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ALBERTA CONSTRUCTION COMMUNIQUÉ

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DISPUTE RESOLUTION IN CONSTRUCTION CONTRACTS

If you find your company facing a construction-related problem, the first place to look to resolve it is in the written contract itself. Many construction contracts contain detailed Alternative Dispute Resolution (“ADR”) provisions. Two examples of these ADR alternatives are mediation and arbitration. Each of these methods of dispute resolution has advantages and disadvantages; however both are usually quicker and less expensive than traditional court-based litigation.

Your contract will often stipulate whether mediation or arbitration is available to you. Briefly stated, the differences between the two are as follows. Mediation usually involves a third party to help guide the discussions between the parties, point out the relative strengths and weaknesses of the respective positions, and recommend steps towards a settlement. Some mediators are more interventionist than others and will try to force the parties to find a resolution; however, this is not always the case. Mediation is most often non-binding on the parties and either party can walk away from mediation at any time. Note that because these discussions are in furtherance of settlement, they are privileged and cannot be used against either party later on should the dispute require formal litigation. This is intended to encourage full and frank discussions and to allow concessions and admissions to be made that could lead to a settlement without the worry of this information being used against either party should a trial be necessary.

Arbitration is usually based on a process that is outlined in the contract. It allows for disputes to be resolved by independent third parties who will, in the case of binding arbitration, resolve the dispute and finally decide the matter. The arbitration process is similar to the litigation process in that parties to the dispute will generally be required to produce documents to each other and answer questions based on those documents. The arbitrator, after hearing the evidence of the parties and arguments from counsel, will issue a written decision that in most cases is binding on the parties.

Arbitration is only available when the contract allows for it or when the parties otherwise agree to it. You cannot be forced into arbitration if your contract does not provide for it. Deciding who should be appointed arbitrator and how the arbitration should take place is made easier by referring to one of many external arbitration bodies in the contract. In most provinces, provincial statutes, such as the Alberta *Arbitration Act*, regulate the arbitration process. Another alternative is the National Arbitration Society. Parties can also devise their own rules and procedures for arbitration; however, these rules should be clearly outlined and incorporated into the parties' contract.

Note:

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If you are one of the lucky companies about to enter into a contract for a large project, it is a good idea to include some form of ADR process, either mediation or arbitration, in the agreement. This will save you time and money in the future when the inevitable happens and you find yourself facing a dispute under the contract. If you are presently engaged in a project, it is important to be aware of the dispute resolution process contained in the contract as well as the associated provisions describing how to trigger that process. Missing a notice period in the dispute resolution process can result in the loss of the ability to mediate or arbitrate on a given problem.

Legal counsel can certainly assist your company through mediation, arbitration or any other dispute resolution process as outlined in your contract, although lawyers are not necessarily required. It is important as your project progresses to keep accurate and organized records of all communications, site meetings, invoices, and any other time and materials' related documents. By keeping appropriate project documentation, you will be better able to prove your claim, should the need arise. Further, you will save your company both time and money.

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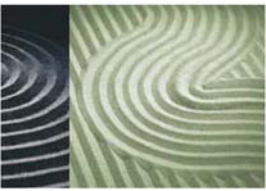
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