Straith & Company

Dispute Resolution Guide

You have become embroiled in a dispute, willingly or not, in which it has become necessary for you to engage a lawyer (counsel). This guide is intended to be a thumbnail sketch of some of the important information and experiences you need to be aware of to assist you in dealing with your dispute.

Dispute Resolution Procedures

There are a variety of procedures available to resolve your dispute:

1. Negotiation – This is accomplished by discussions with the other lawyers representing the other parties in the dispute to attempt to resolve the dispute, or certain aspects of it, by way of agreement. This is an on-going process.

2. Mediation – This is a dynamic process whereby the parties themselves participate, with or without counsel, but with the aid of a trained impartial mediator, whose role it is to facilitate discussions directly between the various participants to attempt to resolve the dispute through those discussions. Typically each party agrees to contribute equally to the cost of mediation in advance. Mediation can be entirely voluntarily, or in certain cases, mandatory by virtue of the rules of the Supreme Court of British Columbia.

3. Arbitration – In certain commercial disputes arbitration is mandatory, it having been agreed to in advance that this procedure will be utilized by the parties to resolve disputes. Arbitration can have advantages of being faster and less expensive than using the court system; and having the added benefit of employing a decision-maker more knowledgeable in the subject matter of the dispute. The costs of arbitration can be shared or awarded by the arbitrator as the parties may agree.

4. Litigation – This procedure employs the established system of courts in the province to have a judge decide the issues in dispute.

The Litigation Process

British Columbia uses the adversarial process in its court system. This means that it is up to the parties to marshal and present to the court, in accordance with the law and the rules of the court, whatever evidence they chose to prove their cases. By design therefore, this process embodies conflict – move and counter-move. Accordingly this process is highly unpredictable, and for this reason, no lawyer can guarantee any particular outcome. *For this reason too, the cost of litigation is high and can escalate rapidly unless a concerted effort to minimize and focus the issues in*

dispute is constantly employed. Put another way, the more issues that are in dispute the more it costs and the longer it takes to obtain a resolution. While it is not always possible to do so, litigants should therefore endeavour to avoid adding to, enlarging or expanding the issues in dispute – if they want to try and minimize both the cost of litigation and the time it takes to achieve resolution.

There are three courts in the province which are used by most people. Small Claims Court (Provincial Court) deals with most disputes having an amount in issue of $25,000 or less. (Some disputes, involving, libel, slander, malicious prosecution, interests in land and some others, cannot be dealt with by provincial court.) The Supreme Court of British Columbia is the primary court available for the resolution of virtually all disputes. It is a trial court, but also acts as an appeal court for Small Claims Court. The Court of Appeal is strictly an appellate court, which hears appeals from decisions made in Supreme Court if they are appealable.

There are generally two types of proceedings in Supreme Court, those started by a Petition to the court and those started by a Notice of Civil Claim. Petitions are used where there are little or no disputed facts and the issues centre upon the interpretation of the written word. The culmination of a *proceeding* (started with a Petition) is a *hearing* in court where witnesses do NOT testify orally. All evidence is given by affidavits sworn and filed with the court. Notices of Civil Claim are used for everything else. The culmination of an *action* (started with a Notice of Civil Claim) is a *trial*, where the parties tender their evidence, including documents, through witnesses who testify orally in open court and are subject to cross-examination.

An *action* can be considered to have 3 phases to it, the *pleadings phase*, the *discovery phase* and the *trial phase*. In the pleadings phase, the parties file and exchange documents prepared by their counsel called pleadings which attempt to delineate and focus the nature and scope of the dispute. In the discovery phase the parties are obliged to disclose to one another the evidence upon which each relies to prove their respective claims and defences. At the trial phase, the parties evidence is heard by the court and put to the test. Generally, there are three potential outcomes: what one or more of the parties contended for; ***part*** of what one or more of the parties contended for; and *nothing any of the parties contended for – something else entirely*. Whilst the latter alternative does not often occur, it occurs with such frequency that it must be considered by litigants as a possible outcome.

COSTS

The general rule in the Supreme and Appeal Court is that costs follow the event. This means that the “successful” party usually is awarded his or her costs from the “unsuccessful” party. “Costs” generally refers to an amount specified in the Court Tariffs of costs for various steps taken in a given proceeding and does not usually amount to complete recompense for the amounts paid by the successful party to his counsel. This is by design, so that parties are encouraged (by knowing that they will not recover ALL

of their legal expenses form the other parties) to settle their disputes out of court.

Litigation is therefore aptly described as time-consuming, frustrating, inconvenient, expensive and fraught with risk and delay. For this reason, wherever possible, disputes preferably should be resolved outside of court, with a trial being employed as a dispute resolution mechanism only as a last resort.

MEDIATION

This is a non-adversarial dynamic process in which the disputing parties, with or without counsel present, engage in a structured negotiation process with the assistance of a trained mediator. The mediator is an independent third party, who moderates the discussion. The mediator has no decision making authority except as to the proper conduct of the parties during the mediation session(s). Mediation can be very successful where the parties involved are reasonable to begin with and particularly where the disputing parties have an ongoing legal relationship. The major benefits of mediation are that the parties can choose their mediator; have much more control over the timing of the resolution of their dispute, and are more likely to achieve a more satisfactory and permanent resolution because they have directly participated in the resolution of their dispute.

ARBITRATION

Arbitration is probably best described as private litigation. In other words, the parties choose their decision-maker and agree with him/her for the resolution of their dispute contractually. Unlike the litigation process, the parties can choose their “Judge” ie., their Arbitrator. Like the mediation process, parties in arbitration, in conjunction with their arbitrator, set the rules and the timing for the hearing and deciding of their dispute. Unlike mediation, arbitration employs the adversarial process just the same as the courts do. The arbitration process is particularly suited to disputes arising in specialized areas of human activities where special knowledge may be required to fully appreciate the nature and intricacies of the issues.

The Role of Counsel

Apart from the structured procedures, as indicated at the outset, the traditional role of counsel continues to be that of negotiating the resolution of disputes privately without third party intervention. Most disputes are still resolved this way.

Choosing the right procedure or procedures to obtain a resolution of any dispute is itself a delicate process at times where many competing benefits and detriments must be weighed and decisions made accordingly. No two disputes, or the parties involved, are the same. At Straith & Company you will receive sound legal and practical advice coupled with effective representation to help you endeavour to resolve your dispute in the manner most beneficially available to you.

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