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# ALTERNATIVE DISPUTE RESOLUTION IN CHILD PROTECTION CASES

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By Carolyn Leach, Counsel, Office of the Children's Lawyer

Prepared for the Intensive Child Protection Program for Lawyers,  
June 24-27, 2015, Windsor, Ontario

Alternative dispute resolution (ADR) has been used in child protection cases in Ontario for over twenty years, both formally and informally. However, until recently, the use of ADR was not widespread, nor was it an entrenched part of child welfare practice in most regions. Then, in 2006, the *Child and Family Services Act* was amended to specifically provide for the use of ADR in child protection cases. These amendments, combined with the launch of a formal, government funded child protection ADR program through the Ministry of Children and Youth Services, have had a dramatic impact on the use of ADR in child protection cases across Ontario.

This is a development with many potential benefits for the child welfare system, including cost-effectiveness, time savings, high settlement rates, greater compliance rates, participant empowerment, and improved relations between agencies and families.<sup>1</sup> ADR also provides parents, children, and societies with an opportunity to address a much broader range of issues than can be addressed in court, with a wider set of possible solutions.

This paper will outline the structure of the child protection ADR program in Ontario, identify some of the types of cases that may or may not be suitable for ADR, and discuss the role of counsel in the ADR process.

## **Legislation and regulations**

Section 20.2(1) of the *CFSA* imposes a positive obligation on all children's aid societies to consider using a form of ADR whenever they are working with a family, whether or not the matter is in court.<sup>2</sup> For those cases that are in court, the *CFSA* specifically authorizes the

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<sup>1</sup> L.Crush, "When Mediation Fails Child Protection: Lessons for the Future" (2007) 23 Can.J Fam.L.55 at 55-56

<sup>2</sup> Under section 20.2(1) of the *Child and Family Services Act (CFSA)*, if a child is or may be in need of protection, a children's aid society is obligated to consider whether ADR could assist in resolving any issue relating to the child or a plan for the child's care. As this section references both children who

court to adjourn the proceeding to permit an ADR process to take place.<sup>3</sup> The *CFSA* also makes specific reference to the use of ADR in applications to vary or terminate openness orders, again permitting the court to adjourn the proceeding to allow ADR to take place.<sup>4</sup>

Section 20.2 references the use of *prescribed* methods of ADR. The ADR Regulation<sup>5</sup> sets out the five criteria for an ADR method to be a “prescribed” method:

- (1) All participants must **consent** to the use of the ADR process
- (2) Any of the participants must be **able to terminate** the ADR process at any time
- (3) The ADR must be conducted by an **impartial facilitator** without any decision making power
- (4) The ADR process must meet specified requirements of **confidentiality** (details below) – subject to certain exceptions, no information shared during an ADR process can be used in evidence in a civil proceeding
- (5) The ADR process must **not be an arbitration**.

### **Prescribed Methods of Child Protection ADR**

The Ministry of Children and Youth Services has issued a policy directive<sup>6</sup> which defines the “prescribed” methods of ADR that are available:

#### **A. Child Protection Mediation**

This is a process where child protection workers, the family (including the child, where appropriate), the OCL (if appointed) and any other person putting forward to proposing to participate in a plan for the child, work together with the aid of a trained and impartial child protection mediator who has no decision-making power. The mediator assists the participants in reaching an agreement on the issues in dispute, in generating options for resolving their dispute, and in developing a mutually acceptable plan that addresses the child protection concerns identified.<sup>7</sup> Although practices vary among mediators and from case to case, it is not uncommon for counsel for the parents and the society to participate in child protection mediation.

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have been found to be in need of protection and children who may be in need of protection, ADR can take place either before or after a protection application has been initiated.

<sup>3</sup> *CFSA*, section 51.1

<sup>4</sup> *CFSA*, section 153.1(10)

<sup>5</sup> “Methods and Procedures Regarding Alternative Dispute Resolution”, O.Reg. 496/06

<sup>6</sup> Ministry of Children and Youth Services (MCYS), Policy Directive CW 005-06

<sup>7</sup> MCYS Policy Direction CW 005/06

Child protection mediators must undergo specific Child Protection Mediation Training and be on the provincial roster managed by the Ontario Association for Family Mediation (OAFM).<sup>8</sup> The OAFM offers both initial and ongoing training opportunities for child protection mediators.

## **B. Family Group Conferencing (also known as Family Group Decision-Making)**

This is a process that brings together the family (including the child where appropriate), the child's extended family and community, child protection workers, and service providers to develop a plan that addresses the child protection concerns identified. A trained and impartial coordinator, with no decision-making power, assists the participants throughout a three-part process. During the first segment, family and community members, child protection workers, OCL counsel, and service providers meet to share information about the child and family and to discuss goals for the conference. During the second segment, the extended family group is given an opportunity to meet privately, independently of professionals, to develop a plan that will address the child protection concerns. The plan is then presented to the coordinator and the child protection worker during the third part of the process.<sup>9</sup>

Family Group Conference coordinators must undergo training and mentorship in the principles and practice of family group conference provided by the George Hull Centre for Children and Families. They must also be on the provincial roster managed by the George Hull Centre.<sup>10</sup>

## **C. Aboriginal Approaches**

These are traditional methods of dispute resolution, including circle processes, which have been established by First Nations communities or Aboriginal organizations. Impartial facilitators who have no decision-making power, and who are skilled in First Nation traditional methods, assist the participants in developing a plan that is supported by the participants and/or the First Nation community and addresses protection concerns identified.<sup>11</sup> The model employed varies from community to community: from talking circles formats, to formats that resemble family group conferencing, to community council models in which a council of elders renders a decision after hearing from family members and other participants.

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<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

Facilitators must be recognized by the First Nations community with whom the child is affiliated (or by an Aboriginal organization) as qualified to engage in an Aboriginal approach to ADR.<sup>12</sup>

#### **D. “Other” or “Fourth” Option**

Children’s aid societies may use another method of ADR, if any of the three above options are not available or this “fourth” option is deemed more suitable. To be considered a prescribed method of ADR, this “fourth” option must satisfy the five criteria set out in the regulation (see above), must be facilitated by someone with the requisite qualifications and experience, must be detailed in a written proposal, and must be approved by the Executive Direction of the children’s aid society<sup>13</sup>

In some regions, “fourth option” methods have been developed in response to specific identified needs. For example, ADR-Link in Southwestern Ontario offers a hybrid ADR process that blends either mediation or family group conferencing with an educational program for parents experiencing high post-separation conflict. Other regions have longstanding ADR programs that pre-existed the introduction of the ADR provisions in the *CFSA*. Although these programs do not precisely meet the descriptions of the three standard prescribed methods (for example, they may use facilitators who are neither rostered child protection mediators or rostered family group conference coordinators, or the programs may be located within the child protection agency), they are very well regarded in their communities, and have therefore been “grandfathered”.

#### **Confidentiality**

The ADR Regulation is explicit that all child protection ADR processes are confidential or “closed”. This is subject to very limited exceptions, namely:

- information shared during ADR gives rise to a duty to report that a child may be in need of protection;
- disclosure is necessary to address a threat to a person’s safety;
- an individual consents to disclosure of personal information; and

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<sup>12</sup> *Ibid.*

<sup>13</sup> The ADR policy directive sets out the required qualifications and experience of any person facilitating a child protection ADR process. These requirements include membership on the provincial rosters (where applicable), formal post-secondary education in the field, work experience in the field, knowledge of the *CFSA*, and satisfactory criminal record checks.

- to disclose the agreement, memorandum of understanding or plan arising from the ADR to a court and counsel for the participants.

Aside from these exceptions, none of the participants, including the mediator, are compellable to give testimony or produce disclosure in court, and no representations, statements or admissions made during the mediation can be used as evidence.<sup>14</sup>

### **Referrals and Funding**

ADR services are funded by the Ministry of Children and Youth Services. They are accessed in different ways in different communities. In some areas, children's aid societies make direct referrals to rostered mediators or coordinators. In other areas, referrals are made to an agency, who will then arrange for the assignment of a mediator or coordinator. Some of these agencies provide access to multiple methods of ADR (for example, ADR-Link in Southwestern Ontario), and others provide access to a single approach (for example, the Toronto Mediation Centre, which coordinates access to child protection mediators only).

Although referrals to ADR are most typically made by children's aid society staff, in many cases referrals can also be initiated by other individuals. If a lawyer for a parent feels that ADR would be helpful in resolving a case, the first place to start is to raise the issue with the children's aid society. If the society does not seem inclined to pursue a referral, counsel may wish to contact the ADR service provider or agency in the community to express interest. In most areas, ADR agencies and service providers are willing to connect with the children's aid society and see if they can activate a referral. Alternatively, counsel may raise the option with the court.

### **Involvement of the Office of the Children's Lawyer**

Children may be provided with legal representation in an ADR process through the Office of the Children's Lawyer (OCL). Section 20.2(3) of the *CFSA* states that the OCL may provide legal representation for a child in a proposed ADR process, if the Children's Lawyer is of the opinion that legal representation would be appropriate.<sup>15</sup>

If a case that is before the court proceeds to ADR, the OCL may already be representing the child in the court process. In such cases, the assigned OCL lawyer will also represent the

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<sup>14</sup> "Methods and Procedures Regarding Alternative Dispute Resolution", O.Reg. 496/06

<sup>15</sup> *CFSA*, section 20.2(3)

child client in the ADR process. However, in cases where the OCL is not already involved (either because it is not yet before the court, or because the OCL has not been appointed to represent the child in the court process), the children's aid society must notify the OCL of the referral to ADR. The Ministry of Children and Youth Services has developed a Notice Form for children's aid societies to forward to the OCL in such situations. Upon receiving the Notice, a decision is made by the OCL ADR Intake Coordinator as to whether a lawyer will be assigned for the child(ren) in the ADR process.

For the most part, OCL lawyers are assigned only for older children who are capable of expressing views and preferences, and only in situations where the involvement of the OCL will be of benefit to the child or otherwise add value to the process.

OCL lawyers can play a number of important roles in an ADR process. Certainly, the primary role is to provide a voice for the child in the process. This involves ascertaining the child's views and preferences over the course of a number of private meetings, and then sharing those views with the family and other ADR participants at the joint session or conference. For children who attend a mediation or family group conference, the OCL can provide active support during the session – perhaps by supporting the child in making a statement or expressing his views, by offering emotional support during a highly charged moment, by reframing statements made by other participants, or by keeping a child engaged with the process when he becomes frustrated. OCL lawyers also play a valuable role in preparing child clients for an ADR process (explaining the process, reviewing possible alternative, sorting through the options, determining the message that the child would like shared with the other participants), in explaining and providing legal advice about the outcome of the ADR process, and in following up to ensure that a proposed plan is being implemented.

### **What kinds of cases are suitable for ADR?**

ADR can be a very effective manner of addressing a wide range of issues. Sometimes, these are issues that are very important to a parent or child, but which cannot really be addressed by the court. As counsel for a parent in a child protection case, some of the following situations might prompt you to propose ADR:

- Placement issues: For example, your client may have concerns about the appropriateness of a child's placement in care (distance from home community, suitability to meet child's needs, etc ). Alternatively, a placement with kin may be on the verge of breaking down and an ADR process may identify ways to shore it up – by addressing communication issues between a parent and a kin caregiver, by

identifying family members who could offer respite or support, and so forth. ADR may also be an effective way of finding family placements for children so that they need not come into care.

- Terms of supervision orders: ADR can be a much more productive way of developing mutually agreeable, pragmatic, and workable terms of supervision, as opposed to trying to negotiate these terms outside a court room door or via correspondence.
- Access issues: ADR can be a way to develop creative and detailed terms of access to Crown wards, for example, or addressing issues around access for children who are temporarily in Society care. It is also very useful for developing access plans in those cases where the Society is involved due to concerns about high conflict between separated parents. (If you are acting for a parent in a custody/access proceeding and the CAS is involved on a voluntary basis due to concerns about the children's exposure to conflict, a referral to child protection ADR may assist in resolving your domestic case as well.)
- Crown wardship orders or reviews: If your client has initiated a status review of a Crown wardship order (or wishes to do so), ADR can be a useful way to explore the viability of a return home or to negotiate the terms on which a return might take place.
- Issues in the relationship between your client and the child protection worker/foster parents/kin caregiver: ADR offers an opportunity to clear the air, set boundaries, and establish better communication patterns.
- Length of time in care or conditions for return: If your clients' children have been in care for a period approaching the legislated maximum (12 months for children under six; 24 months for children 6 and over), ADR may help "kickstart" the case. It is not uncommon for cases to drift for months, without any progress towards the children's return. ADR can offer an opportunity to develop a structured and focused plan for re-integrating the child into the parents' care, including clear expectations for the parent to meet, services to be provided by the Society, and a graduated access plan.
- Parent-teen conflict: Mediation can be a useful way for parents and teens to develop some mutually acceptable house rules, for example. Or, family group conferencing may lead to a concrete plan whereby extended family can offer temporary respite

when things become too heated between parent and teen.

- Long term care issues: If a parent is unable to resume care of a child, the ADR may assist in identifying an alternative long term placement for a child with a family member, or in developing a plan for what Crown wardship might look like (what will the long term access plan be, where will the child be placed, what involvement will the parent have in decision-making about the child's care, etc)
- Openness: ADR is an extremely useful tool for negotiating openness or post-adoption contact. Openness agreements and orders are the starting point for long term relationships between biological family members and adoptive parents. ADR allows terms of openness to be developed on a consensual basis, while sowing the seeds for a positive and trusting relationship between biological and adoptive families, to the benefit of the child.

### **When is ADR not appropriate?**

ADR is not appropriate when there is an active dispute about whether the children are in need or protection. If you or your client do not believe that there is a valid basis for children's aid society intervention with the family, ADR is not the place to address this issue. ADR can only be useful in situations where there is an acceptance of the need for CAS involvement. From there, discussions can focus on how the children's needs and the society's concerns can be addressed.

ADR may also be premature or inappropriate if:

- Your client has outstanding criminal charges related to the child protection issues. These charges will likely preclude your client from speaking openly about the issues that gave rise to society intervention, and how they might be mitigated in future.
- There is a parenting capacity assessment or other assessment (including a Children's Lawyer's Report in a custody/access case) underway. In most cases, it will make sense to wait until the assessment is complete, unless there are pressing issues that need to be addressed on a temporary basis pending the release of the assessment.
- Your client is struggling with a serious addiction or substance abuse problem. Unless your client has engaged with treatment and has made progress, there will be serious concerns about his/her ability to follow through with any commitments



made during an ADR process.

- Your client has developmental, emotional, or psychiatric issues that significantly compromise his/her ability to participate meaningfully in an ADR process. Participants in an ADR process must be able to comprehend verbal discussions, advocate for themselves, and understand the nature of the agreements they are making. Your client will be unlikely to adequately follow through with a plan or process that they don't understand.

As counsel, you may be concerned about your client's vulnerability vis a vis the children's aid society, or vis a vis other family members. This is a legitimate concern. Power imbalances present a significant challenge for mediators, coordinators and facilitators in the child protection ADR field, and require skill and experience to navigate. However, they do not preclude the use of ADR. If you have concerns that your client is in a particularly precarious or vulnerable position, speak with the assigned facilitator. Your concerns may be able to be addressed through careful design of the ADR process.

### **Role of Counsel in the ADR process**

With the exception of OCL counsel, lawyers do not generally participate in family group conferences or Aboriginal approaches. Practices vary in child protection mediation, with some mediators being open to the participation of all counsel, depending on the nature of the issues being addressed. However, whether or not you attend the joint session or conference with your client, there are many steps that you can take "behind the scenes" to support the efficacy of the ADR process.

Counsel can play a key role in preparing the client for ADR. Even though the mediator or coordinator will explain the ADR process to your client during intake sessions, it will be helpful for you to review key aspects as well: in particular, that the process is consensual and that your client can terminate it at any time, that all participants will be given an opportunity to tell their side of the story, that discussions are confidential (within the limits set out above), that the facilitator has no decision-making authority but is simply there to facilitate and structure discussion, and that the goal of the process is to arrive at a consensus together.

It will also be helpful to explore with your client what they hope will be accomplished by the ADR process. What aspects of an agreement are important to your client? What items are simply not negotiable? What does your client want the other participants to know? What do they expect that the CAS worker or other participants will be asking for at the

mediation? What do they understand to be the basis for that request? How might they respond to it? If your client has a proposal or plan that he/she feels strongly about, it is worthwhile to discuss how such an option could be made more attractive to the other participants. In essence, you will be generating some options for resolution in advance of the ADR, and getting your client thinking about what arrangements they can and can't tolerate.

It is also a good idea to remind your client about some of the ground rules for the ADR, although the facilitator will certainly review these with them as well. Where possible, speak with the facilitator about how the sessions will be structured so that you can discuss this with your client. If your client is anxious about the process, it will help them to know who will be involved in the meetings, where they will be held, how long they will last, what their interaction with the other parties might be, and what role they will be expected to play. For your more volatile clients, it may be helpful for you to explain appropriate conduct for the ADR process; namely, that emotion is expected and acceptable, but that verbal and physical attacks are not. Preparing your client emotionally for the session is important: your client will need to understand that they may hear some things during the session that are upsetting or that they don't agree with, but that it may still be helpful to hear the perspectives of the other parties.

Finally, your client should go into the ADR process well-informed about their responsibilities and entitlements under the *CFSA*, as the facilitator will not be able to give legal advice.

As noted above, most child protection ADR processes do not involve counsel other than the OCL. However, some child protection mediators are open to the involvement of counsel in certain types of cases. For example, cases that are on the eve of trial may benefit from the inclusion of counsel, given the many legal and procedural demands around that time.<sup>16</sup> As well, the involvement of counsel can be a good way to ensure that a mediated agreement actually results in resolution of the court proceeding: counsel may be reticent to approve agreements when he or she did not witness the "give and take" that resulted in them. However, if you will be actively participating in an ADR process alongside your client, it is imperative you enter the process with a constructive attitude – flexible and willing to listen to new ideas. Hard-nosed bargaining and adversarial posturing will quickly undermine any progress that can be made. You will also need to rein in your impulse to speak on behalf of your client during the joint session. Rather, your focus should be on supporting your client

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<sup>16</sup> S. Jain, "Child Protection Mediation: Practical Tips for Practitioners", Prepared for "Pathways to Resolution – Using ADR Effectively in Child Protection and Domestic Cases", North York Family Law Education Series, March 31, 2015

in having his/her voice heard and in hearing what others have to say. It is important to remember that mediation is intended to be a consensus-building forum, and that while you certainly have an obligation to advance your client's interests, you will also have an important role to play in moving your client and the other participants towards resolution.

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There is no question that ADR will be used more routinely in child protection cases in the future. As such, it is essential that all counsel practising in this field familiarize themselves with ADR processes and with their role as advocates within these processes. It is also critical for child protection lawyers to recognize ADR as a potentially important element of their overall approach to a case. The successful, long term resolution of a child protection case is often heavily dependent on the existence of positive relationships between parents and a variety of other individuals: their children, their child protection workers, their extended family members, foster parents, and so forth. ADR often provides opportunities to address issues in these relationships: by "clearing the air", improving communication, establishing ground rules or boundaries, or developing the structure for future relationships. Furthermore, ADR is a way for a parent to be actively involved in shaping the outcome of his or her child protection case, rather than simply waiting for the judge's decision. Certainly, there will always be cases that must be litigated. But ADR should never be dismissed as an option for exploring resolution, even in factually complex or highly contested cases.