

## Practice Direction

### Toronto Region

#### Alternative Dispute Resolution Pilot Project

In order to provide litigants with a timely and cost-effective alternative to the conventional means of resolving civil disputes, the Ontario Court of Justice (General Division) and the Ministry of the Attorney-General have initiated a two year pilot project under which court-based Alternative Dispute Resolution (ADR) services will be offered in Toronto Region. The project will be funded through the Ministry of the Attorney-General's "Investment Strategy", which aims to strategically add resources to the Ontario justice system.

This pilot project has been designed and will be implemented by a steering committee comprised of members of the court, representatives of the Bar and Ministry officials. Once the project is under way, an ADR User's Committee consisting of practitioners familiar with ADR will meet regularly with the Court's representatives to consider improvements to the project's operations.

A facility to be known as the ADR Centre will be established at 77 Grenville Street, Toronto. Commencing in March, 1994, new civil cases commenced in this Region, cases already in the Region's civil inventory and matters emanating from the Commercial List may be referred by judicial direction to the ADR Centre. Referral may occur at any point subsequent to the filing of a statement of defence. Where all parties consent and to the extent that resources permit, cases not previously referred to the ADR Centre may be referred to it. It is not anticipated that in its initial stages, this project will deal with motor vehicle negligence or family law cases.

Cases selected will receive ADR assessment by court officials to be known as dispute resolution officers, and, with the consent of the parties, will be referred to ADR processes conducted by either dispute resolution officers or judges. In order to assist them in providing these services, the judges participating in the project and the dispute resolution officers will be trained in ADR techniques. These techniques include but are not limited to ADR assessment, neutral evaluation, mediation and mini-trials.

Alternatively, the parties may choose to utilise private ADR services instead of those provided by the Court, in which case the parties will be responsible for fees charged by the private ADR service providers. A directory of available private ADR service providers will be available at the ADR Centre.

Cases using the court-based ADR services or the private ADR services will be set down for, and will continue to trial if not resolved through the ADR process. Pursuant to rule 48.07(c) of the Rules of Civil Procedure and paragraph 7.1 of this Practice Direction, those cases will proceed to trial on the filing of a certificate in a form prescribed by this Practice Direction, stating that ADR techniques have been considered but are unlikely to succeed in resolving the dispute.

Before attending at the ADR Centre, the parties or counsel acting on their behalf will be required to meet and confer about the dispute. If the dispute is not settled the parties will be required to submit a statement in a prescribed

form identifying the factual and legal issues in dispute, setting out the individual parties' cases at their best and listing any documents which in the view of the individual parties are of central importance to the case. This statement and the court file will form the basis for ADR sessions.

Parties to litigation and counsel appearing on their behalf will be expected to attend the ADR session. If the attendance of one or more parties is inappropriate or impractical, counsel are expected to give reasonable notice of this fact to the ADR Centre and to the opposing party or parties, to explain the absence of the party or parties, and to have full authority to resolve the matter.

It is anticipated that ADR sessions will include an ADR assessment and a mediation. ADR sessions may include a neutral evaluation or a mini-trial.

It is not anticipated that ADR sessions will include an ADR assessment and a mediation. ADR sessions may include a neutral evaluation or a mini-trial.

It is not anticipated that the power to award costs pursuant to s 141 of the Courts of Justice Act and r 57 of the Rules of Civil Procedure will be exercised in relation to ADR sessions attended by the parties or counsel appearing on their behalf.

Planning is under way for information sessions in relation to the pilot project.

This pilot project is designed to provide enhanced, more timely and more cost-effective access to justice for both defendants and plaintiffs. It is designed to provide additional court services and significantly improved access to justice. Ultimately, its success will depend on the cooperation of all parties to any dispute, and their counsel.

The procedures applicable to the pilot project are set out below.

The Honourable R Roy McMurtry, *Chief Justice of the Ontario Court*  
The Honourable A G Campbell, *Regional Senior Justice*  
February 1994

#### Alternative Dispute Resolution Pilot Project Procedures

##### 1. Definitions

###### 1.1 In this Practice Direction,

1. "alternative dispute resolution" or "ADR" refers to a range of processes designed to aid parties in resolving their disputes outside of a formal judicial proceeding. These processes include but are not limited to ADR assessment, neutral evaluation, mediation and mini-trial;
2. "ADR assessment" is a process in which the parties to a dispute, their counsel and a dispute resolution officer or a judge discuss the suitability of ADR as a means of resolving the dispute and the particular process to be employed for that purpose;
3. "ADR Centre" refers to the court-based alternative dispute resolution centre established pursuant to this Practice Direction;

4. "ADR session" refers to a meeting presided over by either a judge of the Court or a dispute resolution officer, and attended by counsel and parties to a dispute to which this Practice Direction applies;
5. "dispute resolution officer" means a person other than a judge, providing ADR services through the ADR Centre;
6. "mediation" is a process in which the judge of the Court or a dispute resolution officer assists the parties to a dispute in reaching a mutually acceptable resolution of that dispute;
7. "mini-trial" is a process in which opposing counsel present their best case to the parties or to a representative of the parties with authority to settle the case and to a judge of the Court who moderates the presentations and renders a non-binding opinion as to the probable resolution of the dispute; and
8. "neutral evaluation" is a process in which a judge of the Court or a dispute resolution officer at the ADR evaluates the relative strengths and weaknesses of the positions advanced by the parties, and the probable outcome at trial and advises the parties accordingly.

## 2. Referral to ADR Centre

- 2.1 At any time after the delivery of a statement of defence, new civil actions commenced in Toronto Region and cases already in the Region's civil inventory, including the Commercial List, may be referred to the ADR Centre upon notice to counsel for the parties, or where the parties are not represented, to the parties themselves.
- 2.2 The notice referred to in subparagraph 2.1 shall be in Form 1 and a copy of it shall be placed in the court file for the case.
- 2.3 Upon receipt of a notice in Form 1, counsel for a party shall forthwith give a copy of the notice to his or her client(s).

## 3. Choice Between Court-Based and Private ADR Services

- 3.1 Nothing in this Practice Direction limits the ability of litigants to resort to private ADR service providers as a means of resolving disputes or the nature described in paragraph 2, and in fact, resort to such services is encouraged.
- 3.2 A directory of those indicating a willingness to provide private ADR services will be available at the ADR Centre.

## 4. Procedure Where Case Referred to the ADR Centre

- 4.1 Before attending an ADR session, the parties or counsel acting on their behalf will be required to meet and confer about the dispute.
- 4.2 If the dispute is not resolved by meeting and conferring about the dispute, the parties shall submit a statement in Form 2, confirming that they have met and conferred about the dispute, and identifying the factual and legal issues in dispute, setting out the individual parties' cases at their best and listing any documents which in the view of the individual parties are of central importance to the case.

- 4.3 The statement in Form 2 shall be filed with the ADR Centre at least 7 days prior to the attendance.
- 4.4 All parties to the litigation referred to the ADR Centre are expected to attend the ADR session. If the parties are unable to attend, counsel are nonetheless expected to attend the ADR session and have full authority to settle. Counsel are also to give reasonable notice to the ADR Centre and other counsel that the party will not be attending the ADR session and to explain their absence.
- 4.5 ADR sessions shall be presided over by a judge of the Court or by a dispute resolution officer.

## 5. Confidentiality of Proceedings/Immunity of Neutrals

- 5.1 Prior to participating in an ADR session, the parties will be required to enter into and file at the ADR Centre and agreement in Form 3, indicating their agreement that:
  - (a) statements made and documents produced in an ADR session and not otherwise discoverable shall not be subject to disclosure through discovery or any other process and shall not be admissible into evidence for any purpose, including impeaching credibility;
  - (b) the notes, records and recollections of the judge or dispute resolution officer conducting the ADR session shall be confidential and protected from disclosure for all purposes; and
  - (c) the judge or dispute resolution officer conducting the ADR session shall have immunity described in s 82 of the Courts of Justice Act, with necessary changes to points of detail.
- 5.2 Users of private ADR services may wish to enter into express agreements addressing, among other things, the matters described in paragraph 5.1, clauses (a) and (b).

## 6. Recording the Outcome of the ADR Session

- 6.1 If an agreement to resolve the dispute is reached, it shall be reduced to writing and signed by the parties or their counsel. The parties shall provide written notice of the resolution of the case to the ADR Centre within 10 days of the agreement and the agreement may be filed with the Court. The parties shall then take appropriate steps to dispose of the action.
- 6.2 If the parties do not reach any agreement to resolve the dispute as a result of the ADR session, no record of the ADR session shall be available to the trial judge other than the Certificate of Inability to Resolve through ADR in Form 4, referred to in paragraph 7.1.

## 7. Proceeding to Trial Where No Resolution is Reached

- 7.1 No case which has been referred to the ADR Centre shall proceed to trial unless:
  - (a) if an ADR session has not yet been held, a Certificate of Inability to Resolve through ADR in Form 4 has been executed on behalf of all parties and filed at the ADR Centre; or

- (b) if an ADR session has been held, a Certificate of Inability to Resolve through ADR in Form 4 has been executed on behalf of at least one of the parties and filed at the ADR Centre, along with proof that a copy of the certificate was given to all parties.
- 7.2 Notwithstanding paragraph 7.1, clause (b), where an ADR session has been held and it is possible to do so, the parties are encouraged to file a joint Certificate of Inability to Resolve through ADR in Form 4.

### 8. Users' Committee

8.1 A Users' Committee will be established, consisting of practitioners familiar with ADR and appointed by the Chief Justice of the Ontario Court. The names of members of the Users' Committee may be obtained from the ADR Centre. The Users' Committee will meet regularly with representatives of the judges involved in the pilot project to consider improvements to the organisation and operation of the pilot project and to make recommendations to the Chief Justice in that regard. The Users' Committee welcomes suggestions, compliments and complaints from other practitioners who have had cases referred to the ADR Centre.

### Form 1

(General heading)

#### Notice of referral to the ADR centre

The parties are notified that the action described above has been referred to the Alternative Dispute Resolution ("ADR") Centre of the Ontario Court of Justice (General Division) for an ADR session. The ADR session will take place at the ADR Centre, 8th Floor, 77 Grenville Street, Toronto, on [date] at [time] . . . . ., 199 . . . . . at . . . . . m.

The ADR session will be conducted under the authority of the Practice Direction relating to the Alternative Dispute Resolution Pilot Project. The purpose of this initiative is to provide additional court services and significantly improved access to justice. In practice, litigants will be provided a timely and cost-effective alternative to the trial process. While relatively new to Canada, court-based ADR programs have been successfully instituted in several other countries, most notably the United States.

Parties to cases referred to the ADR Centre will be given the opportunity to use any of a range of court-provided dispute resolution services as an alternative to the time-consuming and costly trial process. These ADR services are designed to resolve disputes economically and at an early stage. Another of the principal virtues of ADR is that it permits the parties themselves to fashion a "tailor-made" resolution to the dispute.

ADR sessions at the Centre include but are not limited to the following services, which are provided either by judges or "dispute resolution officers" (court officials acting under the supervision of judges):

**ADR assessment** (a process in which the suitability of ADR as a means of resolving the dispute and the particular process to be employed for that purpose are discussed);

**mediation** (a process in which a judge of the Court or a dispute resolution officer assists the parties to a dispute in reaching a mutually acceptable resolution of that dispute);

**neutral evaluation** (a process in which a judge of the Court, a dispute resolution officer, or a private ADR service provider evaluates the relative strengths and weaknesses of the positions advanced by the parties, and the probable outcome at trial and advises the parties accordingly); and

**mini-trial** (a process in which opposing counsel present their best case to the parties or to a representative of the parties with authority to settle the case and to a judge of the Court or a private ADR service provider who moderates the presentations and renders a non-binding opinion as to the probable resolution of the dispute).

As an alternative to attending at the ADR Centre, the parties may choose to avail themselves of the services of a private ADR service provider at their own expense.

Before attending at the ADR Centre, the parties or counsel acting on their behalf will be required to meet and confer, and, if the dispute is not settled, to submit a joint statement in Form 2, identifying the factual and legal issues in dispute, setting out the individual parties' cases at their best and listing any documents which in the view of the individual parties are of central importance to the case. The statement or joint statement must be filed with the ADR Centre at least 7 days prior to the ADR session.

Parties to the litigation referred to the ADR Centre are expected to attend the ADR session. If the parties are unable to attend, counsel are nonetheless expected to attend the ADR session and to have full authority to settle the action. Counsel are also to give reasonable notice to the ADR Centre that the parties will not be attending the ADR session and to explain their absence.

Prior to participating in an ADR session, the parties will also be required to enter into an agreement in Form 3 (copy enclosed), which is designed to protect the parties' interests in the event that the action proceeds to trial.

Further information concerning ADR services provided through the Ontario Court of Justice (General Division) is set out in the Practice Direction relating to the Alternative Dispute Resolution Pilot Project, available at the ADR Centre.

**NOTE: Paragraph 2.3 of the Practice Direction relating to the Alternative Dispute Resolution Pilot Project requires that upon receipt of this notice, counsel for a party shall forthwith give a copy of it to his or her client(s).**

**Form 2**

*(General heading)*

**Parties' joint statement in anticipation of ADR session**

*(to be filed at the ADR Centre at least 7 days prior to the ADR session)*

The parties or counsel acting on their behalf have met and have conferred about the dispute but have been unable to resolve it.

The parties state that the following legal and factual issues remain to be resolved:

.....  
.....  
.....  
.....  
.....  
.....  
.....  
.....

In separate appendices to this form, each of the parties has stated his, her or its case at its best and has listed any documents which in the view of that party are central to the case. *(attach appendices)*

The parties or counsel acting on their behalf estimate that if this case were to proceed to trial, the trial would take ..... court days.

Dated ..... 199 .....

*[signature]*  
Counsel for the Plaintiff,

*[signature]*  
Counsel for the Defendant  
*(signatures of counsel for further parties may be set out in an attachment to this form)*

**Form 3**

*(General heading)*

**Agreement concerning confidentiality of ADR session(s)**

The parties will participate in an Alternative Dispute Resolution ("ADR") session to be conducted in accordance with the Practice Direction regarding the ADR Pilot Project. Through their counsel, the parties agree that

- (a) statements made and documents produced in an ADR session and not otherwise discoverable shall not be subject to disclosure through

- discovery or any other process and shall not be admissible into evidence for any purpose, including impeaching credibility;
- (b) the notes, records and recollections of the judge or dispute resolution officer conducting the ADR session shall be confidential and protected from disclosure for all purposes; and
- (c) the judge or dispute resolution officer conducting the ADR session shall have immunity described in s 82 of the Courts of Justice Act, with necessary changes to points of detail.

Dated ..... 199 .....

*[signature]*  
Counsel for the Plaintiff

*[signature]*  
Counsel for the Defendant  
*(signatures of counsel for further parties may be set out in an attachment to this form)*

**Form 4**

*(General heading)*

**Certificate of inability to resolve through ADR**

*(to be filed along with proof that a copy has been given to all parties)*

Through their counsel, the parties certify that they have been advised by their counsel of the availability of a range of processes known as Alternative Dispute Resolution ("ADR"), designed to aid parties in resolving their disputes outside of a formal judicial proceeding, and of the existence of the court-based Alternative Dispute Resolution Centre.

The parties further certify that Alternative Dispute Resolution techniques *(check one)*

- have been considered but are unlikely to succeed
- have been tried and have not succeeded in resolving the dispute.

*(this section to be completed where ADR techniques have been tried)*

The parties further certify that the Alternative Dispute Resolution techniques have been tried through

- (check one)*
- the ADR Centre
- a private ADR service provider. *(name private ADR service provider)*

who used the following ADR technique(s): *(specify ADR technique(s) used.)*  
The parties therefore request that this action proceed to trial.

The parties further state that it is anticipated that the following legal or factual issues will remain to be determined at trial:

1. ....
2. ....
3. ....
4. ....
5. ....
6. ....

*(further factual or legal issues may be set out in an attachment to this form)*

Dated ....., 199 .....

[signature]  
Counsel for the Plaintiff

[signature]  
Counsel for the Defendant  
*(signatures of counsel for further parties may be set out in an attachment to this form)*