



Mediation – Snapshot of Current Options, Developments and Considerations

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It is opportune to revisit mediation options in Canada, private versus judicial, against the backdrop of the recently released Ontario Bar Association Task Force Report (“Report”) on JDR – *A Different ‘Day in Court’ – The Role of the Judiciary in Facilitating Settlements*. The Report provides an informative overview of the state of JDRs from province to province and in the process casts fresh focus on the comparative strengths of private versus judicial mediations.

This short paper is intended to compare and contrast, in a very general fashion, judicial versus private mediation options in Canada against the backdrop of the Ontario Bar Association (OBA) Task Force Report (“Report”) on Judicial Dispute Resolution, *A Different ‘Day in Court’ – The Role of the Judiciary in Facilitating Settlements*, released in July, 2013¹. The Task Force undertook a comprehensive review of JDR design and usage from province to province with input from knowledgeable sorts from across Canada. Where Alberta is concerned, the input and views of Associate Chief Justice R.D. Rooke feature prominently in the Report.

As Paul Godin observes, the cross-Canada review of JDRs conducted by the Task Force “... revealed a startling variation in JDR design and usage from province to province, with everything from ad hoc informal models to highly regulated rules-based models, but even the rules-based models were of very different design and philosophy...”. The Report includes a comprehensive and insightful collection of perceived advantages and disadvantages to JDRs in the ADR world. The cross-Canada review of JDR reality and experiences provides no clear compelling path forward in Ontario where for 20+ years private versus judicial mediations have been the policy choice. In contrast, the Report observes that in provinces such as Alberta and Quebec, JDR as opposed to private mediations have been the policy choice and have been integrated into the justice system.

Whether with reference to the Report or anecdotally, Alberta is perceived to be one of the leaders in Canada in JDRs. The approach of judges in Alberta JDRs was well captured by the Honourable Justice Robert Graesser in a recent paper, as follows:

“Every judge is different to some degree as to his or her approach or style, and willingness to be other than evaluative. Some judges will mediate (focusing on the parties’ interests instead of their rights or legal positions), but if that is ultimately ineffective, he or she will provide an evaluation of the case. Some judges will use evaluative interventions during a mediation, but shy away from giving any kind of detailed evaluation. Some judges will shy away from giving any kind of evaluation. Some judges will be entirely evaluative (focusing on the parties’ rights) and be unwilling to explore interests or mediate. Some judges will essentially evaluate (focusing on the parties’ rights). Some judges will conduct a mini-trial, take a break to consider the matter, and return to deliver a decision. The judge might then leave. Others might stay, to help the parties settle the case with the benefit of the judge’s evaluation. Some judges will caucus with the parties; some will not ...”².

¹ Accessible at www.cba.org/CBA/sections_adr/news2014 - with overview by one of Report’s authors – Paul Godin

² Honourable Justice Robert Graesser – *Judicial Dispute Resolution Advocacy*, October 2011

It is assumed that aspects to JDR approaches noted above for Alberta are mirrored in other provinces. The broad cross-section to approaches to JDRs clearly reflects personal process preferences by individual Judges. Query whether a fusion of some or all of these approaches at individual mediations might enhance the prospects for success and satisfaction levels amongst the parties with the process to that end.

The Court of Queen's Bench of Alberta periodically circulates so called Notices to the Profession regarding booking procedures for JDRs. The latest Notice (NP No. 2014-05 – May 2, 2014) is two pages long with multiple steps and restrictions noted for the booking process. Securing a JDR booking, let alone with a judge deemed by the parties as well suited to their needs, is increasingly difficult. Still further, as at April 2013, priority in JDR bookings is given to family matters and matters otherwise well advanced to trial. All the while, personal injury claims continue to dominate JDR bookings and resources. Of late, an increasing number of JDRs are cancelled with little or no notice on account of stretched judicial resources. Now, by further Notice (NP No. 2014 – 06 – May 20, 2014), the Court has announced that commencing in the fall, 2014, there will be a 33% drop in judges available for JDRs.

While accurate statistical information is difficult to compile and secure, approximately 750 JDRs are currently performed in Alberta on an annual basis with a pool of 75 judges. Anecdotally, at least that number of mediations are performed annually by the 10 busiest private mediators practicing in the Province. Alberta may not have, as is described in the Report, "... Ontario's well-established and respected private mediation Bar", but in a Province perceived to be heavily weighted toward JDRs, private mediations are a desired, credible and compelling alternative to JDRs.

Over the past 15 years, ADR and specifically mediation, both private and judicial, have become a major component to our litigation process and the means by which an increasing number of cases get resolved. The selection of a mediator for a given dispute is critical. Considerable expense, risk and angst is often involved with most disputes. Generally speaking, an experienced mediator with a proven track record of flexibility and creativity in guiding the process and inclusiveness throughout where the input of parties and their counsel is concerned (principle of party autonomy), is a prudent choice. While there are positive features to both judicial and private mediations, when reflecting on important considerations such as ease of securing a mediation, selecting an appropriate mediator to the case, and flexibility and respect for party autonomy and advocacy in the process, there is much to commend private mediations.

Ivan Derer, Q.C., has pursued a diverse litigation practice, based in Alberta, for over 30 years. Most of his practice time currently is devoted to the roles of mediator and arbitrator in a wide cross-section of disputes. His complete CV can be found at www.dererlaw.com

