

March 12, 2019



COURT OF QUEEN'S BENCH OF ALBERTA

ANNOUNCEMENT

Mandatory Dispute Resolution Before Entry for Trial Proposed Lifting of Suspension of the ADR/JDR Rules

Last July the Court circulated by way of Announcement a proposal for a pilot project to lift the suspension of the enforcement of Rules 8.4(3)(a) and 8.5(1)(a) of the Alberta Rules of Court (the ADR/JDR Rules) requiring parties to conduct an Alternate Dispute Resolution (ADR) or a Judicial Dispute Resolution (JDR) before setting a matter for trial. The suspension directed by former Chief Justice Wittmann and Associate Chief Justice Rooke came into effect in 2013. At that time, 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. Following upon the *Jordan* decision of the Supreme Court of Canada on July 8, 2016, the Court was also facing increased early booking demands for criminal trials. As a result, JDR weeks in Edmonton and Calgary were cut back significantly, which resulted in unacceptably long JDR lead times. Maintaining the suspension of the ADR/JDR Rules appeared to be the only reasonable response.

In the meantime, 14 new judicial positions were created on the Court (2 in 2014, 11 in 2016 and the second ACJ position in 2017) and these positions are gradually being filled (7 vacant positions at time of writing). However, lead times to trial are still unacceptably long, particularly for civil trials exceeding 5 days in Calgary, Edmonton and Red Deer. In the result, steps must be taken to encourage parties to attempt alternative means to resolve their disputes. In lifting the suspension, the Court 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.

With the support of the Court's Executive Board, we have decided to lift the suspension of the ADR/JDR Rules on a one-year pilot project basis to start on September 1st, 2019.

How the Pilot Project will work:

The ADR/JDR Rule will be enforced as of September 1st, 2019 for all civil (non-family law) actions scheduled after that date. In order to book a JDR during the pilot period, parties will be required to complete an amended version of Forms 37 or 38 which will state that the parties "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." The filing fee will

continue to apply. Parties who resolve their action can request reimbursement from the QB Clerk's office of the portion of the fee paid over and above the basic \$600.

Family law matters will be exempt from filing Form 37 or 38 as a condition for accessing a JDR. The Court is focusing its efforts on early resolution of these cases. As of September 2018, in the context of the introduction of the Family Law Resolution week in Edmonton and Calgary, family law JDR's are being offered one day each week of sittings in the Spring and Fall terms. However, current requirements for obtaining a family law JDR will be maintained: current financial disclosure exchanged and complete; current MPA statements or equivalent filed; and any PN7 or PN8 that has been ordered has been completed.

Concerns raised by the Bar:

Despite broad circulation and (recirculation in September 2018) of our announcement proposing to lift the suspension of the ADR/JDR Rule, we did not receive extensive feedback. Some of those who responded did not support the lifting of the suspension. Their concerns included:

- o Complying with the ADR/JDR Rule will be problematic when one party is self-represented;
- o ADR is a privilege of wealthier litigants;
- o Some litigants attending ADR will not participate in the process in good faith;
- o Other resolution processes (such as the collaborative law process) should be part of an expanded definition of ADR;
- o There should be an exit mechanism to allow matters to go to trial without engaging the requirement of an ADR or JDR;
- o 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;

All of these concerns are legitimate. We believe that the Rules of Court provide the tools to address most of them.

We appreciate the concern that ADR is only accessible to wealthier litigants. We 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. 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.

Parties may also apply under Rule 4.16(2) for an exemption from the requirement of conducting an ADR or JDR. One of the grounds cited for granting an exemption is "(c) there is a compelling reason why a dispute resolution process should not be attempted by the parties". See also "(d) the Court is satisfied that engaging in a dispute resolution process would be futile." R. 4.16(3) requires the attendance of the parties at the exemption hearing "unless the Court otherwise orders."

Expanding the definition of ADR to other processes would require a Rule change. Those processes, depending on their nature, can nonetheless be cited in support of an application for an exemption from conducting an ADR/JDR and will be decided on a case-by-case basis.

While we appreciate that the requirement of filing a Form 37 or 38 to access a JDR is a burden on parties who seek to resolve their dispute well in advance of trial, we anticipate this will be an interim measure only to avoid creating a JDR backlog that will further extend lead times to trial while our vacant judicial positions are being filled.

In order to facilitate the adjudication of applications for exemptions, we will be instituting a system of desk applications. A template form of Notice of Application, supporting Affidavit, Notice of Objection citing (under oath/affirmation) the basis for the objection, and Order will be posted to the Court's website, along with a Notice to Profession and Public describing the exemption process, well in advance of the September 1, 2019 lifting of the suspension of the ADR/JDR Rules. The ease of access to a desk application should not be construed as providing ease of access to an exemption. The purpose of the ADR/JDR rules is to encourage parties to resolve their disputes without the need for a trial. Parties must establish by evidence the grounds for making their exemption application. After considering the reasons for any objection to the exemption being granted, the application justice may grant or dismiss the application or require that it be set for hearing in regular Civil Chambers.

We will be closely monitoring the pilot project and welcome your feedback.