

A PROBLEM SOLVING APPROACH TO DISPUTE RESOLUTION

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What is a problem solving approach?

We negotiate daily. The smallest negotiations may take only seconds of our time and are done without any conversation at all – do we take the last seat on the bus or yield it to the other person who is standing? Some negotiations may be over a limited resource – there is only one seat available on the bus. Yet what we bring to the negotiation, our particular needs and objectives, may affect the extent of the limited resource. If I have been sitting all day, I may welcome the chance to stand, and so the fact that I give up the seat fills both my need to stand for a while and the other person's need to sit.

When we have a problem, we have a number of options. We may be able to ignore it; do nothing. If this is not a workable option, then we will attempt to resolve it. Assuming the problem involves another person, we may be able to begin a conversation with the other person and work out a solution to the problem. If this fails, we may enlist the help of family or friends. If this does not resolve the problem, we may call a lawyer.

A fundamental aspect of the job of lawyering is problem solving. How this problem solving is approached can take different forms. Often, lawyers respond to a problem by framing it as a dispute, and starting a court action. Within the confines of the litigation process, the lawyer will work towards negotiating a solution on behalf of the client. If he is unable to negotiate a solution, then a judge will decide the matter.

Once a problem is characterized as a dispute, we have framed the problem in a polarized manner. The oppositional nature of this way of looking at the problem leads us into a process to attempt to resolve it that assumes one of us will lose, one will gain, or at the very best, we will both need to compromise, with each of us sustaining some degree of loss.

A dispute, particularly a legal dispute, assumes that one party is right and one party is wrong. Much of legal training involves learning the rules that apply to legal problems – how do rights come about, how are obligations created, how do we apply these rules in order to resolve the disputes that lawyers see every day? The Rule of Law has an important, overarching function in organizing our society and in providing a way to resolve the most intractable of disputes. Yet there are other methods of negotiating, of resolving problems, which can be more individualized and relevant to the total objectives of each of the people involved. We all use what is called a problem solving approach regularly, often without thinking about it or without labeling it. The children's nursery rhyme, Jack Spratt, is a perfect example of a problem solving approach, though Mr. and Mrs. Spratt

may never have thought about the way they share their food as a model of problem solving behaviour:

Jack Spratt could eat no fat
And his wife could eat no lean.
So between the two of them
They licked the platter clean.

If Mr. and Mrs. Spratt had been confined to the standard way of sharing their food, that is, they were forced to divide every food item equally in half, each of them would have had food they could not eat. Not only would they each have less to eat, some of the food would have gone to waste.

In approaching a negotiation, we may have different purposes. Some common purposes include:

- To win
- To resolve rights and obligations
- To establish who is right and who is wrong
- To get the biggest piece of the pie
- To come up with a solution that best meets the needs of each of us

How we define our purpose in negotiating may well lead us into a particular process. If we define our purpose in negotiating as attempting to reach a solution that best meets the needs of each of us, then we are ready to move to a problem solving approach to negotiation.

How does a problem solving approach differ from adversarial approaches?

Since the court system has been designed to insure that rights are respected and enforced, the model of resolving disputes that have entered the court system (or entered a lawyer's office, even if a court action has not yet begun) is often referred to as a "rights based model". Yet as important as rights are in our culture, individually we don't need to enforce them all the time. Mr. Spratt may have the right to eat the french fries that come with his dinner when he and Mrs. Spratt go out to eat, but he has no need to enforce his right. He would rather have the salad on Mrs. Spratt's plate.

Resolving disputes in a rights-based model involves a number of aspects:

- Evaluating the legally relevant evidence (all the evidence that the law prescribes as relevant)
- Making decisions about the truth of each piece of evidence
- Applying the law to the evidence (this involves looking at both the statutes and how the statutes have been interpreted by other judges)

- Making a fair or just decision based on how the law is applied to the relevant, true facts

Resolving disputes in a problem solving model involves the following:

- Gathering together the information about what is important to each of the parties involved in the dispute
- Making certain that all the relevant information (all the information we need to know in order to resolve matters) is known to each party involved
- Understanding the needs, goals and objectives (in both the short and the long term) of each of the parties
- Looking at a number of different possible solutions
- Agreeing on a solution that best meets the needs of each party, which may include:
 - Any need for a continuing relationship
 - Maximizing the needs, goals and objectives of each party
 - Minimizing the negative effects on each party
 - Minimizing transaction costs (the costs necessary to come to a solution)
 - A solution that is achievable
 - A solution that is fair or just to each party

The defining criteria for resolution in a rights-based model is the fairness or justness of the solution, using the law as the way that fairness or justness is measured. In a problem solving model, whether a solution is fair or just from a legal perspective is important only to the extent that it is an important objective for one or both of the parties.

Let's go back to Mr. Spratt. Unfortunately, Mrs. Spratt had a heart attack and Mr. Spratt is now a widower. He is out for a walk and is approached by a man with a pig. The man tells him he has been forced to move off the farm he has been renting, and he needed to sell his pigs. This is his last pig, and he just needs to get rid of it, and offers it to Mr. Spratt at a bargain price.

Jack knows he can only eat the lean meat on the pig, and with Mrs. Spratt gone, he may just have to throw away all the fatty cuts. But the farmer is offering him such a deal, he could afford to throw away all the meat he can't eat. He buys the pig on the spot and takes it home, intending to slaughter it the next day.

The next morning, another farmer turns up at Jack's home, irate. He is yelling and screaming, and Jack realizes that he is accusing him of stealing the pig. Jack explains that he bought the pig the day before, and relates the story to the man at his door. He finds out the man's name is Mr. Jones. Mr. Jones, irate, tells him that the man he bought the pig from had stolen it from him, and if Jack had any brains he would have guessed the pig was stolen because of the bargain price he was able to purchase it for.

Mr. Spratt and Mr. Jones have a problem. They both feel they have a right to the pig. They both want the pig. And each is certain he is entitled to the pig.

If they go to court, Mr. Jones would have to prove that the pig Jack bought was in fact his pig, and that it had been stolen from him. Jack would have to prove that he had purchased the pig, in good faith, not knowing that it was stolen, and not being “willfully blind” to the fact it was stolen. Who eventually ended up with the pig might be determined by which of these facts were capable of being proven in court. Assuming that they could both prove their respective facts, the outcome would be determined by what the law where they lived said about their competing rights. It may be that Jack, being a good faith purchaser, had the right to keep the pig. It may be that Mr. Jones had the right to have the pig returned. But Mr. Jones might not be able to prove that the pig Jack bought was his pig that had been stolen. Or perhaps, the evidence would show that Mr. Jones had actually lost his pig; he had fallen asleep taking his pig to slaughter and the pig had wandered off, only to be found by the man who sold the pig to Jack. And then there are the transaction costs; perhaps by the time the case is decided in court, the pig would have died a natural death and be of no use to either Mr. Jones or Jack Spratt.

Jack invites Mr. Jones in and makes a pot of coffee. They start to talk about their problem. Jack learns that Mr. Jones and his wife make soap. “We’re completely out of lard,” Mr. Jones tells Jack, “and I was going to butcher that pig today so that we could render him and get on with our soap making.” As they drink their coffee, they solve their problem. They agree they will slaughter the pig. Jack will keep the lean meat. Mr. Jones will have all the fat, and all the fatty cuts of meat. They realize that, given each of their particular needs, they can do business in the future. Mr. Jones is glad to have a ready market for his lean cuts of meat, and he and Jack agree that he will let Jack know the next time he is butchering a pig, and give Jack a reasonable price on the leanest pork.

Negotiating in a problem solving approach involves knowing what it is that each of the people wants to achieve, and negotiating a solution that best reconciles the interests of each of the people involved. Negotiating in a rights-based, or adversarial approach¹, involves determining one’s position based upon what would likely happen in a courtroom, and then negotiating from that perspective. This usually involves a compromise between the positions of each of the people involved.

¹ The term “adversarial approach” is used throughout this paper to describe a negotiating style consistent with negotiating within a court context or a rights-based model of dispute resolution. It is not meant to imply that people must use an adversarial approach in negotiating outcomes in litigated matters. Another word that has been used to describe the adversarial approach to negotiation is “litigotiation”, meaning “the strategic pursuit of a settlement through mobilizing the court process” see: Galanter, M. *Worlds of Deals: Using Negotiation to Teach about Legal Process* 34 *Journal of Legal Education*, 1984 268

What are the underlying principles of problem-solving and adversarial approaches?

A problem solving approach is based on the principle that finding solutions that are inclusive of the underlying needs and objectives of each person will lead to resolution of the problem. What is important to each person is going to be similar in some aspects (Mr. Spratt and Mr. Jones both want the pig), but there are also often some different values held by each of the people (Jack values lean, Mr. Jones values fat). Problem solving approaches are able to exploit the differences in values held by each person, enlarging the possibilities for settlement.

The adversarial or rights-based approach has, as a basic principle, the assumption that both parties desire the same thing and value this resource equally. This approach assumes that both people have the same goals, want the same items, and share the same values, so the goal becomes dividing up the resource. This goal then defines the outcome, which is to maximize victory so that one person prevails. Prevailing includes receiving the largest portion of the asset at the center of the problem.

An adversarial approach assumes that the “legal issues” are the only issues that can be bargained about, and that these issues define what is to be divided. A problem solving approach considers the issues more broadly, inviting each person to define what it is that they want. This may bring other matters into the dispute equation, which are not necessarily legal issues, but which may help move the problem towards resolution (for example, Mr. Jones welcomes an opportunity to have a ready market for his lean pork from future pigs).

How do the processes differ?

Problem solving approaches encourage people to think about their preferences and their priorities. In fact, preferences often help shape the agreement, because not all preferences or needs are mutually exclusive. The process itself tends not to move in a linear direction of offers and counter-offers. Rather, solutions are generally built piece by piece, after a sharing of all information. Once all information is shared, both people work towards building a shared pool of meaning². It matters less whether Mr. Jones fell asleep and lost his pig or whether it was stolen from his yard (a distinction which might be pivotal if they were in court), than the fact that both Mr. Jones and Mr. Spratt feel they have a legitimate claim to the pig (the “shared pool of meaning”). Negotiations in a problem solving approach continue to seek new solutions until a solution is reached that best meets the needs of both people.

² To read more about techniques for building a shared pool of meaning, see K. Patterson, J. Grenny, R. McMillan, A. Switzler *Crucial Conversations Tools for Talking When Stakes are High* McGraw Hill 2002

Steps in a problem solving process include:

- Analysis of the problem posed in order to make the best decision about the most effective process to use in order to resolve the problem
- Notification to the other party about the problem to be resolved
- People generally meet face to face (they may have lawyers or a neutral party such as a mediator present to help them with the discussion) to discuss the parameters of the dispute and identify what issues are important to each of them (whether or not they are “legal” issues)
- Exchange all information or documents necessary for both people to be able to make a decision
- Begin a discussion about what is important to each person in resolving the issues – what are the needs and objective of each person, what about timing needs, what about relationship needs, how important is certainty, how important is finality? Are there psychological needs to be met?
- Potential solutions are generated. Often times, people strive to be creative in generating solutions. The fact that a solution is voiced does not mean that it needs to be implemented. The more possible solutions that are generated, the more creative people will likely be able to be in building a final solution
- Measure possible solutions against the needs and objectives of each party. Use this as the criteria to begin to narrow down the solutions
- Fine-tune a solution. Sometimes, there are some purely distributive decisions to be made at the end, which become “split the difference” issues. Sometimes the timing for the exchange of money or goods can be adjusted to make a solution work better for both people. Does the solution feel fair and just to each party? Make sure it is achievable, it can be implemented, and that it addresses all of the issues that needed to be addressed to resolve the problem

The process of adversarial negotiations build in a very different way. A rights-based model leads to a competitive structure, making bargaining tactics and strategies important. For example, timing (either dragging out the timing or forcing the negotiations to happen more quickly) may be an important negotiation tactic. As well, the timing of information disclosures or whether or not to disclose someone’s “bottom line” may form a strategic part of the negotiation. Often times, people will assume that if the other side knows what is most important to him, this will be used “against me”.

In an adversarial model, escalating negotiation strategies sometimes lead to increased conflict. As conflict increases, free sharing of information and creativity of options decreases. The competitive nature of the adversarial structure increases compromise, and it is culturally acceptable for us to seek compromise through a “split the difference” approach.

The litigation framework (timing and process components) usually structures the process in adversarial negotiations. This means that people tend to share only information that is legally relevant and necessary to share, and control the timing of sharing this information to maximize their negotiating benefit. Once offers are put forward, offers go back and forth in a “pre-determined linear scale of compromise”³. These offers and counter-offers divide what is at stake, while ignoring or de-emphasizing each person’s preferences.

Most cases that are started in the court process settle. However, cases usually settle because of this process of offers and counter offers, which is often combined with the escalation of time pressures as court dates approach. Added to the time pressure is escalating transaction costs and the fear that, if the parties end up in court, there will be a “winner take all” solution imposed.

In a simplified form, the steps in an adversarial, court-based process include:

- Notification of dispute
- Translate the dispute into legal language
- Frame the dispute by determining what the legal issues are
- Exchange documents and information as required by the court
- Set a date for trial. The timing of the trial may be a tactical decision, depending upon whether the status quo works better for one person or the other
- Gather further information, as provided by court rules (for example, there may be some oral discovery of the other party)
- Exchange the first offer to settle, which may be a “best-case” scenario offer, and is based on the legal issues as defined earlier. The timing of the first offer, and who makes the first offer, may be a tactical decision
- Counter-offers go back and forth, narrowing the gap (usually a monetary gap) between offers
- Some kind of “split the difference” approach to settle matters, and if this is not possible or does not happen, proceed to trial
- Some analysis of the cost of trial, which may lead to a last-minute “split the difference” or acceptance of the last offer on the table, depending upon one’s confidence in the case being decided in one’s favour in the court forum; or
- Trial, where matters are decided according to the evidence adduced and the law as it is applied to the evidence that the judge finds truthful

What are the basic assumptions of each model?

Both the adversarial or rights-based approach and the problem solving approach share some assumptions. They also have each a number of different

³ This phrase has been coined by Carrie Menkel-Meadows, in the article *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. Rev. 754 1983-1984, which has been a valuable resource for this article.

assumptions. The different basic assumptions help shape the two separate processes. An adversarial approach is based on determining and balancing rights and obligations, and a problem solving approach is based on building mutually acceptable solutions.

At the heart of the adversarial model are some assumptions about truth. The most important of these truth assumptions is that it is necessary to know what the truth is in order to resolve the dispute. Since it is necessary to know what the truth is, the next important assumption is that the truth is best determined by two parties calling evidence, which will be weighed by a decision maker, who will be able to determine what the truth is. Imbedded in these assumptions are assumptions about objectivity and neutrality. Psychological, relational, and social contexts tend to be ignored, as these are not objective criteria.⁴ A neutral, unbiased decision maker is necessary. The adversarial process assumes that truth is best determined through the arguments advanced by two advocates.

The adversarial model functions on the assumption that we all hold common, shared values, and that everyone who has legally enforceable rights wants and expects to be able to enforce them. It uses the law to define fairness (this assumes the objectivity and neutrality of the law). It demands a narrowing of the issues to fit into legal categories. This helps assure the predictability of solutions, which is an important underlying concept of a rights-based model.

Problem solving approaches assume that sharing of information (whether or not the information relates to the legally defined issues) will help enlarge the possibility for solutions. In a problem solving approach, it is assumed that if there are non-legal issues that are important to one or both parties, knowing about these may help build workable and agreeable solutions (e.g. a continuing relationship may or may not be important, an apology may be important to one person, people may have very different needs that can be satisfied from different resources). This approach also assumes that not everyone wants the same thing at the same time, or that peoples' priorities may be different, and that there are different answers to "what do you want to achieve". Rather than seeking to narrow the issues, this approach considers that broadening the issues may lead

⁴ This is not to imply that psychological, social and relationship issues are never examined by the court. Rather, these become evidentiary issues and, because of the subjective nature of these issues, it is often difficult to fit them into the evidentiary structure of a court hearing. As well, again because of the subjective nature of these issues, the system itself has a systemic framework, including statute and case law, that include assumptions about some of these issues. As an example, different statutory rules apply to property division on marriage breakdown than apply on the breakdown of a common law relationship. The implied assumption behind this fact is that, if people want to have the laws governing marriage apply to their relationship, they are free to marry. However, until recently, this assumption (which is a social-relationship assumption) did not hold true when applied to same sex couples. Because these social-relationship factors as they applied to unmarried same sex couples were outside the statutory regime, there was no place for the exploration of this difference, with same sex common law couples (unable to marry because of the law as it stood) falling into the same statutory regime as heterosexual common law couples.

to an increased potential for more creative solutions. Finally, rather than assuming that the issues are best analyzed from an objective perspective, a problem-solving approach works with the assumption that humanizing the dispute can lead to lowering the conflict and assisting people to work together to find an agreed upon solution.

How do the solutions differ?

The court system is structured to give predictability of outcome. The process of applying the law as it exists to the facts of the case is meant to be objective and neutral, in order to increase this predictability. Since predictability of outcome is important in a rights-based approach, solutions negotiated within the adversarial framework tend to be predictable also. For disputes that proceed to court, there is often the "winner take all" possibility because of particular legal issues (for example, liability), or because evidence of only one party is believed, or because of the determination of rights and obligations. This predictability of outcome shapes the negotiation process of offer and counter-offer, attempting to narrow the solution window to within predictable ranges.

Since problem solving approaches tend to be more creative, outcomes or solutions are less predictable and become more personal. The structure of solutions generated in problem solving approaches, tends not to have any component of "winner take all", since problem solving approaches utilize a process of client-centred negotiation and are built by consensus,

Following a case through each approach

Mr. George and Ms. Webster are neighbours on adjoining city lots. They have been neighbours for six years. They have a cool relationship, don't speak often, and when they do it is usually to complain about small nuisances. Mr. George has a Jack Russell terrier that barks frequently, and Ms. Webster, from time to time, will comment on the noise. Ms. Webster has a large Mountain Ash that sits close to the property line, and Mr. George finds it a constant state of clutter. In the spring, the tree sheds white tendrils that blow across his lawn. Summer is the worst, when large clumps of berries ripen and litter his front yard, the sidewalk in front of his home and his front steps. Birds eat the berries, increasing the mess with bird droppings. Mr. George could abide by the leaves that need to be raked in the fall if that were the only debris he had to clean up from this tree, but it isn't, and for him this is only a reminder of the constant work the tree creates for him. Woodpeckers have pecked at some of the large limbs, and last winter a huge branch came down in the wind and took out Mr. George's phone line.

Mr. George has tried to encourage Ms. Webster to prune the tree, at least so that the offending branches are not hanging over the property line. Whenever he brings this up, she counters with a comment about the fact that the trees he has

at the back of his property diminish the light on her garden, and if he is so interested in pruning trees he should start with them. Besides, she adds, if he were really interested in a “good neighbour” policy, he would do something about his barking dog.

The back fence, which sits just slightly on Ms. Webster’s side of the property line, is beginning to rot and sag, and provides little privacy between the two lots. When Mr. George brings this up (being as nice as he can) and suggests that perhaps it is time for Ms. Webster to replace the fence, she responds by telling him he is free to build his own fence.

Mr. George enjoys entertaining in his yard, and in the summertime regularly cleans up the berries from the Mountain Ash before his guests arrive, so they don’t track the berries into his house. Not only are they a mess, last summer his elderly mother slipped on a clump of the berries. Although she wasn’t hurt, other than being shocked and a bit shaken, he was deeply concerned that she could have broken her hip. When he mentioned this to Ms. Webster, not only did she not apologize, she actually implied that it was his fault for not sweeping up the berries prior to his mother’s arrival.

Another summer of berry-falling has begun, and Mr. George has had enough. While Ms. Webster is away, he decides to prune the branches that are hanging over the property line. He realizes that this won’t stop all the berries from falling on his property, but he is certain it will reduce the clutter.

When Ms. Webster returns from her holiday, she pulls up in front of her house and is horrified to see her Mountain Ash has been butchered. What leaves remain on the tree are turning brown and dying. There are few branches left. The next morning she confronts Mr. George. He acknowledges that he “trimmed” the tree, tells her that he had advised her of this before she left, and insists that he did not go onto her property in order to perform the trimming. Ms. Webster takes pictures of what is left of the tree, and calls a lawyer.

Ms. Webster meets with her lawyer and shows him the pictures of the dying Mountain Ash. She tells her lawyer how much she adored the tree, that it provided a shady spot for her to sit in the front yard, and how much she enjoyed looking out her window in the morning and watching the birds in the tree. She kept a bird feeder in the tree and the squirrels visited daily. She tried to tell her lawyer what a poor neighbour Mr. George was; explain about his barking dog and the fact that he refused to prune his own trees. Her lawyer encouraged her to stay on point and explained that there was nothing she could do to make Mr. George prune his trees, and as for his dog, if it was truly a nuisance she could call the pound and complain. Her lawyer asked her how much the tree was worth, and she said she had no idea; she thought it would be impossible to replace because it was such a mature tree. Her lawyer told her that she was to contact an arborist and get an estimate as to what the tree was worth. As she

was leaving, she told her lawyer she was concerned about how much this was all going to cost. She was on a fixed income and she would like to build a taller fence between the two properties, but couldn't even afford to do that. He told her not to worry, that once they found out how much the tree was worth he would be able to tell her how much she was likely to win in damages, and she could pay him from the amount she collected.

An adversarial negotiation

Things were strained and quiet between Mr. George and Ms. Webster over the next two weeks. Mr. George was relieved to hear nothing further from Ms. Webster, and was enjoying his property without the nuisance of the Mountain Ash. Then he received a letter from Ms. Webster's lawyer. The letter demanded immediate payment of \$18,000 as damages for the mutilation of the Mountain Ash. The letter detailed how this figure was arrived at, and it included an estimated value of the Mountain Ash, estimates to remove the dying tree and replace it, and an amount called "punitive damages". The lawyer went on to detail what he called Mr. George's trespass "if not actual trespass onto the property, then trespass into the airspace of Ms. Webster's property". The letter gave him one week to reply, and said that the lawyer had "instructions to commence litigation if this matter has not been fully resolved by the end of the month".

Mr. George was incensed. Punitive damages? Trespass to airspace? Where was he going to get \$18,000? The tree was old, and would likely have died within a few years anyway, didn't the rotten branch that had fallen on his property prove that? And what about the nuisance to him – the mess, the clutter, and the fact that his mother could have been injured? Mr. George phoned a lawyer, and went in, with the letter and a picture of the pruned tree, for an appointment.

Mr. George was a bit nervous when he went in to see his lawyer. He had never had to hire a lawyer before. He was worried about what it was going to cost, and he was afraid of being sued. He also couldn't believe that, after all these years of having put up with that filthy tree, he was the one that was now being sued. He admonished himself for not suing Ms. Webster when his mother slipped. After meeting with his lawyer, he did not feel much better. He explained to his lawyer that he had told Ms. Webster he wanted to prune the tree and she appeared to be indifferent. She told him that he could prune the branches that hung over onto his property, as long as he didn't step foot on her property. He explained to his lawyer that he was careful not to go onto her property, and he had done all the pruning from his ladder, which was placed on his side of the property line, and that he had used a small, electric chainsaw that was attached to a pole to facilitate pruning.

His lawyer explained that there was, in fact, an argument to be made about trespass to airspace. He also explained that punitive damages were sometimes

awarded by the courts so that people would know they couldn't infringe on other people's rights, and that the courts were regularly awarding punitive damages against people who had cut down trees without permission. He looked at the picture of the tree and shook his head. He told him how much it would cost to defend against a suit, and that he would likely have to pay something at the end of the suit, although he told him he thought that \$18,000 was an extravagant amount, given the circumstances, and perhaps he could counter sue for nuisance, particularly if his mother was willing to testify about her fall. The lawyer also told him that currently the upper limit for a law suit in small claims court was \$10,000. If Ms. Webster wanted more than that, she would have to sue in Supreme Court, and that would be so expensive that it would not be worth the extra \$8,000 she was claiming. He went on to warn Mr. Webster that there was talk about the limit in small claims court increasing, and he would be wise to settle this matter quickly, in case the monetary limit in small claims court did increase. When Mr. George left his lawyer's office, he had authorized him to respond with an offer of \$5,000, but not a penny more.

The offers and counter offers went back and forth between the two lawyers. Ms. Webster's lawyer started an action in small claims court. Mr. George's lawyer told him this was good news. Good news that he was being sued? He couldn't believe this. But his lawyer explained that, if they could settle quickly, they should be able to "get out of this" for no more than \$10,000. He convinced Mr. George to offer \$9,000, and another \$500 towards the costs Ms. Webster had paid for an arborist's report, and the matter was settled on those terms. Mr. George and Ms. Webster avoided speaking to each other. She planted a new Mountain Ash, and Mr. George grumbled, "I can't believe I had to pay for that tree and, even though I gave her \$9,500, she still won't repair her fence."

Both Mr. George's lawyer and Ms. Webster's lawyer have done what they were hired to do – Ms. Webster's lawyer got her compensation for the tree, and Mr. George's lawyer was able to limit his liability, and avoid what was possibly a greater award of damages if the matter had proceeded in a different court or after the small claims limit had increased. Could they have done things differently? If they did do things differently, what would this have looked like (process), and would the outcome have been different?

A problem solving approach

Let's assume that things unfolded as we've seen in the above example, except when Mr. George was in his lawyer's office, his lawyer asked him this question: "What would you like to achieve?" At first, Mr. George replied that he just wanted this whole mess to go away. He had gotten rid of one problem (the Mountain Ash) but now he had an even bigger problem on his hands. And no one seemed to be interested in his complaints – the fact that the berries were such a nuisance, that Ms. Webster had not only refused to prune the tree when he brought it up but that she also wouldn't replace her rotting fence, and that he was

tired of her complaints. She complained about his dog, about his trees blocking the sunlight in her garden, and she never had a pleasant word for him.

Mr. George's lawyer asked him some more questions. Finally, Mr. George replied, "Well, if I had my way, I would actually like to have a cordial relationship with my neighbour. I would like to be able to enjoy my property without litter from her tree. I would like a new fence that gave each of us some privacy." He then laughed and said, "and I would like it if my dog didn't bark so much too – but what can you do with a Jack Russell Terrier?"

Mr. George's lawyer explained to him that the threat of a law suit was serious, and that he believed Ms. Webster had a good case. He talked to him about the cost of a law suit, and explained to him that perhaps, if they wanted to work on negotiating a settlement, they could try to work towards a settlement that met some of his needs also. He explained to him about mediation, and suggested that they might want to try mediation.⁵

Mr. George was not really interested in sitting in a room with Ms. Webster "talking things out". They had been unable to speak civilly for years, and now she was threatening to sue him. He also didn't really like his options – letting a lawsuit go forward, or offering to pay her something to settle. He agreed that, if Ms. Webster would agree to attend, he would also.

Mr. George and Ms. Webster spent two sessions with a mediator. At first things were very tense. Ms. Webster denied the fact that Mr. George had asked her permission to trim the tree. If they couldn't agree on the basic facts, how were they ever going to settle things? Then something amazing happened. Mr. George was explaining, again, about his anguish when his mother slipped on the berries. Ms. Webster said, "I'm sorry your mother was so upset. If I had a chance to plant a new tree, I might choose something different, those berries can be a bit of a pain. But that didn't give you any right to kill my tree." As they worked toward resolving things, they were encouraged to talk about things their lawyers had told them were not "legally relevant". They talked about Mr. George's barking dog, the rotting fence, and the fact that Ms. Webster wanted Mr. George to trim the trees at the back of his property. At the end of the second

⁵ Mr. George and Ms. Webster could have entered into a problem solving approach in different ways. They could have done so with their lawyers. Mr. George's lawyer suggested they use a mediator, instead of meeting together with their lawyers, for a number of reasons: He was concerned that things may be too explosive if it was a meeting with the two lawyers and no mediator, and that they might not be successful working in that way. He was concerned that if they had a discussion between the lawyers without Mr. George and Ms. Webster present, they would not be able to fully understand what was important to both Mr. George and Ms. Webster, and would have less possibility to be creative in generating solutions. He was also concerned about costs, and, given the amount of the potential suit, he thought that it might be more cost-efficient if they spent time with a mediator without the lawyers present. Finally, he realized that, as neighbours, Mr. George and Ms. Webster would have a continuing relationship of some sort, and he was hopeful that a mediator may be able to assist them in coming to a settlement that might improve their relationship.

mediation session, they had agreed to go back to their lawyers and talk about settling the case on the following terms: Mr. George would pay Ms. Webster \$1,000 to remove the old tree and purchase a new one, and Ms. Webster agreed that she would choose something other than a Mountain Ash. Mr. Webster would pay for the cost of a new fence between the two properties. He would have an arborist top the trees at the back of his property to provide more light into Ms. Webster's garden. He also agreed that he would attend a dog training course with his dog, specifically aimed at providing techniques to help curb the incessant barking.

Mr. George and Ms. Webster still would not call themselves friends. They would agree that they are civil neighbours. Ms. Webster planted a maple in her front yard, which has grown rapidly and provides shade for her in the summer months, and Mr. George is happy that all the maintenance he needs to do his raking leaves in the fall. And as for Mr. George's dog, he still barks sometimes, but Mr. George has been successful in actually training him to bark less incessantly.

A litigated outcome

So what could Mr. George and Ms. Webster been able to expect if they proceeded to court? Mr. George's lawyer advised him that he should hire an arborist to give evidence as to whether or not the Mountain Ash was killed by the exuberant pruning or some other cause. Ms. Webster had an expert arborist of her own, testifying that the tree had a value of \$9,000.00. Mr. George's expert testified that the tree was likely "at the end of its natural life span".

Mr. George testified that he had asked Ms. Webster if he could prune the tree, and she had given him permission to do so, as long as he didn't enter onto her property. He also testified that she had asked him to "make certain the tree didn't look lopsided" when he was done, which he took to mean that she wanted him to trim both sides of the tree. Ms. Webster denied this conversation ever took place, and said that if she knew he was going to trim the tree, she would have wanted to be there and would never have allowed it to happen when she was away.

Mr. George testified about the fall his mother had taken, and about the branch that took out his telephone line. The judge held that, if Mr. George had sued for nuisance about these two incidents, she might be able to address them, but they weren't before her. She rejected Mr. George's evidence about the conversation he said he had with Ms. Webster, and said she preferred the evidence of Ms. George. She held that even if he had stayed on his side of the property line to do the pruning (which she found unlikely given the photographs of the pruned tree) he clearly had, at the very least, trespassed against the air space over Ms. Webster's property.

The judge calculated compensatory damages (damages to reimburse Ms. Webster for costs incurred because of loss of the tree, attempts to save the tree, removal of the old tree, and purchase of a new tree) in the amount of \$10,000.00. She awarded another \$9,000.00 in punitive damages, to deter Mr. George and others from zealous pruning of other's property in the future. She also ordered that Mr. George pay the cost of Ms. Webster's expert arborist in the case.

Since the small claims limit was still \$10,000, the amount of the judgment was reduced to \$10,000, plus the cost of the arborist.

Ms. Webster was moderately happy with the judgment, but was upset that she could not collect the total amount, because of the limit in small claims court, and that the amount she was awarded was further eroded by legal fees. She was so angry when she did not receive the full amount of her judgment immediately, that she bought another Mountain Ash, "just so Mr. George doesn't think he can push me around."

Mr. George was incensed that the judge had not believed him. He resisted paying until he found out that a judgment had been registered against his property. The fence between their properties continued to rot. And the dog still barked.

When did problem solving approaches first enter the legal realm?

Problem solving approaches have always been at the root of the job that lawyers do. Mohandas Gandhi had this to say about his role as a lawyer:

"I realized that the true function of a lawyer was to unite parties driven asunder. The lesson was so indelibly burnt into me that a large part of my time during the twenty years of my practice as a lawyer was occupied in bringing about the private compromises of hundreds of cases. I lost nothing thereby – not even money, certainly not my soul."

United States Supreme Court Chief Justice Warren Burger, spoke of lawyers as healers of conflict:

"The entire legal profession – lawyers, judges, law teachers have become so mesmerized with the stimulation of the courtroom contest that we tend to forget that we ought to be healers...healers of conflict. Should lawyers not be healers? Healers, not warriors? Healers, not procurers? Healers, not hired guns?"⁶

⁶ State of the Judiciary Address, American Bar Association, Feb. 12, 1984

Problem solving was first coined as a descriptor for an experimental law school course in February 1962 at the University of Buffalo.⁷ The sophistication of problem solving methods, as they are referred to today, has grown in the last thirty years as lawyers look to negotiation literature in other professional domains. The application of the conflict literature and the techniques and specific skills for conflict resolution have been expanded and modified to use these methods for problem solving within the legal forum. Problem solving techniques often involve an interdisciplinary approach, bringing together professionals from different domains. An early leader in this interdisciplinary model is the Association of Family Conciliation Courts (AFCC), created in 1963 to bring together professionals from different domains (lawyers, social workers, psychologists, judges, and others working with families at separation) to promote conciliatory approaches as opposed to litigated approaches for families going through separation.

In the 1980's a mandatory mediation program was begun in Saskatchewan that required lenders in foreclosure litigation to mediate with landowners before proceeding with foreclosure.⁸ In 1985, the federal *Divorce Act* was amended, specifically obligating lawyers who were commencing divorce actions for clients to discuss the advisability of negotiating matters of custody, access and support, and informing clients about mediation facilities.

Institutional change

As problem solving approaches become more common, the justice system has moved towards a systemic incorporation of these approaches. A number of factors have been responsible for the movement towards incorporating problem solving approaches into the institutions of the justice system. These include the significant cost of pursuing matters through court, delay brought about by backlogs or procedural requirements within the courts, the propensity for problem solving approaches to decrease, or at least not exacerbate, conflict, and the ability of these approaches to provide more individualized outcomes or solutions. As well, problem solving approaches often have some educational components (for example, courses in parenting after separation, which speak to the importance of not exposing children to parental conflict). These educational components serve to assist people with incorporating problem solving techniques into their relationships.

Problems of cost and delay have plagued the justice system in many countries, and Canada is no different in this regard. Cost of representation has made the courtroom virtually unavailable to many Canadians, unless they proceed on their own without lawyers, and the courtroom can be a difficult and intimidating venue

⁷ MacLeod, Gordon A. *Creative Problem solving – for Lawyers?!* 16 J. Legal Education 198 (1963)

⁸ MacFarlane, J and Keet, M *Civil Justice Reform and Mandatory Civil Mediation in Saskatchewan: Lessons from a Maturing Program* Alberta Law Review 2005 (42:3) 677 at 683

to navigate without legal expertise. Delay has meant that, even if people can afford to access the courts, being able to do so in a timely manner is not always possible.

Another advantage of problem solving approaches is their ability to assist in fashioning more personal, comprehensive settlements. Being able to craft solutions that address the particular needs of the parties is another reason this model of resolution is being incorporated into institutional settings.

What's happening to institutionalize problem solving approaches?

Three major groups have been responsible for creating institutional change that reflects ways of resolving problems that seek to move the process away from an adversarial model of negotiating. These groups include all the participants in the justice system: the people that use the justice system or that require some assistance in resolving issues that may otherwise end up in the courts, the professionals that work in all areas of the justice system, and the institutions of the system itself: the courts and ancillary agencies.

Perhaps the broadest and most significant change that people are met with when they enter the justice system is a growing expectation that, given adequate resources and assistance, people are able to resolve disputes without going to trial. Since all of the literature supports the finding that most cases settle short of trial, a significant thrust of institutional change has been in the direction of supporting parties' efforts for early resolution using problem solving approaches. Many of the programs – be they mandatory or voluntary – have included access to or a mandatory exposure to mediation.

It has now been over thirty years since the first court supported mediation services were established. Mediation for all custody and access disputes was initiated in California in through a pilot project in the Los Angeles Conciliation Courts in 1973, and was later expanded to a state-wide, mandatory model. In order to support this initiative, free mediation services were provided to anyone filing for contested custody or access in the courts. This service continues to be a mandatory first step for parents wishing to access the courts in custody and access matters, unless a case is screened out as being unsuitable for the mediation process.

In Florida, the Citizens Dispute Settlement Center was created in 1975. Judges were able to refer family matters to mediation prior to 1987, and in 1987 judges in Florida were given a broad authority to refer all civil litigation matters (subject to limited Supreme Court exceptions) to mediation. Texas, in an effort to deal with a tremendous backlog of cases in that state's courts, passed a law in 1983⁹ which authorized county commissioners to establish and maintain alternate

⁹ Senate Bill 10 (Tex. Civ. Stat. Ann. art. 2372aa)
in 1987 the Texas Legislature passed the 1987 Alternative Dispute Resolution Procedures Act

dispute resolution systems in cooperation with the local bar associations. These were supported by an increase in court filing fees, which increase was diverted to the alternative services.

In Canada, Saskatchewan has the oldest court mandated civil mediation program.¹⁰ Initially conceived as a mandated “orientation to mediation” it has grown into a successful mediation program that built on its successes and has helped to transform the culture of civil disputes in Saskatchewan.

Ontario has had a civil mediation program associated with the courts, in both Toronto and Ottawa, initiated by a rule within the Ontario Rules of Civil Procedure.¹¹ The rule requires mediation (unless one is exempted on court application before a by a master or judge) within 90 days of filing a statement of defence in a court action.

In British Columbia, there are a number of different mediation alternatives linked to various court settings. A Notice to Mediate regulation applying to motor vehicle cases was introduced in April, 1998, followed by a general Notice to Mediate in 2001, which applies to most non-family, civil actions in BC Supreme Courts.¹² This provides that, if one party requests mediation by filing a notice to mediate, the other party must attend. In family cases, two initiatives through the BC Supreme Court have attempted to facilitate early discussion of resolution or of what is needed in order to help cases resolve. The first such program was a pilot program in limited areas called the Early Intervention Hearing. This was later enlarged and replaced with another pilot program, Judicial Case Conference. Attendance at a Judicial Case Conference is mandatory in Supreme Court in all counties prior to attendance at a contested family court matter (unless exempted out). Judicial Case Conferences often have judges taking a problem solving approach to help couples resolve some or all of the matters that are the subject of the litigation.

In the Provincial Court in British Columbia, Rule 5 has provided that, in applicable courts, family matters must attend at a settlement conference with a judge before they can proceed to trial. A small claims mediation program operates in numerous small claims courts in the province. Family Justice counselors are available in 28 communities in British Columbia, and travel to a further ten communities, and are available to provide free mediation services for family disputes. As well as mediation services, parenting after separation courses are widely available in British Columbia, and attendance is mandatory in ten communities prior to proceeding with a contested custody or access matter.

¹⁰ MacFarlane, J and Keet, *supra* @ 684

¹¹ Ontario Rules of Civil Procedure RPO 1990 Rule 24.1

¹² The Notice to Mediate (General) applies to civil actions commenced in BC Supreme Court other than family law proceedings, actions brought under the Judicial Review Procedures Act, claims for compensation for physical or sexual abuse, or other actions which are covered by the other provincial Notice to Mediate regulations.

The British Columbia government has established high-quality rosters of mediators in the civil area, the family area, and the child protection area. These rosters provide a resource for the public to access private mediators in different communities in British Columbia. The government continues to support the growth of high quality, qualified mediation practitioners through providing funding support for mediation practicums in small claims, family and child protection. In 1996 the provincial child protection legislation was changed to make mediation available for matters that were the subject of child protection actions.¹³

As numerous problem solving approaches enter the mainstream of dispute resolution practices, many people question the often used phrase “Alternate Dispute Resolution” (ADR) and prefer to call these practices Appropriate Dispute Resolution, as the processes endeavour to closely match the needs of the people they are serving. In Australia, these services are called “Primary Dispute Resolution”, to identify that, in almost all matters, these services are suited for the first attempt at resolution, and for many are successful in resolving all issues.

Problem solving courts

Perhaps the most radical approach to institutional change has been the establishment of problem solving courts. Problem solving courts are structured to focus on specific issues, and seek to adjust the court procedures to meet specific goals consistent with the issues that are central to the particular court. An example of a problem solving court is a drug treatment court. These courts offer alternatives to offenders who enter the criminal justice system because of addiction problems. The courts, instead of incarceration, refer people to programs for treatment of addiction, under judicial supervision, and focus on life skills training to break the cycle of criminal involvement that often accompanies drug addiction.

Other problem solving courts include mental health courts, which expedite assessment of mental health illnesses and, where appropriate, strive to facilitate treatment of mental health conditions instead of incarceration. Unified Family Courts bring all family matters under one jurisdiction, where the court can coordinate a range of services to best meet the needs of families going through separation and divorce, such as parenting after separation programs, mediation, conciliation and assessment services.

In aiming to match the process with the goals of the courts, problem solving courts share a number of features, including:¹⁴

¹³ The first child protection mediations were piloted in Victoria in 1992. In 2001, the Surrey Court Facilitated Planning Meeting Project was set up.

¹⁴ The following list is quoted from *Judging for the 21st Century: A Problem-solving Approach* prepared for the National Judicial Institute by Susan Goldberg

- An underlying premise that courts should do more than simply process cases. The goal is not simply to clear cases from a docket, but to make a positive, tangible difference in the lives of victims, defendants and neighbourhoods/communities, including
 - Reductions in recidivism
 - Increased sobriety for addicts
 - Increased safety for survivors of domestic violence and decreased violent behaviour from their partners
 - Increased compliance with treatment programs for rehabilitation for those with mental disorders
 - Increased alternatives to incarceration for all populations, but especially for those, such as Aboriginal people, who are over-represented in prisons
 - A non-adversarial, team approach
 - Partnership and collaboration with treatment and social service agencies within communities to address the underlying causes of criminal behaviour
 - A focus on collaborative, rather than an adversarial, approach
 - A focus on rehabilitation
 - Ongoing, hands-on judicial interaction with participants, and
 - Ongoing judicial monitoring of offenders, generally with appropriate rewards and sanctions for compliance and non-compliance.

Collaborative Practice

Another initiative in the problem-solving arena is one that has been initiated by lawyers, mental health professionals and financial professionals who want to provide non-adversarial approaches for families going through separation and divorce. This process, referred to as collaborative law or collaborative practice, was begun in 1990 by a lawyer in Minneapolis, Stu Webb, and has spread rapidly through North America in the last decade.

Collaborative practice involves a contract signed by all participants (parties and all professionals) setting out the parameters that they agree to be bound by. Fundamental to these parameters is a provision that, if a party begins a contested court application, all of the professionals (including the lawyers) will withdraw from the case, and the collaborative process will end. This requirement means that there will be no contested court applications so long as they couple is working in the collaborative process. The contract further sets out that there will be good faith negotiating, and that parties will make full disclosure of all documents and information relevant to the matters at issue. Collaborative practice, like many other problem-solving initiatives, recognizes the value of interdisciplinary teams, so that parties can be served by the professionals best

for more information about problem solving courts, see the Center for Court Innovation website at www.courtinnovation.org

suited for their particular needs. Lawyers working in the collaborative model work closely with mental health professionals and financial professionals so that where the service of professionals other than lawyers will best benefit the parties, those professionals will be used.

One of the benefits of the collaborative model is that, because people have contracted out of litigation during the course of the collaborative process, everyone is working in a problem solving model. This helps ensure that tactics and strategies that are sometimes inherent in an adversarial model of negotiation are put aside, as people focus on building solutions that meet the needs of both parties and the needs of any children involved. As is common in problem solving approaches, professionals are available for educational components about different matters such as: children's needs through separation and divorce, age-appropriate parenting plans, and financial matters.

Just as mediation began with a particularly strong development in the family area, collaborative practice is currently mostly confined to the family law area. However, it is beginning to be explored as a model for resolving civil disputes.¹⁵

Advocacy in a problem solving model

Can lawyers still advocate for their clients if they are using a problem solving approach? Don't people hire a lawyer so they can have an advocate, someone who is capable of "tough bargaining" on behalf of their client? If lawyers still work as advocates in a problem solving approach, what does this entail?

Since problem solving approaches involve outcomes that are not necessarily predictable (because of their reliance on individual needs, goals and objectives) the outcome-driven advocacy model (based on getting the biggest piece of the predictable "outcome pie") is not directly applicable to a problem solving approach. This does not mean that lawyers abandon the notion of achieving good outcomes for their clients in a problem solving model of negotiation. It does mean that, in order for lawyers to assist their clients, they need to be aware of both process components and outcome components, and the relationship between these two.

In looking specifically at components of advocacy in a problem solving model, assessing process options for one's client is an important first step. Throughout the advocacy process, it is possible that options need to be reconsidered. Also, in order to work closely with clients in a problem solving model, informed client decision making is very important, and this may include the necessity of some client education, which can take a variety of roles.

¹⁵ For more information about collaborative practice, go to the website of the International Academy of Collaborative Practitioners at www.collaborativepractice.com

Building good working relationships, both with one's client and with the other advocate, is important in being able to effectively work in a problem solving relationship. In working with clients, this involves:

- assisting clients in articulating and prioritizing their needs and objectives,
- analyzing and sorting through both long and short term goals, including the costs and benefits of each. This includes both monetary and non monetary (including relational) costs,
- listening to clients, and fully understanding what is important to the client in reaching resolution (including issues that may not be strictly "legal" issues), and
- being mindful of not escalating the conflict.

Facilitating processes used to negotiate is another important part of advocacy. This can involve:

- the lawyers facilitating problem-solving sessions with the clients present, or providing support through the mediation process,
- ensuring that negotiations move forward in a timely manner (since these approaches are often outside of court timelines, it is important that lawyers set up a structure for work on these matters since the litigation template will not be used for establishing time frames), and
- that processes are productive in moving towards resolution.

Since the skills involved in problem solving approaches include a number of skills that are different from the skills involved in adversarial negotiation, it is important for lawyers to develop this new skill repertoire.

Finally, problem solving approaches can be instrumental in preventing further disputes. This area of law, sometimes called "preventative law" includes not only building solutions that aim to prevent further problems (for example, Ms. Webster deciding to plant a maple tree to replace the Mountain Ash), but also extends to work with clients to assist in building effective systems that will help limit problems and disputes.

Limits of problem solving approaches

Problem solving approaches are not applicable to all disputes, and cannot always satisfy the needs of everyone involved. The assumption that satisfying needs will lead to resolving problems is not an assumption that holds true for all problems. Some problems are purely distributive problems (that is, a finite resource needs to be divided, and two people both want the exact same thing – the whole resource). Some problems arise as our society develops or expands

rights and obligations, or as we realize that we *need* to expand rights and obligations and cannot agree on how to do this.¹⁶

Our rights-based court system has been responsible for ensuring that rights are enforced, and has also been responsive to the expansion of rights in order to acknowledge changing cultural norms. The judicial system is responsible for protecting individuals, for establishing a predictable process for resolving disputes, and for providing a mechanism for enforcing rights. The kind of public ordering of society that happens within the judicial framework is an important component of the manner in which our societal rules are revised in order to properly reflect current changes in our society. Arguably, if all disputes were resolved on a private level, we might forego the larger, systemic changes that are brought about because of judicial decisions expanding rights-based concepts. This is an important component of our public ordering justice system, which we clearly do not want to lose.

Problem solving approaches may be difficult if there are real or perceived inequalities in bargaining power or ability, or if there are safety issues that may be exacerbated by a private approach. Often, the process can be changed in order to meet these challenges (for example, good advocacy support may meet the challenge of inequality in bargaining power). At other times, judicial intervention may be necessary in order to provide safety (for example, someone may need a restraining order for preservation of property or to enhance personal safety).

Problem solving approaches may not satisfy people that are focused purely on proving a “principle”, or if someone needs revenge, punishment, or public vindication. Personality or other psychological deficits may make it difficult or impossible to negotiate in a problem solving model.

Finally, problem solving may be counter-intuitive in a competitive world. A rights-based model of dispute resolution resonates well with competitive thinking. Yet as we realize the nature and extent of challenging problems that confront us in our modern world, processes that are built on a collaborative or cooperative philosophy may well expand our ability to resolve conflict. For those problems that would benefit from individualized solutions and creative, flexible process options, problem solving approaches help expand our repertoire of conflict resolution skills.

¹⁶ an example of this is the cases that were brought in the superior courts of different provinces challenging the definition of marriage