

Ontario's Mandatory Mediation Program

Lessons, Outcomes, and the Impact on Dispute Resolution

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Executive Summary

The purpose of this research paper is to provide a brief overview of existing study regarding Ontario's mandatory mediation program which began as a pilot project in Ottawa in 1997, then Toronto in 1999, after which it became mandatory with Ottawa being acknowledged as the first mandatory court annexed mediation program in Canada as set out in the Canadian Bar Association's *National* magazine. In reviewing Ontario's experience with mediation, one limitation arises due to the absence of recent data on the impact of the mediation program on Ontario courts, access to justice in the province, settlement rates, and program and user costs. The most comprehensive study dates from 2001 which recommended mandatory mediation be made permanent. Since then, the program has been modified and has become an established feature of Ontario civil cases. It is widely believed that settlement rates have increased beyond what is reported in the 2001 study. This research does present an overview of the debate regarding the merits and weaknesses of the mandatory mediation program. This is not comprehensive but is intended to illustrate some of the reaction to the program by the Ontario bar.

I. Introduction

The Ontario Mandatory Mediation Program (OMMP) has operated within Ontario as a feature of the civil procedure landscape since 1999. The program developed quite quickly in Ontario beginning with several pilot projects. In 1994 the ADR Centre of the Ontario Court of Justice became the first court connected ADR program in Canada. Limited to the Toronto region, the program began testing the introduction of Alternative Dispute Resolution (ADR) techniques in civil cases. In 1997, Ottawa became the first region to experiment with mandatory mediation for all civil cases with the introduction of a Practice Direction that later became the basis for Ontario's mandatory mediation scheme. The provincial program itself began January 4, 1999 as a two-year trial, after which the Ontario government conducted a wholesale evaluation of the program (2001) which recommended the OMMP be made permanent. By 2002 mandatory mediation was expanded to Windsor.

Despite some initial criticism, there were indications the program was successful in meeting its main objective of reducing public costs and encouraging settlement. Mandatory Mediation was adapted following the near paralysis of Toronto civil courts stemming from an overburdened case management system. Following some retooling, mediation remains in place as the centerpiece of the province's case management system. The focus now is on flexible mediation, ensuring that parties mediate when ready, rather than on fixed timetables. This is believed to have contributed to increased settlement rates. Mediations are conducted by private sector mediators. The mediation coordinator in each county maintains a list or roster of mediators. Parties may choose to select either a mediator from the roster or one who is not on the roster. If the parties fail to agree on a mediator, the Local Mediation Coordinator appoints one from the roster. Prior to the mediation session each party is required to prepare a statement of factual and legal issues in dispute, setting out their positions and interests and share the statement with the mediator and other parties.

In Ontario, Mandatory Mediation has been described as largely evaluative, or adjudicative, with the aim of encouraging settlement. Yet, as one study shows, this public goal has not limited mediators from pursuing alternative visions or goals complementary to the OMMP. These include educating parties about conflict and empowering parties through participation in dispute resolution. Ultimately, the OMMP

has succeeded in reducing costs, encouraging parties to reach settlements, and avoiding trials. The OMMP also emerged at a time when Canadians had new expectations of the legal system, expressing a desire to participate in conflict resolution and when access to justice concerns still pose challenges. In light of this, the OMMP has acted as a step towards a more participatory model.

II. The Development of Ontario's Mediation Program

In integrating ADR practices into Canadian courts, most provinces have chosen a voluntary mediation system¹. By contrast, Ontario has moved partly towards mandatory dispute resolution, insisting on mediation for certain cases prior to a trial. Ontario's path towards a mandatory mediation scheme began in 1994 following a Civil Justice Review which addressed concerns about access to justice. The review aimed 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 utilisation of public resources allocated to civil justice"². The review recommended the introduction of mandatory mediation and case management. Also, in 1994, a Toronto pilot project referred civil (non-family) cases to voluntary three-hour mediation sessions with the objective of improving participation in dispute resolution by providing a non-adversarial forum to work towards settlement³. Of the cases mediated at the Toronto ADR Centre, 54% settled in full or in part⁴. A further project in 1997 made a three-hour mediation mandatory for non-family civil cases in Ottawa.

The Ontario Mandatory Mediation Program (OMMP) came into effect in 1999. Rule 24.1 of the *Rules of Civil Procedure* required mediation for non-family civil case-managed cases, and Rule 75.1 extended mediation to contested estates, trusts, and substitute decisions matters. The program began on a trial basis, but following evaluation was made permanent, and in 2002 was expanded to Windsor. Data suggests that less than 5% of cases that are commenced proceed to trial. As well, it has been shown that during the litigation process cases settle when lawyers are required to pick up the file under the *Rules of Civil Procedure*. Court annexed mediation is one such opportunity to prompt the movement of cases

¹ Jean-François Roberge, "Emerging Trends in Access to Justice and Dispute Resolution in Canada" (2014) Vol 4, No 2, *Revue d'arbitrage et de médiation / Journal of Arbitration and Mediation (RAMJAM)* 69 at p 81.

² Ministry of the Attorney General, "Ontario Civil Justice Review, First Report of the Civil Justice Review" (Toronto, Queen's Printer for Ontario, 1995).

³ Julie Macfarlane, "Court-based mediation for civil cases: an evaluation of the Ontario Court (General Division) ADR Centre" (1995)

⁴ *Ibid.*

forward. As Ontario's Ministry of the Attorney General notes, over 90% of lawsuits settle before reaching a trial, and the mandatory mediation program refers litigation cases to mediation giving the parties an opportunity to discuss the issues in dispute⁵.

III. The 2001 Evaluation of Ontario's Pilot Project

Evaluation of the mandatory mediation pilot project was originally completed in 2001. The report focused on the four key objectives of the mandatory mediation program:

- a) did the program improve the pace of litigation?
- b) did it reduce costs to participants in litigation?
- c) did it improve the quality of disposition outcomes?
- d) did it improve the operation of the mediation and litigation process?⁶

The evaluation found that the program had a positive impact on the pace, costs, and outcomes of litigation and should be regarded as a successful component of dispute resolution⁷. It was recommended that mandatory mediation be made permanent. Key findings included:

Pace of Litigation

- Cases subject to mandatory mediation proceeded to disposition faster than prior to the introduction of Rule 24.1

Costs to Litigants

- Based on responses from litigants, in 85% of cases mediation was said to have reduced costs, with 57% claiming it had a "major" positive impact.
- In only 2% of Ottawa cases and 7% of Toronto cases did lawyers believe mediation had a negative cost impact on their clients.
- Lawyers estimated the cost savings to clients to be \$10,000 or more in 38% of mediated cases, less than \$5000 in 34%, and from \$5000 – \$10,000 28% of cases.

⁵ Ministry of the Attorney General, "Public Information Notice – Ontario Mandatory Mediation Program".

⁶ Robert Hann and C Baar, "Evaluation of the Ontario Mandatory mediation Program (Rule 24.1): Executive Summary and Recommendations" (Toronto: Queen's Printer for Ontario, March 2001).

⁷ *Ibid.*

Dispute Resolution Outcomes

- In both Toronto and Ottawa four of every ten cases were completely settled within seven days of mediation. Rule 24.1 had a significant impact on the percentage of cases that were settled within three and six months of litigation.

Satisfaction with Outcomes

- Both lawyers and litigants were more likely to feel their own case was suitable for mediation, with 79% in Ottawa and 61% in Toronto.
- A minority of lawyers and litigants were concerned with the quality of mediation outcomes, particularly amongst Toronto lawyers, with 33% disagreeing with the statement that “justice was served by this process”. But, amongst all types of cases, more agreed that the settlement was fairer with mandatory mediation having taken place.

It was also noted that the project demonstrated the real possibility of establishing an effective program within a short time frame, as Toronto achieved comparable results to Ottawa, which had two prior years experience with mandatory mediation under the 1997 pilot⁸.

Despite the early encouraging findings mandatory mediation has faced criticism. Some of the complaints have been aimed at the perceived failings of the program. One widely shared and exploited flaw was that some lawyers used mandatory mediation as a “discovery” rather than with the intention to settle⁹. Other criticism was aimed at the mandatory nature of the OMMP. As one practitioner noted, most civil cases settle without mediation and there is no suggestion that a mediated settlement is superior; it’s an expensive step that adds little to the litigation process¹⁰. Likewise, with mediation mandated, counsel may be less willing to engage in negotiations up to the point of the mandatory mediation. If the case doesn’t settle, the parties may be so polarized the chances of a later negotiated settlement are lessened¹¹. This theme was also echoed by Toronto litigator Martin Teplitsky, suggesting that mediation doesn’t increase settlement rates and may actually delay settlement. He argues that only 15% of cases settle

⁸ *Ibid.*

⁹ Bruce Ally and Leah Barclay, “Hijacked by Ulterior Motives: The Manipulation of the Mandatory Mediation Process in Ontario” (January 2008).

¹⁰ Brian M Campbell, “Mandatory Mediation: Does it Facilitate Pre-Trial Settlements?” (July 2002).

¹¹ *Ibid.*

earlier due to mandatory mediation¹². And for the cases that are going to settle anyways, mandatory mediation simply adds costs.

IV. Restructuring Ontario's Mandatory Mediation for Success

Ontario's mandatory mediation program is embedded within the province's wider system of case management, through Rule 77, which applies to civil actions in Toronto, Ottawa, and Windsor. This is a system aimed at reducing delays and costs and facilitating early resolution of cases through court-imposed time limits for steps in the litigation process. It also involves active intervention by the court to promote resolution and bring cases to a timely trial¹³. It was thought that mandatory mediation fit nicely within the existing case management structure, as both had common goals of improved efficiency and lower costs¹⁴. Indeed, interest in dispute settlement and prevention are pervasive in the province's regime, such that former Chief Justice of Ontario, Warren Winkler, speaks of Ontario having three mediations: mandatory mediation, the pre-trial settlement conference, and "designated hitter" mediations¹⁵. The pre-trial conference is mandatory (under rule 50.02 of the *Rules of Civil Procedure*) and is overseen by a judge, offering an opportunity to narrow the actual issues to be raised during trial or alternatively to reach a settlement. As well, judicial mediation is introduced through what he refers to as "designated hitter" mediations, where judges offer litigants a neutral evaluation of their case encouraging them to settle. Immediately prior to trial judges with experience with the issues in dispute act as mediators when the

¹² Janice Mucalov, "Mediation, Like it or Not" (January/February 2003) Vol 12, No 26 National at 28. Also reported in Trevor CW Farrow, *Civil Justice, Privatization, and Democracy* (Toronto: University of Toronto Press, 2014) at p 223.

¹³ Ministry of the Attorney General, "Fact Sheet: Civil Case Management".

¹⁴ Colleen M. Hanycz, "Through the Looking Glass: Mediator Conceptions of Philosophy, Process and Power" (2005) No. 42 Alberta Law Review at para 28.

¹⁵ Warren Winkler, "Civil Justice Reform – The Toronto Experience" (The Warren Winkler Lectures on Civil Justice Reform) delivered at the University of Ottawa, Faculty of Law September 12, 2007).

parties are dug into “irreconcilable positions”¹⁶. For Justice Winker, mediation is the centrepiece of the current case management regime¹⁷.

By mid 2004, Warren Winkler, then the new Regional Senior Justice for Toronto, found a case management system with backlogs of cases, delays, waitlists, routine motions being scheduled six months out, trials being scheduled years away, insufficient numbers of judges, and no additional government funding¹⁸. There were also challenges in the way mandatory mediation unfolded. Often parties did not communicate or cooperate in scheduling, disagreed on the choice of a mediator, or disagreed about what steps to take prior to the mediation¹⁹. It was clear that the case management system needed a major overhaul. Winkler notes that there was considerable pressure to eliminate mandatory mediation as a costly and ineffective step²⁰. That was rejected, as the committee reviewing both case management and mandatory mediation believed the proper approach was to ensure that mediation continued to occur at some point before trial. Their chosen solution was for the timelines by which mediation had to be completed be extended so it could be more effective.

This was a significant change as members of the Bar had complained that the prior rule, for mediation to occur within 90 days of delivery of the Statement of Defence, was too early. For personal injury cases, mediation was mandated before injuries were capable of assessment, simply leading to further motions for extensions of time²¹. The early mediation rule meant counsel often felt they did not have sufficient information so early in the process to make informed decisions about settling their case²². In 2003, orders for an extension of time to complete mediation were made in nearly 40% of Toronto cases²³. As one practitioner put it, “the system was tied [...] to case management, and case management was heavily focused on the clock rather than the parties”²⁴.

This highlighted the difference between voluntary and mandatory mediations. Naturally, in voluntary mediations both clients and counsel decide when they are ready to mediate, and can select the

¹⁶ Tania Sourdin and Archi Zariski (Eds), *The Responsive Judge: International Perspectives*, (Singapore: Springer Singapore, 2019) at 224.

¹⁷ *Supra* note 15.

¹⁸ *Ibid.*

¹⁹ Warren Winkler, “Evaluation of Civil Case Management in the Toronto Region” (February 2008) at 10.

²⁰ *Supra* note 15.

²¹ Paul Jacobs, “A Recent Comparative History of Mandatory Mediation vs Voluntary Mediation in Ontario, Canada” *International Bar Association Mediation Newsletter* (April 2005).

²² *Supra* note 19.

²³ *Supra* note 19.

²⁴ *Supra* note 21.

timing, pace, and choice of mediator. By 2004, prior to the reforms, settlement rates for the OMMP hovered around 40% compared to success rates of 70-75% for voluntary mediations²⁵. By eliminating early mandatory mediation and extending the timeframe for its completion, it was anticipated that parties would use mediation more effectively, participating at times when they were better prepared for settlement discussions. The current rules now require a mediation session to take place within 180 days after the first defence has been filed. It was hoped this flexibility would improve the settlement rates and reduce the time needed to solve disputes²⁶. It appears this has been borne out by reaction to the new regime, with the changes being well received by the Bar and ADR community²⁷.

Interestingly, the freedom to negotiate at times chosen by the parties themselves and the earlier ability to obtain extensions of time, have been identified as central to the OMMP's success²⁸. In this view, the program tempered the mandatory effect by first liberally granting extensions, and later by undertaking reforms eliminating mandatory early mediation. For a program to be well received by litigants and counsel these lessons are key²⁹. According to the Attorney General's Court Services Division, full settlement rates have slowly increased, from 41% in 2007-2008 to 46% in 2011-2012³⁰. Alternatively, a 2016 commentary on the mediation program suggests that approximately 60% of matters are settling, indicating the program is working as designed³¹.

V. Ontario's Mandatory Mediation in Context

How have the OMMP's stated objectives impacted how mediation is conducted in Ontario, and what impact has the new focus on mediation had on the legal profession?

²⁵ *Ibid.*

²⁶ *Supra* note 19 at 18.

²⁷ *Supra* note 21.

²⁸ Dorcas Quek Anderson, "Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program" (Spring 2010) Vol 11, No 2, *Cardozo Journal of Conflict Resolution* 479 at 501.

²⁹ *Ibid.*

³⁰ Ministry of the Attorney General, "Court Services Division Annual Report 2011-2012" (Toronto: Queen's Printer for Ontario).

³¹ "Focus: Time to Re-evaluate the Mandatory Mediation Program", *Law Times* (11 April 2016).

The OMMP emerged at a moment when Canadians were beginning to have new expectations of the judicial system. The Law Commission of Canada spent three years consulting with Canadians and found that individuals want choices for resolving their conflicts and often want to actively participate in the conflict resolution process³². The original objective of the OMMP was to develop a system that made better use of public resources spent on civil justice. As earlier noted, the goal was improved judicial efficiency with rather less focus on the “transformative” potential that mediation and ADR could deliver³³. Nevertheless, by default, mandatory mediation in Ontario is a step towards a participatory model that focuses on dialogue, relationships, and outcomes agreed to by the disputants, which was the vision outlined by the Law Commission in 2003.

Professor Colleen Hanycz, whose research focuses on the application of ADR, has examined how mediators themselves view the Ontario mediation process, particularly looking at whether their own conceptions of their role corresponded with the original goals of the OMMP. She found that there was certainly some consistency between personal and program objectives in responses by some mediators, but a significant number held different views of what the program was meant to achieve, with some being mutually inconsistent³⁴. Beyond the purpose of moving towards a settlement, some view the scheme as having an educational element, helping parties understand their interests and motivations within a process that is outside of litigation³⁵. Some mediators also recognized that the program empowered parties, which was not an explicit objective, but rather a beneficial by-product³⁶. Hanycz concludes that the OMMP fosters a settlement orientation within the program’s mediators³⁷, but it also leaves room for additional objectives or public benefits, such as giving parties tools to handle conflict, or addressing access to justice. Indeed, disputants who participate in mediation programs are less likely to engage in the full litigation process in future cases, providing significant cost saving and other public benefits to governments.

Not surprisingly, the OMMP has contributed to the development of a large roster of trained mediators. There is also some indication that exposure to mediation has led to a shift in attitudes

³² Law Commission of Ontario, *Transforming Relationships Through Participatory Justice* (Ottawa: 2003) at xiii.

³³ *Supra* note 14 at para 13.

³⁴ *Ibid* at para 85.

³⁵ *Ibid* at para 93.

³⁶ *Ibid* at para 96.

³⁷ *Ibid* at paras 13, 241.

generating positive feelings about mediation³⁸. This was specifically recognized by Christine Hart in 1994, then Director of Canada's first court annexed ADR program, when she created the Toronto ADR Centre. Under that model parties were forced to the table as the civil litigation bar had little experience with mediation and rejected it for that reason. The designers of the ADR Centre believed that once counsel experiences the flexibility of the model it would be perceived as valuable in solving disputes³⁹. Professor Julie Macfarlane, whose research focuses on dispute resolution and the role of lawyers, has examined the shift in attitudes within the legal profession, noting that lawyers who oppose settlement instead aiming for trial are more likely to now describe themselves as working outside of the mainstream⁴⁰. Likewise, there is growing acceptance of the importance of thinking about settlement early in the life of a case rather than settling immediately before trial, which used to be standard practice⁴¹. Professor Macfarlane has traced a shift in attitudes and values amongst lawyers to experience with mediation, including through the OMMP. Counsel are more willing to move away from a lawyer centric role controlling the process, towards fostering client engagement in dispute resolution⁴².

VI. ADR into the Future

Courts are formal institutional settings that were designed for parties to participate through their advocates. This model has been under pressure as concerns about accessibility to justice mount and courts see an increasing number of self represented litigants. Court proceedings are unintelligible to most parties in turn eliciting frustration, whereas settlements allow parties to participate directly and will be informed by their own understanding of their rights⁴³. Consequently, the key advantage in ADR is its flexibility;

³⁸ Catherine Morris, "The Impact of Mediation on the Culture of Disputing in Canada: Law Schools, Lawyers, and Laws" in Wang Guiguo and Yang Fen eds *Mediation in Asia Pacific: A Practical Guide to Mediation and its Impact on Legal Systems* (Hong Kong: Wolters Kluwer, 2013) 67 at 103.

³⁹ Peter M Daigle, "The Impact of Court-Connected Alternative Dispute Resolution on the Practice of Law in Ontario: A Litigator's Perspective" at 13, citing Genevieve A. Chornenki and Christine E. Hart, *Bypass Court - a Dispute Resolution Handbook*, Second Edition, Butterworths Canada Ltd., Toronto, 2001.

⁴⁰ Julie Macfarlane, *The New Lawyer: How Clients are Transforming the Practice of Law*, 2nd ed (Vancouver: UBC Press, 2017) at 15.

⁴¹ *Ibid.*

⁴² Julie Macfarlane, "*Culture Change? Commercial Litigators and the Ontario Mandatory Mediation Program*" (Ottawa: Law Commission of Canada, 2002) at 34.

⁴³ George W. Adams, "Alternative Dispute Resolution: The Ontario Experience" (1997) *Journal of Business Valuation* 229 at 231.

new processes can be designed to suit the individual needs of particular parties or certain types of cases⁴⁴. These options complementing mandatory mediation include the four-way without prejudice negotiation, collaborative law with or without a mediator, and the inclusion of dispute resolution clauses in industry watchdogs⁴⁵. As well, ADR can be seen as an inclusive process, ensuring that every stakeholder is represented in the mediation process by asking “Is everyone at the table?”⁴⁶ Given the current constraints facing courts, the legal system depends on the majority of civil cases settling to continue to function⁴⁷. Mandatory mediation forces parties to recognise an objective assessment of their case which helps them be realistic in negotiations. Within Ontario, discussion is now focused on expanding mandatory mediation across the rest of the province, or even nationally. As one proponent has noted, there is little to lose in such a wider program; “where it does make sense to have a full-blown trial, mandatory mediation will not prevent the parties from doing so. But in all the other cases, it will help the parties to resolve the matter without incurring the costs of trial”⁴⁸.

⁴⁴ Ernest G. Tannis, *Alternative Dispute Resolution that Works!*, 2nd ed (ADR Centre Canada Inc, 2010) at 51.

⁴⁵ For example, see the mediation requirement adopted by Canada’s Commission for Complaints for Telecommunications Services (CCTS) at <https://www.ccts-cprst.ca/for-consumers/complaints/complaints-process-explained/>.

⁴⁶ Ernest G. Tannis, *Is Everyone at the Table? 18 Life Lessons in Problem Solving*, (ADR Centre Canada Inc, 2010) at 3.

⁴⁷ Stuart Rudner, “It’s Time to take Mandatory Mediation National” *The Lawyer’s Daily* (April 15, 2019).

⁴⁸ *Ibid.*

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