

3-1-2005

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Recommended Citation

Condliffe, Peter (2005) "ADR and immigration: looking at Canada," *ADR Bulletin*: Vol. 7: No. 8, Article 3.
Available at: <http://epublications.bond.edu.au/adr/vol7/iss8/3>

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From the practice front

ADR and immigration: looking at Canada

Peter Condliffe

I was doing some research into the situation in Albania in relation to an asylum seeker appeal before the Federal Court when I came across some interesting material from the website of the Canadian Immigration Review Board (IRB) and a rather interesting experiment they are undertaking into the use of ADR in their Immigration Appeal Division (IAD).¹ This is the equivalent, of sorts, to Australia's Migration Review Board or Refugee Review Board.

ADR was first introduced by way of a pilot project in the Toronto Region of the IAD in 1998. The success of the 1998 project led to the ADR process being made a permanent part of the Toronto office's case processing for many types of sponsorship appeals. The ADR process was then implemented in Vancouver in 2000 after further study, refinement and consultation. An independent consultant's evaluation in 2001 confirmed that the IAD's use of ADR contributes significantly to the efficiency, effectiveness and quality of administrative justice at the IAD. It provides appellants with a process that is generally viewed as fair and worthwhile and often produces savings in terms of costs and time. It was found that its informality reduced the tension often felt by participants in adversarial proceedings.²

Following the implementation of the new Canadian Immigration and Refugee Protection Act, which came into force on 28 June 2002, the Montréal and Calgary offices started using ADR in the fall of 2003, followed by Ottawa in January 2004.³

An important part of this process was the provision of information sessions for appellants' counsel, as well as ongoing training for dispute resolution officers (DROs) and Minister's counsel, mentoring for DROs and communications with stakeholders.

The IAD is trying to build increased capacity for decision-making rather than

just relying upon traditional inquisitional tribunal and adversarial processes. To date, about 50 per cent of cases considered through ADR are resolved without proceeding to a full hearing. When one considers that the IAD handles about 5000 appeals per year the potential for this sort of program is evident.

The use of ADR offers an informal, less confrontational and more consensual approach to dealing with sponsorship appeals, which essentially concern the appellant's desire to reunify his or her family. ADR is consistent with the Immigration and Refugee Board's stated vision to deal with matters 'simply, quickly and fairly.'

The ADR process at the IAD usually involves an in-person meeting – an ADR Conference – that is scheduled to last for one hour. The IAD assigns a member to act as a DRO for each appeal that is selected for the ADR process. All DROs receive training in ADR and have in depth substantive and procedural knowledge of sponsorship appeal issues. In addition to the DRO, the ADR Conference participants are the Minister's counsel and the appellant and their counsel. About half of the cases that go through ADR will have a final result without the parties having to attend an oral hearing. There are written ADR procedures and Rule 20 in the new IAD Rules covers such matters as exchange of documents, participating in good faith, confidentiality and IAD approval of any settlements.

The ADR program has not, however, reached its full potential. The IAD accepted all of the recommendations of the consultant's evaluation report referred to above, and they have now largely been implemented – this includes enhancing ADR training for dispute resolution officers and Minister's counsel, and providing more detailed written guidelines on ADR procedures

and practices.

The Protocols for the running of the mediations in this fascinating program are lengthy and run to over 3,500 words – too many to included here.⁴ I liked the section on Overcoming Impasse which read:

You may encounter impasses during the ADR session. Impasses may occur at any stage of the process. They may be caused by psychological unwillingness to settle a dispute, lack of trust, poor communication, unrelated interests, intransigence, the undesirability of solutions under consideration etc. Impasses may be overcome through the actions of the parties or through your assistance. Some of the techniques useful for overcoming impasses include:

- Improving lines of communication
- Reality-checking
- Caucusing
- Option generation
- Adjournment
- Use of outside expert/evaluator
- Modifying the dispute resolution process

Now that some serious and widespread community attention and concern has been focused upon our own immigration systems through the tragic experiences of Cornelia Raus and others, perhaps in any overhaul some consideration could be given to the use of ADR. ●

Peter Condliffe is a Victorian Barrister practising in Human Rights, Family and Criminal Law and is a Specialist Mediator and Facilitator. Any queries or comments can be directed to pc@vicbar.com.au.

Endnotes

1. Go to <www.irb-cisr.gc.ca>.
2. Go to <www.irb-cisr.gc.ca/en/about/tribunals> for further information.
3. See Immigration Review Board Report on Plans and Priorities 2003-2004, Canada.
4. Go to <www.irb-cisr.gc.ca/en/about/tribunals/iad/adr/protocol>.