ALBERTA LAW REFORM INSTITUTE

EDMONTON, ALBERTA

ALBERTA RULES OF COURT PROJECT

Promoting Early Resolution of Disputes by Settlement

Consultation Memorandum No. 12.6

July 2003

THE RULES PROJECT CONSULTATION MEMORANDA

No.	Title	Date of Issue	Date for Comments
12.1	Commencement of Proceedings in Queen's Bench	October 2002	January 31, 2003
12.2	Document Discovery and Examination for Discovery	October 2002	January 31, 2003
12.3	Expert Evidence and "Independent" Medical Examinations	February 2003	May 16, 2003
12.4	Parties	February 2003	June 2, 2003
12.5	Management of Litigation	March 2003	June 30, 2003
12.6	Promoting Early Resolution of Disputes By Settlement	July 2003	November 14, 2003

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ACKNOWLEDGMENTS

This Consultation Memorandum sets out the proposals of the Working Committee with responsibility for the topic of Promoting the Early Resolution of Disputes by Settlement. The Committee's views are communicated in this paper which was written by Margaret A. Shone, one of the Institute's counsel. She was greatly assisted by the members of the Committee, who were generous in the donation of their time and expert knowledge to this project. The members of the Committee are:

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The Hon. Judge Nancy A. Flatters; Provincial Court of Alberta
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PREFACE AND INVITATION TO COMMENT

Comments on the issues raised in this Memorandum should reach the Institute by November 14, 2003.

This consultation memorandum addresses issues concerning the early resolution of disputes by settlement. Having considered case law, comments from the Bar and the Bench, and comparisons with the rules of other jurisdictions, the Committee has identified a number of issues and made preliminary proposals. These proposals are not final recommendations, but proposals which are being put to the legal community for further comment. These proposals will be reviewed once comments on the issues raised in the consultation memorandum are received, and may be revised accordingly. While this consultation memorandum attempts to include a comprehensive list of issues in the areas covered, there may be other issues which have not been, but should be, addressed. Please feel free to provide comments regarding other issues which should be addressed.

We encourage your comments on the issues and the proposals contained herein. You may respond to one, a few or many of the issues addressed. You can reach us with your comments or with questions about this consultation memorandum or the Rules Project on our website, by fax, mail or e-mail to:

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Table of Contents

BACKGROUND

A. The Rules Project

The Alberta Rules of Court govern practice and procedure in the Alberta Court of Queen's Bench and the Alberta Court of Appeal. They may also apply to the Provincial Court of Alberta whenever the *Provincial Court Act* or regulations do not provide for a specific practice or procedure. The Alberta Rules of Court Project (the Rules Project) is a 3-year project which has undertaken a major review of the rules with a view to producing recommendations for a new set of rules by 2004. The Project is funded by the Alberta Law Reform Institute (ALRI), the Alberta Department of Justice, the Law Society of Alberta and the Alberta Law Foundation, and is managed by ALRI. Overall leadership and direction of the Rules Project is the responsibility of the Steering Committee, whose members are:

The Hon. Mr. Justice Neil C. Wittmann (Chair), Court of Appeal of Alberta
The Hon. Judge Allan A. Fradsham, Provincial Court of Alberta
Geoff Ho, Q.C. (Observer), Secretary, Rules of Court Committee
Peter J.M. Lown, Q.C., Director, Alberta Law Reform Institute
The Hon. Justice Eric F. Macklin, Court of Queen's Bench of Alberta
Alan D. Macleod, Q.C., Macleod Dixon
June M. Ross, Q.C., Special Counsel, Alberta Law Reform Institute
Phyllis A. Smith, Q.C., Emery Jamieson LLP
The Hon. Madam Justice Joanne B. Veit, Court of Queen's Bench of Alberta

B. Project Objectives

The Alberta Rules of Court have not been comprehensively revised since 1968, although they have been amended on numerous occasions. The Rules Project will address the need for rewriting that has arisen over the course of this lengthy period. As well, the legal community and the public have raised concerns about timeliness, affordability and complexity of civil court proceedings.[1] Reforms have been adopted

[1] Notable recent civil justice reform projects responding to these concerns include: Ontario Civil Justice Review First Report, *infra* note 17 and Ontario Civil Justice Review, *Civil Justice Review: Supplemental and Final Report* (Toronto: Ontario Civil Justice Review, 1996); The Right Honourable H.S. Woolf,
(continued...)

in Alberta and elsewhere to address these issues. In Alberta, some of these new procedures have been included in amendments to the rules, others have been implemented by other means, such as practice directives. The Rules Project will review and assess reform measures that have been adopted and consider other possible reforms.

The Steering Committee approved four Project Objectives that address both the need for rewriting the rules and reforming, or at least rethinking, practice:

Objective # 1: Maximize the Rules' Clarity
Results will include:

- simplifying complex language
- revising unclear language
- consolidating repetitive provisions
- removing obsolete or spent provisions
- shortening rules where possible

Objective # 2: Maximize the Rules' Useability
Results will include:

- reorganizing the rules according to conceptual categories within a coherent whole
- restructuring the rules so that it is easier to locate relevant provisions on any given topic

Objective # 3: Maximize the Rules' Effectiveness
Results will include:

- updating the rules to reflect modern practices
- pragmatic reforms to enhance the courts' process of justice delivery

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[1] (...continued)
Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales (London: Lord Chancellor's Department, 1995) and The Right Honourable H.S. Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (London: HMSO, 1996) [Woolf Report]; and CBA Task Force Report, *infra* note 2.

- designing the rules so they facilitate the courts' present and future responsiveness to ongoing technological change, foreseeable systems change and user needs

Objective # 4: Maximize the Rules' Advancement of Justice System Objectives
Results will include:

- pragmatic reforms to advance justice system objectives for civil procedure such as fairness, accessibility, timeliness and cost effectiveness

C. Purpose Clause

In all Canadian jurisdictions other than Alberta and Saskatchewan, the rules contain a general principle to the effect that they are to be interpreted liberally to secure the just, most expeditious and least expensive determination of every proceeding on its merits. The Steering Committee views this purpose clause as consistent with the Project Objectives and proposes the inclusion of such a clause in the new rules.

D. Legal Community Consultation

Rules reform should address the needs and concerns of the users of the civil courts. As informed users of the system, and as representatives for public users, lawyers play a particularly essential role in reform. In conducting the Rules Project, ALRI has been looking to the legal community, including both lawyers and judges, to provide the information and views that give the project its direction.

Consultation with the legal community commenced in the fall of 2001 with ALRI presentations to 9 local bar associations across the province. This was followed by 17 meetings with law firms and Canadian Bar Association (CBA) sections in Edmonton and 17 meetings with law firms and CBA sections in Calgary. In addition, there were meetings with Queen's Bench justices and masters, and Provincial Court judges. An Issues Paper describing the Rules Project and seeking input on a range of issues was widely distributed in paper form and made available on the ALRI website and through links on the Law Society of Alberta, Alberta Courts, Alberta Justice and Justice Canada websites. In addition to the input received through consultations with local bar associations, firms and CBA sections, ALRI received 64 letters and e-mails from the legal community with feedback on the Rules Project.

Input from the legal community, whether in the form of letters, e-mails or notes from meetings, was categorized and entered into a central ALRI database. As of September 23, 2002, this database numbered 288 pages and contained 783 comments on different aspects of the civil justice system. This input has been provided to the Rules Project working committees on an ongoing basis, and is summarized in a Report available on our website: <http://law.ualberta.ca/alri/>. Excerpts from the Report are set out under the subheadings below.

1. Objectives and approach of the Rules Project

There was widespread agreement among those who commented on this issue that one of the objectives of the Rules Project should be to make the existing rules shorter, more organized and generally more user friendly. Many respondents also expressed the view that some degree of flexibility and informality needed to be retained in the rules such that counsel may reach agreements as to scheduling and other matters amongst themselves. In a similar vein, while some felt that fairly detailed rules are required, others expressed the view that the rules should stay away from "micro managing" and instead provide broad directions and principles for counsel to abide by.

Another theme running through many of the responses in this area was that the Rules Project should not go too far in trying to rewrite the substance of the rules – if it is not broken, the Project should not try to fix it. Some respondents voiced concerns about the existing rules annotation becoming redundant and procedural points needing to be re-litigated if there are too many significant changes.

Some of the responses raised the issue of implementation of the new rules – it was suggested that the educational and transitional process for the bench and bar should be an important component of the Rules Project.

2. Models from other jurisdictions

Some recommended looking to the British Columbia Rules of Court as a model – the comments reflected the view that these rules are short, effective, well-organized and generally user-friendly. Others thought that the Ontario Rules are a model of good organization. Another model suggested for consideration in framing the new rules was the Code of Professional Conduct. The new rules could be fixed, kept fairly short and

simple, and be amplified by commentaries and rulings which could change from time to time. Finally, some commented that the Federal Court Rules are not a good model.

3. Uniformity

A frequent comment was that it would be useful to make Alberta practice as consistent with other provinces as possible, particularly the western provinces, due to the increase in inter-provincial litigation and the relaxation of mobility rules.

4. Regional concerns

Some respondents commented that the concerns addressed by the rules do not necessarily apply in smaller centres. Sometimes the problems are "big city/big file" problems, but the "solutions" are imposed across the board. Another point raised was that judges visit from Edmonton, Calgary and elsewhere and each judge brings his or her own practice, which complicates practice in the smaller centres.

5. Application and enforcement of the rules

A frequently expressed concern was that the rules are not being consistently applied and enforced. Respondents pointed out that people need to know that the rules will be applied in a predictable manner, that they will be enforced, and that judges will not impose steps not contemplated by the standard rules. Some also commented on the differences in application by clerks in Edmonton and Calgary. There were concerns that clerks are making policy, for example, the "docketing statement" which is required in the Calgary Court of Appeal.

E. Public Consultation

A Public Consultation Paper and Questionnaire was prepared and distributed to organizations with interests that relate to the civil justice system and to the general public. Despite extensive circulation of the Questionnaire, the return rate was disappointing. A total of 98 questionnaires were received by the cutoff date of June 30, 2002. A Public Consultation Paper describing the responses has been prepared and is available on our website: <http://law.ualberta.ca/alri/>. Some of the respondents indicated a willingness to participate in focus groups about rules reform. In the fall of 2002, focus groups were conducted in Edmonton and Calgary. A Report on the Focus Groups has been prepared and is also available on the website.

Overall, survey respondents provided insightful feedback and suggestions on various aspects of the Alberta Rules of Court. While many areas received moderate to relatively high satisfaction scores, the purpose of this study is to focus on areas of improvement, or areas receiving relatively high dissatisfaction ratings. Aspects under study can be grouped into high, medium and low levels of respondent dissatisfaction.

Aspects with **high** levels of dissatisfaction (50% or more of respondents dissatisfied) included:

- cost of legal fees;
- time to resolve legal cases; and
- the overall legal process.

Aspects with **medium** levels of dissatisfaction (40 - 49% of respondents dissatisfied) included:

- court forms;
- information available through the court;
- ease of understanding of the legal process;
- the trial;
- the discovery stage; and
- interlocutory hearing(s).

Aspects with **lower** levels of dissatisfaction (30 - 39% of respondents dissatisfied) included:

- documentation required;
- alternatives to a full trial;
- the pleadings stage; and
- formality of the legal process.

F. Working Committees

Over the course of the Rules Project, working committees have been and will be established to examine particular areas of the rules. The committee structure reflects the "rewriting" and "rethinking" objectives of the Rules Project, and ensures that specialized topics will be reviewed by persons with relevant experience. The General Rules Rewrite Committee and the "Rethink" Committees dealing with Early

Resolution of Disputes, Management of Litigation, and Discovery and Evidence were the first to commence. Specialized areas of practice are now being reviewed by committees dealing with rules relating to the Enforcement of Judgments, Appeals, Costs and other matters.

G. Process for Developing Policy Proposals

The major task for working committees is the development of policy proposals regarding the topics included in their mandates. The committees consider the project objectives and purpose clause, rules from other jurisdictions, research prepared by ALRI counsel, and information received in the consultation process. At the current stage of the Rules Project, the committees are concerned with issues of policy, dealing with civil practice and the content of the rules. Drafting issues, such as the organization and the wording of the rules, will be addressed at a later stage.

H. Committee on Promoting Early Resolution of Disputes

The mandate of the EDR Committee is to explore ways and means of promoting the early resolution of disputes within the framework of the Rules. It includes consideration of the provisions which may assist settlement found in:

Rules

Part 12, 12A (Rules 165-185) Compromise Using Court Process, Money in Court

Part 16 (Rules 219-219.1) Pre-trial Conference (with respect to facilitating settlement in the context of pre-trial conferences)

Practice Notes

Issues relating to facilitating settlement in the context of case management and pre-trial conferences - see Guidelines for Case Management, Civil Practice Note 3, Civil Practice Note 7

Other

Systems of court-connected ADR, JDR and other dispute resolution methods (e.g., collaborative law) - see, e.g., Recommendations 1-3 of the CBA Task Force, Chapter 5.2 of the Ontario Civil Justice Review Supplemental and Final Report

This consultation memorandum is a product of the Committee on Promoting Early Resolution of Disputes (EDR Committee) and forms the basis for consultation on early dispute resolution. The Committee members are:

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The Hon. Judge Nancy A. Flatters; Provincial Court of Alberta
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The Hon. Justice Bonnie L. Rawlins; Court of Queen's Bench of Alberta
Margaret A. Shone; Counsel, Alberta Law Reform Institute
Karen M. Trace; McCuaig Desrochers
Kenneth J. Warren; Gowling Lafleur
Camilla Witt, Q.C.; Solicitor, Government of Alberta, Justice and Attorney General

The Committee met on sixteen occasions in 2002; in 2003, additional communication took place by e-mail and telephone. The Committee reviewed materials provided by ALRI counsel, comments received through Rules of Court consultations, the relevant Rules, current case law, practices and programs in the Court of Queen's Bench and the Provincial Court of Alberta, and recommendations made in studies and reports produced in Alberta and elsewhere.

I. Consultation Memorandum

This consultation memorandum addresses issues concerning the early resolution of disputes by settlement, including the use of court-annexed alternative dispute resolution programs and judicial dispute resolution. The Committee has developed five core premises, identified a number of issues and framed preliminary proposals. The Committee will review its position and make final recommendations once comments on the matters discussed in this consultation memorandum are received. As noted above, the proposals are concerned with issues of policy, not drafting. At a later stage in the Rules Project, draft rules will be circulated for comment. When reviewing the premises, issues and proposals put forth in this consultation memorandum, please feel free to comment on other issues relating to early dispute resolution that need to be addressed.

EXECUTIVE SUMMARY

A. Introduction

This consultation memorandum (CM 12.6) explores ways of promoting the resolution of disputes by settlement at the earliest appropriate opportunity given the nature of the dispute. Promoting the resolution of disputes more quickly by adjudication falls to the Committee on the Management of Litigation (*see* ALRI CM 12.5). Of course, responsibility for the decision to settle a dispute lies with the persons in dispute (the parties), but the civil justice system can play a role by encouraging, or even requiring, the use of processes that hold the potential to eliminate the need to commence or continue litigation.

Only a few of the existing rules are specifically designed to promote the early settlement of disputes (*e.g.*, the formal settlement rules found in Part 12 of the Alberta Rules of Court). Therefore, of necessity, CM 12.6 differs in flavour from those CMs that deal with a known body of rules.

B. Impetus for Change

As a matter of process, greater emphasis is being placed on settlement now than in the past (although the goal of settlement is by no means new to litigation). Programs and services formerly provided only in the private sector are now being annexed to the court, or even offered by the court as part of its service (*e.g.*, judicial dispute resolution in which judges employ ADR techniques in sessions such as judicial mini-trials, early neutral evaluation or settlement conferences). The trend is observed and promoted in the Canadian Bar Association's Report of the *Task Force on Systems of Civil Justice* (CBA Task Force Report) issued in August 1996. Across Canada, government and courts are integrating a variety of innovative dispute resolution techniques with litigation. The Committee on Promoting Early Dispute Resolution (EDR Committee) anticipates that the trend in this direction will continue.

C. Five Core Premises

The EDR Committee's recommendations are built around five core premises (*see* chapter 1). These premises recognize that litigants, the courts and the public all have an interest in, and should strive for, early dispute resolution in order to make

economical use of both private and public resources, save costs, increase litigant satisfaction with the process and results, and enhance overall respect for the administration of justice. The resolution of disputes by settlement between the parties is generally preferable to resolution imposed by court adjudication. However, adjudication may be required to satisfy the interest of the public in the establishment and maintenance of standards for behaviour, the interest of the court in performing its constitutional role in this regard, the interest of the public and the court in making economical use of public resources by moving the litigation along and the interest of the parties in concluding the dispute.

D. Early Settlement Measures

CM 12.6 seeks opinions about what modifications, if any, the civil justice system should make to the existing settlement measures and what settlement measures could usefully be added. Chapter 2 identifies seven early settlement measures that are, or could be, linked to litigation.

Because settlement opportunities do not depend on litigation, but are present from the beginning of a dispute, CM 12.6 explores ways the Alberta Rules of Court (ARC) could promote settlement with a view to averting litigation. Three settlement measures discussed hold potential to promote settlement prior to the commencement of court action:

Party obligation to consider settlement. The EDR Committee recommends that the rules should "impose on all litigants a positive, early and continuing obligation to canvass settlement possibilities and to consider opportunities available to them to participate in non-binding dispute resolution processes" (*see* CBA Task Force Report at 33).

Counsel obligation to pursue settlement. The EDR Committee recommends that the lawyer's obligation to pursue settlement, now embodied in the Law Society of Alberta's *Code of Professional Conduct*, be incorporated into the rules.

Pre-action requirements. Possible pre-action requirements include compelling parties to take part in civil mediation (non-binding ADR) as a condition of using the litigation system, or expecting parties to comply with protocols designed for use in designated types of action, with case management or costs consequences if proceedings are later commenced. The EDR Committee rejects the first

possibility. It seeks comments from the legal profession on the merit of the second possibility, that is, introducing pre-action protocols.

The remaining four measures identified become available after an action has been commenced. They are:

Action protocols. The EDR Committee invites comments from the legal profession about introducing action protocols which build on the concept of pre-action protocols but postpone their operation until after an action has been commenced. Action protocols would operate as incentives or expectations as to good practice to govern what happens in an action after the pleadings are filed.

Formal settlement rules. These rules are found in ARC, Part 12 on "Compromise Using Court Process." The EDR Committee recommends the retention, perhaps with modifications, of the formal settlement rules. Issues relating to the reform of these rules will be discussed in detail in a future CM.

Court-annexed ADR. Three current projects are described (*see* chapter 4). The EDR Committee applauds Alberta Justice and the Court of Queen's Bench for the initiatives they are taking in this direction, and encourages the piloting of innovative, formally evaluated programs. It does not make recommendations for the addition of any particular programs.

Judicial facilitation of settlement. The judicial role in facilitating dispute resolution through settlement has become an integral part of dispute resolution in the Alberta civil justice system (*see* chapter 5). The EDR Committee supports its retention. After examining issues relating to several features of judicial dispute resolution, the EDR Committee asks whether the judicial role should continue to be openly flexible as it is now, or whether the central features should be specified in Rules of Court or practice notes or by statute.

E. Ties With Significant Litigation Events

CM 12.6 explores the question whether any of the settlement measures described should be tied to any particular litigation event or events (*see* chapter 3). It identifies existing or prospective ties with six litigation events: commencement of the action; close of pleadings; filing the affidavits of records; close of discoveries; exchange of expert reports; and filing of certificate of readiness.

After identifying these ties, CM 12.6 poses five reform options: building settlement discussions into the litigation process; sharing information before, or shortly after, commencement of an action; building judicial conferences to explore settlement into the litigation process; making participation in a non-binding dispute resolution process a prerequisite to the next step in litigation; or choosing from a menu of settlement options.

The EDR Committee takes the view that the civil justice system should focus the attention of litigants and counsel on the possibilities of settlement early in the dispute and successively thereafter, as meaningful opportunities present themselves in the litigation process. While it may be desirable to mandate a discussion of settlement possibilities at specific points in the litigation process, the only stage by which the EDR Committee would require the parties to have utilized a settlement measure is before filing a certificate of readiness for trial in order to obtain a trial date. By this time, we would expect the parties to have used at least one settlement measure from a menu of settlement options, built on existing or currently proposed choices. Litigants would be able to be exempted from the requirement in appropriate cases.

The choice of this reform option is based on the Committee's belief that flexibility of approach is desirable and that cases should be looked at on an individual basis from the perspective of their particular facts. It encourages parties and counsel to give serious consideration to the measures available to promote settlement and to use them wisely. The menu could include: civil mediation in a court-annexed program (as proposed by the Alberta Justice Working Committee on Court-annexed Mediation in Civil Matters), settlement facilitation by a judge (judicial ADR) or court-appointed specialist (e.g., Dispute Resolution Officer), use of a private sector ADR process, or service of compromise using court process (if service of compromise does not lead to a settlement, the parties should select one of the other settlement measures on the menu).

The promotion of early dispute resolution by any of the measures discussed should not have the effect of undermining the quality of justice or public confidence in the system.

LIST OF ISSUES

ISSUE No. 8

If judges are to have an active role in facilitating settlement, what provision should be made with respect to:

(a) planning a JDR conference;
(b) initiating a JDR;
(c) requiring participation in a JDR;
(d) exceptions from participation;
(e) timing;
(f) choosing a judge;
(g) attendance of parties, counsel or others;
(h) location;
(i) materials;
(j) protecting the confidentiality of communications;
(k) recording agreement, where reached;
(l) giving effect to an agreement by parties to be bound by the judge's opinion about the likely outcome of the dispute at trial;
(m) recourse with respect to the procedure followed at a JDR or the terms of the settlement;
(n) conferring immunity from suit on the judge conducting the JDR;
(o) disqualifying the judge from presiding at trial? 70

CHAPTER 1. SETTING THE STAGE

A. Outline of Consultation Memorandum

[1] This chapter (chapter 1) sets the perimeters for our discussion of "early dispute resolution" within the context of the ALRI Rules of Court Project. We begin, under heading B, by investigating the meaning of "early dispute resolution." Under heading C, we explore the changing relationship between adversarial litigation and settlement promotion in the civil justice system. We follow this up, under heading D, by presenting five core premises that have guided our discussion. We pause, under heading E, to give some supplementary background information. Here, we draw attention to relevant questions asked and comments received in the legal community and public consultations conducted soon after the Rules Project was launched in the fall of 2001; we lament the shortage of useful statistics on the operation of the civil justice system today; and we underscore the importance of having a shared understanding of the meaning of the terms used in the discussion of this subject.

[2] In chapter 2, we examine various settlement measures now in use, or proposed for use, in the Court of Queen's Bench of Alberta. In chapter 3, we identify points in the litigation process that may provide timely opportunities to explore settlement possibilities, and inquire when the settlement measures identified in chapter 2 would be most effectively utilized. Chapter 4 is devoted to discussion of court-annexed alternative dispute resolution processes (ADR) – court-annexed ADR being one of the settlement measures introduced in chapter 2. Chapter 5 examines the judicial role in settlement – another aspect of settlement identified in chapter 2.

B. Meaning of "Early Dispute Resolution"

1. CBA Task Force Report

[3] In August 1996, the Canadian Bar Association issued the Report of its *Task Force on Systems of Civil Justice* (CBA Task Force Report).[2] This Report encapsulates the state of civil justice systems in the various jurisdictions of Canada at that time. Canada's civil justice systems were in a state of flux; the traditional ways of

[2] Canadian Bar Association, Task Force on Systems of Civil Justice, *Systems of Civil Justice Task Force Report* (Ottawa: Canadian Bar Association, 1996) [CBA Task Force Report].

doing court business were changing. The Task Force recommendations have influenced developments since that time. The Report is significant for the two reasons just described, and because it provides a marker from which to gauge the progress that has been made with civil justice system reform between 1996 and 2003. We make frequent reference to the Task Force Report in this consultation memorandum.

[4] The first recommendation in the CBA Task Force Report emphasizes the desirability of early dispute resolution:[3]

> Recommendation 1:
>
> The Task Force recommends that every jurisdiction
>
> (a) make available as part of the civil justice system opportunities for litigants to use non-binding dispute resolution processes as early as possible in the litigation process and, at a minimum, at or shortly after the close of pleadings and again following completion of examinations for discovery.

This recommendation flows from a "vision of the civil justice system in the twenty-first century" that:[4]

> – is responsive to the needs of users and encourages and values public involvement,
> – provides many options to litigants for dispute resolution,
> – rests within a framework managed by the courts, and
> – provides an incentive structure that rewards early settlement and results in trials being a mechanism of valued but last resort for determining disputes.

Trials continue to be used in the CBA Task Force's "multi-option" vision of the civil justice system, but they become the "last-resort mechanisms of dispute resolution."[5] In addition to trials, various dispute resolution techniques are integrated into the court system. The focus throughout is on early settlement.

[5] As have governments and courts in other jurisdictions, Alberta Justice and the Alberta Court of Queen's Bench have accepted the wisdom of the CBA Task Force's number one recommendation and have been working on its implementation.

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[3] *Ibid.* at 33.

[4] *Ibid.* at 23.

[5] *Ibid.* at 31.

2. Which "disputes"?

[6] The civil justice system offers a means of resolving disputes to parties (individuals, corporate entities, governments) who have not been able to find an answer on their own. In recent decades in our society, it has become commonplace for persons to rely on the courts for dispute resolution. The more litigious a society is, the greater the burden on the courts. The extensive use now being made of the courts has contributed to criticisms relating to costs, delays and inefficiencies in the operation of the civil justice system.

[7] Dispute resolution is one function performed by the courts, but it is not the only function. Other goals are maintaining order in society, setting standards for behaviour and upholding rights.[6] Promoting the resolution of a case by settlement between the parties may not be appropriate for every case. One of the challenges for lawyers and judges lies in distinguishing between those cases that are suitable for settlement and those that appropriately should proceed to adjudication. Decisions about the diversion of cases away from the litigation track leading to trial and into measures designed to promote settlement should be guided by an understanding of the varying roles of the court.

[8] The interest of the civil justice system in the early resolution of disputes extends not only to disputes that have found their way into the litigation system but also to those that appear to be headed toward litigation. One way to relieve the volume of demand made on the courts would be to encourage a popular shift in attitude away from adversarial litigation and toward self-resolution using cooperative problem-solving approaches and, if and as necessary, availing oneself of dispute resolution resources offered in the private sector as an alternative to going to court. That is to say, **our conception of "early" includes resolution before the commencement of**

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[6] Canadian Bar Association, Task Force on Court Reform in Canada, *Court Reform in Canada* (Ottawa: Canadian Bar Association, 1991) at 42-43 [CBA 1991], identifies other goals, which include: (1) as an essential part of government, playing an important part in "maintaining order, upholding the rule of law and preserving public confidence in society's institutions"; (2) the provision of "authoritative statements about the law" which "contribute to the formulation of "background norms" necessary for private ordering" and which "actually form part of the basis upon which individuals plan their affairs and conduct their businesses"; and (3) rights vindication which is "concerned with compliance with legal rules rather than the adjudication of a particular dispute."

litigation, or, stated another way, our conception of "dispute" extends to matters where a statement of claim has not yet been filed.

[9] With respect to the subject matter of the dispute, we note that family law matters have special requirements. Earlier this year, Alberta Justice announced its intention carry out the recommendations of the Unified Family Court Task Force to establish a unified family court in Alberta (Graham Report).[7] In April, an Implementation Steering Committee was named to prepare a detailed implementation plan for a unified court.[8] One of the Implementation Committee's tasks will be to address a "plain-language re-write of the Family Law Rules of Court to provide simpler, more user-friendly procedures." The relationship between the completion of this task and our Rules of Court project is currently under discussion.

3. Why "early"?

[10] Promoting the early resolution of disputes is fundamentally important to maintaining public respect for the civil justice system. According to the CBA Task Force, "[t]he greatest potential for reducing delay and costs lies in early settlement."[9] The earlier in the process settlement occurs, the better for achieving this potential. The CBA Task Force refers to pilot projects and studies demonstrating that "the single most effective way to reduce costs and delay is to achieve early settlement before a case has been committed to extensive pre-trial discovery and other forms of trial preparation."[10] The sooner the dispute is settled, the sooner the need is eliminated for the persons in dispute to continue to draw on court resources, enlist the rules of civil procedure that govern later stages in the litigation and pay lawyers to keep on working.

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[7] Alberta, Unified Family Court Task Force, *Unified Family Court Task Force: Report and Recommendations* (Edmonton: Alberta Justice, 2000) (Chair: Marlene Graham, Q.C., MLA) [Graham Report]. For the Graham Report and addition information on the task force and its public consultation see online: Alberta Justice <http://www.gov.ab.ca/just>.

[8] Alberta Justice, News Release, No. 03-104, "Alberta to establish a Unified Family Court" (23 April 2003) online: Alberta Justice <http://www.gov.ab.ca/just>.

[9] CBA Task Force Report, *supra* note 2 at 42. Litigant dissatisfaction with the process and results, and public loss of confidence in the administration of justice are other sources of concern.

[10] *Ibid.* at 32.

[11] There is no particular magic in the word "early." **In our discussion, "early" simply refers to resolution of the dispute *at the earliest appropriate point in time* short of trial, given the nature of the dispute and other factors, such as the number of parties, the available information, the complexity of the facts, the amount at stake and so forth.**

[12] Early resolution should not diminish the quality of justice. As the CBA stated in its 1991 report on *Court Reform in Canada*, "the prime objective of all reform activity must be to foster and enhance public confidence in the justness of the courts."[11] For this reason, we have tied our concept of "early" to Objective #4 of the Rules Project which is to maximize the rules' advancement of the overarching civil justice system objectives for civil procedure such as fairness, accessibility, timeliness and cost effectiveness.

4. How resolved?

[13] Two avenues to early dispute resolution are apparent. One avenue is by advancing the litigation more quickly toward trial than occurs at present; the other avenue is by promoting settlement at the earliest appropriate opportunity instead of, as happens all too often today, "on the courthouse steps."

[14] Within the overall Rules Project, recommendations for advancing the pace of litigation fall within the mandate of the Committee on the Management of Litigation. That Committee is investigating matters such as caseflow management strategies, case management tools, the use of judicial conferences and other means of achieving early issue identification, narrowing the issues, structuring and generally moving the litigation forward. It has published a separate consultation memorandum on that topic, which is available on the ALRI website.[12]

[15] The focus of the Committee on Promoting Early Dispute Resolution ["EDR Committee"] is on how the civil justice system can better promote early dispute resolution through settlement. Responsibility for the decision to settle a dispute lies

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[11] CBA 1991, *supra* note 6 at 56-57.

[12] Alberta Law Reform Institute, *Management of Litigation* (Consultation Memorandum No. 12.5) (Edmonton: Alberta Law Reform Institute, 2003) [ALRI CM 12.5].

with the persons in dispute (the parties), but the civil justice system can play a role by encouraging, or even requiring, the use of processes aimed at achieving early settlement. As the CBA Task Force observes, the details of the processes can be debated but "the goal of all such processes should be both to provide the opportunity [to resolve the dispute through settlement] as early as possible and to ensure that the opportunity is used by the parties."[13]

[16] As already noted, settlement may occur before litigation has been commenced or while litigation is under way. By way of example, it may be the result of:

– independent initiative taken by the parties, perhaps making use of dispute resolution processes available outside the civil justice system, in the private sector;

–advice given by counsel, who may negotiate a settlement with counsel for the other party or parties to the dispute, or propose the use of a settlement process alternative to litigation;

– the discussion of settlement possibilities, including the possibility of using a settlement process or processes other than litigation, at a meeting with a judge (judicial conference); or

– the facilitation of settlement by a judge, stepping out of the authoritative role associated with adjudication and using non-binding methods of the sort ordinarily offered in the private sector to assist the parties to come to an agreement.

[17] It is readily apparent that the mandates of the EDR Committee and the Management of Litigation Committee are closely related. Some litigation steps perform the dual function of advancing the litigation and promoting settlement. Some settlement processes perform the dual function of promoting settlement and advancing the litigation. Both Committees are aware of the overlap between their mandates, and watchful of the trajectory each is travelling.

5. EDR Committee task

[18] Working within the context of the Rules of Court, the EDR Committee's task is to investigate measures that could help the parties settle their dispute at an early point

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[13] CBA Task Force Report, *supra* note 2 at 32.

in time where settlement is appropriate given the nature of the dispute. The EDR Committee is searching for settlement measures and opportunities that have the potential to eliminate the need to commence or continue litigation.

C. Shifting Relationship Between Litigation and Settlement

1. From past to present

[19] In past times, the civil justice system operated in a manner markedly different from today. The means of dispute resolution provided was court adjudication. In court adjudication, a state-empowered authoritative figure, the judge, hears the evidence presented by the parties (usually through their legal counsel) and makes the decision. The issues are framed in the language of legal specialists, which does not always fit well with the understanding (and lived reality) of the parties to the dispute. The parties are often distanced from the process which is dominated by lawyers and judges.

[20] Formerly, the adversarial nature of the civil justice system was more pronounced than it is today. At worst, some would say, it emphasized "argument, debate, threats, hidden information, deception, lies, persuasion, declarations, and toughness."[14] The rules of civil procedure which structured the litigation process served as "agreed rules of combat" in the "march toward the courthouse."[15] Generally, the judge kept out of the arena of the dispute and let the parties, with the advice of their legal counsel, decide when and how to proceed.[16] Many disputes in litigation were settled but the

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[14] Carrie J. Menkel-Meadow, "When Winning Isn't Everything: The Lawyer as Problem Solver" (1999-2000) 28 Hofstra L. Rev. 905 at 908.

[15] Pauline Tesler, "Collaborative Law: What It Is, and Why Lawyers Need to Know About It" (1999) 13 Am. J. Fam. L. 215 at 218 (online: The Law School Consortium <http://www.lawschoolconsortium.net/teslerarticle.htm>).

[16] In the words of Doris Wilson, Q.C., "Managing Litigation in Canada" (2002) Issue 5 News & Views on Civil Justice Reform 4 at 4:

> In the Canadian civil justice system litigants or their counsel have traditionally controlled the pace of litigation, only involving the court when they perceive a problem with the progress of their case. From the time a Statement of Claim is filed in the justice system, litigants work through the steps of the litigation process – from pleadings, to disclosure, to examination for discovery, through to the trial itself – at their own pace. While all cases make use of some of the court's services and resources, there is no attempt by the justice system to manage the progress of cases.

settlements tended to occur later in the litigation process. As observed in the CBA Task Force Report:[17]

> The fact that a very high percentage of civil cases are settled or abandoned before trial might suggest that many clients can obtain an effective consensual resolution of their disputes; however, the problem identified by the Task Force is that a high percentage of settlements occur very late in the litigation process and therefore do not result in significant savings of time or money for the participants.

[21] In past times, as now, many persons resolved their disputes without going into litigation.[18] Beginning in the 1970's, spurred on by growing dissatisfaction with the high cost, slow pace and adversarial nature of litigation, an era of experimentation with creative new methods of dispute resolution was occurring in the private sector.[19] The experimentation led to the growth of a new body of dispute resolution methods dubbed alternative dispute resolution or ADR. The range of ADR methods is far-reaching, bounded only by the limits of human imagination. The use of one or another or any combination of these private sector settlement processes is a choice lying entirely within the control of the parties. That is to say, the parties define the issues in the dispute, control the choice of the procedure and (generally) agree on the resolution which will be achieved by settlement (although the parties could agree to accept a process such as binding arbitration that has an adjudicative result). A cultural shift

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[17] CBA Task Force Report, *supra* note 2 at 31-32. On the information available to the Task Force it appears that only 3 to 5 per cent of civil actions initiated in the superior courts actually proceed to trial: see Ontario Civil Justice Review, *Civil Justice Review, First Report* (Toronto: Ontario Civil Justice Review, 1995) at 171 [Ontario Civil Justice Review First Report]. Currently, in Alberta, of the 54,000 civil case filings that currently occur annually, only about 1000 civil trials are heard. This figure excludes divorce, adoption, lawyer-client disputes arising from contingency agreements, dependent adult, estate and bankruptcy matters (which, if included, added up to 79,400 filings in 1999-2000). It is consistent with the current ratio of trials to filings in other Canadian and foreign jurisdictions (less that 2%). In short, 98% of cases conclude in some manner before trial. *See* Alberta, Court of Queen's Bench, *Annual Report of the Court of Queen's Bench 1998-1999* (Edmonton: The Court, 1999) [QB Annual Report 1999]; Alberta, Court of Queen's Bench, *Annual Report of the Court of Queen's Bench 1999-2000* (Edmonton: The Court, 2000) [QB Annual Report 1999-2000]; and ALRI CM 12.5, *supra* note 12 at 6, footnote 8.

[18] Indeed, litigation represents merely the tip of the underlying iceberg of disputes: Hazel Genn, *Paths to Justice: What People Do and Think About Going to Law* (Oxford: Hart Publishing, 1999), particularly chapters 4 and 5.

[19] For a fuller account of the ADR movement, *see* Alberta Law Reform Institute, *Dispute Resolution: A Directory of Methods, Projects and Resources* (Research Paper No. 19) (Edmonton: Alberta Law Reform Institute, 1990) at 7-9 [ALRI RP 19]. Significant in the move toward more consensual dispute resolution was the publication of Roger Fisher and William Ury's book, *Getting to Yes: Negotiating Agreement Without Giving In* (New York: Penguin Books, 1983), which has become a classic text.

toward dispute resolution using methods other than court adjudication is in progress. Evidence of this shift is provided by the appearance in the workforce of persons who make a living by helping others resolve disputes (*e.g.*, mediators, arbitrators and others persons with similar skills).

[22] A cultural shift is also in progress in the civil justice system. The CBA Task Force Report signalled a move toward greater management of the judicial process by the courts and an enhanced role for judges in promoting settlement. The trend toward placing greater emphasis on settlement and less reliance on court adjudication to resolve disputes is well under way. Today, more than ever before, society recognizes the advantages of promoting settlement at the earliest time appropriate to the nature and circumstances of the dispute. The existing civil justice system offers a range of measures that promote settlement, and new measures are being introduced. Programs and services formerly provided only in the private sector are now being annexed to the court, or even offered by the court as part of its service. The practices and expectations of litigants, lawyers, judges and court staff with respect to the civil justice system are changing. As the CBA Task Force has asserted:[20]

> The change in approach urged by the Task Force begins with a new focus on dispute resolution as the goal and a corresponding reduction in the antagonistic nature of the litigation process. For some lawyers this will mean a fundamental re-orientation away from fighting the other side to solving a common problem.

In short, a significant cultural shift is taking place and the promotion of settlement in litigation is a major component of that shift.

2. Positioning settlement alternatives

[23] Over the years, different meanings have been attributed to the acronym "ADR." In 1990, ALRI gave wide scope to the concept of ADR, describing it as encompassing: processes for dispute resolution that are truly alternative to the existing judicial system; the idea of providing better access to justice by removing the barriers that block or impede the access of some persons to the courts for dispute resolution; and processes that modify or improve upon practices and procedures in current use

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[20] CBA Task Force Report, *supra* note 2 at 63.

within the court system.[21] In 2003, for the purpose of this discussion, the EDR Committee has adopted a definition of ADR that embraces processes that contrast with the determination of disputes by court adjudication.[22] ADR may refer to assistance with dispute resolution that is offered entirely outside the civil justice system, or as a program or service connected to the court, or by judges of the court acting in a facilitative rather than an authoritative role (in effect, "judicial ADR" known in Alberta as "JDR").[23]

[24] The interests of parties and of the civil justice system can be seen to converge. On one hand, the parties generally have an interest in maintaining control over both the process adopted in attempting to reach agreement and the predictability of the result – in short, in avoiding litigation where possible; nevertheless, their discussions (problem-solving, solution-seeking) take place in the "shadow of the law," even where no legal action has been commenced.[24] On the other hand, the civil justice system has an interest in promoting dispute resolution through settlement because society has an interest in the effective, economically efficient use of its public resources (the courts) and settlement reduces the demand on the courts. Overall, governments, acting in the interests of society, have an interest in promoting the orderly, harmonious resolution of disputes. Objectives #3 (maximize the Rules' effectiveness) and #4 (maximize the Rules' advancement of justice system objectives) of the Rules Project embody this interest.[25]

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[21] ALRI RP 19, *supra* note 19 at 1.

[22] See below at 11.

[23] For a discussion of this terminology, see below, Chapter 5.

[24] In ALRI RP 19, *supra* note 19 at 19, ALRI observed: "It is highly likely that settlements are strongly influenced by the adversarial characteristics of the current adjudicative process rather than a true application of negotiation or mediation." In the Rules Project consultation with the legal community, lawyers commented that "Unless a person is able to access the court system, there is no reasonable assurance that she or he will get justice in a mediation – the prospect of a trial and having to accept its outcome is often the main motivation for settlement" Alberta Law Reform Institute, *Report on Legal Community Consultation* (Alberta Rules of Court Project) (Edmonton: Alberta Law Reform Institute, 2002) at 4 (online: Alberta Law Reform Institute <http://www.law.ualberta.ca/alri/>) [Legal Community Consultation Report].

[25] Above at xiv-xv.

[25] The litigation and settlement processes, which once functioned more or less independently of each other, now interconnect, so much so that now a move is afoot to identify the acronym ADR with "appropriate dispute resolution."[26] Characterized as "alternative dispute resolution," ADR embraces processes that are alternative to court adjudication. Characterized as "appropriate dispute resolution," ADR connotes the idea that the parties to disputes in litigation (and their counsel) "would be able to choose the appropriate process, or combination of processes, from the selections offered" on a "menu" of dispute resolution choices that includes adjudication in court.[27]

[26] With the multi-option vision of the civil justice system gaining favour today, the characteristics of the ***litigation (court) and non-litigation (non-court) dispute resolution processes***, identified in the chart below for discussion purposes, ***no longer operate in sharp contrast to each other***. The second column, headed "non-litigation (non-court) process" describes interest-based processes such a negotiation, mediation or collaborative law. In contrast, as noted in chapter 4, arbitration is essentially a form of adjudication, although "non-binding" arbitration is an option. Arbitration therefore straddles both columns.

3. Summary

[27] Clearly, an important characteristic of the emerging emphasis on early dispute resolution in the civil justice system is the promotion of settlement using processes that are alternative to court adjudication. The settlement measures being introduced are inspired by processes initiated in the private sector, but adapted to fit the contours of litigation. In this hybrid-breeding soil, the use of these dispute resolution methods may be mandatory rather than voluntary, publicly rather than privately provided, and more fixed in structure than freely-chosen private-sector processes. These changes both reflect and spearhead a change in the mind-set of litigants, lawyers, judges and court staff.

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[26] See *e.g.*, Michael Fogel, "ADR: What is the Real Alternative?" (2002) 11 Can. Arbitr. Mediat. J. 10 at 10; Joseph M. Jacob, *Civil Litigation: Practice and Procedure in a Shifting Culture* (Welwyn Garden City, Hertfordshirt, England: EMIS Professional Publishing Ltd., 2001) at 4.

[27] Fogel, *ibid.* at 10.

LITIGATION (COURT) PROCESS	NON-LITIGATION (NON-COURT) PROCESS
Process is adversarial (win-lose)	Process is non-adversarial (cooperative, collaborative) (win-win)
Process is court-controlled	Process is party-controlled
System is publicly provided	Assistance is privately engaged
Process fairly structured (although flexible within institutionally-fixed limits)	Wide open choice of process from limitless possibilities, able to accommodate wishes of parties
One party sues, the other *must* respond or stand in default	Voluntarily undertaken by both parties
Time limits imposed	Pace up to the parties
Result often uncertain, not readily predictable	Result (usually) rests with parties
Progresses on a more or less lock-step continuum	More an integration than a continuum – allows for seamless movement among ADR processes on a single occasion, or simultaneous application of various ADR processes with respect to particular elements of the dispute
Issues are framed in legal terms, using legal concepts; the discussion is "rights-based"	Issues reflect the interests of the parties; the discussion is "interest-based"
Remedies are limited to legal remedies	Remedies respond creatively to parties interests
The record and proceedings (generally) are open to members of the public	Proceedings (generally) are conducted in private; shared information is confidential

LITIGATION (COURT) RESULT	NON-LITIGATION (NON-COURT) RESULT
Adjudicative decision by official of state-empowered institution external to the dispute (*i.e.,* a judge or master)	Agreement of the parties on resolution of the dispute

D. EDR Committee's Core Premises

ISSUE No. 1
What core premises should guide recommendations for early dispute resolution?

1. The premises

[28] In thinking about the promotion of early dispute resolution by settlement at the earliest appropriate opportunity, the EDR Committee has developed five core premises from which to work. These premises recognize that litigants, the courts and the public all have an interest in, and should strive for, early dispute resolution in order to make economical use of both private and public resources, save costs, increase litigant satisfaction with the process and results, and enhance overall respect for the administration of justice.[28] While the resolution of disputes by settlement between the parties is generally preferable to resolution imposed by court adjudication, adjudication may be required to satisfy the interest of the public in the establishment and maintenance of standards for behaviour, the interest of the court in performing its constitutional role in this regard, the interest of the public and court in making economical use of public resources by moving the litigation along and the interest of the parties in concluding the dispute. These premises also reflect the goals of Project Objectives #3 and #4.

Premise 1: Disputes should be resolved as soon as possible after they arise in keeping with the civil justice system objectives of fairness, accessibility, timeliness and cost.

Note: This premise recognizes that "early" dispute resolution begins before parties initiate litigation.

Premise 2: Open communication and timely evaluation throughout the dispute resolution process will promote the possibility of settlement.

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[28] In CBA 1991, *supra* note 6 at 56-57, the CBA stated that "the prime objective of all reform activity must be to foster and enhance public confidence in the justness of the courts".

Note: This premise supports processes that encourage, or require, the early exchange of information. Parties should not be required to participate in a settlement process until they have enough information to make an informed decision. However, parties should accept that they have an obligation to each other, to the courts, and to the public, to consider and discuss settlement at an early stage and to evaluate their positions throughout the litigation process.

Similarly, this premise recognizes that the court has a role to play in both creating opportunities for settlement discussion and in providing evaluation during the litigation process.

Premise 3: Settlement by agreement of the parties is preferable to resolving disputes by court adjudication.

Note: This premise recognizes that an agreed settlement is more likely to meet the parties' interests and produce better resolution of the dispute. The pursuit of settlement is first and foremost a matter for the parties. Ordinarily, participation by the parties in settlement processes should be voluntary.

Premise 4: The court, as the adjudicative branch of government, has an active interest in promoting and facilitating settlement both to preserve the public peace and as part of the efficient use of public resources.

Note: This premise recognizes that in carrying out its role of promoting settlement, the court may suggest processes by which the parties may pursue settlement and encourage the parties to use such processes. Within the limits of public resources, flexibility and responsiveness to individual cases and the availability of a range of settlement processes will promote early resolution of disputes.

Premise 5: Dispute resolution is a primary, although not the only, goal of the civil justice system.

Note: This premise recognizes that the civil justice system also has a role in setting standards for behavior and upholding rights.[29] For this reason, the resolution of litigation by settlement between the parties may not be appropriate for every case.

This premise also recognizes that there is a shift in control over the initiation of settlement processes, once litigation is commenced. While early intervention by the judiciary can be helpful to early resolution of cases, the court's interest and involvement in promoting settlement increases as the dispute moves along the litigation continuum toward trial.

Similarly, the changing role of the court must also be recognized in the changing role of a judge. The role of judges in managing litigation and promoting settlement by encouraging the parties to consider settlement, including making use of settlement processes, is different from the role of judges in actively facilitating settlement in what is in effect a judicial ADR (JDR). Being clear about the differences in function will assist preparation by counsel and the parties who need predictability about why they are going to meet with a judge.

[29] In proposing these core premises, we recognize that certain tensions are inherent in the effort to promote early dispute resolution. For example, a tension exists between the idea that parties and counsel should consider settlement often and the idea that the occasions when settlement is considered should be focussed and meaningful. Another tension exists between the desire to promote early settlement and the need for the parties to be adequately informed in order to make a good settlement. A third tension exists between the interest of parties in settling voluntarily and the interest of the court and society generally in preserving public resources by bringing the dispute to a resolution quickly and inexpensively.

2. Request for comments

[30] ***In Issue No. 1, we invite your views and comments on these five premises, and whether they provide a sound basis for the development of recommendations for early dispute resolution.***

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[29] *Ibid.* at 42.

E. Other Background Information

[31] Before proceeding to chapter 2, where we identify various settlement measures that are, or could be, associated with the litigation process we close this chapter by providing relevant information of a supplementary nature.

1. Rules Project Consultation

a. Legal community consultation

[32] As stated in the Background to this consultation memorandum, in the fall of 2001, ALRI released an *Issues Paper for the Legal Community* in order to obtain the views of the legal community on issues relating to rules reform.[30] In that document, under the heading "Alternative Dispute Resolution," we asked a number of questions:[31]

- *Should there be mechanisms to encourage or to require ADR?*
- *If ADR should be encouraged or required after the commencement of litigation, at what point in proceedings should this occur?*
- *Who should have responsibility for initiating ADR: the Court or the parties?*
- *Should ADR be performed by judges (JDR), or other court personnel or specialist ADR practitioners?*
- *Does the legal profession understand the advantages of ADR and JDR well enough to recommend their use wherever appropriate?*
- *How are clients encouraged or discouraged from using ADR or JDR?*

[33] The responses to these questions are recorded at pages 3-5 of our *Final Report on Legal Community Consultation*.[32] Respondents were in broad agreement that ADR should be encouraged. The majority did not favour mandatory ADR. They felt that the prospect of a trial with its surrounding mystery, having to accept its outcome and the weight of costs provide enough motivation for clients to settle. Moreover, most lawyers manage their cases responsibly and look for settlement opportunities. Most respondents felt that ADR held too early in the litigation process is a waste of time and resources. The majority found the involvement of judges in facilitating dispute

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[30] Alberta Law Reform Institute, *Issues Paper for the Legal Community* (Edmonton: Alberta Law Reform Institute, 2001) online: Alberta Law Reform Institute <http://www.law.ualberta.ca/alri/> click on Publications, then click on Rules of Court Publications [Legal Community Issues Paper].

[31] *Ibid.* at 5.

[32] Legal Community Consultation Report, *supra* note 24 at 3-5.

resolution to be useful. Not only do judges have the ability to analyze and interpret legal issues but also their views of the merits of the case carry weight with parties who are reluctant to settle. Resorting to facilitation by a judge should continue to be voluntary. Being able to choose which judge based on a judge's particular area of knowledge also received widespread support.

b. Public consultation

[34] We also conducted a public consultation inviting Albertans to provide feedback on the Alberta Rules of Court and the operation of the Court of Queen's Bench and the Court of Appeal. In our public consultation document," we asked respondents the following questions about ADR:[33]

- If you have been in a lawsuit, were you encouraged to use ADR? Discouraged from using ADR?
- If encouraged, in what ways were you encouraged to use ADR? If discouraged, in what ways were you discouraged?
- In your opinion, should people involved in a lawsuit be encouraged or required to use ADR?
- Who should carry out these alternative forms of dispute resolution? Judges (outside of the court)? Lawyers? Other court personnel? Specialized ADR practitioners? Don't know?
- Using a scale of 1 to 5, where 1 means you were "very satisfied" and 5 means you were "not at all satisfied," please circle the response that best describes your level of satisfaction with the ADR services available to you.
- Do you have any other comments about ADR?

The responses are reported at pages 23-28 of the *Alberta Rules of Court Public Consultation Report* prepared by Banister Research & Consulting Inc. in September 2002.[34] Almost half of the respondents (49%) agreed that people involved in a law suit should be encouraged to use ADR to settle matters out of court; a further one quarter of respondents (25%) would require the use of ADR. Generally, ADR was seen to be a "highly useful and effective means of resolution" and a process that "reduces much of the time and costs usually associated with resolution." Public knowledge of ADR

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[33] Alberta Law Reform Institute, *Public Consultation Paper and Questionnaire* (Edmonton: Alberta Law Reform Institute, [2001]) online: Alberta Law Reform Institute <http://www.law.ualberta.ca/alri/> at 7-8 [Public Consultation Issues Paper].

[34] Alberta Law Reform Institute, *Alberta Rules of Court Public Consultation Report* prepared by Banister Research & Consulting Inc. (Edmonton: Alberta Law Reform Institute, 2002) online: Alberta Law Reform Institute <http://www.law.ualberta.ca/alri/> [Public Consultation Report].

needs to grow, as does the availability of ADR services provided by specialized ADR practitioners, possibly lawyers or other court personnel, or judges "outside of the court." These results should be read subject to the caution that, as noted in the Background to this consultation memorandum, the response rate to the public consultation was low. Only 30% of the respondents who had been in a lawsuit recalled having been encouraged to use ADR.

[35] Comments at invitational public forums held by the Rules Project in Edmonton and Calgary indicate that persons involved in lawsuits like having a chance to tell their story to a judge in a setting that is less formal than the court room.[35] Open Chambers sessions limited to 20 minutes are not sufficient. Litigant awareness of the availability of ADR processes tends to be low.

2. Settlement statistics

[36] One impediment to thinking about a system that promotes early dispute resolution is the lack of reliable data disclosing patterns in litigation. Where, if at all, do the bottlenecks in the existing civil litigation system occur? We know that only a small percentage (approximately 2%) of the cases that are commenced proceed to trial.[36] What we do not know, and what it is important to determine, is what happens along the way. What proportion of the cases that do not reach trial are settled, and at what stage of the litigation process? How does this compare with the proportion of cases that are abandoned, have pleadings struck out, are resolved by default judgment, or otherwise disposed of? What factors influence settlement? There are very few sources of statistics, either formal or informal. The Canadian Centre for Justice Statistics *Civil Courts Study Report*[37] is the most comprehensive study to date but it contains little data directly relevant to settlement patterns. The Alberta Court of Queen's Bench published some data on aspects of litigation province-wide in its

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[35] Alberta Law Reform Institute, *Focus Group, Edmonton & Calgary Venues, Final Report* prepared by Banister Research & Consulting Inc. (Alberta Rules of Court Project) (Edmonton: Alberta Law Reform Institute, 2003) online: Alberta Law Reform Institute <http://www.law.ualberta.ca/alri/> [Public Focus Group Report].

[36] See above at 8, note 17.

[37] Statistics Canada, *Civil Courts Study Report* (Ottawa: Canadian Centre for Justice Statistics, 1999).

previous Annual Reports.[38] Additional data is available from individual judicial districts but, from what we have been able to determine, the method of recording the data is not standardized so the data obtained is difficult to compare. Anecdotal evidence from lawyers and judges points to a high rate of settlement when judges are involved in facilitating dispute resolution using ADR techniques. However, overall, reform initiatives are hampered by a shortage of statistical and other empirical information on the operation of the civil justice system.

3. Terminology

[37] Variability in the use of terms interferes with the discussion of measures that may be taken to promote early dispute resolution. In the current climate of change, a single term may have different meanings in the minds of one or another individual and from one jurisdiction to another. In this consultation memorandum, we have taken care to be consistent in our use of language, and to avoid the possibility of misunderstanding by explaining our usage of words that might otherwise leave confusion.

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[38] ALRI CM 12.5, *supra* note 17 at 6.

CHAPTER 2. SURVEY OF SETTLEMENT MEASURES

ISSUE No. 2

What measures (either existing or additional) should the civil justice system employ to promote settlement:

(a) impose an obligation on disputing parties to consider settlement;
(b) impose an obligation on legal counsel to pursue settlement;
(c) encourage or require parties to comply with specified pre-action measures;
(d) encourage or require parties to comply with specified action protocols relating to the exchange of information and settlement discussions;
(e) define formal settlement rules (compromise using court process);
(f) provide court-annexed ADR programs and services;
(g) support a judicial role in facilitating settlement;
(h) other measures?

[38] As a matter of process, greater emphasis is being placed on settlement now than formerly (although the goal of settlement is by no means new to litigation). We expect the trend in this direction to continue. In this chapter, we draw attention to seven measures that are, or could be, used to promote settlement prior to court adjudication – measures for which the Rules of Court do, or could, make provision. Our presentation of the seven measures follows the order in which they are likely to come into play in the lifespan of a dispute. Starting from the fact of the dispute, we examine expectations with respect to settlement efforts prior to the commencement of litigation. Three settlement measures are discussed: the obligation of the disputing parties to pursue settlement; the obligation of counsel to pursue settlement; and the imposition of pre-action requirements. We then survey four further measures that are intended to assist settlement after the litigation is under way. They are: action protocols; formal settlement rules (compromise using court process); court-annexed ADR; and the judicial role in settlement. The formal settlement rules will be fully discussed in a future consultation memorandum. Court-annexed ADR and the judicial role in settlement are examined in detail in chapters 4 and 5, respectively, of this consultation memorandum.

A. Settlement Measures Activated Prior to Litigation

1. Obligation of disputing parties to consider settlement

[39] It is the parties to a dispute who decide whether or not to settle. However, as the CBA Task Force observed, "the civil justice system does not impose a direct and personal obligation on disputants to explore settlement possibilities before or during litigation."[39] The Task Force would impose such an obligation:[40]

> Recommendation 2:
>
> The Task Force recommends that each jurisdiction through its rules of procedure impose on all litigants a positive, early and continuing obligation to canvass settlement possibilities and to consider opportunities available to them to participate in non-binding dispute resolution processes.

[40] If adopted, the Task Force recommendation would help to focus the attention of the parties on settlement possibilities at an early stage of the litigation and repeatedly thereafter as the litigation progresses. In their report, the Task Force suggests that "parties should be required to attest in an appropriate way that settlement options have been canvassed before they can use the court system."[41] Further, at pre-trial or other conferences held with a judge, "parties should be obliged to inform the court whether dispute resolution options other than a trial have been considered and used and, if so, which ones were tried and, if not, why these options were not warranted or attempted."[42]

[41] Imposing a settlement obligation on the parties is a new idea. ***We invite your views on the question whether one settlement measure adopted in the Alberta Rules of Court should be to impose a settlement obligation on the parties, and if so, what form that settlement obligation should take.***

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[39] CBA Task Force Report, *supra* note 2 at 33.

[40] *Ibid.* at 34.

[41] *Ibid*.

[42] *Ibid.*

2. Counsel obligation to pursue settlement

[42] As the CBA Task Force pointed out, "[l]awyers have always concerned themselves with the potential for settlement within litigation, primarily through the use of various negotiation techniques."[43] Today, codes governing professional conduct place lawyers under an ethical obligation to seek out settlement opportunities and to advise clients to accept a reasonable settlement.[44] Modern codes place greater emphasis on this obligation than former codes.[45]The *Code of Professional Conduct* [Code] endorsed by the Law Society of Alberta identifies advisory, advocacy and negotiation roles for lawyers.[46]

a. Advisory role (Code, c. 9)

[43] As an advisor:

> 15. (a) A lawyer must not make a settlement offer on behalf of a client except on the client's instructions.
>
> (b) A lawyer must promptly and fully communicate all settlement offers to the client.
>
> 16. A lawyer must recommend that a client accept a compromise or settlement of a dispute if it is reasonable and in the client's best interests.

The commentary on rule 15 clarifies that, although the decision to settle is for the client and the client must be informed of all offers, lawyers should not be inhibited in exploring settlement possibilities. Even without a specific instruction, a lawyer is entitled to negotiate a settlement. However, because the settlement negotiated is subject to client confirmation, the lawyer must be sure the "opposing parties are made aware that the settlement is conditional."[47]

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[43] *Ibid.* at 31.

[44] The Canadian Bar Association Task Force, *ibid.* at 64, proposed in Recommendation 38 that every jurisdiction make it a rule of professional conduct that lawyers have an obligation to explore settlement and to explain available dispute resolution options to clients.

[45] Canadian Bar Association, Special Committee on Legal Ethics, *Code of Professional Conduct* (Toronto: Canadian Bar Association, 1975).

[46] Law Society of Alberta, *Code of Professional Conduct*, looseleaf (Calgary: Law Society of Alberta, 1995), c. 9, 10 and 11.

[47] *Ibid.*, c. 9, commentary on r. 15.

b. Advocacy role (Code, c. 10).

[44] A "lawyer is obliged to use all reasonable efforts to pursue settlement or compromise."[48] That is because "it is to the general benefit of society and the administration of justice that lawyers discourage unmeritorious suits and seek the early resolution of disputes."[49] Lawyers have an ethical duty to "keep legal costs to a minimum and ease the demands on the judicial system while encouraging cooperation among opposing parties and counsel."[50] This duty includes the duty to objectively evaluate whether settlement or compromise is a realistic alternative and then to advise the client about the advantages and drawbacks of settlement compared with court adjudication.[51] Lawyers should also consider alternative dispute resolution.[52]

c. Negotiation role (Code, c. 11).

[45] Rule 3 of chapter 11 repeats rule 15 of chapter 9, word for word. That is because "the issue of whether to settle a dispute is so fundamental to a lawyer's representation that it must be the subject of discussion with and direction from the client."[53]

d. Discussion

[46] Balancing these various roles is challenging. As explained in chapter 1 of this consultation memorandum, settlement may not be appropriate for cases involving "important matters of legal principle that ought to be decided by the courts in the interests of the parties and in the public interest".[54] In cases where settlement is appropriate, the CBA Task Force includes *within* the lawyer's obligation to "advance the client's interests vigorously," the obligation "to canvas and pursue diligently all prospects for settlement and to make effective use of dispute resolution techniques

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[48] *Ibid.*, commentary on r. 16.

[49] *Ibid*.

[50] *Ibid*.

[51] *Ibid*.

[52] *Ibid*.

[53] *Ibid.*, c. 11, commentary on r. 3.

[54] CBA Task Force Report, *supra* note 2 at 63.

suitable to the client's cause."[55] The lawyer has an obligation "to be alert to the possibilities of early settlement and open to the options available to assist in dispute resolution."[56] The obligation includes encouraging clients to consider dispute resolution options, and involves "at least three elements":[57]

> ... canvassing settlement possibilities with the client at an early stage, explaining at an early stage the available dispute resolution options, and re-visiting the merits of settlement and dispute resolution options at repeated intervals as the case progresses.

The move toward a multi-option civil justice system requires litigation lawyers to fundamentally adjust how they work. The focus is no longer on exclusively rights-based thinking. The wider approach taken to problem-solving requires "the acquisition of new information and skills to assist clients with dispute resolution."[58]

[47] The lawyer's obligation to pursue settlement could be fostered in the Rules of Court. In some jurisdictions, the rules now mandate early settlement discussions. For example, under the Federal Court Rules 1998, the solicitors for the parties must discuss settlement within 60 days of the close of pleadings:

> 257. Within 60 days after the close of pleadings, the solicitors for the parties shall discuss the possibility of settling any or all of the issues in the action and of bringing a motion to refer any unsettled issues to a dispute resolution conference.

[48] ***The EDR Committee would like to have your comments on the question of what, if any, provision the Rules of Court should make with respect to the obligation of counsel to promote settlement.***

[49] As an aside, it is worth noting that some lawyers are now employing an innovative process known as "collaborative law" designed to promote settlement by eliminating litigation as an option.[59] The collaborative law concept originated in the

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[55] *Ibid.* at 64.

[56] *Ibid*.

[57] *Ibid*.

[58] *Ibid.* at 63.

[59] For fuller descriptions of the process, see: Tesler, *supra* note 15; and Stephen Coughlan, "Collaborative Lawyering", online: Canadian Bar Association <http://www.cba.org/CBA/EPIIgram/June2001>.

United States as a reaction to legal proceedings that are costly, time-consuming, and lead to unpredictable results that do not satisfy the parties. The process is set up by contract: lawyers and clients together agree not to go to court. Instead, they all direct their energies toward finding a lasting solution to the dispute. Collaborating for a shared purpose leads to creative possibility. If the clients, being unable to reach an agreement, decide to litigate, they must retain different lawyers. In short, collaborative law emphasizes serious negotiation by removing the threat of going to court using the lawyers involved. Collaborative law is being used in Alberta in family law and estate matters, and holds potential for beneficial use in other areas. Much of what lawyers do in collaborative law mirrors what good lawyers do in any event.

3. Pre-action measures

[50] Persons in dispute could be required to take certain steps before litigation is commenced. By reducing case loads and freeing judges to attend to the cases that warrant judicial attention, settlement prior to litigation advances the civil justice system objectives of reducing cost and delay. We will pose two options: requiring parties to participate in ADR before bringing an action; and establishing pre-action protocols which, in effect, set out pre-litigation standards of practice for disputes in specified areas.

a. Settlement efforts prerequisite to litigation

[51] The CBA Task Force raises the idea of requiring parties "to certify that they have participated in an early, non-binding dispute resolution process as a pre-condition for commencing an action or an application."[60] This option further extends the suggestion that "parties should be required to attest in an appropriate way that settlement options have been canvassed before they can use the court system."[61] A requirement that the parties attest to having "canvassed" settlement options engages the parties in thinking about settlement possibilities and the processes that might be used to achieve settlement. In contrast, a requirement that the parties "participate" in an early, non-binding dispute resolution process (which infers the use of a specific type of settlement process, likely involving outside assistance) is more onerous. The

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[60] CBA Task Force Report, *supra* note 2 at 32.

[61] See above at 22.

Task Force rejects this more onereous extension, viewing it as an unrealistic requirement in many situations:[62]

> For example, time might not permit participation in such a process before commencement of legal proceedings if the interests and rights of the client are to be protected. Moreover, in many circumstances, the issues between the parties are not defined until the close of pleadings, that is, until the parties have exchanged the formal statements (pleadings) setting out the issues they believe to be relevant and in dispute.

[52] ***We seek your comments about the idea of making resort to a non-binding ADR process a prerequisite to litigation.***

b. Pre-action protocols

[53] "Pre-action protocols" are discussed and rejected by the Management of Litigation Committee in Consultation Memorandum No. 12.5. We have chosen to describe them at greater length than is done in that consultation memorandum because our definition of "early" dispute resolution includes the time period prior to the commencement of litigation. The emphasis of the Management of Litigation Committee is on "management" of the dispute once it arrives in court.

[54] Pre-action protocols are a measure recommended in *Access to Justice* – the 1996 final report of a civil justice system review conducted for the Lord Chancellor by Lord Woolf [commonly referred to as the "Woolf Report"]. Lord Woolf's recommendations are implemented in Civil Procedure Rules for England and Wales which came into force on 26 April 1999.[63] These rules embody reforms designed to foster a civil justice system in which litigation will be both "avoided wherever possible" and "less adversarial and more cooperative" where it cannot be avoided.

[55] The pre-action protocols "outline the steps parties should take to seek information from and to provide information to each other about a prospective legal claim."[64] Different protocols are developed for different subject areas. They are all

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[62] CBA Task Force Report, *supra* note 2 at 32-33.

[63] Australia has also adopted pre-action protocols: ALRI CM 12.5, *supra* note 12 at xxii.

[64] United Kingdom, Department for Constitutional Affairs, *Practice Direction (PD) 1.3*, online:

(continued...)

covered by a general Practice Direction.[65] The protocols are designed to provide early notice of potential claims and to promote the early exchange of basic information between claimant, defendant and insurers before an action is commenced:[66]

> The objectives of pre-action protocols are:
>
> (1) to encourage the exchange of early and full information about the prospective legal claim,
>
> (2) to enable the parties to avoid litigation by agreeing to a settlement of the claim before the commencement of proceedings,
>
> (3) to support the efficient management of proceedings where litigation cannot be avoided.

That is, the protocols operate as guides to sensible practice that should be followed before an action is commenced. The idea is that better information will allow the parties to settle all or part of the dispute without litigation. To date practitioner groups have developed specialist protocols in the following areas: personal injury, clinical negligence, construction and engineering disputes, defamation, professional negligence, and judicial review.[67]

[56] How the protocols are intended to operate can be illustrated by the personal injury protocol.[68] The personal injury protocol targets motor vehicle accidents, slip-and-fall claims, and workplace accidents where the value of the personal injury is likely to be less than £15,000. These claims will typically be assigned to the "fast track" also recommended by the Woolf reforms. The protocol requires that the claimant send a "Letter of Claim" to the defendant as soon as the claimant has sufficient information to substantiate a realistic claim and before issues of quantum are discussed in detail. The Letter of Claim should provide:

- sufficient information to allow the defendant to investigate the claim and put a broad valuation on the "risk"

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[64] (...continued)
Department for Constitutional Affairs <http://www.lcd.gov.uk/civil/procrules_fin/contents/practice_directions/pd_protocol.htm> [U.K. Practice Directions].

[65] *Ibid*.

[66] *Ibid*., PD 1.4.

[67] United Kingdom, Department for Constitutional Affairs, *Pre-action Protocols*, online: Department for Constitutional Affairs <http://www.lcd.gov.uk/civil/procrules_fin/menus/protocol.htm> [U.K. Protocols].

[68] *Ibid.*

- a clear summary of facts relating to the claim
- an indication of the injuries suffered
- an indication of any financial loss incurred
- a request that the alleged defendant identify the insurer, if any
- a list of documents required to be disclosed if known
- the names of any experts the claimant proposes to nominate, if known

[57] A duplicate copy of the letter will usually be enclosed for the defendant to provide to his or her insurer, or the claimant may send the letter directly to the defendant's insurer. The defendant is required to acknowledge the claimant's letter within 21 days, with a further 14 days to object to any of the experts proposed by the claimant. The defendant then has a period of 3 months to investigate the claim before he or she is required to formally reply to the claimant. The defendant's reply should include an admission of liability with respect to all or part of the claim, or an admission of liability with a claim for contributory negligence with reasons and supporting documents, or a denial of liability with reasons and supporting documents. If the defendant does not acknowledge or reply to the Letter of Claim within the set time lines, the claimant may commence proceedings. However, the observance of a protocol does not suspend the running of any limitation period and the claimant may have to commence proceedings to preserve a claim even though the protocol has not been completed. The protocol additionally encourages parties to use a mutually agreed expert where possible. Protocols may also encourage the use of appropriate alternative mechanisms for the resolution of disputes.

[58] There is, of course, no need for the court to intervene in disputes that settle before an action is commenced. Where litigation ensues, the "court will expect all parties to have complied in substance with the terms of an approved protocol."[69] With respect to their enforcement, the Civil Procedure Rules allow courts to consider compliance with the protocols when making directions on case management and when making costs orders.[70] Rule 3.1 deals with the court's general powers of management. It provides, in subrules (4) and (5):

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[69] U.K. Practice Directions, *supra* note 64, PD 2.2.

[70] United Kingdom, Civil Practice Rules, rr. 3.1(4) and (5), 3.9(1)(e) and 44.3(a) [U.K. CPR].

> (4) Where the court gives directions it may take into account whether or not a party has complied with any relevant protocol.
>
> (5) The court may order a party to pay a sum of money into court if that party has, without good reason, failed to comply with a rule, practice direction or a relevant pre-action protocol.

In cases not covered by an approved protocol, "the court will expect the parties ... to act reasonably in exchanging information and documents relevant to the claim and generally in trying to avoid the necessity for the start of proceedings."[71] From the wording of rule 3.1(5), it appears that the court has discretion to levy a monetary payment into court from a party who has failed to comply with this requirement.

[59] Rule 44.3 pertains to the court's discretion regarding costs. In deciding what order (if any) to make about the costs payable from one party to another, the court must have regard to all of the circumstances, including the conduct of the parties.[72] Among other matters, "conduct" expressly includes "conduct before, as well as during, the proceedings and in particular the extent to which the parties followed any relevant pre-action protocol."[73] The extent of a party's compliance with pre-action protocols or other practice directions is also a factor the court will consider in deciding an application for relief from any sanction imposed by the Civil Procedure Rules.[74]

[60] Preliminary review indicates that the protocols have made a positive contribution to the goal of settling claims. A recent qualitative study notes:[75]

> Most practitioners regarded the Woolf reforms as a success. The reforms were liked for providing a clearer structure, greater openness and making settlements easier to achieve. Claimant offers under Part 36 of the Civil Procedure Rules were singled out for praise; claimants saw them as a useful way of obtaining a response from the defendant, while defendants appreciated them for setting an upper limit to the bargaining

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[71] U.K. Practice Directions, *supra* note 64, PD 4.1.

[72] U.K. CPR, *supra* note 70, r. 44.3(4)(a).

[73] *Ibid.*, r. 44.3(5)(a).

[74] *Ibid.*, r. 3.9(1)(e).

[75] Tamara Goriely, Richard Moorhead & Pamela Abrams, *More Civil Justice? The impact of the Woolf reforms on pre-action behaviour?* (Research Study 43) (London: The Law Society and the Civil Justice Council, 2002) at xiii.

> range. Those involved in personal injury and clinical negligence work also felt positive about the protocols. By establishing clear ground rules on how claims should be formulated and responded to, protocols were thought to focus minds on the key issues at an early stage and encourage greater openness. This smoothed the way to settlement. Interestingly, housing practitioners reported similar changes even though there was no protocol.

Of course, Alberta has allowed claimant offers since 1984. However, the early operation of the protocols in England and Wales has been influenced by other factors that are also relevant in Alberta such as increased use of contingency fees and changes in availability of Legal Aid, organisational changes within the insurance industry, and professional advertising by lawyers.

[61] Research suggests that the protocols have gone a considerable way towards bringing about a cultural change in the approach to litigation which has been beneficial to achieving settlement. As noted:[76]

> The good news is that almost everyone thought that there had been at least some improvement in the culture of negotiations. There was general agreement that there was now more "openness," with parties willing to exchange more information earlier. This was widely believed to be a change for the better:
>
> > There's definitely more openness... We thought we would be forced to be more open, and we didn't really like that... But I think a lot of people now, in the discussions I have had with other solicitors and insurers, they actually want to be more open because you think: "Well why not put your cards on the table?" [Claimant solicitor – large firm]

[62] Against this evidence of cultural change, evidence of decreased cost or time to settlement is still inconclusive. The protocols are still fairly recent; a comparison of pre- and post-protocol closed files is complicated by the short operation time of some protocols and a period of transition under the new rules. However, personal injury claims presently appear to settle more quickly, though with higher initial costs: nearly 60% of claims are settled within two months of the first offer being made, the median time from first offer to settlement now being 43 days in comparison to 57 days before the Woolf reforms.[77]

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[76] *Ibid.* at 165, discussing the personal injury pre-action protocol.

[77] *Ibid.* at 154-55.

[63] The EDR Committee sees merit in the idea of developing pre-action protocols for use in particular actions relating to specific subject areas. In particular, we believe that an early exchange of information by the parties would promote the possibility of settlement before positions become fixed, as they tend to do once a statement of claim is filed. On the other hand, we recognize that settlement with insufficient information can be risky. Factual discovery and the exchange of expert reports may be a necessary prerequisite to settlement in some cases. We also respect the position which the Management of Litigation Committee which "[g]enerally agreed that the Rules should focus on what happens after the action is commenced and not before that" and "recognized that it would be too radical a change in Alberta to implement pre-action protocols."[78] That Committee observed that:[79]

> ... it was important to note that the British pre-action protocols were introduced in a context where there was little or no oral discovery, limitations period were longer, and the legal system was seen as requiring massive change.
>
> The Committee noted that the general purpose of such protocols is to facilitate early exchange of information and dialogue between the parties prior to a matter entering the court system; but also noted that, in the Alberta context, limitations dates are shorter and there is less time for pre-action protocols to take place. The *Limitations Act* performs the function of requiring an action to be commenced at an early date. Committee members also felt that plaintiffs generally have an interest in getting action moving at an early date as, the sooner they ask for their relief, the sooner they will receive it.

[64] ***We would like to hear what you think about the idea of introducing pre-action protocols, and who should be responsible to develop them.***

B. Settlement Measures Introduced After Litigation Commenced

1. Action protocols

[65] The Management of Litigation Committee did not reject the idea of developing protocols for an early exchange of information after an action has been commenced.

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[78] ALRI CM 12.5, *supra* note 12 at 53.

[79] *Ibid.* at 52.

Instead, that Committee considered the possibility of including incentives or expectations as to good practice in other ways:[80]

> The Committee then considered whether there are other ways to include incentives or expectations as to good practice in the Rules or in some sort of accompanying materials to the rules (such as a set of "action protocols" to govern what happens in an action after the pleadings are filed) or whether this should be left to other parts of the system, such as the Law Society or Legal Education Society.

Without endorsing them, the Committee asked for "feedback from the legal profession as to whether 'action protocols' to govern what happens in an action after the pleadings are filed, based on the best practices available, would be a useful addition to the rules."[81]

[66] Like the Management of Litigation Committee, ***the EDR Committee invites comment on the question whether "action protocols" (protocols that come into play after the pleadings are filed) based on the best practices available regarding the exchange of information, settlement discussions and other steps in particular types of action would be a useful addition to the rules.***

2. Formal settlement rules

[67] Rules designed to encourage formal settlement are of long standing, having originated in England in the 19th century These rules encourage settlement by imposing cost consequences for failure to accept money paid into court or an offer of settlement made in accordance with the rules. In Alberta, the formal settlement rules are located in Part 12 of the Rules of Court, under the heading "Compromise Using Court Process."[82] Amendments to Part 12 over the past two decades have widened the scope of application of the original rules. The operation of the current rules and consideration of the need for reform will be covered in a future consultation memorandum. We will not say anything further about them here.

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[80] *Ibid.* at 53.

[81] *Ibid*.

[82] Alberta, *Rules of Court*, rr. 165-174 [Alberta].

3. Court-annexed ADR

[68] Increasingly, courts are supplementing the traditional litigation system by introducing dispute resolution programs and services designed to encourage parties to settle their dispute. The programs and services are based on the dispute resolution methods developed in the private sector as an alternative to litigation culminating in court adjudication. Because they are connected to the court, programs and services of this sort are known as "court-annexed ADR." Court-annexed ADR is the subject of chapter 4 of this consultation memorandum.

4. Judicial role in settlement

[69] It is not unusual for judges to play a role in relation to settlement. Formerly, a judge who felt a dispute ought to be settled would call counsel into his or her private chambers to discuss the case on an informal basis. Today, the judicial role in promoting settlement is expanding. Judges now encourage settlement as a component of pre-trial and case management conferences. In addition, they sometimes step out of the authoritative role associated with adjudication in order to facilitate settlement using ADR techniques in specially-scheduled judicial alternative dispute resolution sessions ("judicial ADR," now known in Alberta as JDR). Here, we merely introduce these two aspects of the emerging judicial role. More intensive examination of the judge's role in promoting settlement is deferred to chapter 5 of this consultation memorandum.

C. Position of the EDR Committee

[70] We began this chapter by asking what measures the civil justice system should employ to promote settlement. We have surveyed seven possibilities: the obligation of the disputing parties to pursue settlement; the obligation of counsel to pursue settlement; the imposition of pre-action requirements; action requirements; formal settlement rules (compromise using court process); court-annexed ADR; and the judicial role in settlement. As the CBA Task Force points out in an implementation point, "[p]roviders of dispute resolution services could include court personnel, judges, the private sector, or a combination of these."[83] Stated another way, the services could be delivered directly by the court, annexed to the court, provided by the private sector or available in combination. We caution that the promotion of early

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[83] CBA Task Force Report, *supra* note 2 at 33.

dispute resolution by any of the measures discussed should not have the effect of undermining the quality of justice or public confidence in the system.

[71] As for our position, the EDR Committee is inclined to favour the inclusion in the Rules of Court of lawyer and party obligations to pursue settlement. We also support the retention, perhaps with modifications, of the formal settlement rules (which will be explored in a future consultation memorandum) and a judicial role in settlement (considered at greater length in chapter 5 of this consultation memorandum). We describe two Court of Queen's Bench court-annexed ADR initiatives in chapter 4: the civil mediation project that Alberta Justice has proposed (the implementation of this project is currently on hold awaiting funding), and the Dispute Resolution Officer (DRO) Project that is operating for family law matters. We applaud Alberta Justice and the Court of Queen's Bench for taking these initiatives and look forward to the evaluation of both projects in due course. While we think the idea has some potential, we acknowledge that introducing the concept of pre-action protocols in our Rules may be too radical a change.

[72] Keeping in mind these various possibilities, ***we seek opinions about what modifications, if any, the civil justice system should make to the existing settlement measures, and what settlement measures could usefully be added.***

CHAPTER 3. RELATING SETTLEMENT MEASURES TO LITIGATION EVENTS

[73] In the opinion of the EDR Committee, placing emphasis on serious settlement discussions on an early and continuing basis is a desirable goal. In this chapter, we consider ways of ensuring that serious settlement discussions take place at appropriate times in the litigation process.

Note: You may wish to defer consideration of the issues raised in this chapter until after you have read chapters 4 and 5 of this consultation memorandum.

A. Settlement Opportunities

ISSUE No. 3
When, in the litigation process, should each of the settlement measures identified in chapter 2 be used in order to promote the achievement of *early* settlement?

[74] In chapter 2, we concluded that settlement should be promoted through the use of existing and additional settlement measures. Settlement opportunities do not depend on litigation; they are present from the beginning of a dispute. For this reason, we considered ways the Rules of Court could promote settlement with a view to averting litigation. We discussed imposing obligations on the parties to the dispute and counsel to pursue settlement, and introducing pre-action requirements – such as compelling parties to take part in civil mediation (non-binding ADR) as a condition of using the litigation system, or expecting them to comply with protocols designed for use in designated types of action, with case management or costs consequences if proceedings are later commenced.

[75] In this chapter, we move the focus to settlement within litigation. Bearing in mind the aim of promoting *early* settlement, we inquire whether any of the settlement measures described in chapters 2, 4 and 5 should be tied to any particular litigation event or events. Or discussion is based on existing litigation events. However, it is important to recognize that these events may change during the course of the Rules of Court Project as other Committees make their recommendations (*e.g.*, Management of

Litigation Committee in ALRI CM 12.5; Discovery and Evidence Committee in ALRI CMs 12.2 and 12.3).

[76] In ALRI CM 12.5, the Management of Litigation Committee proposes the introduction of three tracks on which litigation would progress at different speeds: a Standard Track of general application, a Simple Track for less complicated matters with few documents and a Customized Track for more complex matters. Recommendations include an opportunity for parties (counsel) to prepare their own comprehensive timetable for each action and submit it for court approval guided by the times for completion of steps specified in the Standard Track. Where the parties do not submit their own schedule, the times specified in the Standard Track would apply. The Simple Track moves cases forward to completion at a faster rate that the Standard Track, thus promoting earlier dispute resolution. Its use "is not limited by size or value of the case; rather it is chosen by counsel or litigants after consideration" of several factors.[84] Cases on the Customized Track would "likely be handled through case management and be given specific deadlines by the court or by agreement."[85]

[77] The Management of Litigation Committee has "defined three broad stages of litigation: issue definition, gathering of information, and resolution of the action."[86] As proposed, time starts to run from the date of filing of the last statement of defence, including defence to counterclaim and third and fourth party defences. That Committee anticipates that "[at] this stage, the pleadings and responses are complete and the parties have had some opportunity for negotiation and discussion."[87] After time starts to run, the steps identified on the Draft Standard Track Timetable Schedule are:[88]

- resolution of track disagreements;
- disclosure of documents;

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[84] ALRI CM 12.5, *supra* note 12 at 49.

[85] *Ibid.* at 37.

[86] *Ibid.* at 35.

[87] *Ibid.* at 38.

[88] *Ibid.* at 38-39.

- issue identification (the first evaluation), which includes filing of the case schedule agreed to by the parties, case management conference or court application, and striking out.

That Committee observes that "[at] the end of this stage the issues should be clear, the parties determined, and the nature of the dispute understood."[89] The next stage sets timelines for:

- discovery (oral or interrogatories, transcripts, undertakings), which includes the completion of discovery and, if requested, a case management conference;
- filing of interlocutory applications;
- experts (reports); and
- rebuttals.

By now, "[t]he information is more or less complete and the parties can perform a comprehensive evaluation of their case."[90] The remaining steps are:

- settlement discussions (settlement conference and other types of judicial resolution can be booked but may be completed later due to the court's schedule);
- trial readiness (certificate of readiness and pre-trial conference); and
- trial.

[78] These litigation events do not differ greatly from the current litigation events. However, some of the time expectations would be altered. For example, the first expert report would have to be "provided 90 days from the end of discovery, with 30 days for a rebuttal report.[91] This recommendation changes rule 218.1 which counts 120 days back from the trial date and gives 60 days for rebuttal.

[79] The litigation events we consider are: commencement of proceedings; close of pleadings; filing the affidavits of records (the Management of Litigation Committee's "disclosure of documents"); close of discoveries; exchange of expert reports; and filing of certificate of readiness.

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[89] *Ibid.* at 39.

[90] *Ibid*.

[91] *Ibid*.

1. Commencement of action

[80] The only settlement measure that is tied to the commencement of an action under the existing Rules is compromise using court process in accordance with Part 12 of the Rules of Court. The plaintiff may serve an offer to settle on the defendant at any time after the statement of claim is issued and before the commencement of trial.[92] The defendant may act either before or after pleading and before the commencement of trial by paying a sum of money into court or serving an offer of judgment on the plaintiff.[93] A formal offer by either party would open up the possibility of resolving the dispute before the litigation goes any further. However, in practice compromises tend to be extended after more information has been exchanged, usually after the close of discoveries. As previously noted, the settlement rules set out in Part 12 will be discussed in a separate consultation memorandum.

[81] The duties of the parties and counsel to pursue settlement discussed in chapter 2 would be continuing duties. The duty of a party, which would arise at the outset of the dispute, would be present when an action is filed and continue until the dispute is resolved. The duty of counsel would arise when counsel is retained, so it may or may not be exist when the action is commenced.

2. Close of pleadings

[82] As has been noted, many lawyers, judges, parties and legal policy makers see early intervention in the dispute as a desirable measure. The CBA Task Force concluded that the opportunity to participate in a non-binding dispute resolution process should be available at or shortly after the close of pleadings:[94]

> The Task Force believes strongly that the opportunity to participate in a non-binding dispute resolution process must be provided at an early stage of the proceedings and that incentives must be created to encourage parties to address the issues and the possibility of early resolution at a stage before their investment in the dispute begins to operate against resolution. The Task Force has concluded, therefore, that such opportunities must be available at or shortly after the close of pleadings ...

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[92] Alberta, r. 170.

[93] Alberta, rr. 166-169.

[94] CBA Task Force Report, *supra* note 2 at 33.

The most common forms of intervention are a meeting with a judge or non-binding ADR in a court-annexed program.

a. Meeting with a judge

[83] At an early meeting, the judge may review the status of the dispute with the parties and encourage them to explore settlement possibilities. The role being played by the judge in this scenario is essentially one of litigation management. In the CBA Task Force Report, and in the timetable tracks proposed by the Management of Litigation Committee in CM 12.5, the role of the judge at points in time prior to the completion of discoveries is associated with recommendations relating to managing the litigation, including its pace (*i.e.*, pre-trial or case management conferences in which settlement possibilities may be canvassed and encouraged as part of the judge's administrative function).[95]

[84] Alternatively, the judge may assume a more active role, using ADR techniques in an effort to facilitate settlement by the parties. In the Court of Queen's Bench, although in theory they are currently available at any time, JDRs (understood as non-binding judicial ADR)[96] are ordinarily held after the close of discoveries, when information sufficient for decision has been gathered. To date, the experience in Queen's Bench suggests that the facilitation of settlement in a JDR is not generally effective right after the close of pleadings, although it may be effective in certain types of litigation (*e.g.*, wrongful dismissal cases where expert reports are unnecessary). Many cases need to proceed through to discoveries. Anecdotal evidence indicates that the practice is changing and more and more JDRs are being held earlier in the litigation, long before any thought is given to setting a trial date. Running contrary to this change in practice is the argument that emphasis should be placed on achieving settlement using non-judicial resources, making JDRs the exception rather than the mode.

[85] A judicial dispute resolution pilot project conducted in the Provincial Court of Alberta, Family Division from July 1998 to May 1999 reported good success with

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[95] *Ibid.* at 34.

[96] See discussion below Chapter 5 at 67.

settlement at the outset of litigation.[97] In that project a judge met with parties ("all parties were expected to attend and participate") and their lawyers (the "general stipulation was that the parties had to have counsel") at the close of pleadings for a maximum time of 1½ hours. The judge performed a mixture of functions that ranged from encouraging settlement as part of litigation management to the judicial facilitation of settlement using ADR techniques:[98]

> The purpose of the Pilot Project was to create a context different from trial where parties could directly address, with a Judge of the Court, the Family and/or Child Welfare/Protection matters before the Court. To facilitate this, a Model for Settlement Conferencing was developed which utilized a blend of judicial non-binding case evaluation in a problem-solving approach incorporating interest-based techniques.

A Judicial Dispute Resolution Program based on the pilot project is now available in the Family and Youth Division of the Provincial Court in Calgary, Edmonton, Lethbridge and Medicine Hat.[99] The program allows the parties to choose which judge they wish to conduct the JDR. Under the program, "judges hear summaries of a case in an informal setting" then provide "a non-binding opinion based on what he or she would decide if the same evidence were presented in court."[100] Alberta Justice reports that "[o]nly three to five per cent of cases that have gone to JDR subsequently go to trial."[101]

b. Civil mediation

[86] In jurisdictions that have introduced mediation programs into their civil justice systems, mediation used at the earliest opportunity "has been shown to produce

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[97] The Hon. Nancy A. Flatters, "Family/Child Judicial Dispute Resolution (JDR): An Overview of One Canadian Court's Settlement Conference Approach to the Pre-trial Resolution of Family and Child Welfare/Protection Matters" (2003) 41 Fam. Court Rev. 182 at 183.

[98] *Ibid*.

[99] Alberta Justice, *Annual Report 2001-2002* (Edmonton: Alberta Justice, 2002) at 31 [AJ AR 2001-2002] (topic "Strategic Objectives and Accomplishments," subtopic "Access to justice and cost of administering justice: Provide Albertans with access to alternative forms of dispute resolution"). JDR is also available for family cases in the Court of Queen's Bench.

[100] Alberta Justice, *Annual Report 2000-2001* (Edmonton: Alberta Justice, 2001) at 19 [AJ AR 2000-2001] (topic "Ministry Overview – analysis of Key Activities," subtopic "Program Initiatives").

[101] AJ AR 2001-2002, *supra* note 99 at 31.

significant and successful results."[102] The "earliest opportunity" is usually seen to be at or after the close of pleadings and before discovery. For example, unless an exemption is granted, the Rules of Court that apply to the civil mediation programs in Toronto and Ottawa require each civil case to go to mediation after a Statement of Defence has been filed.[103] In Saskatchewan, as soon as the pleadings are closed the registrar arranges for a mediation session which the parties must attend before taking any further steps in the action.[104] The requirement applies to all contested actions (excepting family law proceedings).[105]

3. Filing the affidavits of records

[87] Filing the affidavits of records is the point in time recommended by the Alberta Justice Working Committee on Court-annexed Mediation in Civil Matters (AJ Court-annexed Mediation Committee) for activating the use of court-annexed civil mediation by service.[106] Recommendation 4 of that Committee's report states: "Upon the filing of an Affidavit of Records, either party may file and serve a Request to Mediate."[107] Recommendation 5 creates an expectation that the parties will mediate before the time of the pre-trial conference held to determine trial readiness, whether or not a Request to Mediate is served. As noted in chapter 4 of this consultation memorandum, an Implementation Committee is working on a pilot project that will carry out these recommendations.

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[102] CBA Task Force Report, *supra* note 2 at 32. Favourable results from early mediation have also been achieved in civil claims brought in Alberta's Provincial Court where in 1998 66%-70% resolution rate was observed: Alberta, Court Services, *Edmonton Provincial Court Civil Mediation Pilot Project: Evaluation Report* (Edmonton: Court Services, 1999) at 6 [Edmonton Provincial Court Civil Mediation Project]. See also Alberta Justice, *Annual Report 1998-1999* (Edmonton: Alberta Justice, 1999) at 40 [AJ AR 1998-1999].

[103] Ontario, *Rules of Civil Procedure*, r. 24.1 [Ontario].

[104] *Queen's Bench Act, 1998*, S.S. 1998, c. Q1-01, s. 42(1).

[105] *Ibid*.

[106] Alberta Justice, *Report of the Working Committee on Court-annexed Mediation in Civil Matters* (Edmonton: Alberta Justice, 2002) [AJ Court-annexed Civil Mediation Report]. The Report is available online: Alberta Justice <http://www.gov.ab.ca/just/> click on Publications.

[107] *Ibid.* at 4.

4. Close of discoveries

[88] The CBA Task Force discusses mini-trials and judicial settlement conferences (two versions of judicial participation in dispute resolution) under the heading "post-discovery dispute resolution processes." Under the Task Force recommendations, these efforts at settlement will follow previous attempts:[108]

> Renewed attempts at settlement after discovery is complete, for example, can be made through the use of judicial mini-trials, renewed attempts at mediation, conciliation or judicially-supervised settlement conferences.

After describing different forms of judicial dispute resolution, the CBA Task Force comments on the "wide range of experience across Canada concerning the integration of non-binding dispute resolution in the post-discovery stage of litigation."[109] It sees it as "essential that reforms be implemented to facilitate the resolution of cases before trial without adding substantially to parties' costs or the burden on the courts."[110] It concludes that "there is a need to identify best practices with respect to the integration of additional dispute resolution processes [in the post-discovery stages of litigation] in order to ensure that their full potential is realized."[111] Recommendation 3 is that every court undertake studies or pilot projects to determine best practices. The Task Force does not specify any particular JDR process (*e.g.*, mini-trial, neutral evaluation, settlement conference).

[89] In CM 12.5, the Management of Litigation Committee envisages that settlement discussions will take place after discoveries and the exchange of expert reports. This is the time when the parties have information that is "more or less complete" and "can perform a comprehensive evaluation of their case."[112] This is the time at which a settlement conference or other type of JDR can be booked. The timetable tracks in CM 12.5 do not build in earlier settlement activities, although the first evaluation (issue definition following disclosure of documents) provides a clear opportunity for parties and the court to review the situation and consider settlement possibilities.

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[108] CBA Task Force Report, *supra* note 2 at 34.

[109] *Ibid*.

[110] *Ibid*.

[111] *Ibid*.

[112] ALRI CM 12.5, *supra* note 12 at 39.

5. Exchange of expert reports

[90] Our **core premise 2** embodies the understanding that the parties should not be required to participate in a settlement process until they have enough information to make an informed decision. Expert reports may be needed before an informed decision can be made. As stated previously, the timetable tracks proposed by the Management of Litigation Committee require this exchange to take place earlier in time than is required under the existing rules.

6. Filing of certificate of readiness

[91] The CBA Task Force recommends that the parties be required to try a non-binding dispute resolution process as a condition of going to trial. This is in addition to the requirement that the parties participate in a non-binding dispute resolution process after the close of pleadings as a condition of using court process. The Task Force does not name a specific non-binding dispute resolution process.

[92] The Management of Litigation Committee timetable tracks allow time to book a settlement conference or other type of JDR prior to trial (60 days for booking in the Standard Track, 30 days in the Simple Track). That Committee thereby anticipates, but does not require, the use of a settlement measure.

[93] Experience in the Provincial Court of Alberta, as well as in other jurisdictions, indicates that the time when the parties indicate that they are ready for trial is an effective point for exercising a judicial role in connection with settlement. That role may be to encourage settlement as part of litigation management by reviewing settlement efforts and suggesting others, or to facilitate settlement through JDR.

B. Mandatory or Voluntary Use of Settlement Measures

ISSUE No. 4
When, if at all, should the use of a settlement measure be mandatory?

[94] Traditionally, the participation of parties in settlement processes has been voluntary. At the same time, as stated in **core premise 4**, the court has an interest in the resolution of disputes that are in litigation. The further the dispute progresses

along the litigation continuum leading toward trial, the greater the court's interest in seeing it resolved. Although the court cannot compel the parties to reach settlement, the rules could require the parties to take steps that have the potential to bring about settlement as part of the management of litigation. For example, as the CBA Task Force recommended, the rules could require the parties to attempt to reach settlement using one or another of the processes offered by the civil justice system as a prerequisite to taking certain steps in the litigation.

[95] If participation in a non-binding settlement process becomes mandatory, the question of screening for appropriateness arises. We have seen that cases that raise a point of principle having precedential value may be unsuitable for settlement. Other grounds for screening cases away from mandatory settlement processes may be the unequal bargaining positions of the parties, or a history of violence between them. What method of screening should be used? Should screening take place automatically, for example, as part of a non-binding settlement process provided by the civil justice system? Alternatively, should a party who sees settlement as inappropriate be required to apply to the court for an exemption? These are questions that need to be addressed if the use of any settlement measure is rendered mandatory.

C. Reform Options

[96] **Core premise 3** sees the resolution of disputes by settlement between the parties as preferable to resolution imposed by court adjudication (which is, in most cases, a last resort). The objective is to encourage people to seriously consider settlement as early and often as is appropriate in terms of the interests of the parties, the interest of society, and the expeditious resolution of disputes.

1. Building settlement discussions into the litigation process

[97] As stated at the beginning of this chapter, our recommendations need to be tailored to fit into the overall picture of litigation. For example, the goal of early settlement would be assisted by provisions that require clear pleadings, eliminate illusory issues and promote full disclosure early in the dispute.

[98] Building in meaningful occasions for the parties and counsel to direct their minds to the possibility of settlement has the potential to aid settlement. An important element is to have the parties and their counsel get together to decide what they need

to do to get to resolution of the case. That is to say, settlement discussions should start right away. What do the parties agree on? What needs to be done to get on with resolving the case? Identifying an early step in which opposing parties and counsel are required to sit down and discuss settlement would help both parties and counsel start thinking seriously about settlement at the outset.

2. Sharing information before, or shortly after, commencement of an action

[99] We have advanced, but not endorsed, the idea of introducing either pre-action or action protocols whose use would set a standard for best practice.[113] A party's failure to comply with the relevant protocol could be considered by the court when making case management directions and determining costs.

3. Building judicial conferences to explore settlement into the litigation process

[100] The existing rules and practice notes allow pre-trial and case management conferences to be held at any time before trial. However, an early conference is not mandatory. One option would be to require the parties and counsel to meet with a judge before discoveries. The purpose of the meeting would be to explore settlement possibilities, consider the need for discoveries (including what could be done without them) and define the issues that warrant discoveries, if any. The Management of Litigation Committee's timetable tracks provide opportunities for such conferences (1) after documents have been disclosed and the issues defined, and (2) after discovery and the exchange of experts reports.[114]

4. Making participation in a non-binding dispute resolution process a prerequisite to the next step in litigation

[101] The CBA Task Force discussed requiring the use of a non-binding dispute resolution process at three points in time: before filing; at or after the close of pleadings; and before trial or hearing date. It limited its recommendations to stages in the litigation.

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[113] Above at 27ff.

[114] ALRI CM 12.5, *supra* note 12 at 39 and 41.

a. Before filing

[102] We noted, in chapter 2, that the CBA Task Force considered, then rejected, the idea of requiring persons in a dispute to use a settlement process as a prerequisite to commencing litigation.

b. After close of pleadings

[103] The CBA Task Force recommends that as a pre-condition for use of the court system after the close of pleadings, litigants should be obliged to certify either that they have "availed themselves of the opportunity to participate in a non-binding dispute resolution process or that the circumstances of the case are such that participation is not warranted or has been considered and rejected for sound reasons."[115] (Opportunities for litigants to use non-binding dispute resolution processes would be available as part of the justice system.)[116] This is one of two occasions when attendance at a non-binding dispute resolution process would be mandatory under the Task Force recommendations. The second occasion would be before a trial date is granted.

[104] As previously noted, the Management of Litigation Committee schedules time for settlement discussions after discovery and the exchange of expert reports, but before trial.[117]

c. Before trial or hearing date

[105] The CBA Task Force recommends that later in the proceeding, entitlement to a trial or hearing date should be governed by the same pre-condition. That is to say, once again, litigants should be obliged to certify either that they have "availed themselves of the opportunity to participate in a non-binding dispute resolution process or that the circumstances of the case are such that participation is not warranted or has been considered and rejected for sound reasons."[118]

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[115] CBA Task Force Report, *supra* note 2, Recommendation 1(b) at 33.

[116] *Ibid.*, Recommendation 1(a).

[117] ALRI CM 12.5, supra note 12 at 39 and 41.

[118] CBA Task Force Report, *supra* note 2, Recommendation 1(b) at 33.

[106] This is the second occasion on which the CBA Task Force would require the parties and their counsel to attend a non-binding dispute resolution process. It is also the time by which the AJ Court-annexed Mediation Committee would require the parties to have participated in civil mediation.

5. Choosing from a menu of settlement options

[107] Although ordinarily the court would not direct the parties to use a particular settlement process, the rules might direct the parties to a menu of settlement measures and require the parties to use at least one of the options before a certificate of readiness for trial can be filed. That menu could include: civil mediation in a court-annexed program, settlement facilitation by a judge (JDR) or court-appointed specialist (*e.g.*, Dispute Resolution Officer), use of a private sector ADR process, or service of compromise using court process. Used alone, the choice of service of compromise using court process does not guarantee an opportunity for the parties (and counsel) to address the merits of an action or the interests a solution must meet. Therefore, if service of compromise does not lead to a settlement, the parties should select one of the other settlement measures on the menu.

D. Position of the EDR Committee

[108] The introduction of measures to promote "early" dispute resolution could mean settlement before trial, before discovery, or even before filing. It could mean settlement achieved by agreement of the parties on their own initiative. It could involve the court in mandatory explorations with the parties of opportunities for settlement at designated stages in the litigation process. It could mean that participation in specified settlement procedures would become a mandatory part of the litigation process. Many possibilities exist.

[109] The EDR Committee agrees with the overarching intent of the CBA Task Force which is "to focus the attention of litigants and their lawyers at an early stage on the possibilities of settlement."[119] In our view, the civil justice system should focus the attention of litigants and counsel on the possibilities of settlement early in the dispute and successively thereafter, as meaningful opportunities present themselves in the litigation process. As is often remarked, and in our view accurately, the more times

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[119] *Ibid.* at 34.

that meaningful events require counsel to pick up the file and think about settlement, the more likely it is that there will be an earlier resolution of the case.[120] The attention of the parties and counsel should be focussed on settlement early and repeatedly as the litigation process unfolds. As in the Task Force's conception, broadening the dispute resolution options available throughout the litigation process is an ancillary goal.[121]

[110] The EDR Committee believes that flexibility of approach is desirable. In our view, cases are sufficiently different that it would be artificial to force them into a one-size-fits-all process. The available processes must be looked at from the perspective of the facts of the particular case. For example, the considerations affecting settlement choices, how much information is needed before the discussions can be meaningful, and so forth may vary depending on the amount of money at stake. If settlement measures are made mandatory, it may be appropriate to provide that litigants may be exempted from their use in some circumstances.

[111] While it may be desirable to mandate a discussion of settlement possibilities at specific points in the litigation process, the only stage by which we would require the parties to have utilized a settlement process is before filing a certificate of readiness for trial in order to obtain a trial date. By this time, settlement must become the prime focus. This recommendation fits well with the timetable schedule proposed by the Management of Litigation Committee, and corresponds to that Committee's view that the use of judicial resources to facilitate settlement is well justified in the later stages of litigation.

[112] Our preference would be to allow the parties to choose one settlement measure from a menu of settlement options that would include the list suggested under heading C.5. The parties should be encouraged to make this choice as soon as they have an understanding of the important issues in the lawsuit which may be before or after discoveries, depending on the case.

[113] ***We seek your comments regarding the connections between settlement measures and litigation events that ought to be secured in the Rules of Court.***

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[120] Ontario Civil Justice Review First Report, *supra* note 17 at 170-71.

[121] *Ibid*.

CHAPTER 4. COURT-ANNEXED ALTERNATIVE DISPUTE RESOLUTION

[114] Increasingly, courts are supplementing the traditional litigation system with dispute resolution programs and services known as "court-annexed ADR." These programs and services are designed to encourage parties to settle their dispute before trial using non-binding processes assisted by persons other than judges. They form the topic of this chapter. We consider the judicial role in ADR in chapter 5.The issues discussed under heading C. of this chapter also arise with respect to the judicial facilitation of settlement (JDR).

ISSUE No. 5

What court-annexed ADR programs and services should be available for civil cases commenced in the Alberta Court of Queen's Bench, and what features should they have?

ISSUE No. 6

What provision should be made with respect to:

(a) the degree to which a program or service is integrated with the court;
(b) initiating use of a service;
(c) excepting cases from a requirement to use a court-annexed program or service;
(d) the costs associated with use of a program or service;
(e) protecting the confidentiality of parties who use a program or service;
(f) conferring immunity from suit on the person conducting the ADR?

A. ADR Processes

[115] To more fully understand what is meant by "court-annexed ADR," one must first understand the term ADR. As stated in chapter 1, many meanings of ADR are possible. For the purposes of this consultation memorandum, we have defined ADR as any method of resolving a dispute that is alternative to court adjudication.[122]

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[122] See above at 11.

[116] The range of alternatives falling within the rubric of ADR is pretty well limitless, making ADR processes difficult to categorize. The three basic methods are: negotiation, mediation and arbitration. Negotiation and mediation are non-binding processes; arbitration is usually (but not always) binding.

> *Negotiation*, the most common form of dispute resolution, is the method used traditionally by lawyers. In negotiation, the parties (perhaps assisted by their lawyers) attempt to settle their dispute themselves.
>
> *Mediation* ordinarily involves an outside person, the "mediator," acting as a facilitator to help disputants settle their dispute consensually between themselves.[123]
>
> *Arbitration* ordinarily takes the form of an adjudication, that is, a formal decision that binds the persons in dispute, but non-binding arbitration is also a possibility. Arbitration proceedings are less formal than court adjudication. In some cases, the arbitration process will have been structured in advance, by reference to a statutory form or a method agreed to by the parties. In other cases, the parties may design the process leading up to the decision which may include a mediated discussion. Often, the parties have a say in the choice of decisionmaker.

[117] These are bare descriptions. In actuality, the dispute resolution processes are myriad. The interventions lying between the extremes of mediation and arbitration can vary greatly,[124] as can the mixing and mingling of the methods. Any attempt at classification of the different methods of outside intervention for dispute resolution is by necessity fraught by overlapping, as many of the methods share characteristics with others.

[118] Numerous factors affect the choice of ADR method. In 1990, ALRI offered the following list, which we reproduce here because similar factors may affect decisions

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[123] ALRI RP19, *supra* note 19 at 17. This is a simplistic definition. In reality, a diversity of views exists on what it means to be a "mediator": Michelle Christopher, "What's New in Alternative Dispute Resolution?" (2003) 27 LawNow 9 at 9-10.

[124] Conciliation is a form of mediation in which efforts are made to repair the relationship between parties in order to help them find a peaceable and amicable resolution of differences. Therapeutic intervention is a form of mediation in which the relationship is repaired and personal skills for coping and dealing with problems is improved. An extension of therapeutic intervention would include individual therapy.

with respect to the provision and use of court-annexed ADR:[125] matching a dispute with a process;[126] the strength of the "interpersonal" dimension of the dispute (*i.e.*, interpersonal or impersonal relationship between the disputants); the nature of the dispute; the amount at stake; alternative methods; the speed of resolution; the cost involved; the relative power of the disputants; the relative knowledge of the disputants; the relative financial resources of the disputants; the mechanisms for steering disputants and intermediaries to the right choice; the relationship between dispute resolution methods (*i.e.*, linear, hierarchial model, or integrated); the incentives for use of alternative methods; and the attitudes of lawyers and judges.

[119] Litigants may be attracted to ADR for a number of reasons, including the following:[127]

- ADR is not restricted to consideration of legal issues and remedies; other interests at stake in the dispute can be accommodated by taking an "interest-based" (rather than "rights-based") approach to problem-solving.
- The parties choose their own ADR proceeding, including the persons who will assist (*e.g.*, mediate) or "judge" (*e.g.*, deliver a binding or non-binding opinion about the likely outcome of the case at trial).
- The parties determine their own outcome.
- The parties choose the time when they will use ADR.
- ADR processes are ordinarily held in private, thereby preserving the confidentiality of the proceedings and resolution.
- ADR may be more affordable than court adjudication.

B. Court-annexed ADR Programs

[120] Two court-annexed ADR measures have been introduced in Alberta – civil mediation, and the use of court-appointed dispute resolution officers in family matters.

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[125] ALRI RP 19, *supra* note 19 at 20.

[126] We lack empirical evidence to show that a particular process is most effective for a particular dispute: Canada, Law Reform Commission, *Dispute Resolution in Canada: Present State, Future Direction* (Consultation Paper) by Andrew J. Pirie (Ottawa: Law Reform Commission of Canada, 1987) at 18.

[127] See chart above at 12.

1. Civil mediation

[121] The concept of civil mediation is not new to Alberta. In 1975, after a successful 3-year pilot project, the first court-annexed ADR program in Canada was established in Edmonton, in the Family Division of the Provincial Court of Alberta.[128] The original program was known as the Edmonton Family Court Conciliation Project. One or another form of family mediation service has been available in Alberta since that time, although the scope of the service, terms of its availability and administrative details have gone through several transitions. Family mediation services are now available in 15 communities across Alberta for cases involving custody, access, support or guardianship brought in the Court of Queen's Bench or the Provincial Court. The services are available at no charge where the parties have a child under age 18 and one party has an annual income below $40,000.[129] Mediation services for cases involving child welfare issues are available in eight communities.[130] The mediators are employees of Alberta Justice, Court Services, Family Mediation Services, or are on contract.[131]

[122] In 1995-1996, Alberta Justice approved a 1-year pilot project for the mediation of civil claims brought in the Provincial Court in Calgary and Edmonton.[132] The Provincial Court hears claims for lesser monetary sums (the $7,500 ceiling was raised to $25,000 in late 2002).[133] The project, which started in Edmonton in January 1998 and expanded to Calgary in September 1998, was set up as a partnership between Alberta Justice and community-based organisations (Alberta Arbitration and Mediation Society, Calgary Better Business Bureau, Community Mediation Calgary,

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[128] Alberta Law Research Institute, *Court-connected Family Mediation Programs in Canada* (Research Paper No. 20) (Edmonton: Alberta Law Reform Institute, 1994) Appendix 4 at 60 [ALRI RP 20].

[129] AJ AR 2001-2002, *supra* note 99 at 31.

[130] *Ibid*.

[131] AJ Court-annexed Mediation Committee Report, *supra* note 106 at 2.

[132] Alberta Justice, *Annual Report 1995-1996* (Edmonton: Alberta Justice, 1996) at 16 [AJ AR 1995-1996].

[133] Alberta Provincial Court Civil Division Regulation 329/89, s. 1.1 as amended by AR 215/2002.

Edmonton Community Mediation Society and Mount Royal College).[134] The services are now available on a continuing basis. Alberta Justice reports that "parties may request mediation, or cases may be selected for the mediation process"[135] after screening for appropriateness. The mediations, which are conducted by trained and experienced mediators, are "interest-based": the cases are resolved in ways that meet the needs expressed by the parties.[136] The success rate is significant, with agreements being reached in over 70 per cent of the 1,300 cases referred in the 2001/02 fiscal year.[137] Cases not successfully resolved return to regular court proceedings for disposition.[138] A recent report describes the program as follows:[139]

> In Alberta, the Provincial Court Civil Claims Mediation Program operating in Edmonton and Calgary is highly integrated with the court. Mediation is mandated for selected cases after a Dispute Note has been filed. Mediators from a roster mediate without charge to the parties. The mediators receive an honorarium.

[123] Improving access to justice became one of the goals of Alberta Justice following the Justice Summit held from January 27-29, 1999.[140] One of the strategies to achieve this goal is to enhance opportunities for Albertans to obtain appropriate dispute resolution mechanisms.[141] An initiative taken to this end was examination of the use of appropriate dispute resolution techniques as a means of resolving legal disputes.[142]

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[134] AJ AR 1998-1999, *supra* note 102 at 40; Alberta Justice, *Annual Report 1999-2000* (Edmonton: Alberta Justice, 2000) at 47 [AJ AR 1999-2000]. See also: Edmonton Provincial Court Civil Mediation Project, *supra* note 102.

[135] AJ AR 2001-2002, *supra* note 99 at 31.

[136] *Ibid*.

[137] *Ibid*.

[138] AJ AR 1998-1999, *supra* note 102 at 40.

[139] AJ Court-annexed Mediation Committee, *supra* note 106 at 6.

[140] Alberta Summit on Justice: Final Report, online: Alberta Justice <http://www4.gov.ab.ca/just/justicesummit>. See also AJ AR 2001-2002, *supra* note 99 at 28 (Goal 4); AJ AR 2000-20001, *supra* note 100 at 35 (Goal 5); and AJ AR 1999-2000, *supra* note 134 at 27 (Goal 4) online: Alberta Justice <http://www4.gov.ab.ca/just/>.

[141] AJ AR 1999-2000, *ibid.* at 27 (Goal 4, strategy 1).

[142] *Ibid.* at 47 (Initiative 4).

[124] In pursuit of this goal, Alberta Justice is now working on the implementation of a court-annexed mediation program for civil cases brought before the Court of Queen's Bench. A pilot project will carry out recommendations contained in the AJ Court-annexed Mediation Committee's Report when funding (which is now on hold) becomes available.[143] The Report defines court-annexed mediation as mediation that "is available, and may be mandated, as part of the litigation process."[144] It continues:

> The mediation program may be an integral part of the organization of the court, it may be totally separate from the court and litigation process, or the connection between the court and the mediation program may fall somewhere between these two extremes.

[125] The AJ Court-annexed Mediation Committee's proposal builds on experience with civil mediation programs that operate in superior courts in Saskatchewan, Ontario (Toronto and Ottawa) and British Columbia, civil claims mediation in the Provincial Court of Alberta and family mediation in Alberta's Provincial and Queen's Bench Courts. According to Alberta Justice, "[r]esearch indicates that cases referred to court-annexed mediation programs in other jurisdictions are being resolved 50 to 55 per cent of the time."[145] Brief descriptions of the programs in Saskatchewan, Ontario and British Columbia are as follows:[146]

> In Saskatchewan, the *Court of Queen's Bench Act* requires that parties to all civil cases attend a mediation session. The mediators are employed by the Mediation Services Branch of Saskatchewan Justice, and provide one hour for the mediator to prepare, and three hours of mediation at no charge. Where necessary the mediator begins with information about mediation and a discussion about mediation in the case. Parties may continue after the three hours, but pay a fee determined on a sliding scale. Parties may apply for an exemption from the requirement to mediate. This mediation program is highly integrated with the court process.
>
> In Toronto and Ottawa, the mediation programs are also highly integrated with the court process although private practitioners, rather than government employees provide mediation services. The Rules of Court applying in Toronto and Ottawa require each civil case to go to mediation after a Statement of Defence has been filed, unless an exemption from

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[143] *Supra* note 106.

[144] *Ibid.* at 2.

[145] AJ AR 1998-1999, *supra* note 102 at 40.

[146] AJ Court-annexed Mediation Committee Report, *supra* note 106 at 6.

> the requirement to mediate is granted. Parties pay mediators directly unless they show that they cannot afford to pay. In those cases, mediators on the mediation roster still provide services, as each mediator agrees to provide 12 hours of mediation per year without charge for those who cannot afford to pay.
>
> In British Columbia, the Notice to Mediate program is a court-annexed mediation program, but its only connection with the court is that the court has passed a rule allowing it. If one party wishes to mediate, that party serves a Notice to Mediate on the other party. The parties then retain a mediator, pay the mediator and either discontinue their lawsuit or go to trial. Although the court is supposed to be informed if a mediation has taken place, and whether a case has been resolved, often it is not, so the court is not aware of all of the cases in which mediation has taken place, or the total number of mediations occurring under its rules. This program is less integrated with the court process than the previous examples.

[126] Like the Saskatchewan and Ontario programs, the Alberta small claims civil mediation program is highly integrated with the court process whereas mediation in family cases is less integrated:[147]

> [Mediation in family cases] may be provided at any stage in the proceedings if the parties wish, but the courts may have no information it is taking place, or any record that it has occurred.

[127] The AJ Court-annexed Mediation Committee's recommendations are build around seven principles:[148]

> ***1. Accessibility*** - A court annexed mediation program, when fully implemented, will be accessible to all parties with civil, non-family cases in the Court of Queen's Bench of Alberta, regardless of the type of claim, the parties' location or their ability to pay.
>
> ***2. Appropriateness*** - The program will be flexible enough to allow for opting out where cases are not appropriate for mediation.
>
> ***3. Competence*** - Standards for mediators' education and provision of mediation services will be set and monitored, so that a fair, high quality service is consistently provided.
>
> ***4. Awareness / Understanding*** - Information will be made available so that the public is aware of the program, and parties understand the mediation process and how to best make use of it.

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[147] *Ibid.* at 2.

[148] *Ibid.* at 3.

> ***5. Effectiveness*** - The program will provide a quality mediation process that is simple, affordable, and effective, and empowers parties to negotiate agreements that meet their needs.
>
> ***6. Properly supported*** - The program will have adequate financial support and resources, both during the pilot phase, and afterwards. Leadership, government-funded administration, and well trained and fairly compensated mediators will be in place.
>
> ***7. Timeliness*** - The program will provide parties with the opportunity to negotiate early or timely resolution of disputes.

[128] The report emphasizes the AJ Court-annexed Mediation Committee's view that "[a]ny court annexed mediation program must be set up so that it is in harmony with, and complementary to, the existing litigation process."[149] The Court-annexed Mediation Committee's recommendations cover a broad spectrum.[150] The mediation is to be interest-based. Use of the service is initiated by a "request to mediate" served by one party on another (as under the British Columbia model). The person receiving the notice has a choice whether to agree to the mediation, ask the court for a postponement, or ask the court for relief from the requirement to mediate (which relief would only be granted "upon evidence of sufficient cause"). Failure to mediate (without sufficient cause) renders a party liable to pay costs in a manner similar to that set out in rule 190 (failure to file an affidavit of records). Voluntary mediation by the parties before or after the commencement of litigation is still possible, and may be considered in substitution for use of the court-annexed program. The parties are expected to mediate their differences at least once before the date set for the pre-trial conference to determine trial readiness. If the parties agree that the action is not suitable for mediation, they may present their reasons to the judge who will consider them in determining their readiness for trial, and who may recommend that they use mediation or JDR. The mediation process is to be confidential and all discussions in mediation without prejudice unless the parties agree otherwise in writing. It is left to the Court-annexed Mediation Implementation Committee to consider whether some kind of record of the mediation should be kept "either for protection of mediators in case of complaints, or for parties to use where they agree that is desirable." Legislation is recommended to ensure that mediators are not compellable as witnesses. Generally, the parties are expected to split the fees for mediation (which they

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[149] *Ibid.* at 4.

[150] *Ibid.* at 4-6.

negotiate with the mediator), but the service will fund mediation for parties who cannot afford it (as determined by a means test). The fund is recommended to be formed by adding a surcharge to filing fees in the Court of Queen's Bench.

[129] As stated earlier, funding approval for the pilot project has been put on hold.

2. Settlement facilitation by court-appointed lawyers

[130] An idea coming out of the CBA Task Force Report is to give litigants an opportunity for early non-binding dispute resolution through mediation or early neutral evaluation by a senior lawyer.[151] In Alberta, the Court of Queen's Bench has introduced this concept in two similar family law pilot projects. These pilot projects are breaking new ground.[152] We describe them here because the experiments may be well worth emulating for other types of dispute.

a. Dispute Resolution Officers (DROs)

[131] A family law pilot project involving Dispute Resolution Officers (DROs) commenced in Calgary on December 1, 2001.[153] The DRO project is founded on the view that the use of mediation skills early in family law disputes will often result in settlement:[154]

> Generally the litigation system is "back-end loaded" in that many of the resources and judicial time are expended late in the process to ultimately result in a trial. A more appropriate use of resources, it is reasoned, would be to "front-end load" the system to place emphasis on intervention at the earliest possible stage. The use of mediation skills at this point in time would be beneficial to all parties.

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[151] CBA Task Force Report, *supra* note 2 at 83.

[152] We inquired about similar programs in other jurisdictions, and learned of only one, the New Brunswick Child Support Variation Service. Materials describing the service state: "This is a new, free service for parents in the Saint John Judicial District who believe the dollar amount of their child support should be changed. It is being piloted in Saint John from October 1st, 2002 to March 31, 2003, and is made possible through funding from Justice Canada and the New Brunswick Department of Justice."

[153] Dispute Resolution Officer Pilot Project: General Information, online: Alberta Courts <http://www.albertacourts.ab.ca/> click on Court of Queen's Bench [DRO Project].

[154] DRO Project, *ibid.*, click on A Proposed Solution.

The project was initiated in response to parent complaints about delay, high cost (particularly the prohibitive cost of applications to vary child support orders) and "problems which are never seemingly resolved" in court.

[132] The DROs are experienced family law practitioners (35 or so in number) whose judgment commands respect among members of the family law bar and who donate one day out of every six weeks to the role. The DRO uses mediation skills to help the parties settle and provides a non-binding opinion as to the likely outcome of the application in court that can then be the basis of a formal consent order to vary support. The success rate is reported at 70%. Where settlement is not achieved, the DRO ensures that "everything that is procedurally necessary to have the application heard has been done" so that only one appearance before a judge will be required and judicial time is saved on that appearance.

[133] The parties (self-represented or with counsel) must appear before a DRO on any interim or variation child support application (an exemption from this requirement may be obtained in emergency situations). Parties may request a "settlement conference" with a DRO on ongoing family law matters at any stage of the proceeding (on consent). In addition, a judge may refer contested family law motions to a DRO. Parties and their counsel may schedule the conference with the DRO before whom they want to appear. The DRO conferences are held in a room provided in the Calgary court house. Because the DRO program uses volunteer lawyers, the service is provided at no cost to the litigants.

[134] Hearing the independent viewpoint of a DRO is of benefit to both parties and counsel. It can help achieve settlement; it may divert parties from an "expensive, time consuming and intimidating" court process; and it provides a good opportunity for counsel to "pre-try" a case. Other benefits include: "improved delivery of justice to the public" and "the enhancement of the reputation of the legal profession in providing free services in conjunction with the current court system."

b. Child Support Resolution Officers (CSROs)

[135] An analogous project involving Child Support Resolution Officers (CSROs) commenced in Edmonton on September 1, 2002, pursuant to a Practice Directive

issued by the Chief Justice of the Court of Queen's Bench.[155] The primary function of this project is "to conduct Child Support Resolution meetings with litigants in cases where a self-represented individual is making an application in the Court of Queen's Bench" concerning child support in: initial applications under the Divorce Act or the Parentage & Maintenance Act; applications to vary an existing support order; annual recalculations; or any of these matters combined with other issues such as arrears, custody and access. Attendance at a CSR meeting prior to bringing a court application is mandatory in any case where the applicant is self-represented, without exception.

[136] The CSROs are either legal counsel from the Court of Queen's Bench Family Law Information Centre or senior members of the Edmonton Family Law Bar who participate as volunteers. A lawyer serving in the CSRO role is expected to do perform three functions:[156]

> 1. Draw on his or her experience with application of the Federal Child Support Guidelines to provide the parties with objective views on matters in issue which may lead to a settlement;
> 2. Ensure that everything that is procedurally necessary to have the application heard has been done. For example, all financial disclosure should be exchanged. In this way, it is hoped that judicial time could be saved and only one appearance before a judge would be necessary.
> 3. Provide assistance in drafting of court documentation such as Consent Orders.

The CSR process "take[s] into consideration several themes common to mediation." These include: active listening; looking for areas of agreement or common concerns; identifying issues and approaching them in order of difficulty; reaching agreement on procedures that will lessen delays; and obtaining agreement on as many issues as possible.

[137] All self-represented litigants who file applications regarding child support matters are given a standard form notice to attend a CSR meeting. A CSR Clerk schedules a meeting date. The applicant is responsible for serving notice of the meeting on the respondent and completion of an affidavit of service. Both parties are

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[155] Child Support Resolution Project, "Project Description," available from the Family Law Information Centre, Main Floor, Law Courts Building, Edmonton; see also online: <http://www.albertacourts.ab.ca/familylaw/index.htm> [CSR Project].

[156] *Ibid*.

expected to disclose their financial information by completing a Financial Statement and providing supporting documentation. Where agreement is reached at the meeting, the CSRO may "assist the parties by recording minutes of settlement." Either party may rescind the minutes within seven days of the meeting. The CSRO may produce a consent order for the parties to sign immediately, if the agreement is satisfactory, or execute and enter with the Court after expiration of the seven-day "cooling off" period.. At the conclusion of the meeting, the CSRO completes a CSRO report for the court file. The report records a party's failure to attend. If the respondent fails to attend, the applicant may apply for an ex parte or variation order, as required.

[138] The benefits derived from meeting with a CSRO are analogous to the benefits derived from meeting with a DRO.

C. Essential Features of Court-annexed ADR

[139] The issues discussed in this section are also relevant to the judicial facilitation of settlement (JDR) which is discussed in chapter 5.

1. Integration with court processes

a. Court record of ADR use and outcome

[140] The AJ Court-annexed Mediation Committee comments on the extent to which mediation programs are or are not integrated with court processes. In order to evaluate court-annexed ADR programs, it seems important to know how often court-annexed ADR services are used, at what point or points in the litigation process, and with what outcome.

b. Adjournment where parties undertake referral to ADR

[141] Federal Court Rule 390 empowers a case management judge (or a prothonotary), on motion, to order a proceeding to be stayed for up to six months where the parties "have undertaken to refer the subject-matter of the proceeding to an alternative means of dispute resolution." A stay may be granted more than once. Judicial dispute resolution conferences are excluded from the operation of the rule. A rule of this sort may be necessary if the new rules impose strict time lines for the completion of designated steps.

c. No trial date to be set while court-annexed ADR is taking place

[142] Alberta's *Provincial Court Act* contains a section that is similar in purpose to the Federal Court Rule: an action is not to be set down for trial until after the conclusion of a court-annexed mediation:[157]

> 66 Except as otherwise directed by the Court, if a pre-trial conference or mediation is to be conducted in respect of an action, that action shall not be set down for trial or otherwise continued until the conclusion of the pre-trial conference or the mediation, as the case may be.

2. Initiating court-annexed ADR

[143] Different approaches are taken to initiating the use of court-annexed ADR. Use of the court-annexed ADR program may be mandated for all cases fitting the program requirements. For example, the Ontario civil mediation requirement arises automatically at the close of pleadings. In Alberta, a meeting with a DRO must be held before a judge will hear an interim or variation application for child support. In a variation to this approach, use of court-connected ADR may be mandated in cases authoritatively referred to a program. For example, in small claims matters, the *Provincial Court Act* allows "the Court, or a person authorized by the Court to do so" to "refer the action to mediation."[158] A Court of Queen's Bench judge may refer family law matters to a "settlement conference" with a DRO.

3. Exempting cases from court-annexed ADR

[144] It is usual to recognize some exceptions from a requirement to use court-annexed ADR. The exceptions may be: defined in the provisions mandating the use (*e.g.*, history of violence between the parties, "emergencies" under the DRO pilot project); left to the discretion of a judge on application of the parties (*e.g.*, CBA Task Force recommendation); or left to the discretion of the person conducting the "mediation" or other non-binding dispute resolution process.

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[157] R.S.A. 2000, c. P-31, s. 66.

[158] *Ibid.*, s. 65. See also *Queen's Bench Act, 1998*, S.S. 1998, c. Q1.01, s. 44; Ontario, r. 24.1; British Columbia, *Supreme Court Rules*, r. 35 [British Columbia].

4. Paying for court-annexed ADR

[145] The CBA Task Force Report states:[159]

> The cost of providing early non-binding dispute resolution could be borne by government (and hence taxpayers), by litigants, or by some combination of the two. The issue is controversial. It is the Task Force's expectation, however, that the savings resulting from early resolution of cases will greatly exceed the cost of providing early dispute resolution processes. Funding will be a matter for each jurisdiction to decide. Some may wish to have these services provided by the private sector at cost to the litigants. Alternatively, it may be appropriate in some jurisdictions for this service to be provided at public expense through the court system.

The Task Force did not take a position on this issue, saying only, as an implementation point, "[c]onsideration to be given to issue of how these services are to be funded."[160]

[146] In Alberta, the small claims mediation program operates at no direct cost to the litigants. The AJ Court-annexed Mediation Committee's proposal for civil mediation in the Court of Queen's Bench envisages cost-sharing by the parties, with a special fund being established for persons who fall below an income-tested level. The approaches taken in other jurisdictions vary. Saskatchewan provides 3 hours of mediation at no charge to the parties; if parties wish to continue after that they pay a fee which is determined on a sliding scale. In Ontario, the parties share equally the mediator's fees for the mandatory mediation session which includes up to 3 hours of actual mediation; the fees are set by regulation.[161] For any further time, the parties negotiate the fee with and pay the mediator directly. The mediators on the roster donate 12 hours of mediation annually for persons who cannot afford to pay.[162] In British Columbia, the parties retain and pay their own mediator.

5. Protecting confidentiality

[147] It is usual to treat the communications that occur in a court-annexed ADR process as privileged because the purpose is settlement. The AJ Court-annexed

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[159] CBA Task Force Report, *supra* note 2 at 33.

[160] *Ibid*.

[161] O. Reg. 291/99, s. 4.

[162] AJ Court-annexed Mediation Committee Report, *supra* note 106 at 2.

Mediation Committee recommends protection of the confidentiality of the mediation process. Saskatchewan, British Columbia and Ontario include protections in the governing statute or regulation.[163]

[148] Alberta's *Provincial Court Act* contains a useful precedent. Section 67 provides:

> 67(1) Any settlement discussions in respect of an action that take place during a pre-trial conference or mediation are privileged and are not admissible in any action under this Part or in any other civil action.
>
> (2) Neither a judge who conducts a pre-trial conference nor a mediator who conducts a mediation is compellable to give evidence in any court or in any proceedings of a judicial nature concerning any proceeding, discussion or matter that takes place during or with respect to the pre-trial conference or mediation.
>
> (3) Subsection (1) does not apply
>
> (a) to any order made under section 64;
>
> (b) to any written agreement arising from a pre-trial conference or mediation;
>
> (c) to the admission in evidence of factual evidence relating to the claim or counterclaim that would otherwise be admissible except for the operation of subsection (1);
>
> (d) to any facts that are relevant to the issue of the validity or enforceability of an agreement arising from a pre-trial conference or mediation.
>
> (4) Subsection (2) does not apply where a judge or a mediator is required by law to disclose those discussions if the disclosure is to the person who under that law is entitled to receive the disclosure.
>
> (5) The Freedom of Information and Protection of Privacy Act does not apply to any document, information or record arising during or as a result of a pre-trial conference or mediation.

6. Conferring immunity

[149] Another issue is the potential liability of the person conducting a court-annexed ADR process. The *Provincial Court Act* affords the following protection:[164]

> 68 No action may be brought against a mediator who conducts a mediation for any act done or omitted to be done in the execution of the mediator's duty or for any act done in respect of that mediation unless it is proved that the mediator acted maliciously and without reasonable and probable cause.

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[163] *Queen's Bench Act, 1998*, *supra* note 158, s. 43; Ontario, r. 24.1; British Columbia, r. 35.

[164] *Supra* note 157, s. 68.

D. Position of the EDR Committee

[150] The EDR Committee supports the use of court-annexed ADR. We believe that initiatives in this direction are a good idea and applaud Alberta Justice and the Court of Queen's Bench for the initiatives being taken. Like the CBA Task Force, we simply endorse the ongoing initiatives. We agree with the CBA Task Force that, like other jurisdictions, Alberta should "provide the opportunity for early, non-binding dispute resolution in the civil justice system."[165] Implementation of this proposal will involve decisions about the various matters identified by the CBA and discussed in this consultation memorandum:[166]

> ... when the opportunity is presented, who will be involved in providing the services, whether they will be mandatory in some or all cases, where the services will be provided, what incentives and/or penalties, if any, there should be to encourage litigants to use the opportunities provided, and who will fund the services.

We also agree with the Task Force's recommendation 3 that every court should "undertake studies or pilot projects to determine best practices concerning the integration of non-binding dispute resolution processes in the post-discovery stages of litigation." That is to say, it is important to monitor and evaluate the operation of the initiatives on the basis of actual data and to develop standards of best practice.

[151] ***We invite your response to Issue Nos. 5 and 6 which are raised at the beginning of this chapter.***

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[165] CBA Task Force Report, *supra* note 2 at 32.

[166] *Ibid*.

CHAPTER 5. JUDICIAL ROLE IN FACILITATING SETTLEMENT

A. Introduction

[152] As observed in earlier chapters of this consultation memorandum, in the past judges kept out of the arena of the dispute and let the parties (on the advice of their legal counsel) decide when and how to proceed. Today, judges perform an expanded role by encouraging settlement as part of the management of litigation and actively facilitating the settlement of disputes by party agreement.

[153] A judge may ***encourage settlement*** by exploring the possibility of settlement and suggesting settlement processes to the parties in a conference convened for the purpose of managing the litigation. Under the existing system, that conference may be a pre-trial or case management conference convened at any time (near the beginning of the action, just prior to trial, or anywhere in between). This facet of the judicial role falls within the mandate of the Management of Litigation Committee which makes provision for case scheduling, case management conferences, settlement conferences and other types of JDR, and pre-trial conferences on its proposed Litigation Tracks.

[154] The role of a judge in ***actively facilitating settlement*** is a role of another ilk. In effect, the judge steps outside the authoritative role required to manage litigation and decide cases, and into a role more akin to that performed by an outside facilitator in a private sector ADR process. In current Alberta practice, the distinction is apparent from the different scheduling processes used for judicial conferences having case management functions as their purpose and those which have a settlement purpose.[167] This chapter focuses on the judicial role in facilitating settlement.

1. Terminology: defining JDR

[155] In Alberta, the term most frequently associated with the judicial role in facilitating settlement is JDR. Because the term JDR has been adopted by the court and is widely used by the bar, we will use that term in this memorandum.

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[167] See below at 89 on "Selecting the judge" for a description of current JDR scheduling processes.

[156] Given the flexible nature of the process it is difficult to advance an all-inclusive definition of JDR. We have two definitions to suggest. The first is that JDR is "a flexible process voluntarily entered into by the parties which often leads to an evaluative non-binding opinion or otherwise assists the parties in achieving a consensual outcome (final or in the course of litigation) using techniques that are alternative to court adjudication which may include elements of some or all of the following: evaluation, mediation, facilitation, discussion . . . [list left open]." The second is that JDR is "a judicially-assisted settlement process which by its nature is facilitative rather than adjudicative." The first definition would not allow a judge to compel attendance at a judicially-facilitated settlement session. The second definition leaves open this possibility.

[157] The designation of JDR could be replaced by judicial ADR as a descriptor of active judicial involvement in bringing about settlement. The term judicial ADR highlights the functional distinction between the facilitative role being performed by the judge in JDRs and the authoritative role carried out with respect to the conduct of the litigation. It also highlights the fact that judges use ADR techniques when meeting with litigants and counsel to facilitate settlement.

[158] ***The EDR Committee asks for your views on the feasibility of changing the designation JDR to judicial ADR.***

2. Authority for JDR

[159] Sources cited as authority for expansion of the judicial role in settlement include:

- the inherent jurisdiction of a superior court to control proceedings before it;
- statute, in Alberta the *Judicature Act*, especially section 8 on control over procedure and avoidance of multiplicity of actions;
- rules, in Alberta especially rule 219 on pre-trial conferences and rule 219.1 on "very long trial actions," defined in rule 5(u) to mean "an action which will or is likely to require more than 25 trial days"; and
- practice notes, in Alberta PN3 on pre-trial conferences and PN1 on case management in very long trial, and other, actions.

[160] The only express reference to JDR occurs in section 13 of PN1. However, the availability of JDR is not limited to proceedings that come under this practice note.

The word "settlement" appears more often in the rules and practice notes. However, the context often suggests the judicial role of encouraging settlement as an aspect of case management rather than facilitating settlement using ADR techniques.

[161] The pre-trial conference is generally seen as the root source of the expansion of judicial involvement in facilitating settlement. For this reason, we will say no more about the court's inherent jurisdiction and the provisions of the *Judicature Act*. Instead, we will focus on the procedural detail provided in rules 219 and 219.1 and PN1 and PN3.

[162] These provisions reveal that settlement must be raised in a pre-trial conference held pursuant to rule 219 and PN3, section 2(a) and (c), and that it may be raised in a case management conference held pursuant to rule 219.1 and PN1. Moreover, PN1 and PN3 broaden the purposes of the pre-trial conferences specified in rules 219 and 219.1. PN3 stipulates that conferences may be called at any time during the litigation, and renders a conference mandatory in cases requiring 3 or more days at trial. Judges now encourage settlement during judicial conferences by discussing the possibility of settlement (PN3, s. 2(a) and (c)) and encouraging parties to use mediation or other ADR processes (including JDR) (PN1, s. 13). They may also "facilitate efforts the parties may be willing to take towards ... settlement" (PN1, s. 14(e)). It is not clear whether the words "facilitate efforts of the parties" are meant to describe JDR or assistance that the court might render as a facet of litigation management (*e.g.*, adjourning the action or suspending time to allow the parties to participate in extrajudicial settlement processes). In short, an examination of these rules and practice notes reveals an array of provisions covering a mixture of functions about which there is room for confusion.

3. Issues

[163] This chapter is devoted to a discussion of the role of the judge in actively facilitating settlement. After providing background information, we will address the following two issues:

ISSUE No. 7
What role, if any, should judges play in actively facilitating settlement (JDR)?

ISSUE No. 8

If judges are to have an active role in facilitating settlement, what provision should be made with respect to:

(a) planning a JDR conference;
(b) initiating a JDR;
(c) requiring participation in a JDR;
(d) exceptions from participation;
(e) timing;
(f) choosing a judge;
(g) attendance of parties, counsel or others;
(h) location;
(i) materials;
(j) protecting the confidentiality of communications;
(k) recording agreement, where reached;
(l) giving effect to an agreement by parties to be bound by the judge's opinion about the likely outcome of the dispute at trial;
(m) recourse with respect to the procedure followed at a JDR or the terms of the settlement;
(n) conferring immunity from suit on the judge conducting the JDR;
(o) disqualifying the judge from presiding at trial?

B. Current JDR Practice in Alberta

[164] Where requested by the parties, judges use ADR techniques to actively facilitate settlement discussions between the parties in individually scheduled conferences known as JDRs. As the discussion of their evolution reveals, this practice is relatively recent in origin.

1. Evolution

[165] The Court of Queen's Bench first offered JDR to litigants in Alberta around 1990. Initially, the process took the form of a judicial mini-trial. In 1992, an article in the Bencher's Advisory described the mini-trial as "an expanded pre-trial settlement conference." ALRI wrote about the judicial mini-trial in a discussion paper published in 1993 (DP1).[168] ALRI noted that the Alberta judicial mini-trial was modelled on a

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[168] Alberta Law Reform Institute, *Civil Litigation: The Judicial Mini-Trial*, (Discussion Paper No. 1, Dispute Resolution–Special Series) (Edmonton: Alberta Law Reform Institute, 1993) [ALRI DP1].

process introduced in rule 35of the British Columbia Supreme Court Civil Rules.[169] The British Columbia rule was developed from a dispute resolution process that had proven effective to resolve commercial disputes in the private sector.[170] In Alberta, the early mini-trial consisted of a structured process involving the presentation of the agreed facts and argument by counsel with parties present and concluding with the delivery by the judge of a non-binding opinion on the likely outcome were the case to proceed to trial. ALRI described the mini-trial as a discrete technique that may be used to produce a settlement, and observed that although a pre-trial conference may lead to a mini-trial, the mini-trial is not a continuation of the pre-trial conference, but is a separate event.[171] In 1996, the CBA Task Force identified two key features of the Alberta mini-trial, "voluntary participation" and "flexible design of procedure tailored to the dispute."[172]

[166] Once judges had become involved in facilitating settlement in judicial mini-trials, they began to employ other processes in their settlement efforts with counsel and parties. As stated in the *Legal Community Issues Paper*, today judges performing JDR frequently use mediation, caucusing, early neutral evaluation and other techniques associated with ADR.[173] The use by judges of a myriad of ADR techniques has led to wide variations in the processes employed. These wide variations occur even though JDR is a specialized function and the conference judge is usually selected

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[169] R. 35 has since been amended, but it is still of similar effect. The current British Columbia Supreme Court Civil Rules are online: <www.qp.gov.bc.ca/statreg/reg/C/CourtRules/>.

[170] The "private mini-trial" was created in 1977 to settle a bitter and complex patent infringement case but its use has since been extended to other private disputes, particularly in the commercial area, and to disputes with government: ALRI DP1, *supra* note 168 at 2, citing Eric D. Green, "Growth of the mini-trial" (1982) 9 Litig. 12 at 12.

[171] ALRI DP1, *ibid.* at 8, footnote 30. This notion is in keeping with recommendation of the Ontario Civil Justice Review, as described in the CBA Task Force Report, *supra* note 2 at 34, that:

> ... pre-trial conferences and settlement conferences be seen as separate steps in the litigation process, because each has a distinct purpose. [The Ontario Civil Justice Review suggests] that in a settlement conference, the sole focus should be on trying to resolve the dispute, or at least parts of the dispute. By contrast, in their view, a pre-trial conference should focus on ensuring that the case is prepared for trial from the court's perspective.

[172] CBA Task Force Report, *ibid*.

[173] Legal Community Issues Paper, *supra* note 30 at 4.

from a small roster of judges who are willing to perform this function. Factors that contribute to these variations include:

- the JDR Guidelines are not available through the Courts' website and hard copies issued by court clerks differ from one judicial district to another;
- the process for selecting the judge who will facilitate settlement appears to differ in Calgary and Edmonton (although both districts give the parties some say in the selection);
- the process is highly flexible (because of this, judges tend to develop individual "styles" of settlement facilitation, some being more inclined toward the original mini-trial, others making more liberal use of ADR techniques).[174]

A few judges will conduct a "binding JDR," a practice that invites conceptually difficult questions about the judicial role being performed and about the relationship between adjudication, JDR and settlement by the parties – matters to which we return later in this chapter.

2. Forms of JDR

[167] Legislation in some jurisdictions names one or another form of judicial dispute resolution. However, both the terminology and the practices vary widely across Canada. As with private sector ADR, there are numerous variations and hybrid methods of JDR. One process may lead into another, as where the use of mediative techniques progresses to neutral evaluation. Although no firm models of judicial dispute resolution have been established, certain designations tend to describe processes that share a core of features in common. We will describe three such classifications: judicial mini-trials, settlement conferences and early neutral evaluation. In doing so, we quote liberally from a handbook on JDR written for Alberta judges by Justice J.A. Agrios which we have been privileged to read.[175]

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[174] Agrios, *infra* note 175.

[175] John A. Agrios, *A Handbook on Judicial Dispute Resolution for Canadian Judges* (Version 2.5, September 2002) is an excellent source of information about current practices, and the variety of theoretical and practical issues involved. Justice Agrios cautions that the models he describes are his "attempt to analyze the different practices that have arisen by different judges in what will always be a developing field of non-traditional judicial approaches" at 19. See also: Paul R. Belzil, "Negotiating the Future: Court-annexed Mediation in our Civil Courts," (Paper presented to the Negotiating the Future Conference, Calgary, November 14-16, 2001) [unpublished].

a. Judicial mini-trial

[168] We have mentioned Alberta's judicial mini-trial, describing it as a structured presentation of facts and argument that concludes with the judge's non-binding opinion about the likely outcome if the case proceeds to trial. As described by Agrios J., the Alberta mini-trial is:[176]

> ... really a summary hearing where all the essential facts are principally agreed and a judge provides a non-binding opinion as to what likely would happen in a formal trial. It is usually held in a conference room rather than in a courtroom. All parties are present, including the clients. In advance an Agreed Statement of Facts, briefs, expert reports (*tabbed and highlighted*) have been exchanged and provided to the presiding judge. Usually the issues have been agreed to in advance. Both the Plaintiff's and Defendant's lawyers are given an opportunity to present their positions in a summary fashion. Some judges prefer to let them introduce their cases and make their comments. I prefer to outline the pertinent facts, the issues as I see them, and I make specific directions to the lawyers as to the points I want dealt with. The parties are given an opportunity to address the judge if they so wish. In the traditional model the judge then provides a non-binding opinion as to the judgment they would render if the matter went to trial. Many commentators think that it is quite wise to provide short but considered criteria for the non-binding opinion, making reference to specific cases if this is appropriate.
>
> At this point any number of things can happen. Some lawyers thank the judge and politely ask that he or she excuse themselves and they will continue the discussion between the lawyers and the parties. Some judges leave the meeting voluntarily to permit the parties to discuss the non-binding opinion with the comment that if they can be of further help, call, and they will return to the conference room. Other judges stay and try to see if, based on the non-binding opinion, a settlement can be reached. Some lawyers will immediately ask the judge if they can caucus to discuss the non-binding opinion. One is best to take a pragmatic approach and go with whatever works.

The mini-trial has been credited with having "been used successfully to facilitate the settlement of complex cases that would have taken months to litigate."[177]

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[176] Agrios, *ibid.* at 17-18.

[177] CBA Task Force Report, *supra* note 2, at 34.

[169] In Alberta, mini-trials are mentioned in a practice direction.[178] In British Columbia, Manitoba, Newfoundland, the Northwest Territories and the Federal Court, provisions in the rules or practice directions separate mini-trial conferences from pre-trial conferences.

b. Settlement conference

[170] The settlement conference is another form of JDR. In conducting a settlement conference, a judge may use mediation, caucusing and other ADR techniques as well as provide a neutral evaluation in the form of a non-binding judicial opinion:[179]

> Once again, briefs have been exchanged and provided to the judge. There may not be the same agreement on facts. Liability may be in issue and settlement conferences are often utilized when there is a strong possibility of contributory negligence. The technique employed by some judges is risk assessment. This is an attempt, with the assistance of counsel, to, based on the best available information, make a determination of a percentage on the likely outcome of trial. This is an art, not a science. The parties are invited to set out the strengths and weaknesses of the case and the judge hopefully facilitates a frank and open discussion, hopefully to arrive at a meritorious settlement. The clients may or may not contribute to discussions, depending on the circumstances. There is no reason why a settlement conference cannot be held even where there is general agreement on the facts. However, in my models, what distinguishes a settlement conference from a mini trial is that without general agreement on facts, a judge will not usually be in a position to provide a non-binding opinion at a settlement conference. There will clearly be exceptions and in a settlement conference a judge may well forecast the likely outcome of a trial in percentage terms. For example, "I think that Plaintiff's chances of winning are about 75%." If appropriate, caucusing may also be used during settlement conferences.

In several jurisdictions, settlement conferences are associated with pre-trial conferences. Prince Edward Island and Saskatchewan specify that settlement is the primary purpose of the pre-trial conference.[180] In contrast, the rules or practice

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[178] W. Kenneth Moore, C.J., "Mini-Trials" (1993) Issue 34 Law Society of Alberta Benchers' Advisory [Mini-Trial PN] and reproduced in Stevenson & Cote, *Civil Procedure Guide 1996* (Edmonton: Juriliber, 1996) at 956. Stevenson & Cote observe at 956 that "The orders issued in 1995 consolidating Alberta Queen's Bench practice directions do not refer to this document".

[179] Agrios, *supra* note 175 at 18-19.

[180] Prince Edward Island, *Rules of Civil Procedure*, r. 50.01 [Prince Edward Island]; Saskatchewan, *Queen's Bench Rules*, r. 191(8) [Saskatchewan].

directions in British Columbia, Manitoba, New Brunswick and Newfoundland make it clear that settlement conferences and pre-trial conferences are separate events.[181]

c. Early neutral evaluation

[171] Early neutral evaluation (ENE) is a third form of JDR. It consists of a non-binding judicial opinion given prior to discoveries:[182]

> This is a model that has been used in other countries with considerable success. The literature indicates it has much appeal to non-adversarial lawyers. It usually arises in jurisdictions which have structured case management procedures and involves a judge meeting at an early stage with the lawyers. It will occur before discoveries and before expert reports and clearly requires an attitude of open disclosure based on "will-say" statements. One of the objects is to avoid selection of "hired gun" experts who are known clearly as either Plaintiff or Defence experts. An attempt is made to agree on one expert, e.g. an orthopedic surgeon or a psychiatrist who will provide the same information to both sides, thereby giving a shared basis for future settlement discussions. In some cases frivolous matters can be disposed of quickly and, in others, issues can be delineated and a settlement conference held once the agreed experts' reports have been received.

Manitoba and the Federal Court include ENE in their rules or practice directions.[183]

3. Success rate

[172] In 1996, the CBA Task Force was informed that "the success rate of mini-trials in the Alberta Court of Queen's Bench was between 80 and 90 percent, resulting in substantial savings in sitting days."[184] In 1999-2000, according to Alberta Justice, an estimated 75 to 80 per cent of cases that went through the judicial dispute resolution process in the Court of Queen's Bench reached settlement at some point prior to trial.[185] These are anecdotal figures. No formal system for keeping statistics on the

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[181] British Columbia, r. 35; Manitoba, *Court of Queen's Bench Rules*, r. 50.01 [Manitoba]; New Brunswick, *Rules of Court*, rr. 50.01, 50.08 [New Brunswick]; Newfoundland, *Rules of the Supreme Court, 1986*, r. 39.02(5)(i) [Newfoundland].

[182] Agrios, *supra* note 175 at 19.

[183] *Federal Court Rules, 1998*, r. 387(b) [Federal]; Manitoba, r. 50.01; Karen Busby, *Manitoba Queen's Bench Rules Annotated*, looseleaf (Scarsborough, Ont.: Carswell, 1992) at 9-10 entitled Notice to the Professions (January 1998) Judicially Assisted Dispute Resolution.

[184] CBA Task Force Report, *supra* note 2 at 19.

[185] AJ AR 2000-2001, *supra* note 100 at 42.

outcomes of judicial dispute resolution conferences has been established. In comparison, Newfoundland has a formal system to require parties to file notice of settlement.

4. Popular reception

[173] JDR is now an integral part of dispute resolution in the Alberta civil justice system. It is available in a wide variety of circumstances and is generally popular with lawyers and litigants.

[174] As reported in chapter 1, in answer to the question whether ADR should be performed by judges, the majority of lawyers responding to our legal community consultation favoured the involvement of judges in facilitating dispute resolution. That is because judges are skilled at analyzing and interpreting legal issues and because their views carry weight with parties who are reluctant to settle. Lawyers wanted litigants to continue to be able to choose whether or not to involve a judge in settlement facilitation. Lawyers also liked being able to choose the judge based on a judge's particular area of knowledge. While a "frequent comment was that the Alberta JDR system is working well and that JDR should continue to take place on a voluntary basis," lawyers also identified some issues or concerns. These included:[186]

- Booking delays
- Cost – usually brief and expert reports are filed
- Not knowing what you are getting – you may have requested a mini-trial but the judge or the other party may prefer and get something else
- Trials being delayed because judicial time and resources are taken up by JDR activities

[175] Respondents to the public consultation regarded ADR as an effective means of resolving disputes and reducing associated time and costs. They also felt that the availability of ADR services needs to grow. Respondents included judges "outside of the court" among those persons whose availability to provide ADR services needs to be expanded.[187] At the invitational public forums held in Edmonton and Calgary,

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[186] Legal Community Consultation Report, *supra* note 24 at 5. Regarding the fourth bullet, we have been told that, at times in Calgary, the waiting time for JDRs exceeds the waiting time for trials.

[187] Public Consultation Report, *supra* note 34 at 27.

participants commented that litigants want to tell their story to a judge and hear a judge's view.

[176] Like lawyers and litigants, Alberta Justice is a proponent of an expanded role for the judiciary in actively facilitating settlement. The ministry's Annual Reports for 2000-2001 and 2001-2002 describe JDR in the Court of Queen's Bench under "strategic objectives and accomplishments" in relation to "improving our courts," "access to justice" and "cost of administering justice."[188] The reports also cast a favourable light on JDR in the Provincial Court.[189] However, it should be noted that the executive branch of government has a limited constitutional role with respect to independent procedures carried out by the judiciary.

C. Changing Judicial Role: Adjudicating Disputes and Facilitating Settlement

[177] In Issue No. 7 at the beginning of this chapter, we ask what role, if any, judges should play in facilitating settlement. In this section, we examine factors that may influence your response to this question. We start by discussing judicial qualifications for the role and raise some attendant procedural uncertainties and concerns. We conclude by endorsing this role for judges. Later in this chapter, under heading D, we consider whether the JDR process should continue to exist in its present open form or whether certain understandings should be written into the rules. We also explore the possible content of such understandings.

1. Qualifications

[178] The involvement of judges in facilitating settlement signifies a departure from the traditional concept of the judge as adjudicator. Speaking in 1996, the CBA Task Force remarked that a "real issue to be determined in each jurisdiction ... is whether judges should participate in early non-binding dispute resolution."[190] Since 1996, the role of judges in facilitating settlement has evolved to the point that JDR is now an

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[188] AJ AR 2000-2001, *supra* note 100 at 42; AJ AR 2001-2002, *supra* note 99 at 31.

[189] AJ AR 2000-2001, *ibid.* at 19 (under "key activities"); AR 2001-2002, *ibid.* at 31 (under "strategic objectives and accomplishments").

[190] CBA Task Force, *supra* note 2 at 33.

accepted component of the civil justice system. As just seen, JDR has been welcomed by lawyers and litigants; it is being promoted by courts and the government.

[179] JDR is different from ADR conducted by persons other than judges. Judges bring a number of unique strengths to the role. First, judges have excellent analytical and interpretive skills. They are able to clarify the issues for the parties and discuss the legal ramifications. Second, judges bring an authoritative presence to the settlement discussions. They command respect by virtue of their office. Third, by highlighting challenges to be overcome in each party's case, the judge is in a good position to provide a reality check to litigants and counsel:[191]

> Most trial judges doing J.D.R. are skillful at evaluating a case from the material that is presented to them and have a fairly good idea as to what will happen in Court, so can be very effective in terms of bringing a touch of reality to the parties.

We heard repeatedly that what litigants want is a chance to tell their story to a judge and hear a judge's opinion. Similarly, lawyers find that "the weight a judge carries can be useful in convincing a reluctant plaintiff or defendant about the merits of the case."[192] Fourth, judges are able to offer an opinion about what would be decided in a courtroom. "[A]t the end of a mini trial a judge can say: 'If I were sitting as the trial judge on this claim I would award the Plaintiff $100,000.00.' No mediator can ever use those words."[193] The "opinion-giving" by an authoritative figure may well be the main advantage of JDR over ADR provided by non-judges.

[180] JDR also shares several of the beneficial characteristics of ADR provided by other persons. For one thing, the discussion is not limited to legal issues and rights. Instead, the parties have an opportunity to discuss their interests and seek creative interest-based settlement remedies that would not be available at trial. For another, litigants may prefer the confidentiality of JDR to public disclosure in an open trial. Then, too, the informality in a JDR renders it less intimidating to litigants than a trial.

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[191] Agrios, *supra* note 175 at 26.

[192] Legal Community Consultation Report, *supra* note 24 at 4.

[193] Agrios, *supra* note 175 at 26.

[181] However, judges are "naturally judgmental."[194] Training and practice in law and experience on the bench are no guarantee that judges will possess the skills needed to facilitate settlement. In the legal consultation, some respondents saw settlement facilitation as better suited to ADR providers. They expressed the view that that "ADR should be left to trained mediators as not all judges have expertise in mediation or accept the value of professionalism in ADR." Some claimed that "most cases do not require a judge and are better served by someone with more expertise in the relevant field (*e.g.*, personal injury)."[195]

[182] The CBA Task Force recommended that every jurisdiction ensure that individuals involved in helping litigants explore settlement possibilities in non-binding dispute resolution processes have suitable training and support to assist litigants in a meaningful way.[196] The recommendation applies to judges as well as other persons:[197]

> The role of a judge at trial by its nature requires skills and perspectives that are very different from those of a mediator or conciliator attempting to facilitate a negotiated resolution. While some judges are very adept at mediation and conciliation, not all judges have the temperament, skills or training necessary to carry out such a role.

[183] The CBA Task Force asks whether non-binding dispute resolution should involve all judges or specially designated judges. In its view, "[s]uitable training and orientation must be provided ... for all those who undertake this role."[198]

[184] To our knowledge, judges facilitating settlement in Alberta are not required to complete any formal training requirements or skill level tests although many judges do complete the courses offered by the National Judicial Institute. The ability of counsel to select the judge who will facilitate settlement provides an informal means of

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[194] Agrios, *ibid*.

[195] Legal Community Consultation Report, *supra* note 24 at 4.

[196] CBA Task Force Report, *supra* note 2, Recommendation 1(c) at 33; see also Recommendation 26 at 62.

[197] *Ibid.* at 33.

[198] *Ibid*.

screening for judges who have the necessary skills. There may be merit in the judiciary establishing a standard of credentials for judges who are involved in facilitating settlement through JDR.

2. Procedural uncertainties

[185] The variability of JDR, pre-trial and case management processes can be problematic both for lawyers and litigants. We have observed that the pre-trial conference rule is often cited as providing the authority for a judicial role in facilitating settlement. As they have evolved, pre-trial and case management conferences serve several purposes. A recurring comment in our consultation with the legal profession is that counsel often do not know which function or purpose will prevail at a pre-trial or case management conference: should counsel prepare for a litigation management discussion or a settlement discussion? Without this information, both preparation and conference time may be spent inefficiently. The difficulty exists despite the fact that separate scheduling of JDR sessions helps highlight the distinction between the judicial role in managing litigation and facilitating settlement.

[186] Participation in a judicially-facilitated settlement process is usually characterized as voluntary. The pre-trial conference rule (rule 219) gives the court discretion to "direct the solicitors for the parties or the parties themselves to appear before it for a conference." The ability to compel a meeting for the purpose of managing the litigation is not surprising because in managing litigation the judge is performing an authoritative function. However, the words in rule 219 could include a conference convened to pursue settlement. The ability to compel attendance at a meeting in which the judge performs an ADR-type role by actively facilitating settlement – a process in which participation is ordinarily regarded as voluntary – raises a different set of considerations. We examine this issue under the topic of initiating a JDR.[199]

[187] If the participation in the process is truly voluntary, litigants need a clear description of the JDR process in order to make an informed decision about how to proceed. For example, in some circumstances, it may be preferable to use a proceeding in which evidence is given under oath (*e.g.*, summary trial) or at least held on the

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[199] See below at 84.

record with (*e.g.* stated case). The wide range of techniques used by judges conducting JDRs and the diversity in individual styles make it difficult for lawyers to provide a clear description.

[188] The judicial roles in settlement facilitation and litigation management may become blurred where one process leads into the other. In one example, judicial encouragement to settle in a pre-trial conference may progress to active facilitation of settlement. In another example, where the parties are unable to settle the dispute in a judicially-facilitated settlement process, the judge may give directions regarding the process to be followed in the continuing litigation. As the Ontario Civil Justice Review team commented:[200]

> Under the pressures of present day litigation the purpose of the pre-trial has become blurred. Is it to settle the case? Is it to plan the trial? Is it simply an entry hurdle for obtaining a trial date? ... It is all of these things, of course.

We are drawn to the Ontario team's conclusion that "[o]ne way of making the exercise more effective ... is to make it clear precisely what the function is that is the focus of attention at the moment." The Ontario team recommended jettisoning the name "pre-trial" and replacing it with "two separate and recognizable concepts: a 'settlement conference,' and a 'trial management' conference." The report continues: "In the case management context, these two techniques can be supplemented by other 'case conferences,' from time to time as appropriate, throughout the processing of the case."

[189] The fact that judges command respect as a figures with decision-making authority is a strength of JDR, but it also raises the risk that litigants will misunderstand the difference between the traditional judicial role of adjudication and the emerging judicial role in settlement facilitation. From a constitutional perspective, judges are adjudicators, accorded the authority and power to resolve disputes. The very existence of that adjudicative power may influence a process intended to facilitate settlement and the parties resolving their own dispute. Adding to the reasons for confusion, in a judicial mini-trial, the process may be trial-like, but without the protections that come with the adjudicative process (e.g., sworn evidence, cross-

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[200] Ontario Civil Justice Review First Report, *supra* note 17 at 227.

examination, appeal). Of course, where a lawyer represents the litigant (the situation we envisage in this CM), the lawyer will be able to explain the difference.[201]

[190] There may be confusion around the finality or enforceability of the outcome of a judicially-facilitated settlement. Although JDR is generally regarded as a voluntary process, the handouts now provided by the court in some judicial districts ask the parties to specify whether the judicial dispute resolution is to be binding. Ordinarily, it is up to counsel to document the result. If the parties do not address the procedure for making a settlement binding, there may be difficulty in enforcing the result, particularly where the parties present at the conference have limited authority to settle.

[191] It could be objected that JDR is not equally accessible to all counsel and litigants. Whereas judges who conduct JDRs are available in major centres, we learned from the legal consultation that judicially-facilitated settlement sessions are more difficult to obtain in regional areas. Another point arises from the different "styles" of individual judges. Counsel who specialize in litigation are familiar with the differences, making their participation in the selection of a judge on the basis of "style" meaningful. However, other counsel and litigants do not have ready access to this knowledge and this places them at a disadvantage.

[192] Two further concerns about judicially-facilitated settlement expressed during the legal consultation are the potential for abuse by parties and scheduling delays. The first concern is that some parties may abuse the process by using it to run up costs or to discover more about the other side's weaknesses, with no genuine desire to settle or to settle at a fair amount. The second concern has two components: in some judicial districts, the wait time for JDRs is sometimes longer than for trials; in others, trials may be delayed because judicial time and resources are taken up by JDR activities.

3. Endorsement of JDR

[193] The EDR Committee recognizes that judicial involvement in settlement has become an integral component of the civil justice system. In our opinion, facilitating settlement is an appropriate role for judges to play. The availability of a judicially-facilitated settlement process enhances public respect for civil justice as an adaptable

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[201] Self-represented litigants will be dealt with in a future CM: see below at 105.

system that is capable of changing to meet societal needs. At the same time, it is important to keep present to mind the difference between the court's authoritative role in managing the litigation and adjudicating the dispute, and the assistance it gives to the parties by facilitating settlement in a JDR. The EDR Committee is of the view that the current rules and practice notes should be redrafted to more clearly distinguish between these roles. Settlement is achieved by agreement between the parties. The role of the judiciary is facilitative, not decisive.

D. JDR Details

[194] The remainder of this chapter is devoted to a consideration of whether the JDR process could be improved by certain understandings about the procedural requirements. As part of this consideration, we explore the possible content of such understandings.

[195] As you read this section, consider whether and which elements of JDR are best left to judicial discretion, which should fall in whole or part to decision by counsel and the parties, and which should be imposed systemically. Consider as well whether those details which should be imposed systemically should be implemented in Rules of Court or practice notes or by statute, or whether they should continue, as now, to be set through customary practice. These are matters to reflect on as you go through this section of the consultation memorandum.

1. Planning the JDR

[196] We have commented on the wide variability in the way in which JDR is handled. The main criticism made by lawyers during legal consultation is that under the present mix of pre-trial conferences, case management conferences and JDR, lawyers do not always know what they are getting in to when they meet with a judge.

[197] In its Discussion Paper on the *Judicial Mini-Trial* (DP1), ALRI emphasized the importance of taking time to plan for the mini-trial. DP1 suggested that the parties should determine the procedure, subject to obtaining the approval of the mini-trial judge.[202] Some litigants may find JDR most effective when the judge gives a view of how the claim would be assessed at trial. Others litigants may prefer a process in

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[202] ALRI DP1, *supra* note 168 at 17.

which the judge uses mediative techniques, but refrains from giving an opinion. These are matters that should be discussed between the parties and planned for in advance.

[198] In our view, pre-planning is important whenever judicial resources are applied to the facilitation of settlement. The procedural ground rules should be clear in advance of the meeting to all those involved. Successful advance planning requires collaboration between the judge and counsel. DP1 contains a checklist of topics counsel and the judge may consider (reproduced as Appendix A to this consultation memorandum). In the opinion of the EDR Committee, the ALRI checklist remains a good starting point.

[199] Many of these topics are discussed under the remaining headings of this consultation memorandum. They include consideration of details such as the appropriateness of JDR, who will attend, where the session will be held, what materials will be required, what form the session will take (*e.g.*, judicial mini-trial, early neutral evaluation, settlement conference), whether caucusing will be used, how the outcome will be recorded, and so forth.

[200] Some persons may favour a more directorial approach. For example, New Brunswick provides that the judge may "conduct the settlement conference in any manner the judge deems fair," asking questions of parties, solicitors or other persons in attendance.[203] In Alberta, strict adherence to pre-determined judicial protocols may limit discussion on some matters of detail.

[201] ***The EDR Committee asks for your views on the approach that should be taken to planning for a JDR.***

2. Initiating a JDR

[202] In Alberta, JDR is usually described as a voluntary process that is initiated at the request of the parties. At the same time, a judge has the ability to order attendance at a pre-trial conference or case management conference (one purpose of which is to

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[203] New Brunswick, r. 50.09.

"facilitate efforts the parties may be willing to take towards ... settlement").[204] The EDR Committee understands that this power is rarely for the purpose of either litigation management or settlement facilitation.

[203] Some Canadian jurisdictions allow a judge to direct mini-trials, settlement conferences or other judicial dispute resolution processes without the consent of the parties (*e.g.*, British Columbia, New Brunswick, Newfoundland, the Federal Court).[205] This is not surprising in jurisdictions where the pre-trial conference (*e.g.*, Ontario)[206] or case management conference (*e.g.*, Northwest Territories)[207] has both litigation management and settlement facilitation purposes. Of course, requiring parties to attend a JDR is not equivalent to making parties settle.

[204] If adopted, our proposed distinction separating the judicial role in encouraging settlement (as an aspect of managing litigation) from facilitating settlement (in a JDR) would mean that JDRs would be initiated at the request of the parties; their participation would be voluntary. The judge would be able to compel attendance at a pre-trial or case management conference for the purpose of reviewing the prospect of settlement and suggesting settlement measures for the litigants to consider.

[205] The question remains: should the judge have the power to compel the parties to attend a JDR? For example, in "specially-managed proceedings" under the Federal Court rules (*i.e.*, in "case management" situations), the judge is required to "fix and conduct any dispute resolution or pre-trial conferences that he or she considers necessary." This requirement includes an order for the use of dispute resolution services in which the judge (or prothonotary) may proceed by way of mediation, early neutral evaluation or mini-trial.

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[204] Alberta, Queen's Bench Civil Practice Notes, online: Alberta Courts <www.albertacourts.ab.ca.qb/practicenotes> PN1, s. 14(e) [PN].

[205] British Columbia, r. 35; New Brunswick, r. 50; Newfoundland, r. 39; Federal, rr. 257, 258.

[206] Ontario, r. 50.

[207] Northwest Territories, *Rules of the Supreme Court*, r. 283 [Northwest Territories].

[206] ***The EDR Committee would like to hear your views about who should be able to initiate a JDR.***

3. Voluntary or mandatory

[207] The question of who should be able to initiate a JDR leads directly into the question whether participation should be voluntary or mandatory. Descriptions of current JDR practice in Alberta characteristically describe participation in the process as voluntary with non-binding results.[208]

[208] We have seen that elsewhere in Canada a judge can order parties to participate in settlement processes without their consent. In Ontario, in addition to the power of a judge to order a pre-trial conference, a settlement conference is automatically scheduled by the registrar within a specified number of days after the first defence is filed – 150 days for a proceeding on the fast track, and 240 days for a proceeding on the standard track.

[209] This section puts up front for consideration the question whether there should be some directory or mandatory aspect to judicially-facilitated settlement. Points to consider include:

- It is widely recognized that voluntary participation in a settlement process is likely to lead to a better settlement rate than mandatory participation.
- There is a difference between mandatory participation in a settlement process and a mandatory meeting before a judge as an aspect of litigation management. The pre-trial and case management conferences may provide the merit in having a mandatory meeting before a judge, eliminating any need to create another forum.
- As discussed next, in connection with screening, JDR is not appropriate in all circumstances. This is a factor to take into account when considering whether participation should be voluntary or mandatory.
- Ultimately, JDR will function within a broader system that will likely include court-annexed settlement mechanisms at designated stages within the litigation

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[208] "Non-binding" refers to the effect of the judicial role. Where the parties reach an agreement, their settlement agreement is enforceable under the principles that apply to contracts..

process. It will be important to look carefully at how JDR is going to dovetail with these other processes.

- Mandatory programs can be made more flexible by building in choices in the process the judge will use to facilitate settlement (*e.g.*, judicial mini-trial, neutral evaluation of likely outcome at trial, settlement conference).

As proposed in chapter 3, the solution may be to require litigants to participate in at least one mandatory settlement process before the case can be set down for trial. Litigants would be able to choose from a menu of settlement mechanisms that include court-annexed ADR, and different types of JDR.

[210] ***The EDR Committee would like to know views about whether JDR should ever be imposed on litigants, and, if yes, in what circumstances?***

4. Screening for appropriateness

[211] Very few restrictions are placed on the eligibility of cases for judicially-facilitated dispute resolution. Although "[a]lmost all civil disputes are potentially suitable,"[209] this is not so of every case. Examples of cases that may not be suitable include cases in which credibility is a critical issue, volatile domestic cases, custody cases, and cases where the parties are not participating willingly and fully.[210]

[212] The EDR Committee sees no reason, in principle, to exclude particular types of cases from JDR. All types of cases should be eligible, though individual cases may not be appropriate. Decisions of suitability can be made on a case by case basis.

[213] Much of the success of judicially-facilitated dispute resolution is tied to the choice of individual judge (discussed below under heading 6). Some judges may be willing to conduct a JDR on the matter at hand whereas others may not. Parties who are turned down by one judge have the option of asking for another judge. This option is available in practice today, although it may not be well known (except to lawyers who specialize in litigation).

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[209] Belzil, *supra* note 175 at 2.

[210] *Ibid.* at 3.

[214] ***The EDR Committee seeks comments on the question whether any types of cases be excluded from JDR automatically, or whether the screening should occur on an individual basis?***

5. Stage of litigation

[215] Currently in Alberta, a judicially-facilitated settlement session can occur at any time. There is extensive flexibility. This is because PN3 allows a pre-trial conference to be held "at any stage of the proceeding."[211] In practice, the sessions tends to take place in later stages of the litigation.

[216] The nature of the claim is an influential factor in choosing the timing. Its availability at earlier stages may not be widely known. As discussed in connection with screening, the fact that a JDR may occur at any stage does not mean that it ought to be held. In some cases, it may be premature to conduct a settlement process (*e.g.*, because the litigants are waiting for a report, discovery or production). As well, the demand for judicial help with settlement is high whereas systemic resources are limited. At present, in one judicial centre, the scheduling wait time for JDR is greater than the wait time for trial.

[217] Elsewhere in Canada, formal settlement conferences tend to be placed late in the process when the parties are ready for trial. In Ontario, for example, where the settlement conference is scheduled automatically, "[a]ll examinations, production of documents and motions arising out of examinations and production of documents" shall be completed before the settlement conference date."[212] In the legal consultation, some respondents "felt that the [mandatory pre-trial] settlement conference happens too early in the process" in Saskatchewan.

[218] The EDR Committee thinks flexibility regarding the timing of a JDR is desirable and that JDR should be available at any stage of the litigation. However, looked at from a systemic perspective, the Committee suggests that it may be preferable to encourage the use of other settlement measures at early stages.

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[211] PN, *supra* note 204, PN3, s. 1.

[212] Ontario, r. 77.14(2).

[219] ***The Early Resolution of Disputes Committee invites your comments on the question of timing of JDRs – are they most effective at a particular stage of litigation or should the timing remain flexible?***

6. Selecting the judge

[220] Both Edmonton and Calgary make provision to accommodate preferences for particular judges. In Edmonton, the trial coordinators advise the bar about which judges are scheduled to facilitate settlement during which weeks. This gives the parties "the option of declining to choose to be slotted in during that week or of declining to go forward once the judge is assigned."[213] In Calgary, assignments are made from a roster by the Associate Chief Justice who is open to accommodating individual requests. Sometimes, lawyers approach a judge directly and arrangements are made from there. There is less flexibility for judge selection in smaller centres.

[221] Those who commented in the legal consultation expressed "widespread agreement ... that it is a good idea to continue the practice of being able to choose which judge you get for JDR based on a judge's particular area of knowledge."[214] It is recognized that a party's preference for some judges often reflects a desire to avoid others.

[222] Some jurisdictions give masters or other officials the authority to facilitate a settlement function. The British Columbia pre-trial names a "judge or master."[215] The Ontario pre-trial conference rule refers to a "judge or officer presiding at the hearing"; the settlement conference rule refers to a "judge or master."[216] The federal court rules refer to a "case management judge or prothonotary."[217]

[223] The EDR Committee sees advantages as well as drawbacks to permitting litigants to choose the judge who will conduct a settlement process. In the settlement

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213 Agrios, *supra* note 175 at 29.

214 Legal Community Consultation Report, *supra* note 24 at 5.

215 British Columbia, r. 35(2).

216 Ontario, rr. 50, 77.14(3).

217 Federal, r. 383(c).

context, being satisfied with the person who assists with the process is important. We have observed that judges tend to develop their own style of facilitating settlement. The ability to choose a judge helps counsel predict the process that the chosen judge will use. While not all counsel will have knowledge about a particular judge's style, this difficulty is minimized because Alberta tends to have a specialized litigation bar.

[224] Identifying different judicial "styles" and assigning JDRs on the basis of the style being requested would reduce the importance of seeking a specific judge. In our understanding, what the parties most want to secure is a style of settlement facilitation (what techniques does a judge use: caucus, opinions, mediation). The parties are looking for predictability of process.

[225] The EDR Committee concluded that litigants ought to have some freedom of selection from a pool of available judges where appropriate. Needless to say, adopting "rules" about judge selection would have an impact on the scheduling of other judicial tasks.

[226] ***We invite views about whether the practice of allowing litigants to choose a JDR judge be continued and, if yes, whether the choice should be of a particular judge, or of a judge from a roster of judges offering a similar settlement facilitation style.***

7. Participants

[227] Decisions need to be made about who will attend a JDR.

[228] Under Rule 219(1), the court "may in its discretion, direct the solicitors for the parties or the parties themselves to appear before it" for a pre-trial conference. PN1 confers a similar authority with respect to a case management conference. Where the purpose of the conference is to advance the litigation, counsel and the judge may work out procedural details among themselves without the necessity of having parties present. The parties may attend where the conference is convened to explore

settlement possibilities. The parties usually attend a judicially-facilitated settlement session.[218]

[229] The requirements for the attendance of the parties vary across Canada depending on whether the purpose of the conference includes judicial settlement facilitation. Courts throughout Canada are authorized to direct the attendance of solicitors and parties at conferences. With respect to parties, the Ontario rule specifies "the parties, or a representative of a party responsible for making decisions in the proceeding and instructing the solicitor."[219] In Prince Edward Island, the direction may cover all or part of the conference.[220] In Saskatchewan, and in the Federal Court, the rules require the parties to appear with their counsel unless the court excuses them.[221] In Saskatchewan, a corporate representative must attend in addition to counsel.[222] With respect to lawyers, the rules in several provinces require the attendance of the lawyer who will represent the party at trial (*e.g.*, New Brunswick, Newfoundland, Northwest Territories, Saskatchewan).[223] In New Brunswick, the court also has authority to direct "any other person" to attend whereas in Saskatchewan the court may request that attendance. In addition, in connection with a settlement conference in New Brunswick, the judge may "direct that expert witnesses meet, on a without prejudice

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[218] This contrasts with attendance by the parties at conferences convened for litigation management purposes. Most of the discussion at pre-trial and case management conferences relates to procedural matters and the presence of parties may hinder some of the discussion between judge and counsel. Ordinarily, the lawyer who will be representing a party at trial is required to attend the conference: see *e.g.*, PN3, s. 6. That lawyer is to come properly instructed regarding their authority to deal with the matters that are likely to be discussed at the conference.

[219] Ontario, r. 77.14(3).

[220] Prince Edward Island, r. 50.01(1).

[221] Saskatchewan, r. 191(6); Federal, r. 260.

[222] Saskatchewan, r. 191(6).

[223] New Brunswick, r. 50.13; Newfoundland, r. 39.02(2); Northwest Territories, r. 285; Saskatchewan, r. 191(7). In ALRI DP1, *supra* note 168 at 25-26, ALRI raised the issue whether the lawyer's role at a JDR was as case presenter, advocate or negotiator, and, at 27, whether the lawyer should or should not be the lawyer who will appear at trial.

basis, to determine those matters on which they agree and to identify those matters on which they do not agree."[224]

[230] ***The EDR Committee would like to hear your views about what provision, if any, should be made regarding attendance by the parties, counsel or any other person at a JDR.***

8. Location

[231] Under PN1, case management conferences are usually held at the courthouse in the judge's private chambers or in settlement conference rooms constructed specifically for this purpose. The judge may permit a party to attend by telephone or video conference. The conference is held in open court where a self-represented litigant is participating, the parties request it or the case management judge so chooses. In these cases, in order to distinguish the conference from a court hearing, the judge may sit in the well of the courtroom instead of on the bench.

[232] The EDR Committee suggests that a judge should be able to consent to holding a JDR in another venue, or conducting it by telephone or video conference. Newfoundland[225] and the Northwest Territories allow conferences to be held electronically.

[233] ***The EDR Committee asks what, if any provision should be made regarding the location of a JDR.***

9. Materials and evidence

[234] In Alberta, the judge facilitating a settlement usually requires the parties to identify the issues and their positions in advance. In the JDR session, evidence is usually presented by agreed statement of facts; oral evidence is sometimes heard but might be unsworn. Deciding on the materials required and method of presenting evidence in advance would spare counsel from preparing unnecessary documentation and from the frustration of discovering that the judge has not read it.

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[224] New Brunswick, r. 50.09.

[225] Newfoundland, r. 39.02(8).

[235] Five Canadian jurisdictions have provisions covering the materials that are to be filed and distributed to the judge and other parties before a conference on settlement is held (*i.e.*, New Brunswick, Newfoundland, Ontario, Saskatchewan and the Federal Court). The documents may be called "pre-trial briefs"or "settlement conference briefs." The descriptions of the materials required differ from one jurisdiction to another. The New Brunswick requirements suggest a settlement conference in a later stage of the proceeding.[226] In Saskatchewan, the brief may include a proposal for settlement.[227]

[236] The time prior to the conference within which the brief must be submitted and exchanged ranges from 2 days prior in Newfoundland to 10 days in Saskatchewan.[228] In Alberta, the deadlines for submitting materials are determined by the individual judges.

[237] The form and extent of the materials to be provided would depend on the type of JDR selected and the stage reached in the litigation. Some items to consider for submission in advance of conference include: settlement positions; will-say statements; authorities; and agreed statement of facts. Some cases are more suited to materials than others. Less formal judicial "styles" may require less documentation than more formal ones. There is also a question of timing with respect to the preparation of the materials. If requiring the parties to document their positions raises the risk of hardening the positions, it could be preferable to make the positions an item of discussion at the pre-conference meeting but not before.

[238] In the EDR Committee's opinion, materials generally should be provided to the judge and parties in advance of the JDR at the discretion and direction of the judge as determined by the judge and counsel at the planning meeting held prior to the JDR session.

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[226] New Brunswick, r. 50.12(1).

[227] Saskatchewan, r. 191(3)(d).

[228] Newfoundland, r. 39.02(3); Saskatchewan, r. 191(3). In New Brunswick, the time is 4 days; in the Federal Court, 7 days; and in Ontario, 10 days for the plaintiff, 5 days for other parties: New Brunswick, r. 50.12(1); Federal, r. 262; and Ontario, r. 77.14(4).

[239] ***The EDR Committee is interested in hearing your views on matters relating to the exchange of materials for a JDR. Should any requirements operate automatically (e.g., exchange of what materials? how far in advance?) or should the details be worked out at the discretion and direction of the judge as determined by the judge and counsel at the advance planning meeting?***

10. Confidentiality / Privilege

[240] What is meant by "confidentiality" in a judicially-facilitated settlement process? The current practice is to maintain strict confidentiality. The process leaves no paper trail – all documents get handed back. Statements made by the parties during the session and opinions expressed by counsel are not used for any other purpose. The judge facilitating settlement does not give any information to the trial judge and is not a compellable witness with respect to what went on. (Judicial compellability and immunity from suit are discussed below, under heading 13.)

[241] In the Provincial Court, settlement discussions during a pre-trial conference are privileged from future disclosure.[229] The privilege does not extend to an order made in a pre-trial conference, a written agreement arising from it, the admission of factual evidence otherwise admissible in court, or to facts that are relevant to the issue of the validity or enforceability of a written agreement arising from a pre-trial conference.[230] In practice, if an agreement falls apart, the parties may resume their own discussions and review the process.

[242] The rules adopted in other Canadian courts generally protect confidentiality. With variations, they address non-disclosure by the judge, parties and counsel, and whether the confidentiality extends to the recording of the conference result. Differences appear where the conference covers both settlement and litigation management rather than settlement alone.

[243] Words like "without prejudice," "privileged," "confidential,""shall not be disclosed " or "without waiver of any claim to privilege with respect to non-

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[229] *Provincial Court Act*, *supra* note 157, s. 67(1).

[230] *Ibid.*, s. 67(3).

production" appear in the confidentiality provisions in several jurisdictions (*e.g.*, New Brunswick, Newfoundland, the Federal Court and Saskatchewan).[231]

[244] It is usual for the rules in other jurisdictions to restrict disclosures to the trial judge (*e.g.*, New Brunswick, Ontario, Saskatchewan and the Federal Court).[232] The New Brunswick rule also prohibits the judge from making disclosures to "any other person." An exception is made for the pre-trial conference report or order in some jurisdictions (*e.g.*, Ontario rule 50.03, New Brunswick rule 50.10(1), Saskatchewan rule 191(4), the Federal Court rule 267),[233] but in others the judge's opinion is provided to the parties only (*e.g.*, Newfoundland rule 39.05(8)). Some jurisdictions also permit disclosure with the consent of the parties (*e.g.*, the Federal Court).[234]

[245] The EDR Committee's view is that the settlement process is probably protected by the common law rules of privilege and protection of without prejudice communications. There may be no need to legislate these except out of an abundance of caution.

[246] If a distinction is not drawn between encouraging settlement as part of litigation management and facilitating settlement using ADR techniques, as we have proposed, the EDR Committee recommends that the confidentiality of the settlement portion of the pre-trial or case management conference be protected by keeping the discussion and materials pertaining to settlement off the record. Clearly, litigation management raises different considerations. For example, management issues should be on record to assist compliance, whereas settlement discussions should remain confidential heading into trial. Without separating the processes, the line between settlement and management may be difficult draw.

[247] As is now the practice, the JDR judge should pass nothing on to the trial judge.

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[231] New Brunswick, r. 50.10(3); Newfoundland, r. 39.02(4); Federal, r. 388; Saskatchewan, r. 191(15).

[232] New Brunswick, r. 50.10(1); Ontario, r. 50.03; Saskatchewan, r. 191(14); Federal, r. 267.

[233] Ontario, r. 50.03; Saskatchewan, r. 191(4); Federal, r. 267.

[234] Federal, r. 267.

[248] ***The EDR Committee seeks your ideas about how confidentiality should be protected in a JDR. Is the common law sufficient in this area or should provision be made in rules, practice notes or statute?***

11. Keeping a record

[249] The issue whether any record of a JDR should be kept is closely associated with the issue of confidentiality. For discussion purposes, it is useful to draw a distinction between recording the result (*i.e.*, the settlement agreement reached as a result of the JDR) and recording the process (*i.e.*, making a transcript of the proceedings). In this consultation memorandum, we deal with cases in which parties are represented by counsel. Self-represented litigants, for whom additional precautions may be required, will be discussed in a future consultation memorandum.

a. Recording the result

Where settlement, in full or part, is achieved during a JDR, a mechanism for recording what was agreed is essential. In this connection, we distinguish an "ordinary JDR" from the more anomalous "binding JDR."

i. Ordinary JDR

[250] In ordinary settlement situations, the parties are responsible for documenting their agreement. If judicially-facilitated settlements are treated in the same way as settlements reached privately, then the parties would bear responsibility for recording the settlement.

[251] Although the provision is used infrequently, PN3 gives the court the ability to make an order. This provision allows the court to make an order respecting the conduct of the action (*e.g.*, an order directing the parties to attend a settlement conference). Issuing an order to attend a settlement conference should not be confused with making an order containing the outcome of a judicially-facilitated settlement process.

[252] Some other provinces authorize the court to make a consent order at a settlement conference. For example, the New Brunswick rule permits the judge to "make a payment order or other appropriate order in the terms consented to on the face of the

order by the parties."[235] Saskatchewan allows the judge to make "any order by the consent of the parties."[236]

[253] In other jurisdictions, documenting the agreement is left to the parties. In the Federal Court, three separate provisions deal with the result of a dispute resolution conference. First, a settlement of all or part of the proceeding reached at the conference "shall be reduced to writing and signed by the parties or their solicitors" and a notice of settlement filed with the court.[237] Second, where a partial settlement is reached, the case management judge "shall make an order setting out the issues that have not been resolved" and giving the directions necessary for their adjudication.[238] Third, where no settlement can be reached, the case management judge "shall record that fact on the Court file."[239]

[254] In Ontario, counsel "may sign a memorandum setting out the results" at the conclusion of a pre-trial conference (the primary purpose of a pre-trial conference in Ontario is settlement). The memorandum binds the parties unless the judge "orders otherwise to prevent injustice." In addition, the judge may make orders with respect to the conduct of the proceeding (a litigation management function).

[255] Both the Federal Court and Newfoundland require the parties to notify the Court of settlement at or following a judicial settlement process.[240]

[256] We have defined JDR as a facilitative process voluntarily entered into in which the judge may give an evaluative, non-binding opinion. In the EDR Committee's view, parties participating in a settlement process on a voluntary basis should document their own agreement (*e.g.*, by preparing a settlement contract or seeking a

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[235] New Brunswick, r. 50.09(d).

[236] Saskatchewan, r. 191(16).

[237] Federal, r. 389(1)(a).

[238] Federal, r. 389(2).

[239] Federal, r. 389(3).

[240] Federal, r. 389(1)(b); Newfoundland, r. 39.06.

consent order). Even if attendance at a JDR is made mandatory, the parties should continue to be in charge of documenting the result. No distinction should be made between a settlement agreement reached with the assistance of judicial facilitation and a settlement reached without it.

[257] ***The EDR Committee would like to hear your views about how the result of an ordinary JDR should be recorded.***

ii. Binding JDR

[258] Most descriptions of judicially-facilitated dispute resolution refer to it as non-binding.[241] *Guidelines for Judicial Dispute Resolution* provided by the Court of Queen's Bench refer to the judge rendering a non-binding opinion. The word "non-binding" appears in definitions of settlement processes involving judges in other jurisdictions. Even where parties may be ordered to attend a mini-trial, settlement conference or other settlement process with a judge, the result is up to them. Nevertheless, from the early days of judicial dispute resolution in Alberta, some lawyers were asking their clients to agree to accept the decision rendered by the judge. We commented on the practice in DP1, remarking that "this practice transforms the judicial mini-trial from a settlement technique into a procedure in the nature of an arbitration or abbreviated trial."[242] We observed further that "the practice produces a philosophical shift in outcome."[243]

[259] What is meant by "binding"? By what or whose authority do the parties become bound? For example, the parties may agree between themselves in advance to be bound by the judge's opinion. The parties' agreement that the JDR lead to a binding settlement may or may not be communicated to the judge. Enforcing the parties' agreement to secure a binding result may require the assistance of a court order, ideally by consent.

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[241] See *e.g.*, Mini-Trial PN, *supra* note 178; Belzil, *supra* note 175.

[242] ALRI DP1, *supra* note 168 at 16-17.

[243] *Ibid.* at 17.

[260] Orders binding the parties to the judge's opinion rendered in a judicially-facilitated settlement have been made. On some occasions, these will have been consent orders. On others, judges' binding opinions have been issued as "reasons for judgment" or as "memorandum of decision," and have been publicly reported. If the judge's opinion is going to be binding in this second way, the judge needs to have the authority to make an order. Where does that authority come from? Is a judge who participates in a process intended to facilitate settlement carrying out a judicial function such that he or she has the authority to make binding settlement orders outside the consent procedures in the rules? Alberta practice supports this viewpoint.

[261] Arguably, as suggested in DP1, a JDR that is determined to be binding before the content of the settlement has been determined is not a JDR but a hybrid process in the nature of a judicial arbitration or summary trial. Although the parties have agreed to the process for resolving their dispute, they cannot be said to have agreed to the substance of the result. Thus, a binding JDR is essentially an adjudicative process and may require a record and an appeal process.

[262] As elsewhere in the settlement process, the answer may lie in leaving the means to the parties. Where parties have agreed in writing to be bound by the judge's opinion in a JDR, they have entered a contract. The parties can work out for themselves how they will incorporate the judge's opinion into their agreement, how the agreement will be enforced and other matters such as the effect of their agreement on confidentiality in the JDR process. This is not a matter for the judge. The judge should not render the opinion in the form of an order unless the parties sign a consent order containing it.

[263] This approach would not prevent attempts to reopen the JDR process in order to show that the judge's opinion was based on erroneous information, or otherwise ill-informed, and that for this reason the agreement to be bound by the order should not be enforced. However, reopening the JDR or requiring the judge to testify are two situations to be avoided. As discussed under item 13, making the judge non-compellable as a witness and immune from legal action would protect the judge from any further involvement.

[264] ***Before arriving at a position on binding judicially-facilitated dispute resolution, the EDR Committee would like to hear more about how it works in***

current Alberta practice. How is the intention that the result be binding communicated? How is the binding effect achieved? We seek information about your experience in this regard. We also seek your views about the practice of binding parties to the opinion rendered in a judicially-facilitated settlement process.

b. Recording the process

[265] In current practice, no record of the judicially-facilitated settlement process is maintained.[244] Nor is it the general practice to keep a record of the process in a pre-trial conference.

[266] Reasons for recording the process in a JDR include: assisting a subsequent review of the JDR process or appeal of an order made in a JDR; protecting the judge in the event of a litigant complaint (e.g., to the Canadian Judicial Council); and protecting counsel in the event of a client or opposing client complaint (*e.g.*, to the Law Society).

[267] Reasons for not recording the process include: maintaining confidentiality of the discussions; and the absence of any need for a record because JDRs are not applications to the court.

[268] An issue that appears here is the position of a judge in a JDR? The conduct of judges is open to objection about what the judge has done or to reporting if the judge has done something outside the judicial function. The issue has systemic ramifications: protection against complaints about the judge is protection against a complaint about the system.

[269] In the EDR Committee's view, discussions pertaining to settlement, as well as the judge's opinions on the likely outcome at trial, generally should be off the record. Recording should be avoided.

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[244] A record is usually kept where the JDR involves a self-represented litigant. As indicated previously, the position of self-represented litigants will be the subject of a future consultation memorandum.

[270] ***The EDR Committee invites comments on the question whether recording a JDR should be an option and, if there is such an option, what should happen to the record in order to preserve confidentiality.***

12. Recourse where dissatisfied with the JDR

[271] What avenues should be open to a party who is dissatisfied with the JDR process or result? Where the parties reach a settlement, the EDR Committee sees no reason to make a distinction between a settlement reached at or following a JDR and a settlement reached outside the JDR process. The answer is linked to how the agreement is documented. Where the parties have signed a contract, then the recourse is to sue on the contract. Where the parties have signed a consent order, the recourse is to appeal the order with leave. However, in a binding JDR, it would be possible for the court to exceed its jurisdiction. A mechanism may be needed to correct that situation.

[272] A problem arises where the result stops looking like an agreement reached by the parties and starts looking like a decision of the court. As noted in the previous section, some binding JDRs have been issued as reasons for judgment or memoranda of decision. How are litigants and the public to easily understand which decisions can be reviewed and which are final regardless of error? Two means of review are discussed below.

[273] ***Appeal***. If the judge's opinion is rendered in an ordinary order, that order (without more) would be subject to the appeal rule ordinarily applicable to orders at large. However, a JDR is not ordinary litigation. The usual protections are not present (*e.g.*, evidence is presented in summary form, and unsworn; no opportunity is given for cross-examination of parties or witnesses). In addition, an appeal requires a record and a record of a JDR is not usually kept. In choosing the form of JDR (*e.g.*, mini-trial, settlement conference, neutral evaluation) and how it is recorded, the possibility of appeal would be a consideration. Having an appeal process scuttles the effectiveness of the settlement process by adding another layer into what ought to be final. If an order binding the parties to the opinion given in a JDR is appealable, one question is whether the order should be treated as a consent order (appealable only with leave of the court), or an order at large.

[274] ***Judicial review***. An alternative avenue of recourse is judicial review within the same court level. Here, again, a record is required. Issues to consider include the nature of the task being performed by the judge who makes an order in a JDR and whether the review would be of the JDR result or the process.

[275] The EDR Committee has not come to a position about the recourse that should be provided to a persons who is dissatisfied with the result or process in a binding JDR.

[276] ***The EDR Committee seeks your comments on the recourse that should be available to a party who is dissatisfied with conduct of the judge, process followed or the result in a JDR.***

13. Judicial compellability and immunity

[277] Settlement facilitation and judicial decision-making are two different functions. Without protections, judges who step outside their traditional role by participating in flexible processes and facilitating settlements leading to interest-based, rather than law-based, remedies might find themselves party to a legal action or summoned as a witness. The EDR Committee notes that section 56 of the federal *Judges Act* may also have implications regarding judges' ability to act as mediators in certain proceedings.[245]

[278] Judges who facilitate settlement processes in Alberta's Provincial Court receive statutory protection. The judge is "[not] compellable to give evidence in any court or in any proceedings of a judicial nature concerning any proceeding, discussion or matter that takes place during or with respect to the pre-trial conference."[246] The protection does not apply "where a judge or a mediator is required by law to disclose those discussions if the disclosure is to the person who under that law is entitled to receive the disclosure."[247] The meaning of this provision is open to interpretation. It seems to say that a judge is not a compellable to give evidence (*i.e.*, compellable by

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[245] *Judges Act*, R.S.C. 1985, c. J-1, s. 56.

[246] *Provincial Court Act*, *supra* note157, s. 67(2).

[247] *Ibid.*, s. 67(4).

law) except in situations where the judge is compellable "by law." The intention may be to provide that the particular prevails over the general, *i.e.*, that as a general matter a judge is not compellable to give evidence but a judge may become compellable by express provision. The extent of the intended exception is also open to interpretation. For example, would it cover providing a record for the purpose of an appeal or judicial review?

[279] An example of a simpler solution is found in the New Brunswick. The rules there provide that a "judge conducting a settlement conference is not a compellable or competent witness in any proceeding and is immune from legal action."[248]

[280] The EDR Committee thinks that a judge who facilitates settlement should be protected from being named as a party to a legal action concerning the enforceability of the settlement or summoned as a witness. The JDR judge should be neither compellable (ordered to testify) nor competent (able to testify voluntarily) as a witness. The judge should also be immune from legal action. The details of any exceptions remain to be worked out.

[281] ***The EDR Committee asks for your views about whether and to what extent the JDR judge should be non-compellable and non-competent as a witness, and immune from legal action.***

14. Disqualification as trial judge

[282] As a matter of practice in Alberta, a pre-trial, case management or JDR judge does not preside at trial. Both PN1 and PN3 allow an exception from this practice where all parties and the judge agree to it in writing.[249]

[283] Other provinces have similar provisions. Like Alberta, a number of jurisdictions make an exception from the disqualification where all parties consent (*e.g.*, Newfoundland, Saskatchewan and the Federal Court).[250] In other jurisdictions, the

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[248] New Brunswick r. 50.11.

[249] PN, *supra* note 204, PN1(34), PN3(11).

[250] Newfoundland, rr. 39.02(1) and 39.05(3); Saskatchewan, r. 191(13); Federal, rr. 266 and 391.

disqualification appears to be outright (*e.g.*, New Brunswick; Northwest Territories and Ontario).[251] In addition, New Brunswick expressly disqualifies a judge assigned to the same matter who becomes aware of information intended to be confidential to the settlement meeting.[252]

[284] A judge who has conducted a JDR is ordinarily disqualified from presiding at the trial. Some Canadian jurisdictions include a provision excepting from this disqualification conferences held by the trial judge during the course of, or in preparation for the trial (*e.g.*, Ontario; Newfoundland; and Northwest Territories).[253] In Newfoundland, the trial judge is permitted to order the parties "to attend and participate in a pre-trial conference, a settlement conference or a mini-trial upon such terms and under such circumstances as the judge deems necessary or desirable." This does not "of itself" disqualify the judge from continuing to preside. However, the Newfoundland rule is not clear whether the trial judge or another judge conducts the conference.

[285] The EDR Committee supports the approach taken in PN3 and PN1. It is, of course, possible to distinguish between a case management judge who makes an interlocutory order in a traditional litigation (leading to trial) and a judge conducting a JDR (which is *not* a trial). However, we see no reason to make a distinction where a settlement process is involved. We think that a judge who is privy to confidential settlement information would remove themself from the case.

[286] ***The EDR Committee requests your views on the disqualification of a JDR judge from presiding at the trial. Should an exception from disqualification be made where the parties agree in writing to allow the JDR judge to conduct the trial, and the judge is willing to do so? We ask, further, whether a judge assigned to a matter who becomes aware of confidential settlement information should also be disqualified from presiding.***

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[251] New Brunswick, rr. 50.10(3) and 50.14; Northwest Territories, rr. 290 and 292(3); Ontario, rr. 50.04 and 77.14.

[252] New Brunswick, r. 50.10(3).

[253] Ontario, r. 50.07; Newfoundland, r. 39.07; Northwest Territories, r. 291.

15. Other matters

[287] Issues in three related areas will be dealt with in consultation memoranda produced by other Rules Project Committees. Questions about the award of costs for matters relating to JDR will be dealt with by the Committee on Costs. Questions about the judicial role in facilitating settlement on appeal will be dealt with by the Committee on Appeals. Questions about procedural adaptations, if any, for self-represented litigants will be dealt with by the Steering Committee.

E. Implementation

[288] Outlining the purpose and limits of the judicial role in facilitating settlement in rules or practice notes would make information about the process more widely accessible and introduce greater consistency in practice. Substantive matters such as judicial immunity would be dealt with by statute. Against these advantages is the importance of the flexibility of JDR to adapt to a wide variety of circumstances and the fluidity of movement among various ADR techniques during the course of an individual JDR. These characteristics are prized as considerable strengths, and might be lost to some extent by attaching rules to the process.

[289] ***The EDR Committee invites your opinion about formalizing aspects of the JDR process in rules, practice notes or statute. If this step is taken, which aspects should be formalized and in what manner?***

APPENDIX

JUDICIAL MINI-TRIAL CHECKLIST:

MINI-TRIAL DESIGN[254]

A. Key Features of Judicial Mini-Trial
(1) Voluntary Participation Participation in a judicial mini-trial should be VOLUNTARY.
(2) Flexible Design The judicial mini-trial design should be FLEXIBLE to meet the needs of the case at hand.

B. Initiation of Mini-Trial		
Topic	**Questions**	**Notes**
(1) Decision to Initiate	Is the mini-trial procedure appropriate for the case at hand?	
(2) Stage of Civil Litigation	At what stage of the civil litigation proceeding should the mini-trial be conducted?	
(3) Effect	Will the result be binding or non-binding?	

[254] ALRI DP 1, *supra* note 168 at 37-40.

C. Mini-Trial Planning		
Topic	**Questions**	**Notes**
(1) Mini-Trial Agreement or Order	How will the mini-trial procedure be determined?	
(2) Participants	Who will participate in the mini-trial?	
(a) Role of mini-trial judge	What role will the mini-trial judge take? (a) Will the mini-trial judge be required to give an opinion, with reasons, on the likely outcome of the case at trial? (b) Will the mini-trial judge be precluded from participating in negotiating sessions during or after the mini-trial?	
(b) Choice of mini-trial judge	How will the mini-trial judge be selected?	
(c) Alternative to judge	Should a technical expert or skilled negotiator preside instead of a judge?	
(d) Role of lawyer **(i) Presentation of case** **(ii) Advocate or negotiator**	What role will counsel take in presenting the case? Should the lawyer in a mini-trial act as an advocate or a negotiator?	

C. Mini-Trial Planning		
Topic	**Questions**	**Notes**
(e) Selection of lawyer	Should counsel in the case conduct the mini-trial or should independent counsel be appointed to act?	
(f) Parties	What role will the parties take?	
(g) Witnesses	Will witness testimony be allowed? Should expert witnesses be permitted to question each other and engage in debate?	
(3) Pre-hearing Preparation **(a) Discovery** **(b) Exchange of information**	What provision will be made for pre-trial preparation?	
(4) Hearing	According to what standards will the mini-trial hearing be conducted? How long will the hearing last?	
(5) Settlement Negotiations	Will provision be made with respect to settlement negotiations?	
(6) Confidentiality	Will any record of the mini-trial be kept? Will the confidentiality of the mini-trial receive specific protection?	
(7) Trial Judge	Will the mini-trial judge be precluded from presiding at trial?	

C. Mini-Trial Planning		
Topic	**Questions**	**Notes**
(8) Costs	Who will bear the costs of a judicial mini-trial?	
(9) Sanctions	What sanctions will be imposed on a party, or counsel, who does not cooperate in the mini-trial process, abuses it or does not improve their position at trial?	
(10) Mini-Trial Schedule	Should time limits be placed on the completion of steps leading to and following a judicial mini-trial?	