

Thursday May 16, 2013

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Chairs, Task Force on Judicial Dispute Resolution

Below are the comments of the OBA ADR section to the draft report of the JDR Taskforce. These comments are as a result of extensive deliberation by our Executive in addition to seeking input from our members.

1) Expansion of the Ontario Mandatory Mediation Program

We are pleased the Task Force has recognized the contribution of the OMMP to the judicial system in Ontario. However the OMMP only applies to three judicial centers; Toronto, Ottawa and Windsor. These three cities constitute only 29% of the population of Ontario, thus 71% of Ontario residents are not covered by the OMMP.

There were valid historical reasons why the OMMP was initially restricted to these three population centers, as the OMMP was initially tied to Case Management. However even though Case Management was effectively abolished a number of years ago, there has been no move to expand the OMMP throughout Ontario.

This has resulted in a two-tier justice system in Ontario; those regions with Mandatory Mediation and those without.

Given the undisputed success of the OMMP, we believe it makes sense to expand the OMMP throughout the Province at the same time as a more regulated form of JDR is introduced throughout Ontario.

The Task Force report endorses the concept of the integration of the OMMP with JDR, however this concept will only work if this dual system of ADR is brought in on a province-wide basis. Otherwise, we will continue to under service 71% of the population of Ontario.

We therefore urge the Task Force to propose that the OMMP be expanded throughout the province concurrent with the introduction of JDR.

2) Gatekeeper Function

In the event that that JDR is introduced, we feel strongly the judiciary take an active “gatekeeper” function to insure limited JDR resources are used for only the most appropriate cases.

We generally agree with the comments made by the Task Force at page 24 of the Report where they list five reasons why JDR may be effective.

However the issue of who decides when JDR will be offered must also be dealt with.

Our proposal is that there be two gatekeeper aspects to JDR:

- 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, exactly the sort of cases where JDR is likely to be the most effective. We do not believe it makes economic sense to use valuable public resources to help settle the garden-variety type of cases that are currently being handled very effectively by the mediation community.
- b) Rule 24.1 .05 currently provides “ The court may make an order on a party’s motion exempting the action of this Rule “

In other words, if the parties want to skip the OMMP mediation and go right to JDR, they would simply bring a motion before a judge or a Master, and after explaining to the judge or Master why they wanted to have JDR instead of mediation and confirming that all parties consent, the Judge or Master could order the case be exempted from the OMMP and referred to JDR. Therefore the Court, and not the parties alone, would decide which dispute resolution system was most appropriate.

Without this Court gatekeeper function, there will be a natural tendency among many litigants to opt for the “free” JDR (free to the parties but expensive to the government) without giving mediation a fair chance. This could easily overwhelm the judiciary, thereby causing even more systemic delays in actually having a case go to trial. It could also undermine the successful OMMP program that we all so proud of.

3) Cost of Mediation to the Parties

There is no doubt that there is a cost to mediation. However that cost consists of a number of factors:

- a) The cost of the lawyer to prepare the mediation brief and meet with his or her client.
- b) The cost of the lawyer to attend the mediation.

- c) The cost to the client of attending the mediation, that is, his or her own costs such as travel, lost wages, lost opportunity, and wages paid to employees attending the mediation.
- d) 50% of the cost of the mediator.

In a JDR, all of the costs referred to above remain the same, except for item "d", above. We predict in a JDR world these other costs would likely increase for the following reasons:

- a) Given the busy and unpredictable schedules of judges, there will undoubtedly be many occasions when the JDR session has to be cancelled because the selected judge will be unavailable due to other commitments. As the parties pre-select the judge, it would not be possible for the Court to simply substitute another judge. In the private mediation Bar, we have no other commitments other than the scheduled mediation. Any private mediator who has a reputation of cancelling pre arranged mediation dates would quickly lose favor with the Bar. Lawyers and clients cancel or adjourn mediations all the time, but not mediators. Needless to say, every adjournment adds considerable costs to the litigants.
- b) Many mediations briefs we receive are informally written. Mediators do not critique the lawyer on the quality of the other's brief. In many cases, there is no need for an in depth mediation brief so the lawyers may do a simple brief or no brief at all.

However in a JDR we believe the lawyers would feel a need to file a more formal and comprehensive brief, whether or not the case called for it. This is because lawyers quite naturally care very much what a judge thinks of them. Moreover some judges feel that it is quite appropriate for them to openly voice their opinion regarding the quality of the material filed before them.

This increased effort to produce extensive briefs will drive up the cost to the litigants much more than the savings from not having to pay the mediator directly.

4) Cost of Mediation v Cost of JDR

The Task Force focuses again on the apparent advantage of JDR over private mediation in that the parties do not have to pay for JDR.

However let us look at the real cost of mediators in the OMMP.

Under the terms of Mediators' Fees provisions of Rule 24.1, the cost to a party of the mediator (in a two party case) is \$300 for a three-hour mediation with a roster mediator. This fee has not changed since 1998.

In Toronto alone there are hundreds of mediators on the roster list who are qualified to perform mediations. All roster mediators are obligated to only charge roster rates if they perform a mediation under the OMMP, whether they are chosen by the Local Mediation Coordinator or chosen directly by the parties.

Many years ago a study indicated the average legal fees per party of a matter that went to trial in Superior Court were approximately \$25,000 per party. This would mean that to a litigant in the Superior Court, the cost of a Roster mediation would represent only 1.2% of his or her total litigation cost.

We acknowledge that non-roster mediators charge considerably more than roster mediators, just like some lawyers charge \$800 an hour whereby Legal Aid lawyers are paid as little as \$81.44 per hour. All of these lawyers are qualified to practice law and all of the roster mediators are qualified to mediate disputes in the Superior Court.

Moreover, Pro Bono Ontario is just about to announce a mediation program in which financially qualified unrepresented litigants will have access to top line private mediations at absolutely no cost. These experienced mediators are waiving their fees to the unrepresented litigants so they too have access to the same dispute resolution system that all residents of Ontario should have.

Therefore the cost of private mediation vs. JDR is really a red herring because the real extra cost of private mediations can be either minimal or non-existent. In addition, JDR is not free in any sense of the word. If the average JDR takes 3 to 4 hours, then the most a judge could do is two sessions a day. If the average judge is in the courthouse 30 weeks a year (meaning that we are not counting vacations, seminars, holidays and writing time), and makes \$216,000 plus 20% for pension and benefits (\$260,000) then his or daily rate for being in the Courthouse is about \$1,734 per day or \$ 867 per mediation. Remember that a Roster Mediator only gets \$600 total for the same mediation.

So the choice is not between free JDR and expensive mediations. The real choice is between a cost of \$600 to the private litigants vs. \$867 to the public. In these times of fiscal restraint at both the federal and provincial level, it seems unlikely that the government would bring in a system which would cost the public purse hundreds of thousands of dollars when an existing privately funded system already in place satisfies the ADR needs of the communities it serves.

Finally, if the OBA views this as the first submission of two then that assumption should be made explicit in the report and should at least identify the key areas in which further recommendations will likely be necessary.

We thank you for receiving these submissions and we hope you will incorporate them into your final report. If the Task Force has any questions, please feel free to contact me.

Elizabeth A. Hyde

Chair ADR Section