BINDING JDRS

PRESENTATION FOR LAW SOCIETY OF SASKATCHEWAN
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BRIEF HISTORY

- Maybe an Alberta invention, or at least a Prairie invention
- Born out of efficiency and economy
- Many litigants cannot afford a trial, let alone a mandatory settlement process and then a trial if the ADR doesn’t work
- Alberta and Saskatchewan have a long history of judicial settlement conferencing or judicial dispute resolution
- Civil litigation has always been criticized for its expense and the time it takes
- And for the uncertainties

History (Con't)

- While Saskatchewan refers to the judicial settlement process as a pre-trial conference, Alberta has always referred to it as a judicial dispute resolution process (JDR)
- Your Part 4 Subdivision 2 Pretrial Conferences way more detailed than our bare-bones Rules of Court that only deal with privilege, confidentiality, judge disqualified and destruction/return of records – otherwise Wild West!
- JDR's have taken place in Alberta more than 25 years although initially these were ad hoc processes without any reference in our Rules
- Perhaps the historic roots of the process were exemplified by a judge calling counsel into their chambers in the middle of a trial suggesting that they might want to consider settling the matter for "these reasons"
  - Often coercive
- In Alberta a JDR is either a form of mediation (non-binding) or, with the parties consent, the judge can make a binding determination which is incorporated in a consent order

History (Con't)

- The JDR process was incorporated as QB Rules 4-17 through 4-21 of the 2010 rules revision
- The new Rules do not distinguish between a settlement JDR and a binding JDR (sometimes referred to as a mini trial)
- The 2010 rule revision also incorporated a provision that no parties could obtain trial dates without going through Alternate Dispute Resolution (either privately mediated or a JDR)
- This was incorporated in Rule 8-4(3) but the operation of this sub-rule was suspended in 2014 because of scheduling concerns related to the availability of JDR's

History

- Alberta had a very robust JDR program until perhaps 2014 when for various reasons the availability of JDRs was cut back
- From 2007 to 2014, JDRs had grown in popularity, achieved acceptance within the bar and with clients, and the Court threw more and more judges at the process
- Trial wait times plummeted, and many lawyers and litigants preferred to wait to get a JDR rather than take an earlier available trial date
- Found especially in personal injury matters that plaintiff and defence frequently agreed in advance that they would accept the results of the judge's recommendation

History

- That was due to two things: judge shopping as counsel could within reason select the judge they wanted to do the JDR
- Most JDRs were “mini-trials” (at least in Edmonton) where the parties presented their cases and the judge weighed in with the result that “followed” from reviewing the filed materials, meeting with the parties and counsel, and hearing the arguments
- Counsel began to request JDRs with judges who would do a binding JDR
- Not mandatory for judges

History

- Biggest push and biggest demand for binding came from family bar
- Many lawyers were not keen on doing a JDR and then having to do a trial when the JDR didn’t work out
- Frequently wanted exemptions from mandatory ADR requirement
- Couldn’t afford both, and needed certainty to warrant spending money
- A number of judges began to do binding JDRs
- Some would limit their willingness to certain areas of law
- Some would not do binding JDRs with self represented litigants

Not without precedent

- Look to mediation world
- Med-arb (mediation-arbitration)
- Agreement to mediate; if parties fail to agree on something, mediator becomes and arbitrator and makes a decision
- Enforced as an arbitration award
- Recognized in section 36 of *The Arbitration Act, 1992* (Sask.)
- Haven’t heard of unusual difficulties enforcing decisions coming out of the med-arb process

Process

- Well covered by your Rules – a good model; ours ad hoc but similar
- Starts with agreement between parties/counsel to do a binding JDR
- Then selection of judge/booking (still judge shopping)
- Then pre-jdr meeting with judge to discuss issues, process
- No Rules of Court, practice notes or practice directions on binding JDRs
- Essentially up to the judge conducting it
- Completion of binding JDR agreement
- No standard precedent at use in Alberta
- Experienced counsel have forms they use

Process

- I generally provide my form to counsel
- Require that it or another form I approve of by signed and provided by the beginning of the JDR
- Elements:
  - Parties agree that they will conduct a binding JDR agreement
  - Parties specify what issues they are agreeing to have dealt with at the JDR
  - Parties agree that the decision reached will be put into a consent court order
  - Parties acknowledge that there is no appeal from the decision
  - Parties agree that they will not seek judicial review of the decision

Process

- No real idea how other judges conduct binding JDRs
- No training beyond what we have for ordinary JDRs (limited)
- I treat the process somewhat like a very interactive special chambers application
- Engage the parties a lot, not as much time spent with counsel
- Do what I can to mediate/broker an agreement rather than have to make a decision
- Start out as a mediator looking for solutions
- Try to focus the parties on their interests, risk assessment

Process

- But recognize I’m in a position of power
- Careful not to weigh in too early
- Or too precisely
- Try to use Michaela Keet’s risk assessment techniques
- But when mediation fails then get pushier
- “are you at the end of your discussions so shall I decide for you?” is a good way of keeping the parties talking

Issues

Caucusing

- do or don’t
- I’m uncomfortable when binding
- Caucusing is usually a chance for the parties to be more candid and say things they don’t want the other party to hear
- Or for the judge to do a reality check
- Ok (with limits) in a mediation
- But where judge is ultimate decision maker
  - Transparency issues
  - How does other side respond
  - May create distrust

Recording

- “highly recommended” by CJs that we record binding JDRs
- And all JDRs involving self represented litigants
- Mainly defensive and protective of judge in the event of later complaints
- Some do routinely; easier in Calgary where good recording facilities
- Problematic in Edmonton and elsewhere where a portable recorder has to be brought in, with varying levels of quality
- Records invite people asking for them
- Probably a good idea – even if it’s your cell phone – as long as everyone knows it’s being recorded

Recording

- Rule in Alberta: if recording, only for the judge's or Court use, not available to parties or counsel
- Reality: angst about the subject, but no one really cares after a minute or so

Written decision?

- Nothing requiring it in AB, or even “reasons”
- Your 4-21.9 requires written or oral in court
- If parties reach agreement, make sure it’s documented
- Retain jurisdiction to settle order, resolve disputes
- Better yet, go into court and dictate the order and have everyone agree to it
- Where judge has to make decision – write or oral?
- Only reason to write is preference of judge
- Confidential, no academics, press, Court of Appeal, or colleagues to write for

Written decision

- I’m not certain that my “no judicial review” or “no appeal” would hold up, especially in the face of allegations of bias, breach of natural justice, etc, but focuses parties on “no appeal”
- May be at greater risk without giving adequate reasons
- Generally prefer to give written reasons so parties will have some assurance that the judge understood the issues, the evidence/information and the applicable law, and why they decided what they did
- Usually provide counsel with a draft for them to review for E & O (not reargue)
- Many colleagues never write in binding JDRs
- Individual judgment call

Ethics

- Glad JDRs are making their way into judicial ethics
- Controversial until now
- Although not sure new Ethical Principles for Judges contemplate binding JDRs or caucusing in binding JDRs!
- Biggest areas of complaint:
  - Judge put too much pressure on
  - Judge was not prepared

Results

- Not aware of any significant complaints from the process
- Binding JDR slots are always filled
- Some judges are busier than others, with lawyers taking advantage of the judge shopping (avoiding) opportunity
- Court of Appeal has dealt with binding JDRs on a couple of occasions, and recognize party autonomy to make a deal and be bound by it

Thanks for listening!