

The Practice of ADR as It Has Evolved in Canada

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I. WHAT IS ADR

For most people ADR stands for "alternative dispute resolution," its acronymic alternative of course being ESOL, the existing system of litigation. In other words, it is about the resolution of disputes by some means other than a trial and a judgment.¹

There are in reality only two ways to decide "any" dispute, short of force of arms : agreement among the disputants or a decision by a non-disputant that binds the disputants. Neither of these is new. "Settlement" has always been part of the trial process. It is a very recent development for litigants to think of a trial as the natural and normal outcome of a dispute going to a lawyer. Indeed, lawyers of my vintage instead think of a trial as merely a failed effort at settlement.

So what is new? Two things : "zealotry" and "technique."

A. Zealotry

Some claim that ADR is some kind of new wonderful way to make people nicer and society wonderful. Proposals for ADR are usually accompanied by an attack on the Courts. There is a professor at almost every law school these days preaching the ADR gospel. It has become the fashion of the decade, and a great way to get money from government. (In the case of the BCICAC it cost several million dollars to discover that ADR is just another business, not a matter of social reform).

There is a tendency in the literature toward exaggerated claims about the benefits of ADR. And there is a tendency to minimize the complexity and difficulty of any settlement. And a tendency to blame lawyers for the lack of a settlement. But most of the old bad stuff, about how lawyers and judges impede settlements that are just waiting to happen if only the wonderfully reasonable clients could talk to each other, has foundered on the shoals of experience. Settlements are always tough and often impossible. That said, a technique to minimize confrontation can have a positive result.

1. Some say ADR includes trials, so they speak of not "alternative" dispute resolution but rather "appropriate" dispute resolution.

Let me give you an example of the triumph of ideology over reality. The Government of B.C. "requires" arbitration for every contract it makes, and demands this term in the contract. The result is that the government has deprived itself of FDR, free dispute resolution, by the Courts. Both government and the other party now must pay for a private judge. How did that advance justice? And I am willing to bet that, at the time, it was justified as a cost-saving device.

The explanation for all this turmoil is, of course, that litigation is both *slow* and *expensive*.² The last time that zealots tried to deal with this phenomenon they invented the administrative tribunal, which has proved in practice to be too often slower and more expensive than traditional litigation.

Now the zealots have turned to negotiated settlement and private judging, and claim they have invented the brave new world. It is really rather tiresome, and it is a little embarrassing for me to be a part of this brave new world. These are all examples of OSR, overly-simplistic reform.

Mediation has been successful in matrimonial cases, and is increasingly popular in commercial cases. But it is not appropriate in every case. Sometimes a client wants a solid legal precedent about an issue as a guide to future relations. For that one must go to Court. Sometimes, the client seeks vindication, as when the other side is lying or calling the client a liar. That case must go to Court. And, sometimes, the client wants ongoing relief, as when a woman makes a claim of espousal abuse. Only a judge can give effective relief. But when the claim at root is about money, then the client may well accept that it is time to make a sensible business decision about the suit. That is what drives settlements.

Nevertheless, it must be admitted that resort to litigation is today quite beyond the purse of the middle class let alone the blue collar worker.

One result is an effort in the marketplace to establish new forms of dispute resolution. I was reading yesterday of one typical effort. This is by USPS, the United States Postal Service. The acronym is REDRESS. That stands for Resolve Employment Disputes Reach Equitable Solutions Swiftly. A pilot program has been in place since 1994. This is an entirely voluntary outside neutral mediation program for Equal Employment Opportunity disputes. Many similar efforts are underway in many businesses.

2. When ADR (Any Dispute Resolution) — including courts — lacks *credibility*, they tend to lose business. How to lose credibility? Notably, by *Partiality*, *Incompetence*, or *Inaccessibility*. By and large, Canadian courts are OK on the first two, but in trouble from time to time on the third.

B. Technique

There are thousands of techniques to settle a dispute. One can flip a coin, cut a card, ask a rabbi. Or dicker. Or ask a third party to step in and suggest a settlement. Or ask a third party to step in and decide. Or Government can step in and require that a third party decide.

Today, the three techniques most people have in mind when they speak of ADR are arbitration, interests-based mediation, and mini-trials.

There are some interesting new developments in this area I shall review quickly for you.

1. Arbitration

We all know what we want in a third-party decider : *Impartiality, Competence, and Accessibility*. Some zealots say the Courts fail on all three, but for most people the Courts fail only on the third. So they look for new techniques for judging. Most courts recently have been resourceful in this area, offering summary proceedings, case management, and other techniques to get matters on for decision quickly and cheaply.

But private judging, i.e. arbitration, has always been an option. It offers the disputants three things : judge-picking, privacy, and control over the procedure. Some disputants want to go further on one or all of these three factors than a Court will or should go. So they rent a judge. Maybe they save money and time, but that is I suggest not an obvious result.

a) Privacy

News media do not often invade a civil courtroom, but they have a right to do so in most cases.

b) Judge-Picking

Sometimes both parties are worried about the get-what-comes-out-the-door system. And so worried that they may agree on an alternative. If cost is not a factor, they often agree on a 3 — person panel.

c) Control Over Procedure

— *Simplified Pre-hearing process*. Because the disputants decide on the procedure, they can agree on abbreviated discoveries, and abbreviated production. Curiously, they can also agree to that in traditional process, but are perhaps more likely to do it in a process to which they have made a commitment.

- *Simplified Hearing Process.* The parties may similarly agree to not strictly follow the rules of evidence, and let the decision-maker sort wheat from chaff. There is a sort of convention that there will not be objections, and that sort of argument. Curiously, with arguably less assurance about the partiality and competence question, the parties lean to greater trust in the adjudicator. But consensual arbitration permits the disputants to decide what the rules shall be.
- *Limited Review.* Most Arbitration Acts permit appeals only from questions of law. And thus it is thought that there is more limited review than from QB. I am not persuaded this is so, although I did argue in a decision that consensual arbitration should attract limited review because it is merely a form of settlement, and the Courts should respect the views of the disputants. But there certainly is limited review from interlocutory decisions.
- *Time Control.* I have seen no data to establish that consensual arbitration is quicker, although intuitively one would agree that simplified pretrial procedure and a casual trial procedure might produce time savings. But the process lets the disputants control time : they decide when the hearing will start and when it will end.
- *Summary process.* Most arbitrations involve commercial disputes, and most of them in turn do not involve the credibility of witnesses. They turn on non-credibility disputes, like lease payment calculations or the interpretation of terms in a contract or the assessment of damages. Often, the parties agree on a "quick-and-dirty" arbitration, where there are no witnesses and the materials are put forward informally by the parties.

2. Recent Developments

Arbitration now is more common than 10 years ago. But I am not sure how long the popularity will last. Disputes about procedure, particularly pre-hearing disclosure, are commonplace. I even know of a case where one party sought a summary dismissal of a claim from an arbitrator. The pre-hearing procedures in the Rules of Court are, contrary to what the zealots say, not merely means for lawyers to run up bills. They reflect real issues that arise in a complicated dispute. This is not to say that the Rules are perfect, just that rules are inevitable and so are some of these preliminary skirmishes.

In my view, the efforts of the Courts to improve trial and pre-trial procedures will largely abate the call for arbitration.

There always will, however, be cases where the parties find the three advantages of arbitration out-weigh the advantages of litigation. I suspect, so long as Courts strive to be efficient and effective, the demand for arbitration, contrary to the claims of the zealots, will continue to be marginal.

One view, in these days of stringent public finance, is that some litigants should no longer receive free, or better tax-subsidized, justice. I think, for example, that litigants who would take longer than a month to resolve their disputes should have to pay for the process.

Another development is that alternative judges, i.e. arbitrators, have had problems with partiality and competence. It is not just retired judges who are in the business, and some charlatans and incompetents are said to be preying upon the disputants. Efforts have been made to licence arbitrators. In Alberta, arbitrators can seek a charter from AIMS. In the USA, lawyer-arbitrators have established SPIDR and that organization is attempting to get started in Canada.

The new techniques then are successful to the extent that they offer some assurance of impartiality, competence, and accessibility. For obvious reasons, senior lawyers and retired judges can make a fair claim on credibility.

In an interesting experiment, the Supreme Court of British Columbia started this year what is called familiarly the "bumpoff" program, where arbitration is offered to cases not reached on the trial list.

II. INTERESTS-BASED MEDIATION

I have achieved the age where I can now say, "in my day." When I was young, I dreaded those words. But here we go: "In my day," lawyers could settle disputes by one on one negotiation. They did not see any need for the assistance of a third party.

The reality was, however, that it was tough in Alberta in those days to complete a trial without a heavy-handed attempt at mediation by the trial judge. Obviously, the judges of those days thought we did not settle enough cases. With many judges, one could expect a call into the retiring room either before or soon after the start of the case. Most of us did not like that, and thought judges should shut up and listen to the case. When my generation got on the trial bench, we mostly tried to do that. But I have the impression that the pendulum is swinging again the other way.

It is yet unclear why younger lawyers today are so keen on mediation. Some say they are too aggressive to settle on their own. Perhaps. Some say that they are strangers to each other. Perhaps. Some say that clients no longer trust lawyers, and therefore the client must participate more directly in the negotiation, and this new form of negotiation needs a referee. I suspect this last may be a large part of it. I am not sure why they like the intervention of a third party, preferably somebody with grey hair. But they do.

Having embarked on a negotiation process that involves the client, and a third-party, then certain new techniques have proven to be effective.

The mediator ideally has skills in getting people to talk, and understands attitudes. The mediator does not simply pronounce a "judgement" after hearing two submissions, but rather talks with the parties, with patience and empathy. She encourages them to express their views, even if they are not legally relevant.

This also is called win-win settlement, where the mediator does not attempt to suggest the "right" decision, but rather attempts to draw out from the parties a solution with which they will be content. This search for common ground is the real purpose of the process. The mediator actively seeks this solution, and does not merely play the role of passive judge. The best mediators not only understand the clients but also suggest imaginative possibilities to solve their problems.

In "pure" interests-based mediation, the mediator need not be a lawyer, and need not know what is the right answer. Indeed, some say that just gets in the way. In my view, once the legal rights of a party are accepted as a legitimate — and perhaps key — aspect of the business or commercial interest of the party, then assistance of a lawyer at a mediation becomes critical, and a mediator not trained and experienced in law is a distinct disadvantage. Indeed, it is my view that, to be effective, I must be "au courant" of all the factual and legal issues of the cases before the mediation begins.

Mediation techniques include many other things. A good mediator should know something about "Reality Therapy," which is a specific method of counselling which assists individual to direct their own lives by making more effective choices, to develop the creativity to cope with stress in relationships, personal, professional and societal. And about PSM. This, the "Problem-Solving Model," which a recent email correspondent summarized thus :

- Identification of the underlying needs of both parties (economic, legal, social, psychological, ethical/moral needs)
- Creation of possible solutions
 - a) by meeting the need directly
 - b) by expanding the available resources
- c) Solutions need not be just or fair (except when it is one party's need) <=> Fisher/Ury/Patton : objective criteria are necessary
 - d) The negotiation itself can be divided into two phases
 - Planning : like Fisher/Ury/Patton's Brainstorming process
 - a) Execution : the negotiator gives reasons for his suggested solution; instead of refusing the solutions of the other side he shows the advantages and disadvantages of each solution.
- Problems of the PSM in praxis :
 - a) Inequality of power
 - b) Definite rulings are required
 - c) Negotiator' personality

One often-employed technique is the "breakout" or caucus. This is a private meeting between the mediator and one party and his lawyer. Often a mediator will engage in shuttle diplomacy, carrying messages back and forth between the two groups. Often too, the mediator will, in these confidential caucuses, challenge the position taken by the party in terms of likely result at trial.

The successful mediator learns that there are usually three stumbling blocks to a settlement : "business interest," "personal interest," and the "lawyer's opinion." Consideration of all three is wrapped up in the term "interests-based" mediation.

A. Business Interest

There is often some part of the position of the other side that a disputant simply cannot afford to agree to. It will often involve a risk of a bad precedent, i.e admitting that a product or procedure is unsuitable. Similarly, it may involve a term in a contract in general use. In other words, there is a legitimate concern that reaches beyond the immediate dispute. Any settlement must move around this concern.

B. Personal Interest

There is often some part of the position of the other side that offers some personal outrage or embarrassment or similar emotional response to the disputant. The mediator must seek a settlement that assuages these feelings. Often the trick is to have the person express them. Thus, a great part of the process is to draw out the disputants in a non-threatening atmosphere.

C. Legal Interest

A disputant does not come to the table in a vacuum. She will have a lawyer's opinion about likely success at the default arbitration, a trial in Court. The settlement must be fairly close to that view, or that view must be shaken.

The criticism of some interests-based mediation is that it ignores this last factor, despite the fact that it may be the most dominant in the mind of the disputant. The most successful mediation relies heavily on interests-based techniques but also addresses the legal issues. The legal issues are not given paramountcy, but the mediator must be able and competent to address them in a timely and low-keyed fashion. It is for this reason that lawyers (and retired or active judges) can be the most successful mediators. But, because interests-based mediation is not necessarily part of the lawyers (or judges) skills, new skills must be learned by the successful mediator.

This is a very brief overview of what is rapidly becoming a new profession. One can take courses to learn mediation skills. The best is offered at Harvard Law School.

III. MEDIATION ADVANTAGES

1. **Quickest and cheapest ADR.** Hours rather than days, days rather than weeks.
2. **Client Satisfaction.** Clients make a contribution to the interests-based process and think they are a part of the settlement. It is for them truly a win.
3. **A cathartic.** The process drives the disgruntled client who has not before been inclined to give even a little.
4. **Minimal risk.** If there is no settlement, little is lost. The proceeding is of course without prejudice. And trial preparation is usually easier.
5. **Privacy.** This is particularly important in case involving claims against professionals, or business secrets.

IV. RECENT DEVELOPMENTS

Lawyers and clients increasingly resort in Canada to mediated negotiation in an attempt to resolve a dispute that is headed for trial.

Many lawyers have decided to limit their practice to work as mediators. They have active CBA subsections in many parts of the country. ADR Chambers, an association of over 30 retired judges, has facilities in Toronto and elsewhere. Some retired judges, like George Adams, prefer to work alone.

Many law groups offer mediation facilities to their members. The Law Society has mediation rooms in Calgary and the Decore Centre has rooms at the University of Alberta, managed by AAMS.

I mentioned the formation of professional groups, like the AAMS. In addition the Canadian Foundation for Dispute Resolution is widely supported and has as its objective the promotion of the resolution of commercial disputes by mediation. I should also draw to your attention AMIC, the Association and Mediation Institute of Canada, which offers mediators and arbitrators a chance to meet with their colleagues.

In B.C. the BCICAC has recently been re-established. It offers facilitation but not facilities.

In Alberta, the Court of Queen's Bench has started what they call JDR; Judicial Dispute Resolution. Ken Moore reports he assigns two judges each week to this task, and will add a third next year. He told me that this was to meet a demand from lawyers for the judicial perspective on a case. Many of the Q.B., judges doing mediation in Alberta have taken special training, and conduct interests-based mediations.

V. MINI-TRIALS

At a "pure" mini-trial the parties usually agree to no witnesses, but put in summary form to the mediator the case for each side. The mediator then offers her "independent opinion" who is likely to win the case if it goes to trial. This opinion can involve points of law, points of evidence, and matters of judgment. The parties then go away with the opinion as an aid to settlement. At ADR Chambers we call this a "neutral evaluation," as distinguished from a legal opinion. The difference is that we actually judge the case, although the judgment does not bind.

Note that this may require that the mediator be a member of the legal profession, because the parties pay her for an opinion about the law. The general view is that mediation and arbitration are not "practice of law," but this form may be.

Parties can of course agree in advance to be bound by the mediator's opinion, and thus the matter becomes one of arbitration. In some simple or 'abstracted' disputes, as for example about the meaning of a term in a contract, parties may agree to be bound by the view of the mediator, but yet call this arbitration a mini-trial.

A pure mini-trial is of course "rights-based," not interests-based, by which is meant that the mediator merely says who is likely to win at law. In other words, it is an opinion who has "right" on his side. It is criticised for this. Like a trial or any arbitration, it is win-lose. Somebody wins, somebody loses. But for certain kinds of case, I think the lawyers can soon negotiate a settlement after getting the neutral evaluation.

In the United States, the term mini-trial can describe a somewhat different procedure. The "judges" on the mini-trial can be senior executives from both sides, perhaps chaired by an independent person who makes legal rulings. The panel, after a hearing, will then attempt to agree on a decision.