

Evolution, revolution and culture shift: A critical analysis of compulsory ADR in England and Canada

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Abstract

Civil justice reforms in both England and Canada have consistently advocated the need for a litigation ‘culture shift’ away from the traditional adversarial trial process in resolving disputes to settlement through ADR. In seeking to implement this cultural shift, both countries have adopted distinctly diverging approaches to the issue of mandatory ADR. This paper critically analyses the current rules of civil process and associated judicial attitudes toward compulsory ADR in England and in Canada. It argues that the Canadian approach of legislating compulsory ADR provides greater consistency and predictability when it comes to ensuring that litigants undertake ADR efforts. In contrast, the English approach, which formally rejects but impliedly accepts and implements mandatory ADR, creates uncertainty for those who engage with the civil justice process. Drawing on the Canadian practice, this paper proposes ways in which the English court rules may be reformed to better integrate mandatory ADR.

Keywords

Alternative Dispute Resolution, civil justice systems, civil justice reforms, civil litigation, comparative law, ‘culture shift’, mandatory ADR, mandatory mediation

Introduction

For decades, legislators and courts in both England and Wales¹ and in Canada have been responding to calls for a ‘culture shift’ in their respective civil justice systems. Facing long-standing concern over the excessive costs and delays associated with trial-based litigation, seminal civil justice reform reports were issued in both England and Canada in the mid-1990s.

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These reports contemporaneously advocated for a dramatic change in the focus of the two nations' respective civil justice systems. In both countries, the recommended reforms included acknowledging and implementing alternative dispute resolution mechanisms (ADR) as legitimate and preferred methods of resolving civil disputes, relegating the traditional civil trial to a tool of 'last resort' (Canadian Bar Association Task Force on Systems of Civil Justice, 1996: 31; Woolf, 1995a).

Thirty years on, the suggestion to incorporate ADR into the civil litigation process has been largely embraced in both England and Canada. Policy makers and senior members of the judiciary in both countries have formally recognised and acknowledged the practical and economic benefits of ADR as a meritorious means of resolving disputes prior to trial. Despite this, both England and Canada have thus far embraced ADR primarily as a voluntary measure, and both have exhibited reluctance to make ADR a mandatory feature of litigation. Of the two countries, Canada has currently made greater strides in implementing compulsory ADR measures into its civil justice system, and, accordingly, in effecting a 'culture shift' in litigation which de-emphasises trial as the preferred method of civil dispute resolution.

The rules of civil process in England, known collectively as the Civil Procedure Rules (CPR),² do not currently provide the courts with an express legislative mandate to *compel* litigants to engage in ADR. In the context of this legislative void, prevailing jurisprudence is inconsistent in determining whether and when litigants can be compelled to participate in ADR. English jurisprudence is further inconsistent as far as identifying appropriate mechanisms to enforce a judicially-imposed ADR obligation. In contrast, civil procedure rules in several Canadian jurisdictions either prescribe or expressly authorise courts to mandate participation in pre-trial ADR. While this mandate is not universal across Canada, the legislative endorsement of mandatory mediation has enabled Canadian courts to be more consistent and predictable in their approach to compulsory ADR as compared to their English counterparts.

In this paper, we offer a comparative and critical analysis of the current rules of civil process and of the associated judicial attitudes toward compulsory ADR in England and in Canada. The purpose of this analysis is to identify ways in which the Canadian experience may provide useful guidance for improving the consistency of the judiciary's approach to mandatory ADR in England. England and Canada are appropriate and natural comparators on the issue of compulsory ADR because their systems of civil justice are built on the same common law traditions. Moreover, since current civil justice processes in both countries derive, at least in part, from contemporaneous law reform reports advocating for an increased role for ADR, it is instructive for the ongoing litigation 'culture shift' in each jurisdiction to examine how each of these countries is currently approaching the implementation of mandatory ADR.

In the first part of this paper we provide the foundation for our analysis by describing the civil justice reforms initiated in England and Canada in the mid-1990s, with particular focus on the recommended adoption of ADR as a dominant feature of the civil justice system in each country. In the second part, we discuss the judicial approaches to mandatory ADR as reflected in court decisions and extra-judicial statements in England and Canada respectively. Drawing on the preceding sections, in the next part we offer a comparison and critical analysis of the respective approaches of England and Canada to mandatory ADR, identifying ways in which the Canadian experience might be instructive in improving the consistency of the English approach. Finally, we conclude with a short summary of our findings.

For the purposes of this discussion, we have intentionally adopted a broad definition of 'mandatory ADR', encompassing any judicially or legislatively prescribed participation of litigants in a pre-trial dispute resolution process involving the assistance of an impartial third

party and intending to facilitate an out-of-court settlement. This definition includes both adjudicative and non-adjudicative processes as well as both interest-based and non-interest-based resolution practices. Mandatory private mediation (where the parties hire a private mediator to assist with settlement negotiations), judicial mediation (where a judge facilitates the settlement) and court-annexed mediation (where a court-appointed mediator or representative facilitates settlement) are all included. Settlement conferences involving a third party facilitator fall within the definition, but litigation conferences *not* specifically focused on settlement do not.

This discussion is not intended to be a debate over the value or appropriateness of mandatory ADR, ADR in general, or of particular forms of ADR. Instead, for the purpose of this comparative analysis, we assume that ADR mechanisms as a whole are beneficial and appropriate methods of attempting to increase access to justice by reducing the costs and delays associated with traditional trial-based litigation. Our sole focus is to determine what steps can be taken to make compulsory ADR a more reliable and functional component of the civil justice systems in Canada and England. It is worth noting that our consideration of mandatory ADR focuses exclusively on civil litigation *outside* of the family law context. We draw this distinction between family-law litigation and other litigation matters for pragmatic reasons, recognising that family-law disputes are often subject to specialised rules of process and may involve unique cost considerations. Likewise, we do not address legislation mandating mediation or arbitration as a precondition to litigation in the context of particular legal relationships (such as insurance contracts),³ but instead address only ADR as provided for in generally applicable rules of civil process. Finally, while acknowledging that the adoption of ADR into the civil justice systems of both England and Canada has been an evolving process, our discussion intentionally focuses on the rules of procedure as they currently exist in each country.

Civil justice reforms, ADR and compulsion

England

The resolution of civil disputes through consensual settlement has long been welcomed and promoted by the English judiciary, even before the revolutionary Woolf Reforms.⁴ There was an obvious but significant policy rationale which underpinned this judicial attitude: the settlement of civil disputes was in the public interest because pursuing litigation through the adversarial adjudicative process was (and continues to be) expensive and time-consuming for the parties while straining the courts' finite resources.⁵ One of the primary revolutionary features of the Woolf Reforms was the formal recognition and integration of ADR processes, for the first time in English civil justice history, as a significant aspect of the court process and of the civil justice system. Although the concept of compulsory ADR has been consistently rejected by civil justice reforms since the Woolf Reports, the virtues of settlement through ADR have been consistently *reinforced*.

Like many civil justice systems, the English civil justice system has suffered from the perennial problems of complexity, expense and delay. In the early 1990s, it was described as being 'in a state of crisis' (Glasser, 1994). This state of crisis was not unique to this time period. The problems of high litigation costs and delays, in particular, were a common feature in the past and earlier reforms proposed by, for example, the Winn Committee, the Cantley Committee, and the Civil Justice Review, had all failed to produce any significant solutions to these problems (Cantley Committee, 1979; Civil Justice Review, 1981; Winn Committee 1968). It

was not until the Heilbron–Hodge Report that a novel approach to tackling the problems of delay and cost was first proposed (Heilbron and Hodge, 1993). It was this novel approach which subsequently influenced Lord Woolf’s ADR revolution.

The Heilbron–Hodge Report advocated the need for a radical change in approach to civil justice. Unlike previous reforms which had concentrated primarily upon recommending structural changes to the system,⁶ the Heilbron–Hodge Report focused on recommending a change in litigation *culture*. In doing so, the authors of the report proposed the early settlement of disputes as an alternative aim of the justice system, which, to that point, had existed primarily for the vindication and enforcement of rights (Sorabji, 2014: 26).

Nine months after the publication of the Heilbron–Hodge Report, Lord Woolf was commissioned to conduct a formal review of the civil justice system with the aims of, *inter alia*, improving access to justice and reducing delay and costs (Woolf, 1995b). Adopting the approach advocated by the Heilbron–Hodge Report, Lord Woolf made clear that ‘the philosophy of litigation should be primarily to encourage early settlement of disputes’, and as such, trial must be considered as a last resort. Consistent with Heilbron–Hodge, Lord Woolf did not recommend compulsory ADR and he provided two principle reasons for this decision. First, Lord Woolf argued that, in England, judicial resources for the enforcement of civil rights were sufficient, unlike the situation in some United States jurisdictions where court resources were lacking and, consequently, compulsory forms of ADR were prevalent (Woolf, 1995b). Second, there was a need to preserve the citizen’s constitutional right to access the courts. As Lord Woolf explained:

I do not think it would be right in principle to erode the citizen’s existing entitlement to seek a remedy from the civil courts . . . I do, however, believe that the courts can and should play an important part . . . in providing information about the availability of ADR and encouraging its use in appropriate cases. (Woolf, 1995b: chapter 18, para. 4)

Despite his reluctance to introduce compulsory ADR, Lord Woolf did nevertheless enhance the role of ADR within the court process. The court is now obliged to further the overriding objective of dealing with cases justly and at proportionate cost by actively managing cases. A fundamental feature of active case management includes settlement. CPR Rule 1.4(e) provides that the court must encourage and facilitate parties to use an ADR procedure if it considers that appropriate. Additionally, during the litigation process the parties may request a stay of proceedings under Rule 26.4 in order to attempt settlement. For small claims disputes, the parties, *if they agree*, may have their dispute referred to the Small Claims Mediation Service.⁷

In his attempt to affect a change in litigation culture, Lord Woolf also introduced ‘pre-action protocols’ as a mechanism for controlling the conduct of the parties before formal proceedings are issued. Through the early exchange of information, the protocols are aimed at allowing the parties to understand the issues, to attempt to settle the matter, to consider any relevant ADR process to assist settlement and, where proceedings are issued, to assist case management and reduce the costs of resolving the dispute.⁸ As Lord Woolf explained, the main emphasis of the protocols is on settlement and ADR: ‘[they are] intended to build on and increase the benefits of early but well-informed settlements which genuinely satisfy both parties to a dispute’ (Woolf, 1995a). The court expects parties to have complied with any relevant protocol. Although the protocols do not state that ADR is compulsory, they make clear that the parties ‘should consider’ whether some form of ADR procedure might enable them to settle the matter without starting proceedings.⁹ Where there has been a failure to comply with a relevant protocol

without good reason, the court may exercise its powers under CPR Rule 44.4 to penalise that party for failing to follow the protocols.¹⁰

The two major civil justice reforms that followed the Woolf reforms, the Jackson Review and the Briggs Review adopted a consistent approach to the one taken in the Woolf reforms and the Heilbron–Hodge Report by promoting and reinforcing settlement while rejecting the idea of compulsory ADR on the policy grounds of preserving the constitutional right of citizens to access the courts (Jackson, 2010; Briggs, 2013).

In his review, Sir Rupert Jackson acknowledged the economic significance of ADR (and in particular mediation) as a valuable but underused tool, and he argued that an appropriately structured costs regime would encourage the use of ADR. Nevertheless, Sir Rupert expressly rejected any formal procedural change which would compel parties to engage in mediation or which would incorporate compulsory mediation within case management. Rather, his Lordship explained that courts should encourage the use of mediation by educating the parties of its benefits and by utilising their costs powers to penalise parties for unreasonably refusing to mediate.

Consistent with Lord Woolf's call for a culture change to make early settlement the philosophy of litigation (Woolf, 1995b: chapter 2, para. 7(a)), Briggs LJ recommended a cultural change in the management of cases (Briggs, 2013: 68). This proposal required the courts to embrace an approach emphasising 'the management of the dispute resolution process as a whole', including resolution of a claim via court adjudication or through the consensual settlement of disputes through ADR. The courts must, Briggs LJ explained, adopt 'a more active role in the encouragement, facilitation and management of disputes in the widest sense, rather than merely case preparation for trial' (Briggs, 2013).

Lord Justice Briggs reinforced the status quo on the issue of compulsory ADR in his most recent Civil Courts Structure Review Interim Report (IR)¹¹ and Final Report (FR).¹² In his IR Lord Justice Briggs made clear that '... the civil courts have declined ... to make any form of ADR compulsory. This is, in many ways, both understandable and as it should be ... the civil courts exist primarily, and fundamentally, to provide a justice service rather than merely a dispute resolution service' (Briggs IR, 2015: 28). His Lordship also emphasised the courts efforts in vigorously promoting pre-action protocols and, as a consequence, the use of ADR (Briggs IR, 2015: 29). Despite this, Lord Justice Briggs has recommended, *inter alia*, the establishment of an innovative online court¹³ to deal with lower-value¹⁴ (i.e. in monetary terms) cases. The online court will be structured in three stages. In a slightly modified structure to the online court to the one proposed in his IR, Lord Justice Briggs in his FR has recommended that the first stage, which is intended to be a mainly automated process by which the parties are assisted in identifying their case and are required to upload key documents so that it is easily understood by their opponents and the court, will now consist of three sub-stages: stage 0; stage 0.5; and by-passes.¹⁵ Stage 0 will include guidance about treating litigation as a last resort; provide affordable or free advice; and perhaps some commoditised summaries of the essential legal principles. Stage 0.5 is intended to include provision for a short exchange between the parties designed to find out whether there really is a dispute which the courts need to resolve. Lord Justice Briggs has recommended that the traditional solution to this early precaution is for the service of a Claim Form, requiring an Acknowledgment of Service stating whether the defendant intends to contest the claim. By-pass, the final sub-stage, is intended to 'address the reality that legally represented parties ... will not need, and should not necessarily have to be driven through, the whole of the interactive questioning needed to extract the key details of a case from the uninitiated LiP.'¹⁶ The second stage will involve a mix of conciliation

and case management, which will be conducted mainly by court officers, who will not have judicial powers but who will be experienced civil servants, and which will be conducted partly online or by telephone but not face-to-face. The choice of the most suitable conciliation process for each case should, Lord Justice Briggs recommended, 'be a matter for the experienced, judicially qualified trained and supervised, Case Officer in conjunction with the litigants themselves.'¹⁷ The final stage will consist of determination by a judge either on the documents, by telephone, by video or by a face-to-face hearing. However, Lord Justice Briggs makes it clear that there will be 'no default assumption that there must be a traditional trial' (Briggs, 2015: 79). In his FR, Lord Justice Briggs noted the potential for including, as part of a centrally managed online court, specialist experts sitting as judges for deciding cases which would be too complex for the non-specialist district judges who currently decide most of the cases in the small claims and fast tracks.¹⁸

There are three issues to note concerning Lord Justice Briggs' key recommendations. First, the sub-stages to the first stage (in particular sub-stage 0 and 0.5) reinforce Lord Woolf's philosophy that litigation should be concerned with settlement rather than trial. Secondly, although ADR is given an enhanced role within the proposed online court at stage two, it is not compulsory and this approach remains consistent with the approaches adopted in previous civil justice reforms. Thirdly, the structure of the online court and the involvement of court officers in managing cases, possibly to a resolution through a form of ADR, is consistent with Lord Justice Briggs' approach in introducing and promoting a *culture shift* in the management of disputes in the civil justice system as advocated in his earlier Chancery Modernisation Review. As Lord Justice Briggs has explained, stage two of the online court process 'is mainly directed to making conciliation a culturally normal part of the civil court process . . . [b]y that I do not mean that it should be made compulsory' (Briggs, 2015: 78).

Canada

Canada's civil justice system has always recognised and encouraged the settlement or resolution of disputes outside of the court system. Traditionally, such compromise was viewed as the voluntary and private prerogative of the disputing parties. Beginning around the 1970s, however, concerns about the cost, time and adversarial nature of litigation sparked the development of more structured private alternative dispute resolution mechanisms (see generally Alberta Law Reform Institute, 1990, 2003). Still, for the most part, efforts to formally integrate ADR into civil litigation procedures were not made until after the release of the Canadian Bar Association's 1996 *Systems of Civil Justice Task Force Report* (CBA Report), which identified cost and delay as significant barriers to access to civil justice in Canada.¹⁹ This report observed that, while a high percentage of civil cases settle before trial, these settlements typically occur too late in the litigation process to effectively save time and money for the litigants or the court system (CBA Report, 1996: 31). Accordingly, the CBA Report advocated for a multi-option civil justice system where trial is retained as a 'valued but last resort in dispute resolution', and where various dispute resolution mechanisms are integrated into the system in order to promote the early settlement of claims (CBA Report, 1996: 31). In particular, the CBA Report recommended that ADR be formally incorporated as a compulsory step at both early and later stages of the litigation process in order to facilitate the settlement of claims:

The Task Force suggests that as a precondition for use of the court system after the close of pleadings, and later as a precondition for entitlement to a trial or hearing date, the parties should be obliged to certify 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 (CBA Report, 1996: 33).

In the years since the CBA Report was issued, numerous reforms have been made to the rules of civil process in Canada. These reforms have implemented the Task Force's recommendation for compulsory ADR to varying degrees.²⁰

Understanding the extent to which mandatory ADR has been integrated into Canada's current civil justice system is a complex task because of the numerous jurisdictions and court systems involved. Canada is a federation and, pursuant to the Canadian constitution, legislative authority over the civil justice system rests primarily with the regional governments (ten provinces and three territories), leaving the federal Parliament with jurisdiction over civil process only in relation to limited matters which may be heard by the federal court.²¹ Pursuant to this constitutional distribution of legislative powers, each jurisdiction has created its own court system and its own independent processes for resolving civil disputes. This means that, counting both standard²² and small claims structures, there are presently 27 distinct systems of civil process operating in Canada in 14 legislative jurisdictions. Further, while voluntary cooperation among the jurisdictions has resulted in significant commonality between the civil processes employed across the country, there are also notable differences, particularly in respect of the adoption of compulsory ADR.

Currently, the CBA Task Force's recommendation of mandatory ADR has not been widely implemented in Canada. As discussed in detail below, only three provinces have made ADR compulsory in the civil litigation process for all standard (non-family law) claims, and the operation of this mandatory ADR rule is, at present, significantly restricted in two of the three provinces. Four other jurisdictions authorise the court, on a case-by-case basis, either on its own initiative or in response to a request by a litigant, to order the parties to participate in ADR or in a judicial settlement conference.²³ The remaining seven jurisdictions have not formally implemented any mandatory ADR rules for standard cases. Compulsory ADR as a systemic component of litigation is slightly more common in small claims proceedings, with five jurisdictions requiring participation in an ADR process or judicial settlement conference in all small claims cases,²⁴ and two other jurisdictions authorising the court to order parties to participate in mandatory mediation or in a settlement conference when circumstances warrant.²⁵ Notably, with regard to both standard and small claims cases, the province of British Columbia uniquely provides for 'quasi-mandatory' ADR by enabling a litigant to force all other parties into mediation by serving a Notice to Mediate.²⁶

The three provinces currently mandating ADR participation as a systemic feature of the litigation process in standard cases are Saskatchewan, Ontario and Alberta. Saskatchewan's legislation provides that 'after the close of pleadings in a contested action or matter that is not a family law proceeding, the local registrar shall arrange for a mediation session, and the parties shall attend the mediation session before taking any further step in the action or matter.'²⁷ This requirement applies to most civil cases²⁸ and means that, once pleadings are complete, no further action can be taken in respect of the litigation until the parties have participated in a mediation proceeding. Saskatchewan legislation also provides for the government appointment of a Manager of Mediation Services²⁹ who is authorised to postpone the mediation to a later stage of the litigation, or to fully exempt parties from the compulsory mediation requirement.³⁰ The procedural rules do not provide any express guidance as to the circumstances in which such an extension or exemption might be appropriate, however it does not appear that exemptions are commonly sought or approved. Initially introduced in 1994 as a pilot project applicable in

only two municipalities, Saskatchewan's mandatory mediation rule now applies province-wide and is Canada's longest-standing mandatory mediation programme. By comparison, the mandatory mediation provisions adopted in Alberta and Ontario are far less robust in their application.

The mandatory mediation rule in Ontario requires litigants to participate in mediation 'within 180 days after the first defence has been filed'.³¹ This requirement applies, with limited exceptions, to most civil litigation matters.³² The rule only applies, however, to actions commenced in the City of Toronto, the City of Ottawa and the County of Essex.³³ Geographically speaking, this means that systemic compulsory ADR is not widespread in Ontario, although the City of Toronto and the City of Ottawa are major population centres. In the Ontario programme, the court is also empowered to extend the time for mediation or to dispense with the mediation requirement on a case-by-case basis.³⁴ The Ontario Rules do not specify the circumstances in which a court might exercise its discretion to exempt litigants from mandatory mediation. With regard to extending the time for mediation, however, the rules provide that the court 'shall take into account all the circumstances', including: 'the number of parties, the state of the pleadings, the complexity of the issues in the action'; whether motions to resolve the action on a preliminary basis are likely or pending; whether the mediation 'will be more likely to succeed if the 180-day period is extended to allow the parties to obtain evidence' through pre-litigation procedures; and more generally 'whether, given the nature of the case or the circumstances of the parties, the mediation will be more likely to succeed if the 180-day period is extended or abridged'.³⁵ Finally, in the event that a party fails to attend a scheduled mandatory mediation, the Ontario Rules empower the court to convene a case conference and to:

- a. establish a timetable for the action;
- b. strike out any document filed by a party;
- c. dismiss the action, if the non-complying party is a plaintiff, or strike out the statement of defence, if that party is a defendant;
- d. order a party to pay costs;
- e. make any other order that is just.³⁶

Alberta's Rules of Court require litigants to engage in 'good faith participation' in one or more itemised dispute resolution processes,³⁷ failing which the matter cannot be scheduled for trial.³⁸ The available listed dispute resolution processes all involve the assistance of a third-party mediator or arbitrator, and specifically include a judicial dispute resolution system (JDR) which provides for 'a judge to actively facilitate a process in which the parties resolve all or part of a claim by agreement'.³⁹ The rules further authorise the court, on application, to waive the mandatory mediation requirement only if:

- a. before the action started the parties engaged in a dispute resolution process and the parties and the Court believe that a further dispute resolution process would not be beneficial,
- b. the nature of the claim is not one, in all the circumstances, that will or is likely to result in an agreement between the parties,
- c. there is a compelling reason why a dispute resolution process should not be attempted by the parties,
- d. the Court is satisfied that engaging in a dispute resolution process would be futile, or
- e. the claim is of such a nature that a decision by the Court is necessary or desirable.⁴⁰

The operation of Alberta's compulsory ADR rule was suspended by a Notice to the Profession issued by the Alberta Court in 2013. The notice, which remains in effect today, provides that civil matters will be entered for trial without requiring compliance with the mandatory ADR Rule (Court of Queen's Bench, 2013). Without expressly identifying a reason for the suspension of the mandatory ADR obligation, the notice states that it will remain in effect 'until such time as the judicial complement of the Court and other resources permit reinstatement'. This wording may imply that the suspension was induced by a lack of sufficient judicial resources to conduct ADR, and particularly JDR, which is a popular choice for litigants in Alberta selecting from the menu of options listed in the mandatory ADR rule.⁴¹

Judicial attitudes and approaches to compulsory mediation

England

Although the reforms in England spoke with a united voice in rejecting compulsory ADR, the same cannot be said of judicial approaches and extra-judicial attitudes towards the issue of compulsion. While the official position of the senior judiciary is against compulsion, as recently reinforced by Lord Justice Briggs in his Court Structure Review, the courts appear to have assumed the power to compel parties to engage with ADR, utilising the threat of costs consequences for parties refusing to engage in ADR (Briggs, 2015).

Halsey, PGF and the issue of compulsion. The question of whether courts should compel parties to ADR was considered in the landmark decision of *Halsey v Milton Keynes General NHS Trust*.⁴² The main issue for the Court of Appeal was whether the defendants in two personal injury claims should be penalised in costs for refusing to mediate. Mediation had been offered by the claimants in both actions, and, in one case, a court had actually recommended it. Dyson LJ, giving the leading judgment, rejected the argument that the courts should compel parties to mediation. He reasoned that compulsion would breach the right to a fair trial enshrined in Article 6 of the *European Convention on Human Rights* (ECHR).⁴³ He stressed that the courts could, however, encourage the parties to consider mediation, and the strongest form of encouragement would be in the form of an ADR order (an order made in the Commercial Court which requires the parties to not only engage in ADR but also to provide reasons to the court if the ADR is unsuccessful). If a party subsequently failed to comply with such an order, that would amount to an unreasonable refusal to engage with ADR and would justify the courts penalising that party in costs.

Dyson LJ went on to explain that in assessing an unreasonable refusal, the court will consider all of the circumstances of the case including the following six non-exclusive factors: the nature of the dispute; the merits of the case; whether other settlement methods have been attempted; whether the costs of mediation would be disproportionately high; whether any delay in setting up and attending ADR would have been prejudicial; and whether the ADR process has a reasonable prospect of success. He confirmed that despite this, where one of the parties remained opposed to ADR, it would be wrong for the courts to compel them to embrace it.

Following on from *Halsey*, Lord Neuberger MR (as he was then), speaking extra-judicially, has reiterated the need to preserve the constitutional right of accessing the courts. His Lordship has forcefully argued that ADR, a system which provides private benefits to individuals, is not

and should not be considered as a branch of the government. Although ADR has a part to play in the civil justice system, it cannot serve the formal adjudicative role of the courts in administering equity and the law. ADR provides private justice because it exists within the framework of law and formal adjudication, without which ‘there would be mere epiphenomena’ (Neuberger, 2010a, 2010b). In his recent speech to the Civil Justice Council, Lord Neuberger reinforced his view that mediation is an effective adjunct to litigation, but can never be a substitute to it, and as such it is important to uphold and preserve the right to access the courts (Neuberger, 2015). However, as will be discussed later, Lord Neuberger did not rule out the possibility of certain small disputes being referred to compulsory mediation.

Dyson LJ’s stance on the ECHR Article 6 ‘right to trial’ issue was recently confirmed and followed in *PGF II SA v OMFS Co I*.⁴⁴ In that case the claimant, at an early stage in the litigation process, wrote to the defendant to participate in mediation and, four months later, the claimant sent a second letter inviting the defendant to ADR. The defendant failed to respond to these invitations, however, and instead made a Part 36⁴⁵ offer without providing an explanation as to the basis of that offer. The matter eventually settled, with the claimant accepting the defendant’s Part 36 offer. At the costs hearing the claimant argued, *inter alia*, that the defendant was unreasonable to have refused to participate in ADR. The ADR point succeeded and both parties appealed.

Giving the leading judgment on appeal, Briggs LJ formally endorsed the advice of the authors of the Jackson ADR Handbook, and held that silence in the face of an invitation to participate in ADR is, as a general rule, itself unreasonable—even if a refusal might have been justified by the identification of reasonable existing grounds (Blake et al., 2013). By doing so, his Lordship made a ‘modest’ extension to the *Halsey* guidelines on assessing an unreasonable refusal to participate in ADR. His reasoning did, however, also endorse Dyson LJ’s point that the court should not compel parties to mediate because doing so would breach Article 6 of the ECHR. The court may encourage the parties to embark on ADR, that encouragement may be ‘robust’, and a failure to engage in ADR may result in adverse cost consequences for the defaulting party. Still, there is to be no compulsion.

Briggs LJ emphasised the success rate of mediation and the Court of Appeal’s own voluntary mediation scheme. He referred to the ‘intense focus’ of Sir Rupert’s report into costs in achieving proportionality between the overall cost of litigation and the damages being sought. This, according to Briggs LJ, was Sir Rupert giving a clear endorsement of ADR. Finally, Briggs LJ referred to the government’s austerity policy which had impacted on the ‘provision of state resources for the conduct of civil litigation.’ The issue of austerity, he elaborated, necessitated ‘[a]n ever-increasing focus upon means of ensuring that court time... is proportionately directed towards those disputes which really need it.’

Briggs LJ made clear in *PGF* that parties would be expected to attempt some form of ADR, regardless of whether the parties had a justifiable reason for refusal:

This case sends out an important message to civil litigants, requiring them to engage with a serious invitation to participate in ADR, even if they have reasons which might justify a refusal... To allow the present appeal would, as it seems to me, blunt that message. *The court’s task in encouraging the more proportionate conduct of civil litigation is so important in current economic circumstances that it is appropriate to emphasise that message by a sanction which, even if a little more vigorous than I would have preferred, nonetheless operates pour encourager les autres.*⁴⁶

Both the *Halsey* and *PGF* decisions raise a number of issues regarding ADR compulsion. Both decisions reflect a tension between the formal rejection of compulsory ADR and the acknowledgement of the courts' powers to 'encourage' parties to engage in ADR. To say that parties should not be compelled to ADR but then to indicate that 'encouragement' may be robust and in the form of a court order appears to be contradictory. It is highly unlikely that parties, even if they are opposed to ADR, will decline to abide by a court order: such parties would clearly face severe cost consequences under CPR Rule 44.3. The court order and the threat of severe cost consequences would impliedly force the parties to ADR, rendering both Dyson LJ's and Briggs LJ's position on Article 6 of the ECHR obsolete.

Further, the pre-*Halsey* Court of Appeal decisions in *Cowl v Plymouth (City Council)*⁴⁷ and *Dunnett v Railtrack Ltd*⁴⁸ adopted a robust, pro-ADR stance. In *Cowl*, Lord Woolf MR was unequivocal in arguing that the courts should make appropriate use of 'their ample powers under the CPR to ensure that the parties try to resolve the dispute with the minimum involvement of the courts.' His Lordship went on to indicate that the courts could require the parties to provide an explanation as to the steps which they have taken to try to settle the matter. In disallowing the successful defendant's costs in *Dunnett* for failing to engage in ADR, Brooke LJ concluded with a stern warning when he stated:

It is to be hoped that any publicity given to this part of the judgment of the court will draw the attention of lawyers to their duties to further the overriding objective in the way that is set out in CPR Pt 1 and to the possibility that, if they turn down out of hand the chance of alternative dispute resolution when suggested by the court, as happened on this occasion, they may have to face uncomfortable costs consequence.⁴⁹

The second issue relates to the strong emphasis by Briggs LJ in *PGF* on the need to utilise limited court resources proportionately, which arguably has overtaken Lord Woolf's first reason for resisting compulsory ADR. Briggs LJ placed great weight on the need for the courts to encourage the more proportionate conduct of civil litigation. For Briggs LJ, this was extremely 'important in the current economic circumstances', and it was important to send out the message of the significance of the need for the parties to conduct themselves proportionality during litigation. Briggs LJ emphasised this message by a sanction of an adverse costs order against the defendants. Thus, Lord Woolf's first reason not to have compulsory ADR is redundant.

Finally, it is worth reflecting on the comments of Sir Alan Ward in *Wright v Michael Wright Supplies Ltd*.⁵⁰ Sir Alan, who was a member of the court in *Halsey*, expressed doubt on the Article 6 of the ECHR 'right to a trial' point and called for the need for a possible review of *Halsey* in light of developments in the field of ADR since the decision. His lordship expressed his reservations over *Halsey* when he said:

Was it wrong for us to have been persuaded by the silky eloquence of the *eminence grise* for the ECHR, Lord Lester of Herne Hill QC, to place reliance on *Deweert v Belgium*... Does Civil Procedure Rule 26.4(2)(b) allow the court of its own initiative at any time, not just at the time of allocation, to direct a stay for mediation to be attempted, with the warning of the costs consequences, which *Halsey* did spell out and which should be rigorously applied, for unreasonably refusing to agree to ADR? Is a stay really 'an unacceptable obstruction' to the parties' right of access to the court if they have to wait a while before being allowed across the court's threshold?⁵¹

Diverging judicial and extra-judicial approaches on compulsion. Rather than settling the matter and providing clear jurisprudential guidance, Dyson LJ's approach to Article 6 of the ECHR led to the emergence of an opposing judicial school of thought which appears to have embraced the notion of compulsory ADR. Blackburn J in *Shirayama Shoukusan Co v Danovo*⁵² held no doubt that the courts have assumed the jurisdiction to order parties to mediation. Blackburn J drew support from Arden J's (as she was then) decision in *Kinstreet Ltd v Balmargo Co*,⁵³ in which the parties were ordered to mediation. Further, Coleman J in *Cable & Wireless Plc v IBM United Kingdom Ltd*⁵⁴ confirmed that the courts maintained the power to order unwilling parties to engage in ADR in the Commercial Court.

In *C v RHL*⁵⁵ the Commercial Court exercised its powers and made an ADR order. Coleman J, in making the order and actually setting the date for the conclusion of the mediation, stated:

I have no doubt that the overall interests of all parties . . . would be best served if the whole group of disputes between C and RHL was referred to mediation before any further substantial costs are incurred either in pursuing or defending satellite litigation . . . In many respects this series of disputes with its particular commercial background is the paradigm of a case which is likely to be settled by mediation.⁵⁶

The case of *Rolf v De Guerin*⁵⁷ is also illustrative of the diverging judicial approaches to compulsory ADR and the court's expectation that the parties will engage in settlement processes. The claimant issued proceedings against the defendant builder for defective work on a small building project. Before and after issuing proceedings, the claimant's various invitations to the defendant to enter mediation were rejected. When asked by the Court of Appeal why he had been unwilling to mediate, the defendant argued that, *inter alia*, he wanted his 'day in court'. Dismissing the defendant's contentions, Rix LJ found that the defendant's refusal to mediate was unreasonable behaviour for the purposes of CPR Rule 44(5) and, as a consequence, the court was entitled to exercise its discretion and make an order as to costs. Rix LJ held:

As for wanting his day in court, that of course is a reason why the courts have been unwilling to compel parties to mediate rather than litigate: but it does not seem to me to be an adequate response to a proper judicial concern that parties should respond reasonably to offers to mediate or settle and that their conduct in this respect can be taken into account in awarding costs.⁵⁸

An analysis of extra-judicial statements also supports compulsory ADR, contrary to *Halsey* and *PGF*. On the Article 6 point, Sir Gavin Lightman has argued that the court appeared to be unfamiliar with the mediation process and confused an order for mediation with an order for arbitration or some other order which places a permanent stay on proceedings (Lightman, 2007). An order for mediation did not interfere with the right to a trial: at most it merely imposes a short delay to afford an opportunity for settlement. Similarly, Lord Clarke MR (as he then was) also recognised the court's jurisdiction to require parties to engage in mediation when he stated that, despite the *Halsey* decision, it was at least 'strongly arguable that the court retains jurisdiction to require parties to enter into mediation' (Clarke, 2009). Also, Sir Bernard Rix, while recognising mediation as a 'given good', was critical of the decision in *Halsey* (especially on the Article 6 ECHR point) for being insufficiently supportive of mediation (Rix, 2014: 21).

Lord Neuberger alluded to the idea of extending the compulsory family mediation, information and assessment meeting (MIAM) to certain, smaller civil cases.⁵⁹ Although expressing

caution on the idea of compulsory mediation ‘happening’, Lord Neuberger appeared to embrace the idea of extending the MIAM to certain disputes when he said:

While, as I say, it would be wrong for me to go so far as to say that it ought to happen, I think there plainly must be a lot to be said for extending the MIAM scheme to smaller civil cases. Indeed, I understand that at last year’s conference, Lord Faulks, then Minister of State for Justice, said he would explore whether a similar system could be introduced for civil mediation (Neuberger, 2015).

More importantly, the European Court of Justice in *Alassini v Telecom Italia Spa*,⁶⁰ a decision which came after the *Halsey* decision, dealt directly with the issue of whether compulsory mediation was a breach of Article 6. *Alassini* concerned an action which was brought by customers of two telecom companies for breach of contract under the EU Directive on the Provision of Electronic Communications Network. The Italian government made legal action pursuant to the Directive conditional on a prior attempt to settle the matter before bringing proceedings. The Italian law, in the opinion of the Advocate General Kokott, pursued legitimate objectives in the general interest in the quicker and less expensive resolution of disputes. Advocate General Kokott found that the measure of requiring parties to engage in settlement discussions before commencing court proceedings was proportionate because no less restrictive alternative existed to the implementation of a mandatory procedure, since the introduction of an out-of-court settlement procedure which is merely optional is not as efficient a means of achieving those objectives. The Italian law did not seek to replace court proceedings and therefore access to the court was not denied but, at worst, delayed by 30 days.

Lord Dyson MR revisited the *Halsey* decision in his recent speech to the Belfast Mediation Conference in 2014.⁶¹ Lord Dyson reiterated that unwillingly parties should never be compelled to mediate but went on to argue, as he did in *Halsey*, that adverse costs orders would be an appropriate means of encouraging parties to use mediation. However, in light of the European Court of Justice ruling in the case of *Alassini*, his Lordship modified his position and conceded that compulsory mediation does not, of itself, breach Article 6 of the ECHR. He did maintain that if the court were to compel parties to enter into a mediation to which they objected, that would achieve nothing except adding to the costs of the dispute resolution process, possibly postponing the judicial determination of the dispute, and damaging the perceived effectiveness of the ADR process. Lord Dyson went on to argue that the ruling in *Alassini* did not mean that compulsory mediation will never breach Article 6, and that in some circumstances where, for example, the costs of mediation were very high, compelling a party to mediate could still be considered a denial of access to justice. There was also, in Lord Dyson’s opinion, a moral question: should a party be forced to attend mediation rather than exercising his right to go to court? Lord Dyson answered: ‘[i]t doesn’t seem to me that it is the role of a court of law to force compromise upon people who do not want compromise.’

In summary, there are currently two schools of thought on the issue of compulsory ADR within the English senior judiciary: the official position which dictates that parties should not be compelled into ADR, and the unofficial but implied position which confirms that the courts have power to compel parties to ADR. The unofficial position is reinforced by the existence and making of ADR orders by the courts and the very real threat of adverse cost consequences in the event of a breach of such an order. Further, there are clear signs of acceptance, albeit in a very cautious manner, at the most senior judicial level of the possibility of compulsory mediation for small disputes, as indicated by Lord Neuberger.

Canada⁶²

In the years since mandatory mediation was suggested by the CBA Report on access to justice, there has been considerable debate within Canada's legal community, including among members of the judiciary, about the perceived benefits and drawbacks of compulsory ADR. Resistance to compulsory ADR was founded in the customary notion that good faith participation of litigants in pre-trial settlement discussions necessarily requires the *voluntary* participation of the parties:

[The] traditional view was that although alternative dispute resolution was a useful process, the court would not ordinarily order it over the objections of a party. The thinking was that a mandatory dispute resolution process is an oxymoron because a party who believes that it is a waste of time and money will not engage in good faith negotiations.⁶³

It is clear from Canadian jurisprudence, however, that judicial attitudes toward compulsory ADR have now moderated, at least in jurisdictions where legislated rules of civil process compel litigants to participate in ADR as a matter of course, or permit the courts to order such participation on a case-by-case basis.⁶⁴

Judicial attitudes in jurisdictions with compulsory ADR rules

In *IBM Canada Ltd v Kossovian*, presently Canada's leading decision on mandatory ADR, Mahoney J summarised the 'new millennium view'⁶⁵ of the court in the context of Alberta's compulsory ADR rules:

The experience in this Court plus ample informed commentary suggests that requiring participation in an alternative dispute resolution process leads to many settlements that would otherwise not occur. Often disputants, when choosing between a settlement process or proceeding to trial, lack information, make distorted assessments, misjudge the cost, have an overly optimistic or constricted view of potential trial risks and outcomes and fail to understand the hidden benefits of entering structured settlement negotiations, like a JDR.

Even if a final agreement is not reached on all issues, the parties, by engaging in the process, can address their dispute sooner, learn valuable information to help sharpen their understanding of the real issues, reduce the costs of final resolution, and in some cases, improve their relationship. The Court has seen that even in major commercial litigation that was dealt with by way of a JDR, the process has led to quite unexpected positive results. Even in the field of healthcare disputes including medical malpractice, where negotiated settlements are the exception, breakthroughs in conflict resolution have been made as an alternative to litigation . . .

Making the alternate dispute resolution process mandatory is an attempt to ensure that parties to litigation are exposed to its proven benefits . . .⁶⁶

In other words, courts in mandatory ADR jurisdictions are less inclined to think that litigants or their counsel necessarily know best when it comes to determining whether a lawsuit might benefit from mediation or another out-of-court dispute resolution mechanism. The fact that a party does not voluntarily consent to participation in ADR is not determinative.⁶⁷ Instead, the judicial presumption is that, in most circumstances, a civil action will benefit, in some manner, if the parties engage in ADR. Some of these benefits, as identified by Canadian courts, include: educating the parties about methods of resolving the dispute in a less adversarial fashion; promoting effective communication between the parties; helping the parties to identify the

material issues in dispute; helping the parties to identify and understand their respective positions so as to more readily consensually resolve the matter after the ADR or to reduce the time and cost of a trial, should it become necessary.⁶⁸

The benefits of mandatory ADR are also vigorously protected by Canadian courts in jurisdictions where the legislated rules do not require ADR in all cases, but instead empower the courts to order ADR in appropriate circumstances. For example, in considering the utility of a court exercising its authority to compel ADR participation in the face of a litigant's resistance to mediation, Handrigan J of the Newfoundland and Labrador Supreme Court stated that:

[R]eluctance to participate in mediation, or even outright opposition to it, should not always trump the use of mediation. Rule 37A allows the court to 'order' mediation thereby overriding objections voiced by responding parties. It is important to be sensitive to the attitudes of the parties because mediation is less likely to be successful if it also has to overcome recalcitrance. But, as Green, C.J. of this court has said, '... a skilled mediator can do a lot to encourage participation by reluctant litigants and to bring them around to a positive way of thinking.'⁶⁹

As this comment suggests, the courts now recognise that a party's resistance to mediation may be overcome by the very act of participating in mediation, even where that participation is not initially voluntary. This leads to the further conclusion that parties should not be exempt from compulsory ADR simply because they mutually consent to the exemption. As stated by Burrows J of the Alberta Court of Queen's Bench, '[t]he intent that pre-trial dispute resolution no longer be voluntary would be entirely frustrated if the Rule could be waived by the consent of the parties to the litigation.'⁷⁰

The enthusiasm with which Canadian courts in mandatory ADR jurisdictions have embraced ADR as a desirable and useful component of the civil justice process is also reflected in the fact that these courts have been reluctant to exercise their discretionary authority to exempt litigants from the mediation requirement. For example, in *Kossovian*, Mahoney J refused to exempt the parties from compulsory mediation where the claimant, suing the defendants for fraud, argued that the proposed JDR would be futile because the claimant would settle for nothing less than full or near-full indemnity, and because the defendants did not have the resources to settle the case on a full-indemnity basis. Mahoney J concluded that this argument was premature because the plaintiff's position on compromise might change over the course of the JDR. He also held that the claimant's argument failed to acknowledge that there might be other benefits to participating in the JDR, beyond the immediate settlement of the action:

It is a fallacy to think that the outcome of a JDR will always result in a substantial compromise to one's initial position. While one of the objects of dispute resolution is to get both parties to 'move' from their initial positions to one upon which they can mutually accept, the ultimate objective is achievement of a judicious outcome that all parties can live with, put behind them and move on.

...

A number of plaintiffs enter into the litigation process believing that they are entitled to recover the full amount of their claim. Positions may be based on what they have been told by counsel, personal principles, or as in this case, corporate direction. Yet despite this belief successful settlements are often reached. Parties may be persuaded to resolve the dispute once the weaknesses in their own case is revealed to them, given the uncertainties of litigation. Having a Justice of this Court outline the strengths and weaknesses of each party's case may

cause one or both of the parties to modify their settlement positions. Alternatively, if a strong case is put forward where ability to recover is in issue, creative repayment solution might be successfully canvassed.

A belief that there is little room for flexibility and no major concession as to amount will be made does not act to render the alternate dispute resolution process futile.⁷¹

Thus, a party's objections to compulsory ADR on the basis of its negative perception of the substantive utility of ADR as a settlement mechanism is *not* a justifiable reason for a court to fail to enforce a compulsory mediation rule.

Canadian courts have also refused to exempt parties from compulsory mediation on procedural grounds. For instance, in *O (G) v H (CD)*,⁷² the Ontario Supreme Court of Justice refused to grant an exemption from mediation where the claimant, who was suing the defendant for a series of torts, including sexual assault and indecent assault, argued that she was too afraid of the defendant to be in the same room as him for the purposes of participating in ADR. The court essentially held that such procedural considerations do not trump the greater purpose served by engaging in ADR:

The concerns of the defendant can be accommodated by (a) selecting a mediator with skills to address issues of violence; and (b) exploring with that mediator whether the mediation can proceed without the necessity of the plaintiff G.O. and the defendant being present in the same room. With those concerns accommodated, I see no reason to exempt this action from mandatory mediation. Indeed, I find that it is consistent with the objective of the mandatory mediation pilot project that the parties participate in mediation in order to give them an opportunity to explore an early and fair resolution.⁷³

Along similar lines, in *Pelham Properties Ltd v Hessdorfer*, the Saskatchewan Court of Queen's Bench rejected the plaintiff's argument for an exemption from mandatory mediation on the grounds that it was going to be pursuing a summary judgment application against the defendant. Gerein J reasoned, in part, as follows:

The mediation requirement is universal. It does not in any way speak to the merits of a claim. The absence or presence of a defence plays no part in whether there should be mediation. The purpose of the process is to afford the parties an opportunity to resolve their dispute through agreement rather than through the adversarial process of litigation. The process affords a person, even one devoid of a valid defence, to seek and perhaps obtain a resolution through compromise. Even a confident plaintiff may make an accommodation to achieve early closure, eliminate risk and avoid expense. That possibility should not be removed simply because a summary judgment would be granted.⁷⁴

These cases are reflected in Mahoney J's findings in *Kossovian* that, given the purposes and benefits of mandatory ADR, the legislated discretion of the court to grant an exemption to a mandatory ADR rule should be exercised sparingly, and the threshold for obtaining an exemption should be high.⁷⁵ As stated by Mahoney J, even in the context of Alberta's rule, which expressly lists some of the circumstances in which the court may grant an exemption, '[a]bsent compelling reasons . . . the court should not use its discretion to bypass the legislated objectives of the Rule.'⁷⁶

Mahoney J did, however, acknowledge that an exemption to mandatory ADR may be granted in appropriate circumstances, with the burden of proving such circumstances being

borne by the party or parties seeking the exemption.⁷⁷ Relying on prior case law, he noted that appropriate circumstances might include: a complex case involving a catastrophic claim; multiple parties and complicated cross-claims; a case involving a party who lives in a foreign jurisdiction and where the costs of that party attending mediation are prohibitive and outweigh the cost advantages of the ADR process; a case which is pending certification as a class action; or a case involving an assault or a power imbalance where a mediator trained to address the parties concerns is not an option.⁷⁸ Additionally, it has been suggested that an exemption from mandatory ADR may be appropriate where the nature of the case means that public policy arguments favour a public trial rather than a private resolution.⁷⁹

As regards the optimal timing for mandatory mediation to take place, several courts have expressed the view that the benefits of ADR are usually most significant if ADR takes place early in the litigation. For example, Handrigan J of the trial court of Newfoundland and Labrador stated that:

Mediation is generally regarded as most beneficial if it occurs early in the proceedings... the rationale for this belief is simple: The parties are likely to become more firmly entrenched in their positions as time goes on. They will be less malleable and indisposed to the creative problem-solving techniques that successful mediation requires.⁸⁰

Similarly, Halvorson J of the Saskatchewan Court of Queen's Bench noted that '[o]ne objective of early mediation is to reduce costs of litigation, and this objective would be frustrated where mediation is delayed.'⁸¹ Further, Mahoney J of the Alberta Court of Queen's Bench noted that Alberta's mandatory ADR rule must 'be read in light of the objectives of accessibility, affordability and timeliness.'⁸² Ironically, this association between the timeliness of ADR and its benefits is likely the rationale behind the decision of the Alberta courts to suspend enforcement of the province's mandatory ADR rule. Specifically, where litigants select JDR as the mechanism by which they will fulfill their pre-trial ADR requirement, the cost and time saving benefits of compulsory ADR requirement are lost if, as a result of dwindling judicial resources, the JDR cannot be conducted in a reasonable period of time.

Of course, the definition of 'early' ADR, or ADR within a 'reasonable period of time', inevitably varies with the circumstances. It has been noted by Alberta's Associate Chief Justice John Rooke, for example, that for the purposes of achieving a settlement, JDR is most successful when conducted after pre-trial evidence disclosure procedures have been completed (Rooke, 2010). Some flexibility as to the timing of compulsory ADR, therefore, seems desirable.⁸³

Judicial attitudes in jurisdictions without compulsory ADR rules

Despite the benefits of mediation lauded by the judiciary in jurisdictions with rules mandating or expressly authorising the courts to order participation in ADR, in Canadian jurisdictions without such legislative provisions the courts have generally been unwilling to force parties to mediate. In fact, there does not appear to be a single reported case in which a court has compelled a party to mediate in circumstances where compulsory or court-ordered mediation is not provided for by the relevant rules of civil process. There are cases, however, in which these courts have been asked to award costs against a party who has refused the opposing party's offer to mediate the dispute. Here again, the courts have generally been

unwilling to indirectly compel mediation by threatening costs against a litigant because of that party's refusal to voluntarily participate in mediation.⁸⁴ In *Roscoe v Halifax (Regional Municipality)*, Muise J of the Nova Scotia Supreme Court held that 'in the absence of . . . statutorily mandated settlement steps, accompanied by costs sanctions for failing to take them, the failure to make all reasonable attempts to resolve a claim does not, by itself, warrant augmented costs.'⁸⁵ In *Michiels v Kinnear*,⁸⁶ however, the plaintiff's unreasonable refusal to mediate was listed among several factors considered by Power J of the Ontario Supreme Court in determining an appropriate costs award against the unsuccessful plaintiff. This suggests that, while Canadian courts are reluctant to use their discretion to award costs against a party as a direct punishment for failing to voluntarily engage in ADR, the Canadian judiciary has not fully closed the door on taking a party's unwillingness to mediate into account when considering an overall costs award. Generally, however, prevailing case law leads to the conclusion that, where legislated procedural rules do not expressly provide Canadian courts with the authority to compel parties to mediate, the courts are not presently inclined to assume jurisdiction to compel ADR.

Analysis

As the preceding discussion indicates, the major civil justice reforms in England and Canada over a quarter-century ago had one significant similarity: both identified the need for a culture shift in the civil justice process. Specifically, the reforms called for ADR mechanisms to be integrated into the civil litigation process as a standard *alternative* to the traditional adversarial trial process, so as to ultimately relegate trial to a mechanism of last resort. However, despite this common goal, the Woolf Reforms and the CBA Report adopted distinctly divergent approaches to the issue of ADR compulsion. Lord Woolf dismissed compulsory ADR on the grounds that, at the time, the courts were sufficiently resourced to conduct trials, and that there was a need to preserve the constitutional right of citizens to access the courts. In contrast, the CBA Report was bolder in its recommendation on ADR, calling for a multi-option civil justice system which would formally incorporate ADR as a compulsory step in the litigation process in order to facilitate the settlement of claims. In short, the English reforms advocated for an *evolution* of the civil justice system which would ultimately integrate ADR as an accepted part of civil procedure, whereas the Canadian reforms called for a *revolution* of the civil justice system, with governing legislation being amended to implement mandatory ADR.

As a result of these distinct approaches, England and Canada currently have very different civil justice regimes, and judicial attitudes, with regard to compulsory ADR. In England, the situation is especially complex. In the absence of any procedural rules requiring litigants to participate in ADR or expressly authorising the courts to compel parties to engage in ADR, the judiciary has divided itself along two lines of authority. The first states that the courts do not have the power to compel parties to participate in ADR and, even if the courts did have such a power, they should not exercise it. The second, unofficial judicial position stands in stark contrast with the first. It confirms that the courts do, in fact, have the power to compel parties to ADR through various means, and those powers have sometimes been exercised by the courts.

In Canada, the legislative approach to mandating ADR varies among the country's civil jurisdictions. Depending on the jurisdiction, civil procedure rules either (1) expressly require all litigants to participate in ADR prior to trial, subject to exemptions; (2) expressly authorise the courts to order parties to participate in ADR in appropriate cases; or (3) are silent as to whether parties can be compelled to participate in ADR. In this legislative environment,

judicial approaches and attitudes toward mandatory ADR are reasonably consistent and, as a consequence, Canadian jurisprudence on compulsory ADR is more coherent than that of England. This consistency is principally due to the enactment of court rules mandating ADR, setting clear exceptions to compulsory ADR, empowering courts to order ADR, and linking the obligations of the parties to engage with ADR with specific court powers to penalise defaulting parties.

The Canadian judiciary speaks with a united voice on the issue of compulsory ADR because of the court rules. Where the rules place a positive obligation on the parties to engage in ADR, they also limit the circumstances in which the courts may exempt a party from this obligation, and clearly link any default with appropriate court sanctions such as calling a case conference and making adverse costs orders. Where the rules expressly authorise a court to order mandatory ADR on a case-by-case basis, the judiciary is able to exercise this authority without puzzling over whether compelling ADR is in fact within the court's discretion. And, by contrast, where the rules are silent as to mandatory ADR, judges are able to point to their counterpart jurisdictions to definitively conclude that, unless express legislative authority exists to compel ADR, the court cannot require parties to participate in ADR.

In England, however, the absence of any rule within the CPR clearly mandating the parties to engage in ADR or providing the courts with clear powers to compel parties to ADR (at least in certain cases) has led the English judiciary to adopt opposing and inconsistent approaches. CPR Rule 1.4 does provide the courts with some discretion to assist the parties in settling the matter, but neither this rule nor other 'ADR rules' within the CPR oblige the parties to engage in ADR or provide the courts with the powers to compel parties to participate in ADR. CPR Rule 1.4 simply requires the court to help the parties to settle the case, while Rule 26.4 states that the parties 'may' request a stay of proceedings to attempt settlement, and the Small Claims Mediation Service is only available if the parties agree. Even the pre-action protocols speak of the need for the parties to *consider* ADR without stating that they should *engage* in an ADR process.

In England, the contradictory and opposing positions of the judiciary have left the issue of compulsory ADR in a wholly unsatisfactory state. The exercise by some members of the judiciary of their powers to compel parties to ADR in some cases has created unpredictability and a great deal of uncertainty for all participants in the civil court process, including judges, lawyers and, most importantly, the parties. Litigants are left in the undesirable position of not knowing what approach the courts will take in deciding whether to mandate ADR. They are also left with the potential risk of an adverse costs order ultimately being made against them because of a failure to participate in voluntary ADR. This uncertainty has the real potential to create costly satellite litigation and thus to increase the overall cost of conducting litigation, an outcome which undermines the purpose of the various civil reforms. Although *PGF*⁸⁷ is significant in confirming that parties should engage constructively with an invitation to ADR (and that silence in response to such an invitation maybe considered as unreasonable conduct warranting costs), it also stands as an example of how uncertainty on the issue of compulsion and the exercise of the courts powers in awarding costs can lead parties to engage in expensive satellite litigation that may find its way to the Court of Appeal.

In addition to these practical problems resulting from the current uncertainty surrounding mandatory ADR, continued resistance to the notion of compulsory ADR in England is no longer sustainable for a number of reasons. It will be recalled that Lord Woolf rejected compulsory ADR because, at the time, his Lordship was of the view that the courts were sufficiently resourced to deal with cases coming to them. He also rejected compulsory ADR because he wished to preserve the right of citizens to access the courts. It is this second

justification, in particular, which has been consistently used in subsequent civil justice reforms in rejecting the notion of compulsory ADR. These policy justifications for resisting compulsory ADR, however, are now redundant.

The courts are no longer sufficiently resourced to deal with all cases which are brought to them, especially in light of the current government agenda of austerity. As the current Lord Chief Justice, Lord Thomas, recently made clear:

We live in times where, so it seems now and for the foreseeable future, the State is undergoing, a period of significant retrenchment . . . the cutback on government expenditure is to continue for the foreseeable future. It was an approach born in times of austerity, but there is no indication that there will ever be a return to times of abundance in the provision of funding by the State (Thomas, 2014).

The need for parties to adopt more proportionate approaches to litigation and for the utilisation of proportionate court resources was also a major aspect of Briggs LJ's judgment in *PGF*. Briggs LJ did not hesitate to make an adverse costs order to highlight the importance of ADR and the need to utilise court resources proportionately during a time of austerity. Briggs LJ emphasised the need to send out the 'right message' to litigants by making an adverse costs order which operated 'pour encourager les autres'.⁸⁸ It is this policy rationale which now underpins the unofficial position on compulsory ADR, and which has arguably overtaken Lord Woolf's first justification in rejecting compulsory ADR.⁸⁹

The need to preserve access to the courts is also redundant as a basis for rejecting compulsory ADR. As discussed earlier, the English courts have not only assumed and confirmed their powers to compel parties to ADR, they have, in certain cases, actually exercised those powers. Coleman J in *RHL*⁹⁰ made an ADR order because it was in the 'interest of all the parties' to the dispute. Blackburn J's comments in *Danovo* and Arden J's judgment in *Kinstreet* continue to stand and have not been overruled, nor were they commented upon in *PGF*, even though those cases dealt with the controversial issue of compulsory ADR. Further, Rix LJ's comments in *Rolf* seemed to imply that small building disputes should use the courts as a last resort and only after engaging in ADR. Rix LJ stated:

In particular . . . the nature of the case, namely a small building dispute between a householder and a small builder, is well recognised as one in which trial should be regarded as a solution of last resort.

A further policy rationale which appears to emerge from the English jurisprudence and which appears to underpin the unofficial position on compulsory ADR is the need to expose parties to the benefits of ADR. That policy rationale places emphasis on the practical benefits of ADR processes for disputing parties, regardless of the opposing wishes of the parties to go to ADR. The emergence of this policy rationale was evident in the comments of Brooke LJ in *Dunnett* when he stated: Skilled mediators are now able to achieve results satisfactory to both parties in many cases which are quite beyond the power of lawyers and courts to achieve. This court has knowledge of cases where intense feelings have arisen, for instance in relation to clinical negligence claims. But when the parties are brought together on neutral soil with a skilled mediator to help them resolve their differences, it may very well be that the mediator is able to achieve a result by which the parties shake hands at the end and feel that they have gone away having settled the dispute on terms with which they are happy to live. A mediator may be able to provide solutions which are beyond the powers of the court to provide.⁹¹

More recently, Ramsey J in *Northrop Grumman v BAE Systems*,⁹² a case in which the defendant had failed to engage in mediation because it believed it had a strong defence and that

mediation had no prospect of success, pointed to benefits of exposing the parties to mediation when he held:

The authors of the Jackson ADR Handbook properly, in my view, draw attention at paragraph 11.13 to the fact that this seems to ignore the positive effect that mediation can have in resolving disputes even if the claims have no merit. As they state, a mediator can bring a new independent perspective to the parties if using evaluative techniques and not every mediation ends in payment to a claimant.⁹³

Notably, Canadian judges have also consistently referred to the practical benefits of engaging with ADR. As Mahoney J explained in *Kossovian*, engagement with ADR leads to many settlements and, even if a settlement is not reached, the process of engagement in ADR allows the parties to narrow the issues and achieves other positive results. Likewise, Handrigan J referred to the skills of a mediator in encouraging participation and in bringing the parties 'around to a positive way of thinking'.

Overall, the English judiciary appears to be moving toward a similar approach to that employed by the Canadian judiciary in presuming that, regardless of what prompts participation in ADR, parties benefit from being exposed to ADR. This is true whether that benefit is the settlement of the dispute, the narrowing of the issues, or some other advantage. Clearly, it is easier for the Canadian judiciary to justify overriding any opposition to ADR by the parties because of the existence of specific court rules on compulsory ADR. The fact that the English judiciary is reasoning in the same way as the Canadian judiciary with regard to the benefits of ADR indicates that a clearer procedural framework is required in England to resolve the current judicial inconsistencies on compulsory ADR.

Reform is required to remedy the current problems with the issue of compulsion in the English civil justice system. But a necessary precondition of that reform must be an appreciation by the senior judiciary that compulsory ADR does not restrict access to the courts. As argued previously and recognised by the ECJ in *Alassini*, ADR may, at worst, delay a litigant's right to go to trial, but it does not deny the litigant that right. ADR processes such as mediation, negotiation and conciliation are non-adjudicative and consensual forms of dispute resolution, and as such the parties are free to explore whether or not a settlement is possible. In the absence of a settlement agreement, the parties are not denied access the courts. Therefore, Lord Dyson's comments on the Article 6 of the ECHR 'right to trial' and Briggs LJ's subsequent confirmation of it should be formally rejected.

There must then be a review of the rules concerning the parties' ADR obligations with a view to amending those rules to expressly strengthen judicial authority to compel parties to engage in ADR in appropriate circumstances. Although Sir Rupert in his Final Report did not recommend a change to the existing rules on ADR (Jackson, 2010), it is submitted that this option should be reconsidered with the objective of remedying the current diverging judicial approaches. The following two options may be considered to strengthen ADR within the CPR and to bring about greater consistency, predictability and certainty.

The first option is to retain the existing rules on ADR, which simply require parties to consider settlement with the courts being under an obligation to assist the parties in this regard. However, those rules, such as CPR Rule 1.4(2), should be amended to make clear that the courts retain the power to refer parties to ADR. The benefits of this option are twofold. First, it remedies the uncertainty concerning the issue of whether the courts even possess the power to compel parties to ADR. It confirms the court's powers and thereby avoids parties and their

lawyers 'guessing' whether a court can order them to participate in ADR. It also avoids the courts relying on ADR orders as an implied way of exercising their powers of compulsion. The second advantage of this option is that it provides the parties with some freedom to engage in ADR from an early stage in the litigation process, while at the same time maintaining the court's powers to compel parties to ADR if they have not discharged their obligations.

The second option requires a clear rule to be inserted at the pre-action stage which, similar to some Canadian rules, obliges parties to engage in ADR before they are permitted to proceed to trial. It will be recalled that the rules in Saskatchewan require engagement with ADR after the close of pleadings; in Ontario the parties must participate in mediation within 180 days after the first defence has been filed; and the court rules of Alberta require participation in ADR failing which the matter cannot be listed for trial. Notably, these Canadian rules require participation in ADR after the claimants and defendants have completed formal pleadings. This requirement recognises that ADR should take place when the parties are aware of their own case as well as the issues raised by their opposition. Similarly, the pre-action protocols require essential details of the parties' cases to be set out in pre-action correspondence along with disclosure of any relevant evidence. Any change in the English rules to compel ADR should follow this example by ensuring that ADR take place at an appropriate stage in the litigation, when the parties have an understanding of the salient facts and issues, as well as disclosure of relevant evidence which would allow for better and more informed settlement discussions.

Conclusion

Just over a quarter-century ago, law reformers in England and Canada called for a culture shift in their respective civil justice systems and envisioned ADR as an accepted and even dominant feature of an improved civil litigation process. While the English reforms sought this change through an evolutionary process, Canadian reformers essentially called for a revolution of civil procedure rules so as to mandate ADR participation as an ordinary step in litigation. These different approaches are reflected in the judicial attitudes and rules of civil procedure today. English jurisprudence, while continuing to evolve, evidences ongoing confusion about the authority of the courts to compel ADR. In contrast, Canadian case authority is consistent as to if, and when, courts can order litigants to participate in ADR. To remedy the existing confusion, English law should follow Canada's example in expressly requiring litigants to engage in ADR or expressly authorising the courts to order litigants to participate in ADR in appropriate cases. As the preceding comparison of England and Canada's approach to mandatory ADR demonstrates, a smooth, consistent culture shift in litigation process must be spearheaded by legislative change.

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Notes

1. For the purposes of this discussion, England and Wales are collectively referred to as ‘England’.
2. Civil Procedure Rules 1998 (UK) (‘CPR’).
3. See for example Alberta’s Insurance Act RSA 2000, s. 519. See also Ontario’s Insurance Act RSO 1990, s. 258.6.
4. Woolf (1995a). See also Woolf (1995b: chapter 2, para. 7(a)). For a detailed and interesting discussion of the nature of the central plank of the Civil Procedure Rules, Rule 1 the ‘Overriding Objective’, see generally Sorabji (2014); see also Sorabji (2012: 77). Not all considered the Woolf Reforms to be revolutionary, however. See for example Zander (2009: 417); Zander (1995: 79).
5. See for example the comments of Lord Simon in *D v National Society for the Prevention of Cruelty to Children* [1977] UKHL 1.
6. See Sorabji (2014) for a detailed account of the history of previous civil justice reforms.
7. CPR Rule 26.4A.
8. Ministry of Justice, Practice Direction—Pre-action Conduct and Protocols. Available at: https://www.justice.gov.uk/courts/procedure-rules/civil/rules/pd_pre-action_conduct (accessed 2 April 2016).
9. *Ibid.* at para. 8.
10. See *Citation Plc v Ellis Whittam Ltd* [2012] EWHC QB 764 at para. 20, where Tugendhat J held that ‘[the] CPR provides a strong incentive to parties to engage in pre-action communications, with the risk to those who do not do this that they may not recover their costs, even if they bring an action in which they are the successful party’.
11. Briggs LJ (2016) Civil Courts Structure Review: Interim Report. Available at: <https://www.judiciary.gov.uk/wp-content/uploads/2016/01/ccsr-interim-report-dec-15-final1.pdf>
12. Briggs LJ (2016) Civil Courts Structure Review: Final Report. Available at: <https://www.judiciary.gov.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf> (Accessed 31 July 2016).
13. Briggs (IR) (2015) chapter 6. At paragraph 6.1 Briggs refers to the development of an online court as “... the single most radical and important structural change with which this report is concerned.”
14. Lord Justice Briggs had recommended a financial threshold of £25,000 for the online court (Briggs IR Chapter 5). Following a period of detailed consultation, Lord Justice Briggs in his FR has confirmed that the online court jurisdiction will remain at £25,000 (Briggs FR para. 6.47 – 6.54).
15. Briggs (FR) (para. 6.108 - 6.111).
16. Briggs (FR) para. 6.111.
17. Briggs (FR) para. 6.113.
18. Briggs (FR) para. 6.114.
19. See Canadian Bar Association Task Force on Systems of Civil Justice (1996) (‘CBA Report’).
20. For an inventory of the reform initiatives regarding ADR, see Canadian Forum on Civil Justice Inventory of Reforms—Alternative Dispute Resolution. Available at: <http://www.cfcj-fcjc.org/alternative-dispute-resolution-inventory> (accessed 3 April 2016).
21. See Canada’s Constitution Act 1867 (UK) reprinted in RSC 1985, ss 92(13), 94(14), 101. See also Northwest Territories Act RSC 1985, s. 16; Yukon Act SC 2002, s. 3; Nunavut Act SC 1993, s. 23.

22. For the purposes of this paper, a ‘standard’ case is one that is not categorised as a small claims case under the procedural rules set out by a province or territory.
23. Canada’s Federal Court may refer any proceeding to a dispute resolution conference: Federal Court Rules (1998) (SOR/98-106), rule 386. The New Brunswick Court may order the parties to appear before a judge at a settlement conference: New Brunswick Rules of Court (NB Reg 82-73), rule 50.07. Available at: http://www2.gnb.ca/content/gnb/en/departments/attorney_general/acts_regulations/content/rules_of_court/rules_of_court.html (accessed 3 July 2016). The Newfoundland and Labrador Court may order the parties to attend mediation or a settlement conference: Rules of the Supreme Court (1986) (SNL), rules 37A, 39B. All cases in the Yukon Territory must proceed through case management and the case management judge may order the parties to attend a dispute resolution conference or a judicial settlement conference. The Yukon court also has a general authority to require parties to attend a judicial settlement conference: Rules of Court (2006) (YOIC 2009/65), rules 36(6), 37.
24. See British Columbia’s Small Claims Rules (BC Reg 261/93), rules 7, 7.2, 7.4. See also Newfoundland and Labrador’s Small Claims Rules (NLR 52/97), rule 10; the Northwest Territories’ Territorial Court Civil Claims Rules (NWT Reg 034-92); Nunavut’s Small Claims Rules of the Nunavut Court of Justice (Nu Reg 023-2007), rule 11; and Ontario’s Rules of the Small Claims Court (O Reg 258/98), rule 13.
25. See Alberta’s Mediation Rules of the Provincial Court—Civil Division (Alta Reg 271/1997), s. 65; and Saskatchewan’s Small Claims Act, 1997 (SS 1997, c S-50.11), s. 23.
26. Notice to Mediate (General) Regulation (BC Reg 4/2001); see also British Columbia’s Small Claims Rules, rules 7.2, 7.3.
27. See Saskatchewan’s Queen’s Bench Act, 1998 (SS 1998, c Q-1.01), s. 42(1.1). See also Saskatchewan’s Queen Bench Rules (2013 S Gaz), rule 4-10.
28. The limited exceptions regarding the types of claims which are not subject to mandatory mediation are set out by regulation: The Queen’s Bench Regulation (RRS, c Q-1.01), regulation 1, section 5.
29. The Justice and Attorney General Act (SS 1983, c J-4.3), s. 14.1.
30. Queen’s Bench Act (SS 1998), s. 42(1.2).
31. Rules of Civil Procedure (RRO 1990, Reg 194), rule 24.1.09(1).
32. For exempted matters, see *ibid.* at rules 24.1.04(2), (2.1), (3).
33. *Ibid.* at rule 24.1.04.
34. *Ibid.* at rules 24.1.09(1), 24.1.05.
35. *Ibid.* at rule 24.1.09(2).
36. *Ibid.* at rule 24.1.13(2).
37. Rules of Court (Alta Reg 124/2010), rule 4.16(1).
38. *Ibid.* at rule 8.4(3).
39. *Ibid.* at rule 4.17. Further details of the judicial dispute resolution process are set out in rules 4.18-4.21.
40. *Ibid.* at rules 4.16(2), 8.5.
41. Court of Queen’s Bench of Alberta (2013a). This explanation is further supported by subsequent Notices to the Profession aimed at prioritising the use of limited judicial resources for Judicial Dispute Resolution. See for example Court of Queen’s Bench of Alberta (2013b); Court of Queen’s Bench of Alberta (2014a); Court of Queen’s Bench of Alberta (2014b).
42. *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576.
43. Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (213 UNTS 221). Article 6(1) holds that ‘in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an

independent and impartial tribunal established by law. Judgement shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice’.

44. *PGF II SA v OMFS Co 1* [2013] EWCA Civ 1288. For an example in which the court confirmed that it did not have the power to compel mediation, see *Aird & Anr v Prime Meridian Ltd* [2006] EWCA Civ 1866 at para. 6, holding that ‘[s]ince the court cannot order the parties to participate in mediation, neither can the court make orders stipulating the details of how the parties should conduct a mediation. The most the court can do is to encourage’.
45. CPR Rule 36 offers are formal settlement offers that can be made by either the claimant or defendant, which, if made in accordance with the rules, will attract cost consequences for the parties.
46. *PGF*, n. 36 at para. 56 (emphasis added).
47. *Cowl v Plymouth (City Council)* [2001] EWCA Civ 1935.
48. *Dunnett v Railtrack Ltd* [2002] EWCA Civ 3030.
49. *Ibid.* at para. 15.
50. *Wright v Michael Wright Supplies Ltd* [2013] EWCA Civ 234.
51. *Ibid.* at para. 1.
52. *Shirayama Shoukusan Co v Danovo* [2003] EWHC Ch 3306.
53. *Kinstreet Ltd v Balmargo Co* [2000] CP Rep Ch D 62.
54. *Cable & Wireless Plc v IBM United Kingdom Ltd* [2002] EWHC Comm 2059.
55. *C v RHL* [2005] EWHC Comm 873. See also the subsequent case of *Honda Giken Kogyo Kabushiki Kaisha (a firm) v Neesam* [2009] EWHC Pat CA 1213.
56. *RHL*, n. 47 at para. 8.
57. *Rolf v De Guerin* [2001] EWCA Civ 78.
58. *Ibid.* at para. 41.
59. See Neuberger (2015). See also The Children and Family Act 2014 (UK), s. 10, which makes it mandatory for ‘separating couples’ wishing to commence family proceedings to attend a MIAM. At this meeting the parties are provided with information regarding the mediation of family applications, ways in which such matters may be resolved other than through the courts, and to assess whether the particular matter is suitable for mediation.
60. *Alassini v Telecom Italia Spa* [2010] 3 CMLR 17.
61. See Dyson (2014). See also Lord Dyson MR’s previous speech on Halsey to the Chartered Institute of Arbitrators Third Mediation Symposium.
62. The ‘Canada’ portion of the paper focuses on judicial attitudes toward mandatory ADR in the context of standard, rather than small claims, cases. In the opinion of the authors the issues surrounding the merits or use of compulsory ADR in standard cases do not arise in the same degree in small claims matters, because the litigation processes for small claims actions in Canada are typically far less formal than in standard actions and provide for more judicial intervention in the case for a wide range of issues, including settlement.
63. *IBM Canada Ltd v Kossovian* [2011] ABQB 621 at para. 25.
64. Although a discussion of the attitudes of lawyers regarding compulsory ADR is beyond the scope of this paper, it has been suggested that lawyers in mandatory ADR jurisdictions have come to see the benefits of this system. See for example MacFarlane and Keet (2005: 688) for a discussion of the views of lawyers in Saskatchewan before and after the province’s implementation of mandatory ADR rules.
65. *Kossovian*, n. 55.

66. Ibid. at paras. 26-28.
67. See for example *Cassidy v Westwood Holdings* [2000] OJ No 5396; *Dumoulin v Ontario* [2004] OJ No 2778 at para. 6.
68. See for example the following cases, each of which identify one or more of the itemised benefits of ADR in civil disputes. *Kossovian*, n. 55 at para. 12; *Rampersaud v Baumgartner* [2012] ABQB 673 at para. 8; *Welldone Plumbing, Heating & Air Conditioning (1990) Ltd v Total Comfort Systems Inc* [2002] SKQB 475.
69. *Drodge v Martin* [2005] NLTD 73 at para. 27.
70. *Rampersaud*, n. 60 at para. 4.
71. *Kossovian*, above n. 55 at paras. 39-42.
72. *O (G) v H (CD)* (2000) 50 OR (3d) 82.
73. Ibid. at paras. 19-20.
74. *Pelham Properties Ltd v Hessdorfer* [2005] SKQB 234 at para. 8.
75. Ibid. at para. 31.
76. *Kossovian*, n. 55 at para. 13.
77. Ibid. citing *Chase v Great Lake Altus Motor Yacht Sales* [2010] ONSC 6365 at para. 15; *Welldone Plumbing*, n. 60 at para. 13.
78. See *Kossovian*, n. 58 at para. 30 for a summary of the law and citations to various other common law cases. For an example of a case in which the court considers, and rejects, the argument that the action before it is too complex to be mediated, see *Drodge*, above n. 61.
79. This possibility was raised by a Master of the Ontario Supreme Court in *Maldonado v Toronto (Metropolitan) Police Services Board* [2000] OJ No 5401, where the plaintiff, a homeless man, alleged that he had been assaulted by the police. Otherwise, this issue has not been specifically addressed by Canadian courts. It does, however, reflect a question that appears to be increasingly raised by legal commentators in Canada with regard to the use of ADR in the civil justice system. The question asks whether the resolution of civil claims outside of the courtroom is contrary to the interests of justice for the parties involved and for society at large because justice is not 'seen to be done' and because common law principles cannot develop in the absence of the judicial resolution of actions. See for example Farrow (2014).
80. See *Drodge*, n. 61 at para. 23.
81. *Ross v Seib* [1996] SJ No 375 at para. 8.
82. *Kossovian*, n. 55 at para. 17.
83. See Prince (2007) at 89 for further discussion on the flexibility of the timing for compulsory ADR.
84. See for example *Dhillon Group Investments Ltd v Peel Standard Condominium Corp No 919* [2013] ONSC 7833; *Muirhead v York Regional Police Service Board* [2015] ONSC 2142.
85. *Roscoe v Halifax (Regional Municipality)* [2013] NSSC 5 at para. 25.
86. *Michiels v Kinnear* [2011] ONSC 6024.
87. *PGF*, n. 39.
88. Translated as 'in order to encourage others'.
89. Of course, court resources can also be an issue in conducting ADR, as illustrated by Alberta's experience with judicial resources for the purposes of conducting JDR. Our intention, however, is not to advocate for any particular form of ADR, but rather to simply focus on the inclusion of mandatory ADR as part of the procedural framework for civil justice systems.
90. *RHL*, n. 50.
91. *Rolf*, n. 52 at para. 14.
92. *Northrop Grumman v BAE Systems* [2014] EWHC TCC 3148.
93. Ibid. at para. 59.

References

- Alberta Law Reform Institute (1990) *Dispute Resolution: A Director of Methods, Projects and Resources*. Research Paper No 19, Edmonton, Alberta.
- Alberta Law Reform Institute (2003) *Alberta Rules of Court Project: Promoting Early Resolution of Disputes by Settlement*. Consultation Memorandum No 12.6, Edmonton, Alberta.
- Blake S, Browne J and Sime S (2013) *The Jackson ADR Handbook*. Oxford: Oxford University Press.
- Briggs LJ (2013) *Chancery Modernisation Review: Final Report*. Available at: <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/CMR/cmr-final-report-dec2013.pdf> (accessed 3 April 2016).
- Briggs LJ (2015) *Civil Courts Structure Review: Interim Report*. Available at: <https://www.judiciary.gov.uk/wp-content/uploads/2016/01/ccsr-interim-report-dec-15-final1.pdf> (accessed 3 April 2016).
- Canadian Bar Association Task Force on Systems of Civil Justice (1996) *Systems of Civil Justice Task Force Report*. Report, Ottawa, Canada.
- Cantley Committee (1979) *Report of the Personal Injuries Litigation Procedure Working Party*. Command Paper 7476. London: Her Majesty's Stationery Office.
- Civil Justice Review (1981) *Report of the Review Body of the Chancery Division of the High Court*. Command Paper 8201, London: Her Majesty's Stationery Office.
- Clarke MR (2009) *Mediation: An Integral Part of our Litigation Culture*. Speech, Littleton Chambers Annual Mediation Meeting.
- Court of Queen's Bench of Alberta (2013a) *Notice to the Profession: Mandatory Dispute Resolution Requirements Before Entry for Trial*. Available at: <https://albertacourts.ca/docs/default-source/Court-of-Queen's-Bench/ntp-2013-01-mandatory-dispute-resolution-requirement.pdf> (accessed 3 April 2016).
- Court of Queen's Bench of Alberta (2013b) *Notice to the Profession: Priority of Assignment of Judicial Dispute Resolution Under Rule 4.16(1)*. Available at: <https://albertacourts.ca/docs/default-source/Court-of-Queen's-Bench/ntp-2013-03-priority-of-assignment-jdr.pdf?sfvrsn=2> (accessed 3 April 2016).
- Court of Queen's Bench of Alberta (2014a) *Notice to the Profession: New Booking Procedures in Calgary and Edmonton for JDRs*. Available at: <http://www.cba-alberta.org/ab.cba.org/media/CBA-Library/Notice%20to%20Profession/NTP-2014-05-JDR-Booking.pdf> (accessed 3 April 2016).
- Court of Queen's Bench of Alberta (2014b) *Notice to the Profession: Reduction in Judicial Dispute Resolution Bookings, Calgary and Edmonton*. Available at: <http://www.cba-alberta.org/ab.cba.org/media/CBA-Library/Notice%20to%20Profession/NTP-2014-06-JDR-Booking-Reductions.pdf> (accessed 3 April 2016).
- Dyson MR (2014) *Halsey 10 Years On: The Decision Revisited*. Remarks, Belfast Mediation Conference, May 2014.
- Farrow T (2014) *Civil Justice, Privatization and Democracy*. Toronto: University of Toronto Press.
- Glasser C (1994) Solving the Litigation Crisis. *The Litigator* 1: 14.
- Heilbron H and Hodge H (1993) *Civil Justice on Trial: The Case for Change*. Joint Report of the Bar Council and Law Society.
- Jackson LJ (2010) *Review of Civil Litigation Costs: Final Report*. London: The Stationery Office.
- Lightman G (2007) *Mediation: An Approximation to Justice*. Speech, SJ Berwin Mediation Summer Drinks Reception.
- MacFarlane J and Keet M (2005) Civil justice reform and mandatory civil mediation in Saskatchewan: Lessons from a maturing program. *Alberta Law Review* 42(3): 677.
- Neuberger L (2010a) *Equity, ADR, Arbitration and the Law: Different Dimensions of Justice*. Fourth Keating Lecture, Lincoln's Inn.

- Neuberger L (2010b) *Has Mediation had its Day?* The Gordon Slynn Memorial Lecture.
- Neuberger L (2015) *A View from on High*. Keynote address, Civil Mediation Conference. Available at: <https://www.supremecourt.uk/docs/speech-150512-civil-mediation-conference-2015.pdf> (accessed 4 April 2016).
- Prince S (2007) Mandatory mediation: The Ontario experience. *Civil Justice Quarterly*. 26: 79–95.
- Rix B (2014) The interface of mediation and litigation. *Arbitration*. 80(1): 21.89
- Rooke JD (2010) *The Multi-Door Courthouse is Open in Alberta: Judicial Dispute Resolution is Institutionalized in the Court of Queen's Bench*. LLM Thesis, University of Alberta, Canada. Available at: http://www.cfcj-fcjc.org/sites/default/files/docs/hosted/22471-multidoor_courthouse.pdf (accessed 4 April 2016).
- Sorabji J (2012) The road to New Street Station: Fact, fiction and the overriding objective. *European Business Law Review* 23(1): 75–89.
- Sorabji J (2014) *English civil justice after the Woolf and Jackson reforms: A critical analysis*. New York: Cambridge University Press.
- Thomas CJ (2014) *Reshaping Justice*. Speech. Available at: <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Speeches/lcj-speech-reshaping-justice.pdf> (accessed 4 July 2016).
- Winn Committee (1968) *Report of the Committee on Personal Injury Litigation*. Command Paper 369, London: Her Majesty's Stationery Office.
- Woolf HK (1995a) *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales*. Report, London.
- Woolf HK (1995b) *Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales*. Report, London.
- Zander M (1995) Why Woolf's reforms should be rejected. In: Zuckerman AAS and Cranston R (eds) *Reform of Civil Procedure: Essays on 'Access to Justice'*. New York: Oxford University Press.
- Zander M (2009) The Woolf reforms: What's the verdict? In: Dwyer D (ed) *The Civil Procedure Rules Ten Years On*. Oxford: Oxford University Press.