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Mandatory Dispute Resolution Coming Back to Alberta, But What About Domestic Violence Cases?

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Matter Commented On: Court of Queen's Bench of Alberta, Notice to the Profession & Public - Enforcement of Mandatory Alternative Dispute Resolution Rules 8.4(3)(A) and 8.5(1)(A)

Last month, the Court of Queen's Bench of Alberta issued a Notice to the Profession indicating that it would be lifting the suspension of the mandatory alternative dispute resolution (ADR) provisions of the *Alberta Rules of Court*, Alta Reg 124/2010, for a one-year pilot period commencing September 1, 2019. Mandatory ADR (or mandatory judicial dispute resolution, JDR) will now apply once again to civil and family litigation in Alberta. Although there are some exceptions to this requirement, there is no explicit exemption for domestic violence cases. As noted in a previous ABlawg post concerning similar developments under family legislation in Saskatchewan and federally under the *Divorce Act*, RSC 1985, c 3 (2nd Supp), as well as a more recent post on a government review of civil and family legislation in Ontario, cases involving domestic violence may not be not appropriate for ADR, and should be explicitly exempted from any mandatory requirements. There should also be screening and training requirements on domestic violence for those who will be assessing exemptions and conducting ADR.

How We Got Here

The "new" *Alberta Rules of Court* came into effect on November 1, 2010. Rules 8.4(3) and 8.5(1)(a) provide that parties requesting a trial date must provide certification (via Forms 37 and 38, respectively) that they participated in one of the dispute resolution processes set out in rule 4.16(1), unless they have an order under rule 4.16(2) waiving the dispute resolution process requirement. Part 12 of the Rules covers family law procedure specifically, and rule 12.34 indicates that Part 4 (which includes rule 4.16) applies to family law proceedings.

Rule 4.16 provides as follows:

> **4.16(1)** The responsibility of the parties to manage their dispute includes good faith participation in one or more of the following dispute resolution processes with respect to all or any part of the action:
>
> (a) a dispute resolution process in the private or government sectors involving an impartial third person;
>
> (b) a Court annexed dispute resolution process;

(c) a judicial dispute resolution [JDR] process described in rules 4.17 to 4.21;

(d) any program or process designated by the Court for the purpose of this rule.

(2) On application, the Court may waive the responsibility of the parties under this rule, but only if

(a) before the action started the parties engaged in a dispute resolution process and the parties and the Court believe that a further dispute resolution process would not be beneficial,

(b) the nature of the claim is not one, in all the circumstances, that will or is likely to result in an agreement between the parties,

(c) there is a compelling reason why a dispute resolution process should not be attempted by the parties,

(d) the Court is satisfied that engaging in a dispute resolution process would be futile, or

(e) the claim is of such a nature that a decision by the Court is necessary or desirable.

(3) The parties must attend the hearing of an application under subrule (2) unless the Court otherwise orders. (emphasis added)

The Alberta Court of Queen's Bench (ABQB) issued a Notice to the Profession in 2013, which suspended the operation of rules 8.4(3) and 8.5(1) with the effect that the requirements in rule 4.16 did not apply (see NP#2013-01). Unfortunately this Notice does not appear to be available on the ABQB's website, but an Announcement from March 2019 provides some of the background. This Announcement indicated that the 2013 suspension was directed by former Chief Justice Wittmann and Associate Chief Justice Rooke at a time when "limited judicial resources were being stretched beyond capacity and lead times for JDRs became unacceptably long due to a higher demand for them created by the new ADR/JDR Rules."

The ABQB announced in July 2018 that it was proposing a pilot project to lift the suspension of the enforcement of rules 8.4(3)(a) and 8.5(1)(a) effective January 2019. This Announcement "encourage[d] feedback from the Bar and from the public in advance of the implementation of this proposal." The Announcement from March 2019, referenced above, noted that the Court "did not receive extensive feedback" on this proposal, but some of the concerns that were raised were as follows:

- Complying with the ADR/JDR Rule will be problematic when one party is self-represented;
- ADR is a privilege of wealthier litigants;
- Some litigants attending ADR will not participate in the process in good faith;

- Other resolution processes (such as the collaborative law process) should be part of an expanded definition of ADR;
- There should be an exit mechanism to allow matters to go to trial without engaging the requirement of an ADR or JDR;
- Requiring the filing of a Form 37 or 38 limits access to JDR to those cases that are close to trial, whereas many civil cases could settle at a much earlier point.

While acknowledging that these concerns were legitimate, the Court went on to state that it "believe[d] that the Rules of Court provide the tools to address most of them."

The March Announcement thus declared the Court's decision to lift the suspension of the ADR/JDR Rules on a one-year pilot project basis to begin on September 1st, 2019 (not January 2019 as originally suggested). The Court further explained its rationale by noting that 14 new judicial positions had been created since 2014, but "lead times to trial are still unacceptably long, particularly for civil trials exceeding 5 days in Calgary, Edmonton and Red Deer." As a result, "steps must be taken to encourage parties to attempt alternative means to resolve their disputes." The Court also expressed the concern that "In lifting the suspension, [it] must also ensure that the lead times for JDR's do not unduly delay parties in later proceeding to trial where necessary to do so."

The pilot project focuses on JDR. JDR is described on the Court's website as follows:

> Judicial Dispute Resolution (JDR) is a confidential pre-trial settlement conference led by a Justice of the Court of Queen's Bench. The objective of a JDR is to resolve the dispute so a trial will be either unnecessary, or at most limited to those issues on which the parties do not agree. The parties meet with Justice to confidentially discuss the background of the case and what the parties feel is important in the case. The participants will then discuss possible solutions. If no agreement is reached, the Justice may give a non-binding opinion of what decision they would make if this case and these facts were presented at trial. The Justice's non-binding opinion may help the parties and their lawyers reach a resolution without having to go to trial.

JDR is also defined in rule 4.17 as "a party-initiated framework for a judge to actively facilitate a process in which the parties resolve all or part of a claim by agreement." Rule 4.18 establishes that participation in JDR requires the agreement of the parties and sets out a number of matters they must agree to before engaging in JDR.

Under the pilot project, parties to civil (non-family) litigation seeking to book a JDR will be required to complete an amended version of Forms 37 or 38 stating that they "will participate (in lieu of the current wording "have participated") in at least one of the dispute resolution processes described in R. 4.16(1) to be completed prior to trial." JDR itself is one of the processes described in rule 4.16(1), so if JDR fails it appears the parties will have satisfied the ADR/JDR requirement and can proceed to trial.

Family litigants will be exempt from filing Forms 37 and 38 before applying for JDR. The March Announcement suggests that this exemption is being made because "The Court is

focusing its efforts on early resolution of these cases." The exemption may also be an acknowledgement of the concern about self-represented litigants in family disputes, although parties seeking to obtain a family law JDR must still meet the following requirements: "current financial disclosure exchanged and complete; current MPA [*Matrimonial Property Act*] statements or equivalent filed; and any PN7 or PN8 that has been ordered has been completed." (See the March Announcement; PN7 and PN8 are the Court's Practice Notes dealing with Interventions by Parenting Experts in high conflict cases and Parenting Time/Parenting Responsibilities Assessments, respectively). If JDR fails to produce a resolution for family litigants, they would presumably then be required to file Forms 37 or 38 to proceed to trial.

Some family litigants may also be required to participate in Mandatory Early Intervention Case Conferences or Mandatory Pre-Trial Conferences as a result of an earlier Notice to the Profession and Public (see here). These types of case conferencing processes can be distinguished from JDR, which is typically a more active form of negotiation.

As an alternative to JDR, civil and family litigants could satisfy rule 4.16 by using another type of ADR listed in rule 4.16 and filing Forms 37 or 38 if a resolution is not reached – so the Court's role in the pilot project appears to be as a gatekeeper to JDR or to trial.

Applications for exemptions from the requirement of conducting an ADR or JDR under rule 4.16(2) will be dealt with via a system of desk applications, and the justice considering these applications may grant or dismiss the application or require that it be set for hearing.

The Court specifically acknowledged in the March 2019 Announcement the concern that ADR "is only accessible to wealthier litigants", a concern we raised in our brief to the Saskatchewan government during its consideration of mandatory ADR for family law cases. In Alberta, the ABQB responded to this concern by noting that it "had hoped that the Attorney General's Early Enhanced Resolution of Disputes (EERS) project that would provide some financial support for civil litigants wishing to participate in the ADR process would be up and running, but it has been delayed." The Court also noted that "In the family law context, government funded mediation (the "Court-Annexed Mediation Project") is currently available if one of the parties earns less than $40,000 per year" (see here).

These announcements were formalized in the July 2019 Notice to the Profession, which repeals Notice to Profession NP 2013-01 effective August 31, 2019.

Commentary

The combination of rules, a court-based suspension of the rules, a temporary lifting of the suspension, and various forms and exemptions provides a rather confusing and circuitous route for (re)implementing mandatory ADR/JDR in Alberta. One can imagine how challenging it will be for self-represented litigants to work their way through the foregoing set of rules, announcements and notices to determine what their obligations are. The role of the ABQB in suspending or permitting the enforcement of the Rules of Court is another important issue that we will not address in detail here, beyond noting that in other jurisdictions with mandatory ADR, the courts have not played a similar role as gatekeeper for the operationalization of such rules.

Judicial resources are of course a major concern when it comes to access to justice, and it may be that the approach in Alberta is influenced by the extensive use of JDR in this province.

Our main comment is to raise the concern that the exemptions to mandatory ADR/JDR that can be granted under rule 4.16(2) do not explicitly list domestic violence. This means that in a civil action for damages for assault and battery brought in the context of intimate partner violence and in family law cases involving domestic violence, participation in ADR or JDR may be required – unless the justice hearing the desk application is prepared to grant an exemption. Domestic violence cases might well fit under rule 4.16(2)(c), under which a judge may exempt cases from ADR/JDR requirements where "there is a compelling reason why a dispute resolution process should not be attempted by the parties." That appears to be the view of some family lawyers in Alberta, which is perhaps why this issue was not raised during the consultation period. However, even if domestic violence was explicitly on the list of exemptions, or is considered implicitly, rule 4.16(2) provides only that the Court "may" waive the requirement to participate in ADR/JDR. There is also no duty on the justice hearing the application to make inquiries about – or screen – for domestic violence in appropriate cases. This also raises concerns about how domestic violence will have to be established to grant an exemption – will the statements of the parties be sufficient, or will some form of verification be required?

There is only one reported decision before the 2013 suspension of mandatory ADR/JDR on the interpretation of the exemptions in rule 4.16(2), and that case involved the unrelated issue of employee fraud (see *IBM Canada Limited v Kossovan*, 2011 ABQB 621 (CanLII)).

In the absence of judicial precedent, there is extensive literature discussing the problems with requiring ADR in a context where there may be serious power imbalances and ongoing coercive control, especially where ADR professionals are not required to screen for or complete training on domestic violence (see a discussion of some of that literature here). The propriety of exempting domestic violence cases from mandatory ADR was also raised by the Alberta Law Reform Institute in its Consultation Memorandum No. 12.6, Promoting Early Resolution of Disputes by Settlement (July 2003), part of the Alberta Rules of Court project that led to the 2010 Rules (at paras 95, 144).

This is not to say that litigation is necessarily a better alternative for resolving civil or family disputes involving domestic violence. Without training on domestic violence issues, resolution of disputes by judges – whether through JDR or litigation – may raise similar concerns.

Another jurisdiction that is undertaking a pilot project on family dispute resolution is Manitoba. The *Family Law Modernization Act*, SM 2019, c 8, received Royal Assent in June 2019. When it comes into effect, it will create a new out-of-court dispute resolution process for family disputes, with the stated goal of "help[ing] families resolve disputes in a fair, economical, expeditious and informal manner" (see Bill 9, Explanatory Note). The three year pilot project will implement a two phase process for family dispute resolution: first, a "facilitated resolution phase" where a resolution officer works with the parties to try to assist them to reach an agreement, and second, if the dispute cannot be resolved in the first phase, an adjudicator will hold a hearing and make a recommended order. Where a party to a family dispute disagrees with the adjudicator's order, they can file an objection in the Court of Queen's Bench, which will resolve the dispute by

confirming the adjudicator's order or making another order. Importantly, before taking any action to resolve a family dispute, the resolution officer and adjudicator must:

> (a) consider whether doing so could expose a party or a child to a risk of domestic violence or stalking …; and
>
> (b) ask one or both of the parties
>
> > (i) whether there is a history of domestic violence or stalking involving the other party or a child of a party, or contact with a law enforcement agency about domestic violence or stalking involving the other party or a child of a party, and
> >
> > (ii) whether a civil or criminal court has made an order prohibiting or restricting one of the parties from being in contact with or communicating with the other.
>
> (s 39, emphasis added).

The *Family Law Modernization Act* will also permit family arbitrations, with the Lieutenant Governor in Council empowered to make regulations requiring family arbitrators "to consider whether the arbitration process could expose a party or a child to a risk of domestic violence or stalking … and to take specified steps" (s 56.1(a)(iii)).

As noted in our earlier post, Saskatchewan's Bill 98, *The Miscellaneous Statutes (Family Dispute Resolution) Amendment Act, 2017*, will amend *The Queen's Bench Act, 1998*, SS 1998, c Q-1.01, to require parties to participate in family dispute resolution (s 44.01(3)), but the parties may be exempted from that requirement if there is a history of interpersonal violence between them (s 44.01(6)(c)). Regulations are currently being developed in Saskatchewan that are expected to deal with screening and verification requirements for domestic violence for dispute resolution professionals, who are to provide certificates of compliance after the close of pleadings.

As another example, Newfoundland and Labrador's Supreme Court Family Rules require judges to consider any allegations of family violence or undue influence before ordering mediation (rule F24.01).

It therefore appears that most jurisdictions that do mandate ADR or JDR for family law disputes include an explicit recognition that domestic violence must be considered as an exception to these requirements. An exception is the recent amendments to the *Divorce Act* in Bill C-78, which received Royal Assent in June 2019. The amendments will require parties to try to resolve their dispute through negotiation, mediation or collaborative law processes "to the extent that it is appropriate to do so" and will require legal advisors to encourage their clients to do so "unless the circumstances of the case are of such a nature that it would clearly not be appropriate" (see ss 7.3 and 7.7(2)(a)). There is no express recognition in the amendments that ADR may not be advisable in cases involving family violence, and concerns were expressed about this omission when Bill C-78 was before Parliament.

Ideally, the *Alberta Rules of Court* should be amended to provide an explicit recognition of domestic violence as a required consideration in determining whether ADR or JDR is appropriate. We note that the *Rules* are being monitored by a Rules of Court Committee which is empowered to make recommendations to the Minister of Justice regarding amendments to the Rules, and which includes a Family Law Rules Advisory Committee. We respectfully call on the Advisory Committee to consider such an amendment.

Failing amendment, we respectfully call on the Alberta Court of Queen's Bench to interpret rule 4.16(2)(c) such that domestic violence is considered to be "a compelling reason why a dispute resolution process should not be attempted by the parties." We also call on the Chief Justice and Associate Chief Justices to closely monitor how cases involving allegations of domestic violence are being handled during this pilot period. Justices of the Court who will be hearing applications for exemptions should screen for domestic violence in appropriate cases and ensure they have training on domestic violence, covering its many forms (including emotional, psychological and financial abuse and coercive control), how they can recognize its presence, and how it can affect dispute resolution. We also call on the Alberta government to ensure that the courts have sufficient resources to implement this training.

The Alberta government should also make training on and screening for domestic violence mandatory for dispute resolution professionals. British Columbia, Ontario and Quebec have implemented these requirements in some respects, as we discuss here. Training in other dimensions of domestic violence – such as understanding its complex dynamics, recognizing the signs of abuse or violence, dealing with trauma, and curtailing legal bullying or litigation abuse, is also needed. The only systematic justice system-related screening process currently in place in Alberta appears to be through the government's Family court assistance program, which provides family court counsellors to self-represented litigants and screens for the risk of family violence.

Lastly, we call on the Alberta government to ensure that funding for participation in ADR is provided to those litigants who cannot afford it and who are not exempted, in order to ensure that their access to justice is not further compromised.

In summary, our recommendations are:

- The *Alberta Rules of Court* should be amended to provide for explicit consideration of domestic violence in determining whether ADR or JDR is appropriate;
- The Alberta Court of Queen's Bench should interpret rule 4.16(2)(c) such that domestic violence is considered to be "a compelling reason why a dispute resolution process should not be attempted by the parties";
- The Chief Justice and Associate Chief Justices of the Court of Queen's Bench should closely monitor how cases involving allegations of domestic violence are being handled during the pilot period;
- Justices of the Court who are hearing applications for exemptions under rule 4.16(2) should screen for domestic violence and ensure they have training on domestic violence;

- The Alberta government should ensure that the courts have sufficient resources to implement domestic violence training and should ensure that funding for participation in ADR is provided to those litigants who cannot afford it and who are not exempted.

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