

# ADR - BRANCH REPORTS

November 5, 2005

## Quebec :

En septembre , nous avons offert une conférence donnée par Me Olivier Després intitulée " Mise à jour de la jurisprudence en matière d'arbitrage conventionnel et regards et perspectives sur l'évolution des pouvoirs d'ordonnance des tribunaux d'arbitrage"

Le 9 novembre, nous offrons une activité intitulée " Comment résoudre les impasses en médiation, atelier de perfectionnement avec simulations de médiation". Cette activité consiste en trois scénarios de médiation qui résultent en une impasse. Nous avons 2 avocats qui vont jouer le rôle des avocats et 2 non-juristes qui vont jouer le rôle des parties . Me Hélène de Kovachich va agir à titre de médiateur et Me Jean-François Roberge, professeur à l'Université de Sherbrooke , va faire une capsule après chaque scénario pour expliquer ce qui a causé l'impasse et comment la résoudre. Le juge Jean Guibault va présenter les faits qui sont à la base des scénarios et va également donner ses commentaires après chaque scénario .

Au printemps prochain, nous envisageons donner une conférence sur la responsabilité des avocats en médiation. Notre conférencier sera Me John-Nicolas Morello de Via Rail. Il n'y a pas beaucoup de jurisprudence au Québec sur ce sujet. Par conséquent , les commentaires et suggestions venant des membres des autres provinces seraient appréciés .

Nous envisageons également donner une 2e conférence au printemps portant sur l'éventail des moyens de prévention et de règlement des différends.

Salutations amicales,

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## Manitoba:

There are no particularly significant developments in ADR in Manitoba in the past year. Mediation Services continues to offer a wide array of trainings and services to the community. The JADR program continues to expand in the civil litigation sphere channelling litigants into half and full day sessions with the judges of the Queen's Bench Division.

In the family law arena Manitoba continues to make extensive use of the government funded mediation services offered through Family Conciliation for both custody/access issues and the Comprehensive Mediation project that covers custody/access and the financial issues of property and support.

Collaborative practice is becoming more widely known to the public. Its greatest impact is its influence on the conduct of mainstream family law negotiation. Four way meetings are becoming standard and letters are more often carefully worded to avoid escalating conflict.

Legal Aid has introduced a compulsory streaming into their incarnation of the collaborative process for all those cases not involving violence. They report that their model has been very successful.

Case conferencing has been extended to all family law cases in the Winnipeg judicial district and the number of contested interim motions has plummeted.

There does appear to be a movement toward the development of arbitration in family law, though it is too early to say whether this will constitute a trend or not. There have also been a few cases in the past six months of full day case conferencing sessions involving shuttle negotiations conducted by family law judges. Again, it is too early to tell whether these instances are indicative of a trend or not, but due to the satisfaction expressed by the clients, lawyers and judges involved we do expect to see more of this process in the near future.

The law school continues to emphasize training in alternative dispute resolution processes.

The Manitoba ADR and Family Law subsections are planning a joint one day conference with the Arbitration and Mediation Institute of Manitoba for the 3rd or 4th Saturday in March, 2006. This will be attached to a three day skill development workshop with Gord Sloane to include effective communication in conflict situations. The intention is to attract those who want to develop skills that will be useful in both mediation and arbitration settings.

Patricia Lane  
Taylor, McCaffrey LLP,  
Manitoba

## **Alberta :**

### **A. QUEEN'S BENCH MEDIATION PROGRAM**

Alberta now has a Civil Mediation Program in the Court of Queen's Bench. This is a two year pilot project currently being offered in the Judicial Districts of Edmonton and Lethbridge. The program applies to non-family civil actions commenced at the Court of Queen's Bench level.

Parties interested in entering into this program have to file a Request to Mediate at the Court inviting the opposing party to proceed to mediation provided certain conditions have been met:

- The action was commenced on or after September 1, 2004;
- Affidavits of Records of all parties have been filed and served;
- No Certificate of Readiness has been filed; and
- The action pertains to a civil, non-family matter.

Once a Request to Mediate has been filed and served, the opposing party must within 30 days file and serve a Response to Request to Mediate. The responding party indicates whether they are in agreement with proceeding to mediation or indicates that they do not wish to proceed to mediation and state the reasons why.

If both parties are in agreement in proceeding to mediation, the next step is to choose a mediator. Mediators are chosen from a mediation roster or the parties may use their own mediator.

In the event the opposing party does not wish to mediate, the Mediation Coordinator of the program has a Situation Assessment Meeting (SAM) with the parties. The Practice Note for this program grants Mediation Coordinators the authority to make a determination as to whether parties should proceed to mediation or not. The SAM meeting offers parties an opportunity to discuss where they are at in the litigation process, obtain information about mediation and other forms of alternative dispute resolution. Any party dissatisfied with a decision of the Mediation Coordinator may apply to a Justice of the Queen's Bench of Alberta on notice within 15 days.

### **B. SMALL CLAIMS CIVIL MEDIATION PROGRAM**

The Small Claims Civil Mediation Program is very successful in Alberta and has been in operation now for a few years. Participation is mandatory after the pleadings have been filed.

### **C. CASES:**

In ***J.W. Abernathy Management & Consulting v. 705589 Alberta Ltd. [2005] A.J. #370 (C.A.)*** the Alberta Court of Appeal recently had to rule upon a Judicial Dispute Resolution which was binding upon the parties. The Appellant, who was sued by the Respondent, agreed to participate in a Judicial Dispute Resolution (JDR) to resolve a dispute. The parties took it one step further and agreed that if they were unable to negotiate a settlement, they would invite the JDR Judge to make a decision that would be binding on them. When the JDR proceeded, certain matters were not settled and the Judge provided his opinion. The Appellant refused to implement the settlement and argued before the court that aspects of the Queen's Bench JDR process were illegal and that the JDR Judge's participation in a "binding" JDR violated Section 56(1) of the Judge's Act, R.S.C. 1985, c. J-1.

The Court held that the JDR Judge did not exceed his Jurisdiction nor are Binding JDR's prohibited by the Judge's Act. The parties clearly contemplated some disagreement about the terms of the settlement and developed their own mechanism for resolving the dispute.

## **British Columbia :**

The following are the ADR items of note in BC over the past year

1. There have been significant changes to Small Claims Court Rules that include:
  - a. Increased the jurisdictional limit from \$10,000 to \$25,000;
  - b. Added a "Notice to Mediate" provision for claims between \$10,000 and \$25,000 – this new rule is in addition to the existing rule that provides free mediation for claims under \$10,000.
2. Child Protection Mediation has been enormously successful in BC and there is work being done now to develop a practicum program for child protection mediators.
3. The BC Mediator Roster Society has almost 200 mediators on its civil roster and approximately 30 on its family roster.
4. The Court Mediation Program continues (more than 7000 mediations; 300 graduates to March 2005) with very high satisfaction levels and settlement rates well in excess of 50% overall.
5. The Family Mediation Practicum Pilot Project continues (under the BC Dispute Resolution Practicum Society) – over 20 mediators have completed the program.
6. Collaborative family law continues to grow. There was huge support expressed for both mediation and collaborative law processes in the "Report of the Family Law Working Group to the Justice Review Task Force". The Justice Review was commissioned by our provincial government. The family law working group would like to see the court system overhauled to shift to more cooperative approaches and provide more resources for ADR processes. They say that there have been a number of ADR processes introduced into the court rules (such as Judicial Case Conferences, Case Conferences, and Family Case Conferences – with judges attempting to "mediate" resolutions), but these are all "add ons" to a fundamentally adversarial framework. They recommend that cases be managed to "settlement" instead of being managed to "trial", and that consensual dispute resolution processes should be made the presumptive approach. They recommend such things as mandatory mediation (with appropriate safeguards re: urgency, power or safety issues), and mandatory Offers to Settle.
7. There is a pilot project occurring in Kelowna BC entitled: "Meaningful Child Participation in BC Family Court Processes". The goal is to obtain (at low cost) a brief "views of the child" report. A list of "interviewing" lawyers and counsellors has been assembled. The interviewers would meet with the child for approximately one hour and ask the child non-leading questions aimed at obtaining the child's perspective. The interviewers are to simply "parrot back" the child's response, they are not to provide any assessment. Although this is not strictly speaking an ADR initiative at the moment, if this project is successful in the court stream, I expect the service will be expanded and made available to non-litigated custody/access dispute resolution.

Respectfully submitted November 3, 2005,

**Nancy Johnson**

Family Lawyer and Mediator

## **Newfoundland and Labrador :**

Things are steadily improving on the ADR scene in this province. The “mandatory” court appointment mediation system has led to some cases which would not otherwise be dealt with at mediation being sent there. There have been very few of these, but those that have been referred have had a very good success rate. It is fair to say that the system is not being fully utilized and the court system continues to rely heavily on the judge run settlement conferences. The success of those proceedings is dependent to a large degree on the competence of the presiding judge in such matters. Some are very good – some are not.

Training of mediators continues to be a troublesome problem. While there seems to be quite a few who would like to pursue mediation as a career path, there are no facilities available for training. The University of Windsor has traveling road show that plays here occasionally but the cost is prohibitive to many who, for the most part, are young lawyers. There is a free training service provided by Community Mediation Services which is generally poorly attended and runs infrequently. By all accounts it is good value for the money. Even when people are fortunate enough to obtain the classroom training, there is rarely an opportunity for them to get hands-on experience which is vital if they are to be successful.

It is fair to say, however, that the trend is up with respect to the usage of mediation as an integral part of the justice system. The undersigned has developed a practice which is now almost completely composed of various forms of alternate dispute resolution. The bulk of this work is in the area of arbitration, mainly in labour matters, but there is a growing segment of mediation. These mediation files are largely personal injury/insurance related but there is a strong and growing trend toward the use of mediation in resolving grievances which would otherwise be dealt with in arbitration. Many of the labour matters are disposed of in a med/arb type setting where the mediator issues recommendations which, by agreement in advance by the Parties, are binding on the Parties and not subject to appeal or judicial review. There are some undesirable aspects to this method but it has for the most part been very successful in dealing with a tremendous backlog of outstanding grievances which might not otherwise be dealt with prior to the death or retirement of the grievor.

The field of arbitration in labour relations matters is also a very busy sector. The mandatory provisions in the Labour Relations Act requiring settlement of disputes by arbitration has been a very important factor in this situation. Some further refinements however, such as the mandatory use of mediation at certain defined times in the resolution process, would add immensely to the efficiency of the system.

There is also beginning to be an awareness of the practice of collaborative practice which I had heard of for the first time at last years’ meeting of the national section. There is a CLE upcoming within the next couple of weeks to try to stimulate some interest and to provide some awareness of the practice. Who knows where it will go.

I look forward to seeing you all on the weekend.

Regards  
John Clarke