

## HANDOUT 7: Alternatives to Civil Court

### Introduction

There are a range of methods for resolving disputes. Alternative dispute resolution means alternatives for going to court or finding other ways to work out a disagreement. Some are collaborative (the parties working together to a common goal, increasing understanding and maximizing satisfaction with the result) and some are adversarial (me v. you, win: lose, with the problem often stated in terms of monetary value).



We all experience conflict. There are many ways to resolve disputes. Sometimes we talk to the other person informally (discussion), sometimes we have more structured direct discussions (negotiation), sometimes we involve a neutral 3<sup>rd</sup> party to help facilitate discussion (mediation), sometimes we need someone to make a decision for us in a more formal setting and based on our direct input (arbitration) and sometimes we need a very formal, highly structured process where we hire someone to argue for us (if we can afford it) and a neutral 3<sup>rd</sup> party makes a decision for us (litigation).

As the process of solving disputes becomes more structured and formal the:

- Individual has less control over the outcome
- Parties will need to involve professional help (mediators, lawyers, arbitrators or judges)
- More expensive the process
- More public the process and the results
- Less personal commitment the parties have to upholding the outcome

### Negotiation

For the vast majority of disputes, the parties do not have to resort to the courts but are able on their own or with some help to resolve their disputes. Negotiation may be appropriate. Negotiation is any form of “unfacilitated” communication in which people involved in a dispute discuss steps they could take to resolve a dispute between them. Negotiation can occur directly between the parties or indirectly through agents acting on behalf of the parties, such as lawyers.

However, not all disputes can be easily settled by negotiation. Sometimes one of the parties has much more power, knowledge or negotiating skill over the other and can come to an agreement that would be unfair to the weaker party. It is also easy to get sidetracked by your emotions in negotiation, instead of focusing on the real issues

## **Mediation**

Another process to resolve disputes that does not involve the courts is Mediation. In mediation, an impartial third party, the mediator, helps the parties discuss their dispute and come to a mutually agreeable solution. The mediation takes place in a private, informal setting, where the parties actively participate in the negotiation and design of the settlement agreement.

The mediator is trained to help people settle conflicts collaboratively and has no decision making power. The dispute is settled only if all of the parties agree to the settlement and the responsibility for resolving the dispute is with the parties. With the help of the mediator, who skillfully facilitates the discussion between the parties, the parties get to move beyond their stated positions (“I want X!”) to talk about what is really important and why. For example, a conflict of positions is when both parties say, “I want the apples” but a mediator would ask the parties to talk about what it is about the apple that is important to the parties. If A says, “The apples are necessary so I can make apple pies to sell for the fundraiser” and B says, “I need the apples for their seeds, so I can grow apple trees.”

Having a neutral, third party mediator may save money and time as the parties may be able to resolve the dispute without litigation. However, sometimes the mediator is not able to help resolve the dispute. In these cases, the mediation may however result in a better understanding on both sides, a greater focus and faster resolution if the dispute then proceeds to a more formal process involving an external decision maker. Mediators will recommend that the participants in mediation seek legal advice on any agreement reached in mediation. Where one person in the mediation has less power, the mediator will take steps to correct for power imbalance and if they cannot do so, are able to end the process.

Mediation is usually an interest-based process and not a rights-based process, so it is acceptable to make an informed choice to trade off on a right if it meets a deeper interest. Many people who have experienced mediation feel that mediation is extremely powerful and has a deeper legitimacy because those involved have created the resolution to their dispute, so they have a deeper personal commitment to following through on the agreement they have made. Especially where there is an ongoing relationship (i.e. children to be raised), mediation creates a better understanding of the

other's interests and creates productive and cooperative communication experiences that help build skills to support the ongoing relationship.

## **Settlement Conferences**

A Settlement Conference is an informal dialogue between a judge, legal counsel and the parties, before a trial. This process is usually geared toward settlement or trial preparation. Some goals of the process are to settle disputes, get the lawsuit to proceed in a timely way, discourage wasteful pre-trial activities and improve efficiency of the trial through more thorough preparation. During a family law proceeding, a Family Judicial Case Conference could be held. This is a private, informal meeting with the judge and the parties and their lawyers (if represented) for about one hour to identify the legal issues, discuss options for resolution other than trial and to discuss trial management issues such as setting dates and other pre-trial procedures.

## **Collaborative Law**

Collaborative Law is a process, used mainly in family disputes, where the parties and their lawyers make a formal commitment to resolve the dispute without going to court in an atmosphere of trust and collaboration. Lawyers are hired to reach a settlement and if the process breaks down the lawyer must withdraw from the case. Lawyers and parties pledge to work together in a respectful and cooperative manner to resolve the dispute. Lawyers participating in the process often undergo special training in the collaborative approach.

Parties and their lawyers agree to disclose information or material needed to assist the parties in achieving settlement. Such an approach can often be less expensive and time consuming than litigation and can lead to a positive result that will help parties maintain a positive future relationship.

However, there may be instances where collaborative law would not be an appropriate process for the parties. It is a process based on good faith and if one party has a history of not being honest, this process may not be the best way to resolve a dispute. This type of process is also inappropriate where one of the parties wants punitive action (to punish the other side), nor where there is a pattern of violence or inequality of bargaining power in the relationship between the parties. Court-ordered methods of forcing a party to provide information will not be available in this process. Also, if one of the parties is trying to vindicate itself or publicly defend itself from accusations of wrongdoing, this process may not be ideal.

Lawyers and the parties agree not to use litigation or the threat of litigation as long as the parties are in the collaborative process. Lawyers will withdraw from the case if it

cannot settle collaboratively or if they or their client breach the participation agreement. Other lawyers must be retained if the case goes into the litigation process.

## **Arbitration**

In arbitration, disputes are submitted to a neutral decision maker through presentation of evidence and arguments. The arbitrator makes a binding decision. Arbitration is generally a private, voluntary method of adjudication; however, government sometimes requires that certain disputes be submitted to arbitration (e.g., disputes under the Residential Tenancy Act). Also, a contract may provide that disputes will be resolved by arbitration rather than litigation.

However, arbitration is an adversarial process that pits one person against the other and therefore usually does not improve the relationship between the parties. Decision making is also not in the hands of the parties, but instead the arbitrator. There is less predictability than the courts in the sense that certain procedures may vary from one arbitration to the next, such as the rules around evidence. The ability to appeal an arbitration award is very limited and arbitration awards do not set precedent, as they are generally not reported and do not bind anyone except the parties.

## **Litigation**

Litigation is a formal method of resolving disputes that involves bring a civil action, or lawsuit, to solve the dispute. It is an imposed final decision that legally binds the parties. Court-based decisions are based on previous decisions and in that sense provide some predictability and also have built-in safeguards to ensure fairness, such as rules about evidence and court procedure. Court decisions can also be appealed. The dispute will be handled by people with legal expertise, people who are familiar with the safeguards for protecting the parties' rights and ensuring fairness (judges). The courts may even involve other parties with specific expertise, such as scientific experts, to help understand the full extent and nature of the problem. Sometimes, just the mere "threat" of litigation can motivate parties to settle the dispute outside of court. Generally speaking, courts are open to the public and in that sense provide a sense of transparency (as opposed to the idea of "behind closed doors" negotiations).

However, litigation is very expensive (making it impossible for some to have their day in court) and is adversarial. Control over the process is in the hands of lawyers (when the parties have a lawyer) and judges and imposed decisions can drive parties further apart and make their future relationship more awkward or difficult. The courts are overbooked and sometimes it can take years to have a dispute heard and then months after that before a decision is made.

Adapted from [Dispute Resolution Office Bulletin](#) on the Government of BC website.