When it's time to sue

Going to court isn't always the right answer

"Everything has its season, and there is a time for everything under the heavens." —Ecclesiastes 3:1

There are three primary processes for resolving disputes: negotiation, mediation and adjudication (arbitration and litigation). The first two—as well as arbitration—make up ADR, the acronym for alternative dispute resolution and are touted as being faster, cheaper and better than traditional adversarial litigation.

ADR professes to lessen costs, save time, reduce stress, build and strengthen relationships and facilitate win-win solutions. It is hailed as a way to provide more flexible processes and more party-sensitive and creative solutions than a traditional litigated outcome, which typically results in a winner-loser setup.

Traditional adversarial litigation

But litigation remains a frequently chosen dispute resolution process. A party that believes its rights have been violated, or that has been offended, defrauded, suffered injury, loss or damage will often hire a lawyer and start a lawsuit to vindicate its rights. That party wants—and has a right—to have its day in court. Take the transportation industry. A recent review of newspapers and law reports indicates that several lawsuits have been launched by the following parties:

- A carrier seeking payment of its freight charges from the shipper and/or consignee;
- A shipper or claimant against a carrier for a loss that occurred during the undertaking of carriage;
- A consignee seeking damages from the carrier in consequence of losses suffered due to the late delivery of cargo;
- A passenger claiming damages for an injury suffered on the line of a connecting carrier; and
- A carrier who has been required to pay a cargo claim seeking to claim over against the responsible carrier.

Time for litigation

Obviously, for some parties litigation is the chosen dispute resolution process, but why? When might litigation be a better dispute resolution choice than ADR? Litigation may be the more appropriate dispute resolution process where:

- A disputant has no interest in settlement but wants its day in court;
- The disputing parties place no value on strengthening or building their relationship, even after the determination of the conflict;
- The parties have been fighting with each other for a long period of time, are highly emotional, irrational and will not co-operate in resolving the dispute;
- One disputant fails or refuses to negotiate in good faith;
- The disputants have unequal resources or there is a gross inequality of bargaining power;
- A monetary award is the desired result;
- The dispute involves legal technicalities or highly complex or scientific matters;
- The disputants require or want an objective standard of what is a just and equitable decision;
- A binding judicial precedent is required or desired by the disputing parties;
- The parties need or prefer a public hearing, the strict application of the rules of evidence, full pretrial discovery and/or the right to appeal;
- A substantial public interest component is at stake, such as constitutional questions, environmental lawsuits, occupational health and safety proceedings or class actions;
- A party needs or wants personal vindication, retribution to protect its name or reputation or a public declaration of guilt. Such instances can include cases involving breach of fiduciary duty, fraud and sexual harassment;
- One party wants or needs to send the message that frivolous or meritless claims or defences will not be tolerated and that resources will instead go toward litigation rather than on settlement;
- Where irreparable harm is imminent, such as in the case of trademark and patent infringements, misappropriation or dissemination of trade secrets or confidential information, or unfair competition or unlawful interference with business relations and interim relief is necessary to protect against the unlawful activity being engaged in by the other party; and
- The "survival" of one of the disputing parties is at risk. In such cases, it would be better to litigate until the end.

The three "Ps"

There is a time to litigate. The decision to launch a lawsuit is one that must be made wisely and carefully. And it must be made in a specific context in which the three Ps are considered: the correct dispute resolution process, the specific problem at issue and the people involved in the dispute. Once these factors are understood, litigation may indeed prove to be the most appropriate dispute resolution process in certain circumstances. Then it can properly be said that it's time to sue. **MM&D**

Marvin J. Huberman, LLM, (www.marvinhuberman.com) is a Toronto lawyer, mediator and arbitrator.