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# A DIFFERENT 'DAY IN COURT' THE ROLE OF THE JUDICIARY IN FACILITATING SETTLEMENTS



ONTARIO BAR ASSOCIATION  
L'ASSOCIATION DU BARREAU DE L'ONTARIO  
A Branch of the Canadian Bar Association  
Une division de l'Association du Barreau canadien



A Different ‘Day in Court’

The Role of the Judiciary in Facilitating  
Settlements

Report of the Ontario Bar Association  
Judicial Mediation Taskforce

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## I – Introduction

The Ontario Bar Association (“OBA”) Judicial Mediation Taskforce (the “Taskforce”) is very pleased to be able to offer input from the bar on the increasingly topical issue of the judiciary’s role in non-adjudicative dispute resolution. While the term judicial mediation has different meanings in different contexts, the Taskforce’s purpose is to explore and determine whether judicial mediation is in the public interest and if so to outline, from the perspective of lawyers, the optimal role of the judiciary in facilitating settlements. We do not restrict our exploration to techniques that are technically labeled “mediation.” For this reason, in these submissions, we use the term “Judicial Dispute Resolution” or “JDR”.

It should also be noted that we have focused the discussion on non-family civil matters, excluding small claims. We have, however, looked at the family-law and small-claims contexts to provide comparisons and inform recommendations.

### The Ontario Bar Association

As the largest voluntary legal organization in the province, the OBA represents approximately 18,000 lawyers, judges, law professors and students in Ontario. OBA members are on the frontlines of our justice system in no fewer than 37 different sectors and in every region of the province. In addition to providing legal education for its members, the OBA assists government and other decision-makers with several policy initiatives each year - both in the interest of the profession and in the interest of the public.

## II - The Taskforce

### (i) Mission

The Taskforce was established by the OBA Board of Directors on January 27, 2011. The Mission of the Taskforce is to:

1. Develop a comprehensive understanding of the current JDR landscape by:
  - a. examining the role the judiciary now plays in mediative processes in Ontario and in other jurisdictions; and
  - b. consulting with other stakeholders;
2. Determine whether, and, if so, how, JDR could:
  - a. improve access to justice by:
    - i. making the litigation process more affordable; and
    - ii. improving the efficiency of, and reducing delays in, the court system; and
  - b. enhance the reputation of the administration of justice; and
3. Make appropriate recommendations to the relevant policy makers to further the goals of access to



justice and to enhance the reputation of the administration of justice.

## **(ii) Composition of the Taskforce**

The Taskforce represents critical cross-sections of the bar. It is comprised of lawyers from large and small centres, across four judicial regions. They practice in various environments, from one of the country's largest firms to sole practice and academia. The Taskforce members included both consumers and providers of mediation services. There was representation from a wide variety of substantive practice areas as well. There were representatives from the OBA's Civil Litigation, Insurance, Family, ADR, Trust & Estates and Criminal Law Sections, as well as the OBA's Sole and Small Firm Section and our Access to Justice Committee. The Taskforce brings perspectives from Queen's Counsel and department chairs, articling students and new associates, and every experience level in between. A list of Taskforce members can be found at **Appendix "A"**.

## **(iii) Motivation for Establishing the Taskforce**

The OBA's decision to establish the Taskforce was based on several factors, including:

### **(a) Alignment with Other Work Undertaken by the OBA**

It is the stated Mission of the OBA to:

Advance the interests of our members, the justice system and the rule of law in Ontario;

A closer look at JDR was necessary to determine whether, and, if so, how, it could advance the interest of the profession and the justice system, by, for example:

*Improving Access to Justice* - like any valuable form of mediation, JDR may have the potential to improve the affordability for individual clients and reduce over-all delay by moving resolvable cases out of the trial queue. We also sought to determine whether there is value in JDR being free to litigants (without additional cost, or even with savings, to the taxpayer where it can be done with existing resources). JDR may also provide an early opportunity for self-represented litigants to acquire some understanding of the system and the merits of their case from someone they associate with "their day in court";

*Improving the litigation experience for lawyers and their clients* – we sought to determine whether combining the value of a mediation process with the gravitas society instantly ascribes to judges could be an especially useful tool. Where an otherwise clearly resolvable case is eluding resolution because of a client's refusal to take a lawyer's good advice on settlement or a client's insistence on his "day in court", a judge may be able to facilitate a settlement where others have failed. JDR has at least some of the features of "a day in court." It has been said that JDR:

Draw[s] strength from [its] position in "the shadow of the law" and the adjudicative norm



still colours their disputes, gives urgency to their resolution, and provides at least an implicit threat to keep them on track.<sup>1</sup>

We sought to determine how “the shadow of the law” aspect of JDR may satisfy a client’s “day in court” instinct in a more productive and less costly way than a trial – increasing the client’s satisfaction and assisting the lawyer in advising and managing the client; and

*Protecting the reputation of the administration of justice* – our justice system and broader societal interests depend on ultimate recourse to public, unbiased and binding determination of disputes (through trials, motions, applications and similar processes). However, on one extreme there are unrepresented parties turning to the justice system to resolve disputes that are driven more by emotional differences than legal ones and on the other extreme there are sophisticated parties turning away from the courts to private forms of dispute determination such as private arbitration (albeit often in search of an arbitrator’s particular expertise as well as expediency). In order to promote the administration of justice, we asked ourselves whether the state-funded justice system and its leaders (including judges who are most closely identified with the system) need to offer more ways to resolve disputes.

#### **(b) Recognition of, and Comment on, Existing Practices**

Judge-led mediation already takes place in Ontario on an *ad hoc* basis. Efforts by the judiciary to facilitate settlement range from pre-arranged judge-led mediations to quasi-mediation conducted at pre-trials to impromptu suggestions by an assigned trial judges to discuss settlement rather than proceeding with the trial (such suggestions are made on the date of trial, as well as at various points during a trial). Counsel and clients have had both good and bad experiences with these forms of JDR. Some are productive while others simply increase the expense and frustration of litigation. The bar’s input is required, in the public interest, to assist in ensuring a more consistent, effective and satisfactory experience.

#### **(c) Providing the Bar’s input on a topical Justice-sector Issue**

JDR is topical. It is being discussed by justice-sector leaders, including the Chief Justice of Ontario who authored an article on the subject in *The Advocates Journal* in December 2010.<sup>2</sup> What is more, the multi-million dollar cuts in justice-sector spending, that were recommended in the Drummond Report<sup>3</sup> and projected in the 2012 Ontario Budget, will require all justice-sector participants to look at all processes and practices to assist in ensuring the optimal use of resources and to identify potential efficiencies. It is important that, as the voice of the legal profession in Ontario, the OBA provides input from the front lines on an issue that is, and will increasingly be, a topic of review by policy-makers.

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<sup>1</sup> L. Otis and E. H. Reiter, “Mediation by Judges: A New Phenomenon in the Transformation of Justice”: *Pepperdine Dispute Resolution Law Journal*, Vol. 6: 3, 2006, pp. 351-405, at p. 358.

<sup>2</sup> The Hon. W. K. Winkler, CJO, “Some reflections on judicial mediation: Reality or fantasy?” *The Advocates’ Journal*, December 2010.

<sup>3</sup> *Report of the Commission on the Reform of Ontario’s Public Services*, Queen’s Printer for Ontario, 2012.





## III - Research and Consultations conducted

### (a) Inter-provincial Comparisons

#### (i) Legislative and Regulatory Regimes

The Taskforce reviewed the legislation and regulations, primarily rules of court, in each of the provinces to determine what provisions governed judges' roles in dispute resolution. We compared the regimes in regards to a number of criteria, including: whether the JDR regimes were voluntary, mandatory or a combination thereof; whether the rules prescribing how the mediation/settlement process should be conducted; the role and function of the judicial mediator/facilitator; the timing of JDR; the training and accreditation requirements for judges doing JDR; the selection of judges by parties; and the process through which access to judge-assisted settlement is provided.

#### (ii) One-on-one interviews

We supplemented our review of the rules with one-on-one interviews and presentations from British Columbia, Alberta, Manitoba, Quebec and Nova Scotia. These jurisdictions use a range of approaches to JDR including:

- (a) From highly-prescriptive rules to entirely practice-based systems;
- (b) From well-established regimes (Quebec and Alberta) to newly-implemented rules (Nova Scotia); and
- (c) From a dedication to interest-based settlement facilitation (Quebec) to explicit recognition of the role of judge's evaluation of the case (Nova Scotia and Alberta).

Members of the Taskforce also conducted interviews with lawyers, judges, mediators and academics in a number of these jurisdictions to determine how judge-led mediation or other forms of non-adjudicative dispute resolution worked in practice.

### (b) JDR Policy Day

In December 2011, the OBA hosted a JDR Policy Day. In order to garner a wide range of views on the issue of JDR, we sought input from private mediators, academics, clients, tribunal chairs and the judiciary, from coast to coast.

A full description of the panels, panel topics and breakout discussions as well as a link to the archived video, are found in **Appendix "B"**.

### (c) Academic Articles

Members of the Taskforce read several academic articles on alternative dispute resolution in general and JDR in particular. An anthology of these articles is attached as **Appendix "C"**. However, it is not our intention to extensively review the literature or provide a theoretical perspective on JDR in this report. We have focused on the issues and concerns raised by those on the frontlines of the justice sector across the country.



## IV- Provincial Landscapes

### Rules and Regulations

Each of the ten provinces has at least some rules of court that address the role (or potential role) of the judiciary in dispute resolution. **Appendix “D”** is a chart that summarizes various aspects of these rules, followed by a reproduction of the text of each.

In the last two years, Nova Scotia, British Columbia, Alberta and Saskatchewan<sup>4</sup> have amended their rules of court to provide more formalized processes for judicial involvement in non-adjudicative dispute resolution. Manitoba’s judge-facilitated settlement procedures are more a matter of practice set by the chief justice and the associate chief justice rather than being formalized in rules. On the other end of the spectrum, Quebec’s Code of Civil Procedure provides a detailed procedure for JDR. In Alberta, the process for requesting and determining the particulars of the JDR are laid out in detail but the procedure followed in the mediation is determined by the judge and the parties. Similarly, in Nova Scotia, a procedure is set out in some detail but the parties have opportunities to choose a process different from the one set out in the rules.

### Comparison of Some Fundamental Elements

There are no fundamental aspects of JDR that are universal with the exception that where JDR is provided, it is judge-led and there is no fee. Different provinces deal with critical aspects differently, including:

**Voluntariness:** In Quebec and Nova Scotia, the JDR process is party- initiated and entirely voluntary. In Alberta, under s. 4.16 and 8.4(3) of their new rules of court, it is mandatory that parties mediate in some form prior to scheduling a trial date, but not mandatory that they do so using JDR. JDR in Alberta requires the consent of all necessary parties. On the other hand, parties can be ordered to participate in judge-led settlement conferences in British Columbia (Superior Court), Saskatchewan, New Brunswick and Newfoundland. In Manitoba, the rules provide for a mandatory case conference at which judges are to “explore with the parties the possibility of settlement.”

**Procedures for Accessing Judicial Settlement Facilitation:** In entirely voluntary systems, the “sign-up” process ranges from formalized to *ad hoc*. In Alberta, at specified times during the year, a schedule of available JDR sessions with specific judges is posted and counsel send their choice of judge and time slots to the trial coordinator. It works on a first-come-first-serve basis (with some priority given to cases booked for trial). In Manitoba, JDRs are arranged by sending correspondence at any time to the Chief Justice or Associate Chief Justice’s office. In Quebec, an established form is sent to the court requesting a settlement conference. In British Columbia, new Case-Planning Conference decisions on how the case will proceed will include what dispute resolution processes will be used. A judicial settlement conference is one process that may be specified.

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<sup>4</sup> Saskatchewan’s new Rules came into effect on July 1, 2013.



### *Styles of Judicial Dispute Resolution*

**Appendix “E”** describes some approaches used in JDR.

For this report, we have simply compared the provincial regimes on the basis of their approach to providing judicial opinions on the likely ultimate outcome of a trial during the settlement facilitation process. Nova Scotia’s Rules are the most explicit in this regard. They provide for two kinds of settlement conferences:

- (a) an ordinary settlement conference, at which the parties *may request a judge to express opinions* on the issues in dispute after reading excerpts from discoveries, other documentary evidence, and briefs and hearing submissions;
- (b) a trial-like settlement conference, at which the *parties request a judge to express opinions* after hearing some witnesses being questioned in addition to reading materials and hearing submissions.

The first form of settlement conference often involves interest-based mediation. Where evaluations are requested, they are timed so as not to diminish the possibility of an interest-based dialogue and resolution.

None of the other provinces contemplate evaluative involvement as explicitly as Nova Scotia and Alberta (which also offers mini-trials on an ad hoc basis). The Quebec rules tend away from legalistic approaches and towards an interest-based non-evaluative approach given that they explicitly state that the presence of counsel is welcome but not necessary and that the stated purpose of the settlement conference is to “facilitate dialogue between the parties and help them to identify their interests, assess their positions, negotiate and explore mutually satisfactory solutions.” Quebec judicial mediators are trained not to express an opinion but the Taskforce heard, from both a former judge and an academic (both pioneers of the Quebec system) that, in fact, evaluations are sometimes made, most of the time in caucus.

In Alberta, the judges tend to take an evaluative approach. Anecdotally, it was reported that of the 75 judges who do JDR, only one professes to follow an entirely interest-based process with no evaluation of the merits. Justice Rooke’s 2009 evaluative report on Alberta JDR<sup>5</sup> makes similar observations. Alberta also has a binding mediation/arbitration process and some judges use a mini-trial process when parties request it. They deliver a decision that is either binding or not binding depending on the parties’ desires.

***Caucusing:*** Nova Scotia’s rules explicitly provide that the judge may meet with the parties and counsel “together or in caucus.” The Quebec rules provide that the parties must consent to caucusing but it is normally done. The other provinces do not deal explicitly with the issue and the practice varies

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<sup>5</sup> Justice John D. Rooke, *Improving Excellence: Evaluation of The Judicial Dispute Resolution Program In The Court Of Queen’s Bench Of Alberta: Evaluation Report*, Court Of Queen’s Bench of Alberta, June 1, 2009.



significantly. In Manitoba, caucusing is the norm and, in fact, it was anecdotally reported that some judges feel very uncomfortable conducting mediation without the ability to caucus.<sup>6</sup> By contrast, there is a strong objection to caucusing on the part of British Columbia judges and Masters who do JDR.<sup>7</sup> As a middle ground, some Alberta judges choose to do it and others do not. In Alberta, information about which judges will and will not caucus is available to parties on the internet before they choose a judge to conduct their mediation.

**Timing:** The provinces that have separate JDR procedures (i.e. outside an otherwise mandatory case conference) are generally very flexible with respect to the stage in the proceedings at which counsel can request the assistance of a judge in facilitating settlement. In Nova Scotia, the conference will be offered at the mandatory date assignment court but can be requested at any stage in the proceedings, either before or after the trial date is set. Most JDR programs across Canada are focused either expressly, or in practice, on late stage JDR near the pretrial stage or later. In Alberta, for example, approximately 80-88% of JDR deals with cases that have been in litigation for more than 2 years. Justice Rooke's study of Alberta JDR recommended:

While the timing of providing a JDR service should be largely in the hands of the parties and their counsel, as proposed under the New Alberta Rules of Court, in consultation with the proposed JDR Justice, if parties are not essentially ready (or very close to being ready) for trial at the time proposed for a JDR, as required by paragraph 3 of the Guidelines, they be required to submit reasons in the JDR Confirmation form for a JDR at the time proposed for review and consideration by the JDR Justice on behalf of the Chief Justices of the Court.<sup>8</sup>

**Choice of Judge:** In Nova Scotia, parties can choose a judge on consent or name three judges and a coordinator marries it up with dates. In Alberta, parties can view judges' profiles, schedules and their stated approaches to JDR before selecting a judge. In Quebec, the Chief Justice or mediation division head chooses the judge, generally in accordance with expertise in subject matter. In Quebec, requests for a specific judge are not typical. They may be taken into consideration but are not necessarily followed.

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<sup>6</sup> Interview with Associate Chief Justice Bill Burnett (as he then was), June 27, 2011.

<sup>7</sup> Interview with Master William McCallum, October 13, 2011.

<sup>8</sup> Justice John D. Rooke, *Improving Excellence: Evaluation of The Judicial Dispute Resolution Program In The Court Of Queen's Bench Of Alberta: Evaluation Report*, Court Of Queen's Bench of Alberta, June 1, 2009, at p. 532.



## V - Report Cards from other Provinces

### Separation of Settlement Facilitation Function

In those provinces, such as Quebec, Nova Scotia and Alberta, where targeted, explicit procedures have recently separated the judicial settlement-facilitation function from the trial-management functions, the following advantages were reported:

- (a) A separate conference for the facilitation of settlement makes it more likely that the parties and the judge will thoroughly explore settlement options. In a pre-trial or other conference designed primarily for trial management settlement can otherwise become a perfunctory checklist item;
- (b) Where settlement was the only thing on the agenda, judges made themselves more familiar with the background necessary to assist in settling the case. At least one member of the judiciary felt that the reputation of the administration of justice was to some extent compromised when parties attended pre-trial conferences expecting assistance with settlement and the judge was not sufficiently familiar with the case to offer that assistance; and
- (c) Particularly in the cases where lawyers and judges tailored case-specific settlement conference procedures, lawyers were given a better sense about what material the judge expected in order to help facilitate discussions. The more general pre-trial procedures can yield material that is wanting in this regard.

### Demand and Delay

The procedures in British Columbia are too new to determine whether the JDR programs there yield significantly more settlements and, therefore, ultimately reduce case inventory and alleviate delay. That being said, based on anecdotal and survey evidence, settlement rates in JDR range from about 70% to as high as 95%.<sup>9</sup> However, in Alberta, there appears to be a shift in court delay from trial delay to settlement conference delay. Despite the fact that, in Edmonton, an equal number of judges are assigned to each of the trial list and the settlement conference list, judicial resources are not keeping pace with the demand for JDR. In Edmonton, a one-day trial is available within weeks of the set-date; a two-week trial is available within five months and a ten week trial in less than 10 months. In contrast, JDR appointments are generally completely filled on the first day they are posted and those who want to access the services after posting day must wait nine months for a new posting schedule. While there has yet to be a study on

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<sup>9</sup> Justice John D. Rooke, *Improving Excellence: Evaluation of The Judicial Dispute Resolution Program In The Court Of Queen's Bench Of Alberta: Evaluation Report*, Court Of Queen's Bench of Alberta, June 1, 2009, at p. xiv, footnote 184; Justice John A. Agrios and Janice A. Agrios, *A Handbook on Judicial Dispute Resolution for Canadian Lawyers*, at p. 6; and various interviews with providers.



the issue, it was anecdotally reported that parties were waiting for JDR dates rather than setting trials, even though the latter could be accessed more quickly. The problem of shifting court delay from one procedure to another is clear. However, this trend may also suggest that people are looking for a “new offer of justice” and do not consider adversarial trials to be the most attractive court process for every case. In order to ensure optimal use of judicial resources and avoid simply “shifting delay,” judicial dispute resolution should be accessible through a gatekeeper.

### **Judicial Inclination to Foretell Results of Trial**

As outlined above, provinces have different policy approaches to a judge providing his or her opinion or evaluation of the case as part of settlement facilitation. On one end of the spectrum, Nova Scotia has a mini-trial process that is designed for judicial evaluation of the case while judges in Quebec are trained not to take an evaluative approach. Alberta’s rules do not explicitly address the issue of evaluation, but in practice the majority (75% or more) provided an opinion either on their own initiative or after being requested to do so.<sup>10</sup> Regardless of where the provinces land on policy, in practice, judges tend to provide an evaluation of the case. Both former Justice Otis who helped design JDR in Quebec, and a Quebec academic who studies the province’s JDR system have indicated that, regardless of the policy and training to the contrary, some judges do provide “reality checks” during JDR that reflect their opinion or evaluation of the case, particularly when they are frustrated with a lack of movement toward settlement at the end of the session.

There is some concern about how and whether judges should evaluate cases due to the risk that parties may feel pressured or coerced to settle, even if the pressure is inadvertent. Justice Rooke states:

In an evaluative-mediation, while such a “formal opinion” is rare, except at the end of what might be an otherwise unsuccessful JDR, the JDR justice is more likely to be less formal and give softer, more informal, observations and comments, in joint or caucusing sessions as to the risks inherent in positions. However, a JDR justice taking on too aggressive a role in expressing an opinion at all, or, at a less than optimum time, will have a dampening effect on the negotiations. Thus a JDR justice should be careful only to give any assessment (formal or informal) if and when the parties want it so as to be most advantageous to settle the case. Indeed, I would go a step further to suggest that there should be consent on the “if and when” for any opinion delivered in a joint session, and perhaps, if there is a disagreement, only address such issues in individual caucuses.<sup>11</sup>

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<sup>10</sup> Justice John D. Rooke, *Improving Excellence: Evaluation of The Judicial Dispute Resolution Program In The Court Of Queen’s Bench Of Alberta: Evaluation Report*, Court Of Queen’s Bench of Alberta, June 1, 2009, at p. 806.

<sup>11</sup> *Ibid*, at p. 227.



## VI – Other Factors to Consider

If JDR is to be introduced more formally into Ontario, any such system changes must be aware not only of the advantages that JDR can bring, but also the challenges that must be managed. Potential benefits of JDR include:

- **Effectiveness** - a judge who is trained as a mediator can lend a sense of gravitas by virtue of his or her office to the mediation process. This can, in some cases, enhance the possibility of settlement.
- **More focus by counsel** - on proper preparation.
- **Cheaper to the parties**
- **Greater process powers**- a JDR judge may have powers to order appropriate disclosure, give settlements the force of a court order, or provide other procedural direction in an expedited form. This may streamline certain next steps for parties.
- **Enforceability of Settlement**- JDR may provide procedures that allow expedited enforcement mechanisms for settlement agreements reached at JDR processes (e.g., see the *Ontario Commercial Mediation Act, 2010* and Tomlin Orders in the U.K.).

On the challenges side, there are a number of significant issues that any JDR design must consider and address, including:

- **Risk of coercion** - a judicial evaluation during JDR will certainly have persuasive force for most parties and may take on a coercive force, whether intended or not, in certain cases. Any JDR system must be hyper-aware of this particular risk.
- **Justice Light** - there is a risk that some judges might, even inadvertently, use JDR to effectively adjudicate cases without a full evidentiary record and the procedural protections of the trial process. This is what one participant in Judicial Mediation Policy Day called “justice light.”
- **Confidentiality** - especially in smaller jurisdictions, there may be perceived concerns that a small pool of judges might discuss cases, behind closed doors, revealing confidential information from a mediation to a fellow judge who could end up trying the case.
- **Effectiveness** - not all judges make good facilitators, a fact illustrated by some the feedback on JDR outlined in Justice Rooke’s Evaluation Report (which reported some survey qualitative and quantitative results). Thought must be given to the style of mediation, the evaluative content and approach, development of mediation and negotiation skills etc.



- **Desire of the Judiciary to mediate** - not all judges want to be mediators, as borne out by anecdotal information received from several judicial sources. Judges who do not want the role should not be forced into providing JDR.
- **Compellability of judicial mediators** - a live question in the law is the extent to which mediators generally are compellable as witnesses. To what extent would and should JDR judges be compellable in such dispute?
- **Unrepresented Parties and the JDR Judicial Role** - Wearing the judicial cloak places a JDR judge in a challenging position with respect to ill-informed unrepresented parties. Private sector mediators generally have a clearly defined neutral role that does not include giving legal advice to any party. As an officer of the court, and a representative of the justice system, does a JDR judge have a duty to assist parties who are ill-informed about the law, and if so, how far does that duty go before they become advocates or advisers? Careful attention should be paid to a judge's role where legal information/advice is lacking.
- **Jurisdiction** - In any rules for JDR, the jurisdiction for JDR should be clearly established.

This report comments on a number of the above-noted issues below in more detail.

### **Judges as Facilitators – the Parties' Desire to “Tell it to a Judge”**

When one combines the literature, our interviews and the presentations on Policy Day, every jurisdiction mentions that JDR was developed, demanded and, to some extent, made effective because of what a judge brings to the table by virtue of his or her office. This was characterized in several different ways and by different characteristics of “judgeship”:

- (a) For those who are generally alienated from the system by virtue of socio-economic factors, it can be, in their minds, their “day in court”. This is often expressed colloquially as the parties' desire to “tell it to a judge”.
- (b) There was some, although not an overwhelming indication, that clients had implicit faith in the independence, neutrality and gravitas of judges by virtue of their position. Lawyers acting part-time as mediators in addition to their law practice may not inspire the same faith, though this is likely to be less of a factor in Ontario where many mediators devote themselves full-time to their mediation practice.
- (c) If parties are particularly concerned about their prospects, they may want to hear a direct assessment of the merits of their case, and they would likely want to hear it from a judge. Legal evaluations from judges have a credibility that it is difficult to match by a non-judicial mediator, except in the case of a mediator who is an ex-judge or an acknowledged expert in the particular area of law.





- (d) Judges are effective “agents of reality.” To help parties assess their BATNA (Best Alternative to a Negotiated Agreement) if the evaluation is delivered in the right way and at an appropriate time in the mediation. Our justice system depends on society having faith that judges are credible and capable analyzers of the strength of cases. They carry that faith into judge-led mediation. Justice Rooke points out in his study that not all sitting judges deliver evaluations effectively, and that this issue needs to be considered and addressed.
- (e) Where represented clients have already heard and rejected the advice of their lawyer on reasonable settlement, some lawyers reported that there was more utility in having that client hear the analysis or evaluation from a judge rather than another lawyer or lay mediator.

### **The Double-Edged Sword of Gravitas**

The judicial sash has its advantages for achieving settlement. A judge’s suggestions on settlement weigh heavily even if they are not couched in evaluative language. The presence of a judge is also a physical reminder of what lies ahead if settlement is not reached – he or she wears, however subtly, the implications of the adjudicative process.

This is also cause for caution. One person’s respect for gravitas is another’s feeling of intimidation. Without any intention, a judge’s suggestions for settlement can be perceived as coercive, not only to unsophisticated litigants but even to sophisticated ones. While less sophisticated clients are more likely to be easily intimidated, clients with deep pockets report that they too experience intense pressure to settle. This can have undesirable effects on the reputation of the administration of justice. Many of the advantages of the JDR are lost if a client leaves his or her “day in court” feeling *steamrolled*.

This problem is not unfixable. It requires recognition and an appropriate approach by the judicial facilitator. It speaks in favour of the need for training in facilitative techniques rather than against JDR, as echoed by Justice Rooke’s recommendations below<sup>12</sup>:

- (a) Except for any necessity, the Chief Justices not assign any justice to conduct a JDR who does not possess the requisite training or experience to competently conduct same, and make reasonable and continuing efforts to permit - indeed, encourage - justices to obtain such judicial and personal training and education (both entry level and advanced), either within the Court (including mentoring with experienced JDR justices), or externally.
- (b) The JDRC make appropriate recommendations to the Chief Justices and Council of the Court as to the standards of requisite training and experience, and, in conjunction with the Continuing Education Committee of the Court, provide, or prescribe, judicial education programs relevant to [(a)].

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<sup>12</sup> *Ibid*, at p. 536.



### **“Justice Light” – Blurring the Line between Evaluation and Adjudication**

This concern was expressed in several ways by people from various jurisdictions who spoke at the OBA Policy Day<sup>13</sup>. It is basically a concern that a judge-facilitated settlement regime will become a second layer of justice in which cases are being concluded behind closed doors, without the benefit of public scrutiny and the other procedural protections of a trial. The details of the settlement need never be filed in many cases and the only public document will be an order dismissing the action. In some jurisdictions there is no recording of the procedure.

All of this could be true of private alternative dispute resolution as well.

As discussed, ADR is here to stay in Ontario. JDR does not add significantly to the concerns about making the justice system a private rather than an open process. The fact is that claims filed in court are most often settled with private arrangements that are never made public. While this would be cause for alarm in criminal proceedings, it is not in most civil litigation cases. Civil cases are private disputes for which we provide a publicly-funded method of determination to avoid the parties resorting to less civilized methods of dispute determination. If the parties can settle the matter in another civilized way, the civil justice system is not undermined. There is some loss to the development of case law, in that good solutions to problems are not made public in the way that case law is, but this loss arises independent of JDR.

Where a judge rather than a private mediator is involved, the potential danger is that something more akin to adjudication and determination, rather than facilitation, is going on behind closed doors – that the mediation room is really a courtroom without the formalities. The irony is that evaluation, which is one of the greatest advantages of judge-led dispute resolution, is also the portal to potential danger. Concerns grow where evaluations are given too early or too aggressively or look too much like decisions. Judges must walk the fine line noted above between the advantages of gravitas and the effects of coercion. A party cannot be confused about, or deprived of, his or her ability to say no to what is suggested.

The power imbalance between the judge and the parties must be recognized and neutralized and attention must be paid to potential power imbalances between the parties, at least in terms of ensuring a fair process that is seen as fair. The ability of one party to provide a compelling and concise summary of a case, for example, should not deprive the other, less sophisticated party of the opportunity to be fully heard and should not lead the judge to provide an instant evaluation of the case. Parties may be looking for a judge’s opinion but not to be forced into a settlement.

A key to appropriate, effective evaluation is the same as the key to humour ... it’s all a question of timing.

People tend to be dissatisfied with JDR processes in two circumstances: (i) where a judge’s opinion on, or

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<sup>13</sup> The specific term “Justice Light” was used by L. Otis during the Inter-Provincial panel discussion at OBA Policy Day.



evaluation of, the case is given too early; and (ii) where it is not given at all.<sup>14</sup> As the Executive Chair of the Social Justice Tribunals (former Chair of the Human Rights Tribunal) advised - it is not a choice between evaluation and other facilitation techniques, it is a question of reading the situation and using each in appropriate measure at the appropriate time. With skill and appropriate training, judges can be effective in pointing out difficulties with a case or argument without heavy-handed pronouncements.

### **Problem-Solving Satisfaction**

Judges, former judges and other adjudicators reported the satisfaction that comes from being able to craft a creative solution to problems that takes into account emotional factors and other non-legal considerations. The constraint of trial and appeal procedures, evidentiary rules and precedent, while necessary for ultimate determinations of a matter, do not always yield results that are satisfying for the parties or the judges. There was a real sense among some of the judges that society was demanding a larger menu of options from courts beyond the adversarial trial. Involvement in settlement facilitation allows judges to use the broader problem-solving skills they honed in practice where creative problem solving is becoming more and more crucial as the costs of litigation rise and delays increase. Some judges and adjudicators reported that this improves job satisfaction. They feel they are able to preserve relationships and enlarge the pie rather than always dividing it along legal lines.

Some judges also reported that assisting in dispute resolution improves the approach judges bring to trial. Things like the use of less adversarial language are learned in a dispute facilitation room and brought back to the courtroom, making it a more comfortable place for the parties.

### **Self-Represented Parties and Parties of Limited Means**

In the panel presentations and break-out sessions at Policy Day, both a lawyer from Pro Bono Law Ontario who regularly deals with clients of limited means and a lawyer who works with clients in the arts, reported that access to non-fee-based dispute resolution was an access to justice advantage for their clients. Judges from other jurisdictions also referred to this advantage.

It is self evident that good dispute resolution can shorten the litigation process and, therefore, make it cheaper. The study of the Ontario Mandatory Mediation Program (“OMMP”) pilot project confirms this fact. If clients do not have to pay a fee for a valuable justice system service, access to justice will be improved.

What is perhaps more surprising is that having the judge facilitate a settlement process was also important for some clients of limited means. Those who are unfamiliar with the legal system and are not being advised by a lawyer are not likely to be familiar with the advantages of mediation. They want their treasured “day in court”. While we initially considered a judge’s evaluation to be something that sophisticated clients were more likely looking for, clients who have no experience with the justice system

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<sup>14</sup> see comments by Justice Rooke *Improving Excellence: Evaluation Of The Judicial Dispute Resolution Program In The Court Of Queen’s Bench Of Alberta*, *supra* (note 11), at pp. 197-202 and 227-228, as well as his detailed survey results.



are often very concerned about “likely outcomes” and inextricably wedded to “their own sense of justice.” As Matthew Cohen, counsel at Pro Bono Law Ontario pointed out, unrepresented parties are “most interested in what they are least equipped to handle,” i.e. legal analysis of the merits of their case. Initially, they are not necessarily interested in finding a solution in their best interest; rather, they believe they are right, and want what is right. They may need to be convinced that they may not be correct about their legal rights and need to be educated by someone with perceived authority on the realities of the litigation process. Mr. Cohen also indicated that any form of legal advice and aid they could get (including pro bono legal advice from lawyers) would be useful at dealing with this tendency. JDR is one tool to address this concern. Unrepresented parties want to be listened to but they also need education, and would likely value and trust an evaluation from a judge. The need for education, an evaluation and some of the trappings of the court process also speak to the advantages of access to JDR for under-represented, unsophisticated clients.

Clients who are unrepresented because they cannot afford a lawyer have the most potential to benefit from judge-led dispute resolution as it (a) is a free dispute facilitation process; (b) has the trappings of a day in court that a judge brings; and (c) provides an objective evaluation of their case that they may need and that they will likely recognize as authoritative. One of the many ironies in relation to this issue is that these parties are also most vulnerable to the potential dangers of having a judge-led settlement process, particularly the highly evaluative one they desire. Without any legal advice and experience in the justice system, unrepresented clients are most at risk to view a judge’s evaluation and settlement encouragement as a binding decision. Even if special care is taken to explain otherwise, this danger looms large. As noted above, there are also questions about the extent of the JDR judicial role in protecting the rights of ill-informed parties.

As discussed more fully below, this irony speaks to leveraging JDR not as a way of processing unrepresented parties but as a way of increasing representation.

## VII - Current JDR Landscape in Ontario

### The Rules of Civil Procedure

#### The “Civil Reform Project”

In his report on Ontario’s Civil Reform Project,<sup>15</sup> the Honourable Coulter Osborne Q.C. indicated that:

Pre-trials represent an important step in the litigation process. They encourage settlement and may assist in identifying or narrowing the actual issues for trial. Through the pre-trial process, trial management orders and directions may be obtained so that the trial will proceed more

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<sup>15</sup> Hon. Coulter A. Osborne, Q.C., *Civil Justice Reform Project: Summary of Findings and Recommendations*, 2007: [http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/CJRP-Report\\_EN.pdf](http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/CJRP-Report_EN.pdf).



efficiently. To achieve these objectives, all pre-trials must be meaningful events. Otherwise, they will be an unnecessary expense for litigants and a waste of limited judicial resources.

During consultations, many said that pre-trial conferences are often ineffective and in need of reform. The bar consistently reported that the effectiveness of pre-trials is dependent on the skills of the pre-trial judge. All concerned recognize that some judges are more skilled negotiators than others. Some, in making orders and directions for trial, are more activist than others. Some require parties to attend the pre-trial conference; others do not. Some will meet with parties who do attend; others will not speak to the parties under any circumstances. To my surprise, I learned that pre-trials are mandatory in some court locations, but available only upon request in others.

This led to, among other things, the following recommendations:

46. Amend rule 50 to prescribe the *dual purpose* of a pre-trial conference: to *discuss settlement* of some or all of the issues, and to obtain any necessary orders and directions to ensure that the action is ready for trial and that the trial proceeds in an orderly and efficient manner.
47. Judges skilled in negotiation and with expertise in the relevant subject matter should, where possible, preside over pre-trial conferences.<sup>16</sup>

(Emphasis added)

### Current Rules

As a consequence of the Civil Reform project recommendations, the judge's role in settlement facilitation is now explicitly recognized in rule 50.06; however, it remains one on a long list of pre-trial conference functions. Ontario's rules do not provide for a separate procedure aimed solely at judicial assistance with settlement discussions. Nor do they specify the judge's role in facilitating settlement. Rather, both inside and outside the case-management context, the rules provide for settlement to be addressed along with many other pre-trial issues.

Rule 50 provides that pre-trial conferences are:

... an opportunity for any or all of the issues in a proceeding to be settled without a hearing and, with respect to any issues that are not settled, to obtain from the court orders or directions to assist in the just, most expeditious and least expensive disposition of the proceeding, including orders or directions to ensure that any hearing proceeds in an orderly and efficient manner (emphasis added).

The settlement function of the pretrial conference is highlighted by the requirement in rule 50.05 that there be ready telephone access to persons with the authority to settle a matter. On the other hand, the

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<sup>16</sup> Ibid. at p. xvi.



settlement function is muted by the many other matters listed in Rule 50.06 that must be considered at the conference, namely:

1. Simplification of the issues.
2. The possibility of obtaining admissions that may facilitate the hearing.
3. The question of liability.
4. The amount of damages, if damages are claimed.
5. The estimated duration of the trial or hearing.
6. The advisability of having the court appoint an expert.
7. In the case of an action, the number of expert witnesses and other witnesses that may be called by each party, and dates for the service of any outstanding or supplementary experts' reports.
8. The advisability of fixing a date for the trial or hearing.
9. The advisability of directing a reference.
10. Any other matter that may assist in the just, most expeditious and least expensive disposition of the proceeding. O. Reg. 438/08, s. 47.

The potential for an over-all settlement is one of eleven items on a pre-trial conference checklist.

In “Case Conferences” held pursuant to the case-management rules under Rule 77.08(3), a judge “*may*” explore “methods to resolve the contested issues.” The rule is unclear about the judge’s role (is he or she to facilitate settlement discussions or talk about other opportunities for such discussions?). In addition, “methods” of resolution is just one of five topics that may be dealt with at such a conference.

## **Experiences with Judge-led Dispute Resolution**

### **Pre-trials**

In discussions the OBA Taskforce has had with the bar and at the Policy day, the bar has reported that including settlement on the list of pre-trial conference functions presents problems at both ends of the spectrum:

- (a) **Where the parties do not want or need the judicial settlement facilitation function** - Where experienced, sophisticated lawyers and clients feel they have exhausted settlement discussions and wish to focus on the trial-management functions, they are being forced to revisit the settlement issue in some cases. This can be unproductive. What is of greater concern to some of these counsel and more harmful to the reputation of the administration of justice, however, is that some feel pressured to enter into unsatisfactory arrangements. They find it difficult to resist a judge when he or she strongly encourages settlement generally or a particular settlement arrangement. Where intensive settlement discussions are forced on parties as a necessary part of the pre-trial, there is even some feeling that settlements are reached to accommodate overall



justice system efficiency concerns rather than the interests of the individual parties; and

- (b) **Where judicial settlement facilitation is needed** – Short shrift is often given to the settlement discussion aspect of a pre-trial conference because of time constraints, the many other functions to be accomplished at a pre-trial, and the different skills and inclinations of judges.

In addition, the current pre-trial conference mix of settlement facilitation and trial management was reported to be an awkward combination for the judiciary in some cases. The more authoritative approach that may be appropriate for a judge who is constructing a trial process that ensures court time is used most effectively is not consistent with the atmosphere and approach that is optimal for settlement discussions and facilitation.

### *Ad Hoc Judicial Facilitation Arrangements*

Counsel reported making voluntary arrangements for judges to assist in facilitating settlements. They have been very happy to have this assistance and generally considered the process to be a very productive one. The difficulty is that access to such arrangements depends on counsel having a personal familiarity and comfort with the bench that would allow them to contact a judge's office directly to make such arrangements or waiting until such a request can be made at a pre-trial for further assistance. There is no established process in Ontario for accessing JDR. As a result of this, many counsel, particularly younger counsel, are unlikely to be aware of the availability of JDR early in the litigation process (prior to the pretrial stage). They may experience their first introduction to JDR on the eve of trial, with little or no advance notice and little or no guidance on how to conduct themselves in such a process. There is also little clarity in the rules on when and how judges should initiate JDR, if at all. The lack of an established process for accessing JDR also makes judicial settlement facilitation virtually inaccessible to self-represented litigants.

## **VIII –Translating Policy and Lessons to Ontario**

### **Well-Established and Sophisticated Private-Mediation Offering in Ontario**

While some provinces had private mediation services before their JDR procedures were introduced, there are no rivals for Ontario's well-established and respected private mediation bar. When Ontario made mediation an intrinsic part of its justice system in the late 1990's, through the OMMP, it made a policy choice to do so with private mediators rather than the judiciary. To take a contrasting example, in Quebec, JDR was the policy choice that made mediation part and parcel of the justice system there. Both systems are relatively well established; one was built with private mediators, the other with JDR. A description of the unique features and benefits of the OMMP is found in **Appendix "F"**.

In light of the well-established and respected private mediation bar in Ontario the question to be asked in Ontario is not: "Why ADR?" The question is: "What can JDR add to the current ADR landscape in



Ontario?" In other words, are there characteristics unique to the judiciary that can yield advantages over private mediation in some cases?

### **Judicial Resources**

The other relevant characteristic that is, if not unique to Ontario, certainly magnified here, is the strain on judicial resources. The Alberta model that allows for a 50/50 split in judges' hours between dispute resolution and trial, while realistic in a jurisdiction where a 10 week trial is offered in under a year, is not realistic in a jurisdiction like Ontario where parties can wait three years for a four-week trial. Even accepting that effective JDR could take some of the cases off of court's docket, it is not expected that this could yield such a fundamental shift that that much judicial time could be re-assigned, especially in the short term.

In this regard, it should be noted that the ability to provide a timely trial has been raised as an issue that affects the credibility and integrity of settlement procedures generally and JDR procedures in particular. If there is no prospect of a timely trial, both participation in, and settlements from, JDR could be seen as less "voluntary." Settlements are reached in cases where the parties may, in fact, want a full, adjudicated vindication of their legal rights but do not believe that the system can provide a practical way to have their disputes determined on the merits within a reasonable amount of time. There is an added problem where JDR is concerned. Wide-spread delay may create the apprehension, whether accurate or not, that judges are encouraging settlement in the interests of the system rather than in the interests of the parties.

The assignment of judicial resources to resolving versus adjudicating cases is a complicated balance but it is currently inconceivable that the Alberta balance is possible for Ontario.

## **IX – Conclusion: Appropriate Role and Features of JDR in Ontario**

### **Formal Recognition**

JDR is already a part of the litigation landscape in Ontario and has been for many years. However, it currently exists in the periphery of the system as it is not formally recognized in legislation or the *Rules of Civil Procedure*. This has the following disadvantages:

**Availability:** Because there is no formal process for requesting JDR, parties and their counsel (particularly less experienced counsel) do not know how to request it in cases where it could be very useful. The other aspect of this is that making JDR available in some cases but not others runs against the hallmark principle of equal access to justice. If public resources are to be devoted to JDR, the benefits should be available to all participants in the legal system according to clear guidelines.

**Timing:** The current practice in Ontario places too much emphasis on intense, impromptu and often unsolicited JDR immediately before trial. This practice can give the appearance of judicial "list purging" rather than a process designed mainly for the well-being of the parties.





Overemphasis on trial door JDR also ignores the legitimate need for JDR at earlier stages of a lawsuit, before the parties have spent the resources necessary for trial preparation.

**Uncertainty as to process:** The lack of transparency and official status of JDR in Ontario means that both counsel and the judiciary lack an understanding of their professional and ethical duties in a JDR context. Formally recognizing JDR will allow both counsel and the judiciary to learn and disseminate best practices through Continuing Legal and Judicial Education.

It is our view that JDR should be formally recognized as part of the alternative dispute resolution options available in Ontario. Although JDR should not supplant private mediation, it should be formally recognized and made available to participants in the legal system in a consistent, appropriate, and transparent manner. If the process of requesting JDR were more transparent, resources that are currently being devoted to costly adjudication could be deployed to prevention and resolution, resulting in more savings to parties and to the court system. Allowing parties to avail themselves of JDR will, in the long run, decrease the burden on the court system and satisfy many of the goals of litigants to achieve their day in court without the necessity of a trial.

### **The General Role**

It is neither necessary, nor realistic to design a program of judicial settlement facilitation that would replace or supplant the current private mediation system, including the OMMP. Limited judicial resources require JDR to be used only where a judge's involvement can yield particular advantages. These include cases in which:

- (a) the lack of a fee is particularly advantageous;
- (b) a judge's evaluation of the case or the trappings of the court are what is necessary as:
  - i. a case is ripe for settlement but a party needs something approaching a "day in court" to feel vindicated; or
  - ii. the characteristics of one or both parties make "hearing it from a judge" important;
- (c) lawyers have determined that parties would benefit from a "reality check" provided by a judge in order to get clients to a reasonable position that lawyers have been unable to achieve;
- (d) settlement is desirable for various reason, including economic or timing factors but the case is sufficiently close that a judge's opinion would significantly enhance the chances of a settlement;  
or
- (e) a judge has subject-matter expertise that is not available with private dispute resolution services.

Of course, there will always be other cases in which a particular judge is the right person to facilitate settlement. The justice system would be best served if the bar and the judiciary focus judicial facilitation resources where the characteristics unique to the judiciary or to a particular judge make that the superior



choice. While we do not propose explicit rules for the design of a JDR system, we believe that the general recommendations in the following sections would, if implemented by legislation, rule changes or practice direction, create a JDR system well suited to the practical realities of the Ontario litigation landscape.

## Features

### Voluntary

The use of judicial settlement facilitation should be voluntary. Where it is mandatory:

- (a) resources will be wasted on those parties who do not want or need the service as they are able to access high-quality private services and are satisfied that settlement has been thoroughly attempted;
- (b) where parties do not wish to have a judge involved in settlement, they will feel coerced into the process. The settlement itself may be tainted by this feeling of coercion and this is not positive for the administration of justice; and
- (c) some clients indicated that the fact that judicial services were “free” meant parties did not have any “skin in the game” and did not put the necessary effort into preparation or negotiation. The suggested antidote to this potential was voluntariness. This is an indicator that the parties are committed to the process.

### A Separate, Dedicated Process

The Rules of Civil Procedure should separate the judicial settlement facilitation process from the pre-trial process. This separation has the following advantages:

- (a) It will take the settlement facilitation function out of the mandatory pre-trial process, which is necessary to achieve voluntariness and its attendant advantages outlined above. Precious resources will not be wasted on those who do not want them and will not therefore make the most of them.
- (b) If parties have access to a dedicated settlement facilitation process, those parties and the judiciary will better understand what is expected, rather than attending a pre-trial not knowing how significant the attempt at settlement will be. This will lead to more optimal preparation by both.
- (c) The pressure on judicial resources makes the trial management function of a pre-trial crucial. Particularly in large jurisdictions where matters are complex and there are many competitors for trial time, it is a significant job to build the most effective determination process. This is no longer a world where the options can be as simple as settlement versus full, traditional trial or even full trial versus summary proceedings. The parties and the trial judge have to have the time, energy and focus to look at the issues to be determined and the combination of procedures that will most efficiently and effectively allow for fair adjudication. Combining settlement facilitation



with trial management undercuts both important functions.

- (d) The timing of JDR needs to be more flexible than the pre-trial process allows. Where “education” by a judge is necessary because a party is dug into a very weak case, early settlement facilitation may be optimal. Counsel has indicated that where parties do not have any previous dealings or familiarity with one another, document production is critical to a useful settlement process. The threat of imminent trial may be critical in other cases (and if that trial has been well constructed by a focused trial management process, the settlement discussions will be free of the inappropriate coercive fear of an overly cumbersome trial).
- (e) The duration of JDR needs to be greater than the pre-trial process alone allows. Time must be allowed for parties to present perspectives, share and discuss information, formulate options and crystallize offers, change perspectives, consider their choices realistically, and become comfortable and clear on any resolution. A typical private sector mediation requires from 4-8 hours for a settlement to be achieved, and sometimes more for very complex cases. The current pre-trial format does not allow time for these processes to unfold effectively, even if all other pre-trial functions were ignored. For JDR to work, the JDR process will need sufficient time to be allotted.

#### **A Clear Access Procedure that Includes a Gatekeeper**

Either by rule or practice direction (which would allow for flexibility among judicial districts), the procedure for accessing JDR needs to be transparent and available to all counsel.

The transparent process should include “gatekeeping” functions to ensure limited JDR resources are used for only the most appropriate cases. Some gate-keeping protocols could include:

- (a) If the parties have already had a private mediation (either under the OMMP or a voluntary mediation), they should have a prima facie right to have a JDR if all parties request it. The cases that fail to settle at mediation are often the toughest ones to settle. These are the cases in which JDR is likely to be the most effective.
- (b) If the parties would normally be subject to mandatory mediation but feel that direct access to judicial dispute resolution process would be more appropriate, they could simply bring a motion before a judge or a Master. This would allow a party, in an appropriate case, to skip private mandatory mediation and go directly to JDR.
- (c) A *pro bono* or modest means program (described on page 27 below) in which otherwise unrepresented litigants can get counsel for the limited purpose of judicial settlement facilitation would also constitute an appropriate access point.

#### **Training**

All jurisdictions that have embraced JDR require some form of judicial training in ADR techniques. While many judges have experience in ADR from their days in practice, it is important for judges who



engage in mediation to undergo formal ADR training with particular sensitivity to the unique elements involved in JDR.

### Choice of Judge

Parties should be allowed to indicate the choice of judge to provide settlement facilitation and that choice should be accommodated to the extent possible. In some cases subject matter expertise is crucial - the likelihood of necessary buy-in by a sophisticated client often depends on it. Parties should be able to choose judges that are comfortable with the appropriate type of dispute resolution features for the given case. For example, where JDR is being accessed for a party that might need a reality check, caucusing may be crucial and a judge who is not comfortable with caucusing will not be the most effective choice. The right of party selection increases the chance of JDR success by ensuring that parties are likely getting the judge with the right background, style, and credentials to assist their particular dispute (e.g., someone with labour experience in a labour case).

The corollary of this feature is that judges should not be required to participate in JDR if they do not wish to do so or are not comfortable with the process. At its heart, JDR requires buy-in from all parties. We do not recommend a system such as in Alberta where all judges are expected to be available for JDR. A roster of judges in each region who are willing to engage in JDR and who have undergone JDR training should be made available.

### Unrepresented Parties

JDR can provide an evaluation from a judge and the “day in court” feeling vital to many unrepresented parties. Unnecessary, inefficient trials could be avoided. This will yield important justice system savings, savings for the parties and a more satisfactory experience for all. However, mediation with unrepresented parties puts the judge in a difficult position and raises dangers for the parties, including being pressured into settlements, however unintentionally. The process is both advantageous and dangerous.

Fortunately, a JDR option that can be easily accessed creates opportunities for representation. It is a discrete procedure that would lend itself well to the increasingly common limited-scope retainers. It is better suited to such a retainer than is a trial. A *pro bono* or modest-means program dedicated to judicial settlement facilitation conferences would give unrepresented parties access to JDR, which they would be unable to access on their own, while avoiding the dangers for the court and parties of having an unrepresented party appear before a judge in a closed-door process. In Nova Scotia, there is a *pro bono* program that provides lawyers for JDR at the Court of Appeal. The feasibility of this model for the Ontario Superior Court of Justice should be examined.

### Further Consultation with Stakeholders

The intent of this report was to provide general considerations and recommendations for Judicial Dispute Resolution in Ontario. Further consultations with stakeholders will be necessary prior to drafting specific rules, procedures, policies and other design features.



## Appendix “A” - Taskforce Members

Co-Chairs : Bryan Finlay, Q.C., WeirFoulds LLP - Toronto  
David Sterns, Sotos LLP - Toronto

Hilary Clarke – McMillan LLP - Toronto

Tom Dart – Burgar Rowe PC - Barrie

Prof. Trevor C.W. Farrow – Osgoode Hall Law School

Mark Geiger – Blaney McMurtry LLP

Paul Godin – ADR Chambers – Interprovincial and International Practice

Elizabeth Hall – OBA

Sean Lawler – Shibley Righton LLP – Toronto

Jason Lewis – Davies Howe LLP – Toronto

Sandra MacKenzie – Moodie Mair Walker LLP – Toronto

Kenning Marchant – The Marchant Practice - Mississauga

Peter Mrowiec – Thunder Bay

Joyce Thomas-Polishuk, Camman & Steele – London

Aleksandra Zivanovic – Hughes Ames LLP – Toronto



## Appendix “B” - OBA JDR Policy Day

The OBA hosted a JDR Policy Day in December 2011 in order to garner a wide range of views on the issue of JDR.

### The Panels

We heard from four panels:

#### Panel 1- Interprovincial Landscape and Experience

The Honourable Duncan Beveridge (Nova Scotia Court of Appeal)  
The Honourable Justice Rob Graesser (Alberta Queen’s Bench)  
The Honourable Louise Otis (mediator, retired Justice Quebec Court of Appeal)  
Prof. Andrew Pirie (University of Victoria)

#### Panel 2 - Judicial and Administrative Tribunal Mediation Experience in Ontario

Shirish Chotalia (Chair Canadian Human Rights Tribunal)  
Michael Gottheil (Executive Chair, Social Justice Tribunals of Ontario)  
The Honourable Justice J. Maresca (Ontario Court of Justice), Co-founder of Centre for Child and Family mediation  
The Honourable Kevin Whittaker (SCJ, former Chair Ontario Labour Relations Board)

#### Panel 3- Private Mediation Landscape and Perspectives

Kari Boyle (Executive Director, Mediation BC Society)  
Allan Stitt (President, ADR Chambers)  
Joyce Young (Chair, ADR Institute Ontario)

#### Panel 4- The Clients’ Perspective

Matthew Cohen (Director of Litigation Projects, Pro Bono Law Ontario),  
Caroline Jimdar (Head Canadian Banking Litigation Royal Bank of Canada)  
Karen E. McGuire (Associate General Counsel, Toronto Transit Commission)

The panels spoke on wide variety of issues, as follows:

### *The Interprovincial and Non-Civil Ontario Context*

The two comparative panels, which focused on regimes in other provinces or in the Ontario administrative and non-civil judicial context, were asked to discuss:

1. the JDR landscapes in their province or at their tribunals (what rules govern it, how do people access the mediation services, is the culture evaluative or interest-based or both) (5 minutes for each panelist)
2. The pros and cons of JDR;
3. The ethical considerations for the judicial or quasi-judicial mediators and for counsel in a JDR context, for



example,

- a. Does JDR change the lawyers' role/obligations in managing client expectations;
- b. In terms of treating the court with courtesy and respect, are there particular considerations to take into account when characterizing an evaluative opinion from a judge that differs from the lawyer's own view of likely outcomes;
- c. What are the ethical considerations for decision-makers who act as mediators ;
- d. Are there considerations to take into account when addressing the Court in a less formal setting?
- e. What are the views on caucusing?

### *The Clients Panel*

Those who brought a client's perspective on the use of JDR were asked to discuss:

1. The context in which they need/use mediation services
2. The most notable things that divide a useful mediation from a less useful one;
3. Goals of Mediation - trying to reach a settlement based on the likely result in court (or at least with that as the reference point) or attempting to best accommodate the interests of both parties without regard to likely legal outcomes? Does it vary from situation to situation? What are the factors that cause the variance?
4. The key advantages and disadvantages to judge or master-led mediation?

### *The Private Mediation Panel*

Those who both provide and supervise non-JDR services were asked to discuss:

1. The pros and cons of JDR
2. Factors to consider in order to allow JDR to dovetail most effectively with the vibrant private-mediation sector that exists in Ontario?
3. Any special ethical considerations that apply to counsel in a mediation context generally and in a judge-led mediation context in particular
4. The skills and attitudes of a good mediator. Does that change depending on the client or area of law?

### **Breakout Sessions**

In addition to the panels, there were two break-out sessions in which more than 80 participants, including lawyers, judges, mediators (lawyer and non-lawyer) and clients were given an opportunity to provide input on two subjects:

Morning Break-out Session – **The Pros and Cons of JDR**

Afternoon Break-out Session – **What are the elements of a good JDR and what should be avoided?**

These sessions were moderated and observed by Taskforce members who provided feedback to the Taskforce.

### **Watch JDR Policy Day**

The panels and a sample of each of the two breakout sessions can be viewed at:

[http://www.oba.org/En/sec\\_videos/complimentaryArchiveVideos/11AGR1209V.aspx](http://www.oba.org/En/sec_videos/complimentaryArchiveVideos/11AGR1209V.aspx)



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## **Appendix “D” - Inter-Jurisdictional Comparison**

Province	Legislative Provisions	Features of Rules outlining Judges' Role in Settlement Processes	Rule Excerpt at page:
British Columbia	<p><i>Court Rules Act</i>  <b>SUPREME COURT CIVIL RULES</b></p> <p><b>Rule 9-2 (settlement conferences)</b></p>	<p>-Settlement Conferences can be requested or ordered by a judge (specifically contemplated that a “Case Planning Conference” Judge can order the parties to attend a Settlement Conference, mediation or “other dispute resolution process”</p> <p>-Is considered a dispute resolution process (see Rule 5)</p> <p>-Can be presided over by judge or master  Legislation not prescriptive as in Quebec. Just mandates that the judge or master “explore all possibilities of settlement of the issues that are outstanding”.</p> <p>-Is recorded but record not available to, or able to be used by, anyone without a court order.</p> <p>-No indication in the rule as to whether it is designed to be rights based/evaluative or interest based</p>	42-45
Alberta	<p><i>Alberta Rules of Court</i>  (Alberta Regulation 124/2010)</p> <p><b>4.16 (dispute resolution generally)</b></p> <p><b>4.17-4.21 (JDR)</b></p>	<p>-the rules explicitly outline a procedure for “Judicial Dispute Resolution”</p> <p>-is party-initiated and only offered where all necessary parties consent or there is a good reason for proceeding without “complete agreement”</p> <p>-parties must, to the extent possible consent to the manner in which it will be conducted including the role the judge will play but this is subject to the direction of the judge</p> <p>- it is not explicit that mediation is to be technique used by the judge. The judge is to “actively facilitate a process in which the parties resolve all or part of a claim by agreement”</p>	46-48

		- judge not able to make any orders except consent order or judgment explicit provisions for confidentiality and without prejudice privilege -rules are more prescriptive than B.C., less than Quebec.	
Sask.	Queens Bench Rules, rule 191  new Rules took effect July 1, 2013, see <i>Queen's Bench Rules</i> , Division 4.	-pre-trial or post-pleadings conferences are presided over by judge and are explicitly “for the purpose of attempting to settle the Proceeding.” -the rule specifically contemplates filing a settlement proposal with a pre-trial brief  -no indication whether judge is to use mediation techniques or whether process is interest-based or evaluative (note: Rules in effect in 2013 provide that one purpose of the Pre-Trial is (b) to allow the parties to receive the view of a trial judge as to the issues, both facts and law, in dispute, as far as the material before the pre-trial judge allows;  -only if attempts to settle all or part of the claim fail does the judge exercise other case-management- type functions  -there are explicit protections for the confidentiality of matters revealed at the case conferences (eg. discovery transcripts are “resealed”, settlement proposals returned, explicit provision for without prejudice privilege and explicit prohibition on discussion with the trial judge of anything that happened at pre-trial)  -at least one pre-trial conference is mandatory. (Note: The new Rules provide “The Court may, at any time, direct the parties and any other person to attend a conference with the Court.” The purposes of this conference include:	49-52 (old)  53-59 (new rules July 2013)

		(a) dispute resolution possibilities, the process for them and how they can be facilitated;... (e) practice, procedural or other issues or questions and how to resolve them... (f) any other matter that may aid in the resolution or facilitate the resolution of a claim, application or proceeding....	
Manitoba	<p><i>Court of Queen's Bench Rules</i> Manitoba Regulation 553/88</p> <p>Case Conference sub-rules 20A(6)-(23) see especially 20A(15)</p>	<p>- In terms of legislative provisions, a case conference judge (similar to a case management judge or master in Ontario) is directed to “explore with the parties the possibility of settlement. The judge “shall” do this at every case conference -settlement ‘exploration does not appear to be primary function, it is mostly managing the case and hearing motions.</p> <p>Primarily though, Manitoba uses judicially assisted Dispute Resolution fairly widely now at least in the General Division (based primarily in the Winnipeg court). It is not a system based on rules, rather it is an <i>ad hoc</i> procedure that the court has developed as a practice.</p>	60-64
Quebec	<p><i>Quebec Code of Civil Procedure</i>, R.S.Q. c. C-25</p> <p>Settlement Conference - Part –IV</p>	<p>-rule explicitly provides for both assessment of interest and “positions” but rule has been generally interpreted to provide for interest-based arbitration (as evidenced by rule that lawyers not required to attend)</p> <p>Explicit purpose is to: “facilitate dialogue between the parties and help them to identify their interests, assess their positions, negotiate and explore mutually satisfactory solutions.”</p> <p>-the use of mediation techniques is not explicitly required but this is generally considered to be “judicial mediation”</p>	65-67

		<p>-parties must consent to the process even where “suggested” by a judge</p> <p>-parties are required to be present (in person or by electronic means), lawyers can come at the invitation of their clients but are explicitly not required to be there.</p> <p>-rules are explicit that it is confidential, free to the parties and “without formality” and there are no written materials used (another indication meant to be an interest-based, non-legal process)</p> <p>-if settlement reached, judge arranges for any necessary orders effecting the settlement (“homologation”)</p>	
New Brunswick	<p><i>Rules of Court,</i> (rule 50.07-50.15 - Settlement Conference)</p>	<p>-a settlement conference can be at the request of either party or ordered by a judge</p> <p>-it is distinct from a pre-trial conference</p> <p>-on its face, it looks less like mediation than some provinces’ rules (like Quebec’s and Alberta’s)</p> <p>-the explicit purpose is “to allow the parties under the direction of a judge to discuss the possibilities of settlement.”-judge is not required to use meditative techniques and in fact can conduct the settlement conference in any way “he deems fair”</p> <p>-more explicit protections for confidentiality including not only explicit provisions for without-prejudice privilege but also prohibitions directed at the judiciary themselves, including prohibitions against the settlement conference judge discussing the matter with another judge and prohibition against any judge adjudicating the matter if she has become aware of the positions of the parties and other information from the pre-</p>	68-71



		trial conference (recall a criticism of judicial mediation is that people do not feel confident that that they tell the judge on a without prejudice basis will not be shared with the judiciary generally. New Brunswick is the most explicit in addressing this of the rules reviewed)	
Nova Scotia	<i>Nova Scotia Rules of Civil Procedure, Part 4</i>  rules 10.01 and 10.11-10.16	<ul style="list-style-type: none"> <li>-rules outline judge’s involvement in a unique, two-option settlement conference structure</li> <li>-neither appears to be mediative. It is completely evaluative in design at least: the explicit, ultimate purpose of both kinds of settlement conference is to allow the parties to “request a judge to express opinions on the issues in dispute”</li> <li>-participation in the settlement conferences is voluntary. Both parties must agree to participate.</li> <li>-the rule specifically indicates that the conferences are to be “flexible” <ul style="list-style-type: none"> <li>– the parties choose between a traditional (“ordinary”) settlement conference involving paper briefs and submissions versus a trial-like settlement conference where witnesses are called.</li> </ul> </li> <li>-there is explicit protection for judge immunity and confidentiality although not aimed at the judiciary in the same way as the New Brunswick rules</li>   <li>-there can be a recording of the settlement conference and there are rules to protect the confidentiality of the recording</li>   <li>-the rule explicitly allows for judges to “caucus” with each party during the settlement conference</li> </ul>	72-75
PEI		PEI has adopted Ontario’s Rules of Civil Procedure	

		<p>-like Ontario they have the pre-trial conference that allows the judge to <i>inter alia</i> explore the possibility of settlement</p> <p>-like Ontario there is explicit recognition of the “hailed into chambers during trial approach” that allows a trial judge to hold a conference during a hearing to look at a matter that will assist with the “just, least expensive and most expeditious” resolution</p>	
Newfound land	<b><i>Rules of the Supreme Court, 1986, SNL 1986, c 42, Sch D, rule, 39B</i></b>	<p>-the purpose of settlement conference is “to allow the parties to attend before a judge who shall, in private and without hearing witnesses, explore all possibilities of settlement of the issues that are outstanding.”</p> <p>-participation can be requested by the parties (together) or ordered by the court</p> <p>-explicit that no witnesses are heard</p> <p>-representative of a party can attend but must have authority to settle</p> <p>- confidentiality rules are very specific as to what is included in the settlement conference’s without-prejudice privilege</p>	76-77

**British Columbia**

*Court Rules Act*

**SUPREME COURT CIVIL RULES**

[includes amendments up to B.C. Reg. 95/2011, July 1, 2011]

**Rule 9-2 — Settlement Conferences**

**Settlement conference**

- (1) If, at any stage of an action, the parties of record jointly request a settlement conference by filing a requisition in Form 17 or a judge or master directs that the parties attend a settlement conference, the parties must attend before a judge or master who must, in private and without hearing witnesses, explore all possibilities of settlement of the issues that are outstanding.

[am. B.C. Reg. 95/2011, Sch. A, s. 3.]

**Proceedings must be recorded**

- (2) Proceedings at a settlement conference must be recorded, but no part of that recording may be made available to or used by any person without court order.

**When judge must not preside**

- (3) A judge who has presided at a settlement conference must not preside at the trial, unless all parties consent.

**Rule 5-3 — Case Planning Conference Orders**

*Orders*

- (1) At a case planning conference, the case planning conference judge or master may make one or more of the following orders in respect of the action, whether or not on the

application of a party:

- (a) setting a timetable for the steps to be taken;
- (b) amending a previous case plan order;
- (c) any order referred to in Rule 22-4 (2);
- (d) requiring amendment of a pleading to provide details of
  - (i) the facts,
  - (ii) the relief sought, or
  - (iii) the legal basis on which relief is sought or opposedset out in that pleading;
- (e) respecting the length and content of pleadings;
- (f) respecting discovery, listing, production, preservation, exchange or examination of documents or exhibits, including, without limitation, orders
  - (i) respecting electronically stored information, and
  - (ii) that discovery, listing, production, exchange or examination be limited or otherwise conducted as ordered;
- (g) respecting discovery of parties or the examination or inspection of persons or property, including, without limitation, that discovery, examination or inspection be limited, expanded or otherwise conducted in the manner ordered;
- (h) respecting interrogatories;
- (i) respecting third party claims, including imposing terms on any third party procedure to limit or avoid any prejudice or unnecessary delay that might otherwise be suffered by the plaintiff as a result of that third party procedure;
- (j) respecting witness lists;
- (k) respecting experts, including, without limitation, orders

- (i) that the expert evidence on any one or more issues be given by one jointly-instructed expert,
  - (ii) respecting the number of experts a party may call,
  - (iii) that the parties' experts must confer before the service of their respective reports,
  - (iv) setting a date by which an expert's report must be served on the other parties of record, and
  - (v) respecting the issues on which an expert may be called;
- (l) respecting admissions;
  - (m) respecting offers to settle;
  - (n) respecting the conduct of any application, including, without limitation, that an application may be made by written submissions under Rule 8-6;
  - (o) requiring the parties of record to attend one or more of a mediation, a settlement conference or any other dispute resolution process, and giving directions for the conduct of the mediation, settlement conference or other dispute resolution process;
  - (p) authorizing or directing the parties of record to try one or more issues in the action independently of others;
  - (q) fixing the length of trial;
  - (r) respecting the place at which any step in the action is to be conducted;
  - (s) setting the action for trial on a particular date or on a particular trial list;
  - (s.1) striking out a counterclaim or directing that a counterclaim be tried separately;
  - (t) adjourning the case planning conference;
  - (u) directing the parties to attend a further case planning conference

at a specified date and time;

(v) any orders the judge or master considers will further the object of these Supreme Court Civil Rules.

[am. B.C. Reg. 119/2010, Sch. A, s. 9.]

*Prohibited orders*

(2) A case planning conference judge or master must not, at a case planning conference,

(a) hear any application supported by affidavit evidence, except under subrule (6), or

(b) make an order for final judgment, except by consent or under subrule (6).

*Case plan order required*

(3) Without limiting subrules (1) and (2), the judge or master conducting a case planning conference must, at the conclusion of the case planning conference, make a case plan order.

**Alberta**  
**REGULATION 124/2010**  
*Judicature Act*  
*Alberta Rules of Court*

**Dispute resolution processes**

**4.16(1)** The responsibility of the parties to manage their dispute includes good faith participation in one or more of the following dispute resolution processes with respect to all or any part of the action:

- (a) a dispute resolution process in the private or government sectors involving an impartial third person;
- (b) a Court annexed dispute resolution process;
- (c) a judicial dispute resolution process described in rules 4.17 to 4.21 [*Judicial Dispute Resolution*];
- (d) any program or process designated by the Court for the purpose of this rule.

.....

**Purpose of judicial dispute resolution**

**4.17** The purpose of this Subdivision is to provide a party-initiated framework for a judge to actively facilitate a process in which the parties resolve all or part of a claim by agreement.

**Judicial dispute resolution process**

**4.18(1)** An arrangement for a judicial dispute resolution process may be made only with the agreement of the participating parties and, before engaging in a judicial dispute resolution process, and subject to the directions of the presiding judge, the participating parties must agree to the extent possible on at least the following:

- (a) that every party necessary to participate in the process has agreed to do so, unless there is sufficient reason not to have complete agreement;
- (b) rules to be followed in the process, including rules respecting
  - (i) the nature of the process,
  - (ii) the matters to be the subject of the process,

- (iii) the manner in which the process will be conducted,
- (iv) the date on which and the location and time at which the process will occur,
- (v) the role of the judge and any outcome expected of that role,
- (vi) any practice or procedure related to the process, including exchange of materials, before, at or after the process,
- (vii) who will participate in the process, which must include persons who have authority to agree on a resolution of the dispute, unless otherwise agreed, and
- (viii) any other matter appropriate to the process, the parties or the dispute.

(2) The parties who agree on the proposed judicial dispute resolution process are entitled to participate in the process.

(3) The parties to a proposed judicial dispute resolution process may request that a judge named by the parties participate in the process.

#### **Documents resulting from judicial dispute resolution**

**4.19** The only documents, if any, that may result from a judicial dispute resolution process are

- (a) an agreement prepared by the parties, and any other document necessary to implement the agreement, and
- (b) a consent order or consent judgment resulting from the process.

#### **Confidentiality and use of information**

**4.20(1)** A judicial dispute resolution process is a confidential process intended to facilitate the resolution of a dispute.

(2) Unless the parties otherwise agree in writing, statements made or documents generated for or in the judicial dispute resolution process with a view to resolving the dispute

- (a) are privileged and are made or generated without prejudice,
- (b) must be treated by the parties and participants in the process as confidential and may only be used for the purpose of that dispute resolution process, and



(c) may not be referred to, presented as evidence or relied on, and are not admissible in a subsequent application or proceeding in the same action or in any other action, or in proceedings of a judicial or quasi-judicial nature.

(3) Subrule (2) does not apply to the documents referred to in rule 4.19.

### **Involvement of judge after process concludes**

**4.21(1)** The judge facilitating a judicial dispute resolution process in an action must not hear or decide any subsequent application, proceeding or trial in the action without the written agreement of every party and the agreement of the judge.

(2) The judge facilitating a judicial dispute resolution process must treat the judicial dispute resolution process as confidential, and all the records relating to the process in the possession of the judge or in the possession of the court clerk must be returned to the parties or destroyed except

(a) the agreement of the parties and any document necessary to implement the agreement, and

(b) a consent order or consent judgment resulting from the process.

(3) The judge facilitating a judicial dispute resolution process is not competent to give evidence nor compellable to give evidence in any application or proceeding relating to the process in the same action, in any other action, or in any proceeding of a judicial or quasi-judicial nature.

## Saskatchewan

### *OLD QUEEN'S BENCH RULES*

#### **Pre-trial conference required**

**191(1)** Subject to Part Forty, no proceeding shall, unless otherwise ordered, be set down for trial unless a pre-trial conference is held.

#### **Request for pre-trial**

(2) On the close of the pleadings, the parties may request a pre-trial conference by filing with the Local Registrar:

(a) a joint request:

(i) which contains a certificate of readiness;

(ii) which confirms that efforts at settlement have been made;

(iii) which sets out the estimated time required for the pre-trial conference and the trial; and

(iv) which estimates the number of witnesses to be called at the trial;

(b) a certified copy of the pleadings (in a proceeding commenced by petition, a certified copy of the petition and answer is not required). Am Gaz. Dec. 9/94.

#### **Trial brief**

(3) The parties shall file and exchange pre-trial briefs not later than 10 days prior to the date assigned for pre-trial conference. Each pre-trial brief:

(a) shall include a concise summary of the evidence expected to be adduced;

(b) shall include a concise statement of the issues in dispute and the law relating thereto, together with a list of the authorities relied on and legible copies of pertinent portions of such authorities with appropriate highlighting;

(c) shall be accompanied by all documents, or legible copies thereof, intended to be used at trial that may be of assistance to the pre-trial judge in achieving the purposes of a pre-trial conference (such as medical and expert reports). All such documents shall, at the request of the party producing them, be returned to that party at the conclusion of the pre-trial conference;

(d) may be accompanied by a proposal for settlement of the issues involved in the proceedings which may include admissions for the purpose of the pre-trial, or other statements relating to the issues which the party may choose not to have available to the trial judge. If the proceeding is to go to trial after the conclusion of the pre-trial conference, the proposal shall be returned to the party submitting it. Am. Gaz. Dec. 9/94.

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**Rel. No. 12 – Jan. 2008**

#### **Use of examination**

(4) The examination for discovery shall be available for the use of the pre-trial judge

but shall at the conclusion of the pre-trial conference be resealed until trial.

**Pre-trial date**

(5) The local registrar shall assign a pre-trial conference date to ensure optimum use of court time, but shall endeavour to suit the convenience of the parties. The parties must accept the date so assigned.

**Parties**

(6) Unless otherwise ordered, all parties shall appear with their counsel, if any, at all pre-trial conferences. Unless otherwise ordered, a corporation shall have a representative present, in addition to its counsel, at all pre-trial conferences.

**Counsel**

(7) Unless otherwise ordered, the counsel representing a party at the pre-trial conference shall be the counsel who will be representing that party at the trial.

**Purpose of pre-trial**

(8) A pre-trial conference shall be for the purpose of attempting to settle the proceeding, and if that is not possible, to consider:

- (a) the identification and simplification of the issues;
- (b) the necessity or desirability of amendments to the pleadings;
- (c) the possibility of obtaining admissions that will facilitate the trial;
- (d) whether all necessary steps have been taken in preparation for trial;
- (e) the possibility of settlement of specific issues;
- (f) the quantum of damages;
- (g) any other matters that may aid in the disposition of the proceedings;
- (h) the actual trial time required; and
- (i) the date for trial.

**Application for order for pre-trial**

(9) Where one of the parties refuses to join in a joint request, the party wishing to obtain a pre-trial conference may, upon filing the documents described in Rule 191(2) other than a joint request, apply for an order setting a date for the pre-trial conference and a date by which the party refusing to join in a joint request must file the documents described in Rule 191(2). The unsuccessful party to the application shall immediately pay the costs of this application.

**Obtaining date for pre-trial conference**

(9A) Where one of the parties neglects or refuses to join in a request, the party wishing to obtain a pre-trial conference may, upon filing the documents described in Rule 191(2) other than a joint request, together with a certificate confirming that the opposite party was requested to execute a joint request but failed to do so within 20 days without stating any reason therefor, obtain from the local registrar a date for a pre-trial conference. New. Gaz. Dec. 9/94.

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**Rel. No. 12 – Jan. 2008**

**Notification of pre-trial conference date**

(9B) The party obtaining a date for a pre-trial conference pursuant to either Subrule (9) or (9A) shall immediately notify all other parties of the date and the pre-trial conference

shall proceed on that date, unless otherwise ordered. New Gaz. Dec. 9/94.

**Judge may dispense with requirements**

(10) Notwithstanding Subrule (2), if all the parties file a written request with the local registrar, they may apply to a judge to direct that a pre-trial conference be held. The judge, upon being satisfied that it will substantially settle the proceedings, may direct that a pre-trial conference be held, and may dispense with any or all of the requirements set out in Subrule (2).

**Pre-trial ordered**

(11) A trial judge or a chambers judge may, on his or her initiative, order a pre-trial conference to be held respecting any proceeding coming before him or her and may conduct the same if appropriate to do so.

**Post pleadings conference**

(11A) Notwithstanding the generality of the foregoing, all of the parties may, upon the close of pleadings, and prior to any discoveries or other pre-trial proceedings having been conducted, file with the local registrar a joint request that a post-pleadings conference be conducted. Unless otherwise ordered, or as may be agreed by the parties in writing, all of the rules relating to pre-trial conferences shall apply, *mutatis mutandis*, to post-pleadings conferences.

**Adjournment**

(12)(a) A pre-trial conference may be adjourned from time to time at the discretion of the pre-trial judge.

**Attendance**

(b) A pre-trial judge may at any time request that any other person, whose attendance may be of assistance, be present at the pre-trial conference.

**Trial judge other than pre-trial judge**

(13) A judge who conducts a pre-trial conference shall not preside at the trial unless all parties consent in writing. This subrule shall not prevent or disqualify the trial judge from holding trial meetings, (subsequent to the pre-trial conference), before or during the trial, to consider any matter that may assist in the just, most expeditious, or least expensive disposition of the proceeding.

**Disclosure**

(14) No communication shall be made to the trial judge as to the proceedings at the pre-trial except as disclosed in the pre-trial conference report form.

**Privilege**

(15) All communications in the course of the pre-trial conference are privileged and shall not be admitted as evidence in any proceeding.

**Orders, costs**

(16) At the pre-trial conference, the pre-trial judge:

(a) may make any order by the consent of the parties;

(b) may make an order for the preparation of a custody and/or access report under section 97 of *The Queen's Bench Act, 1998* without the consent of the parties;

66 RULES OF PRACTICE AND PROCEDURE

Rel. No. 12 – Jan. 2008

(c) may make an order for costs but, in the absence of such order, the costs shall be costs in the cause.

(17) Where a pre-trial date has been assigned, the party having carriage of the proceeding shall forthwith pay the required fee for setting down. R. 191, Gaz. Jan. 18/91. New; Am. Gaz. Dec. 9/94; Am. Gaz. Feb. 16/96; Am. Gaz. Dec. 12/97; Am. Gaz. Jan. 28/2000; Am. Gaz. Nov. 3/2000; Am. Gaz. Dec. 13, 2002.

**Trial date**

**192(1)** A judge who conducts a pre-trial conference where the matter is to proceed to trial shall direct the local registrar to assign a date for trial.

(2) The local registrar shall set a trial date to ensure the optimum use of court time, but shall endeavour to assign a date to suit the convenience of the parties. The parties must accept the trial date assigned by the local registrar unless otherwise ordered. R. 192, Gaz. Jan. 18/91 New; Am. Gaz. Feb. 16/96.

**Saskatchewan (new)**  
**New QUEEN'S BENCH RULES (effective July 1, 2013)**

**DIVISION 2**

**Court Assistance in Managing Litigation**

**Assistance by the Court**

**4-4(1)** The Court may, at any time, direct the parties and any other person to attend a conference with the Court.

(2) If a party files a request for a conference pursuant to this rule, that party shall:

(a) give one or more reasons for the conference in the request; and

(b) serve on every other party and file the request.

(3) On receiving a request for a conference, the local registrar shall schedule a date for the conference.

(4) The participants in the conference may consider:

(a) dispute resolution possibilities, the process for them and how they can be facilitated;

(b) simplification or clarification of a claim, a pleading, a question, an issue, an application or a proceeding;

(c) setting or adjusting dates by which a stage or a step in the action is expected to be complete;

(d) case management by a judge;

(e) practice, procedural or other issues or questions and how to resolve them;

(f) any other matter that may aid in the resolution or facilitate the resolution of a claim, application or proceeding or otherwise meet the purpose and intention of the rules described in rule 1-3.

(5) The Court may make a procedural order before, at or following the conference.

**Request for case management**

**4-5(1)** A request for a case management order must be in Form 4-5 and made to the Chief Justice, and a copy of the request must be served on every other party.

(2) The request must state whether any other party agrees with the request.

**Information Note**

If the parties desire trial management advice and meet the rest of the requirements in rule 6-23, a party may make an appearance day application pursuant to Subdivision 3 of Division 1 of Part 6.

**PART 4: MANAGING LITIGATION 4**

(3) An action commenced or continued pursuant to *The Class Actions Act* must have a designated judge for case management appointed pursuant to rule 3-90.

**Appointment of case management judge**

**4-6** The Chief Justice may order that an action be subject to case management and appoint a judge as the case management judge for the action after having considered

all the relevant circumstances, including any or all of the following:

- (a) the purpose and intention of the rules described in rule 1-3;
- (b) the complexity of the issues of fact or law;
- (c) the importance to the public of the issues of fact or law;
- (d) the number and type of parties or prospective parties, and whether they are represented;
- (e) the number of proceedings involving the same or similar parties or causes of action;
- (f) the amount of intervention by the Court that the proceeding is likely to require;
- (g) the time required for questioning, if applicable, and for preparation for trial or hearing;
- (h) the number of expert witnesses and other witnesses;
- (i) the time required for the trial or hearing;
- (j) whether there has been substantial delay in the conduct of the proceeding.

#### **Authority of the case management judge**

**4-7(1)** A case management judge, or, if the circumstances require, any other judge, may:

- (a) order that steps be taken by the parties to identify, simplify or clarify the real issues in dispute;
- (b) set or adjust dates by which a stage or a step in the action is expected to be complete and order the parties to comply with the dates;
- (c) make an order to facilitate an application, proceeding, questioning or pre-trial proceeding;
- (d) make an order to promote the fair and efficient resolution of the action by trial;
- (e) facilitate efforts the parties may be willing to take towards the efficient resolution of the action or any issue in the action through negotiation or a dispute resolution process other than trial; and
- (f) make any procedural order that the judge considers necessary.

(2) Unless the Chief Justice or the case management judge directs otherwise or these rules provide otherwise, the case management judge shall hear every application filed with respect to the action for which the case management judge is appointed.

#### **Appearance at case management conference**

**4-8** A case management conference may take place either by personal appearance, video conference, teleconference or a combination of them.

#### **Case management judge presiding at summary judgment hearing and trial**

**4-9** Unless every party and the judge agree, a case management judge shall not hear an application for summary judgment or preside at the trial of the action for which the case management judge is appointed.

### **DIVISION 3**

#### **Dispute Resolution**

##### ***Subdivision 1***

## ***Mandatory Mediation***

### **Mandatory mediation**

**4-10** The parties shall participate in mediation as required by *The Queen's Bench Act, 1998* and the regulations made pursuant to that Act.

### **Information Note**

With some exceptions, parties in non-family law proceedings must participate in a mediation session following the close of pleadings before taking any further step in the action. See sections 42 to 44 of *The Queen's Bench Act, 1998*.

## **PART 4: MANAGING LITIGATION 6**

### ***Subdivision 2***

#### ***Pre-trial Conference***

#### **Obtaining a date for pre-trial conference**

**4-11(1)** On the close of the pleadings, the parties may request a pre-trial conference by filing with the local registrar:

(a) a joint request in Form 4-11 that:

(i) contains a certificate of readiness;

(ii) confirms that efforts at settlement have been made;

(iii) sets out the estimated time required for the pre-trial conference and the trial; and

(iv) estimates the number of witnesses to be called at the trial; and

(b) a certified copy of the pleadings, but, in a proceeding commenced by petition, a certified copy of the petition and answer is not required.

(2) If one of the parties neglects or refuses to join in a joint request, the party wishing to obtain a pre-trial conference may obtain from the local registrar a date for a pre-trial conference by filing:

(a) the documents described in subrule (1) other than a joint request; and

(b) a certificate confirming that the opposite party was requested to execute a joint request but failed to do so within 20 days without stating any reason.

(3) If one of the parties refuses to join in a joint request, the party wishing to obtain a pre-trial conference may apply for an order scheduling a pre-trial conference date and a date by which the party refusing to join in a joint request must file the documents described in subrule (1) other than a joint request.

(4) The unsuccessful party to an application pursuant to subrule (3) shall immediately pay the costs of the application.

(5) The party obtaining a date for a pre-trial conference pursuant to subrule (3) or (4) shall immediately notify all other parties of the date, and, unless the Court orders otherwise, the pre-trial conference must proceed on that date.

(6) Notwithstanding subrule (1), if all the parties file a written request with the local registrar, they may apply to a judge to direct that a pre-trial conference be held.

(7) On an application pursuant to subrule (6), if the judge is satisfied that a pre-trial conference will substantially settle the proceedings, the judge may:

(a) direct that a pre-trial conference be held; and

(b) dispense with any or all of the requirements set out in subrule (1).



- (8) A trial judge or a chambers judge may, on his or her initiative:
- (a) order a pre-trial conference to be held respecting any proceeding coming before him or her; and
  - (b) conduct the pre-trial conference if appropriate to do so.
- (9) The local registrar shall schedule a pre-trial conference date to ensure optimum use of court time, but shall endeavour to suit the convenience of the parties.
- (10) The parties shall accept the date scheduled pursuant to subrule (9).
- (11) If a pre-trial conference date has been scheduled, the party having carriage of the proceeding shall immediately pay the required fee for setting down.

#### **Purpose of pre-trial conference**

**4-12**(1) The parties shall make a genuine attempt to settle an action before a pretrial conference.

(2) A pre-trial conference is not to replace normal negotiations between the parties.

(3) The goals of a pre-trial conference are:

- (a) to allow the parties to participate in the problem-solving process;
- (b) to allow the parties to receive the view of a trial judge as to the issues, both facts and law, in dispute, as far as the material before the pre-trial judge allows;

(c) to allow settlement options to be presented that would not necessarily be available at trial;

(d) to seek settlement of the dispute so as to improve the efficiency of the court system and to save time and costs for all parties and witnesses.

(4) A pre-trial conference must be for the purpose of attempting to settle the proceeding, and if that is not possible, to consider:

- (a) the identification and simplification of the issues;
- (b) the necessity or desirability of amendments to the pleadings;
- (c) the possibility of obtaining admissions that will facilitate the trial;
- (d) whether all necessary steps have been taken in preparation for trial;

#### **PART 4: MANAGING LITIGATION 8**

(e) the possibility of settlement of specific issues;

(f) the quantum of damages;

(g) any other matters that may aid in the disposition of the proceedings;

(h) the actual trial time required; and

(i) the date for trial.

#### **Pre-trial briefs**

**4-13**(1) The parties shall file and exchange pre-trial briefs not later than 10 days before the date scheduled for pre-trial conference.

(2) Each pre-trial brief:

(a) must clearly state on the first page the name of the party on whose behalf it is filed;

(b) must include a concise summary of the evidence expected to be adduced;

(c) must include a concise statement of the issues in dispute and the law relating to those issues, together with a list of the authorities relied on and

legible copies of pertinent portions of those authorities with appropriate highlighting;

(d) subject to subrule (4), must be accompanied by all documents, or legible copies of documents, intended to be used at trial that may be of assistance to the pre-trial judge in achieving the purposes of a pre-trial conference, including medical and expert reports; and

(e) may be accompanied by a proposal for settlement of the issues involved in the proceedings that may include admissions for the purpose of the pretrial conference or other statements relating to the issues that the party may choose not to have available to the trial judge.

(3) All documents and copies filed pursuant to clause (2)(d) must, at the request of the party producing them, be returned to that party at the conclusion of the pre-trial conference.

(4) If the parties agree in writing that a productive pre-trial conference is possible without medical or expert reports and that these reports are not critical to a liability or valuation issue, the parties shall file the written agreement, and not the reports, with the pre-trial brief.

(5) If the proceeding is to go to trial after the conclusion of the pre-trial conference, a proposal filed pursuant to clause (2)(e) must be returned to the party submitting it.

#### **PART 4: MANAGING LITIGATION 9**

##### **Witness lists**

**4-14**(1) Unless the Court orders otherwise, each party shall, not later than 10 days before the date scheduled for a pre-trial conference, serve on every other party and file a list of the witnesses the party may call at trial, other than expert witnesses who are to provide evidence pursuant to Division 3 of Part 5.

(2) Unless the Court orders otherwise, a witness list must include the full name and address of each listed witness.

(3) If a party who had provided a witness list or an amended witness list later learns that the list is inaccurate or incomplete, the party shall promptly:

(a) amend the witness list to make it accurate and complete; and

(b) serve a copy of the amended witness list on all parties and file the amended list.

(4) Nothing in this rule requires a party to call as a witness at trial an individual named as a witness on a witness list served by the party pursuant to subrule (1) or (3).

(5) This rule does not apply to family law proceedings.

##### **Participants at pre-trial**

**4-15**(1) Unless the Court orders otherwise, every party shall appear with the party's lawyer, if any, at all pre-trial conferences.

(2) Unless the Court orders otherwise, a corporation shall have a representative present, in addition to its lawyer, at all pre-trial conferences.

(3) If a party is represented by a lawyer and wishes to dispense with the appearance of the party or a representative of a corporation, the lawyer shall send a written

request, with reasons, to the local registrar.

**Information Note**

Expert reports must be served before the date scheduled for the pre-trial conference pursuant to rule 5-40, unless there is a written agreement.

Appraisal reports intended to be submitted in evidence must be served on every other party not less than 10 days before the date scheduled for a pre-trial conference pursuant to rule 5-46.

Medical reports intended to be used at trial must be served on every other party not less than 10 days before the date scheduled for a pre-trial conference pursuant to rule 5-47, unless there is a written agreement.

**PART 4: MANAGING LITIGATION 10**

(4) The local registrar shall present the request mentioned in subrule (3) to the pretrial judge, who may:

(a) refuse or grant the request without hearing from all parties to the proceeding;

(b) grant the request with conditions, including a requirement that the party or representative must be available by conference telephone or immediately available for telephone communication; or

(c) order the request to proceed by way of application.

(5) Unless the Court orders otherwise, the lawyer representing a party at the pre-trial conference must be the lawyer who will be representing that party at the trial.

(6) A pre-trial judge may at any time request that any other person whose attendance may be of assistance be present at the pre-trial conference.

**Use of transcript of questioning or affidavit in answer to written questions at pre-trial conference**

**4-16** The transcript of questioning pursuant to rule 5-29 and the affidavit in answer to written questions pursuant to rule 5-32:

(a) must be available for the use of the pre-trial judge; and

(b) at the conclusion of the pre-trial conference, must be resealed until trial.

**Adjournment of pre-trial conference**

**4-17** A pre-trial conference may be adjourned from time to time at the discretion of the pre-trial judge.

**Documents resulting from pre-trial conference**

**4-18(1)** The only documents, if any, resulting from a pre-trial conference are to be:

(a) an agreement prepared by the parties and any other document necessary to implement the agreement;

(b) a consent order or consent judgment;

**Information Note**

If a trial date is scheduled at the pre-trial conference, a lawyer of record may not withdraw without the Court's permission: see rule 2-43.

**PART 4: MANAGING LITIGATION 11**

(c) an order for the preparation of a custody report, an access report or both pursuant to section 97 of *The Queen's Bench Act, 1998*;

- (d) an order for costs; and
- (e) if the matter is to proceed to trial, the pre-trial conference report form that includes:
  - (i) matters agreed on by the parties;
  - (ii) issues of fact and law in dispute;
  - (iii) whether required documents were filed;
  - (iv) whether there have been or will be any pre-trial applications relevant to the trial;
  - (v) the estimated number of witnesses, including expert witnesses;
  - (vi) the estimated length of trial; and
  - (vii) whether summaries, books of exhibits or books of authorities will be provided by the parties to the trial judge.
- (2) In the absence of an order pursuant to clause (1)(d), costs must be costs in the cause.

#### **Confidentiality and use of information**

**4-19**(1) A pre-trial conference is a confidential process intended to facilitate the resolution of a claim, or if that is not possible, to manage the action until trial.

(2) Unless the parties otherwise agree in writing, statements made or documents generated for or in the pre-trial conference with a view to resolving the dispute:

- (a) are privileged and are made without prejudice;
- (b) must be treated by the parties and participants in the process as confidential and may only be used for the purpose of the pre-trial conference; and
- (c) may not be referred to, presented as evidence or relied on, and are not admissible in a subsequent application or proceeding in the same action or in any other action, or in proceedings of a judicial or quasi-judicial nature.

(3) Subrule (2) does not apply to the documents referred to in rule 4-18.

#### **PART 4: MANAGING LITIGATION 12**

##### **Trial date**

**4-20** If the matter is to proceed to trial, the pre-trial judge shall direct the local registrar to schedule a date for trial.

##### **Trial judge other than pre-trial judge**

**4-21**(1) A pre-trial judge shall not preside at the trial unless all parties and the judge consent in writing.

(2) This rule does not prevent or disqualify the trial judge from holding trial meetings subsequent to the pre-trial conference and before or during the trial, to consider any matter that may assist in the just, most expeditious or least expensive disposition of the proceeding.

**Manitoba**  
Manitoba Regulation 553/88  
Court of Queen's Bench Rules

**First case conference**

**20A(6)** Within 21 days of the close of pleadings in an action to which this rule applies, the plaintiff shall

- (a) obtain from the trial co-ordinator of the court a fixed date and time for a case conference with a case conference judge and the date must be within 60 days after the date of the close of pleadings; and
- (b) give at least seven days notice of the date and time of the case conference, in writing, to each lawyer of record of a party and to each party not represented by a lawyer.

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M.R. 184/96; 229/96; 120/99

**Case conference at request of a party**

**20A(7)** Notwithstanding subrule (6), a party to an action under this rule may at any time after the statement of claim is served request from the trial co-ordinator of the court a fixed date and time for a case conference with a case conference judge, and the party requesting the case conference shall give at least seven days notice of the date and time of the case conference, in writing, to each lawyer of record of a party and to each party not represented by a lawyer.

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M.R. 184/96; 229/96; 120/99

**Adjourning first case conference by consent**

**20A(8)** The first case conference may be adjourned to a fixed date, which must be within 120 days after the date of the close of pleadings, by a party filing a Request to adjourn with the trial co-ordinator of the court, together with a consent from each party to the action to adjourn the case conference to that fixed date.

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M.R. 184/96

### **Adjourning first case conference by judge**

**20A(9)** If

(a) the parties to the action do not consent to an adjournment of the first case conference;  
or

(b) an adjournment to a date more than 120 days after the close of pleadings is requested;

a case conference judge may adjourn the first case conference following a meeting or teleconference with the parties, initiated by the filing of a Request by the party requesting the adjournment.

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M.R. 184/96

### **Subsequent case conference**

**20A(10)** After the first case conference has been held, a subsequent case conference may be scheduled

(a) by the case conference judge; or

(b) at the request of a party to the action, in accordance with the procedure under subrule 20A(7).

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M.R. 184/96

### **Attendance of lawyer**

**20A(11)** Unless otherwise directed by the case conference judge, the lawyer attending a case conference shall be the lawyer principally responsible for the conduct of the action.

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M.R. 184/96

### **Attendance of parties**

**20A(12)** The parties to a proceeding shall attend a case conference upon the request of the case conference judge.

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M.R. 184/96

### **By telephone**

**20A(13)** A case conference judge may direct a case conference to be held by means of a conference telephone call or other means of telecommunication.

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M.R. 184/96

### **Same case conference judge**

**20A(14)** To the extent possible, the case conference judge who presides over the first case conference shall also preside over

- (a) any subsequent case conference; and
- (b) any motion in the action.

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M.R. 184/96

### **Judge's duty to explore settlement**

**20A(15)** At a case conference, the case conference judge shall explore with the parties the possibility of settlement.

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M.R. 184/96

### **Orders**

**20A(16)** At a case conference, the case conference judge may make any order he or she considers appropriate to ensure a just, expeditious and cost-effective determination of the action, including an order

- (a) that the pleadings be amended or closed within a fixed time;
- (b) that motions be brought within a fixed time;
- (c) that procedures for discovery be completed within a fixed time;
- (d) that discovery, including examinations for discovery and interrogatories, be dispensed with or limited as to the nature, scope or duration of the discovery, having regard to the nature and complexity of the action, the amount at issue in the action, and the likely expense of discovery to the parties;
- (e) where there has been a motion for summary judgment, that discovery be limited to matters not covered by the affidavits filed on the motion and any cross-examinations on the affidavits, and that the affidavits and cross-examinations be used at trial in the same manner as an examination for discovery;

- (f) that the parties exchange reports and resumes of any experts to be called to give evidence at the trial, and fixing the time within which to do so;
- (g) that a pre-trial conference be dispensed with and the action be set down for trial and fixing a date for the trial that is
- (i) within 180 days of the date of the first case conference, or
  - (ii) at such other time as the judge may consider appropriate;
- (h) that the parties file an agreed statement of facts and each file a brief of law;
- (i) that evidence at trial in whole or in part be adduced by affidavit; and
- (j) that a further case conference be held at a time and place to be fixed.

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M.R. 184/96

**If no consent to order**

**20A(17)** If a party does not consent to an order under subrule (16) being made, the party requesting the order shall proceed by way of a motion to the case conference judge, within the time period fixed by the case conference judge.

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M.R. 184/96

**Memorandum re issues**

**20A(18)** The case conference judge shall

- (a) issue a memorandum indicating the issues to be resolved at trial; and
- (b) direct that a copy of the memorandum be provided to the lawyers and unrepresented parties.

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M.R. 184/96

**Facts deemed to be established**

**20A(19)** Any facts ordered by the case conference judge not in dispute, or ordered to be adduced by affidavit shall be deemed to be established for the purpose of the trial, and the trial shall be conducted accordingly, unless the trial judge orders otherwise.

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M.R. 184/96

**Case conference judge not to preside at trial**



20A(20) Except with the consent of the parties, a judge who presides at a case conference under this rule shall not preside at the trial of the action.

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M.R. 184/96

**Judgment exceeding \$50,000.**

20A(21) Nothing in this rule limits the amount of a judgment or order that may be made in an action governed by this rule.

**Costs**

20A(22) Subject to the discretion of the court, in any action under this rule costs shall be assessed on a Class 2 basis pursuant to Tariff A, whether or not the judgment ultimately exceeds the sum of \$50,000.

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M.R. 184/96; [139/2010](#)

**Rule not applicable to family proceedings**

20A(23) This rule does not apply to a family proceeding within the meaning of section 41 of *The Court of Queen's Bench Act*.

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M.R. 229/96

**Quebec**  
**Quebec Code of Civil Procedure, R.S.Q. c. C-25**

**SECTION**

**IV**

**SETTLEMENT CONFERENCE**

151.14. A judge may preside a settlement conference. A judge enjoys judicial immunity while presiding such a conference.

2002, c. 7, s. 19.

151.15. At any stage of the proceeding, the chief justice or chief judge may, at the request of the parties, designate a judge to preside a settlement conference. In their request, the parties must present a summary of the questions at issue.

The chief justice or chief judge may, on his or her own initiative, recommend the holding of such a conference. If the parties consent, the chief justice or chief judge designates a judge to preside the conference.

2002, c. 7, s. 19.

151.16. The purpose of a settlement conference is to facilitate dialogue between the parties and help them to identify their interests, assess their positions, negotiate and explore mutually satisfactory solutions.

A settlement conference is held in private, at no cost to the parties and without formality.

2002, c. 7, s. 19.

151.17. A settlement conference is held in the presence of the parties, and, if the parties so wish, in the presence of their attorneys. With the consent of the parties, the presiding judge may meet with the parties separately. Other persons may also take part in the conference if the judge and the parties consider that their presence would be helpful in resolving the dispute.

2002, c. 7, s. 19.

151.18. In agreement with the parties, the judge defines the rules of the settlement conference and any measure to facilitate its conduct, and determines the schedule of meetings.

2002, c. 7, s. 19.

151.19. The settlement conference does not suspend the proceeding, but the judge presiding the conference may, if necessary, modify the timetable.

2002, c. 7, s. 19.

151.20. The parties must ensure that the persons who have authority to conclude an agreement are present at the settlement conference, or that they may be reached at all times to give their consent.

2002, c. 7, s. 19.

151.21. Anything said or written during a settlement conference is confidential.

2002, c. 7, s. 19.

151.22. If a settlement is reached, the judge homologates the transaction on request.

2002, c. 7, s. 19.

151.23. If no settlement is reached, the judge may not preside any subsequent hearing relating to the dispute.

With the consent of the parties, the judge may convert the settlement conference into a pre-trial conference.

2002, c. 7, s. 19.

508.1. A judge may at any time preside a settlement conference to assist the parties in resolving their dispute. The judge enjoys judicial immunity while presiding such a conference. The conference is held in private, at no cost to the parties and without formality.

A settlement conference may only be held at the written joint request of the parties. The filing of such a request suspends the running of the time limits prescribed by this Title.

A settlement conference is confidential and is governed by the rules defined by the judge and the parties. The judge who presides the conference cannot take part in any hearing relating to the matter.

Any transaction resolving the matter is sent by the clerk to a panel of the court so that it may be homologated and rendered enforceable.

2002, c. 7, s. 95.

508.2. At any stage of a proceeding, a judge may, on his or her own initiative or at the request of a party, convene the parties to confer with them on the possibility of better defining the matters really at issue and on possible ways of simplifying proceedings and shortening the hearing.

After giving the parties the opportunity to make representations, the judge may, as appropriate, limit the pleadings and other documents to be filed, shorten or extend the time limits prescribed by this Code, determine time limits, including those for the filing of pleadings and other documents, lift the requirement to file a factum and allow the parties to proceed on the basis of an argumentation plan, and determine a hearing date.

2002, c. 7, s. 95.

508.3. The judge may, on his or her own initiative or at the request of a party, use any appropriate means of communication to hold a settlement conference, provided all parties consent.

2002, c. 7, s. 95.

508.4. A settlement conference is held without formality and requires no prior written documents.

2002, c. 7, s. 95.

508.5. At any time during the proceeding, a party may apply to the chief justice, or to a judge designated by the chief justice, for directions in relation to the appeal.

2002, c. 7, s. 95.

**New Brunswick**  
***Rules of Court***

**50.07 Where Settlement Conference Available**

97-78

In addition to the pre-trial conference contemplated by Rule 50.01, the court may, at any time, at the request of a party or on its own motion, direct the solicitors for the parties, any party and any other person, to appear before a judge for a settlement conference at a time and place set by the clerk of the court.

**50.08 Purpose of Settlement Conference**

A settlement conference is intended to allow the parties, under the direction of a judge, to discuss the possibilities of settlement.

**50.09 What May Be Done at a Settlement Conference**

At a settlement conference, a judge may do one or more of the following:

- (a) conduct the settlement conference in any manner the judge deems fair;
  - (b) ask questions of parties, solicitors or other persons in attendance;
  - (c) discuss settlement of the dispute;
  - (d) make a payment order or other appropriate order in the terms consented to on the face of the order by the parties;
  - (e) adjourn the settlement conference;
  - (f) consider the matters referred to in Rule 50.01(1);
- and
- (g) direct that expert witnesses meet, on a without prejudice basis, to determine those matters on which they agree and to identify those matters on which they do not agree.

*Rule / Règle 50*

### **50.10 Confidentiality of Settlement Conference Proceedings**

(1) A judge conducting a settlement conference shall not disclose to the trial judge or to any other person what positions were taken or what admissions or concessions were made for the purpose of discussing settlement or anything else relating to the settlement conference and shall not include any references to such matters in any written report of the settlement conference subsequently prepared by the judge.

(2) A judge assigned to hear any matter for which a settlement conference was held and who becomes aware of what positions were taken or what admissions or concessions were made for the purpose of discussing settlement or anything else relating to the settlement conference shall not preside at the trial or hearing.

(3) All discussions, statements or representations and any record, however made or stored, whether in printed form, on film, by electronic means or otherwise, of discussions, statements or representations of the parties, their solicitors, agents or representatives or of the settlement conference judge made at a settlement conference or in preparation thereof are without prejudice, privileged and confidential and shall not be referred to in any subsequent proceedings.

97-78; 2006-47

### **50.11 Non-compellability and Immunity of Settlement Conference Judge**

A judge conducting a settlement conference is not a compellable or competent witness in any proceeding and is immune from legal action.

97-78

### **50.12 Settlement Conference Brief**

97-78

(1) Unless otherwise directed by the court, every party shall, at least 4 days before the settlement conference date, file with the clerk a settlement conference brief containing:

- (a) a concise summary of the facts;
- (b) a concise statement of the issues in the proceeding;
- (c) a concise statement of the law to be relied upon

by the party;

(d) a concise summary of the agreed upon facts and admissions;

(e) a list of witnesses and a summary of the evidence of each witness; and

(f) the relevant portions only of transcripts, experts' reports and other evidence that may be adduced at the trial or hearing.

(1.1) At the same time as a party files his or her settlement conference brief under paragraph (1), the party shall also file a copy of such brief for each opposite party who has not exchanged a copy of his or her settlement conference brief with the party filing the settlement conference brief.

(2) The clerk shall advise each party when an opposite party files his or settlement conference brief. The clerk shall release the copies filed under paragraph (1.1) to any party who has filed a settlement conference brief.  
97-78; 2010-61

### **50.13 Solicitors to Be Prepared at Settlement Conference**

97-78

Unless otherwise directed by the court, solicitors who attend a settlement conference shall be solicitors who propose to conduct the trial or hearing or who are fully authorized, briefed and prepared to discuss, deal with, give binding undertakings with respect to, settle or compromise all matters and issues properly arising during the settlement conference.

97-78

### *Rule / Règle 50*

### **50.14 Limitation on Settlement Conference Judge**

97-78

A judge presiding at a settlement conference shall not preside at the trial of the action or the hearing of the application in respect of which the settlement conference is held, nor shall the judge hear any motion in respect of the same action or application.

97-78

### **50.15 Costs of Settlement Conference**

97-78

If a settlement conference cannot be conducted properly

because a party is not prepared for it, a judge may order that party to pay the reasonable expenses of the other party or parties.



**Nova Scotia**  
***Nova Scotia Civil Procedure Rules***

**PART 4 – Alternate Resolution or Determination**

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**Rule 10 - Settlement**

**Scope of Rule 10**

**10.01 (1)** This Rule applies to a settlement of a proceeding or of a claim in a proceeding, and includes both of the following:

- (a) a formal way to make an offer that may affect how costs are awarded;
- (b) judge-assisted alternative dispute resolution that is voluntary and flexible.

**(2)** This Rule does not cover approval of a settlement by a judge, such as that provided for in Rule 36 - Representative Party.

**(3)** Nothing in this Rule makes a judge a compellable witness, or diminishes judicial immunity from civil claims.

**Settlement conference**

**10.11 (1)** A settlement conference may be organized at any stage of a proceeding, if the party making a claim and the party against whom the claim is made agree to participate.

**(2)** The court may provide either of the following kinds of settlement conference:

(a) an ordinary settlement conference, at which the parties may request a judge to express opinions on the issues in dispute after reading excerpts from discoveries, other documentary evidence, and briefs and hearing submissions;

(b) a trial-like settlement conference, at which the parties request a judge to express opinions after hearing some witnesses being questioned in addition to reading materials and hearing submissions.

....

**Procedures for settlement conference generally**

**10.12 (1)** A judge may adopt any procedure for a settlement conference, and the adopted procedure prevails over procedures provided by this Rule 10.

**(2)** A party may propose a procedure for a settlement conference in any of the

following ways:

- (a) at the conference for scheduling the settlement conference;
  - (b) at an organizing conference requested by a party or required by the settlement conference judge;
  - (c) by correspondence with the settlement conference judge, if all parties agree to the proposed procedure;
  - (d) at a conference called to organize a trial-like settlement conference;
  - (e) at the settlement conference.
- (3)** A party who participates in a settlement conference must do each of the following:
- (a) submit a brief, book of authorities, and book of evidence on time;
  - (b) prepare adequately for the conference;
  - (c) disclose the party's case or defence in written submissions and discussions;
  - (d) attend the conference personally if the party is an individual or, if the party is an individual who cannot attend or a corporation, authorize an agent to bind the party to terms of settlement;
  - (e) if the party authorizes an agent, arrange for the agent to attend the conference or, if the settlement conference judge permits, to be in communication with counsel and able to authorize counsel to bind the party to terms of settlement.
- (4)** A judge may order a party who participates in a settlement conference and does not comply with Rule 10.12(3) and, as a result, causes the settlement conference to be cancelled, to indemnify another party for the expenses of the conference.
- (5)** A judge may order a party who cancels a settlement conference after another party incurs expenses for the conference to indemnify the party for the expenses.

### **Ordinary settlement conference**

**10.13 (1)** Each party who participates in an ordinary settlement conference must submit all of the following to the settlement conference judge at least five days before the conference, unless the judge directs otherwise:

- (a) a brief that complies with Rule 40 - Brief, and this Rule 10.13;
  - (b) a book of authorities that complies with Rule 40 - Brief;
  - (c) a book of evidence containing excerpts from discovery examinations, documentary productions, plans and expert's reports only to the extent necessary for the party to make whatever points the party wishes to make at the settlement conference.
- (2)** A brief must include the party's position on the issues to be decided and on any proposals for settlement that have been made.
- (3)** The book of evidence must conform with all of the following standards:
- (a) reproduction must be as legible as possible;
  - (b) the book must contain an index that describes each document and refers to its tab or page number;
  - (c) the material must be edited to ensure the judge reads evidence essential to

the points being made, and no more.

**(4)** The following agenda applies at an ordinary settlement conference, unless the parties agree or the settlement conference judge directs otherwise:

- (a) meet in a conference room or courtroom, not on record and not open to the public;
- (b) each party refers to any further evidence in response to the other party's book of evidence;
- (c) each party gives concise submissions on the issues in dispute and the party's position on settlement;
- (d) the judge has the opportunity to ask questions and may require an adjournment to reflect on the submissions;
- (e) the judge meets with the parties or counsel, together or in caucus;
- (f) at an appropriate time, the judge expresses opinions on the issues in dispute or explains why the judge is unable to formulate an opinion.

#### **Trial-like settlement conference**

**10.14 (1)** Unless the judge directs otherwise, each party who participates in a trial-like settlement conference must, at least fourteen days before the conference, submit to the settlement conference judge the same materials required for an ordinary settlement conference and the brief must include all of the following additional information:

- (a) a list of witnesses the party would call at trial;
  - (b) a concise summary of the testimony each is expected to give at trial;
  - (c) the name of any person the party intends to produce for questioning at the conference;
  - (d) a proposal for limits on the time to be allotted for questioning.
- (2)** The settlement conference judge may convene a conference to organize a trial-like settlement conference.
- (3)** The parties may agree on, or the judge at an organizing conference may direct, any procedure for a trial-like settlement conference, including any of the following:
- (a) the time allotted for questioning;
  - (b) a will-say statement, instead of direct questioning;
  - (c) limits on subjects for questioning.
- (4)** The following agenda applies at a trial-like settlement conference, unless the parties agree, or the judge directs, otherwise:
- (a) meet in a courtroom, not on record and not open to the public;
  - (b) the judge deals with any preliminary issues;
  - (c) the parties briefly describe the evidence each would present at trial;
  - (d) persons are questioned, without oath or affirmation, by the party presenting them, then the other party;
  - (e) each party gives concise submissions;

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- (f) the judge has the opportunity to ask questions and may require an adjournment to reflect on the submissions;
  - (g) the judge meets with the parties or counsel, together or in caucus;
  - (h) at an appropriate time, the judge expresses opinions on the issues in dispute, or explains why the judge is unable to formulate an opinion.
- (5) The questioning of a person at a trial-like settlement conference is only for the settlement conference judge to better assess the chances a party's position will be accepted.

### **Record of settlement**

**10.15** A judge who conducts a settlement conference at which the parties reach agreement must do all of the following, as soon as possible:

- (a) cause the provisions of the agreement to be recorded in writing or electronically;
- (b) assign responsibility to prepare an order that gives effect to the agreement;
- (c) advise the prothonotary of the effect the agreement may have on requirements for trial or hearing dates.

### **Confidentiality**

**10.16 (1)** The privilege attached to settlement discussions applies to all communications for or at a settlement conference.

**(2)** A judge who conducts a settlement conference may cause all or part of the conference to be recorded.

**(3)** A recording of a settlement conference is not part of the public court record and it must be kept confidential by the prothonotary on behalf of the settlement conference judge.

**(4)** Documents or correspondence for a settlement conference must not be filed with the records of the proceeding, or shown to anyone not involved in the conference.

**(5)** The settlement conference judge must keep custody of the documents and correspondence and destroy them, or return them to the parties, when the judge no longer requires them.

**Newfoundland**  
*Rules of the Supreme Court, 1986, SNL 1986, c 42, Sch D*

**RULE 39B**  
**SETTLEMENT CONFERENCES**

**Purpose of settlement conferences**

**39B.01.** (1) The purpose of a settlement conference is to allow the parties to attend before a judge who shall, in private and without hearing witnesses, explore all possibilities of settlement of the issues that are outstanding.

(2) The parties, or in the absence of a party, the persons representing the party in attendance at a settlement conference, shall have authority to settle the dispute.

**How to get a matter on the Settlement Conference List**

**39B.02.** (1) Matters shall be placed on the Settlement Conference List

(a) by order of a judge either following a pre-trial conference or otherwise; or

(b) subject to paragraph (2), on request of the parties after the pleadings have closed where the parties agree that it is likely the matter will be resolved with the assistance of a judge.

(2) Requests under clause (1)(b) shall be made by filing a Request for Settlement Conference in Form 39B.02A signed by all parties or their counsel.

(3) Where the judge at a settlement conference determines that it was not appropriate for the parties to have requested a settlement conference under clause (1)(b), the judge may make an order as to costs that is considered just or, in appropriate circumstances, set the matter for a hearing in Court with respect to costs.

**Documents to be filed before settlement conferences**

**39B.03.** (1) Each party shall, at least 10 days before the date of a settlement conference, file a brief containing a summary of the facts, issues and law and shall deliver on the same date a copy to each other party.

(2) Unless the parties consent or the Court otherwise orders, materials delivered to a judge under paragraph (1) shall not be placed in the Court file and shall not be disclosed to the trial judge.

(3) Upon completion of a settlement conference, the judge shall return to the parties or their counsel the materials delivered for the purpose of the conference.

**Communications during a settlement conference**

**39B.04.** (1) All communications during a settlement conference

- (a) shall constitute without prejudice settlement discussions;
- (b) shall be privileged from disclosure; and
- (c) shall not be admissible as evidence in a proceeding.

(2) Communications under paragraph (1) include, but are not limited to,

- (a) the judge's recollections of the settlement conference;
- (b) the judge's notes and records relating to the settlement conference; and
- (c) anything said or written down during the settlement conference.

(3) No reference to the positions taken or admissions or concessions made by the parties, or to the opinion of the judge, at a settlement conference or other settlement-related proceeding, shall be contained in a brief or other document filed in a proceeding and shall not be referred to or commented on at the trial of that proceeding.

111/10 s10

**Disposition of settlement conference**

**39B.05.** (1) If the parties settle the proceeding during a settlement conference, a Memorandum of Settlement or notice of discontinuance shall be filed in accordance with rule 39.09.

(2) If the parties do not settle the proceeding during a settlement conference, the judge may

- (a) convert the settlement conference to a pre-trial conference;
- (b) order a pre-trial conference and provide directions on the filing of a trial record and Certificate of Readiness, if necessary;
- (c) order a mini-trial;
- (d) order a summary trial or expedited trial; or
- (e) make another order as is considered just.

(3) A pre-trial conference converted from a settlement conference shall be governed, with any necessary modifications, by Rules 39 and 39A and the judge shall make an order with respect to the filing of the trial record and Certificate of Readiness.

111/10 s10

**Settlement conference judge shall not preside at trial**

**39B.06.** A judge who presides at a settlement conference shall not preside at the trial.

## Appendix “E” – Styles of Judicial Mediation

In terms of approaches to mediation, there are various styles which include:

**Facilitative versus directive styles-** which relate to the degree of control and direction by the mediator over the process of the mediation (for example, asking parties what their perspective on the issues is, versus summarizing parties views from their statements).

**Evaluative versus Non-evaluative styles** – which relate to the degree to which the mediator gives an opinion on the merits of the case. Evaluative styles also come in various forms from the extreme of a direct opinion to both parties in joint session to a facilitative open-ended question promoting self-evaluation (e.g., “What are the consequences for you of taking this issue to trial?”). Some mediators avoid evaluation altogether.

**Interest-based versus rights-based styles-** which relate to the focus of the negotiation. Interest-based styles use a problem-solving approach focused on identifying the goals and concerns of each party and then generating options that deal with those goals and concerns as effectively as possible (a win-win approach). Rights-based styles focus on an evidence-based approach reviewing the legal merits of each side and helping parties reach an agreement that is consistent with a rights-based analysis. Rights can also play a role in an interest-based approach, which requires the mediator to assist parties in identifying their BATNA (Best Alternative to a Negotiated Agreement- essentially, their plan B if they fail to settle). This element often requires an assessment of the strength of parties’ rights-based arguments for trial. Interest-based approaches also promote the use of objective measures of legitimacy such as case law, legislation and evidence.

**Deal-making versus Transformative styles-** which relate to goal of the mediation. Deal-making styles view the goal of mediation as assisting parties in reaching a deal on the issues they face. Transformative styles (often used in family or workplace mediations) view the goal as transforming and improving the relationship and degree of understanding/respect between the parties.

Individual mediators may use a variety of the above-noted styles even in a single mediation.

A major issue in JDR design is the degree to which judges use the styles noted above, particularly evaluative and rights-based styles, versus non-evaluative and interest-based styles. Many ADR commentators prefer interest-based approaches over rights-based approaches, Different provinces have taken different approaches to this question, as have different individual judges engaged in JDR.

## Appendix “F” – Description of Ontario Mandatory Mediation Program

The Ontario Mandatory Mediation Program (OMMP) is a well-developed court-annexed mediation system that has generated a thriving non-judicial mediation sector.

Under Rules 24.1 and 75.1 of the *Rules of Civil Procedure*, almost all civil cases in Ottawa, Toronto and Windsor are mediated prior to the pre-trial stage (most now within 180 days of the first Defence). This system has been proven to work in promoting early resolutions of cases, more than doubling the rate of settlement compared to traditional litigation in the first 6 months of a case (and in some cases like motor vehicle accidents quintupling).<sup>17</sup> That settlement figure has risen significantly then (anecdotally in the 80%+ range) as the OMMP system has evolved, as mediators have substantially improved, and as the Bar has become an educated consumer of mediation services. Most mediations in Ontario now are done by voluntary choice of mediator, rather than by assignment from the OMMP roster.

Many other countries, including Trinidad & Tobago, Bahamas, Bermuda and others, have looked to Ontario as a model for how to integrate mediation into their own court systems effectively.

British Columbia has shown some limited movement from a purely judicially controlled and delivered form of mediation, at least at the provincial court level. Five of the Provincial Court’s 45 registries have moved to a private-sector model (Mediate BC) that works well within their existing court system. The remaining provincial court registries continue to have the mandatory JDR (settlement conference) procedure that was established in 1991. The Superior Court system has optional judicial settlement conference procedure.

The cost of mediation was set at a low tariff rate ensuring that the process was not cost prohibitive. Indeed, at \$600 for a two-person mediation, the roster rate costs most parties less than the cost of their lawyer’s time for the mediation.

The OMMP and the widespread use of other private mediation services around Ontario long ago ended the question of whether mediation is or should be a part of our justice system. A study conducted on the OMMP pilot project concluded that OMMP mediation resolved approximately 50% of cases even in the very first years of the program when mediators, counsel and parties were least familiar with the mediation process, and when mediation was mandatorily required to take place in the first 90-150 days after the filing of the Statement of Claim. In late-stage mediation programs (wherein parties have had a chance to

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<sup>17</sup> Hann, R. G., C. Baar, L. Axon, S. Binnie, and F. Zemans. 2001. *Evaluation of the Ontario Mandatory Mediation Program (Rule 24.1): Final report—The first 23 months*. Toronto: Queens Printer. [www.attorneygeneral.jus.gov.on.ca/english/courts/manmed/fullreport.asp](http://www.attorneygeneral.jus.gov.on.ca/english/courts/manmed/fullreport.asp) See Fig. 5.1B.



do discoveries and more), settlement rates are generally higher (70% or higher) but settlements come at a later stage in the litigation when more costs have been incurred. In Alberta, for example, settlement rates for private mediations and for JDR are at similar levels (75% for private mediation and 73-83% for JDR).<sup>18</sup>

Policy questions continue around issues such as whether mediation throughout Ontario should be mandatory but the utility, acceptability and availability of mediation are well-settled questions in Ontario. Alberta has just joined Ontario as a regime with mandatory civil mediation. Mediation is useful, accepted and clearly available. Even outside mandatory mediation jurisdictions in Ontario, it would be rare for a personal injury case, for example, not to be mediated.

OMMP has been in place in Ontario for more than 12 years and is successfully resolving a significant number of cases (likely closer to 70-80% of cases based on anecdotal evidence) at a relatively early stage in litigation. The OMMP mediation program has evolved through the years, being honed by at least two major rule and practice direction revisions. If JDR is brought formally into the Ontario justice system, it must be done in a way that respects and meshes appropriately with the OMMP program and does not negatively affect OMMP successes.

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<sup>18</sup> Evaluation of the Civil Mediation Program, Court of Queen's Bench of Alberta, Final Report by PRA Inc. May 31, 2007. See also Rooke study, *supra*.