Mon 22/07, 09:57

Sat 13/07, 10:42

TB

Tom Brooker

Fri 12/07, 16:20

Hi Paul,

I am responding to your LinkedIn message.

Mediation remains mandatory in some regions but not all regions of the province of Ontario. I believe it has to do with the additional resources necessary to monitor the system. It is mandatory in the major urban centres. The Ontario Mandatory Mediation Program started on January 4, 1999 in Toronto and Ottawa, and in Windsor on December 31, 2002. Certain civil actions, such as family law cases, are excluded from mandatory mediation. Under Rule 75.1, contested estates, trusts and substitute decisions matters are referred to mandatory mediation. In addition, regardless of where in the province a matter is commenced, Section 258.6(1) of the Insurance Act provides for mandatory mediation in automobile cases, which states as follows: A person making a claim for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile and an insurer that is defending an action in respect to the claim on behalf of an insured or that receives a notice under clause 258.3(1)(b) in respect of the claim shall, on the request of either of them, participate in the mediation of the claim in accordance with the procedures prescribed by the regulations.
https://www.attorneygeneral.jus.gov.on.ca/english/courts/manmed/notice.php

I am not an expert on mandatory mediation as I am not a mediator. I participate on behalf of parties to litigation. I believe that experts in the field will say that mandatory mediation works in Ontario in part because it is part of a case management system which has also changed over the years. But for the case management system which compels the parties to

move the litigation forward the mandatory mediation component would be less effective. Voluntary mediation is in my view effectively useless. Parties have always been free to negotiate, mediate or arbitrate so to develop a system but then make it voluntary brings little added value in my view. Mandatory mediation without case management is less effective.

I continue to be a strong supporter of mandatory mediation. There are some who argued way back when it started that since the goal of mediation is to arrive at an agreement to resolve the litigation, you cannot force an agreement so it makes no sense to make it mandatory. However, the system works. It is fully open to a party to appear at a mediation and state simply they will make no offer to settle and will not engage in any negotiations. However, in practice while this sometimes occurs litigants have seen the benefit of it. When it was first introduced as a voluntary process some old-school litigants saw it as signaling weakness or doubt about the strength of their case to suggest to the other side that mediation might be helpful. By making it mandatory, this issue is taken off the table. There were some old-school litigants who first responded to the mandatory mediation by saying in effect, we don't mediate - we assess a case and establish our position and its take it or leave it. If you don't agree, we go to court. But this approach was quickly seen as short sighted and there are few if any in my practice who take that approach.
In terms of negatives, I do not see any as long as there is flexibility in the system to allow the parties to elect *when* the mediation takes place. There was a period of time when the mediation had to take place within x number of days after pleadings were closed and administrative hoops had to be jumped over to extend that time line. In many cases, the time line was unrealistic and the case was not ready to settle. For example, a personal injury case where the nature or extent of the injuries or effects had not crystalized.

As indicated, I am not an expert on the area but I could refer you to some real experts who have written, practiced as mediators and taught in the area.

Tom

Thomas W. Brooker B.C.L., LL.B.