

**University of Alberta**

THE MULTI-DOOR COURTHOUSE IS OPEN IN ALBERTA:  
JUDICIAL DISPUTE RESOLUTION IS INSTITUTIONALIZED  
IN THE COURT OF QUEEN'S BENCH

by

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in  
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## DEDICATION

I dedicate this thesis to my spouse, Gayle Rooke, M.A. - especially for her tremendous assistance during the analysis phase on my empirical research and her outstanding patience during the trying time of writing the Evaluation Report (as discussed *infra*) and this thesis.

## **ABSTRACT**

Based on the analysis of the empirical research data from a Survey Questionnaire completed by 374 lawyers and 197 clients who participated in 606 judicially conducted Judicial Dispute Resolution (JDR) sessions (JDR Program) in the Court of Queen's Bench of Alberta (the Court) in the year ending June 2008, the author's judicial experience, and legal literature research, it is asserted that the Court's JDR Program has become an integral, normative, and institutional part of the resolution of disputes litigated in the Court. This has been achieved through a judicially led process utilizing multi-faceted dispute resolution techniques, with considerable quantitative and qualitative success. All this has led to more demand by lawyers and litigants for the JDR Program, in which these components have, over time, combined in a symbiotic and synergistic way. Thus, it is asserted that the "Multi-door Courthouse" is open in Alberta.

## PREFACE

Alternative dispute resolution methods have been used informally by justices of the Court in Alberta since the late 1980s. These methods started to take more prominence and formality in 1992 through 1997, and have matured since as the Court's JDR Program. In 2003, I identified a need for evaluation of the Program. In 2007, with the approval of the Chief Justice and Associate Chief Justice of the Court, I started empirical research through Survey (as defined *infra*) questionnaires distributed to all the lawyers and clients participating in the Court's JDR Program in the year ending June 2008. The data from the Survey returns was later analyzed as part of my Canadian Judicial Council approved Study Leave and Master of Laws program at the University of Alberta Faculty of Law commencing in the fall of 2008. Literature research and my own judicial experience were added to document the evaluation in June 2009 in a report called "Improving Excellence: Evaluation of the Judicial Dispute Resolution Program in the Court of Queen's Bench of Alberta" (Evaluation Report), now available online at: [http://cfcj-fcjc.org/clearinghouse/hosted/22338-improving\\_excellence.pdf](http://cfcj-fcjc.org/clearinghouse/hosted/22338-improving_excellence.pdf).

At the end of the Evaluation Report, I concluded that users found the Court's JDR Program excellent, but that some improvements were possible.

This thesis, turning its focus away from the evaluation of the JDR Program to the nature of its imprint on the Court, is drawn substantially from some of the more pertinent statistics, literature review and my judicial experience, as also discussed in the Evaluation Report.

## ACKNOWLEDGMENTS

I would like to acknowledge the pioneers in this field with whom I have had contact. They include Harvard University Professor Frank Sander and retired U.S. Federal District Magistrate Judge Brazil (now Adjunct Professor at University of Berkeley), whose expertise in this field is legion, as I will disclose *infra*. Professor Sander's lecture in Vancouver (1997 - *infra*) was an inspiration to me. Magistrate Judge Brazil's (as he then was) address at a Royal Roads University symposium in 2003 (*Whose Court is it Anyway? Judicial Dispute Resolution in Canadian Courts - A Symposium for Judges*, Royal Roads University, Victoria, April 2003) and subsequent supply to me of relevant evaluation material planted the original seeds that caused me to recommend the pursuit of the evaluation of the JDR Program to the Chief Justices of the Court. A subsequent review of his extensive, relevant and very helpful literature on the subject has greatly assisted me in preparing my Evaluation Report of the JDR Program and this thesis.

The true Alberta pioneers in the craft that has become JDR were (the late) Associate Chief Justice Tevie Miller, and then Chief Justice W. Kenneth Moore<sup>1</sup>. It was the leadership and foresight<sup>2</sup> of these two men, assisted by

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<sup>1</sup> The Honourable W. Kenneth Moore, Q.C., C.M., L.D., O.C. (retired in 2000 at age 75) continues doing mediations and arbitrations to this day.

Anthony Kronman (Anthony Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Cambridge, MA: Harvard University Press, 1993) [Kronman, "Lost"]), speaks of the virtues of the "lawyer-statesman" and, at 3, states that this references "an ideal that has had distinguished representatives in every age of ... law". Chief Justices Miller and Moore typified this description. Both struggled to find a way to preserve the benefits of an excellent Alberta adjudication system, but, facing long lead times to trial and a growing class of dissatisfied litigants, sought better access to justice before the Court. They had little precedent to follow, neither was an expert in ADR (although Associate Chief Justice Miller was a natural for it and Chief Justice Moore became very proficient), and they could not be sure that JDR would be the solution. However, they used their wise and prudent judgment (which Kronman has said is the quality "that the ideal of the lawyer-statesman values most") to add JDR as a judicial service in an attempt to strike an appropriate balance between the principled standard of adjudication and newer forms of interest-based dispute resolution where the parties' needs or

other judicial “pioneers” who worked with them in this search in the 1980s and early 1990s, that led the Court to adopt a formal JDR program in 1996. They were ably assisted by one of the leading and most knowledgeable proponents of the craft, Justice John Agrios<sup>3</sup>. Since then, many of my colleagues past and present have made the JDR Program what it is today. I especially want to acknowledge the work on the subject by my colleague, Justice Lawrie Smith, whose views and paper on the subject<sup>4</sup> inspired me to

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“interests” were equally important as legal “rights” or “principles”. I believe that the Survey results - primarily the parties’ happiness with the JDR Program - demonstrate that they substantially achieved that balance.

- <sup>2</sup> As to judicial leadership, or the lack of it, in pursuing judicial dispute resolution, see:
- Wayne D. Brazil, “ADR and the Courts, Now and in the Future” (2000) 189 F.R.D. 500, at 504-5 and (1999) 17 Alternatives to High Cost Litig. 85 [Brazil, “Now”], at 89-90;
  - Valerie Jo Danielson, “Judicial Dispute Resolution in Alberta: An Examination of the Court of Queen’s Bench Judicial Dispute Resolution Program” (Master’s Research Project, Osgoode Hall Law School, York University, 2007) [unpublished] [Danielson], at 75;
  - Graeme A. Barry, “In the Shadow of the Rule of Law: Alternative Dispute Resolution and Provincial Superior Courts” *News and Views on Civil Justice Reform 2* (Fall 1999), online: Canadian Forum on Civil Justice <<http://cfcj-fcjc.org/publications/newsviews-02/n2-shad.php>> [Barry], at 7, referencing The Canadian Bar Association, *Systems of Civil Justice Task Force Report* (Ottawa: The Canadian Bar Association, August 1996), at 55; and
  - Wayne D. Brazil, “Hosting Settlement Conferences: Effectiveness in the Judicial Role” (1987-8) 3 Ohio St. J. On Disp. Resol. 1 [Brazil, “Hosting”], at 1, referencing his earlier work: Wayne D. Brazil, *Settling Civil Suits: Litigators’ Views About Appropriate Roles and Effective Techniques for Federal Judges* (Chicago: American Bar Association, 1985)[Brazil, “Settling Civil Suits”], at 39 and 44.
- <sup>3</sup> Indeed, Justice Agrios (now retired) later wrote an “electronic book”, in which, in the first chapter, he said, with his usual modesty, “I believe that most neutral observers would agree that [the Court is] further ahead in our formalized dispute resolution practices ... than any other superior trial court in the country”: Justice John A. Agrios, *A Handbook on Judicial Dispute Resolution for Canadian Judges*, version 3.1, October 2007. (Edmonton, AB : s.n., 2007)[unpublished], online: National Judicial Institute, Judicial Library <<http://www.nji.ca/>>,[Agrios], at 3.
- <sup>4</sup> Justice Lawrie Smith, “Seeing Justice Done: From Judicial Mediation to The Judicial Settlement Conference”(Paper presented to the National Judicial Institute, Judicial Settlement Conference, Vancouver, British Columbia, October 15, 2008)[unpublished], online: National Judicial institute <<http://www.nji.ca>> [Smith].

respond vigorously, in a collegial debate, on the arguments she raised.<sup>5</sup>

As the “Dedication” *supra* signals, I acknowledge the outstanding assistance of my spouse, Gayle Rooke, M.A. (Distance Learning), in: formatting the questionnaires for the Survey; the preparation of the database for the inputting of the responses; leading me (a relative techno peasant) through the software tools for the simple and more integrated analysis of the data, and advice and computer skills on my literature research - in short all her computer related assistance; assisting with last minute editing and delivery of the Evaluation Report; her support through the extra work on this thesis; and, most important of all, her inspiration and patience throughout this total “project”.

I thank the 374 lawyers and 193 clients who took the time and showed the interest to complete a long questionnaire. I appreciate the further willingness of the 178 lawyers and 85 clients who volunteered for more questions or interviews (which I decided would not be pursued) - I am in the process of communicating the results of the Survey to them.

I acknowledge the assistance of the 60+ Queen’s Bench judicial puisne, and an evolving group of up to 20 supernumerary, colleagues who work so hard day in and day out in making JDRs successful, and who assisted in distributing the Survey questionnaires. I also appreciate the

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<sup>5</sup> Agrios, *supra* note 3 at 53, speaks of “fair-minded Judges who disagree” with his views . I believe that, notwithstanding some of the vehemence with which Smith, Agrios and I, along with others, engage in arguments on matters relating to JDRs, our discussions fall into that category.

Wayne D. Brazil, “Court ADR 25 Years After Pound: Have We Found a Better Way?” (2002) 18 Ohio St. J. Disp. Resol. 93 [Brazil, “25 Years After”], at 124, talks about disagreements between judges over ADR principles. He said of divergent views: “we must acknowledge them squarely, take them seriously, and consider open-mindedly their validity and their reach. We must also make changes in our programs where necessary and reassure our critics where we can.”



dedication and support of a number of my judicial colleagues who gave me advice throughout the project.

I thank Chief Justice A.H. Wachowich and Associate Chief Justice Neil Wittmann (as they then were<sup>6</sup>) for their full cooperation in allowing me to undertake the evaluation. I acknowledge them and Alberta Justice for securing the necessary office resources and staffing for distributing and retrieving the questionnaires and inputting the database.

I specifically want to thank the Court's Trial Coordinators, especially JDR Coordinators Brent Rosin of Edmonton and Pat Gordon of Calgary, and Trial Coordinator Lisa Brown of Lethbridge, for their diligence in helping convert the Survey questionnaires into Survey results.

I thank summer student, Jenna Will, for her work in entering the Survey data into the data base, and my administrative assistants, first, Valerie Horne, and later, Darlene Walker, for all their work in helping me to initiate, follow up on, and coordinate the completion of the evaluation, and the Evaluation Report.

I acknowledge that some of the time dedicated to this project was made possible by the Canadian Judicial Council Study Leave Program, pursuant to approval of the Governor in Council, under s. 54(1)(b) the *Judges Act*, R.S.C. 2000, c. J-1, which allowed me to leave behind most of my daily judicial duties (other than writing overdue reserved judicial decisions and my duties as Acting Chair of the Rules of Court Committee until December 12, 2008, especially in relation to the New Rules of Court Project

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<sup>6</sup> Chief Justice A.H. Wachowich elected to become a supernumerary justice effective October 1, 2009, in advance of his mandatory retirement on March 8, 2010. Associate Chief Justice Neil Wittmann replaced him as Chief Justice on October 22, 2009, the same day I became Associate Chief Justice, replacing him.

(*infra*)), in the period September 1, 2008 to April 30, 2009.

A very special thanks goes to Alberta Justice, Alberta Law Libraries, Rhonda O'Neill, B.A., M.L.I.S., Assistant Director, Lyn Beattie, B.A., M.L.S., Cindy Roorda, B.A. (Hon.), M.L.S., and Lola Salami, Ph. D., M.L.I.S., all Reference Librarians, for their spectacular assistance in coordinating literature searches, and assisting in editing of cites and the bibliography in the Evaluation Report and this thesis. I also very much appreciate the outstanding assistance of Lauren Warrack, Legal Counsel to the Court, for her diligence in reviewing cites and editing the Evaluation Report and this thesis.

I acknowledge the early assistance and advice of my friend, Judge Hugh F. Landerkin, Provincial Court of Alberta, who, as will be seen *infra*, has written extensively on the subject, with considerable expertise.

Last but not least, I thank my new friends at the University of Alberta, Faculty of Law, who provided the endorsement, atmosphere, setting and support in which to conduct much of this work. Dean David Percy, gave me the opportunity to be a Justice in Residence (along with my colleague, Justice Don Lee) and an LL. M. student during my Study Leave year in 2008-9. Vice Dean Wayne Renke, helped me through the University of Alberta Arts, Sciences and Law Research Ethics Board process to issue the Survey questionnaire<sup>7</sup>, and has provided advice since. Professor Ted DeCoste taught me not only to apply the law, as I have been doing for

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Notwithstanding the comment of Herbert M. Kritzer, "Research is a Messy Business: An Archeology of the Craft of Social-Legal Research" in Simon Halliday and Patrick Schmidt eds., *Conducting Law and Society Research: Reflections on Methods and Practices* (New York: Cambridge University Press, 2009) [forthcoming], online: Social Science Research Network <<http://ssrn.com/abstract=1288063>>, at 1, about the "problems' of increasing demands from Institutional Review Boards charged with protecting human subjects", thanks to the assistance of Vice Dean Renke, this was a relatively painless process.

almost 40 years, but also to love and appreciate the law for itself - in the process trying to warp this judge into a quasi-scholar - a work still very much in progress<sup>8</sup>. I thank Associate Dean, Graduate Studies (2008-9), Dr. Moin Yahya, for his support, assistance and encouragement - and personal friendship - in helping me to come back to the academy after 38 years and (ultimately) to succeed in my project. Regrettably, he has left the University of Alberta, Faculty of Law, for adjudicative pursuits with a regulatory tribunal, before he could see the completion of this thesis and my Master of Laws in Dispute Resolution granted (expected in June 2010). All of this would not have been possible without the advice, direction, and guidance, but more importantly, the encouragement, enthusiasm and friendship of Professor Dr. Russell Brown, my Master of Laws supervisor, throughout this process.

Without these people, the research, empirical and theoretical, and the writing leading to this thesis would not have been possible. I thank them all.

February 15, 2010

Associate Chief Justice John D. Rooke

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<sup>8</sup> As I complete this thesis, I know that I have not yet achieved even that low standard. On the subject of scholarship, I wish to adopt Kronman's words (Kronman - "Lost", *supra* note 1 at 6) to state that I do not write this in a scholarly language - I am a judge, and it is hard to change one's spots. Rather, I have attempted (to use his words) to write "in simple terms and without the use of specialized jargon".

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## LIST OF SYMBOLS, NOMENCLATURE<sup>9</sup> OR ABBREVIATIONS

|             |  |
|-------------|--|
| ALRI        | - Alberta Law Reform Institute   |
| ADR         | - Alternative Dispute Resolution (in this thesis, alternative to a dispute resolution, primarily adjudication, by, or involving, the Court), where a neutral, non-judicial, third party assists the parties to attempt to settle a dispute - also, referencing methods and techniques used in this process and adopted in the JDR Program  |
| BATNA       | - best alternative to a negotiated agreement <sup>10</sup>   |
| Binding JDR | - a JDR where, at the parties' request - indeed, written agreement between them - if a settlement is not reached on one or more issues, the JDR justice will provide a non-binding opinion which the parties expressly agree in advance, at any time, or thereafter, to accept as binding on them as to the result (thus, by agreement, a "Binding JDR opinion"), or, where available (not currently available |

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<sup>9</sup> Terminology was a substantive issue addressed in the Evaluation Report (at 69-128), so the nomenclature here is a mere summary of what was discussed therein. See, for example:  
- Catherine Morris, "Definitions in the Field of Conflict Transformation", online: Peacemakers Trust  
<<http://www.peacemakers.ca/publications/ADRdefinitions.html> [Morris];  
- Center for Public Resources (CPR) Institute for Dispute Resolution, "The ABCs of ADR: A Dispute Resolution Glossary (1995) 13 Alternatives to High Cost Litig. 147;  
- Law Society of Upper Canada, Research and Planning Committee, *Short Glossary of Dispute Resolution Terms* (Toronto, Ont.: Law Society of Upper Canada, 1992);  
- Robert J. Niemic, Donna Stienstra and Randall E. Ravitz, *Guide to Judicial Management of Cases in ADR* (Federal Judicial Centre, 2001), at 8-10; and  
- Douglas H. Yarn, et al, *Dictionary of Conflict Resolution* (San Francisco: Jossey-Bass, 1999), available online at <http://www.credreference.com>.

<sup>10</sup> As set forth in Roger Fisher, and William Ury, with Bruce Patton, ed. *Getting to Yes: Negotiating Agreement Without Giving In*. 2d. ed. (New York: Penguin Books, 1991) [Fisher et al, "Getting to Yes"].

in Alberta as a result of *L.N. v. S.N.*<sup>11</sup>), the JDR justice will provide a formal decision (“Binding JDR decision” by judicial fiat) under a similar express agreement. While there are, at least theoretically, two ways to get there, both are referenced as “Binding JDR”.

|                 |   |
|-----------------|---|
| C               | - Client (in reference to Survey data)  |
| CJC             | - Canadian Judicial Council   |
| Clients’ Survey | - Survey relating to clients  |
| Court           | - Court of Queen’s Bench of Alberta   |
| judge           | - a judicial decision maker, in general, whether a judge or justice   |
| justice         | - a judge of the Court  |
| JDR             | - Judicial Dispute Resolution <sup>12</sup> - a voluntary and consensual process whereby parties to a dispute, following the filing of an action in the Court (and, most typically, close to trial), seek the assistance of a JDR justice to help, in a mini-trial, facilitative or evaluative mediation or binding JDR, to settle the dispute before trial <sup>13</sup> |

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<sup>11</sup> *L.N. v. S.M.*, 2007 ABCA 258, 412 A.R. 232, 79 Alta. L.R. (4<sup>th</sup>) 33, 284 D.L.R. (4<sup>th</sup>) 1, [2007] 12 W.W.R. 191, 43 R.F.L. (6<sup>th</sup>) 4, 159 A.C.W.S. (3d) 672, 2007 CarswellAlta 1080, [2007] A.J. No. 888 [*L.N.*]. The majority in this case, notwithstanding a strong dissent, forbade a binding “decision”, only leaving the option of binding “opinion” (binding in each case by the clients’ agreement to make it so) in a Binding JDR.

<sup>12</sup> In this thesis I have taken the liberty of creating a whole new vocabulary. “JDR” is broadly used - as a noun, singular or plural (“a JDR”, or “JDRs”), an adjective (“a JDR session”, or “JDRing”) and a verb (“JDRed”).

<sup>13</sup> This definition is not far off of that used by Danielson, *supra* note 2 at 2, referencing Alberta Law Reform Institute (ALRI), Alberta Rules of Court Project, “Civil Appeals”, Consultation Memorandum No. 12.21, April 2007, at 137, para. 307, and Alberta Law Reform Institute, Alberta Rules of Court Project, “Promoting Early Resolution of Disputes by Settlement”, Consultation Memorandum No. 12.6, 2003 [ALRI, “Promoting”], at 68, para. 156.

Note that, currently, where the parties do not agree to a JDR, an adjudication is

|                 |  |
|-----------------|--|
| L               | - Lawyer (in reference to Survey data)   |
| Lawyers' Survey | - Survey relating to lawyers   |
| Mandatory ADR   | - a process where some form of ADR or JDR is required before a trial of a dispute <sup>14</sup>  |
| Mediation       | - a neutral third party, who has no decision making power, who assists parties to a dispute to resolve that dispute and issues associated with it <sup>15</sup>  |
| Mini-trial      | - a JDR where, after review of briefs, and submissions of the parties and/or their counsel, the JDR justice provides a non-binding opinion of the result that might be achieved in a judicial adjudication <sup>16</sup> |
| New Rules (NR)  | - new Alberta Rules of Court, as recommended by the ALRI in October 2008, with the general concurrence of  |

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the only recourse within the Court: *Nanrhe v. Nanrhe*, 2005 ABQB 722, [2005] A.J. No. 1332 (Veit J.).

<sup>14</sup> Note that, in Alberta, dispute resolution is mandated under the New Rules. Some form of private ADR, JDR, or court-annexed dispute resolution will be required, or must be judicially waived, before a trial date can be obtained - see NR (defined *infra*) 4.16 and 8.4. However, that does not mean that JDR is specifically mandated.

<sup>15</sup> Judge Landerkin adds "through an informed settlement", ostensibly meaning "in the shadow of the law" as discussed *infra*: Hugh F. Landerkin, "Custody Disputes in the Provincial Court of Alberta: A New Judicial Dispute Resolution Model" (1997) 35 Alta. L. Rev. 627 [Landerkin, "Custody"], at 661.

There are numerous adjectives related to mediation.

<sup>16</sup> Danielson, *supra* note 2 at 3, referencing ALRI, "Promoting" *supra* note 13 at 73, para. 168, claims that the Court in "Alberta is considered the pioneer in the mini-trial".

As an aside, it appears that, even if Alberta is a "pioneer" in this field, it was not the first. Indeed, even the term "mini-trial" itself is a misnomer. U.S. District Court Judge Richard A. Enslin noted that it arose in 1978 and that "It is not named that way by its founders, but named that way by the New York Times." and that "It isn't a substitute for a trial. It isn't a trial. Mini trial is the wrong word. It's a settlement technique.": Richard A. Enslin, "Alternative Dispute Resolution" in *Isaac Pitblado Lectures: Alternative Dispute Resolution: Emerging Mechanisms and Professional Responsibilities in Dispute Resolution* (Winnipeg, Manitoba: Law Society of Manitoba, 1986) [Pitblado Lectures], at 6.

the Rules of Court Committee in December 2008, subject to the determination of the Minister of Justice of Alberta, recently scheduled to come into force November 1, 2010.

“NR” is used to precede a specific proposed New Rule.

- ranking - (and derivatives of it) reference, in multiple choice questions, the ranking (or rating scale) from 1 to 5, where 1 is usually (with some exceptions) negative, and 5 usually positive
- Pre-JDR - a pre-JDR meeting or conference to discuss the JDR process to be followed in an individual JDR in the Court
- RCC - Rules of Court Committee, under s. 25 of the Court of Queen’s Bench Act, R.S.A. 2000, c. C.31
- SRL - Self Represented Litigant(s) - in the U.S., the term “*pro-se*” is used
- Survey - broadly, the survey questionnaires that were distributed, the replies, the database created and the results as summarized herein as it applies to both lawyers and clients. Where there is a distinction between them, I shall use the terms Lawyers’ Survey and Clients’ Survey.
- WATNA - worst alternative to a negotiated agreement<sup>17</sup>

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As set forth in Fisher et al, “Getting to Yes” *supra* note 10.



# THE MULTI-DOOR COURTHOUSE IS OPEN IN ALBERTA: JUDICIAL DISPUTE RESOLUTION IS INSTITUTIONALIZED IN THE COURT OF QUEEN'S BENCH

*The role of judges in the adjudicative system is undergoing significant change.... As a result of the widespread introduction of judicial case management and judicial mediation, which are often pushed for by judges themselves and are never effective without their support, many judges are reconsidering the part they play in dispute resolution. The significance of the attitude of the bench toward change cannot be underestimated – their professional leadership will be key to the future.*<sup>18</sup>

## I. INTRODUCTION

My thesis relates to the question of whether the Court's various JDR methods and processes have become truly integral to the Court's activities. Put another way, do these methods and processes remain mere alternatives to the existing "normal" dispute resolution process of adjudication, or have they become part of the institutionalized "norm"? I ultimately conclude that the Court's JDR Program has become an integral, normative, and institutional part of the resolution of disputes litigated in the Court. I will provide the background, and then the analysis, for this thesis.

## A. BACKGROUND

To understand my thesis, it is important to start with an understanding of the history of the establishment of JDRs in Alberta. To assist parties in the

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<sup>18</sup> Professor Julie Macfarlane, *The New Lawyer: How Settlement is Transforming The Practice of Law* (Vancouver: UBC Press, 2008) [Macfarlane], at 224.

See also Robert H. Mnookin, Scott R. Peppet and Andrew S. Tulumello, *Beyond Winning: Negotiating to Create Value in Deals and Disputes* (Cambridge, Mass: The Belknap Press of Harvard University Press, 2000), which comes with a recommendation from Frank E.A. Sander, "The Future of ADR" (2000) J. Disp. Resol. 3 [Sander, "Future"], at 9.

settlement of civil and family litigation, alternative dispute resolution methods, performed by justices of the Court, have been offered by the Court informally since the late 1980s. Mini-trials were made available by the Court to litigants, mainly in Calgary and Edmonton, in the period from the late 1980s - 1992<sup>19</sup>, and were formally scheduled from the fall of 1992 to the fall of 1995 inclusive. Sessions in the broader service of “ADR” (the term “JDR” had not yet been coined in Alberta, but the service was the same thereafter) were scheduled in those centres in the spring and fall of 1996. “JDRs” were formally scheduled in those centres from the spring of 1997 onward. In other judicial centres since that time mini-trials and, later, JDRs were and continue to be scheduled as requested by counsel<sup>20</sup>.

The more recent Alberta history of the journey that leads to this thesis began in the spring of 2003 when I attended a Royal Roads University Judicial Dispute Resolution symposium in Victoria, British Columbia<sup>21</sup>. While attending the symposium with experts from around the world, including approximately two dozen Canadian jurists, I enquired of then Magistrate Judge Wayne Brazil of the United States District Court of the Northern

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<sup>19</sup> Alberta Law Reform Institute, *Civil Litigation: The Judicial Mini-Trial* (Edmonton: Alberta Law Reform Institute, 1993)[ALRI, “Mini-Trial”], at 8, relying on Chief Justice W. Kenneth Moore, “Mini-Trials Reduce Clients’ Stress and Expense” (1992) 27 *The Law Society of Alberta Benchers’ Advisory* 11, and Associate Chief Justice Tevie Miller, “Mini-Trials” (May 1992) Edmonton Bar Association Notes, at 2.

<sup>20</sup> For a good understanding of how JDRs are conducted, see Danielson, *supra* note 2 at 4-8 (with some minor corrections noted in the Evaluation Report).

See also Deborah Lynn Zutter, “Incorporating ADR in Canadian Civil Litigation” (2001) 13 *Bond L. Rev.* 445 [Zutter], at 455, where Zutter gives a very simple explanation of the Court’s JDR Program, relying on a presentation made by Justice Rawlins of the Court early in the life of the JDR Program.

<sup>21</sup> “Whose Court is it Anyway? Judicial Dispute Resolution in Canadian Courts - A Symposium for Judges”, Royal Roads University, Victoria, April 2003) online at: <http://www.royalroads.ca/NR/rdonlyres/D8FDCE32-ACC2-4CA8-8BD9-92951C19BBB2/0/JDRSymposiumSummaryReport.pdf>. [“Whose Court”].

District of California (San Francisco) - then, but even more so now, a leading expert on judicial dispute resolution<sup>22</sup> - as to his knowledge of any evaluation literature that might lead to an evaluation of our Court's JDR Program, that had formally started about 7 years earlier. He immediately sent me some material, which languished in my bookcase until 2007, when I started to organize some empirical research for my planned Canadian Judicial Counsel (CJC) sponsored Study Leave Program and Master of Laws enrolment at the Faculty of Law at the University of Alberta.

The empirical research component of this project started in the summer of 2007. Over the year that followed, Survey<sup>23</sup> questionnaires were distributed to all the lawyers and clients participating in the Court's JDR Program - 606 JDR sessions in all<sup>24</sup>. By the start of my Study Leave and Master of Laws program in the fall of 2008, 374 lawyers and 193 clients<sup>25</sup>

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<sup>22</sup> Magistrate Judge Wayne Brazil retired from the United States District Court of the Northern District of California (San Francisco and Oakland) in the fall of 2009, after 25 years of exemplary judicial service. In October 2009 he became a "Professor from Practice" at "Berkeley Law" (formerly known as "Boalt Hall") at the University of California, at Berkeley. He is a member of the American Bar Association's (ABA) Dispute Resolution Section and on the Editorial Board of its Dispute Resolution Magazine. He was the 2009 ABA prestigious dispute resolution D'Alamberte-Raven Award winner and, in the ABA announcement of the award, is referred to in the following language "Few people in our [ADR] field have the range of vision, the attention to detail, the energy for new tasks, the depth of experience, or the passion for the enterprise of dispute resolution that ... Brazil shares with the world": [www.abanet.org/dispute/AwardPressRelease.pdf](http://www.abanet.org/dispute/AwardPressRelease.pdf). From my review of his work, I heartily support this characterization.

<sup>23</sup> I use the term "Survey" in a broad way to identify the questionnaires that were distributed, the replies that were returned, the database created and the results as summarized herein as it applies to both lawyers and clients (although primarily lawyers). Where there is a distinction between them, I shall use the terms Lawyers' Survey and Clients' Survey. Where more specific use is required, I will express it or it should be read in context.

<sup>24</sup> Currently (2010) scheduled on the basis of 12 JDRs per non-holiday week in each of Edmonton and Calgary, and in other judicial centres as requested.

<sup>25</sup> 26% and 13% respectively of the lawyers and clients who participated in the 606 JDRs for the year ending June 30, 2008.

had responded and the data had been placed in a database, summarized and analyzed.

The broader history of the Court's JDR Program, the motivation for it and its evaluation<sup>26</sup>, the process of evaluation and the results are documented in a lengthy report that I prepared in June 2009 called "Improving Excellence: Evaluation of the Judicial Dispute Resolution Program in the Court of Queen's Bench of Alberta" (Evaluation Report), accessible online at: [http://cfcj-fcjc.org/clearinghouse/hosted/22338-improving\\_excellence.pdf](http://cfcj-fcjc.org/clearinghouse/hosted/22338-improving_excellence.pdf). This thesis is drawn substantially from some of the more pertinent statistics and literature review discussed in the Evaluation Report.

George W. Adams and Naomi L. Bussin have commented that, except for pre-trial conferences that have "become an important spur to the settlement process", "[w]hat has not yet happened in Canada ... is the institutionalization of the many different ADR processes which now exist as an adjunct to the court system in the United States"<sup>27</sup>. The Court's JDR Program started in earnest on the heels of Adams and Bussin's comment.

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<sup>26</sup> The motivation for the evaluation was, in essence, the same as that expressed by Chief Justice Warren Burger at the 1976 Pound Conference which started the ADR movement: "[w]hen we make changes, their operation must be monitored to be sure they are working as we intended": Warren E. Burger, "Agenda for 2000 A.D.: A Need for Systematic Anticipation" (Address Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Pound Conference), April 7-9, 1976) (1976) 70 F.R.D. 83 [Burger], at 89.

<sup>27</sup> Honourable George W. Adams and Naomi L. Bussin "Alternative Dispute Resolution and Canadian Courts: A Time for Change" (1995) 17 *Advoc. Q.* 133 [Adams & Bussin], at 134.

By 1996 in U.S. Federal District Courts there was "[e]vidence for the growing institutionalization of ADR within the courts [as] seen in the formal rules and procedures adopted...": Elizabeth Plapinger & Donna Stienstra. "ADR and Settlement in the Federal District Courts; a Sourcebook for Judges & Lawyers" (1996) 172 F.R.D. 550 [Plapinger & Stienstra], at 558.

By the end of 1999, JDR had “been largely institutionalized in the superior courts of the prairie provinces”, with the Court becoming “the first court in Canada to incorporate ‘JDR weeks’ into regular sitting schedules”<sup>28</sup>. If the JDR Program was not then institutionalized in the Court<sup>29</sup>, it was on its way.

By 2007, the Court had some anecdotal information about the success<sup>30</sup> of the JDR program<sup>31</sup>, but no hard quantitative and qualitative

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<sup>28</sup> Joan I. McEwen, “JDR - Judicial Dispute Resolution” (1999) 8:7 National 36, at 36-7.

<sup>29</sup> What this thesis does not address, aside from the judicial role (*infra*), is the consequences of institutionalization - see, for example, Jacqueline M. Nolan-Haley, “Court Mediation and the Search for Justice Through Law” (1996) 74 Wash. U. L. Q. 47 [Nolan-Haley], at 52, referencing James Alfini *et al*, “What Happens When Mediation is Institutionalized?: To the Parties, Practitioners, and Host Institutions” (1994) 9 Ohio St. J. on Disp. Resol. 307 [Alfini *et al*, “What Happens”].

The latter consisted of a panel of experts at the 1994 conference of the Alternative Dispute Resolution Section of the Association of American Law Schools, which addressed the “institutionalization of mediation through court-connected programs”. While beyond the scope of this thesis, the analysis therein will provide messages as to the care the Court must take in the future.

Note too the institutionalization discussed in the section on “Court-Annexed Procedures”, focusing on Ontario, in McLaren, Richard H. and Sanderson, John P., Q.C., *Innovative Dispute Resolution: The Alternative*, looseleaf (Toronto: Carswell, 2003), at CAP-1 *et seq*.

<sup>30</sup> “Success” herein refers primarily to the settlement of the matter in dispute without further litigation, although there are other quantitative and qualitative measures of success which will be discussed *infra* in this thesis.

<sup>31</sup> Danielson *supra* note 2 at i, stated:  
 The success of the JDR Program in resolving disputes is widely recognized within the Alberta civil litigation Bar. The underlying reasons for the JDR program’s success are not commonly known and, indeed, have never been studied previously in any detail. Available Court statistics on the program’s settlement rates do not reveal the reasons for the program’s high success rate.

Later, at 5, she added: “ ... the JDR Program has been driven by its success. The Alberta Bench ‘has embraced the program’ creating a program of credibility and integrity”.

information<sup>32</sup>. Hence the need for evaluation of the JDR Program, with a view to identifying necessary changes to ensure that it remained relevant and of assistance to litigants. The Evaluation Report provides that analysis.

In addition to the Survey's empirical results, and my JDR education and judicial experience<sup>33</sup>, I rely on the extensive applicable literature<sup>34</sup>.

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As to the "high success rate", at 6, she provided some statistics to support a success rate of between 70 - 80%, although the results of the Lawyers' Survey shows that it is higher than that - 81% on all issues and 89% on at least some issues - see section F1 of "Executive Summary of Key Results - Lawyers" (attached as Appendix 1 hereto) for detailed analysis.

<sup>32</sup> Danielson *supra* note 2 at 1, said that her research in the form of survey data from JDR justices was for the purpose of gaining  
 ... important insight from the Justices prior to any research being done on members of the Alberta Bar or litigants themselves. This project is not intended to be an evaluation of the JDR Program, or of the Justices who perform their duty within the JDR Program.

She later, at 47, laments that, prior to my evaluation (as she anticipated at 68, note 238), there was no formal evaluation of the Alberta JDR Program.

It should be recognized, so as not to be missed in passing, that the views of my colleagues are very important to my evaluation of the JDR Program. Naomi Bussin, "Evaluating ADR Programs: The Ends Determine the Means" (1999-2000) 22 *Advoc. Q.* 460 [Bussin], at 472, makes the point that, in the evaluation of a JDR system, in addition to the external, "internal stakeholders should be consulted and their input requested during the entire evaluation process" ... "stakeholders should be asked to provide ideas for change within the system". The Danielson survey accomplishes much of that. While I did not do a formal survey questionnaire of my colleagues, I provided numerous requests and opportunities for comments and recommendations from them, and received some - not overwhelming - input. As part of the next step, consideration by the Court's new JDR Committee, and, if thought advisable, proposed implementation of the recommendations in the Evaluation Report, and in this thesis, will be the subject of further input by my colleagues before any significant changes take place in the JDR Program.

<sup>33</sup> My ADR/JDR related education includes:  
 - pre-1991 - Arbitration and Mediation Society, Arbitration, Alternate Dispute Resolution and Mediation (Level I and II) courses;  
 - 1996 - Court of Queen's Bench of Alberta, "*Judicial Dispute Resolution*";  
 - 1997 - National Judicial Institute, "*Settlement Skills for Judges Seminar*";  
 - 1997 - Harvard University, "*Mediation Workshop*" (Presented at Simon Fraser University, Vancouver, by Professor Frank E.A. Sander, Bussey Professor of Law at Harvard University. I pause to note that Sander is the "father" of ADR, the icon of ADR, and the "Dean in this arena - the commentator and leader with the

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deepest experience, the broadest vision, the richest knowledge, and the most balanced counsel”: Wayne D. Brazil, “Continuing the Conversation About the Current Status and the Future of ADR: A View from the Courts” (2000) J. Disp. Resol. 11, [Brazil, “Continuing”], at 11. There are many more tributes: see Brazil, “25 Years After” *supra* note 5 at 94, who called him the “spiritual father of court ADR”.

- 2003 - National Judicial Institute and Royal Roads University, “*Whose Court is it Anyway? Judicial Dispute Resolution in Canadian Courts - A Symposium for Judges*”, Royal Roads University, Victoria, April 2003) ;
- 2004 - Legal Education Society of Alberta, “*Mediation of Family & Divorce Conflict*”;
- 2005 - National Judicial Institute, “*Managing and Resolving Multi-Party Cases*”;
- 2007 - Canadian Institute for the Administration of Justice, “*Judicial Dispute Resolution into the Future*”; and
- 2008 - National Judicial Institute, “Settlement Conferencing”.

My (related) arbitration experience includes conducting approximately 25 labour related arbitrations, and becoming a Chartered Arbitrator (C. Arb.), Arbitration and Mediation Institute of Canada Inc.

My JDR experience consists of approximately 120 plus JDRs of many types - mini-trials, facilitative mediations, evaluative mediations and binding mediations since 1992.

I have also written and delivered a number of papers on this and related subjects:

- 1991 - Canadian Association for the Practical Study of Law in Education Conference, Edmonton, presenting a paper entitled: “*Dispute Resolution Through Arbitration and Mediation*”;
- 1991 - Legal Education Society of Alberta, Edmonton and Calgary, presenting a paper entitled: “*Effective Dispute Resolution: A View from the Bench*”;
- 1993 - Canadian Bar Association, Alternative Dispute Resolution Section (Southern), Calgary, presenting a paper entitled “*Arbitration in Alberta and the New Arbitration Act: an Early View from the Bench*”;
- 1996 - Canadian Bar Association, Alternative Dispute Resolution Section (Northern), Edmonton, presenting a paper entitled “*Assessing Credibility in Arbitrations and in Court: A Difficult Task for Judge, Jury or Arbitrator(s)*”;
- 2008 - National Judicial Institute, Court of Queen’s Bench of Alberta, Education Conference, Calgary, presenting a paper entitled “*Evaluation of the Court of Queen’s Bench of Alberta Judicial Dispute (JDR) Program: QB JDR Participants’ Survey 2007-8; Report on Lawyers’ Survey Results*”; and
- 2008 - University of Alberta, Faculty of Law, Edmonton, Law 699, The Philosophy of Academic Learning, presenting a LL. M. course assignment paper entitled “*Judicial Conduct in Judicial Dispute Resolution*”.

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The quantity of literature is overwhelming, and extensively, but not uniformly, cross-referenced. Indeed, Louise Otis and Eric H. Reiter, “Mediation by Judges: A New Phenomenon in the Transformation of Justice” (2006) 6 *Pepperdine Dispute Resolution Law Journal* 351[Otis & Reiter], at 35, note 2, state that “[t]he literature on ADR is vast”, and they reference:

- Carrie Menkel-Meadow, “Whose is it Anyway?: A Philosophical and Democratic Defence of Settlement (in Some Cases)” (1995) 83 *Geo. L.J.* 2663; and

At the end of my Evaluation Report, I concluded that the users found the Court's JDR Program excellent, but that some improvements were possible.<sup>35</sup>

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- Jean R. Sternlight, "ADR is Here: Preliminary Reflections on Where it Fits in a System of Justice" (2003), 3 *Nev. L.J.* 289 [Sternlight], which provides "particularly useful overviews with bibliographical orientation".

While my canvassing of the literature has been broad, I have sought to synthesize it as much as possible. I have tried to limit my review of the vast literature with the following criteria in mind (in no particular order): focus almost exclusively on North America, concentrate more on articles that have arisen since the Court's JDR Program started in 1996, do not get into subjects beyond the boundaries of this thesis and try to keep those boundaries tight, try to avoid studies of other ADR systems which add little to the study of the Court's JDR Program, time available to do the research (which became a severely limiting constraint), and "other considerations". I know I have missed or not had the time to consider (at all or in sufficient depth) many excellent sources, but I have been time constrained to complete this thesis. Thus, further valuable material has been left for me and others to review in the future, some of which has been referenced in Appendix 9, "Further Readings", of the Evaluation Report.

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Danielson *supra* note 2 at 76, in the last paragraph of her thesis said:  
 ... there is potential for the Alberta Court of Queen's Bench JDR Program to continue to improve and expand. ... Our Courts have responsibility not only to change but to provide a leadership role as the ultimate regulator and keeper of the peace in society's disputes. Alberta's Court of Queen's Bench Judicial Dispute Resolution Program is a clear response to this challenge.

Indeed, as Gandhi said "We must be the change we want to see in the world": Daniel Bowling and David Hoffman, eds. *Bringing Peace to the Room: How the Personal Qualities of the Mediator Impact the Process of Conflict Resolution* (San Francisco, CA: John Wiley & Sons, 2003), at 1. See also their earlier work of similar name: Daniel Bowling and David Hoffman "Bringing Peace into the Room: The Personal Qualities of the Mediator and Their Impact on the Mediation" (2000) 16 *Negotiation Journal* 5.

A Georgia judge brought the concept of change home to the dispute resolution judiciary of the future:

The role of the judge in resolving dispute is to look to the future, assess the way things are done now, and be ready to change, not just for the sake of change but so we can continue to be a viable, equal, third branch of government.

Judge Robert G. Walther, "The Judge's Role in Resolving Disputes" (1993) 244 *Georgia State Bar Journal* 29, at 29.



Now in this thesis, I look back at the role of the Court's JDR Program from the standpoint of the Court's changing role, from its traditional, purely adjudicative role, progressing increasingly since 1992 to its current, continually judicially-led<sup>36</sup> "multi-faceted" role<sup>37</sup>. In the process, the Program's progression has been synergistic<sup>38</sup>. Early success with mini-trials led to expanding ADR techniques - facilitative and evaluative mediation and binding mediation - thus, a multi-faceted approach. As a greater variety of techniques became available, lawyers and their clients were able to select those which were most suited to the nature of their dispute. In the process, familiarity with the techniques and the judicial skills associated with them led to continuing or increasing success (success over time not measured) and increasing demand. As a consequence, my thesis is that JDR has now become an equal partner with adjudication in the Court's dispute resolution

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<sup>36</sup> Brazil spoke early on regarding the judicial role in settlement:  
 ... the vast majority of litigators believe that judges are in a position to make valuable contributions to the settlement process. In fact, lawyers want judges to become more assertively involved in settlement than has been the norm in most courts in the past. It seems clear that judges are going to be under continuing and increased pressure to make settlement work a major part of their job description.

Brazil, "Hosting" *supra* note 2 at 1, referencing his earlier work, Brazil, "Settling Civil Suits" *supra* note 2 at 39 and 44.

<sup>37</sup> A term used by Sander in Frank E.A. Sander, "Varieties of Dispute Resolution" (Address Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Pound Conference)(April 7-9, 1976) 70 F.R.D. 111 [Sander, "Varieties"], at 124, and later in Jeffrey W. Stempel, "Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: *Fait Accompli*, Failed Overture, or Fledgling Adulthood" (1996) 11 Ohio St. J. On Disp. Resol. 297 [Stempel, "Reflections"], at 353-4, in stating that "an institutionalized ADR system with a mediation ... litigation continuum is probably the optimal melding of adjudication and ADR".

<sup>38</sup> "Synergistic" is used here in the sense of one separate component combining with, or leading to, another - in each case, cooperating for an enhanced effect.

process. In short, the JDR Program has become institutionally normative<sup>39</sup>.

## B. THESIS

Alternative Dispute Resolution (ADR) is neither new nor modern<sup>40</sup>. In 1976, Frank E. A. Sander revived ADR by conceptualizing it as one door to the “multi-door courthouse”<sup>41</sup>. Speaking at the “Pound Conference”<sup>42</sup>, he

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<sup>39</sup> “Normative” as used herein is defined as establishing or setting up a norm or standard - here applicable to JDR as part of the dispute resolution of the Court. In other words, it is asserted that JDR has become the normal rule, not an exception, to the usual process of dispute resolution in the Court.

<sup>40</sup> The concept of ADR can be traced to community resolution going back centuries, as seen in, *inter alia*:

- Linda R. Singer, *Settling Disputes: Conflict Resolution in Business, Families and the Legal System* (Boulder, CO: Westview Press, Inc., 1990) [Singer], at 5-6;
- Otis & Reiter, *supra* note 34 at 356, footnote 17;
- Robert J. MacCoun, E. Allen Lind and Tom R. Tyler, “Alternative Dispute Resolution in Trial and Appellate Courts”, in D.K. Kagehiro & W.S. Laufer, eds., *Handbook of Psychology & Law* (New York: Springer-Verlag, 1992)[MacCoun, Lind and Tyler], at 102 - going back anthropologically to medieval times or before;
- Harold Baer, Jr., “History, Process, and a Role for Judges in Mediating Their Own Cases” (2001) 58 N.Y.U. Ann. Surv. Am. L. 131 [Baer], at 131, relying on: Singer, *supra* note 40, and Michael T. Colatrella, Jr., “Court-Performed Mediation in the People’s Republic of China: A Proposed Model to Improve the United States Federal District Courts’ Mediation Programs” (2000) 15 Ohio St. J. on Disp. Resol. 391. Baer notes that the concept of ADR has existed in some form in the United States “for centuries” and in China “since ancient times” - thus, care must be taken in anchoring an argument for adjudication as the sole legitimate method of judicial dispute resolution, when the literature also suggests that mediation skills predated adjudication in the formal sense (see Smith, *supra* note 4, at 6-7, referencing Judith Resnik, “Uncovering, Disclosing, and Discovering How the Public Dimensions of Court-Based Processes are at Risk” (2006) Chicago-Kent Law Review 81, at 106);
- Nolan-Haley, *supra* note 29, at 48, referencing several other sources; and
- undoubtedly others.

<sup>41</sup> Sander, “Varieties” *supra* note 37. In fact, although it appears he never used the term “multi-door”, that handle stuck, although he did talk about “multi-rooms”.

<sup>42</sup> The Pound Conference is of historical interest. It took place in 1976 in St. Paul, Minnesota - 70 years after Roscoe Pound gave his 1906 speech in the same city to the American Bar Association - where, to use the words from Chief Justice Warren Burger’s Keynote Address, Pound gave the “first truly comprehensive, critical analysis of American justice and of problems that had accumulated in the first 130 years of [U.S.] independence”: Burger *supra* note 26 at 83. Chief Justice

described the proliferation of litigation and opined that one “way of reducing the judicial caseload is to explore *alternative ways of resolving disputes* outside the courts...”, and added that the tendency was “to assume that the courts are the natural and obvious dispute resolvers”, when “[i]n point of fact there is a rich *variety of different processes*, which ... singly or in combination, may provide far more ‘effective’ conflict resolution”<sup>43</sup>. He then proceeded to explore the “various alternative dispute resolution mechanisms”, *including* adjudication within the courts and other processes outside the courts. Next, he began to discuss the “rational criteria for allocating various types of disputes to different dispute resolution processes”<sup>44</sup>, which led to a description of the alternative processes and, ultimately, the multi-room concept, addressing in the process the “criteria that may help us to determine how particular types of disputes might best be resolved”<sup>45</sup>. He brought this all together, saying:

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Burger went on to ask “whether there are other mechanism and procedures to meet the needs of society and of individuals” that will be “adequate to cope with what will come in the next 25 or 50 years”: Burger *supra* note 26, at 84. It was to this challenge that Sander responded at the same conference - now 44 years ago. As Nolan-Haley noted, it was this conference that “marked the beginning of a systematic effort to introduce mediation in the courts as an alternative to adjudication”: Nolan-Haley *supra* note 29 at 57-8.

<sup>43</sup> Sander, “Varieties”, *supra* note 37, at 112-3 (emphasis added).

<sup>44</sup> *Ibid.*, at 113.

See also:

- a similar discussion in Jeffrey R. Seul, “Litigation as a Dispute Resolution Alternative”, in Michael L. Moffitt and Robert C. Bordone, eds., *The Handbook of Dispute Resolution* (San Francisco: Jossey-Bass, 2005)[Moffitt & Bordone], at 336-58; and

- the originator, Sander, addressing the matter again in Frank E. A. Sander and Lukasz Rozdeiczer, “Selecting an Appropriate Dispute Resolution Procedure: Detailed Analysis and Simplified Solution” in Moffitt & Bordone, at 386-406. Thus, the term “appropriate” has been recommended to replace “alternative”: Nancy A. Welsh, “Institutionalization and Professionalization”, in Moffitt & Bordone, at 487, referencing C. Menkel-Meadow, “When Dispute Resolution Begets Disputes on Its Own” (1997) 44 U.C.L.A. 1871.

<sup>45</sup> *Ibid.*, at 118 (emphasis added).

What I am thus advocating is a flexible and diverse panoply of dispute resolution processes, with particular types of cases being assigned to differing processes (or combinations of processes), according to some of the criteria previously mentioned. ... *one might envision by the year 2000 not simply a court house but a Dispute Resolution Centre, where the grievant would first be channeled through a screening clerk who would then direct him to the process (or sequences of processes) most appropriate for his type of case. The room directory in the lobby of such a Centre might look as follows...*<sup>46</sup>.

Thus was the concept of the multi-roomed or multi-doored courthouse born.

To carry Sander's metaphor a little further, until 1992, the Court had a single door, leading to a single room. That is, the Court's work was almost purely adjudicative<sup>47</sup>. However, by 2008 (if not before), the Court had become a multi-doored dispute resolution centre where the alternative methods were institutionalized in the Court as a set or series of processes leading to the resolution of a dispute.

This transformation of the Court - or any court - is striking. Historically, the objectives of traditional, adversarial, adjudicative litigation in the Court, as

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<sup>46</sup> *Ibid*, at 130-1 (emphasis added). The seven rooms described were, in sequence, "screening clerk", "mediation", "arbitration", "fact finding", "malpractice screening panel", "superior court" and "ombudsman".

<sup>47</sup> While "adjudication" is so well known that it likely needs no definition, for completeness, it includes:  
 ... decision making by a judge in a court, by an administrative tribunal or quasi-judicial tribunal, a specially appointed commission, or an arbitrator ... [that] determines the outcome of a dispute by making a decision for the parties that is final, binding and enforceable.  
 Morris *supra* note 9 at 4 - 5.

Arbitration is different from other forms of adjudication in that it is usually voluntary and the parties have usually (not always) agreed to it in advance of a dispute in an agreement setting the rules of a relationship, or *ad hoc* after a dispute arises. Occasionally, however, arbitration is imposed by statute. See Morris, *supra* note 9 at 5.

in other courts, had included a certain focus. It concentrated on three processes: truth finding - “[t]ruth finding holds pride among the objectives of formal adjudication...”<sup>48</sup>; fact finding in an atmosphere of scarcity and uncertainty, but at the same time having a system of weight, probability and finding control mechanisms, so as to avoid “discretionary” or arbitrary findings<sup>49</sup>; and liability finding, but in a way that is just, timely, and has a finality and bindingness<sup>50</sup>.

However, adjudication of disputes increasingly led to the related complaints of cost and delay. Adams and Bussin described the origins of these complaints as relating to the “highly competitive and adversarial processes [that] encourage the parties to exaggerate their claims”, which leads to a upward spiral of costs. Vigorous defences were also a factor. As adversarial adjudication spirals costs, it also spirals consequences: delay; “emphasi[is on] positional bargaining”, “extravagant positions from which it is difficult to resile without losing face”; and “exacerbat[ion of] negative feelings between the parties”. Even settlement does not sufficiently reduce costs because of its late arrival, if at all, “leaving the parties exhausted, embittered and often impoverished”<sup>51</sup>.

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<sup>48</sup> Lisa Dufraimont, “Evidence Law and the Jury” (2008) 53 McGill L.J. 199, at 203, referencing *R. v. Nikolovski*, [1996] 3 S.C.R. 1197, at 1206, 31 O.R. (3d) 480. See also Adams & Bussin *supra* note 27 at 143.

<sup>49</sup> Alex Stein, “An Essay of Uncertainty and Fact-Finding in Civil Litigation, with Special Reference to Contract Cases” (1998) 48 U.T.L.J. 299, at 301-2; and Alex Stein, “The Refoundation of Evidence Law” (1996) 9 Can. L.J. & Juris 279, at 319-21.

<sup>50</sup> Susan Haack, “Of Truth, in Science and in Law” (2008) 73 Brooklyn L. Rev. 985, at 985-6.

<sup>51</sup> Adams & Bussin *supra* note 27 at 141-6. The authors placed reliance upon, *inter alia*:  
 - Stephen B. Goldberg, Frank E.A. Sander, Nancy H. Rogers *et al.*, *Dispute Resolution: Negotiation, Mediation, and Other Processes*, 2d ed. (Toronto: Little, Brown and Company, 1992) [“Goldberg, Sander and Rogers”, as to all editions,

Justice Allen Linden described the challenges then needing reforms:

We in Canada are lucky with our legal system. It's been a very fine system. It's served us extremely well, but it, too, is beginning to show wear and tear. Not so much of time, but of numbers. As the cities are growing, as the numbers of lawyers grow, as the types of disputes that come up in our society increase in number and in complexity, greater and greater pressure is being placed upon the legal system to respond to it and a lot of the old methods are really not working as well nowadays. It's just taking us too long and costing us too much.<sup>52</sup>

Later, he argued that it was time for the judiciary to do something about cost and delay:

Conflict is becoming more and more a part of our life. So often it seems there are battles that don't seem to go anywhere.... There are, of course, benefits to .. [the adversary system] but there are also costs, and in particular these days, the costs of lawyers who, if they wish, can battle away for months and even years before trial and during trial. There are so many issues now that can be raised that people can drown one another with costs and we as judges, I think, and as people who are in charge of the legal system, have got to start getting hold of it.

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I believe that it's important for judges to be involved if we can devise within the system techniques to bring the parties together ... to settle.<sup>53</sup>

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unless otherwise noted], at 8;

- D. Paul Emond, "Alternative Dispute Resolution: A Conceptual Overview", in D. Paul Emond ed., *Commercial Dispute Resolution* (Aurora, ON: Canada Law Book, 1989)[Emond], at 5-6; and

- Thomas C. Schilling, *The Strategy of Conflict*, (Cambridge, MA: Harvard University Press, 1960)[Schilling], chapter 4.

<sup>52</sup> Allen M. Linden, "Comments on How Alternative Dispute Resolution Would Apply to Canada's Legal System", in the Pitblado Lectures, *supra* note 16 at 11-12.

<sup>53</sup> *Ibid.*

For a good general history of the background need for the reforms leading to ADR in Canada (in Manitoba and equally in Alberta), but not yet (at that time) to

ADR methods and processes were eventually implemented to meet this challenge<sup>54</sup>.

Since 1992, judicially led<sup>55</sup> ADR type processes - alternatives to this traditional adjudicative dispute resolution process - have become more common in the Court. These processes have become known as Judicial

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JDR, see other articles in the Pitblado Lectures, *supra* note 16, including at 1, but also specifically at 24-5, in Philip Harter "Implementing Alternative Dispute Resolution". See also, at 47-9, then Manitoba Court of Queen's Bench Associate Chief Justice Scott on "Pre-Trial Conferences" and their changing role in that province to becoming "unabashedly settlement-orientated", a trend similar - but not identical - to what led to JDR initiatives as we now see them in our Court.

See also, as to the importance, style and activities of the judicial role, E.W. Olson, Q.C., in "Negotiated Settlements - The Use of the Pre-Trial Conference as a Tool", in the Pitblado Lectures, *supra* note 16 at 61-64.

On the subject of the historical progression from earliest times of only adjudication, to case management, to pre-trial conferences (and in the United States the use of "Settlement Weeks"), to judicial mediation, see: Hugh F. Landerkin and Andrew J. Pirie, "Judges as Mediators: What's the Problem with Judicial Dispute Resolution in Canada?" (2003) 82 Can. Bar Rev. 249. [Landerkin & Pirie], at 262-71, adding the following additional sources:  
 - J. Resnick, "Managerial Judges" (1982) 96 Harv. L. Rev. 376 [Resnick]; and  
 - M. Galanter, "The Emergence of the Judge as a Mediator in Civil Cases" (1986) 69 Judicature 257.

For the history on U.S. "Settlement Weeks", see Singer *supra* note 40, at 10 and 165.

<sup>54</sup> ALRI, "Mini-Trial", *supra* note 19 at 1.

<sup>55</sup> The effective role of the judiciary leading settlement procedures has long been supported by the litigation Bar: William L. Adams, "Let's Make a Deal: Effective Utilization of Judicial Settlements in State and Federal Courts" (1993) 72 Ore. L. Rev. 427 [Adams, "Deal"], at 446-8, relying on Brazil's assertion that "the judiciary's status and unique perspective converge" in settlement, while describing the most productive judicial settlement practices: Brazil, "Settling Civil Suits", *supra* note 2 at 2; and referencing D. Marie Provine, "Managing Negotiated Justice: Settlement Procedures in the Courts" (1987) 12 Just. Sys. J. 91, at 105, and Herbert M. Kritzer, "The Judge's Role in Pretrial Case Processing: Assessing the Need for Change" (1982) 66 Judicature 28.

Dispute Resolution (JDR)<sup>56</sup>. The Court's JDR Program is a service offered only to parties who already have disputes filed before the Court that would, if not otherwise settled, go to an adjudication by way of a binding decision before a justice of the Court. Instead, by the choice of the parties, they may go to a consensual dispute resolution process to seek a voluntarily settlement - a JDR, assisted (but with no binding decision making power) by a justice of the Court.

JDR stands in contradistinction from the Court's traditional exclusively adjudicative role. JDR is not focused on truth, but on the result. The objective of the process still, however, presupposes crucial elements that we have always associated with "justice" - fairness and finality. The focus of JDR is to allow the parties to move back to their regular lives without the costs<sup>57</sup>,

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<sup>56</sup> The establishment of the JDR Program was also consistent with the goals of the 1988 Canadian Bar Association Task Force on ADR, chaired by Bonita Thompson, Q.C.: Joanne Goss, "An Introduction to Alternative Dispute Resolution" (1995) 34 Alta. L. Rev. 1 [Goss, "An Introduction"], at 3, referencing Canadian Bar Association, *Alternative Dispute Resolution: A Canadian Perspective* (Task Force Report)(Ottawa: Canadian Bar Foundation, 1989)[CBA, "ADR Task Force"], at 2.

Landerkin and Pirie assert that "[t]he expression 'Judicial Dispute Resolution' appears originally coined by Alberta judges": Landerkin & Pirie, *supra* note 53 at 251, note 3. The Court started using that appellation in 1996. However, the Court's JDR Program must be distinguished from the similar named program commenced in Edmonton (only) in 2000 by the Family and Youth division of the Provincial Court of Alberta, the process of establishment and evaluation of which is detailed in a methodologically sound and well written "how to do it" document by then Provincial Court Judge Joanne Goss: Joanne Goss, "Judicial Dispute Resolution: Program Setup and Evaluation in Edmonton" (2004) 42 Family Court Review 511 [Goss, "Judicial"]. Judge Goss was appointed to this Court on February 10, 2010.

Landerkin & Pirie, *supra* note 53 at 250, and, in detail at 252-62, address the "link [between] the broader notion of Alternative Dispute Resolution (ADR) to JDR and find many similarities between these two acronyms" and spent much time talking about the various aspects of the "Modern Meaning of Mediation" - although, see *supra* note 40, to the effect that the concept of ADR is not modern.

<sup>57</sup> 75% of lawyer respondents to the Survey identified cost as a motivation for JDR.



delay<sup>58</sup> and stress<sup>59</sup> of traditional, adversarial adjudication<sup>60</sup>. In other words, the objective is a process that achieves justice<sup>61</sup>, but in a manner by which the *interests* of the parties are as important as the legality of their *rights*<sup>62</sup>, and where, in the process, there is a wise balance of a fair and just, but speedy, inexpensive and efficient procedure for achieving finality for such disputes<sup>63</sup>.

The addition of new “doors” to the courthouse raises the question of whether the distinct dispute resolution methodologies which they represent (adjudication and alternatives) are, when placed together, working in competition or in combination with each other. Brazil has asserted that the correct standpoint for the future lay in the latter, not the former:

... we contravene the spirit of ADR if we insist on "winning" -- if we insist on establishing that ADR is necessarily better than traditional litigation.

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<sup>58</sup> Delay has been, and remains, a significant issue. It was a motivation for 72% of the lawyer respondents to the Survey. Indeed, section C2 of the Survey shows that approximately 32% of the JDRed cases were between 2 - 4 years old, whereas 26% were 4 - 6 years old, and over 20% were 6 or more years old - thus those over 4 years old equating to close to 50%.

<sup>59</sup> 52% of lawyers identified stress as a motivation for JDR.

<sup>60</sup> In a broader context, there are also economic benefits to a jurisdiction that has, or develops, and maintains a judicial system that can resolve commercial disputes ethically, within the Rule of Law, but also quickly, efficiently and at a reasonable cost: see Goss, “An Introduction” *supra* note 56 at 2, referencing “The Verdict from the Corner Office” (1992) (13 April) *Business Week* 66.

<sup>61</sup> Laurence H. Tribe, “Trial by Mathematics: Precision and Ritual in the Legal Process” (1971) 84 *Harvard Law Review* 1329, at 1376, says that this represents a ritualistic return to a more simple, but peaceful, settlement of social conflicts. Again, see Adams & Bussin *supra* note 27 at 143-4.

<sup>62</sup> In the literature on resolution of disputes, “rights” align with adjudication and “interests” with ADR - see discussion *infra*, including at note 76.

<sup>63</sup> Jack B. Weinstein, “Some Difficulties in Devising Rules for Determining Truth in Judicial Trials” (1966) 66 *Columb. L. Rev.* 223, at 241, who 30 years later was still troubled about the issue of balance - see Jack B. Weinstein, “Some Benefits and Risks of Privatization of Justice Through ADR” (1996) 11 *Ohio St. J. on Disp. Resol.* 241.

ADR is *not* about being better than; it is about being in addition to. ADR is *not* about subtracting; it is about adding.<sup>64</sup>

He added that the “most significant” promises of court ADR are “opportunity and ... process integrity”<sup>65</sup>. “Opportunity” is a promise to users to “serve you better”. The promise of process integrity was described thus:

... Because the public's trust and confidence in the courts is their most precious and essential asset, courts that sponsor ADR programs must promise the public that those programs would do nothing to diminish or undermine that trust and confidence, but, instead, will enhance it.<sup>66</sup>

All this is taken in this thesis as a “given”. The issue that remains for this thesis is whether these JDR methods and processes continue to be mere alternatives to the historical “normal” dispute resolution process or have become part of the institutionalized “norm”?

Frequently one will hear sentiments expressed which suggest that alternative or judicial dispute resolution methods have become normative in the resolution of disputes in our previously adjudicative prone judicial resolution systems in the courts<sup>67</sup>.

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<sup>64</sup> Brazil, “25 Years After”, *supra* note 5 at 94 (emphasis in the original).

<sup>65</sup> *Ibid.*, at 95 -6.

It is important to note that much of dispute resolution in the United States, of which he writes, is not “judicial” dispute resolution, but that conducted by court staff mediators or private mediators “annexed” to the court, so the use of the term “ADR” is both generic and specifically appropriate.

<sup>66</sup> *Ibid.*, at 97.

<sup>67</sup> In 1984, Marc Galanter said:

On the contemporary American legal scene the negotiation of disputes is not an alternative to litigation. It is only a slight exaggeration to say that it *is* litigation. There are not two distinct processes, negotiation and litigation; there is a single process of disputing in the vicinity of official tribunals that we might call *litigotiation*, that is, the strategic pursuit of settlement through

The very notion of ADR as a normative, fully institutionalized, part of the court process is not new<sup>68</sup>. Indeed, John Lande recognized this in the United States even prior to the time that the Court started the JDR Program:

Mediation is becoming a routine step in contested litigation in many parts of the country due to court mandates and changing legal culture. Indeed, in some places, it is taken for granted that mediation is the normal way to end litigation.

... this [is] a “liti-mediation” environment - that is, where mediation has become institutionalized as a regular part of litigation....<sup>69</sup>

Indeed, this is consistent with my definition of the current “norm”, a matter that has become a more frequent positive assertion<sup>70</sup>.

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mobilizing the court process. [Emphasis in original.]  
Adams, “Deal” *supra* note 55 at 428, quoting Marc Galanter, “Worlds of Deals: Using Negotiation to Teach About Legal Process” (1984) 34 J. Legal Educ. 268 [Galanter, “Worlds”], at 268, and referencing R. Mnookin and L. Kornhauser, “Bargaining in the Shadow of the Law: The Case of Divorce” (1979) 88 Yale Law Journal 950 [Mnookin & Kornhauser].

<sup>68</sup> *Ibid.*

<sup>69</sup> John Lande, “Lawyer’s Routine Participation Directs Shape of ‘Liti-Mediation’” (1998) 16 Alternatives to High Cost Litig. 53 [Lande, “Liti-Mediation”], at 53, apparently adapted from his own “How Will Lawyering and Mediation Practices Transform Each Other”, (1997) 24 Florida State University Law Review 839, at 841 [Lande, “How Will”].

This article (Lande, “Liti-Mediation”) makes it clear that the mediation referenced is that involving private mediators (even if court directed), rather than judicial mediation as in the JDR Program. While it focuses on the risks (in private mediation) of the relationship between lawyers and private mediators to the fairness of the process, not a real risk with the judicial independence invoked in a judicial mediation, the basic point remains that, by that time, in some parts of the United States “mediation has become institutionalized as a regular part of litigation”. The article also focuses on the conflict between “traditional positional” rights based mediation (argued to be more “likely” if judges are involved), as compared to interest based mediation, a matter beyond the scope of this thesis, subject to some observations.

<sup>70</sup> One example of this institutionalization is seen in Minnesota where it has been noted that “[d]ata collected and analyzed from [a] survey of Minnesota’s trial court judges confirm the institutionalization of ADR in the Minnesota State Court

In order to consider whether the same can be said of JDR in the Court, this thesis will examine the breadth - that is, the importance of: the multi-facetedness of the judicial dispute resolution processes in the Court - its success<sup>71</sup>; and the judicial role<sup>72</sup> in the provision of the service; all with a view to determining if JDR is normative - that is, whether it has become the rule, not the exception, within the Court's processes.

## II. THE MULTI-FACETED NATURE OF THE JDR PROGRAM

JDR in the Court, in its various modes, is potentially available for any civil case. The sole absolute pre-requisite is the commencement of legal proceedings in the Court. It is voluntary and consensual between the parties. Thus, with few exceptions, it is the parties that determine if and when a case is suitable for JDR. It does not suspend the litigation process, which may still

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system", adding that "[t]here is nothing 'alternative' about ADR in Minnesota; it is a routinely expected step for most civil litigation": Bobbi McAdoo, "All Rise, the Court Is in Session: What Judges Say about Court-Connected Mediation" (2006-7) 22 Ohio St. J. On Disp. Resol. 377, at 386-7. Indeed, she entitles her third chapter as "ADR is Definitely Institutionalized in Minnesota". While different than Alberta, one aspect is similar, namely that the Minnesota "program design [is such that] the buildup of an extensive court infrastructure to manage ADR programs has not occurred".

Another more recent example focuses on Canada: "Today in many jurisdictions across North America and particularly in Canada, mediation has become one of the steps in litigation ...": Paul Jacobs, "Deal mediation: settling disputes before they arise", *The Lawyer's Weekly* (18 September 2009) [Jacobs], at 10.

<sup>71</sup> As defined *supra* note 30.

<sup>72</sup> I have given particular care and attention to the judicial role. This is, in part, because judges, in their practices and institutional habits, have significant sway over the normality of JDRs in the courts. Another reason for this focus is that such an expanded notion of the judicial role for which JDR calls, is, itself, controversial in the literature. My judicial experiences are a unique vantage point from which to comment on this phenomenon.

lead, if the JDR is unsuccessful in resolving the dispute, to adjudication<sup>73</sup>.

The breadth of dispute resolution methodologies offered by JDR is vast. When the parties to a dispute before the Court negotiate between themselves (usually with the assistance of counsel) but without reaching a settlement, the Court's JDR Program offers pure facilitation or facilitative mediation<sup>74</sup>, judicial mediation and evaluation, pure mini-trials, mini-trials with added facilitation or judicial mediation and evaluation (hybrids), binding JDRs, and, occasionally, by special permission of a chief justice, early neutral evaluation (ENE)<sup>75</sup>. Caucusing is also available with most (but not all) justices, but is not mandatory. The process can focus on the rights and/or the interests of the parties<sup>76</sup>. Adams and Bussin describe interest and rights

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<sup>73</sup> The process in Alberta in practice is currently the same (except for a broader choice of modes of JDR) as that legislated in Quebec: Jean-François Roberge, "A Model of Intervention Types in Judicial Mediation: A Canadian Perspective" (Paper presented at the National Judicial Institute, Judicial Faculty Development Seminar: Settlement Conferences, 18 April 2007), online National Judicial Institute <<http://www.nji.ca>>. [Roberge, "Model"], at 7-11. Permission to reference Roberge articles has been obtained from the author.

<sup>74</sup> Hugh F. Landerkin, "Conflict Management: Are Skills and Theories Enough? The Qualities of a Third Party Intervener", in Suwit Laohasirwong and Ming-Chee Ang eds. *Natural Resources Related Conflict Management in Southeast Asia* (Khon Kaen, Thailand: Siriphan Press, 2006), at 15, adds that "[m]ediation is, at the very least, a facilitated negotiation".

<sup>75</sup> This thesis presupposes familiarity with ADR/JDR processes, styles, and nomenclature. However, for more details see the Evaluation Report.

As to ENE, note that in the U.S. Federal District Court "disbanded its [ENE] program, finding it unnecessary in light of the court's substantial mediation program": Plapinger & Stienstra, *supra* note 27, at 554.

<sup>76</sup> The subject of rights and interests is developed significantly in the Evaluation Report (*inter alia*, at 42-69). A detailed discussion is beyond the terms of this thesis, but suffice to say that adjudication is only about rights - what is the proper, principled, result based on the facts and applicable law and precedent. A resolution based on interests related to the litigation, available in a JDR in addition to a rights determination, on the other hand, allows the parties to look at needs and desires that may not be able to be accommodated by a rights based determination - e.g., awarding a new contract as a resolution of a past dispute.

based negotiations this way:

The aim of interest-based negotiations is to uncover, understand and explore the underlying interests of all necessary parties, in contrast to their stated positions and asserted rights. While positions or rights usually conflict, the underlying interests of parties often overlap in material ways.

In contrast,... rights-based negotiations focus primarily on the legal rights of the parties. The parties attempt to anticipate the outcome in court, and the dispute is approached using that prediction as a benchmark. Settlement may be facilitated by obtaining a neutral party's opinion as to the relative merits of the parties and positions in order to better predict the outcome if the case went to trial. However, some commentators have pointed to the existence of underlying and often overlapping interests in any dispute including the assertion of legal rights and the powerful role interest based negotiations can therefore play in resolving even 'legal disputes'<sup>77</sup>.

Danielson points out that interests are based on “underlying needs, desires, concerns and fears”, and quotes from Macfarlane, who relies on *Getting to Yes* to make the point that “[y]our position is something you have decided upon. Your interests are what cause you to decide ...”<sup>78</sup>.

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A number of authors are renown for advocating an interest-based process - indeed, it is largely what distinguishes adjudication (of rights) from ADR, whereas, as noted, JDR as practiced in the Court may focus on rights *as well as* any existing and identified related interests - interests that must “fit” within the nature of the litigated dispute. Morris, *supra* note 9 at 3, identifies the most renown of these authors that advocate the interest-based process as Roger Fisher, and William Ury, with Bruce Patton, in Fisher et al, “Getting to Yes” *supra* note 10.

<sup>77</sup> Adams & Bussin *supra* note 27 at 135, referencing Frank E.A. Sander, “Dispute Resolution Within and Outside the Courts: An Overview of the U.S. Experience” in Cochran ed., *Attorneys General and New Methods of Dispute Resolution* (Chicago: American Bar Association, 1990), at 15, and Fisher et al, “Getting to Yes”, *supra* note 10.

<sup>78</sup> Danielson, *supra* note 2 at 44, quoting Julie Macfarlane, *Dispute Resolution: Reading and Case Studies* (Toronto: Emond Montgomery Publications Ltd., 2003), and also relying on Fisher et al, “Getting to Yes”, *supra* note 10 at 141-2.

JDR in the Court can be (as the parties wish) both a rights based analysis (i.e. on a “principled basis” - what is the most likely determination of rights at trial) and an interest based analysis (i.e. are there party centered interests which can be recognized - or negotiated?). The interrelationship between interests and rights in the JDR process is a complex one. Interests may prevail over rights - and, may, indeed, lead to settlement. If that happens, that is the end of the matter. However, interests are of little or no relevance to adjudication if there is no settlement. Therefore, in the JDR context, interests should be measured in comparison to the rights that would otherwise obtain - that is, JDR should operate in the “shadow of the law”, as discussed *infra* at 47 *et seq.* This is simply reflective of the hard reality that JDRs are about settlement of a dispute, whereas adjudication is about the legal determination of a dispute. JDR justices in the Court are judicially entitled and capable of assisting in the resolution of a dispute in either way, whether based on interests and/or rights.

In the JDR Program, the traditionally available ADR methodologies have been customized by the Court, in the context of what the parties want, generally or in specific cases, and in the context of individual judicial participation (including the availability of caucusing)<sup>79</sup>. The resulting JDR services provided have resulted in success in individual cases, in addition to

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To be clear, while all these JDR services are offered, not all justices offer each of them - some preferring to restrict their judicial involvement to some only of the services. This is a matter of judicial independence which must be recognized. Two points result. The first is that there is an availability of all types of JDR processes to resolve disputes brought before the Court - thus contributing to the normalcy and institutionalization of the service. Nevertheless, secondly, it is recognized and acknowledged that such services are not yet universally available through every judicial officer, which means that the Court must - and it does - make them available through other judicial officers. In the result, the availability of the JDR service is normative, but more administration within the Court is currently required to achieve this.

institutional success (reduction of trial time and lead times). Thus, the scope of available ADR and JDR methods and styles is not only broad - or, multi-faceted - , but also flexible.

The breadth of the JDR Program - that is, its multi-faceted qualities - does not, in and of itself, make JDR normative in the Court. However, whereas the mini-trial process, when first adopted was merely a “one-off” alternative process to adjudication, the expansion of the scope of the resolution alternatives, I believe, has contributed to them becoming a part of the whole dispute resolution process, rather than a mere alternative to adjudication.

The breadth of *disputes* for which JDRs are available is similarly vast. These JDR services are offered in a variety of disputes as a matter of voluntary choice of and agreement between or among the litigants, not as a matter of judicial compulsion, or as a matter of compliance with the Rules of Court.<sup>80</sup> Additionally, the JDR services are potentially available for any type of civil dispute that the parties believe would be useful. While some civil disputes may be such that observers outside the dispute might perceive that rights between the parties should be the subject of adjudicative determination, that is not the test for whether JDR should be available. Rather, it is the litigants themselves who determine whether the litigation should be adjudicated, or instead might be resolved by compromise. Traditionally, as seen in the Survey, JDRs are performed in personal injury cases (primarily motor vehicle collisions, but also slip and fall cases, and some other personal injury tort cases), family law cases (matrimonial

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<sup>80</sup> Under the New Alberta Rules of Court, recently scheduled to come into force November 1, 2010, there will be a rules based compulsion to do some form of dispute resolution - within (JDR) or external to (private or court annexed) the Court, but there is still no compulsion to do JDR.



property, parenting and support issues), employment, insurance, contract disputes and other cases. In short, the multi-faceted quality of the JDR Program is not only in its design, but in its application.

While multi-faceted JDR is broadly available to most type of cases, there may be some restrictions on the temporal availability of JDRs. While JDR is theoretically available at any time in the litigation process with the approval of the Court, there are some practical and regulatory parameters. First, as a matter of prudent practice, JDRs should not be conducted until such time as there is sufficient information available (including full document and factual disclosure, and expert opinions as appropriate), to make the dispute amenable to resolution by negotiation - that is, "ripe" for settlement.

The second, a "regulatory" perspective, is more controversial. While the Court's primary "business" is adjudication, I believe that the Court's procedures are not currently designed to be that of "first responder" to litigated conflict. That is, it is a widely held view (one I share) that the parties and their counsel should, after the commencement of litigation, attempt to negotiate on their own before resorting to JDR. Thus, I believe, to preserve judicial resources for cases that are unlikely to settle without it, that JDR should not readily available (there may be exceptions) until the parties have tried and failed at settlement, such that the case is likely to go to adjudication without JDR intervention. I describe this as the 95%/5% principle, where broad common knowledge recognizes that statistically (at least, inferentially) 95% of cases litigated in the courts are normally resolved by the parties without adjudication.<sup>81</sup> Thus, I believe that the Court's primary "business"

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<sup>81</sup> Adams, "Deal" *supra* note 55, at 429, referencing 1990 statistical information in U.S. Federal District Courts: 1990 Admin. Off. of the Cts. Ann. Rep., Tbl. C-5 and Marc Galanter, "Judges and the Quality of Settlements", (1989) U. Md. Center of Philosophy and Public Policy Working Paper.

should be to focus settlement resolution on the 5%. Thus, the primary temporal focus for JDRs is toward the end of the normal court process.

My empirical research supports these conclusions. First, it affirms the value to litigants of the multiplicity of options within JDR (see the Survey data, particularly in section E1, as set out in Appendix 1 hereto). By way of summary, the JDR services employed (the total adding to more than 100%, because of use of hybrids of more than one service) included: negotiation or mediation (judicial facilitation only) = 36%; evaluative mediation (judicial facilitation and evaluation through opinions) = 66%; mini-trial (judicial opinion only) = 29%; and binding JDR (judicial opinion that the parties agree to be binding on them if any issue is not settled through judicial facilitation or evaluation) = 11%. However, an interactive analysis, reflected in Appendix 2 hereto, demonstrates the hybrid nature of the exercise of the available JDR services, as well as other statistics.

Section G1 of the Survey also demonstrated the availability of judicial caucusing (which was a bigger issue in the Evaluation Report, relying on other segments of the Survey). Judicial caucusing is here to stay - indeed, there is a growing demand for caucusing as shown in Table 6.11 of Appendix 6 of the Evaluation Report, reproduced herein as Appendix 3.<sup>82</sup>

Section J, as seen in Appendix 1, measures the practical temporal connection - the stage at which JDRs are engaged and are considered by the

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See also: Marc Galanter & Mia Cahill, "'Most Cases Settle': Judicial Promotion and Regulation of Settlements" (1994) 46 *San. L. Rev.* 1339 [Galanter & Cahill, "Most Cases"], at 1342, and sources therein referenced; and Press and Kovach, in Alfini *et al*, "What Happens", *supra* note 29, at 317 and 327 respectively.

<sup>82</sup>

Caucusing by judicial district and case type was also addressed in Appendix 6, Table 6.10 of the Evaluation Report, but has not been reproduced herein.

parties to be appropriate for engagement - the vast majority after both discovery and the retention of experts.

Thus, we can see that the dispute resolution services available through the JDR Program are multi-faceted in type, scope of cases and temporal connection to the litigation. The question remains, however: has the JDR Program been a success?

### **III. SUCCESS OF THE JDR PROGRAM**

There are many ways to measure success. As I have already indicated, I am primarily gauging “success” by whether the matter in litigation was settled<sup>83</sup>, in whole or in part. However, there are other measures of success - the quality of the result, the value obtained even where the dispute was not resolved, and ancillary measures of success. While they overlap, I will focus on them separately.

#### **A. SETTLEMENT AS SUCCESS**

Gauging “success” by whether the matter in litigation was settled, in whole or in part, is a common measurement - that is, the action was discontinued, or resulted in a consent judgment, or other resolution (sometimes with the aid of the court or without it). Bussin described it thus:

... settling cases is almost always one of the objectives of an ADR process. Whether or not agreement has been achieved is the most obvious measure of success in a *dispute resolution* process. Indeed, reaching settlement is often seen as a positive goal in itself. Consequently, measuring the settlement rate of an ADR process generally figures prominently in its evaluation. A certain level of settlement may be necessary to achieve in order for a

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<sup>83</sup>

As defined *supra* note 30.

program to justify its existence.<sup>84</sup>

The Survey data in section F (Appendix 1) also identified whether that success took place at or after the JDR, and, with more integrated analysis (Appendix 3), where in the litigation process, and at what rate with different types of JDR process.

Another potential reference point for measuring success might be the timing of settlement. After all, the closer to the commencement of litigation that settlement occurs, the better. While the Survey tried to measure this directly to some extent (section J, Appendix 1), the data was not too helpful. Moreover, as this section identified (as alluded to *supra* at 27), this is too case specific to be an indicator of success. As many of the parties clearly indicated, they felt that their case, by its very nature, could not reasonably have been settled until well into the litigation process. Further analysis was attempted to try to measure this phenomenon. While not produced herein, the Evaluation Report (Appendix 6, Table 6.4) also measured “Peak Performance”, namely when in the litigation process JDR was most successful. While the data is not as utilitarian as one might have hoped, that analysis seems to confirm the results in section J, namely, that the most successful time (an average of about 42.5% of the time) was after discovery and expert reports, but before trial. Ultimately, the goal is more focused on avoiding a trial by settlement, rather than the measurement of the time before

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<sup>84</sup> Bussin, *supra* note 32 at 464 and 482-4 (emphasis in the original), referencing, *inter alia*:  
- M. Galanter, “The Quality of Settlements”, [1988] *Journal of Dispute Resolution* 55, at 56;  
- K. Kovach and L. Love, “Evaluative Mediation is an Oxymoron” (1996) 14 *Alternatives to High Cost Litigation* 31, at 31;  
- T. Tyler, “The Quality of Dispute Resolution Procedures and Outcomes: Measurement Problems and Possibilities” (1989) 66 *Denver U. L. Rev.* 419, at 424; and  
- Galanter & Cahill, “Most Cases” *supra* note 81 at 1350-51.

trial that it is settled - leaving another area for future empirical research.

Given my primary definition of “success” as relating to the resolution of disputes, one might ask what “success”, so defined, has to do with my overall inquiry of the normativity - that is, the institutionalization - of JDR? Success has, in fact, had a significant role in making JDR institutionally normative. The process has been quite simple. JDR began as a relatively unknown and unproven alternative to traditional adjudication. However, as more and more cases were “JDRed” to a successful resolution, the demand grew - and continues to grow. The more the demand grew<sup>85</sup>, and the more the success continued, the more institutionalized the process has become and remains.

As section D3 of the Survey shows, 96% of the lawyers doing JDRs are repeat users, with over 80% of both lawyers and clients (the latter heavily weighted by insurance adjusters) having done more than 5 JDRs. Moreover, as section E2 of the Survey shows, 80 - 96% of the JDRs held were recommended by the lawyers involved, with as high as 34% being recommended by the clients themselves (again, mostly insurance adjusters) - meaning that often a JDR is a logical joint choice of both the lawyers and clients in a case. Another significant measure of success of the JDR Program is the willingness to recommend JDR in the future - very high at 93%, as seen in section I2 of the Survey.

Drilling down into the details, I examined two factors going to “success”, understood as case resolution. First, there is the factor of success in relation to individual cases. Second, there is the factor of continuing demand for the service. The second is really an affirming evidentiary point going to the first:

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For some time it has been the case that it is easier and quicker to get a trial date for a 1 week civil trial in Calgary or Edmonton than to get a JDR.

continuing demand implies previous satisfactory outcomes. In these contexts, the next question is how to measure success in either case?

Success in individual cases is most often measured by the pure quantitative statistic as to whether the litigation is resolved, leading to its discontinuance. In the context of the role of the Court - to help the parties resolve their disputes - this authenticates the primary measure of success. The measure of this primary form of “success” is seen in the Lawyers’ Survey<sup>86</sup> in section F, as seen in Appendix 1 herein. There, according to the Lawyers’ Survey, we see that 89%<sup>87</sup> of the cases are successfully resolved, either at the JDR itself, or flowing from the JDR<sup>88</sup> - with 81% being successful in resolving all issues, and a further 8% being successful in resolving some issues. Impact assessment<sup>89</sup> analysis, discussed *infra* at 60, demonstrates that the parties believe that the judiciary has had a significant role in this success.

Further as relates to my primary definition of “success” as meaning the resolution of the litigated dispute, another available service - indeed, a unique component of the JDR Program - is the availability of a Binding JDR. This

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<sup>86</sup> The Clients’ Survey, in Appendix 5 of the Evaluation Report is not significantly different.

<sup>87</sup> This empirical data provides some proof for the assertion of Jacobs that “[m]ediation has become a very successful tool for the settlement of disputes. It is considered to be effective in settling approximately 80 percent of cases where it is use on a regular basis in litigation”: Jacobs, *supra* note 70, at 10.

<sup>88</sup> 59% were reported to be successful at the JDR, but it is to be noted that the data is somewhat deficient in that 35% did not answer the question as to when they were successful. Similarly, the Client Survey reporting was 66% at JDR and 24% not answering.

<sup>89</sup> A very significant measure as discussed by Bussin, *supra* note 32, at 484, referencing P. Rossi and H. Freeman, *Evaluation: A Systematic Approach* (Newbury Park, CA: Sage, 1993), at 215.

form of JDR, if the parties honour their agreement (usually made in writing in advance) to accept the JDR justice's opinion at the end of an unsuccessful mediation phase, "guarantees" success in the resolution of a dispute. That is, if a dispute is not mediated to a successful conclusion at the mediation phase of the JDR, in the next phase - the non-binding judicial opinion phase - a resolution will be determined, all within the same JDR, not at a later proceeding. This is achieved, following a failed settlement, by a judicial non-binding opinion, accepted by the parties as a matter of contract (not judicial fiat) to be binding on them. Thus, the Binding JDR process leads, as a matter of the parties agreement, to a resolution of the dispute.

The term "Binding JDR" seems like an oxymoron in concept, but it works with great success (resolution of the dispute) to - and great demand by - the parties. The Binding JDR service has been severely limited by the *L.N.* case to the JDR justice merely giving a non-binding opinion, which the parties, by contract, may agree to accept as binding on them. Before *L.N.*, the judicial opinion could lead to a form of judicial adjudication and formal judgment by agreement of the parties<sup>90</sup>. Nevertheless, there is great and increasing demand for this service. Again, this is success, leading to more demand, leading to normativity. In this way, the parties get the best of both worlds - a negotiated settlement to the extent that they can achieve it and, in effect, a binding adjudicative decision (albeit not by judicial edict, but by contract between the parties) if they cannot. In this sense, a binding JDR is automatically (absent breach of the Binding JDR agreement) 100%

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*L.N. supra* note 11. The limitation, and difference between the two concepts, relates primarily to the enforceability of the result. Before *L.N.*, the party receiving a remedy by the judicial opinion in a Binding JDR also received a formal judgment which was immediately enforceable. After *L.N.*, that party must depend on the other party's agreement to be bound by the judicial opinion, resulting in payment or a consent judgment - otherwise, that party must sue on the settlement (creating another lawsuit) to achieve enforceability.

successful. The demand for this service, in getting a quicker and more cost-effective resolution than a traditional adjudication, or the middle ground of a JDR followed by a trial, is another demonstration that the Court's JDR Program is a success.

To elaborate on the concept of success, in terms of case resolution, individual case success was also measured in the context of the type of JDR being conducted in Tables 6.6 to 6.8 (Appendix 2 herein).

However, there are ancillary or value-added measures of "success" to the JDR Program that are beyond, but nearly as important as, my primary definition of whether a settlement has been achieved.

## **B. OTHER MEASURES OF SUCCESS**

To define "success" in a broader way, with reference to a pre-trial resolution of litigation, recognizes the myriad of benefits to litigants and the judicial system, in avoiding the costs and risks of an all-or-nothing outcome at trial. The benefits and purposes of - the success sought from - ADR, and JDR in particular, are many. The benefits include: "lower court caseloads"; "more accessible forums"; "reduced expenditures of time and money"; "speedy and informal settlement"; "enhanced public satisfaction with the justice system"; "tailored resolutions"; "increased satisfaction and compliance with resolutions"; "restoration of... values"; responding to "complaints about the current judicial system", including the cost (time and money spent) to resolve the dispute; the incomprehensibility of the process (issues relating to the lack of participation of the affected parties); and the results (issues related to the imposition of a "remedy" by a "stranger" from a pre-determined and limited



range of win/loss or "zero-sum" options)"<sup>91</sup>.

While this was neither the motivation of the Court in establishing the JDR Program<sup>92</sup>, nor the specific focus of this thesis, to be inclusive, as this list of benefits noted, some also recognize institutional successes - cost and time savings to the courts, leading lower court caseloads - as well as creating a greater chance of access to justice for others.

Does lack of settlement mean that, for the 11% of the cases that did not settle through the JDR process, the JDR was not useful or successful? On its face (as I have defined success), and perhaps specifically for some cases, that is so. However, there is another, more qualitative measure of success, different from my definition, that argues that an unsuccessful JDR (as I have defined it) may, nevertheless, have some value.<sup>93</sup> As Fisher *et*

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<sup>91</sup> Adams & Bussin *supra* note 27, at 141-6. Reliance was placed by the authors on, *inter alia*:  
 - Goldberg, Sander and Rogers *supra* note 51 (2<sup>nd</sup> ed.) at 8;  
 - Emond *supra* note 51 at 5-6; and  
 - Schilling *supra* note 51, chapter 4.

<sup>92</sup> Unlike the Court's motivation to reduce backlog leading to litigant cost and delay by expanding the traditional role of the judiciary, institutional motivation for alternatives to adjudication (reducing the judicial role) often include off-loading the costs of litigation. To explore these conflicting phenomena, which are outside the focus of this thesis, see, *inter alia*:  
 - Joan I. McEwen, "ADR: Moving From Adversarial Litigation to Collaborative Dispute Resolution Models" (1999) 57 *The Advocate* 699, at 699 and 702-3;  
 - Macfarlane *supra* note 18 at ix - x, and 7;  
 - Otis & Reiter *supra* note 34 at 361;  
 - Valerie A. Sanchez, "Back to the Future of ADR: Negotiating Justice and Human Needs" (2002-3) 18 *Ohio State Journal on Dispute Resolution* 669 [Sanchez], at 674, note 8; and  
 - Nancy A. Welsh, "Institutionalization and Professionalization", in Moffitt & Bordone, *supra* note 44 at 487-506.

<sup>93</sup> The data in section M3 did not seem to rate this "alternative" qualitative measure success very high - only 12% of lawyers and 17% of clients thought that there was something gained from a JDR that did not settle the action, reinforcing that the parties' focus is on my primary definition.

*a/s*<sup>94</sup> analysis would indicate, some may well have been trying to determine, through the JDR process, whether a settlement was a better alternative than trial - what was their BATNA/WATNA<sup>95</sup>. Thus, it may well be that some of the 11% measured the risk and benefits of settlement as offered at the JDR and opted for trial. In this sense, the JDR was a success in that it gave them an excellent opportunity to carefully examine their case in the context of the risks and benefits of trial, which they would not have been able to do without a JDR. Moreover, the parties may have a better understanding of their dispute. Otis and Reiter discussed the value - if not success - thus achieved:

... efficiency gains can result even from a mediation process that does not end in settlement. By the time the parties resign themselves to abandoning mediation and returning to the adversarial system, they will have gained valuable insight into the issues and pertinent facts underpinning their dispute. They will likely have come to a realization of which issues remain intractable and which do not, and can thus agree either to a partial settlement or at least to focus litigation on the principal outstanding issues between them. Ultimately, this can only make preparation for the eventual hearing - if not the hearing itself - a less resource-intensive and more efficient exercise.<sup>96</sup>

A corollary to this is that, if one must proceed to trial, the JDR Program

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<sup>94</sup> Fisher et al, "Getting to Yes", *supra* note 10.

<sup>95</sup> Otis & Reiter, *supra* note 34 at 369.

<sup>96</sup> Otis & Reiter, *supra* note 34 at 363 - 4, referencing, *inter alia*:  
 - Laurence Boulle & Miryana Nestic, *Mediation: Principles, Process, Practice* (London: Butterworths, 2001);  
 - Leonard L. Riskin, "The Represented Client in a Settlement Conference: The Lessons of G. Heilman Brewing Co. v. Joseph Oat Corp." (1991) 69 Wash. U. L.Q. 1059, at 1083;  
 - Julie Macfarlane, "The Mediation Alternative" in Julie Macfarlane, ed., *Rethinking Disputes: The Mediation Alternative* (Toronto: Emond Montgomery Publications, 1997), at 1 and 4-8;  
 - Louise Otis, "The Conciliation Service Program of the Court of Appeal of Quebec" (2000) 11 World Arb. & Mediation Rep. 80, at 81; and  
 - Carrie Menkel-Meadow, "Remembrance of Things Past? The Relationship of Past to Future in Pursuing Justice in Mediation" (2004) 5 Cardozo J. Conflict Resol. 97, at 100.

has reduced the number of trials, leading to less delay in obtaining a trial date. In this sense, another measure of success of the JDR Program is a reduction in wait times for trials, as opposed to wait times for JDRs. Anecdotally, as noted earlier (*supra* note 85), it now often takes longer to get a 1 day JDR than a one week civil trial in Edmonton and Calgary. The Evaluation Report tried to measure this in Appendix 6, Table 6.1 - WAIT TIMES, without much success due to lack of compatible data. However, it is clear that once the judicial JDR schedule is announced for each term (spring and fall), it is almost immediately fully subscribed in both Edmonton and Calgary. There is also growing demand in other judicial centres.

In addition to a JDR ending a dispute, it might also have other measures of success beyond my definition - that is, value added measures of success. These value added components include such things as easier collection or enforcement of an outcome than at trial<sup>97</sup>, or improved relations between parties who are forced (or wish) to continue to have personal or business relations. These and other “valued added” components of success are seen in the qualitative responses in the Survey.

User satisfaction with the JDR process is another alternative measure of success. The Survey - especially in the qualification commentary - demonstrates a high rate of satisfaction even where settlement is not achieved. Were the parties happy with the JDR product and process, as well as the settlement results from it? Were the parties satisfied with the outcome? Did the JDR repair or improve relationships strained by the dispute or its litigation? Would they use the service again or recommend it to others? There are undoubtedly other subjective aspects of this alternate measure of success - or its absence. Much of this is intangible and not easily

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<sup>97</sup>Bussin, *supra* note 32 at 469-70.

measurable. While some of it is picked up in the qualitative - mostly positive - comments in the Evaluation Report (not reported herein), it is sufficient to argue that the JDR Program has provided qualitative success to the parties, although that is not the focus of this thesis. Nevertheless, as the Lawyers' Survey demonstrated in section I2, 94% were emphatic that they would recommend JDR to others or use it again if they had another dispute to resolve. The qualitative comments (see Appendix 4 of the Evaluation Report) support and add to this conclusion. Lawyers (and clients too in their Survey) were also happy with judicial performance as seen in: section H1, where the highest ratings of 4 or 5 for judicial qualities were given by 85%; section H2 were 88% would choose that JDR justice again; section I1 where there was an 85% approval of the JDR processes and procedures; and section O<sup>98</sup>, where individual judicial qualities related to the JDR were highly rated statistically and in qualitative comments.

The concept of client satisfaction - indeed, gratitude - in dispute resolution is very relevant to confidence in the legal system itself and is not to be minimized, as Brazil notes:

... the court is a service-orientated institution and... the people it is to serve are the litigants (not the judges, not the lawyers, not the administrators). ... [It is about the lack of access to justice which has] effectively frozen some claimants out of the public court system and a commitment by the court to try hard to correct this unacceptable state of affairs....

...good ADR programs inspire both respect for and gratitude toward the courts -- and toward our system of government by democratically developed law. The gratitude can be palpable. It is reflected in feedback that we get from litigants.... Inspiring respect and gratitude toward public institutions is

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The "O" section statistics were significantly detailed in Appendix 6, Table 6.5 - JUDICIAL QUALITIES of the Evaluation Report, not reproduced here.

[important]....<sup>99</sup>

Related to this are the benefits to be achieved from the qualitative results of the process itself. In addition to cost and time savings to all participants, Adams and Bussin also reference some of the options that mediation brings to the dispute resolution process, including: confidentiality of information sharing and timely and strategic methods of flow and disclosure (direct or indirect - the later often “without identifying authorship” resulting in the creation of a feeling of ownership of the idea by all parties, as in that was “my idea”); engendering of civility between the parties, and resulting enhancements of communication; creating an atmosphere conducive to “brainstorming” for creative solutions; raising objective perceptions of common ground; promoting face saving admissions, retractions and changes in positions; and, in the end, providing a tailored solution that is fair, and feels fair, to the parties in both the process and the result<sup>100</sup>. I might add that the process also creates an opportunity for “venting” of emotion - or an apology - if relevant and helpful to the process (e.g. this is how your actions “hurt me”, or “I am sorry my actions hurt you”, etc.).

All of this impacts directly on the feelings of the parties in relation to the process - their confidence in the judicial system and what they achieved.

Another phenomenon in the broad success of the JDR Program is that it may be available to self-represented litigants (SRL) - which is not always the case in court connected JDR<sup>101</sup>. Additionally, from the perspective of the

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<sup>99</sup> Brazil, “Continuing”, *supra* note 33 at 38. He made an even more emphatic statement, to the same effect, in Brazil, “25 Years After”, *supra* note 5 at 108.

<sup>100</sup> Adams & Bussin *supra* note 27 at 144-6.

<sup>101</sup> See, for example, John Maull, “ADR in the Federal Courts: Would Uniformity be Better?” (1995-6) 34 Duq. L. Rev. 245, at 262-8.

SRL, JDRs are conducted by JDR justices who can “ensure that the interests of *pro se* parties are adequately protected” and thus ensure “active judicial participation [that] is vital to safeguarding the rights of *pro se* parties”<sup>102</sup>. Other aspects of the use of JDRs for SRL are beyond the scope of this thesis.

It is my belief, based on the Survey data and the literature, that JDR has proven to be of great worth - or success - to the resolution of disputes in the Court. There has been individual case success and institutional success (the reduction of trial time and trial waiting periods) and the individual case success has resulted in growing demand for the service by the parties. That is, JDR has led to success, which success has led to increased demand, which leads to greater success - it is, in essence, a upward spiral of exponential success/demand.

Thus, I believe that, overall, the JDR Program has been, and continues to be, a success, and that its success explains, in part, its normativity. However, another factor - the judicial factor - remains to be considered. JDR is, after all, *judicial* dispute resolution. In an era when parties can easily, if not cheaply, access non-judicial dispute resolution facilitators, the significance of the judicial role as a factor in the normativity of JDR merits consideration.

#### **IV. JUDICIAL ROLE IN THE JDR PROGRAM**

I noted at the beginning of this thesis that alternatives to adjudication in the Court have been judicially led since 1992. Indeed, this is the start of a

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See also: Alberta Law Reform Institute, Rules of Court Project, “Self-Represented Litigants”, Consultation Memorandum No. 12.18 (Edmonton: Alberta Law Reform Institute, 2005).

<sup>102</sup>

*Ibid.*

number of symbiotic processes<sup>103</sup> that I postulate have led to JDR becoming institutionally normative. First, the judiciary initiated the JDR Program. Second, a judicially led early alternative to adjudication (the mini-trial) led, in turn, to a judicial expansion of the alternatives to include judicial mediation, binding JDR and hybrids of each. Third, as the first alternative service led to the expansion to other alternative services, the demand for JDR increased. Fourth, as the demand increased, it was followed by individual and systemic quantitative and qualitative successes. Fifth, this success was achieved in large part by the level and depth of judicial participation. Sixth, success has led to more demand. Seventh, through the evaluation of the JDR Program, based on the empirical Survey research<sup>104</sup> reported in the Evaluation Report, the judiciary are now in the process of looking at recommendations to ensure that the important positive elements of the JDR Program make it a growing, integral part of the resolution of disputes in the Court. Thus, it is asserted that the judicial role in the JDR Program has been instrumental in contributing to JDR becoming institutionally normative within the Court. Let us examine it in more depth.

JDR has established itself not only within the Court, but within the practice of alternative dispute resolution itself. That is, while non-judicial mediators continue to do great work in resolving disputes - whether commenced by litigation in court or not, judicial mediation continues to have ignited prominence, as Anthony Kronman has observed:

Of course not all “dispute resolution” ... is done by judges or occurs in courts. Today much of this work is done by

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<sup>103</sup> I use “symbiotic” in the sense of processes that are independent but, at the same time, inter-dependent on, and/or lead to or follow from other processes in a manner that is for the advantage of each and/or the result.

<sup>104</sup> Roberge says “empirical results regarding the practice of judicial mediation seems to us to be essential in order to complement the literature”: Roberge, “Model” *supra* note 73 at 38.

mediators... and others, and takes place outside the courthouse in less formal settings. But though these alternative forms of dispute resolution have in recent years grown in number and popularity, the judicial form continues to enjoy a decided priority over them. In part this is a cultural phenomenon that reflects the extraordinary prestige that courts and judges have always enjoyed.... But even more obviously, the priority of the judicial form of dispute resolution is a function of the fact that it is judges who must ultimately define the authority that mediators ... exercise – not the other way around – and so long as this remains true, judges and the work they do are bound to retain the position of dominant importance they’ve occupied in our legal culture from the start.<sup>105</sup>

This fits with Kronman’s view of the proper judicial model of what “good a managerial judge is seeking to maximize” - namely that, “the law as a distributive order” operates and is maintained as it was designed<sup>106</sup>.

Several learned authors have described the judicial role. Kronman described how a “managerial judge” would deploy available resources to dispute resolution - namely: to produce the “greatest amount of justice ...” reallocating judicial efforts from courtroom to conference room as appropriate to, in effect, productively maximize access to justice.<sup>107</sup> Macfarlane noted the

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<sup>105</sup> Kronman - “Lost”, *supra* note 1 at 317-8, referencing some early works on the subject:  
 - Owen Fiss, “Against Settlement” (1984), 93 Yale L.J. 1073;  
 - Richard Posner, “The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations” (1986) University of Chicago Law Review 53;  
 - Carrie Menkel-Meadow, “Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or the Law of ADR” (1991) 19 Fl. St. U. L. Rev. 1; and  
 - Neil Vidmar and Jeffrey Rice, “Jury-Determined Settlements and Summary Jury Trials: Observations about Alternative Dispute Resolution in an Adversary Culture” (1991) 19 Fl. St. U.L. Rev. 89.

<sup>106</sup> *Ibid* at 335.

<sup>107</sup> *Ibid* at 335 and 337.



judiciary's predilection for settlement roles.<sup>108</sup>

Landerkin described, better than I could, what a judge can bring to the mediation table in this way:

... the judge has a great advantage in this role. First, by definition, a judge is not for or against a party; the judge is independent. Second, a judge understands the necessity of balancing between disputants. Third, a Judge is master of his or her own house and controls the court process. It is not difficult for the judge to understand the need of a mediator to control process, yet leave control of the ultimate decision-making to the participants. Fourth, a judge is not swayed easily by unilateral actions, words or deeds, and will not be taken in by the articulate style of one of the participants in the lawsuit. Fifth, a judge is used to obtaining information to make a decision. A judge has an understanding of the problems and some of the ways they can be resolved.... Sixth, a judge has the ability to assess the parties and hear what they are really saying; a judge is an effective listener. Seventh, a judge can keep everyone on task and not allow the process to take on a life of its own. Finally, a judge understands better than most the limitations on people in terms of time, money, and emotion. A judge is motivated to find wise solutions ... and if these can be reached before trial, a judge will be well satisfied.<sup>109</sup>

Danielson, while noting that the “adjudicative role is a primary duty”, argues that “the traditional adjudication function of a judge has evolved into a new adaptive role”. She also noted that the Canadian Judicial Council itself acknowledges that the “administration of justice includes issues of ‘... trial and pre-trial practices and procedures, including case management; *court-managed alternative dispute resolution mechanisms and procedures...*” and that the Canadian judiciary “must prepare itself to deal with the growing demands in such areas as judicial dispute resolution...”. I could not agree with her more, when she concluded her discussion on this point by saying:

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<sup>108</sup> Macfarlane, *supra* note 18 at 234-5, referencing a survey she conducted for the National Judicial Institute in 2002: <http://www.nji.ca>.

<sup>109</sup> Landerkin, “Custody”, *supra* note 15 at 674.

There can be no doubt, then, that ‘judicial tasks, broadly defined’ can, and do include judicial dispute resolution. The inclusion of mediation programs, within the Court context, is part of the ever-expanding new scope of judicial responsibilities. ... Although [some] Alberta Justices have disagreement as to *whether their judicial duties ought to be extended to the settlement conference or the practice of mediation*, the writer posits that *the day for that argument has passed. The better argument today is how to undertake the new judicial duties while still maintaining due regard from the public for the judicial office.*<sup>110</sup>

These and other references support my view that our Court’s justices have a role to play in dispute resolution within the Court, but outside adjudication. The participants in the Survey agree and strongly support this role. The JDR Program is the vehicle by which to continue to provide what the Survey demonstrates clients and their counsel want as a possible alternative (if settlement can result) to trial, while adjudication remains available to them if they are unable to settle.

Adams argued in 1993 that active judicial encouragement of “case settlement is one of the cornerstones of case management”. By “active” he meant going “beyond indirectly encouraging settlement to the active discussion and supervision of settlements”. He concluded that “[t]he enduring and increasingly urgent interest in settlement is part of the on-going search for case management solutions to the litigation explosion”<sup>111</sup>. It was this

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<sup>110</sup> Danielson, *supra* note 2 at 20-2, referencing the Canadian Judicial Council, *The Way Forward: Final Report of the Special Committee on Future Directions to the Canadian Judicial Council*, adopted by the Canadian Judicial Council, September 2002, at 12 and 30. [Emphasis (italics and underlining) added throughout.]

<sup>111</sup> Adams, “Deal”, *supra* note 55 at 427, relying upon:  
 - John A. Goerdt, “Explaining the Pace of Civil Case Litigation: The Latest Evidence from 37 Large Urban Courts” (1991) 14 Just. Sys. J. 289, at 318;  
 - Arthur Miller, “The Adversary System: Dinosaur or Phoenix” (1984) 69 Minn. L. Rev. 1, at 2 - 12;  
 - Marc Galanter, “The Day After the Litigation Explosion” (1986) 46 MD. L. Rev. 3,

explosion that motivated the Court in the early 1990s to explore alternatives to traditional adjudicative dispute resolution.

In the development of the JDR Program, not only has the role of the judiciary changed, but so has the judicial attitude. Judicial attitudes have moved from those who were “openly hostile to ADR in concept and practice”, to more ambivalence<sup>112</sup>, to those who are “promoting and practicing JDR.”<sup>113</sup> The result is that it is now beyond question that active judicial participation in settlement procedures, broadly or narrowly defined, is a part of the dispute resolution program in the Court. Simply put, with all trained and/or experienced JDR justices participating, JDR has become and is part of the judicial function in the Court. As authors from the academy, the bench, the bar and the law reform policy advocates all agree: “The sheer volume and extent of civil justice reforms suggest that a settlement orientation is here to stay”<sup>114</sup>.

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at 32-37; and

- Austin Sarat, “The Litigation Explosion, Access to Justice, and Court Reform: Examining the Critical Assumptions” (1985) 37 Rutgers L. Rev. 319.

<sup>112</sup> Brazil, “Continuing”, *supra* note 33 at 20, referencing his earlier article, Brazil, “Now”, *supra* note 2, at 101.

<sup>113</sup> Landerkin & Pirie, *supra* note 53 at 281.

<sup>114</sup> Macfarlane, *supra* note 18 at 10 and Smith, *supra* note 4 at 30.

Danielson, *supra* note 2 at 8 came specifically to the same conclusion: “... it is clear that the Alberta JDR Program is here to stay”. Then, at note 31, she added the comment of one judicial interviewee “There would be *riots* if we stopped doing them. The public now demands this service from us”.

Note too that ALRI, “Promoting” *supra* note 13 at 82-83, para. 191 said 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 system that is capable of changing to meet societal needs*. [Emphasis added.]

There remains, of course, some resistance to this profound amendment to the judicial role. Specifically, some commentators lament the disappearance of a large number of trials, and, with that, the lesser predominance of the judicial role in adjudication - the “vanishing trial” and the loss of the precedential value of adjudication<sup>115</sup>. While acknowledging that the number of trials is diminishing, John Lande, in answering what he sees as the “misleading myth” of vanishing trials, observes that the workload of federal judges actually has grown. He adds that “[c]ontrary to the imagery of trials vanishing, leaving courts as virtual ghost towns, Galanter’s report<sup>116</sup> shows that, facing growing caseloads, courts have been quite busy and shifted some of their efforts from trials to pretrial work.” He added that “Galanter’s report does not present evidence of adverse effects commensurate with the amount of reduction in trial rates or the degree of alarm expressed about

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Agrios, *supra* note 3 (limiting the good natured exaggeration only slightly), said, at 4, “... if we were to cancel the JDR program tomorrow *there might not be riots* in the streets. There would, however, be much unhappiness in the litigation Bar”. [Emphasis added.]

See also: Stempel, “Reflections” *supra* note 37, a veritable history book of the “modern” ADR movement, at various places, including at 301 and 305-6.

None of this is a revelation - as early as 1991 in the US, the same conclusion was being made by other authors - for example: “Judicial use of ADR is now firmly rooted in the legal landscape, and the issue is no longer whether it should be there at all, but how to shape it, prune it, cultivate it, to best effect. ... ADR is entering the mainstream.”: James F. Henry, “No Longer a Rarity, Judicial ADR is Preparing for Great Growth - But Much Care is Needed” (1991) 9 *Alternatives to High Cost Litig.* 95, at 96.

<sup>115</sup> See *inter alia*: Marc Galanter, “The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts” (2004) 1 *Journal of Empirical Legal Studies* 459 [Galanter, “Vanishing”]; Donalee Moulton, “Vanishing trials: Out-of-court settlements on the rise” (2008) 17 *Lawyers Weekly* 22; and Orey, Michael, “The Vanishing Trial; As court battles become more rare, some experts fear the effects on the law” *Business Week* (30 April 2007) 38.

<sup>116</sup> The Galanter report “traces the decline in the portion of cases that are terminated by trial and the decline in the absolute number of trials in various American judicial fora”: Galanter, “Vanishing” *ibid*, at 459 *et seq.*

them”.<sup>117</sup>

At the same time, there are those that welcome the judiciary being involved in what I consider to be its ultimate role - the resolution of disputes, including the impact of interests relevant and related to the litigated dispute, a matter heretofore available to be explored only by a non-judicial mediator.

The judicial role is unique in the Court. In the Court, all JDRs are performed by justices of the Court, something quite unusual in court systems<sup>118</sup>. In most court systems court retained (in house or on a list) non-judicial mediators and/or judicial officers are used. Some use both - e.g. the District Court of Northern California where then Magistrate Judge Brazil presided. Thus, contrary to Galanter’s view, rather than mourning the diminished role of the judiciary, JDR in Alberta actually represents an

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<sup>117</sup> John Lande, “Shifting the Focus from the Myth of ‘The Vanishing Trial’ to Complex Conflict Management Systems, or I Learned *Almost* Everything I Need to Know about Conflict Resolution from Marc Galanter”, (2005) 6 *Cardozo J. of Conflict Resolution* 191 [Lande, “Shifting”], referencing Galanter, *ibid*, at 197-8, and later at 201, and 209-10. Indeed, at 201 he quotes M. Galanter “Reading the Landscape of Disputes: What We Know and Don’t Know (and Think We Know) about Our Allegedly Contentious and Litigious Society ” (1983) 32 *UCLA L. Rev.* 4, at 32-3), acknowledging that “[a]djudication provides a background of norms and procedures against which negotiation and regulation in both private and governmental settings take place”, which, at 205, he notes “show the importance of understanding the significance of trials in the context of the [dispute resolution] system[s] as a whole”. Indeed, while intimating negatives, Galanter, in Galanter, “Vanishing”, *supra* note 115 at 460, acknowledges that “[t]he consequences of this decline for the functioning of the legal system and for the larger society remain to be explored”.

<sup>118</sup> As Roberge states, “The judicial mediation practiced in Canada requires judges to play the role of mediators attempting to reconcile the interests of parties engaged in legal contestation. *The judge does not delegate the role of mediator. He or she acts alone.*”: Jean-François Roberge, “Can ‘Innovative’ Judicial Mediation Improve the Judicial System? Synthesis and Analysis of the Canadian Juridical Community’s Responses” (Paper presented to the National Judicial Institute, Judicial Settlement Conferencing, Vancouver, British Columbia, October 15, 2008), online: National Judicial institute <<http://www.nji.ca>>, [Roberge, “Innovative”] at 3-4 (emphasis added).

expanded judicial role.

Macfarlane described the role of the judiciary in the dispute resolution process as follows:

The role of the judge in the civil courts is changing as *the institutionalization of case management and settlement processes place judges in an increasingly supervisory and managerial role*. A wide range of processes are being developed and tested, including early case management ..., judicial mediation (when the judge is charged with bringing the parties to settlement), as well as more traditional pre-trial processes (where judges play in an evaluative role).... In some courts, judges understand their role is purely facilitative, while in others they assume a more evaluative stance, whatever the formal process.<sup>119</sup>

In fact, the judicial role is seen as extremely important by the users. This is demonstrated in the literature and the Survey, both of which strongly suggest that the judicial role has itself contributed to the normativity. I will look at the literature first and then examine the Survey data.

The importance of the judiciary in the dispute resolution process is closely related to “reality testing” of litigation risks, often referred to as “bargaining in the shadow of the law”. It is a significant part of the rights based evaluation in the JDR process. Macfarlane discussed the importance of the “shadow of the law” principle:

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<sup>119</sup> Macfarlane, *supra* note 18 at 233 (emphasis added).

Danielson, *supra* note 2 at 12, described an “evaluator” as someone ...who normally gives opinions and advice, assesses arguments on each side, assists parties to reach agreements by making predictions about likely court [adjudicative] outcomes and proposes equitable resolutions about the issues in dispute. and a “facilitator” as someone “... whose primary purpose is to clarify and to enhance communication between the parties in order to help them decide what to do”. Later, at 22, she noted that “[e]valuating is the daily experience of the Justice: assessing facts, weighing credibility and applying the law.”

In order to settle disputes in a manner that feels just to the parties, reference to norms and principles, which are often legal norms and principles, is very important. ... Where the possibility for appeal to an adjudicator lies in the background, as it does in legal disputes, we should expect the role of formal norms to be even more pronounced. If the alternative to settlement is adjudication ... it is important that the parties understand what the outcome might be if the matter were to be resolved according to legal principles (or, at least, according to a realistic “best guess” of what this might look like). This evaluation will doubtlessly affect the disputants’ appraisal of the offers on the table. ... The so-called “shadow” of the law is an important predictive tool for when resort to law and a continuation to trial is a possible consequence of failure to settle.<sup>120</sup>

Macfarlane later returned to the concept of the “shadow of the law”, which she postulated to be very much a part of the JDR settlement process in the context of existing litigation:

... law inevitably provides some of the norms that can be called into aid in a conflict. Ignoring or minimizing its role fails to recognize the usefulness and power of law as a social system of norms. Where a matter is already part of the litigation system, adjudication on the basis of legal principles is the context within which negotiation will take place .... a sense of “law” is rarely irrelevant to the outcome of a dispute, whether that is occurring inside or outside formal litigation.<sup>121</sup>

The “shadow of the law” concept is not exclusively associated with assessing rights in a direct sense. It also provides the context - the BATNA/WATNA - by which the parties can assess the potential of a

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<sup>120</sup> Macfarlane, *supra* note 18 at 54, 93 and 168, referencing:  
 - E. Waldman, “Identifying the Role of Social Norms in Mediation: A Multiple Model Approach” (1997) 48 *Hastings Law Journal* 703;  
 - Mnookin & Kornhauser *supra* note 67; and  
 - Center for Mediation in Law, <<http://www.mediationinlaw.org/about.html>>.

<sup>121</sup> *Ibid*, at 187, with further discussion on this point at 188-9. See also: Russell Korobkin, “The Role of Law in Settlement”, in Moffitt & Bordone, *supra* note 44, at 254-76.

settlement based on interests, in addition to rights. In other words, in one sense the “shadow of the law” is a gauge by which to measure the worth of a potential settlement. In this sense it allows an assessment of whether it may be better to take the risk of a potentially better result at trial, than the settlement offered, or whether the settlement offered provides benefits not available at trial.

Sanchez described the process in these words:

A central dispute-resolving function of ADR, viewed through the traditional lens of the court system, is to “reality test” the parties' perceptions of the strengths and weaknesses of their respective legal cases. This process now routinely occurs with the aid of judges who “change hats” during the course of a lawsuit and become “settlement managers,” facilitating settlement outcomes by the parties who are advised in settlement conferences to “bargain in the shadow of the law” or in the “clear light of legal certainty...”<sup>122</sup>

Sanchez added that judicial experience indicates that this a prudent process:

The reality-testing function of such court-related ADR processes is ... a productive function, from the standpoint of enlightening parties and saving court resources, because it serves to persuade parties to “compromise” and reach settlement outcomes, rather than risking the consequences of winner-take-all court decisions. Compromise ... is the tool proffered by ADR to break deadlock and wrench concessions from each side until they both reach some mutually acceptable point between the two extremes.<sup>123</sup>

Otis and Reiter put this into perspective in programs such as the JDR

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<sup>122</sup> Sanchez, *supra* note 92 at 769, referencing a number of publications.

<sup>123</sup> Sanchez, *supra* note 92 at 770, referencing Judge Harry T. Edwards, “Alternative Dispute Resolution: Panacea or Anathema?” (1986) 99 Harv. L. Rev. 668, at 673, noting Edwards’s view that a neutral judicial mediator can “greatly enhance the prospects of a settlement negotiation” not only by suggesting reality of what might happen at trial, but also to allow the parties face-saving from otherwise arguable “admission of weakness”.



Program, as an alternative to traditional adjudication, but within the litigation commenced:

In our view, for disputes that are already within the adjudicative system or that have proved resistant to extrajudicial resolution, judicial mediation presents a powerful alternative to the often blunt instrument of an adversarial trial. It offers a *via media*, combining some of the legal and moral *gravitas* of adjudication with the flexibility and adaptability of ADR. It thus represents not just an efficiency reform but also a reconceptualization of the role of the courts and judges in dispensing justice.<sup>124</sup>

Indeed, the role of the judiciary and the courts in reform of dispute resolution processes is significant, as a Canadian academic made clear:

There is ... [in public opinion] a very substantial degree of trust and confidence in the courts in this country. Indeed, ... even though the movement to ADR is in a sense a response to a crisis in the dockets and demands of the courts, in a strange sense that development is a tribute to the achievement of the courts, through the extension of the services that they are rendering to the... public in an ever widening range of dispute resolution.<sup>125</sup>

Thus, the relevance of JDR and judicial mediation to confidence in the judicial system is very significant. Landerkin and Pirie asserted that “[j]udicial mediation also could be used as a way to regain or strengthen support for, and confidence in, the justice system”, where “judicial mediation”:

... might be fundamentally understood as an essential element of accessing justice in a free and democratic society, as bringing law to every person's door, as a wiser and fuller utilization of our

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<sup>124</sup> Otis & Reiter, *supra* note 34 at 362 (emphasis added). However, in the following footnote they curiously add a statement making the process they envision (different from what happens in the Court) separate from the settlement of a pending adjudication, or an assessment of what a pending adjudication may bring:

“It is worth recalling at this point that we refer here to mediation that a judge conducts within a courthouse setting as neutral third party and not to the various forms of evaluative or binding judicial intervention, such as settlement conferences or mini-trials.”

<sup>125</sup> Dean Anderson, “Summation”, at the Pitblado Lectures, *supra* note 16 at 94.

judicial elders, as an opening up of a traditionally closed and often misunderstood justice system, as a move to empower parties in the sometimes disempowering litigation process, or as a legal process geared towards saving time and money.<sup>126</sup>

I believe the Survey has demonstrated that the JDR Program has done just that - given litigants a greater confidence in the civil justice system, and thus, given the Court enhanced credibility when, before the mid-1990s, cost, delay, formality and complexity were putting it on the slippery slope to collapse under its own weight. Thus, I believe not only that the JDR Program needs the judicial presence (the “shadow of the law”), but that the judicial role itself is enhanced by the JDR Program. It was the Court’s response and leadership, under Associate Chief Justice Miller and Chief Justice Moore, that also recognized this need, as did the Canadian Bar Association:

As concerns with access to justice, administrative efficiency or the appropriateness of court adjudication for particular kinds of cases increase, there may be a greater motivation for the Canadian judiciary to assume more leadership in identifying and evaluating new or improved procedures both inside and outside the formal court structure.<sup>127</sup>

Brazil recognized another phenomenon in the changing role of the court - a return to its service role, in the process fundamentally showing the public

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<sup>126</sup> Landerkin & Pirie, *supra* note 53 at 261-2, and 281, where “judicial mediation” means mediation with a judicial style, authority or authorization - what Landerkin & Pirie there call a measure of “judicial *imprimatur*”.

As noted at 212-3 of the Evaluation Report, 1 year worth of JDRs, involving 6 justices saved more than 1 year worth of civil trials, involving 12 justices - a significant saving in judicial resources. Additionally, it saved an estimated \$10,000,000 in legal fees to clients.

<sup>127</sup> Landerkin & Pirie, *supra* note 53 at 267, quoting CBA, “ADR Task Force” *supra* note 56 at 38.

Note too that, since 1994, the Canadian Bar Association has had a National Alternative Dispute Resolution Section to promote dispute resolution mechanism: Zutter, *supra* note 20 at 445.

the “stuff” of which the Court is made:

... our ADR programs reflect an appreciation of our mission as a court that is more complex than it was twenty years ago. This institutional openness serves very important ends. It communicates to people that the court defines itself fundamentally as a service institution and that its duty to serve runs primarily to the people. This message means, among other things, that the values and interests that ought to play a primary role in defining court policy and programs are the values and interests of the people. Those values and interests span a very wide range, only some of which are best served by traditional litigation.<sup>128</sup>

The concept of the law as a service is not new. F.C. (Ted) DeCoste, relying on a legal legend, states, in my view, the most important role of lawyers and judges:

To profess the law ... requires lawyers to commit themselves to serving others. Karl Llewellyn once described law as “a service institution: in service lies its soul...”. ... Service to others resides at the very heart of the Rule of Law.... the Rule of Law commands lawyers to serve others, fairly and without distinction and for the other’s sake.<sup>129</sup>

Later, DeCoste took this process to another level:

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<sup>128</sup> Brazil, “25 Years After”, *supra* note 5 at 111.

<sup>129</sup> F. C. DeCoste, *On Coming to Law: An Introduction to Law in Liberal Societies*, 2d ed. (Markham, ON: LexisNexis, 2007) [DeCoste], at 279.

As to “lawyers”, throughout this thesis, unless stated otherwise, comments directed to lawyers, often apply, *mutatis mutandis*, to judges, who, of course, were once lawyers in one context and continue to be lawyers in an other context. Indeed, judges have one of the “law jobs”, along with the two others who counsel and advocate the law: Karl Llewellyn, “The Normative, the Legal and the Law-Jobs: The Problem of Juristic Method ” (1940) 49 Yale Journal 1355, as referenced by Kronman - “Lost”, *supra* note 1 at 21, note 5 (at 391) and Anthony T. Kronman “Living in the Law” (1987) 54 U. Chi. L. Rev. 835, at 863, note 46. In the latter, especially at 864-5, Kronman develops the principle of judgment as a character trait, and asserts that to provide “wise judgments”, judges must have sympathetic detachment, where sympathy means seeing “claims ... in their best possible light ... short of actual ... endorse[ment]...” - a characteristic extremely important to judicial mediation, as we shall see *infra*.

In making justice for the parties, judges also serve the political community more widely.... Though judges are confined to the parties, to their arguments and their issues ... judges make secure the community's sense that justice is possible under government by law.<sup>130</sup>

These words as to the importance of legal services, in my view, apply to us as judges not only in our adjudicative role, but also in our dispute resolution roles, including our settlement role. While our historical and primary role to this date is adjudication, that is, on its own, an impoverished conception of the judicial role. The true role of judges is, in accordance with the law, broader - not merely to adjudicate the law, but rather to resolve, or help resolve, disputes between litigants. That this may, in the right case, require adjudication is obvious. It may, however, involve other aspects of the judicial role. In a JDR this often includes assisting the parties in assessing the risk of trial and trying to predict how another justice may decide a case<sup>131</sup>.

Based on the qualitative data in the Survey, the most important aspect of the presence of the JDR justice is to create a way for a party to achieve a "day in court" - to tell his/her/their story to a justice who will listen and evaluate, so that the client can understand the risks of trial<sup>132</sup>.

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<sup>130</sup> *Ibid*, at 286.

<sup>131</sup> See Kronman - "Lost", *supra* note 1 at 124-5 and 136-7, referencing Ronald Dworkin, *Law's Empire* (Cambridge, Mass.: Harvard University Press, 1986), at 407.

See also Richard A. Posner, *How Judges Think* (Cambridge, MA: Harvard University Press, 2008), at 3, in relation to judicial analysis and discretion, in addition to the application of legalistic precedent. Thus, as Posner says, the problem is the difficulty in determining the "consequences of judicial behavior".

<sup>132</sup> On the importance of the client hearing the assessment: see the comments of Alan MacInnes, Q.C., in the "Bear Pit Discussions" at the Pitblado Lectures, *supra* note 16 at 92; Macfarlane, *supra* note 18 at 149; and Singer, *supra* note 40 at 11, which includes the importance of clients having a say in "process control", on which see further: MacCoun, Lind and Tyler, *supra* note 40 at 100 and 103; and

The qualitative comments in the Survey (see Appendix 4 of the Evaluation Report) amply support the quantitative analysis. Indeed, as section E3 established, 68% of the respondents rated “to get a judicial opinion” as one of their motivations for a JDR (after “less cost” at 75% and speed of process at 72%)<sup>133</sup>. This is both evidence of the importance of the judiciary in the process and the success of the JDR Program.

All of this is especially important when “access to justice”<sup>134</sup> is so in jeopardy: “Access to justice has been not just impeded, but fundamentally corroded, by what one justice of the Supreme Court of Canada has declared to be the ‘astronomical’ fees of the private bar”<sup>135</sup>.

On the more philosophical level, Landerkin and Pirie had this to say:

Judge-led JDR developments to date such as settlement conferences, mini-trials, case management, and the like seem to suggest the idea of judges appropriately helping parties settle their cases does not undermine the foundations of our formal justice system. In fact, the policy reasons behind the rapid developments in ADR and mediation generally appear to mirror the arguments *for supporting JDR's integration into formal justice systems*. Court congestion and long delays, staggering legal costs, and problems enforcing judicial orders can mean access to

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Landerkin, “Custody”, *supra* note 15 at 653, referencing, F. Lind & T. Tyler, *The Social Psychology of Procedural Justice* (New York: Plenum Press, 1988).

<sup>133</sup> This is also documented as between Lawyers and Clients in Appendix 6 of Table 6.2 - MOTIVATION of the Evaluation Report - the clients numbers were 64%, 64% and 59% respectively.

<sup>134</sup> “Access to justice”, a relatively recent “buzz word”, is a very broad concept. However, simply put, by using it, I mean the ability of all citizens, both financially and procedurally, to take their reasonable disputes to a public institution or official to assist in, or prescribe, a resolution.

<sup>135</sup> Janice Tibbetts, “Lawyer fees ‘astronomical’, Supreme Court judge says: Binnie suggests courts could exert power to curb costs” National Post (22 October 1999) A4; clarified in Ian C. Binnie, “Legal Fleecing”, Letter to the Editor, National Post (23 October 1999) B9.

justice is compromised. As an essential element in the ordering of a democratic society pursuant to the rule of law, the court's adjudicative mechanisms have to be working and be seen to be working, *particularly by those segments of society most in need of the court's protection*. The courts cannot be viewed, as a 1996 report on the Canadian justice system found, as a system in which 'many Canadians feel that they cannot exercise their rights effectively because using the civil justice system takes too long, is too expensive, or is too difficult to understand'.

... JDR can thus be viewed as complimenting, not conflicting with, the appropriate administration of justice.<sup>136</sup>

In addition to choosing JDR as the mechanism for dispute resolution, a growing number of lawyers are seeking to choose a particular JDR justice. As seen in sections L4 and L5 of the Survey, 73% of lawyers requested a particular JDR justice, 92% of those having obtained their choice.

This aspect of the judicial role, however, remains controversial. There is a considerable amount of literature that maintains that "court mediation" results in injustice, because of the absence of "the shadow of the law" (*supra*, at 47 *et seq*) judicial role, in favour of uninformed non-judicial individualism associated with ADR processes<sup>137</sup>. On the contrary, I believe that the active judicial role in the JDR Program is the answer to this criticism. However, before accepting this conclusion, I believe it is important to note the nature of the criticism and the response.

Without referencing all the literature on the subject, I will focus on the

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<sup>136</sup> Landerkin & Pirie, *supra* note 53 at 282, quoting the CBA, "ADR Task Force" *supra* note 56 at 11 (emphasis added).

<sup>137</sup> See also: Trevor C. W. Farrow. "Privatizing our Public Civil Justice System" (2006) 9 *News & Views on Civil Justice Reform* 16.

work of Jacqueline M. Nolan-Haley as a surrogate<sup>138</sup>. In her paper, after tracing the development of court mediation for 20 years in the U.S., she makes reference to a number of principles and then raises a number of criticisms in support of her perception that they are not being followed. She argues that “[t]he traditional promise of the court system is to provide litigants with justice through law”, but “[a]s mediation programs are institutionalized in court, litigants find themselves directed off their original course...”, where “expectations for a process and an outcome based on legal procedures and principles are suspended in court mediation”<sup>139</sup>. However, in the Court, these legal factors are always maintained by the incorporation of the “shadow of the law” during the JDR, and if it is not achieved there in a litigant’s view, resort may be had to adjudication. Thus, the judicial role in the JDR Program “is different from other types of mediation because it takes place [not only] under the auspices of the legal system”, but actually maintains the presence a presiding justice to provide “justice through law”, thus providing “legal protection”<sup>140</sup>.

Nolan-Haley asserts that mediation, in this context, relates to “an informal, consensual process” with merely a “neutral third party”<sup>141</sup>. However, in the JDR Program, it is not merely a neutral third party, but a neutral justice of the Court, who is available to provide a “shadow of the law” perspective by, in effect, placing his/her “legal expertise at the parties’ disposal in order to

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<sup>138</sup> Nolan-Haley *supra* note 29 (footnotes deleted except as noted).

<sup>139</sup> *Ibid*, at 52, referencing Alfini, “What Happens”, *supra* note 29.

<sup>140</sup> *Ibid*, at 65.

<sup>141</sup> U.S. Federal District Court ADR programs “rely (with a few exceptions) on attorney-neutrals to provide the ADR service”, although about a third have “designated magistrate judges as the court’s primary settlement officers” - nevertheless, “most of the courts’ ADR programs rely on nonjudicial neutrals”: Plapinger & Stienstra, *supra* note 27, at 554-5, and 557.

assess the optimal solutions”<sup>142</sup>.

Nolan-Haley argues that the process merely focuses on a “mutually satisfactory resolution”, without reference to the standard by which legal principles would otherwise be applied to the dispute<sup>143</sup>. That is absolutely not the case in the Court’s JDR Program because a “shadow of the law” standard is always available to parties, represented or not<sup>144</sup>, through judicial evaluation so as to allow for the framework of a legal knowledge base for what might happen in a court determination, as a framework by which to measure the merits of the settlement proposed.

While noting that the promise of mediation is “self-determination, autonomy, empowerment, transformation and efficiency”, where the “motivation is an equitable perspective that supplements the rigidity that often accompanies the application of legal principles to human conflict” and “affirms the humanity of the opposing party”, in a way that “captures the human elements often concealed behind the ‘masks of the law’”<sup>145</sup>, Nolan-Haley expressed concern that the disputing parties have the right of self-determination “in a wider framework than the limited confines of the legal

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<sup>142</sup> Roberge, “Model” *supra* note 73 at 17 and 23. In the latter reference, relying on Otis & Reiter *supra* note 34 at 387, he notes that the “judge must act more as an efficient and neutral negotiator and not simply as an oracle decreeing the law to the disputants from [on] high”.

<sup>143</sup> Nolan-Haley *supra* note 29 at 52-3.

<sup>144</sup> Recognizing in the latter context that “[c]ourts have special responsibilities towards unrepresented parties to ensure that their participation in the mediation process is informed and ... consensual” and the need to relieve from “the possibility of unequal bargaining power” or “dominance by the more powerful party”: *ibid*, at 95-6.

<sup>145</sup> *Ibid*, at 53-4, 63 and 84-5. In this way, Roberge asserts that “[t]he conciliating judge renders justice accessible to the parties by managing a process that allows them to choose an adapted, normative solution, which is perceived as equitable in the context”: Roberge, “Model” *supra* note 73 at 27.



system”<sup>146</sup>. To this I respond, “why shouldn’t the parties have this right by mutual agreement, if it does not affect third parties?”

Nolan-Haley postulates that “mediation operates as ‘individualized justice’ outside the supposed protection of the law and the legal process”, and instead “results more from individual preferences than externally imposed standards”<sup>147</sup>. Again, I don’t understand the concern, if the parties agree to the process and the result. However, with a judicial officer present, judicial mediation within the JDR Program specifically “operates [within] the ... protection of the law and the legal process”.

She asserts further that mandatory mediation “undercuts the traditional voluntariness of mediation” and “sticks’ parties with a mediator”<sup>148</sup>, having “lost the right to see a judge”<sup>149</sup>. In the Court’s JDR Program, participation is completely voluntary, the justice is the mediator and there is increasing right to have input into his/her selection - see sections L4 and L5 of the Survey. While some form of mediation may be mandatory under the New Rules, the JDR Program is not (and will not be) mandatory. Rather, it is (and will be) voluntary, and, rather than losing the “right to see a judge”, there is an actual choice of the judicial mediator to whom to tell your story - where “parties ... experience the functional equivalent of having their day in court”<sup>150</sup>.

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<sup>146</sup> *Ibid*, at 56.

<sup>147</sup> *Ibid*, at 56 and 63-4.

<sup>148</sup> *Ibid*, at 60-1.

<sup>149</sup> *Ibid*, at 64.

<sup>150</sup> *Ibid*, at 90. Roberge refers to this judicial officer, whose normal role is that of being a “decision-making judge”, in this context, as a “conciliating judge”, whose “mandate is to reconcile the parties in order to reach a negotiated solution”: Roberge, “Model” *supra* note 73 at 5.

Finally, Nolan-Haley expresses concern with respect to SRL, asserting that, without knowledge of the law in at least one party there are “significant implications for the ultimate fairness of court mediation” and a risk of “hit-or-miss justice”<sup>151</sup>. This, I believe, is alleviated by the judicial role, which protects fairness.

In the result, I believe that these typical criticisms of non-judicial mediation are answered by the presence of a pro-active JDR justice playing a very specific judicial role in the JDR Program.

Court mediation as practiced within the JDR Program does not maintain mediation as an “alternative to adjudication”, but as an equal partner in concept to it (although not yet in process time) in allowing disputes to be resolved by the parties under the protection of the law - that is, “[t]hough it cannot replace adjudication, mediation contributes towards rendering justice more human, participatory, and accessible, values that better reflect many people’s needs in dispute resolution”. Thus, the result is that “[j]udicial mediation amounts to a new way of rendering justice, one that empowers the parties and provides justice better suited to their needs”<sup>152</sup>. In other words, JDR within the Court presents the best of both worlds in that the parties are “able to understand their legal rights and at the same time be able to acknowledge how their individual ... interests find expression in or outside of those rights”, placing “the locus of decision making in themselves and become active participants in the resolution of their own disputes”, such that “authentic self-determination is exercised and ... the counterpart of justice

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<sup>151</sup> *Ibid*, at 76.

<sup>152</sup> *Ibid*, at 24, relying on Otis & Reiter *supra* note 34, at 363 and 371.

through law is achieved”<sup>153</sup> - that is, justice within the “shadow of the law”.

This is achieved by the judicial role where:

[t]he independence of the judicial institution, the impartiality of its judges, the depth of their knowledge of the law and of conflicts, their traditional mission of taking care of disputes and rendering justice explains why the conciliating judge enjoys such strong moral authority in relation to the parties.<sup>154</sup>

Another way of expressing this point is that the “shadow of the law” connotes “judicial reasoning”. The ever present role of the judiciary means that the JDR Program starts from this premise of judicial reasoning. That judicial reasoning can also be brought to bear upon the parties interests. In doing so, the scope of the problems to which the judgmental quality of the judicial mind set is applied allow “the judicial system to be more flexible and to adapt itself to the numerous disputes of which the solution cannot be defined optimally through an adversarial process”<sup>155</sup>. Indeed, a detailed analysis of literature and Canadian judicial views on judicial mediation suggests that the Canadian judiciary (including justices of the Court) use a number of methods or styles of intervention to make this happen<sup>156</sup>.

The importance of the judicial role to the users is also seen in section

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<sup>153</sup> *Ibid*, at 66 and 91.

<sup>154</sup> Roberge, “Model” *supra* note 73 at 30, referencing Louise Otis, “La justice conciliationnelle: l’envers du lent droit” (2001) 3:2 *Éthique publique* 63, at 66, and Agrios *supra* note 3 at 25.

<sup>155</sup> Jean-François Roberge, “The Settlement Conference: The Issues involved in Judicial Reasoning and Problem-solving Reasoning” (Paper presented at the National Judicial Institute, International Exchange Program for the Development of an Integrated System for Judicial Mediation, 3 October 2005), online: National Judicial Institute <<http://www.nji.ca>>, at 8. Later the author repeats these types of reasoning and defines this as the “traditional tendency” and the “innovative tendency”, but that, in practice, “the judges’ practice resembles instead a continuum” of both tendencies: Roberge, “Model” *supra* note 73 at 12-15.

<sup>156</sup> Roberge, “Innovative” *supra* note 118.

M2 of the Survey, in Appendix 1 herein - 90% of the lawyers thought the involvement of the JDR Justice significantly improved the prospects for, or the achievement of, successful settlement - over other alternatives, including mere party/counsel negotiation and neutral, non-judicial, third party mediation. That analysis was tested against success on all issues (F1) in Appendix 6, Table 6.3 - Settlement - Impact Assessment - of the Evaluation Report, which measured the impact of the justice in the settlement success and demonstrated a 93 - 95% judicial impact on success in Calgary and Edmonton. This was also measured in a different way in sections M1 and M2, with a rating of approximately 75% to 85% believing that the success achieved was due to the judicial involvement.

In addition to mere JDR success, the parties were very supportive in their assessment of judicial qualities. There is relevance to this in the context of the symbiotic nature by which the judicial component and success lead to the normative result. This is in addition to the mere evaluation of the judicial participation for other purposes as part of the total evaluation of the JDR Program. As noted from the Lawyers' Survey, lawyers were statistically and qualitatively very happy with judicial performance.<sup>157</sup> The quality of the judicial leader of the JDRs was also very important, because, as section L5. demonstrated, 89% of lawyers wanted a choice of JDR justice in the future. Section O4 of the Survey demonstrated a 88% approval rating of the JDR justice used.

What does all of this mean on the subject of this thesis. In looking at the "Future Role of the Court in JDR" in the Evaluation Report, I concluded (at 435) that

... through the Survey results, and having considered it in the

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*Supra* at 37.

context of literature on the subject, I have concluded that the Court's JDR Program provides a valuable dispute resolution service to the public in Alberta, improves access to justice, and is, in general, positive to the administration of justice. I recommend that it be maintained.

In this thesis, on a similar basis, I assert that it means the high standard of judicial participation is key to the success of the JDR Program to individual cases (both quantitatively and qualitatively), and to the JDR Program as a whole. This success and the resulting demand, together with the JDR options, are key to making the JDR Program institutionally normative as a part of the resolution of disputes in the Court.

#### **V. JDR HAS BECOME INSTITUTIONALLY NORMATIVE IN THE COURT'S DISPUTE RESOLUTION PROCESSES**

The preceding discussion of the judicial role addresses persistent issues relating to ADR, the answers to which themselves, in the JDR Program, support a conclusion that the Program has implications that go to the heart of the institution of justice and of the Court. As such, inasmuch as JDR has become the "norm", it has so become at an institutional level and scale. This shift to normativity within the Court has been palpable - it is, indeed, monumental. Let's look at the result more closely.

ADR was once thought to be an alternative to the Court adjudicative system - one would go outside the courts to resolve one's disputes, concentrating on interests, not rights, the latter being left to the courts<sup>158</sup>. This began to change with Sander's "multi-door courthouse"<sup>159</sup> where ADR-type

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<sup>158</sup> See, *inter alia*, Adams & Bussin *supra* note 27 at 134.

<sup>159</sup> Sander, "Varieties" *supra* note 37.

methods were used *within the courts* as an alternative to adjudication - but often (usually) with non-judicial officers providing the ADR type procedures<sup>160</sup>. Now JDR remains inside the Court, accommodating both rights and, if requested, related interests, leading to resolution by way of settlement or, failing that, a decision by way of adjudication. Thus, we see JDR and adjudication working together. It is not the elimination of the old paradigm - the adjudicative system - but rather the “convergence” of adjudication and consensus building settlement mechanisms to a new dispute resolution dynamic, all within the Court.<sup>161</sup>

Moreover, the resulting institutionalization has not been mandated by force, in the usual institutional way<sup>162</sup>, but rather has been brought in voluntarily. In the process, “alternative” has been dropped in favour of

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<sup>160</sup> See, *inter alia*: Sander, “Future”, *supra* note 18 at 5; Goldberg, Sander and Rogers *supra* note 51 (2<sup>nd</sup> ed.) at 7; Landerkin & Pirie *supra* note 53 at 273-4; and Stempel, “Reflections” *supra* note 37.

<sup>161</sup> Macfarlane, *supra* note 18 at 17, 20, 22 and 109-11.

Indeed, “[m]any of the ADR processes that are being evaluated are not separate from the court system but a part of it”: R. Baruch Bush, “Defining Quality in Dispute Resolution: Taxonomies and Anti-Taxonomies of Quality Arguments” (1989) 66 *Denver U. L. Rev.* 335, at 342, relied upon by Bussin, *supra* note 32 at 474. That is the case in the JDR Program.

<sup>162</sup> Jeffrey W. Stempel, “Beyond Formalism and False Dichotomies: The Need for Institutionalizing a Flexible Concept of the Mediator’s Role” (1997) 24 *Florida State University Law Review* 949, at 949.

However, even where mandated, there is often a “if you build it, they will come”, buy-in phenomena: Macfarlane, *supra* note 18 at 9-10, and 39-40. See also Sander, “Future”, *supra* note 18 at 7-8.

While the New Alberta Rules of Court coming into force November 1, 2010, will mandate some form of dispute resolution - private ADR, court-annexed mediation or JDR - before trial, JDR itself will not be mandated. Moreover, familiarity and use transcends any aspect of mandating JDR: John Lande, “How Will” *supra* note 69, at 839-40.

“complementary” and “appropriate”<sup>163</sup>, leading to JDR, which has captured the best of both aspects of the dispute resolution world, while, at the same time, shifting off old practices in favour of a new mutual benefit, results-orientated focus.<sup>164</sup> In this way too, it has become institutionalized<sup>165</sup>.

Galanter and Cahill, noted that, as I believe is now the case in Alberta:

... most cases that enter the [court] system are resolved short of full-dress adjudication by a process of maneuver and bargaining “in the shadow of the law”. Rather than two separate tracks - adjudication on the one hand and negotiation and settlement on the other - there is a single process of pursuing remedies in the presence of the courts. For mnemonic purposes, we attach to it the fanciful neologism “litigotiation”.<sup>166</sup>

They concluded:

Once courts were envisioned as dedicated exclusively to adjudication, so that settlement was seen as the product of a consensual private departure from the public forum. ... But now, it is common knowledge that most remedy seeking in the vicinity of courts is going to eventuate in settlement. We share an inescapable awareness that courts do more than adjudicate. They preside over a cluster of dispute processes. ... Once we see settlements not as a stray byproduct of the judicial process, but as part of the essential core, the responsibilities of courts can no

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<sup>163</sup> Sharon Press, “Institutionalization: Savior or Saboteur of Mediation” (1997) 24 Florida State University Law Review 903 [Press], at 903-4. At 904, she defined “institutionalization” as referencing “any entity (government or otherwise) which, as an entity, adopts ADR procedures as a part of doing business”. This “doing business” is, I believe, another way of saying that it has become “normative”.

<sup>164</sup> Kronman - “Lost”, *supra* note 1 at 152.

<sup>165</sup> Press *supra* note 163.

<sup>166</sup> Galanter and Cahill, “Most Cases”, *supra* note 81, at 1342-3, and later at 1389, referencing in each case, Mnookin & Komhauser, *supra* note 67, and Galanter, “Worlds” *supra* note 67 at 268. Elaborating on the “shadow of the law” concept, the authors, at 1388, assert that “[p]ower to achieve an attractive settlement may be dependant on having adjudication as a viable alternative”, referencing Craig A. McEwan & Richard J. Maiman, “Mediation in Small Claims Court: Achieving Compliance through Consent” (1984) 18 Law & Soc’y Rev. 11, at 46.

longer be defined as coextensive with adjudication.<sup>167</sup>

Absent a shift in public policy, it would seem that JDR's normativity will persist. This is obviously never a "given". Indeed, Landerkin and Pirie acknowledge<sup>168</sup> that there are policy issues to consider to ensure that JDR remains in the public interest, and that, over time, it does not, in any way, diminish the existing adjudicative judicial system. Thus, in saying "JDR can ... be viewed as complementing, not conflicting with, the appropriate administration of justice", they added "[t]his is not to say that the concerns raised by Resnick, Menkel-Meadow and others are diminished", and restated the issue in a comparison of the history of JDR to that of ADR:

With ADR recast as the way for the legal profession to better exercise problem solving skills and techniques, questions about ADR's negative potential have not proved to be a barrier to ADR's rapid integration into legal practices. The policy challenge for the courts, meditatively reframed, seems to be similar. How can the positive features of ADR be incorporated into justice system structures and practices in a manner that does not undermine or destroy the essential values and beliefs that underpin the system? This challenge - how to dispute better was the same one faced by the legal profession two decades ago ... [with] ADR....<sup>169</sup>

Stempel, in his extensive chapter entitled "The 'Right' Kind of Multi-Door Courthouse: Promising Avenues for Judicial Incorporation of ADR", addressed the same subject, but this analysis is too complex for in-depth discussion in this thesis<sup>170</sup>. However, he makes a number of points that deserve mention, if not discussion, at this time. First, he asserted that "ADR

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<sup>167</sup> *Ibid*, at 1390.

<sup>168</sup> *Supra* note 136.

<sup>169</sup> Landerkin & Pirie, *supra* note 53 at 282.

<sup>170</sup> Stempel "Reflections" *supra* note 37 at 361-394. However, a more detailed review of it, including the section on "Updating and Modifying the Sander Model", is recommended before any changes are made to the JDR Program.



will be improved and concerns over its accuracy and fairness mitigated if more ADR is brought under the control of the judiciary ... [a] continued role for court-connected ADR is not only wise, but necessary....” He added two comments that I believe are particularly important, because they stress the protection that only the court can provide: “[t]he best type of ADR for judicial adoption is that which provides a definitive assessment of individual claims by a neutral figure acting within a regime of adequate process”, and “the multi-door courthouse structure remains a useful blueprint for courts”, but “[o]f prime importance is the status of the multi-door courthouse as a courthouse”. Additionally, under his vision, mandatory ADR is not prohibited, but voluntariness is promoted. He also made clear that “private ADR should continue to play an important role”. He made a number of additional recommendations, including that: the “screening clerk” proposed by Sander be “upgraded to a judicial officer of substantial training and discretion”; “traditional aspect of pretrial litigation, including some early discovery” be available; staff be “full-time judicial personnel subject to the selection, training, control and evaluation of the court”; “quality control” be achieved through “appellate review”; avoiding power imbalance and coercion be considered a necessity; quality, including fairness, be given priority over cost containment, when in conflict; and attention be paid to process issues such as firm scheduling and sufficient information to the parties and judicial neutral chair<sup>171</sup>. He concluded his detailed analysis by saying:

... courts must continue to be both dispute resolvers and norm articulators....

... the proper role of courts is to have more involvement in ADR rather than less, both to preserve the role of the judiciary and to correct the seeming market imperfections of ... ADR. The multi-door courthouse is a more promising alternative than either judicial rejection of private ADR or judicial imposition of ADR. This

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<sup>171</sup> *Ibid*, generally at 361-394, and specifically at 361-2, 367, 369, 372-5, 381-3, and 392-3.

is true because it retains a core of traditional adjudicative activity. In balancing competing considerations, we should opt for a court system that, in debatable cases, elevates its quest for fairness and accuracy above its desire for greater speed or inexpensiveness. Courts should be willing to absorb appropriate aspects of ADR, but ultimately must remain true to the perhaps corny version of justice as the overarching norm. In short, the multi-door courthouse proposed must continue to be, first and foremost, a courthouse.<sup>172</sup>

Although some of these observations require some modification in the Court's context (e.g., the selection and evaluation of independent judicial officers has been achieved in the Court), and some processes are a choice of the users (e.g., the right of appeal), the JDR Program meets all of these requirements.

Why are these considerations important? Why is he, in my view, so obviously correct in urging these precautions? I suggest the reason goes again to the judicial role, and in particular to the public perception of the presiding justice as being *fair* and being a repository of *judgment*. It is the same reason why people call for judicial enquiries? Because they are, by definition conducted by the *judiciary*. This seems to be what Stempel is urging us to retain.

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<sup>172</sup> *Ibid* at 394-5.

See also Louise Phipps Senft and Cynthia A. Savage, "ADR in the Courts: Progress, Problems and Possibilities" (2003)108 Penn St. L. Rev. 327, where, at 327-8, the authors, before addressing problems that have arisen and identifying strategies for improvement (addressed in the Evaluation Report), open their discussion to note and detail "the benefits resulting from the *institutionalizing* of ADR in the courts" in stating:

The *institutionalization* of ADR in the courts has led to far greater use of ADR... [t]he conception of the court's role has moved increasingly in the direction of the multi-door courthouse envisioned by Frank Sander in 1976. Other benefits of *institutionalization* include increased public awareness of alternatives to litigation and growing sophistication regarding appropriate alternative processes among lawyers and judges. [Emphasis added.]

Elaborating on the same point, Landerkin and Pirie asked and started the answer to this issue in this way:

Are judges as mediators or judges practicing JDR compatible with our understanding of the modern judicial function? ... a closer look at the role of the judge appears to reveal further policy grounds supporting the judicial adoption of JDR.

...

However, two reasons suggest ... [that the] adversarially-inspired and traditional role for the judge is incomplete....

First, despite the obvious advantages of an adversary system, some suggest such a system is flawed. ... [It] contributes to or causes unacceptable delays in getting disputes to trial, high legal costs, procedural and substantive complexities, breakdowns in continuing relationships, and other access to justice problems. The adversarial system may encourage certain beliefs and attitudes that not only obstruct fair and effective dispute resolution, but also legitimize socially undesirable behaviours.<sup>173</sup>

Noting these problems with the adversarial system, Landerkin and Pirie address the first point by suggesting that the “role of judge primarily predicated on a seriously flawed, publicly maligned and changing adversarial approach to justice is surely not sustainable.” Their second point was that a:

... more direct line of analysis also suggests the judicial function can be broader than that traditionally expected in an adversarial system of justice. While the role of judges in North America developed within an adversarial system, descriptions of the judicial function both in codes of judicial ethics and court decisions fit with judicial dispute resolution.<sup>174</sup>

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<sup>173</sup> Landerkin & Pirie, *supra* note 53, at 283-4.

<sup>174</sup> *Ibid* at 285, referencing:  
 - the 1990 American Bar Association’s Model Code of Judicial Conduct, and in particular, Canon 3(7)(d) and (8), which authorize and encourage mediation and facilitate settlement; and  
 - the Canadian Judicial Council’s, *Ethical Principles for Judges* (Ottawa: Canadian Judicial Council, 1998) - online at [www.cjc-ccm.gc.ca](http://www.cjc-ccm.gc.ca) [CJC, “Ethical

They concluded that “[w]hen considered from an ethical perspective, the change in judicial function is very clear, moving from traditional adjudicative limits to carefully flexing the new judicial boundaries to settlement roles”.<sup>175</sup> In expanding on this, they add the language of the Supreme Court of Canada in *Re Therrien* to describe a judge:

... - *impartiality*<sup>176</sup>, *independence, integrity, public respect and confidence, good judgment, a pillar of the process, serving ideals of Justice and Truth, irreproachable conduct, restraint, propriety, decorum, humanity, unique-might* easily describe the [judicial] mediator.... *Judges acting as judicial mediators are now part of*

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Principles”], including the devotion to “judicial duties *broadly defined* which include ... judicial tasks essential to the court’s operation”.

Danielson refers to the CJC, “Ethical Principles”, *supra* note 2 at 21, in some depth at 21.

See also, addressing the CJC Ethical Principles: Justice Georgina R. Jackson, “The Mystery of Judicial Ethics: Deciphering the ‘Code’” (2005) 68 Saskatchewan Law Review 1.

<sup>175</sup> Landerkin & Pirie, *supra* note 53 at 286, asserting that this judicial role must be maintained in this process.

<sup>176</sup> Another view, suggesting that the JDR justice does not need to maintain impartiality, I believe, must be discounted, but, otherwise, I believe the comments of Joseph and Gilbert (Daniel Joseph and Michelle L. Gilbert, “Breaking the Settlement Ice: The Use of Settlement Judges in Administrative Proceedings” (1989-90) 3 The Administrative Law Journal, 571, at 585), as quoted by Danielson, *supra* note 2 at 28, are apropos of the settlement justice:

The chief advantage of the settlement judge is that he or she is both a visitor from outside the case who will not judge the merits – or the counsel – or have any other impact on the formal decision making, and, at the same time, is as knowledgeable and authoritative on the merits – and on the trial judge – as anyone can be who is not a part of the trial process. The settlement judge helps initiate compromise through the respect and deference that his or her position as a judge evokes. By being a judge but not *the* judge who decides the case, the settlement judge can command respect and deference without the need to observe the due process mandate to maintain impartiality. His or her role is to get the parties to drop the adversary pose and to expand efforts to reach a stage of accommodation.

*the fabric of the judicial function.*<sup>177</sup>

Landerkin and Pirie conclude the discussion (in a way with which I strongly agree) by asserting that the importance of the judicial function is a recognition that “impartiality, independence, and integrity must be maintained for they are the *sine qua non* of the essence of a judge's being” and that “public confidence in the judge [must] ... never be eroded . These qualities are sacrosanct in everything a judge does....”. They note too that “*public confidence - would be compromised if the judge as mediator was not qualified or skilled.*” They also asserted that the public “endorse and support this continued evolution of the judicial function as a part” of dispute resolution:

Public confidence would not be eroded whether the judge is judging, mediating, opining, managing, writing, counseling a distraught witness, or otherwise dispensing justice. Done uniquely well, JDR would surely not diminish the respect for the judiciary in the minds of such persons but only enhance it.<sup>178</sup>

Perhaps Chief Justice Dickson best stated the importance of maintaining the proper judicial role in doing JDRs: “we must above all make sure that we do not undermine the legitimacy of our judicial system”, but remain “consistent with the principles of fundamental justice that underlie our judicial system.”<sup>179</sup>

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<sup>177</sup> Landerkin & Pirie, *supra* note 53 at 289, referencing *Re Therrien*, [2001] 2 S.C.R. 3 at 74-5 (emphasis in the original).

<sup>178</sup> *Ibid*, at 289, referencing mediator ethics cited by Pirie in *Alternative Dispute Resolution: Skills, Science and the Law* (Toronto: Irwin Law, 2000), at 191-200 (emphasis added).

<sup>179</sup> Right Honorable Brian Dickson, “ADR, The Courts and The Judicial System: The Canadian Context” (1984) *The Law Society Gazette* 234, at 234 and 241-2, as related by Landerkin & Pirie, *supra* note 53 at 292, and referenced by Danielson, *supra* note 2 at 23-4.

Additionally, Barry (*supra* note 2 at 235, and 241-2) noted that former Chief

These comments generally represent the conclusions to which I have also come, supported by the comments of the participants from the Surveys.

This analyses causes me to conclude that JDRs are no longer an occasional exception to trial, but as one tool, along with other judicial tools, principally adjudication, as part of dispute resolution in the Court.

This is also a synergistic process, where the improvement in each component of the process, improves the next and the result. As I have noted the phenomenon pertaining to my judicial colleagues, Macfarlane also notes the same in the context of lawyers:

As people become more familiar and comfortable with new structures and procedures, normative change will follow. While changing the process does not in itself change attitudes, there may be a longer-term relationship between process and attitude change. Although mandatory mediation may secure lawyers' obedient conduct without necessarily changing their minds and hearts, the changed conduct may, with future practice and exposure, affect a lawyer's normative values and attitudes towards mediation.<sup>180</sup>

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Justice Dickson had two concerns with ADR:

First, some cases may be pushed out of the courts and the parties forced to settle because of an over-burdened system .  
Secondly, ADR must be developed in a manner consistent with "the principles of fundamental justice that underlie our judicial system".

He identified these "principles of fundamental justice" as including "equal access, established procedures, reasoned decisions, public scrutiny, and qualified neutrals" - the latter speaking loudly of the need for an adequate standard of JDR judicial training addressed herein. He added a note to recognize that the former Chief Justice was "especially concerned with the impact that judicial involvement in ADR may have on the public's perception of judicial impartiality".

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Macfarlane, *supra* note 18 at 92, referencing:  
- J. Macfarlane, "Will Changing the Process Change the Outcome? The Relationship between Procedural and Systemic Change" (2005) 65 Louisiana Law Review 1487;

These changes in the norm from adjudication only, to adjudication and other dispute resolution mechanisms, have been both predicted<sup>181</sup> and institutionalization has been realized. Of the latter, Kenneth P. Stewart and Patricia Henshall argue that as dispute resolution methods become normative, one can “take the ‘alternative’ out of ADR so that ‘dispute resolution’ includes mediation and arbitration as well as litigation and settlement conferences”<sup>182</sup>.

## VI. CONCLUSION

Twenty years after the Pound Conference, Stempel, in describing it in detail, stated that Sander’s “proposal continues to hold considerable attraction. Among the many aspects of the Pound Conference worth remembering, it stands out as a particularly instructive potential blueprint for the future...”, and that his “concept and article retain visionary status”, although he conceded that it is a concept that is “in need of careful construction and administration”. He ended his initial discussion on the concept by saying that it had been implemented in some jurisdictions and

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- Roselle L. Wissler, “When Does Familiarity Breed Content? A Study of the Role of Different Forms of ADR Education and Experience in Attorneys’ ADR Recommendations” (2002) 2 Pepperdine Dispute Resolution Law Journal 1999;  
 -John Lande, “Getting the Faith: Why Business Lawyers and Executives Believe in Mediation” (2000) 5 Harvard Negotiation Law Review 137, at 199; and  
 - Morris L. Medley and James A. Schellenberg, “Attitudes of Attorneys Toward Mediation” (1994) 12 Mediation Quarterly 185, at 195-6.

<sup>181</sup> On the projection of the normative change from adjudication only to adjudication and other dispute mechanisms, see the prediction of Dean Anderson in 1986: Pitblado Lectures, *supra* note 16 at 1.

<sup>182</sup> Kenneth P. Stewart and Patricia Henshall, “Take the ‘Alternative’ out of Alternative Dispute Resolution: Results of an ADR Survey of Administrative Judges” (1993) 14 Journal of the Kansas Bar Association 62.

was “largely applauded by its operators and inspectors”<sup>183</sup>.

The challenge in the process of adding JDR to the Court’s procedures is to maintain the principle of alternatives to mainstream adjudication. In reviewing the history of ADR back to Anglo-Saxon times as a “dispute processing continuum”, and noting its “Janus-like” quality, Sanchez asserts that “a central challenge facing present participants in the ADR movement is to preserve the integrity of that continuum into the future”<sup>184</sup>.

Yet, that need not be the end of innovation. Indeed, in a deeply thoughtful article, Roberge has challenged judicial mediators to look further into the issues that got us here and at what further innovation is available and perhaps should be used to “permit the judicial system to cope with the challenges raised by the critics”. He started his analysis by raising the question of whether we are trying to answer the “practical criticism” of the current system (focusing on costs and delay in access to justice) or the “social criticism” of the current system (focusing on the “limitations of formal law in adapting to the new pluralistic social situations”). He studied the

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<sup>183</sup> Stempel, “Reflections” *supra* note 37, at 324 and 333-4, referencing in the latter case: Erica Gray, “Multi-Door Courthouse: A Working Paper for the National Symposium on Court-Connected Resolution Research”, in Susan Keilitz, ed., *State Justice Institute, National Symposium on Court-Connected Dispute Resolution Research: Research Findings; Implications for the Courts; Future Research Needs* (National Center for State Courts, 1994), at 91-109.

<sup>184</sup> Sanchez, *supra* note 92 at 671, referencing:  
 - her own “Towards a History of ADR: The Dispute Processing Continuum in Anglo-Saxon England and Today” (1996) 11 *Ohio State Journal on Dispute Resolution* 1; and  
 - Frank E.A. Sander and Jeffrey Z. Rubin, “The Janus Quality of Negotiation: Dealmaking and Dispute Settlement” (1988) 4 *Negotiation J.* 109.

Sanchez explained (at 671, footnote 2) that the “inter-related nature of dispute resolution and deal-making negotiation has been dubbed the ‘Janus’ quality of negotiation - after the Greek God of doorways, whose twin heads are seen carved at the top of stone archways, facing in opposite directions”. How appropriate for the multidoor courthouse!



literature (including many experts quoted or referenced herein), looked at the results of a broad National Judicial Institute study of Canadian judicial mediators, attempted to characterize a number of judicial mediation styles and tried to measure their effectiveness as solutions to problems perceived with the current system.<sup>185</sup> The further pursuit of his analysis is much beyond the scope of this thesis, but it demonstrates that there are further dispute resolution methods and styles to examine for possible incorporation into an institutionalized JDR Program as we move forward.

The empirical research data from the Survey, the author's judicial JDR experience, and legal literature research, demonstrate that the JDR Program in the Court is multi-faceted in available dispute resolution techniques and is successful. Additionally, it is judicially led. It has become a key component - indeed, integral part - of dispute resolution in the Court. As such, the JDR Program has become normative (that is, institutionalized) at the Court. Put another way, from my research of the literature on the subject and the Court's JDR experience, including the Survey data, the historic normative ordering of the resolution of disputes before the Court by adjudication alone is now joined, again in a normative sense, by JDR, to create a relatively seamless web of dispute resolution.

Indeed, from experimentation to alternatives to institutionalization, ADR has made a tremendous progression to this point:

For decades different forms of alternative dispute resolution (ADR) have been proposed, developed, critiqued, modified, renamed, redefined, and slowly brought *within* the ... edifice of state-based normative ordering. Some see this as the vindication of the "multi-doored courthouse" ... which gives a more human face to the law and its institutions. Others see it as a dangerous dilution or even undermining of justice, a faddish

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Roberge, "Innovative" *supra* note 112, generally and at 3.

striving for speed, flexibility, and efficiency at the expense of principle and accountability. What is clear is that the institutionalization of ADR is an indication of fundamental changes at work *in* our legal system and in our concepts of justice and law.<sup>186</sup>

From this view, which I share, it is clear that these dispute resolution processes are now *within* our system of dispute resolution in the Court, in a normative, institutionalized and ordered way, along side the previous norm of adjudication only.

As to the nature of adjudication and other dispute resolution processes working together, the realization of this normative, institutionalized goal allows but a brief celebration before we start to explore the next frontier:

... judicial mediation heralds a new, participant-centered normative order, one that conceptualizes litigation more broadly and holistically and, thus, offers justice that is fuller and better adapted to the needs of parties with a variety of conflicts.

It is increasingly apparent that "alternative" dispute resolution is becoming part of the mainstream, a part of the legal landscape .... in our opinion, the operative question is now no longer whether ADR has a place in the justice system, but rather how, where, and who should do it. It is now time to begin assessing the integration of ADR in our legal system, not so much its practical impact (which has been the object of research already) but its normative impact (which remains largely still to be examined).<sup>187</sup>

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<sup>186</sup> Otis & Reiter, *supra* note 34 at 351-2 (emphasis added). In footnotes, Otis & Reiter reference:  
 - Judith Resnik, "Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication" (1995) 10 Ohio St. J. Disp. Res. 211, at 216-8, for the references to Frank Sander's innovative description;  
 - Menkel-Meadow, "Whose" *supra* note 34; and  
 - Sternlight *supra* note 34.

<sup>187</sup> *Ibid*, at 353-5.

What is next? Well, Otis and Reiter identify the next frontier as not only continuing to bring existing alternative dispute resolution mechanisms into the courts' institutional processes, but also exploring other streams of resolution methods alternative to adjudication:

... we should see a dispute-resolution continuum [between] state institutions ... and "informal" methods ... [making] room for other forms of normative ordering on an equal footing with traditional adjudication.

What ADR, in general, and judicial mediation, in particular, represent are the institutionalization of some of these informal ways of normative ordering, bringing the power of informal justice within the purview of state legal systems. ... we do not argue for replacing traditional adjudication, nor for juridicizing the vast numbers of everyday conflicts that are already satisfactorily dealt with outside the courts ... by professional mediators. ... complementing traditional adjudication with judicial mediation allows state dispute-resolution institutions to reflect new exigencies better, which helps them provide better justice for those who bring their disputes to the justice system for resolution.<sup>188</sup>

Thus, it is not a handcuffing of adjudication but rather an expansion of the whole body of alternatives to work with adjudication:

... what we see happening ... cannot be - a dilution ... of the adjudicative function to meet efficiency targets but rather the development of another form of justice, complementary to the classical system and based on an entirely different model of rendering justice.<sup>189</sup>

That is precisely how I view the role of JDR Program in our Court - a state-of-the-art trial adjudication system and a state-of-the-art JDR system, working

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<sup>188</sup> *Ibid*, at 357, referencing Roderick A. MacDonald, *Lessons of Everyday Law*, (Montreal: McGill-Queen's University Press, 2002), at 38-42 (published for the Law Commission of Canada and the School of Policy Studies, Queen's University).

<sup>189</sup> *Ibid*, at 361.

together to provide alternatives *within* the Court for the resolution of disputes commenced in the Court, while, at the same time, allowing others *outside* the Court to provide ADR serves to disputes, whether litigated in the Court or not. Others have come to the same conclusion:

Consent-based normativity can co-exist with state-based (or authoritative) normativity. Judicial mediation ...combines a basis in the will of the parties with many of the semiotic trappings of state-based law (for example, it is conducted by a judge within the courthouse - though not in a courtroom - and it plays out in the *shadow of adjudication*, since participants can at any time abandon mediation and return to the adjudicatory track). Some types of conflicts naturally lend themselves better to one or the other, but, in general, deciding whether a dispute should be litigated or mediated is a question of tool selection or "fitting the forum to the fuss."<sup>190</sup>

This is exactly the institutionalized, normative result that I now see in the dispute resolution regime in the Alberta with private ADR outside the Court, and the JDR Program, along with the traditional adjudication, in the Court. This is consistent with the view that "it is important to dispel the ideal that there is or ought to be any one particular settlement conference mode, model or style that should or needs to be embraced or implemented to ensure a successful settlement outcome"<sup>191</sup>. One size does not fit all, and the

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<sup>190</sup> *Ibid*, at 378 (emphasis added), referencing:  
 - Lon L. Fuller, "Two Principles of Human Association" (1969) 11 *Nomos* 3;  
 - Lela P. Love, "Images of Justice" (2000) 1 *Pepp. Disp. Resol. L.J.* 29;  
 - Lon L. Fuller, "The Forms and Limits of Adjudication" (1978) 92 *Harv. L. Rev.* 353, at 366-71;  
 - Lester M. Salamon, "The New Governance and the Tools of Public Action: An Introduction", in Lester M. Salamon ed., *The Tools of Government: A Guide to the New Governance* (New York: Oxford University Press, 2002); and  
 - for that famous expression, see Frank E.A. Sander & Stephen B. Goldberg, "Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure" (1994) 10 *Neg. J.* 49.

<sup>191</sup> Michael Fogel, "An Introduction to Judicial Settlement Conferencing" (Paper presented to the New Federally Appointed Judges Seminar, Canadian Institute for the Administration of Justice/National Judicial Institute, Mont-Tremblant, March 2008 [unpublished], at 1.

parties can choose. While adjudication is unilateral at the instigation of one party (the plaintiff), both ADR (privately or court annexed) and JDR (within the Court currently) are based on the consent - indeed, the agreement - of all parties to the dispute. Therefore, I believe that this new institutionalized normative ordering has been established - adjudication and JDR (with its broad range of services<sup>192</sup>) *within* the Court. Accordingly, as others have done<sup>193</sup>, I declare that the “multi-door courthouse” is open in Alberta.

This closes the circle. The “multi-doored courthouse”, a concept originating with Sander, is thus a very apt way to look at what has, in fact, happened in the Court with the JDR Program. Sander explained his 1976 concept this way:

It is important to recognize that the ADR movement is not an anti-court movement, as is often asserted. It is an effort to have the courts more effectively doing those things that they are particularly fit to do, and have other institutions like arbitration and mediation dispose of those cases that don't require the specialized expertise of courts. That is the idea behind the multi-door courthouse -- a comprehensive justice center where cases are screened and analyzed so that they can be referred to that process or sequence of processes that's best suited to provide an

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<sup>192</sup> Magistrate Judge J. Daniel Breen, “Mediation and the Magistrate Judge” (1995-6) 26 U. Mem. L. Rev. 1007, at 1023, recognizing that “a ‘multi-door courthouse’ involves a program which offers a variety of ADR options or channels a case to a particular settlement process”, and relying on CPR Institute Judicial Project (various authors), “A Taxonomy of Judicial ADR” (1991) 9 Alternatives to the High Cost of Litigation 97, at 98.

<sup>193</sup> Lande, “Shifting”, *supra* note 117 at 202-3, stating that “[i]n recent years, courts have become referral managers in various permutations of Professor Frank Sander’s idea of multi-door courthouses”, referencing Frank E.A. Sander, “Varieties” *supra* note 37 at 111-14, and later, at 207, relying upon Lawrence B. Solum, “Alternative Court Structures in the Future of the California Judiciary; 20/20 Vision” (1993) 66 S. Cal. L. Rev. 2121 and Roberta A. Baruch Bush, “Alternative Futures: Imagining How ADR May Affect the Court System in Coming Decades” (1996) 15 Rev. Litig. 455.

effective and responsive resolution.<sup>194</sup>

What is the next step? Where is the future? Roberge suggests<sup>195</sup> that “judicial mediation may be an answer to the contemporary Canadian judicial system’s challenges”, “if it is conceived and practiced along innovative lines”. This would see less “traditional type” mediation - “the expert in law and risk-manager” (really a “shadow of the law” evaluator, in my view), and more “innovative type” mediation - “the expert in problem-solving and integrative solution manager” (more of an interest based process, in my view), or the “moralizing restorative type” of mediation - “the participatory justice facilitator” (facilitator only, in my view). Others have suggested that, rather than innovation into the latter two - the last particularly - we justices should not stray far from the “shadow of the law”. While making sure to protect the integrity of the judicial system, we will need to experiment with and measure these alternatives to determine the best practices in the JDR Program as part of the Alberta multi-doored courthouse of tomorrow.

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<sup>194</sup> Sander, “Future”, *supra* note 18 at 5.

Baer, *supra* note 40 at 133, states that “[f]or the most part, [Sander’s] vision has become a reality”.

<sup>195</sup> Roberge, “Innovative” *supra* note 112 at 1. See also, Roberge. “Model” *supra* note 73.

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**APPENDIX 1 - EXECUTIVE SUMMARY OF KEY RESULTS - LAWYERS<sup>196</sup>**

October 6, 2009

COURT OF QUEEN'S BENCH OF ALBERTA  
 JUDICIAL DISPUTE RESOLUTION (JDR)

**QB JDR PARTICIPANTS' SURVEY - 2007 - 2008****REPORT ON LAWYERS' SURVEY KEY RESULTS<sup>197</sup>****LAWYER SURVEY - "BASIC QUESTIONS"****A. AREA**

A1. At which judicial centre did you participate in a JDR:

- Calgary (01) - **176 = 47 %<sup>198</sup>**
- Edmonton (03) - **162 = 43 %**

**B. REPRESENTATION**

B1. Did the other side(s) represent themselves at the JDR or have a lawyer:

- Self-Represented - **1 = <1 %**

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<sup>196</sup> Taken from EVALUATION REPORT - APPENDIX 4 - SUMMARY OF KEY RESULTS - LAWYERS) dated December 8, 2008.

<sup>197</sup> These "Key Results" are taken from the Evaluation Report, "Appendix 4 - Summary of Results - Lawyers", and in most cases, except where noted, represent the results from the two highest choices (normally rating "4" and "5"). For more detail go to Appendix 4.

<sup>198</sup> Except as noted % are rounded to the closest number - the total might not be exactly 100% due to rounding. Note also that in some cases more than 1 answer is possible (e.g. type of Family Law JDR) such that the % is more than 100%.

- Lawyer Represented - **364 = 97 %**

### C. TYPE OF CASE & JDR TIMING

C1. What type of case were you involved in at the JDR:

- Personal Injury - **243 = 65 %**
  - Motor Vehicle Collision - **204 = 83 %**
- Family Law - **73 = 20 %**
  - Matrimonial Property - **59 = 80 %<sup>199</sup>**
  - Parenting of Child(ren) - **25 = 34 %**
  - Child or Spousal Support - **48 = 66 %**

- Employment - **10 = 3 %**
- Insurance Coverage - **6 = 2 %**
- Contract Dispute - **18 = 5 %**
- Other - **22 = 6 %**

C2. How long after the litigation commenced did this JDR take place?(to the closest time period)

- 2 - 4 years - **129 = 34 %**            ]                    ]
- 4 - 6 years - **100 = 27 %**            ] **172 = 46%** ] **301 = 80%**
- 6 or more years - **72 = 19 %**                                    ]

### D. YOUR ROLE

D1. Were you the lawyer at the JDR for the/a:

- Plaintiff - **183 = 49 %**
- Defendant - **180 = 48 %**

D2. In what capacity did your instructing client attend:

- Personal - **220 = 59 %**
- Corporate Agent - **24 = 6%**

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<sup>199</sup>

This is an example where more than 1 selection could be made and the total is more than 100% - i.e. some Family Law disputes involved more than 1 issue - e.g. of the 73 Family Law JDRs, 78 % had an issue of matrimonial property, 34% had an issue of parenting, etc.

Adjuster - **120 = 32 %**

D3. Have you participated in JDRs before this JDR?

Yes - **359 = 96%**

If "Yes", how many?

5 - 10 - **81 = 23%** **]291 = 81%**

10 or more - **210 = 58%** **]**

### E. TYPE OF JDR & PRE-JDR INFORMATION

E1. What type of JDR did you participate in (choose all that apply):

a.  Negotiation or Mediation (your client and opposite party negotiated, with your assistance, with a Justice facilitating and chairing the session, but not providing any opinions)

**- 134 = 36%**

b.  Evaluative Mediation (the Justice not only facilitated and chaired the session, but provided, or was available to provide, opinions (on the law or evidence, or the amount of damages) and/or evaluations of the risk of success or failure at trial)

**- 245 = 66 %**

c.  Mini-Trial (you and/or your client presented information and argument on your client's case to the JDR Justice, who gave a non-binding opinion for your guidance)

**- 110 = 29%**

d.  Binding JDR (a Negotiation or Mediation in which the parties agreed that the JDR Justice was to give a binding opinion or decision if the negotiation was not successful)

**- 41 = 11%**

E2. ...

E3. Once you started considering a JDR, what motivated your client to agree to go to a JDR? (choose all that apply)

Less cost than trial - **280 = 75%**

- More settlement options than trial - **151 = 40%**
- Quicker than trial - **270 = 72%**
- Less risk than trial - **207 = 55 %**
- Less formal and stressful than trial - **193 = 52%**
- To get a judicial opinion - **253 = 68%**
- Needed to settle rather than trial - ongoing business, community or personal relationship - **45 = 12%**

E4. ...

E5. ...

## **F. JDR SUCCESS**

F1. Was the JDR successful (ended the litigation), unsuccessful (did not end the litigation), or partially successful (resolved one or more issues):

- Not successful on any issue - **40 = 11 %**
- Successful - **331 = 89 %**
  - on all issues - **304 = 81 %**
  - on some issues (choose the closest) - **27 = 7%**
    - a. When was the JDR successful on all issues, or some issues, or significantly contributed to ultimate success?
      - At the JDR - **220 = 59 %**
      - After the JDR (choose the closest time frame)
        - 1 week later - **8 = 2 %**
        - 1 month later - **6 = 2 %**
        - 3 months later - **5 = 1 %**
  - No answer - **131 = 35 %**

## **G. JUDICIAL PARTICIPATION**

G1. Did you and/or your client caucus with the JDR Justice, separate from the other side?

- Yes - **246 = 66 %**

...

No - **127 = 34%**

...

## H. JUDICIAL QUALITIES

(Note: The purpose of this section is to use your experience, in the context of this JDR, to identify the best qualities of a JDR Justice. It is neither to identify the JDR Justice, nor to be used to provide a personal evaluation to the JDR Justice)

H1. How would you rate the JDR Justice's overall qualities in this JDR (including: preparation, knowledge, assessment of the issues, approach, style, manner, role in success, or other)? (1 = poor and 5 = excellent)

3  - **35 = 9%**

4  - **126 = 34%**

5  - **192 = 51%**

H2. If you had a choice, would you choose this JDR Justice for a future JDR?

Yes - **329 = 88%**

## I. OTHER

I1. Overall, as to the process and procedures (not the result of your litigation), how do you rate your JDR experience in this case? (1=negative; 5=positive)

3  - **33 = 9%**

4  - **132 = 35%**

5  - **187 = 50%**

I2. Would you recommend JDR to others or use it again if you had another dispute to resolve? (1 = definitely not; 3 = indifferent; and 5 = definitely yes)

4  - **68 = 18%**

5  - **286 = 76%**



13. ...

## **LAWYER' SURVEY - "ADDITIONAL QUESTIONS"**

(Some questions may have more than one answer - choose all that apply.  
For additional comments, add at the end.)

### **J. JDR TIMING & NEXT STEPS**

- J1. Which of the following identifies the stage of your litigation at the time of the JDR? (choose all that apply)
- Before Examinations for Discovery - **37 = 10%**<sup>200</sup>
  - After Examinations for Discovery, but before Experts Hired - **95 = 25%**
  - After Examination for Discovery and Expert Reports - **170 = 45%**
  - When ready for trial - **114 = 30%**
- J2. From your total JDR experience, when in this type of case do you think that a JDR is/would have been most useful (choose all that apply)?
- Before Examinations for Discovery - **39 = 10%**
  - After Examinations for Discovery, but before Experts Hired - **118 = 32%**
  - After Examination for Discovery and Expert Reports - **224 = 60%**
  - When ready for trial - **100 = 27%**
  - Earlier than when this JDR was held - **47 = 13%**
- J3. Whether or not your JDR was successful, if it was not/had not been successful, what will be/would have been, the next litigation step? (choose all that apply)
- Further disclosure of documents or Examination for Discovery of

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<sup>200</sup>

Note that on this and some other questions, more than 1 choice could apply, so % is more than 100%.

parties - **10 = 21%**

Further experts = **99 = 26%**

Trial - **295 = 79%**

#### **K. COMPARISON TO OTHER JDRs**

*(\*If you have not previously participated in other JDRs, go to section "L"\*)*

K1. ...

K2. ...

#### **L. EXTENT OF JUDICIAL PARTICIPATION**

*(\*Answer only L1, L2, or L3 - being the closest to the type of JDR you had\*)*

L1. Mediation and/or Evaluative Mediation - Did the JDR Justice offer any opinions (on the law, evidence, damage, or risk of success/failure at trial) on his/her own initiative?

Yes - **255 = 68%**

OR

L2. ...

OR

L3. Binding JDR - Was a binding opinion or decision necessary because negotiation or mediation was not successful?

Yes - **15 = 4%**

No - **12 = 3%**

L4. Did you seek a choice of JDR Justice?

Yes - **274 = 73%**

If "Yes", did you get one of your choosing?

Yes - **253 = 92%**

L5. Regardless of your answers to L4., as a result of your experience in the JDR just completed in this case, do you think a choice of the JDR Justice would be helpful in the future?

Yes - **334 = 89%**

**M. ROLE OF JDR JUSTICE IN SUCCESS OR LACK OF SUCCESS**

M1. Would you have achieved the same outcome of success/lack of success, without the JDR Justice, merely by a negotiation session with the parties and/or lawyers present?

No - **297 = 79%**

M2. Did involvement of the JDR Justice significantly improve the prospects for, or the achievement of, settlement?

Yes - **338 = 90%**  No - **16 = 4%**

- No answer - **20 = 5%**

-TOTAL - **374 = 99%**

If "Yes", specify the degree to which it helped: (1 = little; 5 = a lot)

1  - **2 = <1%**

2  - **6 = 2%**

3  - **20 = 5%**

4  - **90 = 24%**

5  - **185 = 49%**

- No answer - **71 = 19%**

- TOTAL - **374 = 100%**

*(\*If settlement was achieved on all issues, go to section "N"\*)*

M3. ...

**N. JUDICIAL PARTICIPATION**

N1. ...

N2. ...

N3. ...Whether the JDR Justice was asked or offered, did the JDR Justice actually caucus with you and your client?

Yes - **236 = 63%**

No - **120 = 32%**

If "Yes", did the JDR Justice discuss the strength and weaknesses of your case?

Yes - **203 = 54%**

If "Yes", was it helpful?

N4. If you were to do another JDR would you wish the JDR Justice to caucus with you and your client?

Yes - **271 = 72%**

#### O. JUDICIAL QUALITIES

(Note: The purpose of this section is to use your experience, in the context of this JDR, to identify the best qualities of a JDR Justice. It is neither to identify the JDR Justice, nor to be used to provide a personal evaluation to the JDR Justice)

(\*Rate the qualities where 1 = poor; 5 = excellent\*)

O1. In terms of **GENERAL APPROACH**, was/did the JDR Justice:

a. Prepared (appeared to have read all or most relevant material)?

4  - **92 = 25%**

5  - **244 = 65%**

b. Knowledgeable (or appeared to be so) on the law relevant to your dispute?

4  - **96 = 26%**

5  - **231 = 62%**

c. Explain the JDR process to your client:

Yes - **337 = 90%**

If "Yes", was the explanation helpful? (1 = little; 5= most)

4  - **137 = 37%**

5  - **109 = 29%**

d. Polite, courteous and pleasant (as opposed to impolite, discourteous and gruff)?

4  - **55 = 13%**

5  - **292 = 78%**

- e. Accommodating and sensitive to you (and your client) telling your story to him/her and to the other side?

4  - **83 = 22%**

5  - **236 = 63%**

- f. Frank, but fair in expressing his/her views on your risks in the dispute?

4  - **89 = 24%**

5  - **235 = 63%**

O2. ...

- d. Highly emotional (#1), or cool and logical (#5)

4  - **112 = 30%**

5  - **203 = 54%**

- e. Patient with the parties and their participation (1=low; 5=high)

4  - **90 = 24%**

5  - **228 = 61%**

- f. Appeared impartial and open minded (1=low; 5=high)

4  - **98 = 26%**

5  - **214 = 57%**

O3. Over all, how do you measure the effectiveness of the JDR Justice (1=low; 5=high):

4  - **100 = 27%**

5  - **210 = 57%**

O4. Based on your (above) assessment, if you were doing another JDR, what is the rating you would give as to whether you would choose this JDR Justice (if you had a choice) for that future JDR? (1=low; 5=high)

4  - **85 = 23%**

5  - **209 = 57%**

O5. ...

c. Gently Persistent

3  - **78 = 21%**

4  - **137 = 37%**

5  - **108 = 29%**

O6. ...

O7. ...

O8. ...

P. **OTHER**

P1. Having considered these "Additional" questions, is there anything that we didn't ask you about on which you would like to comment? Do you have further believes as to whether the JDR program can be improved - if so, how? Do you have any additional comments?

**APPENDIX 2 - JDR SERVICE ANALYSIS<sup>201</sup>**

October 6, 2009

**TABLE 6.6 - MINI-TRIAL ANALYSIS**

| DESCRIPTION             | CAL                        | EDM                          | LETH |
|-------------------------|----------------------------|------------------------------|------|
| Total                   | 18/176 = 10%               | 85 <sup>202</sup> /162 = 52% | 2    |
| Pure Mini Trial         | 2/18 = 11%<br>2/176 = 1%   | 46/85 = 54%<br>46/162 = 28%  | 0    |
| Mini Trial & Mediation  | 3/18 = 17%<br>3/176 = 2%   | 2/85 = 2%<br>2/162 = 1%      | 0    |
| Mini Trial & Evaluation | 3/18 = 17%<br>3/176 = 2%   | 20/85 = 24%<br>20/162 = 12%  | 1    |
| All Three               | 10/18 = 56%<br>10/176 = 6% | 14/85 = 16%<br>14/162 = 9%   | 1    |
| Caucusing               |                            |                              |      |
| Yes                     | 13/18 = 72%                | 15/85 = 18%                  | 1    |
| No                      | 3/18 = 17%                 | 60/85 = 71%                  | 1    |
| No, but wish caucus     | 1/3 = 33%                  | 16/60 = 27%                  | 0    |
| No, but not wish caucus | 2/3 = 67%                  | 34/60 = 57%                  | 1    |
| Success                 |                            |                              |      |
| 100%                    | 14/18 = 78%                | 67/85 = 79%                  | 2    |
| 0%                      | 1/18 = 6%                  | 7/85 = 8%                    | 0    |
| Some%                   | 3/18 = 17%                 | 9/85 = 11%                   | 0    |

<sup>201</sup> Taken from EVALUATION REPORT - APPENDIX 6: Table 6.6 - MINI-TRIAL ANALYSIS; 6.7 - MEDIATION/EVALUATION ANALYSIS; and 6.8.4 - BINDING JDR ANALYSIS; dated December 8, 2008.

<sup>202</sup> The numbers below do not equal 85, as 3 have some combination with binding JDRs.

| DESCRIPTION     | CAL         | EDM         | LETH |
|-----------------|-------------|-------------|------|
| Type of Case    |             |             |      |
| Personal Injury | 13/18 = 72% | 70/85 = 82% | 1    |
| Motor Vehicle   | 10          | 64          | 1    |
| Slip & Fall     | 1           | 2           | 0    |
| Other           | 2           | 3           | 0    |
| Family          | 3/18 = 17%  | 9/85 = 11%  | 0    |
| Property        | 3           | 7           | 0    |
| Parenting       | 0           | 1           | 0    |
| Support         | 0           | 0           | 0    |
| Other           | 0           | 1           | 0    |
| Employment      | 0           | 1           | 0    |
| Insurance       | 0           | 1           | 0    |
| Contract        | 1           | 2           | 1    |
| Other           | 1           | 2           | 0    |
|                 |             |             |      |



TABLE 6.7 - MEDIATION/EVALUATION ANALYSIS

| DESCRIPTION                      | CAL                            | EDM                         | LETH           |
|----------------------------------|--------------------------------|-----------------------------|----------------|
| Total                            | 138/176 = 78%                  | 58/162 = 36%                | 17/18 = 94%    |
| Pure Mediation                   | 28/138 = 20%<br>28/176 = 16%   | 6/58 = 10%<br>6/162 = 4%    | 5/17 = 29%     |
| Pure Evaluation                  | 79/138 = 57%<br>79/176 = 45%   | 39/58 = 67%<br>39/162 = 24% | 10/17 = 59%    |
| Both                             | 31/138 = 22%<br>31/176 = 18%   | 13/58 = 22%<br>13/162 = 8%  | 2/17 = 12%     |
| Caucusing (from Evaluation only) |                                |                             |                |
| Yes                              | 75/79 = 95%                    | 23/39 = 56%                 | 9/10 = 90%     |
| No                               | 4/79 = 5%                      | 17/39 = 44%                 | 1/10 = 10%     |
| No, but wish caucus              | 2                              | 4                           | 0              |
| No, but not wish caucus          | 2                              | 8                           | 0              |
| Success                          |                                |                             |                |
| 100%                             |                                |                             |                |
| - Pure Mediation                 | 21/138 = 15%<br>21/176 = 12%   | 4/58 = 7%<br>4/162 = 2%     | 4/17 = 24%     |
| - Pure Evaluation                | 67/138 = 49%<br>67/176 = 38%   | 33/58 = 57%<br>33/162 = 20% | 10/17 = 59%    |
| - Pure Both                      | 21/138 = 15%<br>21/176 = 12%   | 10/58 = 17%<br>10/162 = 6%  | 0/17 = 0%      |
| - Total                          | 109/138 = 79%<br>109/176 = 62% | 47/58 = 81%<br>47/162 = 29% | 14/17 =<br>82% |
| 0%                               |                                |                             |                |
| - Pure Mediation                 | 5/138 = 4%<br>5/176 = 3%       | 1/58 = 2%<br>1/162 = <1%    | 1/17 = 6%      |
| - Pure Evaluation                | 8/138 = 6%<br>8/176 = 5%       | 5/58 = 9%<br>5/162 = 3%     | 0              |

| DESCRIPTION                     | CAL                           | EDM                      | LETH       |
|---------------------------------|-------------------------------|--------------------------|------------|
| - Pure Both                     | 7/138 = 5%<br>7/176 = 4%      | 1/58 = 2%<br>1/162 = <1% | 2/17 = 12% |
| - Total                         | 20/138 = 14%<br>20/176 = 11%  | 7/58 = 12%<br>7/162 = 4% | 3/17 = 18% |
| Some%                           |                               |                          |            |
| - Pure Mediation                | 1/138 = <1%<br>1/176 = <1%    | 0/58 = 0%<br>0/162 = 0%  | 0          |
| - Pure Evaluation               | 4/138 = 3%<br>4/176 = 2%      | 2/58 = 3%<br>2/162 = 1%  | 0          |
| - Pure Both                     | 3/138 = 2%<br>3/176 = 2%      | 1/58 = 2%<br>1/162 = <1% | 0          |
| - Total                         | 137 <sup>203</sup> /176 = 78% | 57/162 = 35%             | 0          |
| Type of Case (All 3 categories) |                               |                          |            |
| Personal Injury                 | 104/138 = 75%                 | 34/58 = 59%              | 9/17 = 53% |
| Motor Vehicle                   | 87                            | 30                       | 5          |
| Slip & Fall                     | 6                             | 1                        | 2          |
| Other                           | 9                             | 2                        | 2          |
| Family                          | 24/138 = 17%                  | 13/58 = 22%              | 6/17 = 35% |
| Property                        | 3                             | 6                        | 5          |
| Parenting                       | 3                             | 6                        | 0          |
| Support                         | 9                             | 6                        | 1          |
| Other                           | 3                             | 0                        | 0          |
| Employment                      | 2/138 = 1%                    | 5/58 = 9%                | 0          |
| Insurance                       | 3/138 = 2%                    | 4/58 = 7%                | 0          |
| Contract                        | 0                             | 0                        | 1/17 = 6%  |
| Other                           | 6/138 = 4%                    | 2/58 = 3%                | 3/17 = 18% |
|                                 |                               |                          |            |

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<sup>203</sup>

The totals don't add up to the number of JDRs conducted because, it appears, one participant did not complete the success fields.

TABLE 6.8 - BINDING JDR ANALYSIS

| DESCRIPTION              | CAL          | EDM          | LETH       |
|--------------------------|--------------|--------------|------------|
| Total - Pure Binding JDR | 19/176 = 11% | 19/162 = 12% | 1/18 = 6%  |
| Caucusing                |              |              |            |
| Yes                      | 12/19 = 63%  | 3/19 = 16%   | 1/1 = 100% |
| No                       | 7/19 = 37%   | 15/19 = 79%  |            |
| No, but wish caucus      | 0            | 3            |            |
| No, but not wish caucus  | 6            | 8            |            |
| Success                  |              |              |            |
| 100%                     | 18/19 = 95%  | 14/19 = 74%  |            |
| 0%                       | 0            | 0            |            |
| Some%                    | 1/19 = 5%    | 5/19 = 26%   |            |
| Type of Case             |              |              |            |
| Personal Injury          | 1/19 = 5%    | 6/19 = 32%   | 0          |
| Motor Vehicle            | 1            | 5            |            |
| Slip & Fall              | 0            | 0            |            |
| Other                    | 0            | 1            |            |
| Family                   | 12/19 = 63%  | 13/19 = 68%  | 1          |
| Property                 | 6            | 10           | 1          |
| Parenting                | 7            | 3            | 0          |
| Support                  | 7            | 8            | 1          |
| Other                    | 3            | 1            | 0          |
| Employment               | 0            | 0            | 0          |
| Insurance                | 0            | 0            | 0          |
| Contract                 | 0            | 0            | 0          |
| Other                    | 4/19 = 21%   | 0            | 0          |

**APPENDIX 3 - DEMAND FOR FUTURE CAUCUSING<sup>204</sup>**

October 6, 2009

**TABLE 6.11 - DEMAND FOR FUTURE CAUCUSING**

| ITEM                               | Total      |             | CALGARY    |            | EDMONTON   |            |           | LETHBRIDGE |            | TOTAL         |  |
|------------------------------------|------------|-------------|------------|------------|------------|------------|-----------|------------|------------|---------------|--|
|                                    | #          | %           | #          | %          | #          | %          | #         | %          | #          | %             |  |
|                                    |            |             | Cal        | Total      | Edm        | Total      | Lth       | Total      |            | Grnd<br>Total |  |
| Want to caucus in the future       | 259        | 99%         | 159        | 61%        | 85         | 33%        | 15        | 6%         | 259        | 89%           |  |
| Don't want to caucus in the future | 33         | 1%          | 2          | <1%        | 31         | 11%        | 0         | 0          | 33         | 11%           |  |
| <b>TOTAL</b>                       | <b>292</b> | <b>100%</b> | <b>161</b> | <b>62%</b> | <b>116</b> | <b>44%</b> | <b>15</b> | <b>6%</b>  | <b>292</b> | <b>100%</b>   |  |

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<sup>204</sup>

Taken from EVALUATION REPORT - APPENDIX 6: Table 6.11- DEMAND FOR FUTURE CAUCUSING, dated December 8, 2008.

**APPENDIX 4 - SETTLEMENT - IMPACT ASSESSMENT<sup>205</sup>**

October 6, 2009

**TABLE 6.3 - SETTLEMENT - IMPACT ASSESSMENT**

| JUDICIAL<br>INVOLVEMENT<br>(M2) | SUCCESSFUL ON ALL ISSUES (F1) |     |          |    |            |     |
|---------------------------------|-------------------------------|-----|----------|----|------------|-----|
|                                 | CALGARY                       |     | EDMONTON |    | LETHBRIDGE |     |
| RANKING                         | #                             | %   | #        | %  | #          | %   |
| 1 (LOW)                         | 0                             | 0   | 0        | 0  | 0          | 0   |
| 2                               | 2                             | 2   | 2        | 2  | 0          | 0   |
| 3                               | 6                             | 5   | 4        | 4  | 0          | 0   |
| 4                               | 41                            | 34  | 28       | 25 | 2          | 18  |
| 5 (HIGH)                        | 70                            | 59  | 80       | 70 | 9          | 82  |
| TOTAL                           | 119                           | 100 | 114      | 99 | 11         | 100 |

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Taken from EVALUATION REPORT - APPENDIX 6: Table 6.3 - SETTLEMENT - IMPACT ASSESSMENT, dated December 8, 2008.