Bond Law Review

Volume 13 | Issue 2 Article 11

12-1-2001

Incorporating ADR in Canadian Civil Litigation

Deborah Lynn Zutter

Follow this and additional works at: http://epublications.bond.edu.au/blr

Recommended Citation

Zutter, Deborah Lynn (2001) "Incorporating ADR in Canadian Civil Litigation," *Bond Law Review*: Vol. 13: Iss. 2, Article 11.
Available at: http://epublications.bond.edu.au/blr/vol13/iss2/11

This Article is brought to you by the Faculty of Law at ePublications@bond. It has been accepted for inclusion in Bond Law Review by an authorized administrator of ePublications@bond. For more information, please contact Bond University's Repository Coordinator.

Incorporating ADR in Canadian Civil Litigation

Abstract
This article describes four current provincial developments in civil, court-connected mediation within Canada. The nature of Canada's constitution has resulted in civil court processes, and their linked dispute resolution initiatives, being organized on a province-by-province basis. Even though some statutes, such as the Divorce Act, 1985 are enacted by the federal government and apply throughout Canada, the Supreme Court (also known as the Superior Court or Court of Queen's Bench) of each province has jurisdiction over most disputes, including divorce. For these reasons, an examination of mediation developments in Canada necessarily involves reviewing initiatives in several provinces.

Keywords
alternative dispute resolution, Canada, mediation

This article is available in Bond Law Review: http://epublications.bond.edu.au/blr/vol13/iss2/11

INCORPORATING ADR IN CANADIAN CIVIL LITIGATION

By Deborah Lynn Zutter[1]

This article describes four current provincial developments in civil, court-connected mediation within Canada. The nature of Canada's constitution has resulted in civil court processes, and their linked dispute resolution initiatives, being organized on a province-by-province basis.[2] Even though some statutes, such as the *Divorce Act, 1985* are enacted by the federal government and apply throughout Canada, the Supreme Court (also known as the Superior Court or Court of Queen's Bench) of each province has jurisdiction over most disputes, including divorce. For these reasons, an examination of mediation developments in Canada necessarily involves reviewing initiatives in several provinces.

It may be helpful to keep in mind that all Canadian lawyers are both barristers and solicitors. The Law Society of each province licenses the right to practice law in that province. Most Canadian lawyers belong to the Canadian Bar Association (CBA). There has been a National Alternative Dispute Resolution Section of the CBA since 1994. In 1999, at its national annual general meeting, the CBA passed the following, unanimous resolution:

> Legal counsel has a continuing obligation to canvass with each client, in a fully informed manner, all available dispute resolution processes.[3]

While incorporating the foregoing direction into legal practice is voluntary, the increasing availability of Canadian court-annexed civil dispute resolution processes suggests that prudent lawyers will educate themselves about appropriate, accessible

---

1 Ms Zutter is a Canadian lawyer, mediator and educator practicing in British Columbia. She studied for her Master of Laws at Bond University in 2000-2001.

2 While the Federal Court of Canada does have national jurisdiction and sits in each province, its jurisdiction is focused primarily on income tax and immigration matters.

3 As the then Chair of the National Alternative Dispute Resolution Section, I had the honour of proposing this resolution in August 1999 at Edmonton, Alberta. The immediate Past-President of the CBA, Andre Gervais QC, seconded the motion. The level of support demonstrated by the CBA is consistent with its earlier *Systems of Civil Justice Task Force Report* adopted in 1996. This Report recommended fundamental changes to the Canadian civil justice system. It supported educating lawyers about collaborative dispute resolution processes and encouraging their use. It also supported a multi-door courthouse that incorporated the use of 'alternative' dispute resolution processes, including mediation.

dispute resolution processes and will acquire the skills necessary both to consult strategically with clients concerning the use of these processes and to represent clients participating in them. The discussion of the following initiatives will touch on the impact that mediation has had on Canadian legal culture.

Ontario's Rule 24.1[4]

Mandatory mediation was introduced to Ontario's Superior Court General Division, Civil in 1999. While Rule 24.1 has potential provincial-wide application, it was launched only in Toronto in 1999. As well, Rule 24.1 continued mandatory mediation rules of practice in place in Ottawa since 1997. Essentially, Rule 24.1 requires that mediation occur within 90 days[5] following the filing of the first Statement of Defence in any non-family civil action brought in the Superior Court, General Division. One in five cases in Toronto is placed on the mandatory mediation list. All cases in Ottawa are placed on the mandatory mediation list. Clients and lawyers are required to participate. Mediators are selected from a pre-approved mediator roster[6] and the parties pay their fees.[7] Thereafter, the mediator may charge her usual hourly rate. Masters have been appointed in each jurisdiction to hear applications to adjourn or avoid mediation and to administer the case management program introduced in conjunction with mandatory mediation. Each party must provide a Statement of Issues identifying the issues in dispute as well as the party's interests and positions at least 7 days prior to the mediation.

Rule 24.1 was the subject of two studies within the last year. Dr Julie Mcfarlane, under the auspices of the Law Commission of Canada, interviewed 20 commercial litigators in Toronto and 20 in Ottawa to 'describe in depth what they think about mediation and the impact it has had on their litigation practice'.[8] All participating lawyers had attended a minimum of 10 commercial mediations. Participants volunteered and were assured of their anonymity.

---

4 For information about Rule 24.1 and Rule 75.1 (introduced after Rule 24.1) see <www.attorneygeneral.jus.gov.on.ca>. My description of the rule is based on data contained on this website.

5 The parties may consent to an extension of up to 60 days.

6 If the parties fail to appoint a mediator within 30 days, the Local Mediation Coordinator will appoint a mediator from the roster.

7 The mediator's fee is fixed for the first hour of preparation and the first 3 hours of mediation. The mediator's fee is shared equally by the parties and varies by the number of parties. For two parties, it is $600; for three parties it is $675; for four parties it is $750; for five or more parties, it is $825. GST is added.

8 Julie Mcfarlane, 'Culture Change? Commercial Litigators and the Ontario Mandatory Mediation Program,' Law Commission of Canada (2001). Unfortunately, the version of the report that I have does not have page numbers. This portion of my article references Dr Mcfarlane's report extensively.

Dr Mcfarlane found that the different legal cultures in Ottawa and Toronto influenced her outcomes. Toronto has a population of 2.5 million. Its legal community is large, with the consequence that lawyers are not well know to one other nor are they well known to the bench. Ottawa has a population of 785,000 and the legal community is relatively small; lawyers know each other and are known by members of the bench. The greater collegiality and greater accountability[9] in the Ottawa legal community positively impacted how and to what extent mediation was accepted as legitimate in that city.

Another aspect influencing the differences in acceptance of mandatory mediation and the consequent legal culture changes in Ottawa and Toronto was the leadership in each community. Toronto resisted the introduction of Rule 24.1.[10] Mandatory mediation was introduced in Ottawa several years before Rule 24.1. Ottawa's Mr. Justice Chadwick and Master Beaudoin have been high status supporters of mandatory mediation, providing legitimacy for mandatory mediation in Ottawa. Dr MacFarlane points out that Toronto does not enjoy similar high status endorsement.[11] Finally, Ottawa litigators have greater experience with mandatory mediation than their Toronto counterparts. All Ottawa civil litigation matters have proceeded to mediation since 1997.

Five, distinct 'attitude streams' emerged from the interviews conducted for this survey. Although respondents used language consistent with one stream, the respondents would often express views consistent with one or more other attitude streams during the same interview. Dr Mcfarlane attributed this 'pervasive ambiguity' to the early, incomplete stages of paradigm shift documented in her study. She found an evolution in the lawyer's professional role and identity from gunslinger to client's agent.[12] The following are the five legal attitude streams documented by Dr Mcfarlane:

1. **The Pragmatist.** This individual likes mediation because it is time and cost efficient, and it makes practical 'sense' in the light of the extraordinary legal costs that are becoming the norm. She applies her already well-honed skills to settlement negotiations, probably does little different, but is beginning to identify some surprises coming out of the mediation process and in

---

9 Donald Landon, 'Country Lawyers: The Impact of Context on Professional Practice' (1990) 5. Dr Mcfarlane references the work of Landon.

10 This resistance was related to me in numerous discussions that I had with mediation colleagues from Ontario during 1998 and 1999 in my role as a member of the executive of the National Alternative Dispute Resolution Section. Toronto continues to resist mandatory mediation. Rule 24.1 2001 evaluation findings report, 'For a significant proportion of the Toronto bar, mandatory mediation is still problematic, its overall advantage unproven.' (See Note 18, page 12 of the Executive Summary)

11 McFarlane, above n 8.

12 Ibid.

particular the impact of more actively including (some) clients in the dynamic. She would say that since early exploration of settlement is the way that legal practice is going, lawyers should get with it, and adapt accordingly. After all, the clients set the agenda and here is an innovation that meshes with their interests.

2. **The True Believer.** This individual speaks about mediation in terms that suggest that it has had a significant impact on her attitudes towards practice, clients and conflict. She may even use quasi-religious metaphors like 'converted' or 'transformed' … to describe this process of personal and professional change. She sees mediation as having an impact beyond the purely instrumental use of the process – in conflict resolution and problem-solving processes, in client relationships, in his advocacy role and sometimes in outcomes. She experiences a sometimes strong feeling of tension between her adversarial role and her settlement role, and is continuing to reflect on what this means for his own legal practice and for the practice of law in general.

3. **The Instrumentalist.** This individual regards mediation and mediators as a process or a tool to be 'captured' and used to advance the clients' mostly unchanged adversarial goals. Favourite instrumental strategies include using mediation to reduce the expectations of the other side, or as a 'fishing expedition' to obtain early discovery. She will move with little effort and without apparent discomfort between an adversarial role and a more conciliatory role, regarding the second as a 'game' rather than a genuine change in orientation. However, she is sometimes taken aback at what emerges from mediation, and in particular acknowledges its usefulness for some clients as a cathartic process.

4. **The Dismisser.** This individual regards mediation as a new 'fad', which presents little difference to the traditional model of negotiation towards settlement. Lawyers have always negotiated and in most cases have always settled (which demonstrates that lawyers must be good negotiators). The only substantive and important difference resulting from mandatory mediation is that some aspects of file preparation occur earlier, and timelines are now set and enforced by the court (which the Dismisser generally resents, seeing this as an intrusion into counsel's autonomy and control). Client relationships and outcomes are unchanged, although results may consolidate more rapidly, in some cases as a result of the new system. Mediation is probably most useful for reality-checking clients on either side who are either not listening to their lawyers or are being poorly advised.

5. **The Oppositionist.** This individual sees mediation as a distortion of the proper identity and professional responsibility of counsel. The lawyer's key and most authentic role is to manage a war on behalf of clients. She sees mediation as simply being about clearing the court backlog. But she also considers the movement towards ADR – especially where it is 'touchy-feely'

> – to threaten the integrity of counsel's advocacy role. She sees mediators as bogus, manipulative and unskilled – yet at the same time she feels that mediation is a risky place for herself and her clients.[13]

Dr Mcfarlane identified a number of changes in practice resulting from the introduction of mandatory mediation. Generally, there was more 'front-end loading' involving the gathering of information, early assessment and perhaps research. Lawyers were still honing their skills in identifying the pieces of information essential for reaching early settlement. Information was critical to the value of early mediation. One litigator in Dr Mcfarlane's study observed:

> It has been my experience that negotiating or mediating early is useful but it's only meaningful if the clients have a fairly level playing field in terms of information – and if there isn't a level playing field then almost certainly there's a level of distrust, and it's been my experience that I just can't often convince a client that it's in their best interest to settle because they are convinced that there's more information out there. And I can't tell them that there isn't.[14]

The requirement to mediate within 90 days of filing the first Statement of Defence has impacted on the traditional lawyer/client relationship. Lawyers commented that as a consequence of mandatory mediation, they had to rely more on their client's verbal information than if they had had the opportunity to discover documents. The clients were more involved in resolving the dispute and were active in generating business solutions. Some lawyers expressed concerns over client control due to mediation: that if the matter failed to settle there was the risk that the client would have 'opened up a whole can of worms'. Leaving control with the client may be counter-intuitive for many legal counsel.[15]

Dr Mcfarlane found that those lawyers who were most negative about mediation were most comfortable with evaluative mediators:[16] they wanted the mediator to provide comments on the legal merits of the dispute. Generally, these lawyers preferred lawyer-mediators. They believed that clients would be reassured to hear that the terms of their settlement were reasonable when compared to what a court might

---

13 Julie Mcfarlane, speaking notes circulated on 25 September 2001 in Vancouver, BC entitled 'Dr Julie Mcfarlane for the Law Commission of Canada, 2001: Culture Change? Mediation and Litigation Practice.'

14 McFarlane, above n 8.

15 McFarlane, above n 8. The length of time that a lawyer has practiced may correlate with attitude regarding client control. Dr Mcfarlane noted that, unlike more senior colleagues, a less senior lawyer had never expected to control the client and work without client participation.

16 McFarlane, above n 8. Generally, 'evaluative' mediators are willing to provide disputants with their assessment of the dispute, sometimes going so far as to indicate what they believe a court would decide.

award. However, it was acknowledged that there was a risk of a disputant who had been advised that 'he would win at trial' becoming rigid and less inclined to settle. Lawyers criticized the strategy of 'banging heads and then suggesting that the parties split the difference'.[17] Mediators who used this tactic appeared to be unskilled at facilitating dialogue between the parties.

Of interest, some lawyers expressed a desire for greater mediator flexibility and exasperation 'when confronted by a mediat[or] who had a quasi-religious attachment to one or other approach [facilitative or evaluative]'.[18]

Dr Mcfarlane noted a fundamental change in counsel's perspective concerning opposing lawyers and parties:

> One theme that emerged with some consistency from the Ottawa data was that mediation has changed both the ways and the extent to which counsel thought about and analysed the interests and perspectives of the Other Side in a law suit, as opposed to being focused exclusively or almost exclusively on his or her own client's position.[19]

One consequence of early mandatory mediation related by Ottawa lawyers[20] was that they were able to manage fewer active files. In the past, an average five-year file turnover allowed for managing up to 400 files. The current twelve to fifteen-month turnover reduced the manageable number of open files to 75-100. This was due to the intensive work required early on the file in preparation for mediation. Some lawyers have moved from hourly billing to billing based on results.

Dr Mcfarlane concluded that the increased acceptance of mediation noted with Ottawa lawyers could be explained by their longer and greater experience with mediation. She predicts that as Toronto lawyers use mediation more their acceptance will increase.

---

17 McFarlane, above n 8.

18 McFarlane, above n 8. Dr Mcfarlane defines evaluative as emphasising the known, that is, anticipated legal outcomes, and facilitative as emphasising the unknown, that is, other factors in settlement besides legal evaluations.

19 McFarlane, above n 8.

20 McFarlane, above n 8. Ottawa lawyers have worked with mandatory mediation for 5 years for all civil litigation, non-family matters. Both the duration of exposure to mandatory mediation and the number of files caught by mandatory mediation is less in Toronto. Some Toronto lawyers have increased their caseload as a consequence of their involvement in mandatory mediation.

Rule 24.1 was the subject of a twenty-three month evaluation commencing in January 1999.[21] This evaluation asked four questions:

1. Does Rule 24.1 improve the pace of litigation?
2. Does Rule 24.1 reduce the costs to the participants in the litigation process?
3. Does Rule 24.1 improve the quality of disposition outcomes?
4. Does Rule 24.1 improve the operation of the mediation and litigation process?[22]

Evaluators gathered data from various sources in this qualitative and quantitative study. They compared their data to data gathered from a control group and relied upon questionnaires returned from 1,243 mediators, 600 litigants and 1,130 lawyers caught by Rule 24.1. Like Dr Mcfarlane, they noted differences between Ottawa and Toronto.[23]

There was a significant reduction of time to dispose of cases as a consequence of Rule 24.1. For example, twenty-five percent of Toronto's Rule 24.1 cases were disposed of in the first six months compared to fifteen percent in the control group.[24] The evaluators also found that Rule 24.1 provided adequate flexibility for determining when to schedule mediations. Over one half of the Rule 24.1 mediations took place within the required ninety-day period following the filing of the first Statement of Defence. A further one third of the mediations occurred in the consensual extension period of 90 – 150 days post-filing.[25] Seventy-five percent of Ottawa lawyers and forty-seven percent of Toronto lawyers agreed that the mediation should not have been held later.[26] The researchers found that mediation timing was rule-driven in Toronto whereas the more-experienced Ottawa lawyers tended to schedule the mediation by taking into account the specific attributes of the case.[27]

Although developing a full understanding of the impact on legal costs was beyond the scope of the evaluation, the report concluded that early mandatory mediation saved litigants a substantial amount of money.[28] Thirty-eight percent of lawyer respondents estimated a savings of greater than $10,000.

---

21 Robert Ibid & Associates, Limited, 'Evaluation of the Ontario Mandatory Mediation Program (Rule 24.1).' (Ministry of Ontario Attorney General: 2001) found at <www.attorneygeneral.jus.gov.on.ca/html/MANMED/pilotproject.htm>. My references are to the 'Executive Summary and Recommendations' found at the same website.
22 Ibid, 3.
23 Ibid, 6.
24 Ibid, 6.
25 Ibid, 7.
26 Ibid, 7.
27 Ibid, 7.
28 Ibid, 12.

Analysing the quality of mandatory mediation outcomes revealed useful information. Mediations that took longer than three hours were more likely to settle.[29] Four of every ten mediations were completely settled at or within seven days of the mediation. Although considerable variation in settlement was noted by dispute type, the reasons for this were not explored. Mediations were significantly more likely to result in complete settlement if the parties selected the mediator.[30] Moveover, there was a positive correlation between the number of mediations conducted by a mediator and the likelihood of settlement with that mediator.[31] The researchers further observed that very high concentrations of mediations were conducted by very few mediators: four Ottawa mediators accounted for 49.8% of Ottawa mediations.

Problems were noted with the impact of Rule 24.1 on the mediation and litigation process. Inadequate authority to settle occurred in fifteen to eighteen percent of the mediations. Despite the statistical evidence of positive outcomes from mandatory mediation, Toronto lawyers tended to hold negative perceptions of mediation. Dissemination of information about the positive impacts of mediation, targeted at lawyers, was recommended.[32] As many participants felt that the criteria for selecting mediators to the roster ought to be more rigorous, it was recommended that consideration be given to revision of the criteria for acceptance to the roster of mediators.[33] In response to comments by litigants, the evaluators encouraged the development and distribution of information that reviewed the benefits and costs of proceeding with litigation.

Consistent with the evaluation recommendation, Rule 24.1 remains in force after 4 July 2001 end date of the initial pilot.

Alberta's Judicial Dispute Resolution - 'JDR'

There is tension between the judicial roles of neutrality, passivity and impartiality and the effective, productive use of the court's resources: between fairness and efficiency. With the goal of settling more cases earlier, some judges have become active case managers. The settlement conference, where the parties, their legal counsel and a judge meet before trial to consider settlement and (often) receive the judge's non-binding opinion about the merits of the case, is one tool that has been employed. Commentators urge caution:

---

29 Ibid, 13.
30 Ibid, 15.
31 Ibid, 15.
32 Ibid, 17.
33 Ibid, 16.

> While the motivation behind implementing judicial management is the promotion of time-efficiency, the quality of justice should not be sacrificed.[34]

Justice may be compromised in the following situations: if settlement is coerced; if a party fears judicial partiality as a consequence of that party's refusal to settle; if litigants are forced to participate in an additional litigation step absorbing often limited resources of time and money; if the trier of fact is influenced by inadmissible statements made or behaviour occurring during the settlement conference; and if the judge conducting the settlement conference is not chosen by the parties and is unskilled in facilitating voluntary settlement.[35] In the belief that the negative aspects of settlement conferences can be contained, Tornquist proposed that the following measures be implemented:

1. The judge who is trying the case on the merits should be barred from participating in settlement negotiations;
2. The pretrial settlement conference should be voluntary;
3. The judge who handles the pretrial settlement conference should not be the judge to approve the settlement;
4. The judge should be sensitive to the possible use of pretrial settlement conferences by one or more of the attorneys to engage in unauthorized discovery;
5. The judge should not meet with each attorney separately unless all parties agree; and
6. The judge should not meet with the parties without counsel.[36]

As with many courts, Alberta's provincial and superior courts are experiencing increasing volume of cases with consequent delays. Each court has responded with a distinct version of Judicial Dispute Resolution (JDR). Some of Tornquist's suggestions have been incorporated within Alberta's JDR programs.

Judge N. Flatters designed and implemented the Settlement Conference Pilot Project at Calgary Provincial Court, Family Division in 1998.[37] 100 cases were processed between July 1998 and July 1999. Final resolution was reached in 65 cases, with interim resolution in a further 19 cases. Even more dramatically, 164 trial days were vacated following 154 hours of JDR Judge Flatters points out that

---

34 Katherine Kemp, 'Judicial Management or Activism?' (1990) 15 *University of Dayton Law Review* 343 at 358.

35 For articles articulating these and other criticisms of settlement conferences, see: Kemp (Note 27), and_Leroy Tornquist, 'The Active Judge in Pretrial Settlement: Inherent Authority Gone Awry' (1989) 25 *Williamette Law Review* 743.

36 Ibid, 773-4.

37 Judge Nancy Flatters, 'Judicial Settlement Conferencing. A Structured Approach to the Resolution of Family Matters: A Brief Overview of one Court's Approach.' I am indebted to Judge Flatters for providing me with a copy of her as yet unpublished article.

> [w]hile at first glance settlement conferencing may appear to echo mediation in that it utilizes, borrows from and adapts some well established mediation techniques, it is not mediation. It is, however, a blend of predictive settlement (what a Court would do) and problem-solving techniques (not predictive of what a Court would do) in a judicial facilitated negotiation framework with the Judge giving a non-binding evaluation and opinion.[38]

The Pilot Project used a staged model for JDR commencing with an Introduction, moving through Fact Finding, Option Development, and Delivering the Opinion, to Reviewing the Next Step. Cases were screened before they were selected for the pilot. Child welfare matters most appropriate for JDR were claims of neglect in which there was a lack of positive communication between the parents and caseworker.[39] In family disputes, cases exhibiting any of the following characteristics were screened out: the need of a disputant for judicial vindication; where a legal precedent or declaration of legal rights was required; and when there was a significant imbalance of power.[40]

JDR is an opportunity to overcome or limit the 'uncertainty factor' associated with trials:

> As a facilitator, the Judge can provide insight in the form of an impartial opinion into outcomes in similar cases. In addition, the Judge can determine legal issues, while providing the parties with the opportunity to weigh the impartial opinion and thereby make an informed decision as to resolution. In this respect the Judge can be facilitative in assisting the parties to focus on interests in relation to legal rights, theory and the relief sought, narrow the issues in dispute and give, in particular, if the parties are reluctant to settle, a basis to evaluate the impartial judicial evaluation against their own position. It gives a realistic view of what a party may expect if the case proceeds to trial.[41]

Following the Calgary Pilot Project, the Family and Youth Divisions of the Provincial Court of Alberta installed Judicial Dispute Resolution Programs in Calgary and in Edmonton. The expressed goals of these programs are to 'reduce court time and encourage early resolution of cases involving families and children'.[42] Participants are encouraged to first utilize the Family Court Mediation Service Program. Participation in JDR is voluntary and the meeting can be scheduled at any time by contacting the trial coordinator. The parties, their counsel, the judge and clerk meet informally for a

---

38 Ibid, 4.
39 Ibid, 9.
40 Ibid, 8.
41 Ibid, 10.
42 Alberta Justice, 25 September 2000. News release. 'Edmonton courts launch Judicial Dispute Resolution Program.' Additional information can be found at: www.gov.ab.ca/just/.

confidential 90-minute meeting. Typically, once lawyers have given summaries of the dispute and the parties have expressed what is important to them, the judge discusses the case with the parties. The judge can offer her a non-binding opinion about what her decision would be if she had heard the information in a trial. Should the JDR Judge meet separately with either counsel or party, the contents of these meetings are confidential unless otherwise agreed. If the parties do not accept the judge's opinion, they proceed to trial. The JDR judge seals or destroys her notes and may not hear interim applications or the trial unless the parties agree. Calgary has enjoyed significant success with its JDR program. Eighty-four percent of cases that went through JDR settled without trial.

Alberta's superior court, the Court of Queen's Bench, has offered JDR for over five years through an ad hoc, informal process to 'encourage settlement and shorten the waiting times for those cases that require resolution in court'.[43] Two judges are assigned each week exclusively to conduct JDRs in Edmonton and in Calgary.[44] Success rates vary with the assigned Judge from and range between sixty and eighty percent. Judges who conduct JDRs may not have received specialized training; however, they self-select the JDR assignment. Disputants may choose among the following procedures:

- the parties get the judge's assessment of the case, then consensually reach their own settlement decision;
- the parties may reach their own voluntary settlement without the benefit of a judicial opinion; or
- the judge will make a decision that both parties accept.[45]

JDR procedures vary from judge to judge. Madam Justice Rawlins facilitates a discussion with parties and counsel for about one hour. Then she meets separately with each side during which the disputants evaluate their strengths and weaknesses, what they want, and what would constitute a realistic settlement. Madam Justice Rawlins conveys offers between the parties and will, if requested, give her assessment of the merits of the case. She tells the parties that

> … if they hate the settlement they have probably got it right. If either of them would be thrilled with it, it's wrong.[46]

---

43 Madam Justice B Rawlins, 'Judicial Dispute Resolution.' Presented to the joint meeting of ADR, Civil Litigation, Insurance and Construction Sections of the CBA, September 17, 1996.

44 It is possible in Edmonton to schedule a settlement conference with a Judge selected by the parties.

45 Rawlins, above n 43, 2.

46 Rawlins, above n 43, 1.

Through consultation, Alberta Justice is continuing to review actively court-connected dispute resolution processes. Canadian interest in judicial dispute resolution is not limited to Alberta. Mr. Justice J. Williams of the National Judicial Institute observes: 'The last five years has seen a dramatic change and expansion in the judicial role.'[47] The National Judicial Institute is undertaking initiatives in dispute resolution education for judges that are focused on its unique judicial aspects. The new judges program includes education about judicial dispute resolution and mediation.

British Columbia's Notice to Mediate

Courts and legislatures have developed a variety of methods to encourage litigating parties to participate in mediation. Some of these methods are persuasive, others are mandatory. The Attorney General and Supreme Court were concerned that, while actions were settling, far too many were settling late in the dispute, often 'on the steps of the court house'. Voluntary mediation involvement allowed legal counsel to delay participation until they would ordinarily be preparing for trial. Lack of trust in a mediator proposed by one party resulted in further delay as counsel negotiated over who would conduct the mediation. In 1998 the British Columbia Attorney-General introduced the mandatory Notice to Mediate.

The Notice to Mediate is a process by which one party to a civil action may force all other parties in the action to mediate the matter(s) in dispute. Rather than a court encouraging or mandating participation in mediation, a party who is presumably intimately familiar with the dispute and who has assessed the timing and appropriateness of mediation, compels the participation of the other parties in mediation.

The first Notice to Mediate[48] came into force on 14 April 1998 pursuant to a Regulation enacted under the authority of section 44.1 of the *Insurance (Motor Vehicle) Act.* Personal injury actions arising from motor vehicle accidents were a logical place to introduce the Notice to Mediate. All motor vehicles registered in British Columbia must insure with the Insurance Corporation of British Columbia (ICBC). ICBC has been participating in the voluntary mediation of personal injury motor vehicle disputes since 1985. About eighty-four percent of these mediations settle. However, there has been a relatively low use of the purely voluntary mediation model.

Since its introduction, the Notice to Mediate for motor vehicle disputes has been used over 2000 times. The 1999 Evaluation of the Notice to Mediate Regulation found that

---

47 Mr Justice Jim Williams, Associate Director, National Judicial Institute, 4 December 2001. Mr Justice Williams may be contacted at jwilliams@judicom.gc.ca.

48 For more information about each Notice to Mediate, see the Dispute Resolution Office's website at <www.ag.gov.vc.ca/dro>.

seventy-two percent of respondents agreed that the Notice to Mediate was meeting the objectives of encouraging disputant communication and speeding up the settlement process.[49] Between April 1998 and June 2000 all issues were settled in seventy-two percent of these actions. An additional ten percent of the actions settled before the mediation, between service of the Notice to Mediate and the date set for the mediation.[50] Evaluation of the Motor Vehicle Notice to Mediate suggests that rather than serve a Notice to Mediate, a party's lawyer will advise the other parties of an intention to serve a Notice whereupon the parties may agree to participate in a voluntary mediation.[51]

Leaky condominiums provided the impetus for the second iteration of the Notice to Mediate. The 1998 recommendations of the Barrett Commission report[52] recognized that the litigation system was not serving homeowners embroiled in construction disputes well. Delays and expense were unacceptable to both plaintiffs and defendants. The Notice to Mediate (Residential Construction) Regulation came into force in May 1999. This Notice was authorized by section 29 of the *Homeowner Protection Act.* Most recently, the *Law and Equity Act* was amended in August 2000, to authorize the Notice to Mediate (General) Regulation[53] which applies to all civil, non-family, Supreme Court of British Columbia actions. It came into force on 15 February 2001.

In each Notice to Mediate regulation, specific time lines are set forth within which the parties must agree on the selection of a mediator and attend the mediation. Where the parties are unable to agree on the mediator, the British Columbia Mediator Roster Society will appoint a mediator.

Regulatory stipulations addressing pre-mediation conferences vary among the Notice to Mediate Regulations. There is no provision for pre-mediation conferences in the motor vehicle personal injury regulation. Pre-mediation conferences are permitted under the residential construction regulation if all parties agree. Pre-mediation conferences must be held under the general Notice to Mediate regulation, if, in the mediator's opinion, the action is sufficiently complex. Pre-mediation conferences in both the residential construction and general contexts are described as organizational

---

49 Focus Consultants, 'An Evaluation of the Notice to Mediate Regulation in the Insurance (Motor Vehicle) Act prepared for the Ministry of Attorney General Dispute Resolution Office,' June 1999, ii.

50 Dispute Resolution Office Bulletin, June 2000, 'Notice to Mediate Regulation (Motor Vehicle),' found at <www.ag.gov.bc.ca/dro/bulletins2000/index.htm>, 4.

51 Focus Consultants, iii.

52 Dispute Resolution Office Bulletin, June 2000, 'Notice to Mediate (Residential Construction) Regulation.' found at <www.ag.gov.bc.ca/dro/bulletins2000/ntm_res_constr.htm>.

53 BC Reg 4/2001.

meetings at which disclosure of documents, the exchange of expert reports and scheduling are discussed.[54] British Columbia is unique among Canadian jurisdictions in requiring pre-mediation conferences in advance of the joint mediation meeting.[55]

Mediations held pursuant to a Notice to Mediate have the following characteristics:

- privacy;
- voluntary settlement;
- no decision-making authority invested in the mediator;
- no requirement to negotiate in good faith;
- no requirement to use a specified mediation model;
- the delivery of a Statement of Facts and Issues at least seven days before the mediation session; and
- the delivery of a Fee Declaration setting forth the fees for the mediation and the agreement of the participants as to how the mediator's fees will be apportioned.

The court may adjourn a mediation commenced by way of Notice to Mediate and it may exempt a party from participation. Should a party refuse to attend a mediation, any party may file a Declaration of Default with the court whereupon the court may exercise its discretion from a number of powers, including staying the action until the mediation occurs and making an order of costs against the defaulting party. The court will grant an exemption from the Notice to Mediate where mediation has already been held.

At the conclusion of the mediation, the mediator must complete a Certificate of Completed Mediation, indicating whether:

- all issues have been resolved;
- the mediator has terminated the mediation, and
    - some issues have been resolved, or
    - no issues have been resolved.[56]

Use of the Mediator Roster is not limited to Notice to Mediate disputes. As the Roster is easily accessible on the World Wide Web and membership on the Roster signifies a

---

54 For example, see section 13, BC Reg 4/2001.

55 In making this comment, I am not including meetings held to screen for violence for family law disputants. Although screening for violence is not required by legislation, some mediation programs that are provincially funded and receive court-referred clients do screen for violence. For example, programs in British Columbia, Manitoba and New Brunswick screen for violence.

56 Form 5, BC Reg 4/2001.

level of expertise, a practice has arisen whereby lawyers select mediators for a wide variety of disputes from the Roster.[57]

Most mediators listed on the Roster have not experienced an increased demand for their services. It appears that mediation referrals continue to be made to a relatively small group of mediators.[58] The practice of holding pre-mediation conferences focused on organizational matters has expanded from its original application in residential construction disputes.

British Columbia's Facilitated Planning Meetings[59]

Voluntary mediations have been available under s 22 of British Columbia's *Child, Family and Community Services Act* since 1997. Despite success with these mediations, uptake has been low. The Facilitated Planning Meeting Project was launched at Surrey Provincial Court in March 2001 as an innovative process to address that court's backlog of cases. Facilitated Planning Meetings are authorized by s 22 the process, however, differs from the previously established child protection mediation procedure.

The Facilitated Planning Meeting Project is testing a collaborative decision-making process that is facilitated by a mediator. Its objective is to shorten the time required to make effective decisions for children so that decisions are made within 30 days of the child being removed from their parents. The process involves:

1. Creating a Project Administrative Coordinator who will administer the meetings by selecting appropriate cases, scheduling the mediation, booking the venue and appointing the mediator from a specially selected and trained group of private mediators;

2. The mediator holding an Orientation session(s) with parent(s) to: prepare the parents for the Planning Meeting by covering logistics, who should attend, goals, possible outcomes, options if some issues remain unresolved and confidentiality; identify and list the parents' issues and interests; screen out inappropriate cases; assist parents to identify an advocate or support person for the Planning Meeting; and, if the child is over 12, consider and recommend on the child's involvement at the Planning Meeting;

---

57 More information about the Mediator Roster is available at: <www.mediator-roster.bc.ca>. Lawyers, disputants and the roster administrator related this wider use of the Mediator Roster to me during conversations in 2001.

58 The British Columbia experience is consistent with the Ontario experience. Ibid, 17.

59 British Columbia Ministry of Attorney General, Dispute Resolution Office, 'The Surrey Court Project: The Facilitated Planning Meeting Handbook' (Np:np, 15 March 2001) 4-5 and 13-17.

3. The mediator holding an Orientation Session with the social worker, the Team Leader and the Court Work Supervisor. The Court Work Supervisor is a new position created for this project. She has the power to agree to a plan of care and to approve the allocation of resources to implement a plan. The Court Work Supervisor will attend the Planning Meeting with the social worker. During the Orientation meeting the Ministry's interests will be identified and listed and there will be a determination about who will attend the Planning Meeting and what their roles will be;

4. Holding a structured two-hour Planning Meeting[60] facilitated by the mediator to develop a plan to ensure the safety of the child. The meeting is intended to reach consensus on as many procedural and substantive issues as possible.

This process presents several procedural changes to the child protection mediation process. Of particular note, the emphasis in this project's design is with pre-mediation activities in advance of the Planning Meeting. These are:

- the focus on preparation through the use of separate Orientation sessions and the exchange of documentation prior to the Planning Meeting;
- the separation of administrative tasks from mediator tasks which is achieved by creating a Project Administrative Coordinator position and assigning administrative tasks to the Coordinator; and
- putting in place the Court Work Supervisor for social workers. Not only does the Supervisor act to support social workers in their involvement with mediation, the Supervisor has the authority to reach agreement on behalf of the Ministry and to allocate resources to carry out the agreements.

The intention is that mediation participants will arrive at the Planning Meeting prepared to make decisions about the child's plan of care, that they will understand the process and appreciate what will happen next, that they possess authority to enter into and carry out agreements that are reached, and that they will be accompanied by appropriate support persons.

Conclusion

---

60 My discussions with the Project Administrator and the Court Work Supervisor in early October 2001 revealed that no Planning Meeting has been completed within two hours. While it is too soon to identify an average duration for the Planning Meeting, it is accepted that the meetings will take longer than two hours. At the same time, the project has enjoyed significant success. All but two mediations have concluded with the settlement of some or all issues.

The court-connected mediation programs reviewed in this article incorporate knowledge that has been gained through experience with alternative dispute resolution processes in several Canadian jurisdictions. Ontario's Rule 24.1 provides some flexibility in scheduling mandatory mediation. Alberta's JDR procedures at both Provincial Court and the Court of Queen's Bench prohibit the settlement conference judge from hearing the trial. British Columbia's Notice to Mediate permits the disputant to determine when and if mediation is appropriate. British Columbia's Facilitated Planning Meetings include 3 innovations: separate orientation meetings for parents and for social workers; a support person for social workers; and the delineation and assignment of the administrative aspects of mediation to a full-time administrator.

The foregoing describes some, but not all, of Canada's court-connected mediation processes. Other examples of court-connected mediation exist. Saskatchewan's *Court of Queen's Bench Act, 1998* requires mandatory mediation in all civil matters and mandatory parental education in divorce matters. Mediation is available to Quebec's Superior Court litigants. Small Claims litigants in both Alberta and British Columbia must attend mediation.[61] Manitoba has developed court-connected judicial mediation programs.[62] The variety of court-connected processes introduced in Canada emphasizes the uniqueness of each Canadian jurisdiction. The wide usage of mediation and other dispute resolution options across Canada may mark the evolution of the role of the Canadian lawyer suggested by Mcfarlane[63] from gunslinger to client's agent. Whether or not one agrees with Mcfarlane, the practice of law by Canadian lawyers is evolving and does entail an ability to discern among dispute resolution processes. Jennifer Cooper, the past chair of the National Family Section, Canadian Bar Association eloquently describes current Canadian practices:

> Just think about how you handle that first consultation. Instead of almost automatically taking instructions for a court application, you discuss options: negotiation [directly with the spouse, between counsel, or in a 'four way meeting' with everyone present], mediation [with or without lawyers, for a targeted issue, or as a comprehensive package], arbitration [as straight arbitration or as a combined 'med/arb'], collaboration [the newest kid on the block], and last but not least, litigation. And if it will be litigation, will they first visit a court-mandated mediator or attend a court-mandated information session? And before proceeding to their contested motion, will they get waylaid in an early intervention settlement conference? And if all else fails, will they have

---

61 The mediation Small Claims programs in Alberta and British Columbia are distinct. Mediation is mandatory in Alberta in Calgary and Edmonton. Mediation is mandatory in British Columbia for construction disputes in Vancouver, Surrey and Nanaimo.

62 Freda Steel, 'The Unified Family Court – Ten Years Later' (1997) 24 *Manitoba Law Journal* 381.

63 Mcfarlane, above n 13.

a psychologist or social worker advise as to what is in the best interest of the child before a judge is troubled to make this decision?[64]

64 Jennifer Cooper, 'Doing divorce differently: A view from the trenches' (August 2001) *The Family Way: En Famille* 2.