A Tale of Two Courts: Judicial Settlement Activity in Canada and Malaysia

Archie Zariski, BA, LLB, LLM, Grad Dip HEd
Associate Professor, Athabasca University, Canada
Email: archiez@athabascau.ca

Acknowledgements
The author gratefully acknowledges the cooperation and insight provided by YAA Tan Sri Richard Malanjum, Chief Judge of the High Court in Sarawak and Sabah, Malaysia, and by The Honourable John D. Rooke, Associate Chief Justice of the Court of Queen’s Bench, Alberta, Canada. This paper has also been enriched by the ongoing advice and encouragement of Datuk William Lau, Malaysia, and The Honourable Robert A. Graesser, Justice of the Court of Queen’s Bench of Alberta.

Abstract
This paper offers a comparative view of judicial dispute resolution (JDR) in the courts of two countries: Canada and Malaysia. It focuses on the superior court in the Province of Alberta (Court of Queen’s Bench of Alberta) and in the States of Sarawak and Sabah, both of which are under the jurisdiction of a single High Court. The focus is on the active involvement of judges or judicial officers in facilitating settlement of civil cases pending in the court including conducting settlement conferencing, mediation, and conciliation. It does not include referring cases to others for these purposes. The theoretical framework through which comparisons are made is multifocal, comprising three perspectives: organizational, institutional, and cultural. Impacts of these contextual factors on judicial activity in this area are compared.
Keywords

Alternative dispute resolution; judicial dispute resolution; judicial mediation; judicial settlement
A Tale of Two Courts: Judicial Settlement Activity in Canada and Malaysia

I. Introduction

In 2010, a presentation at the Inaugural East Asian Law and Society (EALS) Conference in Hong Kong charted the development of alternative dispute resolution (ADR) in Malaysia to that point, including what appeared to be some obstacles to its greater use, and possible future trends. Writing in the same year, Wahab and Van Gramberg noted that there was little research on court related mediation in Malaysia.¹ Since then there have been some significant developments with the effect of giving the Malaysian courts a greater role in the provision of alternative dispute resolution (ADR) processes. This article adds to research in this area by providing a conceptual framework for considering the interrelation of judges and court mediation as well as documenting current and evolving judicial settlement practices in Canada and Malaysia using comparative methodology.

Over the last three years there have also been significant developments in Canada, involving the courts and ADR. Notably, in some jurisdictions the use of ADR has been made mandatory for all litigants, and the superior court’s role in providing informal dispute resolution was confirmed and institutionalized.

This article offers a comparative view of these developments in the hopes that both jurisdictions may learn something from, and possibly teach something to, the other. The focus of the article is on the active involvement of judges in trying to settle cases in their courts. In Alberta this practice is formalized under the name of judicial dispute resolution (“JDR”), while in Malaysia it is known as court assisted (or sometimes court-annexed) mediation (both of which will be referred to in this article as “judicial mediation”)². The differing terminology itself calls for investigation and explanation. Both terms however, describe an active role for the judge involving more than merely referring a case for mediation or other ADR by an independent third party. This article will compare and contrast active judicial involvement in settlement of civil cases by focussing on the law and practice of the superior court in the Province of Alberta (Court

¹ Wahab & Van Gramberg (2010), 257.
² This terminology appears to have superseded the term “judge-led mediation” in Malaysia as used by Wahab & Van Gramberg, ibid., 252.
of Queen’s Bench of Alberta) and of the superior court in the Malaysian States of Sarawak and Sabah, both of which are under the jurisdiction of a single court (the High Court in Sarawak and Sabah). In this article the former will be referred to as the Alberta Court, and the latter, the High Court.

II. Developments in the Law and Practice of Judicial Settlement

Alternative dispute resolution methods as alternatives to adjudication have been known and practiced in Canadian and Malaysian civil legal jurisdictions since at least the early 1990s. The active involvement of judges in seeking settlement of civil litigation, however, has a longer history in the Alberta Court than the Malaysian one. In Alberta what is now known as JDR has its roots in two practices: the settlement conference convened by a judge as part of a pre-trial conference to prepare for trial, or as a separate event; and the “mini-trial” in which a judge renders an opinion concerning the probable result of a trial based on a summary presentation of evidence and arguments by the parties to the litigation. Both practices include an active role for the judge in seeking settlement and led to the current practice of judicial dispute resolution which was first regularized in the Alberta Court by means of Guidelines issued by the court in 1996.

ADR in Malaysia was first understood to be a “court-connected” process in which cases might be referred to private mediators to help resolve them short of trial. The Bar became involved in promoting the training and use of lawyer mediators, but as mentioned in the presentation at the 2010 EALS conference there was little enthusiasm amongst lawyers and litigants for this service. In 2008 the Chief Justice of Malaysia launched a program of changes designed to eliminate the large backlog of pending cases in all Malaysian courts which included approval and promotion of mediation as an alternative to adjudication. In the following years to 2010 Malaysian judges started to embrace the role of mediator which has recently been institutionalized as will be described below.

---

5 Ng (2008).
In 2010 the Alberta Court took the major step of introducing a completely revised set of Rules of Court. In addition to modernizing the rules and making them more understandable to the average reader the new rules incorporated significant developments for both ADR and JDR in the Court. By Rule 4.16 the parties to civil litigation are required to participate in good faith in a dispute resolution process mentioned in that Rule before being allowed to proceed to trial. One of the listed approved processes is judicial dispute resolution (JDR). Further, Rules 4.17 to 4.21 now formally institutionalize JDR and provide some parameters for it whereas it was previously only mentioned in Guidelines. These Rules are included in the Appendix for reference.

The year 2010 was also a momentous one for mediation in all courts in Malaysia. In August the Chief Justice of Malaysia issued Practice Direction No. 5 authorizing judges to refer pending civil matters to mediation for resolution and disposal by way of a consent judgment if settled. The Direction (included in the Appendix) provides for two modes of mediation: either judge-led or conducted by an agreed private mediator. This development regularized the practice of judicial mediation and provided guidelines for its conduct as will be discussed below. The High Court was also active in this area in 2010 through issuing an information document for litigants explaining mediation as a process with significant benefits. Amongst other matters this document explains that parties may request a “judge or other legal officer” to conduct the mediation.

The High Court took another significant step regarding judicial mediation in 2011 through the issuance of Rules for Court Assisted Mediation the purpose of which is stated to ensure that “the mediation process adheres to the principles of fairness and justice”. More detailed provisions of these rules will be discussed below.

Finally, it should be mentioned that the Parliament of Malaysia enacted a Mediation Act in 2012 making it one of the few jurisdictions with dedicated legislation on this subject. Although the Act does not formally apply to judicial mediation its provisions will no doubt be considered by, and may influence, judges in their approach to the role of mediator.

---

6 High Court (2010).

7 High Court (2011).

8 Malaysia (2012).
In the next section this article will consider some of the context surrounding these developments and mention some ramifications of the changes which can be observed.

III. Context and Consequences of Developments

Since its inception in the 1990s JDR in the Alberta Court has been well accepted by litigants and their lawyers, and has been positively evaluated for its efficiency and effectiveness.\(^9\) The ideals and philosophy underpinning judicial dispute resolution as an ADR practice, however, have been debated amongst the judges themselves. Some judges of the Court take the view that the judicial role properly does not extend to inquiring into the interests (needs and concerns) of the parties which are not reflected in their legal rights and obligations that are the subject of the litigation.\(^10\) For this reason judges with such views reject the terminology of mediation as an apt description of JDR, since for them mediation is essentially concerned with solutions based on interests rather than law. Other members of the Alberta Court bench take a different view and believe that litigants non-legal interests can legitimately be considered in judicial dispute resolution if the parties wish to do so, and the judge may properly facilitate solutions which take them into account.\(^11\) In the later view, JDR and adjudication go hand in hand as the judge can assist litigants to weigh the possible results of a trial against the merits of consensual agreement with the other side.

At the present time the nomenclature of judicial dispute resolution and the relative generality of the Rules of Court allow judges some latitude to conduct JDR in the way they believe is appropriate. For the benefit of litigants and lawyers the judges are willing to publish some information about the type of JDR they prefer and the practices they will or will not follow in the process. This is accomplished through a coding system embedded in the online JDR calendar which lists the judges who will be conducting JDRs on what dates throughout the year.\(^12\) It

---

\(^9\) Rooke (2009).


\(^11\) Rooke (2010).

\(^12\) Court of Queen’s Bench (2012).
should be noted that all judges of the court are assigned by the Chief Justice or Associate Chief Justice to do JDRs and the effect of publishing the calendars is to allow lawyers and litigants to choose a judge to conduct the process in a particular case, guided by the coding and past experience with the judges.¹³

Judicial mediation has not been so well received in Malaysia. The reforms to the courts commenced in 2008 included the introduction of key performance indicators (KPIs) for judges that measured, amongst other things, their disposal rate of cases assigned to them. Because mediation was also favored by the court leadership some judges recognized that judicial mediation might enhance their perceived performance by contributing to the early termination of litigation without trial. Based upon this belief those judges began to engage in judicial mediation aggressively, behaving as “muscle mediators” determined to extract a settlement from the parties who faced the prospect of trial before the same judge if they proved unable or unwilling to settle. Needless to say, such judicial behaviour attracted the displeasure of the Bar which was also being pressed to expedite litigation by other means such as judicial rejection of postponements in the litigation process.¹⁴ The recent Malaysian developments described above tried to address such concerns and reduce resistance to judicial mediation.

In the Practice Direction No. 5 of 2010 it is stated that “Unless agreed to by the parties, the Judge hearing the case should not be the mediating Judge.” Further, it is provided that “Unless agreed to by the parties, the Judge will not see the parties without their lawyers’ presence …”. Clearly these guidelines were meant to respond to and assuage the concerns of the Bar regarding judicial mediation. The Rules of the High Court¹⁵ go even further. They state “judges and judicial officers are strictly not permitted to mediate cases which are on their own trial list” (Rule 2.2), and “Judicial officers should always bear in mind that the ends do not justify the means.” (Rule 1.3) It should be noted that Sarawak and Sabah are large jurisdictions with some judicial centres having only a single judge, so provision is also made for video conferencing of judicial


¹⁴ New Straits Times (2009); Malaysian Bar (2011).

¹⁵ High Court (2011).
mediation. Whether these adjustments to judicial mediation in Malaysia have been sufficient to make it more attractive to lawyers and litigants is open to question. The “sea change” required in attitudes of the Malaysian legal profession towards mediation mentioned by Wahab and Van Gramberg\textsuperscript{16} does not appear to have yet occurred. In a recent address the current Chief Justice of Malaysia reported that only a few hundred cases had been referred to mediation out of the hundreds of thousands disposed of by the court.\textsuperscript{17}

IV. Analysis and Discussion

There are several theoretical frameworks which may be useful in analysing these developments in the two courts and comparing them: organizational, institutional, and cultural.

Under the organizational perspective comparisons are made between the pressures on the two courts to be efficient, effective, and accountable in cooperation with major organizational stakeholders (such as government departments and the legal profession). The institutional perspective yields comparisons of the legal environments and institutional arrangements of these courts as they relate to settlement. The concepts of legal culture and judicial culture are used as the basis of the third perspective for the purpose of comparison. Beliefs about, and attitudes towards practices of judicial settlement are compared from the perspective of national legal cultures and from the narrower perspective of judicial cultures.

A. Organizational analysis

The administrative staff of courts and the lawyers practicing there are an important part of a justice system designed to process legal disputes. A judge has daily interactions with these people whose work helps determine whether the court succeeds (or fails) in doing its systemic job – lawyers, clerks, bailiffs, registrars, secretaries, IT professionals, and many more. Theories of judicial action that take into account organizational and economic relations are useful to describe the influence that may be exerted by these groups. In this respect the court can be considered as a socio-economic complex incorporating the judge.

\textsuperscript{16} Wahab & Van Gramberg (2010), 252.
\textsuperscript{17} Zakaria (2013).
Connections between courts and the bureaucratic form of organization were noted by Max Weber\(^{18}\) and the subject continues to be of interest.\(^{19}\) Treating a court as a bureaucracy is a perspective that is consistent with thinking of judges principally as managers of litigation rather than as arbiters of law;\(^{20}\) such characterization has been strongly criticized by some.\(^{21}\) In its bureaucratic aspect a court is functionally enmeshed in a highly structured civic apparatus which operates according to procedures intended to achieve effectiveness and efficiency. A judge who is formally independent in law is thus often practically dependent on the cooperation and support of an organization with functional goals and objectives set by those who control the public purse.\(^{22}\) Judges cannot help but be influenced by external decisions allocating public resources within the court system.

One example of the impact of such economic decisions has been noted by Hazel Genn\(^{23}\) who has shown that fiscal support for criminal case processing in the United Kingdom has outstripped that given to the civil legal system, arguably resulting in an emphasis on settling rather than trying civil cases. In the United States, the Speedy Trial Act of 1974 prioritized criminal matters in the courts, resulting in delay in disposing of civil cases and increasing attention being paid to alternative dispute resolution procedures such as mediation and settlement conferencing. Thus, organizational pressures to use court resources efficiently while effectively resolving pending cases may operate to encourage a judge to become an active settlement agent. The opposite may be true if the fiscal masters of the court do not appropriate sufficient resources to assist such judicial activity such as providing administrative support and suitable venues for conferencing within or outside the courthouse.\(^{24}\) If a judge must arrange and host a settlement conference on her own she may decide the time and effort is not worth the possible benefit to be gained.

\(^{18}\) Gerth & Mills (1958).

\(^{19}\) Gazell (1971); Kritzer (1982); Fiss (1983); Longan (1994); Vaughn (1998).

\(^{20}\) Elliott (1986).

\(^{21}\) Resnik (1982).

\(^{22}\) Forde (2001).

\(^{23}\) Genn (2010).

\(^{24}\) Crowne (2001).
Another organizational factor that may play a role in judges' settlement activities is the scrutiny and accountability associated with a modern public bureaucracy. Increasingly the work of courts and judges is being monitored and evaluated using the standards of efficiency and effectiveness. One example of this trend is the use of performance monitoring systems such as key performance indicators (KPI) in scrutinizing court activity. Such indicators, or benchmarking with other jurisdictions, may be used to set targets for the handling of cases by judges, including the time from filing to disposition, and the optimum number of cases per judge awaiting final determination.25 Pending cases are frequently described as a backlog that requires special judicial action. James A. Wall Jr. and Dale E. Rude26 found that judges were more likely to get involved in the settlement of cases requiring long trials, but that the length of their pending docket had no influence on such decisions. On the other hand there is evidence that external reporting of case management results can influence judicial behavior.27

Organizational models and theories that focus on workgroups within a court may also help us to understand the interaction of judges’ settlement activity with the work of others who contribute to the delivery of justice. The concept of a workgroup is based on the observation that formal professional or employment relationships can take on the character of significant social relations due to continuous interaction amongst the participants.28 For example a RAND study of the Civil Justice Reform Act29 in the United States noted the significance of shared understandings between the bench and the bar regarding acceptable case management practices.30 The attitudes and practices found in a workgroup centered on a particular court can become entrenched expectations which are transmitted to new arrivals thus demonstrating some of the hallmarks of a court culture31 or they may even begin to appear like local legal rules.32 If a single judge

26 Wall &. Rude (1985).
27 Kakalik et al. (1996); (1997); IAALS (2009), 8.
28 Jacob (1997).
30 Kakalik et al. supra note 27.
31 Kritzer (1990); Fielding (2011).
predominates in the work of a courthouse we might expect to see the emergence of a distinctive approach to the settlement of cases processed there which represents the consensus of a relatively stable workgroup. On the other hand, a courthouse that hosts a large number of different judges and a large and shifting group of lawyers is less likely to generate stable preferences and practices.

There may also be tension and dissensus amongst a courtroom workgroup. From one perspective the judge and the lawyers who frequent the court are competitors in offering settlement services. Lawyers may do this through direct negotiation, and some of them may be trained mediators who offer their services to help settle others’ cases. Private mediators may also be retired judges, for example Hon. George W. Adams Q.C. in Ontario Canada. Legal professional members of a judge’s workgroup might consider judicial settlement intervention either as unnecessary or as inappropriate competition for the provision of dispute resolution services. On the other hand, judicial perceptions of the bar’s efforts (or lack of them) to settle may also be a factor influencing judges’ settlement activity. There is evidence that judges who consider themselves good negotiators tend to get involved in settlement, and judges have expressed disappointment with counsel without settlement skills and the will to settle their cases. Thus, a court workgroup may affect judicial settlement activity by reinforcing a shared consensus either in favour of or against it. Judges’ perceptions of lack of settlement capacity of a local workgroup may influence judges to do it on their own.

Based upon the above theoretical structure we may identify some differences in the organizational environments of the two courts we are examining here. In Alberta the judges and lawyers who practice in court form a relatively closely knit and trusting workgroup. Almost without exception judges are appointed from amongst senior local lawyers who have a long history of collegiality as members of the Bar. This background means Alberta judges have a

---

33 Killefer (2009).
34 Adams (2011).
35 Finlay & Sterns (2011).
wealth of knowledge of the personalities and practices of many lawyers who enter their courtroom and this can be used to advantage when conducting JDRs. It is less of an advantage when self-represented litigants are present. In addition, Alberta judges usually work in the judicial centre where they have practiced as lawyers, with occasional temporary assignments to other locations.

This working environment contrasts significantly with Malaysian judges who are less likely to be experienced private practitioners. There is more of a tradition of a career on the Bench in Malaysia with High Court judges, for instance, sometimes having started as Magistrates and worked their way up in the judicial hierarchy. In addition, judges are assigned to duties throughout the whole of Malaysia and therefore may find themselves in court or mediation with lawyers whom they have never met or heard of before. This situation may tend to lower the level of mutual trust and confidence between Bench and Bar in Malaysia as compared with Canada and make it more difficult for judges to engage in open and forthright discussion with lawyers and litigants which is required in mediation. Further, although judges are now expected not to mediate cases over which they may preside at trial, the history of overzealous judicial mediation may still cast a pall over current attempts by judges to settle cases. The problem of the influence of mediation success rates on judicial mediation behaviour may still be perceived to exist.

B. Legal structure and institutional setting

Robed judges face the public in courtrooms adorned with symbols of state power and authority. These spaces are designed for the conduct of trials according to precise procedures and to facilitate performance of the traditional roles of judge, jury, counsel, witnesses, and spectators.\(^{37}\) A courtroom with its traditional hierarchical design may not be the most auspicious environment for an effective judicial settlement conference. Further, a judge who is accustomed to the roles and traditions of formal courtroom procedures may not feel comfortable facing litigants in the less structured encounter of a settlement conference or mediation. What is the connection between a judge’s role as public exemplar of legal authority and that of private settlement facilitator? The formal institutional role of the court in a system of justice raises these and other issues for a judge contemplating the compatibility of judging and settling cases.

\(^{37}\) Mulcahy (2007).
The legalist theory of judging must certainly be taken into account when considering judges’ engagement with JDR. Even realist skeptics would probably agree that judges will not engage in judicial settlement activity if it can be characterized as unconstitutional, unlawful or otherwise legally improper. On the other hand, judicial settlement conferences will almost certainly occur if judges are expressly given that responsibility by law. Beyond these stark contrasts, however, lies an area of potential legal indeterminacy within which judges must come to their own conclusions about their proper role in disposing of litigation.\(^{38}\)

Legal constraints on, and authorizations of, judges’ settlement activity may be found at all levels of the hierarchy of positive law ranging from the highest level of national constitutions, to statutes such as the Alternative Dispute Resolution Act\(^ {39}\) in the United States, rules of court such as Rule 16 of the United States Federal Rules of Civil Procedure, to sub-rules and directives promulgated by particular courts\(^ {40}\) at the lowest level of authority. Other legalist influences on judges’ settlement activity may be found in codes of judicial conduct,\(^ {41}\) precedents on the topic of settlement (for example \textit{G. Heilemann Brewing Co. v. Joseph Oat Corp.}\(^ {42}\) concerning compulsive procedures in settlement conferences), and scholarly commentary.\(^ {43}\) Judges can be expected to consider all of these legitimate sources of direction and guidance when deciding upon their proper role regarding settlement.

There are other aspects of the court as a public legal institution which may also affect judicial activity in this area. Judicial selection and retention processes have been suggested as influences on judges’ decision making.\(^ {44}\) A judge who favours active judicial involvement in settlement may or may not be attractive to the public where elections for judicial office occur; however the saliency of settlement activity in relation to such electoral decisions is questionable. A

\(^{38}\) Parness (2006).

\(^{39}\) Alternative Dispute Resolution Act 1998.

\(^{40}\) Adams (1993); Maull (1996); Zakaria (2010).

\(^{41}\) Alfini (1999).


\(^{43}\) Such as Bundy (1992); Roberts (2000).

\(^{44}\) Crynes (1995).
connection might be made if settlement activity affects a judge’s performance in disposing of cases which is publicly reported for the purpose of evaluation and election.⁴⁵

There are other more prosaic aspects of the court viewed as a legal institution which may also affect judges’ settlement activity. Courts are hierarchies and the authority of a chief or managing judge to assign work may help to determine what judicial settlement activity occurs in that court.⁴⁶ Formal assignment authority may be tempered by practical realities such as judges who are uncomfortable with the role of settlement facilitator and wish to be excused from taking it on.⁴⁷ The type of judicial calendar used by a court may affect judicial practices.⁴⁸ A judge with responsibility for overseeing a case from filing to termination under an individual calendar system might more naturally become involved in settlement discussions along the way. calendaring of judicial settlement conferences may tend to legitimate them and lead to judicial acceptance⁴⁹ and the time allocated to such events may have an effect on the way they are conducted.⁵⁰ The number of judges available to preside in a particular location may also affect the settlement activity judges can practically undertake if it means that a “buddy system” between judges is not possible.⁵¹ If a non-local judge must be called in to try a case when judicial settlement conferencing is not successful this may help to dissuade a judge from becoming more involved in settlement efforts. A judge’s concern will be magnified if there is a rule prohibiting a settlement judge from presiding at a subsequent trial.

This institutional conceptual and theoretical framework may also illuminate judicial settlement practices in Canada and Malaysia. In the Alberta Court there is a positive rule requiring parties to engage in some form of ADR and the Rules also expressly provide for JDR as one of those

⁴⁶ LaMar (1991); Jacob (1997); Agnes (1997).
⁴⁷ As reported by Justice André Roy of the Superior Court of Quebec in his presentation at the American Bar Association Section of Dispute Resolution Conference in Washington D.C. April 19, 2012.
⁴⁸ Brazil (1985).
⁴⁹ Robinson (2006); Rooke (2010).
⁵⁰ Burns (1998); Baer (2001).
⁵¹ Longan (1994); Brunet (2002).
options. All of the judges of the Court offer this service and it is possible to select a judge for JDR based upon the published calendar. Because JDR does not involve any additional court fees it has become the ADR mechanism of choice to fulfill litigants’ responsibility under the Rules to attempt settlement. By contrast, the Practice Direction in Malaysia merely allows a judge to suggest mediation which may be rejected by the parties. In the High Court judicial mediation is thus conducted on an ad hoc basis not as a distinct program of the court as is the case in the Alberta Court. Judges in Malaysia are not formally assigned to do judicial mediation and in the High Court there is the potential obstacle of arranging for a non-resident judge to conduct it in place of the sole judge sitting in a judicial centre. As discussed above, judges in Malaysia may consider mediation as a useful tool in disposing of cases efficiently, and thus fulfilling the institutional objectives of the court, but the history of overbearing judicial involvement makes it more difficult to encourage lawyers to cooperate with this goal.

C. Legal and judicial culture

Judges in a court are enmeshed in an invisible web of concepts, ideas, and prescriptions which can affect their thoughts and actions. This influence on judges can be called “culture” and is sometimes invoked as a kind of mysterious “dark energy” to explain action that is not discernibly motivated by rules or roles. The task of defining and using the concept of culture in relation to law is notoriously difficult and contested. However, it seems to me a fruitful way of describing the influence on judges which exists because they are members of a unique group in society – the judiciary.

Judicial cultures emerge from the close association of judges amongst themselves and their collective detachment from the rest of society. Judges must to some extent remove themselves from social and professional interaction with other legal actors so as to protect the reality and appearance of their impartiality and objectivity. This relative isolation of the judiciary facilitates the development of a legal culture unique to it. Some ways in which judicial cultures develop and change include judicial training, reflective and scholarly writing by judges, and the impact of “champions” – judges who are acknowledged leaders of innovation.

_________________________
52 Church (1982); (1985).
53 Nelken (1997).
Judicial training can have a strong impact on judicial culture and practices. Training and education programs for judges are typical in civil law systems but today there is also organized judicial education in most common law jurisdictions. In particular, newly appointed judges are often provided with induction and education programs which in the United States have for many years included introduction to settlement techniques. In some common law countries permanent judicial training institutions have been created. Examples of these are the Federal Judicial Center (FJC) in the United States and the National Judicial Institute (NJI) in Canada. The FJC has provided information to judges about settlement techniques for many years. It has also been criticized by a judge for its advocacy of alternative dispute resolution practices. The NJI offers a multi-day training program in judicial settlement conferencing. It should be noted that in common law jurisdictions attendance at such programs is usually voluntary, so that not every judge can be counted on to be skilled in, or receptive to such activity. Formal training regarding settlement is often supplemented by presentations on the topic at judicial conferences.

Judges write scholarly papers for law reviews and specialized publications intended for the judiciary, sometimes on the topic of settlement. Some judges have published comprehensive guides to judicial settlement processes and techniques based on their observations and experiences. Cogent, persuasive writing by articulate, informed judges about judicial

---

54 Resnik (2002); Robinson (2006).
56 Fox (1971); Will et al. (1973); Rubin & Will (1973).
57 Provin (1986); Plapinger & Stienstra (1996).
60 Lynch & Levine (1988); Kaufman (1990); LaMar (1991); Parker & Hagin (1993); Eisele (1993); Moore (1995); Agnes (1997); Landerkin (1997); Brazil (1999); (2000); (2006); (2007); Nelson (2001); Baer (2001); Flatters (2003); Landerkin & Pirie (2003); Klein (2005); Otis & Reiter (2006); Rooke (2010).
involvement in settlement may have a significant effect on a judicial culture. Judge Posner,\textsuperscript{62} however, doubts whether judges pay much attention to academic writing, particularly when it comments on the bench itself (although he himself appears to be an exception).

“Champions” of judicial settlement activity include members of the bench who have written favourably about it, but they may also be judges who prefer to lead by example and exhortation. In the United States Judge Irving R. Kaufman, and Magistrate Judges Wayne Brazil of California and Morton Denlow of Illinois can be described as champions of judicial involvement in settlement. Chief Justice Warren K. Winkler\textsuperscript{63} and Justice Colin Campbell of Ontario Canada share this distinction. Leaders of the judiciary and judicial innovators can influence the culture of their fellow judges but the test of consensus remains a difficult one for those seeking change.\textsuperscript{64} Julie Macfarlane\textsuperscript{65} suggests that change in legal attitudes and norms may be easier within smaller more homogenous groups of legal actors.

Transnational cultures associated with the legal traditions of common law and civil law systems may affect judicial practices regarding settlement activity. Civil law procedures are “judge-centric” compared to those of the common law in which advocates are given a larger role in the conduct of litigation. We might therefore expect civil law judges who are accustomed to active involvement in all stages of a case to feel more comfortable with intervening for the purpose of settlement.\textsuperscript{66} The suggestion has been made that the advent of “managerial judging” in common law systems represents a convergence with civil law in the search for more efficient case processing.\textsuperscript{67}

National total cultures can be expected to interact strongly with national legal cultures.\textsuperscript{68} The ideas and beliefs about judges forming part of a national culture may therefore have a significant

\textsuperscript{62} Richard Posner (2008), 204.

\textsuperscript{63} Winkler (2007).

\textsuperscript{64} MacDonald (2005); Young (2006).

\textsuperscript{65} Macfarlane (2002).

\textsuperscript{66} Blankenburg (1998).

\textsuperscript{67} Rowe (2007).

\textsuperscript{68} Merry (1990); Dialdin & Wall (1999); Colatrella (2000); Nelken (2004); Erdos (2009); World Bank (2011).
effect on the legal and judicial culture of that jurisdiction. Judicial settlement conferences are usually conducted in private and ensuing settlements are often treated as confidential.\textsuperscript{69} This is in contrast to trials and other hearings that are open to public scrutiny. A public that has doubts about the integrity, impartiality, and wisdom of its judges might find the secrecy surrounding settlement both suspicious and injudicious.\textsuperscript{70} Cultures in which the judiciary is held in high esteem and rarely criticized may be more tolerant of such private judicial activity. Judges, knowing these public attitudes, may take them into account when deciding whether or not to become involved in settlement. The judiciary may reach a consensus that engaging in settlement activity risks undermining their legitimacy and status in society.

Intentional international influences on national legal cultures should also be noted. In keeping with the spread of alternative dispute resolution practices around the world, there is also proselytizing and promotion of settlement activity between judiciaries. Judges who are leading exponents of judicial settlement efforts can be observed training and encouraging foreign counterparts.\textsuperscript{71}

Local legal cultures within nations have been described at various levels from those found regionally, as in the Circuit Courts of Appeal in the United States, to state based jurisdictions within federal systems,\textsuperscript{72} down to the level of towns or cities\textsuperscript{73} or even single courthouses within metropolitan areas.\textsuperscript{74} Teresa Sullivan and her colleagues\textsuperscript{75} describe how a local legal culture may be created through the actions of members of a court workgroup - judges, lawyers, and court officials. Lynn M. LoPucki ascribes local differences in the interpretation and application of law

\begin{thebibliography}{9}
\bibitem{Resnik2006} Resnik (2006).
\bibitem{Nagel1962} Nagel (1962).
\bibitem{Chodoshetal1996} Chodosh et al. (1996); Royal Roads (2003); Zakaria (2010).
\bibitem{Church1982} Church (1982); (1985); Landon (1982); Macfarlane (2002).
\bibitem{Jacob1997} Jacob (1997).
\end{thebibliography}
to variations in “shared mental models” amongst legal workgroups.\textsuperscript{76} Such shared ideas may reflect a consensus about the meaning or intent of law that forms part of a local legal culture.\textsuperscript{77}

We should also keep in mind that there are two principal types of judiciaries: one in which judging is a first legal career, and another type where judging is a second career after practicing as a lawyer. These two types are usually found respectively in civil law and in common law systems, although there are exceptions such as Malaysia, a common law jurisdiction where judges are normally appointed from the ranks of career judicial officials. First career judges are associated throughout their legal working lives, receive the same training, and are generally subject to more centralized judicial management.\textsuperscript{78} These factors may make the emergence of consensus regarding issues such as judicial settlement practices amongst them more likely. Second career judges, however, will likely bring pre-existing beliefs about the roles of lawyers and judges with them to the bench and be more independent minded regarding appropriate judicial behaviour. The emergence of new cultural norms and attitudes distinct to the judiciary may be less likely amongst a group of judges for whom it is their second career.

Although both Canada and Malaysia share a heritage of British legal and judicial traditions, and both continue to have common law based civil legal systems (except in the Canadian Province of Québec), there are some significant differences between the two countries which may be considered as cultural in nature. Canadians generally regard their judges with respect and admiration as befits senior expert former members of the legal profession. Doubts about the integrity and honesty of Canadian judges are seldom heard, although some grumble that the Government chooses to appoint as judges lawyers of the “correct” political persuasion. Once on the bench, however, there is little criticism of the impartiality of Canadian judges who are believed to treat every litigant (whether Government or citizen) fairly and equally. By contrast, the Bench in Malaysia has a history of being embroiled in political influence and of continuing concern over the independence and incorruptibility of judges. Although the appointment process for judges is now substantially similar in Canada and Malaysia (the final decision being made by

\begin{thebibliography}{99}
\bibitem{lopucki1996} LoPucki (1996), 1510.
\bibitem{mcneal2011} McNeal (2011).
\bibitem{koch2004} Koch (2004); Garoupa & Ginsburg (2009).
\end{thebibliography}
the Prime Minister), questions are still raised about the influence of third parties on the selection of judges in Malaysia. The general culture, if not of distrust, but perhaps only of unease over the independence and impartiality of Malaysian judges overshadows all of their work both in court and in judicial mediation. Malaysian judges continue to be admonished by their superiors, and criticised by the Bar, concerning the appearance of bias which may be caused by close personal friendships. The process of mediation, which can include private confidential conferences between each party and the judge, exacerbates the problem of a lower level of confidence in the integrity of Malaysian judges.

Judicial cultures in Canada and Malaysia also differ. Most judges in Malaysia have a career in the judicial branch, with long term immersion in the culture of that public service. By contrast, most judges in Canada are appointed as mature professionals who have enjoyed a lengthy and successful career in private legal practice. This difference can make for more homogeneity in ideas and attitudes amongst judges in Malaysia compared with Canada where judges are more prone to take an independent view on activities such as JDR. As we have seen, in Alberta, there is significant divergence in approaches to JDR between judges but there is little evidence to suggest the same occurs in Malaysia. Both countries now offer judicial training in dispute resolution which may over time tend to harmonise judicial attitudes and practices in both jurisdictions.

In terms of local legal culture there is probably more of a chance for this to influence judicial settlement activity in Canada than Malaysia. As described above, Canadian judges tend to work in the local community where they have practiced as lawyers, while in Malaysia judges may work in centres where they are strangers to the local Bar. This situation, of course, changes over time as Malaysian judges accumulate experience in the local context, but that development may be lost through transfer of the judge to another judicial centre which is not uncommon.

V. Trends and Future Developments

Judicial dispute resolution in the Alberta Court may be to some extent a victim of its own success. According to Associate Chief Justice Rooke of that Court there is now more demand for

79 Borneo Post (2012); Lim (2013).
this court service than available judicial time to provide it.\textsuperscript{80} Although more judges have been authorized to be appointed, the Government has not to date allocated the necessary funding to staff the positions; thus the number of JDRs that may be provided cannot be increased. The Associate Chief Justice also advises that the Rule requiring participation in ADR before trial will be suspended until a new court connected program of mediation to be provided by private mediators can be established. It will be interesting to see whether such private mediation by non-judges will be as popular with lawyers and litigants as the JDR process.

In Malaysia the courts and judges appear to be unwavering in their support of ADR and judicial mediation as one alternative process to be offered to litigants.\textsuperscript{81} A possible further step would be to make some recourse to ADR mandatory as in Alberta and this has already been proposed for motor vehicle accident cases.\textsuperscript{82} Education and training in mediation is being provided to judges;\textsuperscript{83} this may help to improve the confidence of lawyers and litigants in the quality of this judicial service. A Judicial Appointments Commission was created in 2009 to provide advice to the Prime Minister concerning appointments and promotions of judges as part of an attempt to improve trust in the courts.\textsuperscript{84} Although establishment of the Commission has been criticised for not going far enough,\textsuperscript{85} it may help to restore faith in the integrity and independence of the judiciary and accordingly have a positive impact on acceptance of judicial mediation. It will, however, take some time and effort by the Malaysian courts to convince all stakeholders that justice can be achieved through mediation equally fairly as through trial at law.


\textsuperscript{81} Zakaria (2013).

\textsuperscript{82} Zakaria (2013).

\textsuperscript{83} Zakaria (2012); Judicial Appointments Commission (2012).

\textsuperscript{84} Malaysian Bar Council (2008) “PM: Changes Will Increase People’s Confidence in Judiciary.” News article on file with the author.

\textsuperscript{85} Shuaib (2011).
VI. Conclusion

The history and involvement with judicial settlement of the two courts examined here reveal an ongoing tension between at least two pairs of social values: efficiency and fairness; and justice and legality. Courts, as part of the apparatus of government, provide a public service: resolving disputes so that peace and order may be sustained and social affairs conducted with foreseeable consequences. Accordingly, as publicly funded institutions, courts are expected to operate efficiently and effectively so as to maximise the benefits to society at an acceptable cost. But courts are also a source of legitimacy for the state and its government based in part upon their reputation for treating all citizens fairly and equally. In this aspect equal access to the courts and fair treatment within them corresponds to the democratic right of every individual to vote in elections without coercion.

Efficiency in the resolution of disputes may be perceived to conflict at times with the fairness of the process employed for that purpose. Both courts examined here have grappled with this tension. In the Alberta Court an issue arose concerning a judge who presided at trial in a family matter after unsuccessfully conducting JDR in the case. The matter went to the Court of Appeal which acknowledged the efficiencies that may be realized through a trial conducted by a judge familiar with the case, but which ultimately decided that fairness and the necessity to avoid any appearance of bias requires trial by a different judge. In Malaysia, after some initial experience with overbearing judicial mediation, it was also decided that mediation should not be provided by the designated trial judge. The efficiency realized by judges in disposing of cases quickly through mediation did not outweigh the necessity to avoid pressuring litigants to settle on unwelcome terms and instead to provide a fair and non-coercive mediation process. These results can be seen as compromises between the values of efficiency and fairness, with the latter being given more weight in these circumstances, and with real costs to the public as when videoconferencing must be used or judges specially sent to mediate cases for the only resident judge.

Canadian and Malaysian courts are expected to administer justice according to law. It is generally accepted in both societies that justice can usually be achieved by following the

---

procedures of litigation culminating in a decision of a judge based on existing law. It is less widely accepted that justice may be attained through alternative dispute resolution processes such as mediation. This divergence of views reflects a tension between conceptions of justice and legality. For some, justice requires legality while for others legality may only be one avenue to realize it. Judges are acutely aware of this question when asked to take on the role of mediator and shed the mantle of authoritative legal decision maker.

Judges in both Canada and Malaysia have confronted the tension between justice and legality and have dealt with it, at least for the time being, in somewhat different ways. In the Alberta Court judges may decide for themselves the type of JDR they will offer and the extent to which they will deal with the parties’ extra-legal interests in the process. Some are prepared to offer a variety of types of settlement process depending on the circumstances of the case and the parties.\(^{87}\) The coding system used when publishing judicial JDR assignments assists litigants to know in advance what to expect of an individual judge. The Associate Chief Justice of the Alberta Court has published his personal `Judicial JDR Profile` setting out his training, experience, style and procedural preferences regarding JDR.\(^{88}\) In this Court it is thus left up to a judge to decide for her or himself whether judicial involvement in settlement should or should not be limited to considering legal rights and responsibilities.

The tension between justice and legality has been resolved in the Malaysian High Court more in the nature of a synthesis of the two values. According to the Rules for Court Assisted Mediation promulgated by the Court\(^{89}\) the mediator is said to have two main functions: first, facilitating communication between the parties as an impartial neutral; and second, suggesting solutions or giving advice based upon a neutral evaluation of the case. This description of the role of a judicial mediator appears to encompass both listening to parties’ needs and concerns (interests) in the facilitative stage, and also providing advice based on law in the evaluative stage if necessary and as requested. Judicial mediation in Malaysia may thus be described as potentially both interest-based and rights-based. This conclusion is supported by the description of the

---


\(^{88}\) Schulz & Rooke, supra note 13.

\(^{89}\) High Court (2011).
mediator’s role in the Mediation Act 2012 which mentions both facilitating and also suggesting options for settlement. As noted above this Act does not govern judges as mediators but surely helps to clarify how mediation is understood throughout the country. In Malaysia, therefore, official sanction has been given to judicial mediators to work towards solutions based upon the parties’ complementary interests, or in default of such agreement, based on the law which would be applied at trial. Malaysian judges are given more authoritative guidance about the intersection of law and justice when engaged in judicial settlement activity than their Alberta counterparts.

The author hopes that the parallels and contrasts between the two Courts considered here may provide some food for thought in both of them and lead to further refinement in this important area of judges’ work. The tensions between efficiency and fairness, justice and legality will never be definitively resolved and both Courts are to be congratulated for their ongoing efforts to maintain a balance amongst them which is in the public interest.
References


Court of Queen’s Bench of Alberta. (2012) “Edmonton JDR Assignments,”
http://www.albertacourts.ab.ca/LinkClick.aspx?fileticket=YM9JJdaQpnI%3d&tabid=318&mid=820; “Calgary JDR Assignments,”
http://www.albertacourts.ab.ca/LinkClick.aspx?fileticket=HErse%2bIgTgg%3d&tabid=318&mid=820 (both accessed 6 July 2013).


G. Heilemann Brewing Co. v. Joseph Oat Corp., 871 F.2d 648 (7th Cir. 1989).


High Court in Sarawak and Sabah (2010) “Mediation,”

… (2011) “Rules for Court Assisted Mediation,”


Kakalik, James S., Terence Dunworth, Laural A. Hill, Daniel McCaffrey, Marian Oshiro, Nicholas M. Pace, & Mary E. Vaiana (1996) “Implementation of the Civil Justice Reform Act in Pilot and Comparison Districts,” RAND,


Lim Chee Wee (2013) “President’s Message: Corruption in the Legal System and Challenges of Leadership,”


Civil Justice Reform: A Way of Talking about Bureaucracy and the Future of the Federal

Wahab, Alwi Abdul, & Bernadine Van Gramberg (2010) “Court-annexed and Judge-led
Mediation in Civil Cases: The Malaysian Experience.” 21 Australasian Dispute
Resolution J. 251-258.


Canadian Arbitration and Mediation J. 5-9.

World Bank (2011) “Legal Culture and Judicial Reform,”
(accessed May 5 2012).

Young, Barbara M. (2006) “Change in Legal Culture: Barriers and New Opportunities,”
Discussion paper prepared for the Civil Justice Reform Working Group, Ministry of the
Attorney General, British Columbia.
http://www.bccomicereview.org/working_groups/civil_justice/young_paper_02_06.pdf
(accessed May 5 2012).

Zakaria, YAA Tan Sri Arifin (2010) “Responsibility of Judges Under Practice Direction No. 5 of
2010,” High Court of Malaya,

…. (2013) “Speech by Tun Arifin bin Zakaria, Chief Justice of Malaysia, at the Opening of the Legal Year 2013,”
Appendix: Selected Court Documents Regarding Judicial Dispute Resolution

EXCERPT FROM THE ALBERTA RULES OF COURT (CANADA)


Judicial Dispute Resolution

Purpose of judicial dispute resolution

4.17 The purpose of this Subdivision [Judicial Dispute Resolution] is to provide a party-initiated framework for a judge to actively facilitate a process in which the parties resolve all or part of a claim by agreement.

Judicial dispute resolution process

4.18(1) An arrangement for a judicial dispute resolution process may be made only with the agreement of the participating parties and, before engaging in a judicial dispute resolution process, and subject to the directions of the presiding judge, the participating parties must agree to the extent possible on at least the following:

(a) that every party necessary to participate in the process has agreed to do so, unless there is sufficient reason not to have complete agreement;

(b) rules to be followed in the process, including rules respecting

(i) the nature of the process,

(ii) the matters to be the subject of the process,

(iii) the manner in which the process will be conducted,

(iv) the date on which and the location and time at which the process will occur,

(v) the role of the judge and any outcome expected of that role,

(vi) any practice or procedure related to the process, including exchange of materials, before, at or after the process,

(vii) who will participate in the process, which must include persons who have authority to agree on a resolution of the dispute, unless otherwise agreed, and

(viii) any other matter appropriate to the process, the parties or the dispute.

(2) The parties who agree on the proposed judicial dispute resolution process are entitled to participate in the process.

(3) The parties to a proposed judicial dispute resolution process may request that a judge named by the parties participate in the process.
**Information note**

The parties to a JDR process cannot, of course, bind a judge to participate in the process. The parties should find out in advance whether their proposed process gives a judge any difficulty. If the judge is not willing to participate in the process agreed on by the parties, the parties are free to seek the assistance of another judge.

If the parties agree and a judge is willing, the judge may assist the parties in working out a JDR process.

**Documents resulting from judicial dispute resolution**

4.19 The only documents, if any, that may result from a judicial dispute resolution process are

- (a) an agreement prepared by the parties, and any other document necessary to implement the agreement, and
- (b) a consent order or consent judgment resulting from the process.

**Confidentiality and use of information**

4.20(1) A judicial dispute resolution process is a confidential process intended to facilitate the resolution of a dispute.

(2) Unless the parties otherwise agree in writing, statements made or documents generated for or in the judicial dispute resolution process with a view to resolving the dispute

- (a) are privileged and are made or generated without prejudice,
- (b) must be treated by the parties and participants in the process as confidential and may only be used for the purpose of that dispute resolution process, and
- (c) may not be referred to, presented as evidence or relied on, and are not admissible in a subsequent application or proceeding in the same action or in any other action, or in proceedings of a judicial or quasi-judicial nature.

(3) Subrule (2) does not apply to the documents referred to in rule 4.19 [Documents resulting from judicial dispute resolution].

**Involvement of judge after process concludes**

4.21(1) The judge facilitating a judicial dispute resolution process in an action must not hear or decide any subsequent application, proceeding or trial in the action without the written agreement of every party and the agreement of the judge.

(2) The judge facilitating a judicial dispute resolution process must treat the judicial dispute resolution process as confidential, and all the records relating to the process in the possession of the judge or in the possession of the court clerk must be returned to the parties or destroyed except

- (a) the agreement of the parties and any document necessary to implement the agreement, and
- (b) a consent order or consent judgment resulting from the process.
The judge facilitating a judicial dispute resolution process is not competent to give evidence nor compellable to give evidence in any application or proceeding relating to the process in the same action, in any other action, or in any proceeding of a judicial or quasi-judicial nature.

**PRACTICE DIRECTION NO. 5 OF 2010**

**PRACTICE DIRECTION ON MEDIATION (MALAYSIA)**

Available at: http://library.kehakiman.gov.my/digital/Arahan%20Amalan%20Dan%20Nota%20Amalan/Practice%20Direction%20No.%202010.pdf

1. The Chief Justice of Malaysia hereby directs that with effect from 16 August 2010, all Judges of the High Court and its deputy Registrars and all Judges of the Sessions Court and Magistrates and their Registrars may, at the pre-trial case management stage as stipulated under Order 34 Rule 4 of the Rules of the High Court 1980 or by order for directions provided in Order 19 Rule 1(1) (b) of the Subordinate Courts Rule 1980, give such directions that the parties facilitate the settlement of the matter before the court by way of mediation.

1.1 The term "Judge" in this Practice Direction includes a Judge or Judicial Commissioner of the High Court, Judge of the Sessions Court, Magistrate or a registrar of the High Court.

2. **Objective**

2.1 The objective of this practice direction is to encourage parties to arrive at an amicable settlement without going through or completing a trial or appeal. The benefit of settlement by way of mediation is that it is accepted by the parties, expeditious and it is final.

2.2 This Practice Direction is intended to be only a guideline for settlement. The Judge and the parties may suggest or introduce any other modes of settlements so long as such suggestions or directions are acceptable to the parties.

2.3 Advocates and Solicitors shall cooperate and assist their clients in resolving the dispute in a conciliatory and amicable manner.

3. **When to suggest**

3.1 Judges may encourage parties to settle their disputes at the pre-trial case management or at any stage, whether prior to, or even after a trial has commenced. It can even be suggested at the appeal stage. A settlement can occur during any interlocutory application, e.g. at an application for, summary judgment, striking out or at any other stage.

4. **Types of cases**

4.1 The following are examples of cases which are easy to settle by mediation, e.g:

   (a) Claims for personal injuries and other damages due to road accidents or any other tortious acts because they are basically monetary claims;
(b) Claims for defamation;
(c) Matrimonial disputes;
(d) Commercial disputes;
(e) Contractual disputes; and
(f) Intellectual Property cases.

5. Modes of Mediation

5.1 Mediation may be in the following modes:
   (a) Judge-led mediation; or
   (b) by a mediator agreeable by both parties.

5.2 If a judge is able to identify issues arising between the parties that may be amicably resolved, he should highlight those issues to the parties and suggest how those issues may be resolved.

5.3 The Judge can request to meet in his chamber in the presence of their counsel, and suggest mediation to the parties. If they agree to the mediation then the parties will be asked to decide whether they would wish the mediation to be the judge-led or to be referred to a mediator.

5.4 The procedure in Annexure A will apply to a judge-led mediation and the procedure in Annexure B will apply if it is referred to other mediator.

6. General

6.1 Agreement to Mediate
   (a) When the parties agree to mediate, each of the parties shall complete the mediation agreement as in “Form 1”.

6.2 Confidentiality
   (a) All disclosures, admissions and communications made under a mediation session are strictly “Without prejudice”. Such communications do not form part of any record and the mediator shall not be compelled to divulge such records or testify as a witness or consultant in any judicial proceeding, unless all parties to both the Court proceedings and the mediation proceedings consent to its inclusion in the record or to its other use.

6.3 Results of Mediation
   (a) A return date of not more than one (1) month from the date the case is referred to mediation, shall be fixed for parties to report to the Court on the progress of mediation: and in the event the mediation process has ended, the outcome of such mediation.

   (b) Where mediation fails to resolve the dispute, the Court shall, on the application of either of the parties or on the Court's own motion, give such directions as the Court deems fit.

   (c) Except with the agreement of the Court, all mediation must be completed not later than three months from the date the case is referred for mediation.

Annexure A (Judge Led Mediation)
1. Unless agreed to by the parties, the Judge hearing the case should not be the mediating Judge. He should pass the case to another judge. If the mediation fails then it will revert to the original judge to hear and complete the case.

2. The procedure shall be in the manner acceptable to both parties.

3. Unless agreed to by the parties, the Judge will not see the parties without their lawyers’ presence except in cases where the party is not represented.

4. If the mediation is successful, the Judge mediating shall record a consent judgment on the terms as agreed to by the parties.