SUBMISSION TO THE OBA TASKFORCE ON JUDICIAL MEDIATION

FROM THE ADR SECTION OF THE OBA

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Ontario has one of the most well-developed and unique court-annexed mediation systems in the world as the result of more than 13 years of mandatory mediation for civil cases. The Ontario Mandatory Mediation Program (OMMP) has generated arguably the most thriving and experienced non-judicial mediation sector in the world and is focused on promoting early resolution of claims before court costs unduly impede settlement, as opposed to most judicial mediation systems which target late stage settlement at the pre-trial stage or later.

Under Rules 24.1 and 75.1 of the Rules of Civil Procedure (RCP), 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).[1] 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. Provinces like B.C. have also emulated the Ontario approach by moving away from a judicially controlled and delivered form of mediation to a private sector model that works well within their existing court system.

The Ontario system of mandatory mediation has been very successful at promoting early resolution of cases at higher degrees of client and lawyer satisfaction than traditional litigation. The OMMP provides a valuable and skilled service, helping resolve disputes well prior to trial. In light of the success of the OMMP, the ADR section does not believe that Ontario has significant need of a formal system of judicial mediation at this time, but we recognize, as have the other OBA sections, that judges are in fact mediating/facilitating cases in a variety of ad hoc ways in Ontario already. Such forms include pre-trials, chambers meetings, court-mandated mediation as part of case management practices etc.

Given the very different nature of a typical OMMP mediation and a mediation by a judge, we recommend distinguishing the two processes by referring to the judicial variant of the

[1] 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 See Fig. 5.1B.

process as Judicial Dispute Resolution (JDR) and to the judge in such a session as a Judicial Facilitator (JF).

The concerns raised about the current ad hoc approach include:

- Inconsistent quality of judicial mediation services
- Inconsistent approaches to mediation (and to pre-trials)
- Coercive (banging heads) tendencies amongst some judges
- Inconsistent availability of such services
- Lack of party input on the nature and quality of such processes

The OBA is currently looking at whether and how to formalize the addition of JDR to the Ontario Court's suite of ADR processes in order to:

- Further improve accessibility to justice by:
  - Providing additional low cost dispute resolution methods
- Better manage claims by unrepresented parties
- Assist in resolution of cases that are deadlocked due to
  - unreasonable parties
  - parties that want their "day in court" in some form
  - parties with very different views of the legal merits of their case
  - parties that want a credible neutral opinion of the merits of their case

The ADR Section of the OBA is not opposed to the addition of a formalized form of JDR in an appropriate manner that supplements and does not negate the value of the successful existing OMMP system. In fact, we recommend the expansion of the OMMP system province-wide as part of any suggested changes, partnering a thriving private sector mediation program (which has negligible costs for the court system and a focus on early resolution) with any recommended form of JDR (primarily focused on late stage "tough" cases that have not resolved earlier through the OMMP mediation process). The most effective and practical place to integrate JDR into the Ontario justice system would be as a form of post pre-trial ADR process by judicial facilitator (JF) available on consent to parties who believe another attempt at mediation with judicial assistance would break their deadlock prior to trial.

Ideally, any JDR program should be designed so that it has no negative impact on the existing and very successful OMMP processes and the skilled private mediation sector in Ontario.

With respect to the form of such a JDR process, we make specific recommendations in relation to various crucial aspects of JDR below.

Q.1 If Judicial Mediation In Ontario Is To Be Formally Recognized And Regulated, What Is The OBA ADR Section's Perspective On Its Desired Form?

Members of many OBA sections are of the view that JDR would be a useful addition to the Ontario Court's processes for two primary reasons. First, JDR may assist cases in which early private mediation has not worked and the parties are so divided on legal issues that it may take someone with a judge's credibility and legal knowledge to break the deadlock. Some parties may benefit from external neutral evaluation of the merits of the claim. Second, some self-represented parties strongly desire their "day in court" and a judicial mediation may provide that day in court while promoting resolution without the time and expense of a full trial.

There is also a general desire to enhance access to mediation in a way that is affordable to parties.

a) Training and Qualifications of Judicial Mediators

It is well recognized that the quality of the mediator has a significant impact on the degree of success in a mediation and the quality of the result for the parties. Judges are nominated for and selected for judicial office based on a skill set that does not include their skill as a mediator. Given that parties using a judicial facilitator (JF) may not even have chosen their JF (see below), it is very important that any JF meet certain minimum standards in order to ensure that they uphold the reputation of the judicial system. There are two strong reasons why the bar for such standards should be set at a high level, substantially higher than those for a typical private sector mediator:

1. Any new process must maintain respect for the judiciary and court system as a whole;
2. JDR practices should not detract from the positive image of mediation amongst parties that has grown from the last 15 years of mediation in Ontario.

One appropriate measure of the criteria associated with minimum qualification standards is the standards used by the ADR Institute of Canada for its Chartered Mediator designation. These criteria, some of which may need adaptation for application to judges, include:

1. Minimum of 80 hours of mediation training from a recognized provider and a further 100 hours of training related to dispute resolution
2. References from mediation clients (not necessarily applicable to judges)
3. Experience co-mediating (as a lead) or mediating a minimum of 15 mediations
4. Relevant education and experience

5. Independent assessment of skills by observation of a role play (approximately 1.5 hours)
6. Errors and Omissions insurance of at least 1 million dollars
7. A commitment to ongoing mediation education and training (100 points every 3 years)
8. A pledge to be bound by the Institute's Code of Ethics and Code of Conduct

Most mediation programs have similar component requirements (see the OMMP requirement for example).

For judges in Ontario, the OBA ADR Section recommends that all judges who are allowed to mediate in Ontario should receive substantial and appropriate communication, negotiation and mediation training (with a focus on interest-based and appropriate evaluative mediation styles, and careful distinction between the two) before acting as mediators. Given that judges are heavily trained and experienced in a rights-based decision-making model of operation, there is substantial training required to equip them with a full understanding of and appreciation for a more interest-based facilitative problem solving approach to facilitating resolutions on consent. Such training should ideally be delivered by a reputable Ontario provider of negotiation and mediation training and should include:

1. At least 180 hours of appropriate training;
2. More than 50% Role plays/demonstrations, with appropriate coaching and feedback after all mediation role plays.

Judges should also be required to:
1. Undergo a minimum of 3 mediation observations and 5 co-mediations with an experienced mediator prior to mediating on their own.
2. Undergo and pass an independent skills assessment (using a role play scenario) of their mediation skills.
3. Agree to a mediation code of conduct/code of ethics appropriate to the system and their role. That code of conduct may need to address some specific issues set out below.
4. Address the concern for E&O coverage

The ADR training of Ontario judiciary should be planned to promote consistency of dispute resolution philosophy and approaches across the judiciary (while allowing for the necessary variation from case to case).

b) Timing of JDR

The existing OMMP system is focused on encouraging early resolution of claims, ideally within 180 days of the filing of the statement of claim (see the 180 day rule in Rule 24.1 of the RCP). As a result, the OBA ADR Section recommends that JDR be limited to usage as a late stage tool available closer to trial (available only after an earlier attempt at OMMP mediation has failed). Other provinces (Alberta, Nova Scotia, Manitoba) have been successfully using JDR primarily as a dispute resolution tool in the late stages of litigation.

Late in litigation (pre-trial or after) is also the most appropriate and effective time for an evaluative approach. After all discoveries are completed and information has been shared, there is a firm evidential basis on each side for any judicial evaluation that may occur during JDR (one of the primary benefits of JDR). Mediating too soon with an evaluative JF risks an evaluation of the merits on an unsound evidentiary basis, which may lock the parties into their positions, or push parties to agree to a resolution that is not ultimately fair. Without that firm evidentiary basis, we also suspect that many judges would be reluctant to make evaluations, thereby losing the very value sought from the process if that is a major goal.

We therefore recommend that a prerequisite for JDR be that parties have already undergone an OMMP mediation in OMMP jurisdictions.

Ideally, we recommend that the most appropriate place to add a JDR process to the existing court system is after the parties have undergone a traditional (non-settlement based) pre-trial. In the alternative, JDR could be inserted very easily by simply expanding the nature and forms of existing pre-trial procedure. Such a change would be administratively straightforward, adding a dispute resolution tool without disrupting the successful flow of the existing OMMP and pre-trial processes.

As a cautionary note, in non-OMMP jurisdictions (like northern Ontario), introducing JDR may stifle the growth of a responsive and capable private mediation sector.

Such a JDR process should be allotted at least 3 hours of scheduled time, ideally face to face, with the parties as well as counsel in attendance. Experience in the OMMP and in pre-trials has shown that effective facilitation requires significantly more than an hour to complete. There must also be adequate preparation time for any JF to ensure that he/she understands the file issues and can assist the parties in a meaningful way, particularly when an evaluative style is to be used. Most jurisdictions that have adopted JDR have allotted an appropriate amount of time for the settlement facilitation process- 3 hours or more. Trying to squeeze a meaningful settlement discussion into a one hour pre-trial is not effective and often leads to frustrating strong arm techniques by a judge “pushing” settlement through, rather than truly exploring the parties’ perspectives and settlement options. An Alberta study of JDR showed that, for parties to feel satisfied with JDR, they

need the time to digest the issues and perspectives (including that of the judge) before they get to a consensual result.

OMMP experience is clear that, unless the parties with appropriate authority as well as counsel are present at a mediation, the chances of a successful resolution are significantly reduced. Any JDR rule should therefore require that the parties with full authority be present at the mediation along with counsel, unless the court orders otherwise. Exceptions should be made in the case of insurance cases in which the authority figure for the purpose of settlement is an insurer instead of the named party. We also recommend that a simple phone request system be established for the Court to deal with any requests to depart from the general rule (where a party is out of country etc.), such requests to be handled at the reasonable discretion of the Court.

Most experienced mediators share the view that face to face mediation is far more effective than phone mediation. As a result, the default approach should be face to face JDR procedures, rather than phone or video procedures, though allowance can be made for such alternate approaches where circumstances require.

c) Form of JDR

If JDR is to be offered, it would be useful to consider offering parties some choices in terms of the procedures. Such choices could include:

1. Facilitative Mediation
2. Evaluative Mediation
3. Other appropriate procedures

d) Degree of Voluntariness

Given the power and image of judges and the system they represent, JFs are far more likely to be perceived as coercive by parties than non-judicial mediators, whether or not the JF intends such an effect (see the detailed discussion of coercion risks below). As a result, the OBA ADR Section recommends that JDR should only be used in cases where all parties consent.

The Court should also consider whether the parties may obtain a JF as of right, or whether the Court or an individual JF may refuse to conduct JDR in a given case. In a case involving sexual harassment, for example, there may be concerns as to whether the case should be facilitated by a JF at all. A gateway or screening function may need to be considered.

e) Appointment to JF Roster

No judge should be forced to conduct a JDR. Any JF should be a willing participant in the process, otherwise the quality and reputation of the process may be impaired. Appointment to a JF roster should be voluntary on the part of the judges involved. JFs should be comfortable with their role and the mediation process. Rather than forcing all judges to facilitate, whether they want to or not, a special JF roster should be formed, consisting of judges who are interested in and comfortable with the idea of mediation and facilitation, and who meet the qualification criteria previously set out above.

f) Selection of JDR Mediator

Party control of the selection of JFs should be fostered to the extent possible. A number of studies have suggested that mediation processes are somewhat more likely to result in resolution when the parties have selected their own mediator and have bought into the process.

Assuming that all parties have agreed to JDR, the parties should have the ability to select a JF of their choice from the JF roster, subject to an appropriate and fair administrative mechanism for appointment of a JF from the roster when the parties do not agree. For example, if the parties agree on a mediator, then the mediator of their choice would be appointed. If the parties do not agree, they can each submit a list of 3-5 names from the JF roster that they would accept. If the list overlaps, then a JF from the overlap will be appointed, subject to availability. If there is no overlap on the submitted lists, then the administrator in charge of the JF roster would have the right to appoint an available JF from the roster. Parties could also be given the right to submit a list of JFs that should not be appointed.

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).

g) Cost of JDR

An overarching goal under this heading is to improve affordable access to justice. In addressing that goal, we must be aware of the actual costs of JDR, as well as the "cost/fee" to the parties.

There is a concern that, if it is cheaper for parties to use a judge, many may choose for financial reasons to mediate with a judge even though they recognize that a private mediator may be a better choice for their dispute. This may be less of a risk with corporate clients and insurers, but will certainly be a factor for independent litigants who do not have deep pockets. This concern is addressed by making JDR a late stage addition to the litigation process.

The OBA ADR Section recommends that, as long as JDR is a late stage process, JDR be available at no cost to the parties, so that every effort may be made to prevent unnecessary trials.

To ensure that unrepresented or low income parties can still have access to affordable mediation even at earlier stages in the litigation process, we note:

a) There are still many capable and experienced mediators available at roster rates on the OMMP roster (the cost of which is only $300 plus HST per party, and which fee is often paid by the deeper pocket client as part of the settlement); and

b) Pro Bono Law Ontario, with cooperation from the OBA's ADR section, is currently creating a roster of mediators prepared to mediate on a pro bono basis in regards to cases with low income unrepresented parties. Some of the mediators on that roster are expected to be experienced counsel and ex-judges. Such a program should be actively supported by the Ontario Bar.

h) Conflict of Interest

Any judge who mediates/facilitates on a given court file should not be involved in hearing any subsequent motions or trial of the issues on that court file.

i) Confidentiality

JDR should be subject to a typical strict rule of mediation confidentiality (see Ontario *Commercial Mediation Act, 2010* for an example). Given the close work and social contact between judges, JFs should be trained on the importance of maintaining that confidentiality with respect to all other judges, one or more of who will likely hear motions and/or trial of the issues.

j) Compellability of Judicial Mediators as Witnesses

Generally speaking, mediation agreements and mediation rules indicate that information created for and exchanged during the mediation process is privileged and cannot be introduced in evidence by a Court. Some courts around the world and in Ontario have ordered production of information from mediations, usually limited to the context of determining a) whether a settlement was reached, and/or b) what the terms of the settlement were. One form of such potential evidence is testimony and notes from the mediator. Given the special nature of the judicial process and the need to protect the reputation of the administration of justice, we recommend considering a blanket legislative protection to prevent JFs from having to give testimony. On a practical level, there would rarely be a need to hear from the JF since one or more of the parties would have been involved in any of the discussions relevant to those issues in any case.

k) Availability of JDR to Self Represented Litigants

The OBA ADR Section has no objection to JDR being made available to self-represented litigants subject to the other recommendations.

When facilitating with self-represented parties, JFs need to be especially cautious about their role in the process. The line between providing legal information and legal advice is a very blurry one. When information is coming from a judge, in particular, it will be given very strong weight by the parties (see the concerns about potential inadvertent coercion below).

l) Pilot Program and Evaluation Studies- JDR and OMMP

The OBA ADR Section recommends that JDR be implemented first as a pilot program, which should be reviewed before expansion. No system is perfect when first introduced, so a system of monitoring, feedback and evaluation should be built into the pilot program. A report should be produced, based on that feedback and evaluation, prior to any permanent change of the system by the courts or the government.

We also recommend that up to date statistics on settlement rates under the OMMP be undertaken at the same time for comparison.

Such reports will provide accurate (rather than anecdotal) evidence of the current strengths and state of both private mediation and JDR in Ontario. The JDR study in particular will provide invaluable feedback to the Court on how any such pilot program of JDR should evolve to maximize its quality and effectiveness.

m) Nature of JDR Process

Subject to explicit party elections about the process (see above), the exact nature of how a given JDR session unfolds is best left to the discretion of the JF and the parties. No two disputes are alike.

For example, the choice to use or not use caucusing in a given JDR session should be left to the parties and the JF. Given the value of caucusing, however, we do recommend that all JFs on the JDR roster be willing to use caucusing.

n) Information Available to Parties About JDR and Mediation

Parties and their counsel should be made aware of the nature of the ADR process choices available to them in the court system through appropriate education.

o) Risk of Coercion

A guiding principle in most mediation codes of conduct is respect for self-determination of the parties (see part III of the CBAO Model Code of Conduct for mediators).

> Self-determination is the right of parties in a mediation to make their own voluntary and non-coerced decisions regarding the possible resolution of any issue in dispute. It is a fundamental principle of mediation which mediators shall respect and encourage.

Mediation is a non-binding process, and resolutions should be based on rational informed consent of the parties, not on coercion (conscious or otherwise) by a mediator. There is risk of such coercion by mediators in any setting, including private mediation, since mediators are often seen by parties as senior respected credible professionals, with expertise in the subject area of the dispute.

In the case of JDR, the risk of overt and unintended coercion ("strong-arming") is even greater because of the rights-based focus of judicial training and experience, and the very high degree of respect and credibility enjoyed by the judiciary. As stated by one judge undergoing mediation training, the mental process he found himself unconsciously using was to hear the parties, decide who was "right" and then lean on the other party to do the right thing. When a JF in a JDR session leans too hard, it may amount to inappropriate coercion, particularly when the judge's view is not (as at trial) based on a solid complete foundation of tested evidence and procedural fairness.

However JDR is structured, the judiciary must be alive to this concern about potential coercion, which should be addressed in the JDR Code of Conduct. The desire to encourage settlement should not supplant the parties' right to self-determination in the mediation process. This concern does not mean that JFs should not evaluate parties' claims, but if going down that road, they should do so in appropriate ways that do not amount to simply pressuring a deep pocket to settle or telling parties what they must do. Good mediators encourage parties to self-evaluate their choices at and away from the table, particularly in caucus.

If the parties actively want a direct opinion on the potential result at trial, it could be open to the parties to choose, on consent, a mini trial (or a med-arb style hybrid) as opposed to a JDR session. They can also request such an opinion during a mediation.

p) Caucusing

Caucusing is an effective tool in mediations to:

- Allow parties to vent without inflaming issues
- Promote full and frank discussions and disclosure of perspectives
- Let mediators have tough conversations about issues, conduct etc. without compromising neutrality or embarrassing any party
- Help parties evaluate their alternative choices (B.A.T.N.A.- Best Alternative to a Negotiated Agreement) in a safe environment with the assistance of the mediator
- Prevent disruptive and inflammatory comments/behaviour

Some judges are on record as being concerned about the use of caucus for several valid reasons. One is a concern about how to use information given to the JF in confidence (i.e., not shared with or tested by the other party). Unlike in open court where all parties are generally aware of and can test all information shared with the judge, mediation may require confidences to be kept. The other concern relates to the image of the Court as a neutral body. The concern is that a judge meeting in private with the other side may be seen as taking sides or having a hidden agenda.

The concerns are valid ones, but they are shared by mediators of all stripes, and most practicing mediators still use caucuses when the value outweighs the potential costs.

We see no policy reason warranting a rule that JFs cannot caucus. If anything, given the high value of caucusing as a tool, all JFs on the JDR roster should, in principle, be willing to use caucuses if appropriate or if desired by the parties. See also the concerns set out below about using evaluative methods without caucusing. The choice as to whether or not, when and how to caucus *in a given case* should then be left to the discretion of the parties and the mediator in that case.

Judges do, however, need to be aware of the above-noted concerns and guide themselves and their actions in light of their special role in the justice system (see comments in the next section below). Mediation of tough cases and evaluative methods are strongly enhanced by the use of caucusing, therefore a judge

q) Reputation of the Court and Justice System

Maintaining and fostering respect for the Court and the administration of justice is a goal that must be kept in mind in whatever process is designed.

r) Immunity from Liability

The court will need to address whether judicial immunity extends to actions of a judge in a JDR process. If not, JFs should be required to have adequate E&O insurance in excess of 1 Million Dollars.

s) Evaluative Methods

Given the primary purpose behind judicial facilitation (to break deadlocks with the credibility and legal knowledge of judges), it is likely that most parties choosing JDR will want an evaluative style of facilitation. A study of Alberta's JDR process showed that most parties using JDR were frustrated by 2 kinds of JF, the ones that gave no opinion on the merits of the case, and those who were too direct and forceful too early in giving such an opinion. Somewhere between those two poles is where parties had the highest satisfaction with judges mediating.

Evaluative approaches can assist parties to make rational informed choices, by helping them rationally assess not only what is on the table, but what awaits them outside if they do not settle. The challenge is to assist parties to analyze those choices without simply telling them. Effective evaluative mediators tend not to simply announce in joint session who is likely to win, and who is likely to lose at trial. Such a win-lose pronouncement tends to lock the "winner" into a firmer position and to push the "loser" into a stronger defensive pushback.

Good facilitators help the parties to assess their choices in caucus, using a variety of evaluative tools. In caucus, the strengths and weaknesses of a case can be reviewed in frank detail, without causing the parties to lock in or to worry about having vulnerabilities exposed to the other party by the facilitator.

We strongly recommend that, as part of their mediation training, any JFs receive training on both interest-based mediation and appropriate methods for evaluative mediation.

t) Expanding OMMP

In order to maximize the value of Ontario's limited judicial resources, and to promote consistency of application of the Rules across Ontario, we recommend the expansion of OMMP across Ontario. Such a step would pair OMMP (with its focus on early resolution of the bulk of cases at negligible cost to the province) with JDR (with a focus on late stage resolution of remaining cases).

The ADR Section looks forward to seeing the first draft of the Task Force's report and recommendations.

Submitted by the ADR Section

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