

ADR Requirements in Canadian Rules of Courts

Presented By

Chidinma B. Thompson, Ph.D, FCI Arb.

Partner, Borden Ladner Gervais LLP Calgary, AB Canada

CIArb Americas Conference
Miami, October 7, 2022



Agenda and Disclaimer

1. Mandatory ADR In Canadian Provinces

- Ontario
- Alberta
- Quebec
- Saskatchewan
- Newfoundland & Labrador

2. Voluntary ADR in Canadian Provinces

- Canada (Federal)
- British Columbia
- Manitoba
- New Brunswick
- Nova Scotia
- Prince Edward Island
- Northwest Territories and Nunavut
- Yukon

The content of this presentation is intended to provide general information only, does not purport completeness, and does not constitute legal or other professional advice.

Mandatory ADR in Canadian Provinces

- 20 years – Mediation mandatory in civil litigation proceedings in Toronto, Ottawa and Windsor
 - Ontario Mandatory Mediation Program (“**OMMP**”)
- Rule 24.1 of the [*Rules of Civil Procedure*](#)
 - Exceptions – i.e., Rule 75.1
- Selection of mediator
- Mediation must take place within 180 days of filing of first defense (unless parties agree to postponement)
- 7 days prior to mediation – copy of pleadings, Statement of Issues and all related documentation due

Consequences of Non-Compliance

- Party does not comply with mandatory mediation → certificate of non-compliance and referral to a judge or associate judge

- Rule 2.4.13 → judge may:
 - Convene a case conference under rule 50.13, and may:
 - establish a timetable for the action;
 - strike out any document filed by a party;
 - dismiss the action, if the non-complying party is a plaintiff, or strike out the statement of defence, if that party is a defendant;
 - order a party to pay costs;
 - make any other order that is just.

Case Law – Rule 24.1 – Mandatory Mediation

- [*Owen v Hiebert*](#) (2000), 50 O.R. (3d) 82, 2000 CarswellOnt 1900 (S.C.J.)
 - refusal to exempt party from mandatory mediation despite graphic and troubling nature of case (sexual assault)

- [*Hagel v Giles*](#) (2006), 82 O.R. (3d) 470, 2006 CarswellOnt 5217 (C.A.)
 - The court enforced an oral settlement reached during a mandatory mediation despite the settlement not being reduced to writing under rule 24.1.15(3)

- [*Merrill Lynch Canada Inc v Vacation Properties Time Sharing Inc.*](#) (1999), 37 C.P.C. (4th) 317, 1999 CarswellOnt 1708
 - Defendants who failed to appear for mediation were ordered to pay the plaintiff's costs and the mediator's cancellation fee.

Case Management in ADR in Ontario using Arbitration

- Litigants increasingly adopting case management arbitration as a way to move cases forward
- Case management arbitration → submission of some interim procedural issues to arbitration
 - Courts maintain jurisdiction over the determination of the parties' substantive rights on the merit
 - Interim procedural matters are referred to arbitrator mutually agreed-upon by the parties in order to arrive at a quick resolution
 - Agreement as to scope of the case management - arbitrator's jurisdiction
- Time sensitive case? → Case management arbitration is particularly useful → timely resolution of interim matters, resulting in a faster path to trial on the merits
- *The Advocates' Journal*, Vol. 40, No. 3, Winter 2021, p 10-13

Alberta – *Rules of Court*, Alta Reg 124/2010

- Rule 4.16 to 4.21 of the Alberta [Rules of Court](#) – applies to Court of King’s Bench and Court of Appeal of Alberta
 - Dispute Resolution

- Rule 4.16 → responsibility of the parties to manage their dispute includes in one or more of the following dispute resolution processes:
 - a dispute resolution process in the private or government sectors involving an impartial third person;
 - a Court annexed dispute resolution process;
 - a judicial dispute resolution process described in Rules 4.17 to 4.21
 - any program or process designated by the Court for the purpose of this rule

- Rule 8.4 and 8.5 → no booking of trial date without ADR certificate!

- Rule 4.17 to 4.21 → **Judicial Dispute Resolution**
 - A confidential pre-trial settlement conference led by a Justice of the Court of Queen’s Bench
 - A settlement is only reached if everyone agrees

- Binding JDRs are also available at the Court of King’s Bench
 - The parties agree that the Justice’s opinion will be binding

Case Law – Rule 4.16 to Rule 4.21

- [Rampersaud v Baumgartner](#), 2012 ABQB 673, 2012 CarswellAlta 1913
 - Parties cannot waive the responsibility to participate in dispute resolution process pursuant to Rule 4.16 by consent alone

- [IBM Canada Ltd v Kossovan](#), 2011 ABQB 621, 2011 CarswellAlta 1747
 - Exemptions re judicial dispute resolution addressed on case by case basis; high threshold, exemptions used sparingly

- [Stuve v Stuve](#), 2020 ABCA 467, 2020 CarswellAlta 2461
 - Rule 4.16 does not empower a judge to order private arbitration of disputes without consent of parties

Alberta – Provincial Court - Mediation Rules of the Provincial Court - Civil Division, Alta Reg 271/1997

- Alberta’s Provincial Court → civil cases under \$50,000.00, family, youth and traffic cases
- Once the claims and disputes in provincial court matter have been filed → next steps:
 - Mediation;
 - pre-trial conference; or
 - binding judicial dispute resolution.
 - These options are commonly referred to as “Resolution Tracks”.
- [Mediation Rules of the Provincial Court](#) - Civil Division, Alta Reg 271/1997 (the “**Mediation Rules**”)
- Rule 2(1) → any time after a dispute note is filed, the Court or a mediation coordinator may refer the action for mediation, on giving notice to the parties or their lawyer
- Binding Judicial Dispute Resolution (“**BDJR**”)
 - Conducted by a Judge
 - All parties must consent
 - Judge will give a binding decision → cannot be appealed.

Quebec – *Code of Civil Procedure*, CQLR c C-25.01

- Quebec's [*Code of Civil Procedure*](#), CQLR c C-25.01 (the “**Code**”)
- TITLE I - Principles of Procedure Applicable to Private Dispute Prevention and Resolution Processes → parties **must consider** alternate forms of dispute resolution before referring dispute to Court
- Section 1 of the *Code* → To prevent a potential dispute or resolve an existing one, the parties concerned, by mutual agreement, may opt for a private dispute prevention and resolution process
 - Includes: negotiation, mediation and/ or arbitration
- Sections 2 & 3 of the *Code* → parties who enter into a private dispute prevention and resolution process do so voluntarily, and to choose by consent the neutral third party engaged in the dispute resolution process
- Section 7 of the *Code* → participation in a private dispute prevention and resolution process **other than arbitration** does not entail a waiver of the right to act before the courts.

Saskatchewan – *Queen's Bench Rules*, Sask Q.B. Rules 2013

4-10. Mandatory mediation - [Queen's Bench Rules](#), Sask QB Rules 2013

The parties **shall** participate in mediation as required by *The Queen's Bench Act, 1998* and the regulations made pursuant to that Act

- Section 42(1) of the [Queen's Bench Act](#), 1998 → after the close of pleadings in a contested action → the local registrar of the Dispute Resolution Office in Saskatchewan will contact the parties to initiate scheduling dates for a **mandatory mediation session**
 - Parties must attend the mediation session before taking any further step in the action or matter
- On application by a party, the Court *may* exempt the parties from the requirement to attend mediation, or postpone it until a later step in the action has been completed
- If a resolution is not reached at this time, the Dispute Resolution Office will issue a Certificate of Compliance
 - Parties may then continue the action
- Section 4(3) and 4(5) of *The Queen's Bench Act* → If a party fails to comply with this section → Certificate of Non-Compliance filed with the Court → pleadings of the non-attending party may be struck, among other consequences

Newfoundland & Labrador – *Rules of the Supreme Court*, S.N. 1986, c. 42, Sched. D

- Rule 37A of the [Rules of the Supreme Court](#), SN 1986, c 42, Sched D → Court-ordered **mandatory mediation** in civil (non-family) cases
- Rule 37A.03(1) → After filing of a defence, the Court **may**, on the **application of a party or on its own motion**, order that the parties named in the order participate in mediation in accordance with the provisions of this rule
- Rule 37A.03(2) → in considering whether to exercise the power conferred by paragraph (1), the Court must take account of the relevant circumstances including:
 - the nature of the legal issues raised in the proceeding
 - the number of parties
 - the financial resources of the parties
 - Etc.
- Rule 37A.03(3) → Mediation ordered must commence within 24 days of the date of the mediation order
- Rule 37A.06(10) → if following mediation the proceeding remains unresolved in whole or in part, a party may proceed with the conduct of the proceeding, or that portion of the proceeding that remains unresolved, in the normal course
- Rule 37A.05 → Where party fails to comply with a requirement of mandatory mediation → pleadings may be struck

Voluntary ADR in Canadian Provinces

Canada (Federal) – *The Federal Courts Rules*, SOR 98-106 and Arbitration

- The [*Federal Courts Rules*](#), SOR 98-106
 - Section 324 → a party's request for arbitration under the Code must be brought by an application [Commercial Arbitration Code ("the Code"), a Schedule to the [*Commercial Arbitration Act*](#)]
- "Commercial" should be given "a wide interpretation so as to cover matters arising from all relationships of a commercial nature."
 - Section 386 of *Federal Courts Rules* → the Court may order that a proceeding, or any issue in a proceeding, be referred to a dispute resolution conference
 - 30 days
 - Section 387 → dispute resolution conference conducted by case management judge or prothonotary
 - (a) conduct a mediation
 - (b) conduct an early neutral evaluation of a proceeding ...

British Columbia - *Supreme Court Civil Rules*, B.C. Reg. 168/2009

- [Supreme Court Civil Rules](#), BC Reg 168/2009 (the “**BC Civil Rules**”)
- Rule 9-2 (1) → parties can jointly request a settlement conference, or a judge or master can direct the parties to attend a settlement conference
- Rule 9-2(2) → proceedings at a settlement conference must be recorded, no part of that recording may be made available to or used by any person without court order
- Rule 9-2(3) → a judge who has presided at a settlement conference must not preside at the trial, unless all parties consent
- Rule 5-3(1) → Case Planning Conferences
- Rule 5-3(1)(o) → at a Case Planning Conference, the presiding judge or master may require the parties to attend one or more of:
 - a mediation;
 - a settlement conference; or
 - any other dispute resolution process, and give directions for the conduct of the mediation, settlement conference, or other dispute resolution process

British Columbia – *Notice to Mediate (General) Regulation*, BC Reg 4/2001

- [*Notice to Mediate \(General\) Regulation*](#), B.C. Reg. 4/2001 (“**BC Mediation Regulation**”) → regulation issued pursuant to section 68 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253
 - **Any party to an action can force the other parties to attend a mediation**
- Does not apply to:
 - Family law proceedings
 - Claims for compensation for physical or sexual abuse
 - Etc.
- Section 3 of the *BC Mediation Regulation* → any party to an action may initiate mediation in the action by serving a Notice to Mediate in Form 1 on every other party to that action.
- Section 4 → not more than one mediation may be initiated under the *BC Mediation Regulation* in relation to any action unless the court orders otherwise
- Section 5 → the Notice to Mediate must be served no earlier than 60 days after the filing of the first response to the civil claim in the action, and no later than 120 days before the start of trial
- Section 6 → the participants must jointly appoint a mutually acceptable mediator. If unable to do so ...
- Section 7 → permits any participant to apply to a roster organization for the appointment of a mediator.

British Columbia – Provincial Court – *Small Claims Rules*, B.C. Reg. 261/93

- The Provincial Court of British Columbia
- Rule 7.3 of the [*Small Claims Rules*](#), B.C. Reg. 261/93 → Mediation for Claims Between \$10,000 and \$35,000
 - A party may initiate mediation for a proceeding by filing a Notice to Mediate (Form 29)
 - The parties must jointly appoint a mutually acceptable mediator within 14 days after the Notice to Mediate has been delivered
 - A mediation session must occur within 60 days after the appointment of the mediator
 - Entirely confidential

- By consent → parties may request a Judicially Assisted Dispute Resolution (“**JADR**”) through the Court
 - JADR is similar to mediation, but convened by a judge
 - Non-binding, voluntary process
 - Parties usually represented by counsel

- Voluntary mediation = the norm in NB



- Rule 10 of Nova Scotia’s [*Civil Procedure Rules*](#), NS Civ Pro Rules 2009 → governs **Settlement**
 - Scope of Rule 10 applies to **judge-assisted alternative dispute resolution** that is **voluntary and flexible**
 - If the parties reached agreement for settlement of the proceeding or of a claim, one of them may make a motion for an order giving effect to the agreement

- A motion made under Rule 10 in which it is alleged that an agreement was made in the presence of a settlement conference judge must be heard by the settlement conference judge, unless the judge directs otherwise

- Rule 10.04(5) → a judge may grant an order enforcing a **mediated agreement or an arbitration award** disposing of a claim in a proceeding, if **both** of the following apply:
 - (a) after the proceeding was started, the parties agreed to submit the claim to mediation or arbitration;
 - (b) either the mediated agreement or the award disposes of all claims in the proceeding or the claim is severed under Rule 37 - Consolidation and Separation and the award or mediated agreement disposes of the claim

Nova Scotia – Court of Appeal

- The Court of Appeal of Nova Scotia offers a **Judicial Mediation Program (“JDM”)**
 - Voluntary
 - Available to those who have launched an appeal in a civil or family dispute
 - JDM → under guidance of a Judge
 - Parties may request participation in the judicial mediation program once appeal notice is filed
 - Chambers judge, when setting the appeal down for hearing, may suggest to the parties that they consider participation in a mediation process

- If the parties are unsuccessful in resolving their dispute, the parties will proceed to the appeal with a new presiding judge.

Prince Edward Island – *Rules of Civil Procedure*, P.E.I. Rules

- Dispute Resolution may be achieved by:
 - Negotiation
 - Mediation (purely private)
 - Pre-trial conference

Northwest Territories and Nunavut – *Rules of the Supreme Court of the Northwest Territories*, NWT Reg. 010-96

- Nunavut also uses the [*Rules of the Supreme Court of the Northwest Territories*](#), NWT Reg 010-96 (“**Rules of the Supreme Court**”)
 - The *Nunavut Act*, S.C. 1993, c.28 as amended brought Nunavut into being on April 1,1999 (s.3) and provided, at s.29, that the ordinances of the Northwest Territories and "the laws made under them effective March 31, 1999 will be duplicated for Nunavut."
- Part 19 of the *Rules of the Supreme Court* → Case Management Conferences
- Rule 283 → the Court, on the application of a party or on its own motion, at any stage, may direct counsel or the parties and any parties to appear before a judge for a conference that facilitates settlement of the case and/or expedites the disposition of the action
- Rule 284 → the conference judge may consider and take action with respect to the possibility of settlement of all or any of the issues in the action or proceeding, and the possible use of extrajudicial procedures to resolve the dispute
- Civil claims under \$35,000 → heard by the Territorial Court
 - subject to mandatory mediation with a judge → **Judicial Mediation**
 - Judicial Mediation is the process by which the parties to a claim meet in the presence of a Territorial Court Judge and discuss ways to resolve the claim without the need for a trial
 - Occurs after the plaintiff has filed a Statement of Claim at the Territorial Court Registry and the defendant has filed a Defense. The Clerk of the Territorial Court then sets the date for the Judicial Mediation and notifies the parties

Yukon – *Rules of Court*, Yuk. Reg. O.I.C. 2009/65 (Judicature Act)

- Rule 37 of Yukon’s [Rules of Court](#) → provides for **judicial settlement conference**
 - A party may request a settlement conference; or
 - Judge may order a settlement conference upon his or her own motion

- A settlement conference may consist of:
 - Mediation;
 - one judge's opinion; or
 - with consent of the parties, binding arbitration

CIArb New Arbitrator Program

- CIArb piloting New Arbitrator Program for new Fellows
 - Designed to provide practical experience needed for new arbitrators to enter competitive market
- New Arbitrator Program → bridges the gap between achieving a professional qualification to act as an arbitrator and becoming an established arbitrators eligible to be on the roster of an arbitral institution
- Program may assist in accomplishing both the mandatory and voluntary ADR goals in the various Rules of Court across Canada
- Complements Canadian court systems and supports access to justice, because New Arbitrators provide their services at no charge

Thank You

For more information, contact:

Chidinma B. Thompson, Ph.D, FCI Arb.
Partner, Borden Ladner Gervais LLP, Calgary, AB
Canada

403.232.9666

Cthompson@blg.com

The information contained herein is of a general nature and is not intended to constitute legal advice, a complete statement of the law, or an opinion on any subject. No one should act upon it or refrain from acting without a thorough examination of the law after the facts of a specific situation are considered. You are urged to consult your legal adviser in cases of specific questions or concerns. BLG does not warrant or guarantee the accuracy, currency or completeness of this presentation. No part of this presentation may be reproduced without prior written permission of Borden Ladner Gervais LLP.

© 2018 Borden Ladner Gervais LLP. Borden Ladner Gervais is an Ontario Limited Liability Partnership.

BLG
Borden Ladner Gervais