ADR Institute of Ontario

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# Mandatory Mediation - The View of ADRIO

Submitted to: Attorney General of Ontario

Submitted by: ADR Institute of Ontario, Inc. (ADRIO)

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## Introduction

The mission of the ADR Institute of Ontario (ADRIO) is to:

- Assist the public, business, and non-profit communities and government bodies at all levels to consider, design, implement and administer Alternative (increasingly known as Appropriate) Dispute Resolution (ADR) strategies, programmes and processes;
- Assist all the foregoing to locate ADR professionals with the level of skill and experience required to meet their needs;
- Provide training standards and accreditation procedures that contribute to the development of a community of ADR practitioners across Ontario that is competent, well educated and highly professional in delivering ADR services to its users;
- Provide a regulatory infrastructure that includes a Code of Ethics and a Code of Conduct for Mediators that set high standards of practice, as well as providing a complaint and discipline process for any dissatisfied user of ADR services;
- Provide ADR professionals throughout Ontario with educational and networking opportunities;
- Speak on behalf of ADR professionals in response to current events and government initiatives.

This submission is ADRIO's response to the Attorney General's request, dated August 24, 2020, for input and perspectives on legislative potential changes to the mandatory mediation program and a single-judge model (building on the current One Judge Pilot Program) in the Superior Court of Justice.

## Mandatory Mediation Program

Purpose of the Ontario Attorney General's consultation on the Mandatory Mediation Program:

- *To identify reforms that would improve early resolution of civil disputes and increase access to justice in civil proceedings through the potential expansion of the mandatory mediation program and enhancements to make it more affordable and efficient for litigants and lawyers.*

### *1. Should mandatory mediation be expanded to apply throughout Ontario? Should the types of civil actions that mandatory mediation applies to under Rule 24.1 be expanded?*

Yes. ADRIO supports the expansion of mandatory mediation to apply throughout Ontario, as we believe this will meet the Attorney General's goals of improving early resolution of civil disputes, and increasing access to justice in civil proceedings.

Expanding the types of civil actions that mandatory mediation applies to under Rule 24.1 would potentially help to achieve the same goals, but careful considerations should be given the types of civil actions to be added and reasons for the additions. For example, mandatory mediation does not currently apply to family disputes, and should continue to be excluded, particularly in situations of domestic violence.

Given the backlog in the courts caused by the COVID-19 pandemic, expanding mandatory mediation across Ontario would be particularly timely and necessary in facilitating resolution of civil disputes within reasonable timeframes. Further, expansion of mandatory mediation and possibly the types of civil actions it applies to would have positive financial implications, in reducing the costs for long, drawn out court processes, and in generating work opportunities for mediators.

On the other hand, in order for both expansions to work effectively, they cannot be implemented without various longstanding issues with the program being addressed first. These issues are discussed under subsequent questions raised in this consultation. Improving the program within its current scope is necessary for any

expansion, and the implementation of the expansions can potentially be done in phases, starting with the regions where the courts have the heaviest caseloads. A phased in approach can provide opportunities for testing and evaluating improvements to be made to the program.

***2. Is mandatory mediation facilitating early resolution of civil disputes in your/your membership's cases?***

Yes. Mandatory mediation has facilitated early resolution of disputes.

To a great extent, mandatory mediation is facilitating early resolution of civil disputes in our membership's cases. At present, ADRIO does not formally track settlement data on our membership's OMMP cases. A quick polling of the ADRIO Board of 20 Directors, many of whom have had years of experience with the OMMP, indicates mandatory mediation is facilitating early resolution of civil disputes, which in turn helps to shorten court backlog, and save time and costs.

On the other hand, there are factors that negatively impact the effectiveness of mandatory mediation in facilitating early resolution of civil disputes. For one, instances have been observed where mandatory mediation is used more as a 'rubber stamping' process in order to get a matter to court. Secondly, it has been observed that experienced mediators are getting off the rosters for a number of reasons, including the perception that roster mediators are less qualified, and the low roster rate.

It is also observed that mandatory mediations do not have settlement rates as high as those for non-mandatory mediations, as counsel or parties may not want to mediate.

For more accurate settlement statistics to be collected, having mediators file reports on mediations with results of both settlement and non-settlement will be most helpful.

***3. Should mediation be made mandatory prior to filing an action with the court? If so, how could access to justice be maintained for those unable to afford mediation fees?***

No. ADRIO does not believe that a mediation step prior to filing an action is warranted.

It is ADRIO's view that mediation should not be made mandatory prior to filing an action with the court, as there are too many unknowns at such an early stage. Also, making mediations mandatory prior to filing an action with the court would take mediations out of the judicial stream and court process, and there are no clear benefits for doing that.

Where both parties are self-represented, some thought could be given to the possibility of mandatory mediation prior to filing an action with the court.

In terms of maintaining access to justice for those unable to afford mediation fees, there are opportunities for the Ministry of the Attorney General to work with law schools, and colleges providing paralegal and ADR programs to offer field placements. Such field placements would meet the standards of the Ministry of Training, Colleges and Universities, and other governing bodies such as the Law Society of Ontario. Further, ADRIO can offer the Ministry of the Attorney General the experience and 'know-how' required to provide OMMP training and mentorship. Together, these opportunities will not only provide valuable experiences to mediators, but also maintain access to justice to those who need it.

***4. How often have you/your organization's members used the mediation roster used in your region?***

As an ADR organization, ADRIO has not directly used any of the three mediation rosters in the province. On the other hand, a number of our members had direct involvement in the development of the rosters, and many ADRIO members have been on the rosters over the years.

***5. Where you/your organization's members have used the roster, has the mediator been selected on consent of the parties or appointed by the mediation coordinator?***

A recent sampling of ADRIO Board Directors indicates a mix of both, i.e. mediators selected on consent of the parties, and mediators appointed by the mediation coordinator.

***6. Are mediation rosters adequately supporting mandatory mediation requirements under the Rules (e.g. mediator availability, mediator expertise)? Why or why not?***

In their current state, the mediation rosters are not adequately supporting mandatory mediation requirements under the Rules for the following reasons:

- the number of mediators on the rosters has been declining over the years;
- there is no mechanism for mediators to be evaluated, and no mechanism for mediators to provide input to the program as participants;
- there is no mechanism for users of the program to provide feedback;
- awareness of the program is still limited, particularly for people who are self-represented;
- the rosters need to be more reflective of Ontario's diverse population.

To improve on the rosters, strategies are needed for retaining existing mediators and attracting new mediators. ADRIO is putting forward the following options for consideration:

- Improve the fee structure with a graduated scale incremental to the years of experience of the mediators.
- Change the rosters to lists of mediators who have been identified by the Ministry of the Attorney General as having a minimum level of training (including in civil procedure) and experience, to assist parties in choosing. Those who submit their qualifications to be on the program's list should state their fees for assigned mediations only. If a mediator is chosen, they should be able to freely negotiate their rate with the parties.
- If a roster is maintained, parties/counsel should not end run their private selection of a particular roster mediator that they want by not contacting the mediator but the roster office directly asking for an assignment to the mediator. This allows parties/counsel to pay the mediator the lower roster rate rather than the mediator's rate. Such practice could lead to accusation of favouritism made against roster staff, particularly when they choose the mediator based on a potentially inaccurate assessment of who the right mediator is for a particular assignment. Assignments should be made in order of an alphabetical list. Only when a roster mediator is privately selected should advertised expertise be considered.

***7. What are the challenges/issues facing the current mediation roster process and how could this process be improved?***

The current application took effect as of September 1, 2002, so a review can help update the minimum requirements in terms of the skills mediators should have to conduct civil mediations.

Another improvement to be considered is mentoring by more senior mediators.

The cap fee does not reflect the expertise and experience of many of the mediators.

***8. Should the requirement for each party to pay an equal share of a mediator's fees in a Rule 24.1 mediation matter be changed? If so, how should fees be allocated?***

The presumption of equal sharing should be maintained. In the end, which party actually pays is negotiated between the parties, as it should be.

There is a current practice that the defendant picks up the full mediation cost if the matter settles. This can be considered for changing the requirement that each party pays an equal share of a mediator's fees.

Further, a sliding scale can be considered, based on client versus a firm. Fees can be based on size of firm, net worth of yearly income, versus salary of client.

The requirement needs to be clarified and amended to remove the contradictory provision in the Insurance Act that required the defense insurer to pay the costs of mediation in a motor vehicle action for personal injuries.

***9. What are other improvements that can be made to the mandatory mediation program to make it faster, easier, and more affordable for litigants?***

Administration of the program needs to be adequately resourced to keep up with demand.

With pro bono mediation services, the Access Plan and the low roster rate, the current mandatory mediation program is already affordable for litigants in general.

More education for the public about the mediation process, role of mediators and types of mediation offered is helpful to people making their choices for mediators.

Working with mediators who bring experience and knowledge appropriate for the types of cases will make the process easier for litigants.

***10. Are the needs of litigants with limited financial resources being met by pro bono mediation services and/or the Access Plan?***

This depends on the litigants' level of awareness of the Access Plan, and how often the plan is utilized.

***11. Any additional comments you may have on the mandatory mediation program that have not been captured by the questions above.***

An area that burdens roster administration is the need to only place mediators on the roster who are properly qualified. A solution to this challenge that would reduce the administrative burden is to choose a few widely-recognized credentials that can attest to a mediator's technical and practical competence.

ADRIO - as the regional affiliate of the ADR Institute of Canada (ADRIC) - offers candidates access to a number of highly recognized credentials. For mediators, these include the Q.Med. (Qualified Mediator) and C.Med. (Chartered Mediator). These qualifications include educational and practical aspects, and are only awarded after a verification, including a hands on interview, of the mediator's credentials and abilities.

The administrative burden of running a roster of mediators throughout the province could be dramatically reduced if the Q.Med. and C.Med. credentials (and other similar programs) were used as a baseline requirement for inclusion on the roster.

It is critical to expand the program to all Ontario court jurisdictions and enable online mediation as a valid form of mediation, which will help extend service to remote areas. The expansion can at least start with the busy courts not currently covered by Rule 24.1.

A need to re-brand the program is in order. OMMP needs improvements, it has been tarnished as roster mediators are seen to be less competent, and the process is often used as a rubber stamp.

There is an opportunity to explore Restorative Justice processes in a mediation. For example, in sexual assault cases where the plaintiffs are suing the defendants' companies/organizations, a restorative process could bring great healing to the plaintiffs.

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## Single-Judge Proceedings

Purpose of the Ontario Attorney General's consultation on the Single Judge Proceedings Model:

- *To determine whether applying the one-judge model to case management in Ontario would result in more effective and efficient civil proceedings.*
- *Objectives of this potential reform include:*
  - *Promoting consistent rulings within a case and enabling a judge to oversee compliance with their court orders;*
  - *Enabling parties and counsel to predict what the judge may or may not do at the next stage of a case;*
  - *Allowing the judge to become very familiar with the parties, counsel, and the various legal issues, thereby saving judicial time spent on learning new case files; and,*
  - *Promoting prompt and full disclosure and make it more difficult for a party to delay disclosure, when that person must face the same judge every time.*

### *1. Should a single-judge model be applied to all civil proceedings in Ontario? If not, what exceptions to the single-judge model would you propose and why?*

A single-judge model would be ideal in civil proceedings to help increase accountability of all parties. The same judge should oversee all pre-trial motions and the trial.

In a single-judge model, the judge is already familiar with the facts of the case, the parties would not have an excuse not to comply with any order, and the same judge could perform mediation at the eleventh hour before the trial. This model could result in a more efficient trial process.

The difficulty will be on the staffing side in making the same judge available throughout the life cycle of a court action.

### *2. Should parties' consent be required prior to a proceeding becoming a single-judge proceeding?*

The one-judge model to case management differs from a judge-alone trial and should be voluntary, not mandatory. The case management judge oversees all administrative aspects of the case (motions, pretrials, and trial.) The trial could be a jury or a judge-alone trial.

There should be the option of being able to move the matter out of a single-judge into a jury case in the event that it is warranted.

### *3. In what, if any, circumstances, should a single-judge proceeding be able to be reassigned to another judge?*

Circumstances under which a single-judge proceeding should be able to be reassigned to another judge should include:

- the judge is not available on a continuing basis, e.g. due to retirement or death;
- the judge has a conflict of interest;
- the judge errs in law;
- the judge is disqualified;
- on consent of the parties.