

## **Immigration ADR: Back to the Future**

**Mario D. Bellissimo\***

### **Introduction**

Layers of voice mail, computerization, formality and lengthy hearings the first time the parties sat down in a room together marked immigration litigation for a period of time. The story continued for many years as immigration practitioners and their counterparts from the Minister's side grew further apart and the disputes ever longer to resolve. An endless perpetuation of the problem seemed quite plausible but then we turned back the hands of time towards a new reality. A reality that emanated from the past but drew from the present culminating in the birth of Alternative Dispute Resolution (ADR) in the area of Immigration and Citizenship law in the late nineties.

As Canada's largest administrative tribunal, the Immigration and Refugee Board (IRB) mandates Canada's policies relating to immigration and refugee matters. One of the three divisions through which the IRB operates, the Immigration Appeal Division (IAD), deals with immigration appeals, 80 per cent of which are appeals of refusals of family class sponsorships.<sup>a</sup> In an effort to uphold judicial policies and systems, which are accessible, efficient and fair, the IAD established a Working Group in July of 1997, which was commissioned to study the feasibility of introducing ADR into the IAD's adjudication process. The IAD's ADR Program was launched in July 1998 in Toronto after one year of intensive consultation, planning and development. Further study and refinement permitted expansion of the Program to Vancouver in April 2000.<sup>b</sup> Following implementation of the new Immigration and Refugee Protection Act (IRPA) in June 2002, the ADR process was implemented in Calgary and Montreal in 2003 as well as Ottawa in 2004.

In order to assess the effectiveness, efficiency and quality of the ADR Program, the IAD sought an independent Evaluator in 2001-2002 to conduct a comprehensive review of its workings. The success of the Program was measured according to the extent to which stated objectives were realized. These objectives included "providing a quality alternative to the adversarial hearing process, increasing the speed of dispute resolution, and improving the efficiency of dispute resolution, including reducing the financial and emotional costs of dispute resolution."<sup>c</sup> It is interesting to reference this study and examine the progression over the past seven to eight years.

### **ADR at the IAD**

The main objective of the ADR Program is to achieve early resolution for parties involved in the appeal process. As a practical alternative to the litigation process, which employs full, oral hearings, ADR is applied to cases that can be dealt with according to a single process. ADR offers an "informal, less confrontational and more consensual" approach to dealing with the IAD's appeals." In this way, the ADR Program is considered

---

<sup>a</sup>Néron, Robert, "The Bilingual ADR Program of the Immigration Appeal Division," CLE Conference May 2-3, 2003, 1.

<sup>b</sup> "Assessing Efficiency, Effectiveness and Quality: An Evaluation of the ADR Program of the Immigration Appeal Division of the Immigration and Refugee Board – Final Report," 1.

<sup>c</sup> Assessing Efficiency, Effectiveness and Quality: An Evaluation of the ADR Program of the Immigration Appeal Division of the Immigration and Refugee Board – Final Report, 2.

a quick, simple and fair route to resolution.<sup>d</sup> If the IAD streams approximately one third of all appeal cases into ADR as it intends, resources can be shifted to those cases that require more extensive litigation.<sup>e</sup> The expected results of this program included “more efficient utilization of IAD court time and improved client service.”<sup>f</sup> The ADR process at the IAD usually involves an in-person meeting—an ADR conference that is scheduled for at least an hour. The IAD assigns a member to act as a dispute resolution officer (DRO) for each appeal selected for the ADR process. In addition to the DRO the ADR conference participants are the Minister’s counsel, the appellant and if desired their counsel. About half of the cases that go through ADR will have a final result without the parties having to attend an appeal.

### **Case Selection**

Factors involved in selection of cases designated to ADR “include the type of case, whether credibility is an issue, whether the case is complex or straightforward . . . (m)edical, financial and criminality cases where there are strong humanitarian and compassionate factors that lend themselves very well to the ADR process.”<sup>g</sup> The five major types of sponsorship appeals, which are eligible to be resolved through ADR, are: adoption; marriage and fiancé (e) (and now conjugal partners under the new Act); financial; medical, and criminal admissibility.<sup>h</sup> Although the program is generally mandatory, Appellants are permitted to opt-out in limited circumstances and parties are also permitted to opt in through request and subsequent consideration.<sup>i</sup>

### **ADR Procedures and Protocols**

ADR is a confidential process, meaning that if a case is not settled through ADR, either party in a subsequent hearing cannot use anything that is said during the process. However, if information provided by either side is independently available or is related to an offence cited in the *Immigration and Refugee Protection Act* or is a breach of the Immigration Appeal Division Rules, it can be disclosed in an ensuing hearing. Information may also be used based on the consent of a given party.<sup>j</sup>

Although any documents used in an ADR conference are barred from hearing files pending the consent of participants, involved parties are permitted to take notes during the conference. Both the Appellant’s counsel and Minister’s counsel are entitled to share with their colleagues any information gleaned from the ADR process. Dispute Resolution Officers (DROs), however, cannot share information with members who might be privy to a hearing that follows an unresolved ADR conference.<sup>k</sup>

---

<sup>d</sup> IAD Action Plan 2003-04 Summary, 1.

<sup>e</sup> Minutes: Toronto ADR Advisory Committee, June 10 2003, 2.

<sup>f</sup> Letter from CIC to Toronto Hearings and Appeals Office, February 3<sup>rd</sup>, 2003, 1.

<sup>g</sup> Wlodyka, Andrew Z., “A Practical Guide To ADR before the Immigration Appeal Division for Appellant’s Counsel,” 4.

<sup>h</sup> “Assessing Efficiency, Effectiveness and Quality: An Evaluation of the ADR Program of the Immigration Appeal Division of the Immigration and Refugee Board – Final Report,” 1.

<sup>i</sup> “Assessing Efficiency, Effectiveness and Quality: An Evaluation of the ADR Program of the Immigration Appeal Division of the Immigration and Refugee Board,” 1.

Refer to ADR Protocol on Opting Out.

<sup>j</sup> IAD rule 20(4), ADR Protocol on Confidentiality.

<sup>k</sup> Letter from IRB to Toronto ADR Advisory Committee, 7.

## **Parties Involved in ADR**

ADR sessions are directed by Dispute Resolution Officers (DROs), all of whom are tribunal members of the IAD.<sup>1</sup> The role of the DRO is to assist involved parties in discussing issues raised by the refusal letter. He or she does not decide the outcome of the case, but rather facilitates discussion between the involved parties in an objective, impartial manner. If the ADR session is unsuccessful and the case proceeds to a hearing, another member of the IAD will hear the case without receiving information that was shared at the ADR conference. The role of Minister's counsel is to represent the Minister "who is required to uphold the immigration laws of Canada and has discretion to decide whether to recommend that his appeal be allowed."<sup>m</sup> Other principal actors in the ADR process include, of course, the Appellant and his or her counsel.

## **ADR Program Evaluation**

The following findings indicate a positive response to the ADR Program:

- The contribution of DROs to the ADR program is highly valued;
- The resolution rate of cases within the ADR Program compares favourably with other similar programs;
- Cases that resolve at ADR produce time savings.

## **Historical Areas of Concern**

- Cases that were not resolved through ADR took longer, on average, to reach the hearing stage and also.
- Dissatisfaction with the overall level of competency displayed by Appellants' counsel involved in ADR sessions.
- At times participants in ADR perceive resistance to the Program on behalf of Minister's counsel.<sup>n</sup>

## **Response to Areas of Concern**

Efficiency:

- Failed ADR cases should be heard no longer than two months later than those cases not streamed into ADR. <sup>o</sup>

Effectiveness:

---

<sup>1</sup> "Assessing Efficiency, Effectiveness and Quality: An Evaluation of the ADR Program of the Immigration Appeal Division of the Immigration and Refugee Board – Final Report," 1-2.

<sup>m</sup> Néron, Robert, "The Bilingual ADR Program of the Immigration Appeal Division," CLE Conference May 2-3, 2003, 3-4.

<sup>n</sup> "Assessing Efficiency, Effectiveness and Quality: An Evaluation of the ADR Program of the Immigration Appeal Division of the Immigration and Refugee Board – Final Report," 4.

<sup>o</sup> "Assessing Efficiency, Effectiveness and Quality: An Evaluation of the ADR Program of the Immigration Appeal Division of the Immigration and Refugee Board – Final Report," 5.

- Case-selection criteria should be pre-determined. In keeping with transparency, selection criteria should be consistent and clearly communicated to involved parties.<sup>p</sup>
- A defined opting-out mechanism should be developed and the opting-in mechanism should be refined and communicated.<sup>q</sup>

Quality:

- Enhance training for all involved parties, especially Appellant’s counsel.<sup>r</sup>
- Produce a document detailing the Program’s confidentiality policy

Over the past several years, ADR Protocols have been developed and all stakeholders involved in ADR have worked hard to implement the recommendations. In December 2003, the federal government presented one of its highest public service honours – the Head of the Public Service Award – to the IAD ADR Team 2003, in the category of Collaborative Working Relationships. This high distinction was a strong recognition of the innovation and success of this program, and the many contributions of not only the IAD and its ADR consultant, but also the stakeholders – CIC and appellants’ counsel. In this writer’s estimation the ADR program was in part a contributor to IAD Innovation and may of the effective early resolution methods currently being employed at the IAD.

## **25 Preparatory Practice Tips**

As counsel here are some quick practice tips to consider:

1. If available, obtain a copy of the permanent residency application from either the previous representative or the appellant.
2. Immediately make an access request for the appellant’s file – both a CAIPS request and a supporting document request including file jackets to compare and contrast with the file provided by the former representative.
3. Review file jacket and CAIPS notes to ensure there are no procedural breaches or documents allegedly sent to the appellant or the applicant that do not appear in the file.
4. Compare and contrast the Record with previous requests to confirm the file has not been vetted by CIC or CBSA to the disadvantage of your client.
5. Create a time line for the file and cross reference with dates on supporting documents.
6. Rely not on previous forms (i.e. dates on those forms) but on the actual supporting documents (photocopies must be cross referenced with originals).

---

<sup>p</sup> “Assessing Efficiency, Effectiveness and Quality: An Evaluation of the ADR Program of the Immigration Appeal Division of the Immigration and Refugee Board – Final Report,” 5.

<sup>q</sup> “Assessing Efficiency, Effectiveness and Quality: An Evaluation of the ADR Program of the Immigration Appeal Division of the Immigration and Refugee Board – Final Report,” 6.

<sup>r</sup> “Assessing Efficiency, Effectiveness and Quality: An Evaluation of the ADR Program of the Immigration Appeal Division of the Immigration and Refugee Board – Final Report,” 6.

7. Create a list of tombstone data that is not in dispute by cross referencing with the Record.
8. Identify issues within the instant appeal and any other admissibility issues. The goal is to canvass all issues to prevent multiple appeals and refused cases.
9. Consult fact similar case law at both the IAD level as well as the Federal Court and beyond and understand themes and any interpretative divisions at various judicial levels.
10. Consult the Act, the Regulations, the Division Rules and the Manuals and not assume your issue has been decided before. Fact specific nuances and innovative advocacy is what expands or in some cases focuses the law.
11. Re-read the refusal letter and the notes from the visa officer. Make sure as counsel that you know and understand the issues.
12. Ensure that your client knows and understands the issues.
13. Ensure that the client can effectively communicate the reasons why the appeal should be allowed.
14. Create a timeline of the case.
15. Review and compare stamps on original passports.
16. Familiarize yourself with the geographic region in which the relationship may find its genesis and a portion of its progression.
17. Read country reports in the home country to assess the genuineness and practicality of the fact scenario in a cultural context.
18. Although not a participant at the ADR speak to and scrutinize the applicant.
19. Collect and review requisite supporting documentation.
20. Make sure documents are complete, signed by appropriate parties where necessary and relevant.
21. Conduct a minimum of two preparatory sessions that will simulate the ADR conference in advance of your written submission.
22. Prepare a set of questions for the client that may be asked by the DRO. Your client should be able to properly answer the questions with reference to supporting materials where necessary.
23. Analyze the demeanour and comportment of your client and speak to issues of background, nervousness, date recollection etc in your submission.
24. Bring original documentation to the hearing including the passport.

25. Clients and counsel that are nervous and ineffectual usually are not prepared.

### Conclusion

Overall, the IAD's ADR Program has proven highly effective to date. This method of appeal resolution expedited the process of appeal; is highly cost-effective (when ADR is successful) and provided counsel with a clearer understanding of the strength and weaknesses of cases.<sup>s</sup> ADR is a growing facet of varied areas of law and lends support to the proposition that ADR is here to stay. It is incumbent upon all participants to continue to adapt to changing realities and steer clear of obstacles that would jeopardize ADR. Resistance to the program or failure to commit the requisite resources is extremely short sighted. Its loss or minimization in any form in the immigration context will compromise a highly efficient, well-established and cost saving alternative that ushered immigration dispute resolution into the twenty-first century and has lead in part to IAD Innovation.

**Mario D. Bellissimo, C.S.**

Certified Specialist, Lawyer, Notary

**Bellissimo Law Group**

Ormiston, Bellissimo, Rotenberg

Yonge Eglinton Centre

PH 2202 - 20 Eglinton Avenue West

Toronto, Ontario M4R 1K8

Tel: 416-787-6505 ext 210

Fax: 416-787-0455

Website: [www.obr-immigration.com](http://www.obr-immigration.com)

E-mail: [mdb@obr-immigration.com](mailto:mdb@obr-immigration.com)

---

<sup>s</sup> Néron, Robert, "The Bilingual ADR Program of the Immigration Appeal Division," CLE Conference May 2-3, 2003, 6.