MANDATORY MEDIATION IN ONTARIO: TAKING STOCK AFTER 20 YEARS

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For nearly 20 years mediation has been required in many civil litigation proceedings in Toronto, Ottawa and Windsor through the Ontario Mandatory Mediation Program ("**OMMP**"), but is not available elsewhere in Ontario. Mandatory mediation was subject to great resistance when it was introduced. Sceptics were concerned that counsel were best placed to negotiate settlements when appropriate without being mandated to participate in costly, delay-inducing and likely unsuccessful mediation, and that the adversarial model was being wrongly challenged. Proponents believed mandatory mediation would decrease legal costs and delays, increase access to justice and satisfaction experienced in resolving disputes. Twenty years later, mandatory mediation has become a familiar part of swaths of Ontario's litigation landscape, and it is worth taking stock of the program: reminding ourselves why and how was mandatory mediation was introduced, how it has changed since its introduction and, importantly, asking what Ontario lawyers think of mandatory mediation now, having lived with it for nearly two decades. This article aims to address all of those questions, providing insight gleaned from recent Ontario Bar Association member surveys on mandatory mediation.

1. HISTORY OF MANDATORY MEDIATION IN ONTARIO

Mandatory mediation was first introduced in Ontario in a series of pilot projects. The success of these projects, combined with Provincial and Federal-level recommendations supportive of mandatory mediation, resulted in the permanent adoption of the OMMP in Toronto, Ottawa, and later Windsor.

a. 1990s: Testing the Waters with the ADR Centre

In 1994, the ADR Centre of the Ontario Court (General Division) was introduced to determine whether the conduct of civil cases would be improved with the presence of ADR programs. The purpose of the ADR Centre was to provide enhanced, more timely and cost-effective access to justice for defendants and plaintiffs.[2] Through a pilot project, four in every ten cases at the General Division Court in Toronto were referred to the ADR Centre, with some exceptions.[3] Matters were referred to the ADR Centre once the first statement of defence had been received, and were usually assigned a date for a mediation meeting within 2-3 months. Mediations were conducted by ADR Centre Staff, and parties were offered an initial two-hour mediation which could be extended in some circumstances.[4]

In 1995 the ADR Centre was evaluated by a third-party expert who reviewed: questionnaires from clients and lawyers participating in the process; personal interviews with a case study group; and an analysis of the Court's database.[5]

The expert concluded that compared with a control group, the cases referred to the ADR centre had shortened the length of time in which some cases were disposed, reduced the median time period in which General Division cases were disposed and accordingly reduced client costs.[6] Statistics revealed that 40% of the cases referred to mediation resulted in settlement in the very early stages of the case. Lawyers reported that costs were reduced even for cases that did not settle because parties were forced at an early stage to evaluate the merits of their case.[7]

A second pilot project in 1997 made the three-hour mediation session mandatory for non-family civil cases involved in Ontario's case management system in Ottawa. Of the cases mediated in the Ottawa pilot, "44% fully settled; 17% partially settled; and, 5% settled within 60 days of having attended a mediation."[8]

b. 1996: National and Provincial in-depth civil litigation studies recommend ADR be required in litigation

At the same time that the ADR Centre was experimenting with the use of mandatory mediation, two major reviews on civil justice were being carried out by the Province of Ontario[9] and the Canadian Bar Association ("CBA")[10]. Both reviews concluded that mandatory mediation would be beneficial.

The CBA had formed a task force to inquire into the state of civil justice on a national basis and to develop mechanisms to help modernize the civil justice system. The CBA task force consulted individuals and organizations across Canada, releasing a report in August 1996 (the "*CBA Civil Justice Report*") which identified cost and delay as significant barriers to access to justice. The report noted that while a high percentage of civil cases settle, the settlements take place too late in the litigation process to save time and money for the litigants or the Court system. The report included a recommendation that parties to litigation be required to certify after the close of pleadings that either that they have participated in a non-binding dispute resolution process and that it has not resulted in resolution, or that the circumstances of the case are such that participation is not warranted or has been considered and rejected for sound reasons.[11]

Meanwhile, in 1994 a civil justice review was initiated by the Chief Justice of the Ontario Court of Justice and the Attorney General for Ontario. The review's mandate was "to develop an overall strategy for the civil justice system in an effort to provide a speedier, more streamlined and more efficient structure which will maximize the utilization of public resources allocated to civil justice". The review culminated in a November 1996 Report (the *"Ontario Civil Justice Report*") which recommended that mandatory mediation be introduced to all civil litigation matters except family matters.[12]

c. Pilot change to the Ontario Rules of Civil Procedure

In 1999, Rule 24.1 of the *Rules of Civil Procedure* temporarily established mandatory mediation for civil, non-family, case managed actions in Ottawa and Toronto.

Rule 24.1 was negotiated in a lengthy process by the Civil Rules Committee, composed of members of the judiciary, bar, and officials of the Ministry of the Attorney General. The mandatory mediation program was championed by then Attorney General Charles Harnick, Regional Justice Robert Chadwick, and Assistant Deputy Attorney General Leslie H. Macleod.[13] The rule change itself was not initially unanimously embraced; reportedly the Hon Charles Harnick warned the recalcitrant members of Ontario Civil Rules Committee that he would legislate mandatory mediation if they would not accept a pilot rule.[14] As a compromise, the mandatory mediation program was instituted initially for only a two-year period, subject to an assessment of the cost, speed, outcome and satisfaction with the program,[15] with an understanding that if the program would be terminated if it did not achieve its desired aims.

Designed to help litigants settle their cases early in the litigation process, the key features of Rule 24.1 were originally as follows:

- Mediation had to take place within 90 days after the first defence was filed, unless the parties obtained a court order abridging or extending the time. In some cases, parties could consent to a postponement of up to 60 days;
- Parties could opt out of mediation only by obtaining a court order; and

- If the parties did not select a mediator within 30 days after the first defence, the court would appoint one. [16]

d. Evaluation of mandatory mediation concludes it is beneficial - mandatory mediation becomes permanent and expands

A major study assessed the pilot mandatory mediation program promulgated by Rule 24.1 in 2001, concluding that mandatory mediation was beneficial. That study, culminating in a report titled, "Evaluation of the Ontario Mandatory Mediation Program (Rule 24.1): Final Report -- The First 23 Months"[17] (the "Hann Report"), reviewed data from 23,000 cases commenced since 1996, 3000 mediations held under the (then) new mandatory mediation program, and the responses of 600 mediation evaluation questionnaires completed by litigants, 1,130 completed by lawyers and 1,243 completed by mediators all specifically designed for the evaluation.

The Hann Report concluded that mandatory mediation resulted in:

- significant reductions in the time taken to dispose of cases;
- decreased costs to the litigants;
- high proportion of cases (roughly 40% overall) being completely settled earlier in the litigation process, with other benefits being noted in many of the other cases that do not completely settle; and
- in general, litigants and lawyers expressed considerable satisfaction with the pilot mediation process.[18]

The Hann report also recommended that mandatory mediation be extended to other types of civil cases in Ontario and expanded across the Province of Ontario.[19]

As a result of these positive findings, the mandatory mediation program was made permanent and was extended to in 2002 to the third largest Court Registry, Windsor, Ontario, but was not expanded further throughout the province.

e. Subsequent changes to mandatory mediation program

Since 2001, several changes have been made to the OMMP, including to:

- encompass simplified procedure actions;
- extend the time by which mediation was required to take place after the first defence has been filed from 90 to 180 days, pursuant to Rule 24.1.09 of the Rules of Civil Procedure,
- provide the ability for counsel to consent or obtain a court order to extend the timeline for mediation, Rule 24.1.09 of the Rules of Civil Procedure;
- extend mandatory mediation to contested estates, trusts and substitute decisions matters pursuant to Rule 75.1 of the Rules of Civil Procedure.

Mandatory mediation, however, has never been extended beyond Ottawa, Toronto and Windsor.

2. RESULTS OF ONTARIO BAR ASSOCIATION MEMBER SURVEY REGARDING OMMP

In 2019, the Ontario Bar Association[20] ("**OBA**") administered two surveys to its members canvassing views with regard to the OMMP, and whether it ought to be expanded outside of the existing three regions to the rest of the province. The surveys were administered in

June/July[21] and December 2019[22], and showed that approximately 90% and 70% of respondents respectively were in favour of expanding mandatory mediation.

The surveys revealed that mandatory mediation is particularly popular with lawyers who practice in or near regions where mandatory mediation currently exists. This is consistent with the Hann Report which found that lawyers who had experienced mandatory mediation expressed considerable satisfaction with the program.

While the response rate to the December OBA survey was not considered to be statistically significant, that survey elicited comments from respondents which provide insight into perceptions of mandatory mediation. For instance, comments from respondents supportive of expanding mandatory mediation included statements such as:

- "We almost always commence actions in Toronto, even though our firm is located in [X], in order to gain access to mandatory mediation. Even when working with a difficult client or counsel on the other side, the parties are required to come to the table and consider whether resolution is possible. Often, with a good mediator, a resolution can be achieved."
- "... it is preferable to commence proceedings in Toronto to benefit from mandatory mediation. In my experience, most matters settle at mediation (whether mandatory or voluntary) or shortly thereafter."
- "Clients much prefer it... should be expanded to all regions in Ontario... Expeditious settlements, great savings in legal fees. It's already much much less costly than the alternative, which is to proceed to trial (totally unaffordable for most clients). Beneficial for all cases."
- "regularly commence proceedings in Toronto rather than another region to take advantage of mandatory mediation (although this is not the only consideration). Key benefit of mandatory mediation is overcoming knee-jerk resistance to mediation where the process is actually likely to result in a settlement..... Privacy is valued, cost is a major issue, and disputes often are driven by emotional rather than rational factors that can be better addressed in a settlement process than a litigation process."
- "want mandatory mediation to be expanded province wide so that all Ontarians have the same access to quick and cost-effective resolution, regardless of their counsel's style. Benefits of mandatory mediation: it allows parties to save face by not requiring either party to initiative or suggest mediation - this can be perceived as showing weakness. "
- "... it is helpful to connect before the parties are entrenched in their views and much money is spent on legal fees... reduces costs, allows creative resolution, allows counsel to assess the credibility of other party and make more informed decision about resolution."
- "believe the entire province should be included [in expansion of mandatory mediation].... My experience is that for commercial litigation, mediation is highly beneficial to achieving a timely settlement, particularly well before trial. The mandatory nature of such a mediation means that agreement to mediate is taken out of the hands of counsel and the parties .... in my view, all types of cases benefit [from mandatory mediation]..."

Comments from the respondents opposed to expanding mandatory mediation included concerns that mediation will not result in settlement if it is voluntary, that failed mediations add cost and delay, and that there were no mediators in a particular region. When mandatory

mediation was introduced in 1999 similar concerns were raised, according to lawyers practising at the time. The Hann report data showing that mediation saves costs and results in earlier settlements suggests that these concerns were not statistically borne out. Additionally, a supply of mediators soon appeared to fill the new demand.

3. CONCLUSION

In 2001, the Hann Report concluded that mandatory mediation benefitted Ontario's justice system in terms of increased efficiency, and litigants in terms of decreased legal costs, decreased time to resolve disputes, and thus increased access to justice. The strong support from Ontario Bar Association members for expanding mandatory mediation throughout Ontario suggests that those benefits persist twenty years later.

ABOUT THE AUTHOR

Jennifer Egsgard was called to the Ontario Bar in 2002. She worked as a barrister and solicitor for six years in the litigation department of a large Canadian national firm, Fasken, for the Refugee Law Office of Legal Aid Ontario for four years, and later in a smaller firm that she started with a senior Fasken colleague, Sills Egsgard LLP. In 2018 she launched a mediation practice, Egsgard Mediation. In 2020 she was re-elected as an executive member of the Ontario Bar Association Alternative Dispute Resolution Section. Since 2018 she has chaired the Ontario Bar Association Joint Ontario Mandatory Mediation Program Committee, which is considering whether or not it would be beneficial for mandatory mediation to be expanded province-wide. The Joint Committee is comprised of executive members of the Ontario Bar Association Insurance, Civil Litigation, Estates and Trusts, Employment and Labour, and Alternative Dispute Resolution practice sections.

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[2] "Evaluation of Civil Case Management in the Toronto Region: A Report on the Implementation of Toronto Practice Direction and Rule 78", February 2008, Submitted to the Honourable Chief Justice Heather Smith, Superior Court of Justice, the Honourable Chris Bentley, Attorney General for Ontario, and the Civil Rules Committee, prepared by the Honourable Chief Justice Warren K. Winkler, Chief Justice of Ontario (hereinafter the [*2008 Report*], pp. 3, 71-73, available online at: https://www.ontariocourts.ca/coa/en/ps/reports/rule78.pdf .

[3] *Ibid,* p. 3. Matters not subject to mandatory mediation included applications, family matters, motor vehicle claims, and construction liens.

[4] Dr. Julie Macfarlane, *Court-Based Mediation for Civil Cases: An Evaluation of the Ontario Court (General Division) ADR Centre* (Toronto: Queen's Printer for Ontario, November 1995) at 71-73 [hereinafter *Macfarlane Evaluation*] at p. 1, available online at https://archive.org/details/mag_00007535/page/n43/mode/2up.

[5] *Ibid,* p. 3-4.

[6] *Ibid,* p. 17.

[7] *2008 Report,* p. 3.

[8] Leslie H Macleod, Elana Fleischmann and Anne DeMelo, "*The Future of Alternative*

Dispute Resolution in Ontario: Mechanics of the Mandatory Mediation Program",

(1998) 20 Advocates' Quarterly 389, as cited in "The Impact of Mediation on the Culture of Disputing in Canada: Law Schools, Lawyers and Laws ", by Catherine Morris p. 101.

[9] "Ontario Civil Justice Review: Supplemental and Final Report", (November 1996), available online at: https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjr/ ("*Ontario Civil Justice Review*"). According to the *Ontario Civil Justice Review,* "The Civil Justice Review was established in 1994 at the joint initiative of the former Chief Justice of the Ontario Court of Justice and the former Attorney General for Ontario. The Review's mandate is "to develop an overall strategy for the civil justice system in an effort to provide a speedier, more streamlined and more efficient structure which will maximize the utilization of public resources allocated to civil justice".

[10] "Systems of Civil Justice Task Force Report", (The Canadian Bar Association, August 1996).

[11] *Ibid,* p. 33.

[12] *Ontario Civil Justice Review, supra* note 9, recommendation 5.2.

[13] Julie Macfarlane, "Introduction to the Special Topic of Alternative Dispute Resolution" (2006) 21 Windsor Review of Legal & Social Issues Vol. 21.ƒ

[14] Julie McFarlane, "Introduction to the Special Topic of Alternative Dispute Resolution", *Windsor Review of Legal and Social Issues*, Vol. 21, p. 1.

[15] Macleod, Fleischmann and DeMelo (n138) 399, as cited in Catherine Morris, *supra* note 8.

[16] *2008 Report,* p. 8.

[17] Available online at: http://www.ontla.on.ca/library/repository/mon/1000/10294958.pdf

[18] *Hann Report,* p. 2.

[19] *Hann Report,* p. 2.

[20] Established in 1907, the OBA is the largest voluntary legal organization in Ontario, representing lawyers, judges, law professors and students from across the province. OBA lawyers work on the frontlines of the Ontario justice system and in no fewer than 40 different sectors. In addition to providing legal education for its members, the OBA assists government and other decision-makers with several legislative and policy initiatives each year, both in the interest of the profession and in the interest of the public.

[21] A survey sent to 1297 OBA members in June and July 2019 received 110 responses, with 90% indicating that they support expansion of mandatory mediation throughout Ontario.

[22] A more detailed survey sent to 4400 OBA members in December 2019 received 104 responses, 71 percent of whom were in support of expanding mandatory mediation.

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