

e-newsletter e-newsletter

automotive law



Associate Member
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the fight is on, but what are the rules?

To be successfully in business means having disputes arise. There is, unfortunately, no way to avoid all of them. Once someone starts a lawsuit or brings a complaint against you there are two choices: roll over, or oppose it. As we've explained in past newsletters, the process to resolve disputes through litigation is expensive, time-consuming and cumbersome. There is good news, we promise: only 4% of lawsuits in Alberta reach trial so 96% of lawsuits are either settled or abandoned. Those are good odds. In this edition of our newsletter we explain the respective benefits of a lawsuit compared versus Alternate Dispute Resolution ("ADR").

Put glibly, running to the courthouse is better than barreling out of a saloon to test the adage that "God made all men, Sam Colt made them equal." Our justice system fulfills a key function: it provides all Albertans with a trusted way to have conflicts resolved. Lawsuits also have a well established and known process. Civil litigation (a lawsuit between two private entities) is governed by the voluminous *Rules of Court* that, coupled

with case law, provide at least some guidance for every situation. Parties don't have to worry about vetting a judge or whether (s)he knows what to do. In short, it's a tried and true, known system. There are also rights of appeal – after all, each judge brings one person's perspective to a particular issue – so if an initial mistake is made, it can be corrected.

There are drawbacks to lawsuits as a way to resolve conflicts. They are expensive and cumbersome. While a recent Supreme Court of Canada decision gave more teeth to the ability to have a case decided without a full trial, the fact remains that lawsuits can be a maze without shortcuts. The *Rules of Court* impose deadlines for certain steps, but case management (one specific judge taking control of a lawsuit from start to finish) is relatively rare. That means often there is no-one in charge making sure the wheels keep turning. Whether it's a painter, a baby sitter or a lawyer, the person paying the bill wants to minimize the number of hours being paid for. Lawsuits don't lend themselves to that goal.

In contrast, ADR lets the parties pick the field of combat and the weapons. That means having the ability to say “we need to resolve this problem, but it should be wrapped up in a few weeks, not a few years.” There are other key benefits to ADR: picking the person(s) who will oversee the dispute and shrouding the dispute in confidentiality. Her Majesty’s courtrooms are open to the public which means that most of what happens in civil litigation becomes part of the public record. As an example, a dispute about marketing strategies or business models can be uncomfortable to have aired in public. Finally, an arbitral panel has carriage of a dispute from start to finish. That means there *is* someone making sure the trains run on time and toward their destination.

This just in: nothing is perfect. As a starting point, there are many excellent candidates willing to serve as an arbitrator or mediator. They are priced accordingly. While there are small costs to start a lawsuit and set it down for trial, our tax dollars pay for our courts. It can be a bitter pill to have to pay a lawyer’s hourly rate and then pay the arbitrator’s. The cost-benefit varies substantially – paying

two sets of professional hourly fees for a dispute that wraps up in six weeks will much less expensive than paying one hourly rate for six years. A further wrinkle is if the parties don’t agree whom to pick, whether it’s because of cost, perceived bias or something else. The *Arbitration Act* lets parties go to court to have an arbitrator appointed if they can’t decide themselves, but that is far from an ideal solution. Similarly, it’s nearly impossible to successfully appeal an arbitrator’s decision. Finally, it’s important to make sure the person the parties pick to determine their dispute is suited for the job. There are times when technical expertise is more important than experience in resolving disputes, but everyone learns a lot the first time they do something. We strongly recommend hiring experienced and qualified arbitrators.

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this issue's tip: if you want to arbitrate a dispute, put it in your contracts!

Parties can choose to put arbitration clauses in their contracts. Courts were initially reluctant to enforce these clauses on the basis that no-one can opt out of a Superior Court's jurisdiction. But that initial hesitation has evaporated. Alberta courts are now quite supportive of arbitrations and will generally enforce such provisions. This is an important thing to consider when the parties are getting along, because it can be difficult to agree on a form of ADR after the conflict has started.

questions?

Send your questions or topic suggestions for upcoming newsletters to:

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about this newsletter

The McMillan Automotive Law e-newsletter is a quarterly publication designed to keep new vehicle Owners, Presidents, Vice-Presidents, Dealer Principals, General Managers and Sales Managers in the know about legislative changes that may affect your business, as well as updates and developments relevant to your industry, and general legal tips associated with running a busy automobile dealership, such as:

- Litigation matters – what to do when legal issues arise or when faced with a lawsuit.
- Legislation or regulatory changes – to avoid legal pitfalls and minimize your risk.
- Other issues affecting your dealership.

I hope you find this e-newsletter useful. To sign up or if you have any feedback, topic suggestions or questions you'd like to submit in a future issue, please feel free to send me an email at: andrew.stead@mcmillan.ca. As well, feel free to forward this to your friends or colleagues that you think this may interest!

Thanks for reading!

Andrew Stead

about the author



Andrew Stead is a lawyer at McMillan LLP practicing in commercial dispute resolution and regulatory law. He is a member of McMillan's automotive group and has acted for a number of car dealerships and manufacturers, including contractual disputes, product liability claims and employment matters. McMillan is a national business law firm with considerable experience providing the automotive industry with advice on topics from competition, cross-border trade to financial products, and also dispute resolution.

a cautionary note:

This newsletter provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.