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Chair

Brad Mustard

Moe Hannah LLP

Calgary, Alberta

Faculty

Rhoda Dobler QC

Widdowson Kachur Ostwald Menzies LLP

Calgary, Alberta

Sid Kobewka

Kobewka Stark Lawyers and Mediators

Edmonton, Alberta

Robert McBean QC

Parlee McLaws LLP

Edmonton, Alberta

Jim McCartney

McCartney ADR

Calgary, Alberta

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Reintroduction of the Mandatory ADR Rules: A Mediator's Perspective on the Available Processes and Behaviours for Success

Prepared by:

Robert G. McBean QC

Parlee McLaws LLP



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Introduction

This paper is prepared by the writer in conjunction with the Legal Education Society of Alberta's Seminar on Alternative Dispute Resolution scheduled to take place in Calgary and Edmonton on February 19 and 25, 2020, respectively.

This paper will touch upon the various dispute resolution mechanisms that are available under Rule 4.16(1)(a) and will then focus on mediations. It will discuss some of the factors which counsel may consider in determining which dispute resolution process to choose. Finally, it will outline behaviours or approaches that in the writer's experience are most effective to optimize counsel's prospects of reaching a satisfactory settlement.

RULE 4.16(1)(a)

The lifting of the suspension of the enforcement of Rules 8.4(3)(a) and 8.5(1)(a) means that prior to obtaining a trial date, parties need to have participated in at least one of the dispute resolution processes set out in Rule 4.16. The most common dispute resolution processes are those set out in R. 4.16 (1)(a) and (c)

Rule 4.16(1)(a) is drafted widely. It simply provides that the responsibility of parties to manage their disputes includes good faith participation in “...*a dispute resolution process...involving an impartial third person;*”.

There are many dispute resolution processes which involve an impartial third person. Examples include conciliation, early neutral evaluation, facilitative mediation, evaluative mediation, judicial dispute resolution, med-arbs (mediations in which the mediator is empowered to determine any issues that the parties are not able to resolve), and arbitration.

This paper will focus on the processes most commonly used by counsel, namely mediations (both facilitative and evaluative) and JDRs, and the factors which might lead counsel to choose one process over the other.

Mediation

At its simplest, mediation is essentially an “assisted negotiation.” Simply put, the parties engage an impartial third person (a mediator) to assist them to resolve their dispute. Essentially the mediator is a “settlement process guide” whose role is to assist the parties to settle.