



# Court of Appeal XX Anniversary of Judicial Mediation

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# Alberta Initiatives

- JDR (Judicial Dispute Resolution) has been active in the Court of Queen's Bench since the early 1980s
- Became more formalized in the 1990s and early 2000s
- Flourished from 2006 to 2014 (“Golden Age”)
- Cut back in the fall of 2014 because of shortage of resources

# JDR Process in Alberta

- Rules of Court leave process largely to agreement of parties (Rule 4.18)
- Documents resulting from the JDR are limited (Rule 4.19)
- Confidentiality and privilege are ensured except for purpose of proving fact of a settlement or terms of a settlement (Rule 4.20)
- JDR Judge barred from further processes, is bound by confidentiality and is neither competent nor compellable to testify (Rule 4.21)

# JDRs in Alberta

- Basically a free-for-all (subject to ethical obligations)
- Full court day allotted, more if ok'd by CJ or ACJ
- Judges get 2 days of reading for 3 JDRs
- 75 judges; 75 styles
- Highly evaluative (mini-trials) to facilitative (mediation style)
- Everything in between
- Very judge specific: some caucus, others won't; some record the proceedings, some don't; some will JDR with self-reps, others won't
- And some will do binding JDR's, others won't

# Alberta JDRs

- JDR judge selected by parties
- Availability goes on-line when our schedules are set (3 times per year)
- January to June 2019 will be available sometime around the beginning of December
- Priority given to JDRs previously bumped because of judge's unavailability, previously wait-listed, then to family matters involving children that are ready for trial, then family matters involving children, then to everything else

# Result of cutback

- 2014 trial wait times for even long trials a year or less
- Could get a trial sooner than a JDR but lawyers waited for a better result
- 2018 trial wait times for week long trial 1 year
- For longer trials 2 to 3 years (Calgary booking 2022)
- Back to where we were in 2007!
- Civil litigation largely going elsewhere

# Now...

- 2 judges per week in Edmonton and Calgary doing 3 JDRs each
- Before 2015, Edmonton had 3 judges per week; Calgary 4
- Plans: Edmonton to go to 4 and Calgary to 5
- But Jordan, resource issues from Province and Federal Government changed capacity
- Mandatory ADR suspended in 2013 (demand outstripped supply)

# Binding JDRs

- Demand largely from family bar
- Often where parties can't afford a trial
- Or can't afford to wait for trial
- Not unprecedented – related to the Mediation-Arbitration model in ADR
- Appointed decision-maker mediates; if parties are unable to come to agreement, they arbitrate the issues or remaining issues



# Binding JDRs

- Experience (from ACJ Rooke's thesis) show settlement rate of binding JDRs lower than with ordinary ones, but still majority settle without judge having to decide
- Most judges will try to resolve without deciding, but ultimately make a binding decision on the issues the parties haven't been able to agree on themselves

# Binding JDRs

- Very popular in family cases
- Process generally results in a final order or judgment with no appeal or judicial review
- With corollary relief, variation requires change in circumstances; property is done
- Many counsel not interested in non-binding process – extra layer of time and expense
- All judges do JDR; can opt out of binding and set parameters (only \$, no self reps)

# Binding JDRs

- Upside for parties: quicker, cheaper result
- Download problem on judge to solve
- Better chance of salvaging relationship than following adversarial trial
- Downside: no testimony, no cross-examination
- No appeal or review so no way of addressing perceived errors by JDR judge

# Binding JDRs

- Issues for Judge:
- Lots of work (10 day trial in 1 day)
- Risk of complaint about conduct magnified because of binding nature
- Sometimes end up case-managing a process where initial information incomplete or unhelpful on an issue to be resolved
- Ethical issues: caucusing, scant evidence

# Early Intervention Case Conferences

- 2017 initiative
- Pilot project in Edmonton
- Chambers judges direct parties to participate
- Two ways: a matter appears in chambers and is headed towards a “special” application (1 or 2 hour hearing with briefs)
- Or a matter is set for a special and the parties seek interim relief in chambers

# EICC

- Chambers judge directs participation; parties will have a 60-90 minute conference usually within a month (vs special application wait times of up to a year)
- Parties prepare a “Case Conference Summary Form” which briefly describes what they’re looking for and why, and what their settlement position is
- No briefs or arguments

# EICC

- Mixture of represented parties, self-represented parties
- Heard by judge on volunteer roster (more senior judges with greater family law experience and appetite)
- Judge's preparation limited to review of parties' summaries and file (if requested)
- Set for an hour (judge has 30 minutes in between)

# EICC

- Non-binding
- Confidential and without prejudice
- Only orders that result are the ones the parties agree to
- Judge is facilitator but expected to be somewhat evaluative
- If unsuccessful, matter goes to a special
- Reasonable success rate especially on procedural matters
- Somewhat like Ontario pretrial conference process, but without the work expected of counsel



# Future

- Perhaps restore mandatory ADR
- With greater resources, start adding more judges to the weekly schedule to get back up to previous levels of 9-12 per week in each major city
- Unified Family Court on its way (2019?)
- Reforming Family Justice initiative progressing