The Voice of the Legal Profession

Expanding Mandatory Mediation in Ontario

Submitted to: Attorney General of Ontario

Submitted by: Ontario Bar Association

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BAR ASSOCIATION
A Branch of the
Canadian Bar Association

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Table of Contents

Introduction 2

The Ontario Bar Association 2

Overview 2

Recommendation 4

Mediation 4

Mandatory Mediation 5

History of Mandatory Mediation in Ontario 6

Why Should Mandatory Mediation be Expanded? 9

General Benefits of Mediation 10

Documented Success of Mandatory Mediation 10

Support Amongst the Bar for Expansion of Mandatory Mediation 12

Mediation has Already been Required Province-Wide for some cases Pursuant to *Insurance Act* Provisions 14

OBA Recommendation 15

Additional Issues regarding OMMP 17

- Expansion of Mandatory Mediation to Other Types of civil actions 17
- Mediation prior to filing an action with the court 18
- Mediation Costs 18
- Issues with respect to the Mediation Roster 19

Conclusion 20

Introduction

The Ontario Bar Association ("**OBA**") appreciates the opportunity to provide this submission on mandatory mediation in Ontario.

The Ontario Bar Association

The OBA is the largest volunteer lawyer association in Ontario, with over 16,000 members who practice on the frontlines of the justice system, providing services to people and businesses in virtually every area of law in every part of the province. Each year, through the work of our 40 practice sections, the OBA provides dozens of submissions to government for the profession and the public interest and delivers over 325 in-person and on-line professional development programs to an audience of over 12,000 lawyers, judges, students and professors.

The OBA has long advocated for modernizing Ontario's Civil Justice System, and the experience during the suspension of regular court operations as a result of COVID-19 provides an opportunity to combine innovation and technology with an in-depth understanding of law and the justice system to create a sustainable future that works better for the courts, lawyers and the public we serve. At the same time, we understand the need to balance any reforms not only in their potential for streamlining litigation, but for their effectiveness in ensuring they facilitate the justice system's fundamental objective of yielding the fairest result in every case.

Overview

For approximately 20 years mediation has been required in most civil litigation proceedings in Toronto, Ottawa and Windsor through the Ontario Mandatory Mediation Program ("OMMP"). Mandatory mediation is not, however, available elsewhere in Ontario. An extensive study of mandatory mediation in Ontario showed that it resulted in:

- significant reductions in the time taken to dispose of cases;
- decreased costs to litigants;
- a high proportion of cases being completely settled earlier in the litigation process; and
- considerable satisfaction on the part of lawyers and litigants.

The COVID-19 pandemic and related Court backlogs strengthen the already robust case for expanding mandatory mediation. Mandatory mediation reduces the burden on Courts because earlier settlements lead to fewer motions, pre-trials and trials. Mandatory mediation increases access to justice because litigants can achieve resolution of cases more quickly and with fewer legal costs. Mandatory mediation comes at no cost to the government because the relatively modest cost of mediations is paid for by litigants.

Recommendation

The OBA recommends that the Provincial Government:

1. Immediately expand the Ontario Mandatory Mediation Program (**"OMMP"**), taking into account the following factors in relation to each region being considered for expansion:
   a) availability of mediators;
   b) existing problems with "forum shopping" whereby counsel are starting litigation in neighbouring regions and/or
   c) length of the litigation process.

2. Amend Rules 24.1.04(2) and 75.1.02(1)(a) of the Ontario Rules of Civil Procedure to expand OMMP to the following regions, which are among those that meet the above criteria: East, Central East, Central West and Southwest.[1]
3. Continue to monitor the effectiveness of OMMP in new and existing regions, with a view to determining whether and when further expansion of OMMP might become appropriate.[2]

Mediation

Mediation is a way for people to settle disputes or lawsuits outside of court. In mediation, a neutral third party - the mediator - helps the disputing parties look for a solution that works for them.

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[1] **East Region** courts are located in Pembroke, Napanee, Belleville, Picton, Kingston, Brockville, Perth and Ottawa. **Central East Region** courts are located in Bracebridge, Barrie, Newmarket, Lindsay, Durham, Peterborough and Coburg. **Central West Region** courts are located in Owen Sound, Walkerton, Orangeville, Guelph, Milton and Brampton. **Southwest Region** courts are located in Goderich, Stratford, Woodstock, London, St. Thomas, Sarnia, Chatham and Windsor. Please see the attached Schedule "A" showing a map of the regions and corresponding Courts.
[2] A more detailed recommendation is set out at page X.

Mediators do not decide cases or impose settlements. The mediator's role is to help the people involved in a dispute to communicate and negotiate with each other in a constructive manner, to gain a better understanding of the interests of all parties, and to find a resolution based on common understanding and mutual agreement.

The purpose of mediation is not to determine who wins and who loses, but to develop creative solutions to disputes in a way that is not possible at a trial.[3]

Mediation requires that parties take a hard look at the strengths and weaknesses of their own and their opponent's cases, and often leads to settlement or narrowing of the issues in dispute. Because mediation encourages settlement, if it takes place early in the life of litigation then it can result in earlier resolution of the dispute, fewer legal costs being spent and can divert cases from the Courts.

Mandatory Mediation

The OMMP is a program designed to help parties involved in civil litigation and estates matters settle their cases early in the litigation process to save time and money.

Under the OMMP, cases are referred to a mediation session early in the litigation process to give parties an opportunity to discuss the issues in dispute. With the help of a trained mediator, the parties explore settlement options and may be able to avoid the pre-trial and trial process.[4]

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[3] As described, in "Fact Sheet: Mandatory Mediation Under Rules 24.1 and 75.1 of the Rules of Civil Procedure", published by the Ontario Ministry of the Attorney General, available at: https://www.attorneygeneral.jus.gov.on.ca/english/courts/civil/fact_sheet_mandatory_mediation.html (accessed March 24, 2019).
[4] *Ibid.*

The OMMP applies in the Cities Toronto and Ottawa and the County of Essex ("**Windsor**") to certain civil actions under rule 24.1 of the *Rules of Civil Procedure* and to contested estates, trusts and substitute decision matters under rule 75.1 of the *Rules of Civil Procedure*.

History of Mandatory Mediation in Ontario

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

In 1994, the ADR Centre of the Ontario Court (General Division) was introduced to provide enhanced, more timely and cost-effective access to justice for defendants and plaintiffs, and to determine whether the conduct of civil cases would be improved with the presence of mediation.[5] In 1995 the ADR Centre was evaluated by a third-party expert[6] who concluded that compared with a control group the cases referred to the ADR Centre had reduced the median time period in which cases were resolved and accordingly reduced client costs.[7] Statistics revealed that 40% of the cases referred to mediation resulted in settlement in the very early stages of the case. Lawyers reported that costs were reduced even for cases that

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

[6] Matters were referred to the ADR Centre once the first statement of defence had been received, and were usually assigned a date for a mediation meeting within 2-3 months. Mediations were conducted by ADR Centre Staff. Dr. Julie Macfarlane, *Court-Based Mediation for Civil Cases: An Evaluation of the Ontario Court (General Division) ADR Centre* (Toronto: Queen's Printer for Ontario, November 1995) at 71-73 [hereinafter *Macfarlane Evaluation*] at p. 1, 3-4 available online at https://archive.org/details/mag_00007535/page/n43/mode/2up.

[7] *Ibid,* p. 17.

did not settle because parties were forced at an early stage to evaluate the merits of their case.[8] A second pilot project in 1997 also had positive outcomes.[9]

At the same time that the ADR Centre was experimenting with the use of mandatory mediation, two major reviews on civil justice were being carried out by the Province of Ontario[10] and the Canadian Bar Association ("CBA")[11]. Both reviews concluded that mandatory mediation would be beneficial, including to increase access to justice as well as improve the efficiency of the justice system.

In 1999, Ontario amended Rule 24.1 of the *Rules of Civil Procedure* to establish mandatory mediation for civil, non-family, case managed actions in Ottawa and Toronto. The mandatory mediation program was instituted initially for only a two-year period, subject to an

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[8] *2008 Report,* p. 3.

[9] Leslie H Macleod, Elana Fleischmann and Anne DeMelo, "*The Future of Alternative Dispute Resolution in Ontario: Mechanics of the Mandatory Mediation Program*", (1998) 20 Advocates' Quarterly 389, as cited in "The Impact of Mediation on the Culture of Disputing in Canada: Law Schools, Lawyers and Laws ", by Catherine Morris p. 101.

[10] "Ontario Civil Justice Review: Supplemental and Final Report", (November 1996), available online at: https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjr/ ("*Ontario Civil Justice Review*"). According to the *Ontario Civil Justice Review,* "The Civil Justice Review was established in 1994 at the joint initiative of the former Chief Justice of the Ontario Court of Justice and the former Attorney General for Ontario. The Review's mandate is "to develop an overall strategy for the civil justice system in an effort to provide a speedier, more streamlined and more efficient structure which will maximize the utilization of public resources allocated to civil justice". In 1994 a civil justice review was initiated by the Chief Justice of the Ontario Court of Justice and the Attorney General for Ontario. The review's mandate was "to develop an overall strategy for the civil justice system in an effort to provide a speedier, more streamlined and more efficient structure which will maximize the utilization of public resources allocated to civil justice". The review culminated in a November 1996 Report (the *"Ontario Civil Justice Report*") which recommended that mandatory mediation be introduced to all civil litigation matters except family matters, at recommendation 5.2.

[11] "Systems of Civil Justice Task Force Report", (The Canadian Bar Association, August 1996). The CBA had formed a task force to inquire into the state of Canadian civil justice and to recommend ways to modernize the civil justice system. The CBA task force consulted individuals and organizations across Canada and released a report (the "*CBA Civil Justice Report"*) identifying cost and delay as significant barriers to access to justice. The report noted that while a high percentage of civil cases settle, the settlements take place too late in the litigation process to save time and money for the litigants or the Court system. The report included a recommendation that parties to litigation be required to participate in non-binding dispute resolution process or explain why the case did not warrant participation, at p. 33.

assessment of the cost, speed, outcome and satisfaction with the program.[12] The key features of Rule 24.1 were:

- Mediation had to take place within 90 days after the first defence was filed, unless the parties obtained a court order abridging or extending the time. In some cases, parties could consent to a postponement of up to 60 days;
- Parties could opt out of mediation only by obtaining a court order; and
- If the parties did not select a mediator within 30 days after the first defence, the Court would appoint one. [13]

In 2001 a major study assessed Ontario's experience with mandatory mediation, culminating in a report titled, "Evaluation of the Ontario Mandatory Mediation Program (Rule 24.1): Final Report -- The First 23 Months"[14] (the "Hann Report"). The Hann Report reviewed data from 23,000 cases, 3000 mediations held under Rule 24.1, and responses to specially designed questionnaires completed by 600 litigants, 1,130 lawyers and 1,243 mediators. The Hann Report concluded that mandatory mediation resulted in:

- significant reductions in the time taken to dispose of cases;
- decreased costs to the litigants;
- a high proportion of cases (roughly 40% overall) being completely settled earlier in the litigation process, with other benefits being noted in many of the other cases that do not completely settle; and
- in general, litigants and lawyers expressed considerable satisfaction with the pilot mediation process.[15]

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[12] Macleod, Fleischmann and DeMelo (n138) 399, as cited in Catherine Morris, *supra* note 9.
[13] *2008 Report,* p. 8.
[14] Available online at: http://www.ontla.on.ca/library/repository/mon/1000/10294958.pdf
[15] *Hann Report,* p. 2.

The Hann report recommended that mandatory mediation be extended to other types of civil cases in Ontario and expanded across the Province of Ontario.[16] As a result of these positive findings, the mandatory mediation program was made permanent and was extended to in 2002 to Windsor, but was not expanded further throughout the province.

Since 2001, several changes were made to mandatory mediation, including to:

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

Mandatory mediation, however, was not expanded beyond Ottawa, Toronto and Windsor.

Why Should Mandatory Mediation be Expanded?

The OMMP should be expanded given: a) the benefits of mediation generally, b) the documented success of mandatory mediation, and c) the support by Ontario lawyers for expansion of mandatory mediation, particularly those who have experienced it. There is no reason why more litigants and Courts in Ontario should not have access to the many benefits of mandatory mediation.

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

General Benefits of Mediation

Mediation, whether mandatory or not, gives rise to a number of benefits. Making mediation mandatory ensures that all parties have access to these advantages, which are currently listed on the Ministry of the Attorney General website as follows:

- Mediation often leads to resolutions that are tailored to the needs of all parties. Generally, the best solution to a problem is one worked out by the parties themselves.
- Many people find mediation more satisfying than a trial because they play an active role in resolving their dispute, rather than having a solution determined by a judge.
- The mediation process is informal and completely confidential. Parties in mediation may speak more openly than in court. Many people find mediation a more comfortable and constructive process than a trial.
- In situations where the parties have an ongoing relationship, mediation is particularly helpful because it promotes cooperative problem-solving and improved communications.[17]

Mediations require the parties to take a hard look at the strengths and weaknesses of their opponent's and their own cases, and the costs of proceeding to trial. Even where cases do not settle, mediations can lead the parties to narrow and streamline the issues in dispute leading to more efficient trials.

Documented Success of Mandatory Mediation

Studies of mandatory mediation in Ontario have shown, as set out above, that it results in:

- significant reductions in the time taken to dispose of cases;
- decreased costs to litigants;

[17] "Public Information Notice: Mandatory Mediation Program", available online at: https://www.attorneygeneral.jus.gov.on.ca/english/courts/manmed/notice.php (accessed March 25, 2020).

- high proportion of cases being completely settled earlier in the litigation process, with other benefits being noted in many of the other cases that do not completely settle; and
- in general, litigants and lawyers expressed considerable satisfaction with the pilot mandatory mediation process.[18]

Mandatory mediation allows all litigants access to mediation, regardless of the style of their counsel. It allows parties to together drill down on the key issues and the merits of cases to obtain a shared understanding of the case and opportunity to resolve it.

Mandatory mediation increases access to justice because litigants are able to resolve cases earlier and with fewer legal costs.

Because mandatory mediation results in earlier settlements, the number of motions, pre-trials and trials are reduced. This saves Court time and helps to reduce Court backlogs, which ultimately reduces government spending on the justice system.

At the same time, mandatory mediation does not deprive litigants of their rights to a trial. Because settlement is voluntary, matters can still proceed to trial if the parties determine that settlement is not appropriate.

[18] *Hann Report,* p. 2, *MacFarlane Evaluation,* p. 17, *2008 Report,* p. 3, Leslie H Macleod, Elana Fleischmann and Anne DeMelo, "*The Future of Alternative Dispute Resolution in Ontario: Mechanics of the Mandatory Mediation Program*", (1998) 20 Advocates' Quarterly 389, as cited in "The Impact of Mediation on the Culture of Disputing in Canada: Law Schools, Lawyers and Laws", by Catherine Morris p. 101.

Support Amongst the Bar for Expansion of Mandatory Mediation

Finally, mandatory mediation should be expanded because this step appears to be supported by the majority of Ontario litigation lawyers who are well-placed to understand the impact of mandatory mediation on account of their professional experience.

OBA member surveys of June/July[19] and December 2019[20] showed that approximately 90% and 70% of respondents respectively are in favour of expanding mandatory mediation, although it should be noted that the response rate to the December survey was not high enough to be considered statistically significant.

The OBA surveys also showed:

- Mandatory mediation is particularly popular with lawyers who practice in regions where mandatory mediation currently exists. This is consistent with the Hann Report which found that once lawyers had dealt with mandatory mediation they expressed considerable satisfaction with the program;

- A number of lawyers reported that they frequently started proceedings in cities where mandatory mediation is available, instead of the cities in which the parties and counsel reside and carry on business. This "forum shopping" is problematic because it overburdens courts in mandatory mediation jurisdictions, and causes counsel outside those jurisdictions into them, thereby incurring additional travel and accommodation expenses which will be passed on to their clients. "Forum shopping" into mandatory mediation regions also demonstrates lawyers' enthusiasm for the benefits of mandatory mediation.

- Comments from survey respondents in favour of expanding mediation included the following:
  - "We almost always commence actions in Toronto, even though our firm is located in [X], in order to gain access to mandatory mediation. Even when working with a difficult client or counsel on the other side, the parties are required to come to the table and consider whether resolution is possible. Often, with a good mediator, a resolution can be achieved."

[19] A survey sent to 1297 OBA members in June and July 2019 received 110 responses, with 90% indicating that they support expansion of mandatory mediation throughout Ontario.
[20] A more detailed survey sent to 4400 OBA members in December 2019 received 104 responses, 71 percent of whom were in support of expanding mandatory mediation.

  - "I regularly commence proceedings in Toronto rather than another region to take advantage of mandatory mediation …. Key benefit of mandatory mediation is overcoming knee-jerk resistance to mediation where the process is actually likely to result in a settlement. … Privacy is valued, cost is a major issue, and disputes often are driven by emotional rather than rational factors than can be better addressed in a settlement process than a litigation process."

  - "I believe the entire province should be included [in expansion of mandatory mediation]…. My experience is that for commercial litigation, mediation is highly beneficial to achieving a timely settlement, particularly well before trial. The mandatory nature of such a mediation means that agreement to mediate is taken out of the hands of counsel and the parties. Being obligated to attend a mediation, settlement discussions can commence at an earlier stage than on the eve of (or during) trial…. in my view, all types of cases benefit [from mandatory mediation]…"

- Comments from the survey respondents opposed to expanding mandatory mediation included the following:
  - mediation only works if it is voluntary;
  - mandatory mediation rarely results in settlement and leads to higher costs and delays;
  - if parties want to mediate they will do so without being required;
  - there are no existing mediators in a particular region.

Additionally, implementing mandatory mediation is consistent with the findings and recommendation set out in the February 19, 2020 Canadian Bar Association Resolution on Alternative Dispute Resolution (the "Resolution"):

  - Access to justice is an urgent public need;
  - There is a need for a cost-effective alternative to the formal justice system;
  - The prevalence of self-represented litigants and insufficient judicial resources increases time to bring matters to trial and litigation costs, impeding access to justice;
  - The Resolution recommends that governments to direct parties to appropriate dispute resolution alternatives.

Mediation has Already been Required Province-Wide for some cases Pursuant to *Insurance Act* Provisions

It bears noting that for several decades the *Insurance Act* (R.S.O. 1990, c. I.8) has established a Province-wide mandatory mediation process for all matters arising from motor vehicle accidents. Section 258.6 of the *Insurance Act* provides:

> (1) A person making a claim for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile and an insurer that is defending an action in respect of the claim on behalf of an insured or that receives a notice under clause 258.3 (1) (b) in respect of the claim **<u>shall</u>**, on the request of either of them, participate in a mediation of the claim in accordance with the procedures prescribed by the regulations.
>
> (2) In an action in respect of the claim, a person's **<u>failure to comply</u>** with this section shall be considered by the court in awarding costs. [emphasis added]

This provision is not limited to tort claims; it also applies to claims for accident benefits. It allows either the claimant or an insurer defending an action to request a mediation of the claim, and the *Insurance Act* directs that the parties "**<u>shall</u>**" participate in mediation. The consequences for a refusal to participate is addressed by subsection 258.6 (2), which provides that a failure to comply shall be considered in an award of costs; and, indeed, courts have shown a willingness to award significant costs where a party has refused to participate in mediation. See, for instance, *Keam v. Caddey*, 2010 ONCA 565.

Consequently, a version of mandatory mediation is already present in much of the Province for certain types of claims.

OBA Recommendation

The OBA recommends that:

1. The Provincial Government expand OMMP, taking into account the following factors in relation to each region being considered for expansion:
   (a) Availability of mediators;
   (b) Existing problems with "forum shopping";
   (c) Length of litigation process.

2. Rules 24.1.04(2) and 75.1.02(1)(a) be immediately amended to expand OMMP to the following regions, which are among those that meet the above criteria: East Region (courts located in Pembroke, Napanee, Belleville, Picton, Kingston, Brockville, Perth and Ottawa; Central East Region (courts located in Bracebridge, Barrie, Newmarket, Lindsay, Durham, Peterborough and Coburg); Central West Region (courts located in Owen Sound, Walkerton, Orangeville, Guelph, Milton and Brampton); and Southwest Region (courts located in Goderich, Stratford, Woodstock, London, St. Thomas, Sarnia, Chatham and Windsor). [21]

3. The Ministry of the Attorney General should continue to monitor the effectiveness of OMMP in new and existing regions, with a view to determining whether and when an expansion of OMMP to the rest of the province might become appropriate. Existing mediators should be encouraged to file their mediator reports pursuant to Rule 24.1.15 regardless of whether the mediation results in settlement to allow accurate settlement statistics to be collected.[22]

[21] Please see the attached Schedule "A" showing a map of the regions and corresponding Courts.
[22] It has come to the OBA Joint Committee's attention that in practice many Ontario mediators only file the mediator report in cases that do not settle, leading to inaccurately low mediation settlement statistics held by the Ministry of the Attorney General.

Mediators will be available if OMMP is expanded to the the East, Central East, Central West and Southwest regions. These regions are all located within 200 kilometres of Toronto, Windsor or Ottawa and mediators in existing OMMP regions can service these areas while local mediator capacity builds.

Forum shopping will be decreased by expanding OMMP to the East, Central East, Central West and Southwest regions. The OBA surveys indicated that lawyers in some of these regions are commencing actions in existing OMMP regions to obtain the benefit of mandatory mediation, when they are more properly brought in other courts. Forum shopping overburdens courts in Toronto, Ottawa and Windsor and expanding OMMP to nearby regions should result in more evenly distributed court use.

The **length of litigation processes should be decreased** if mandatory mediation is expanded to the East, Central East, Central West and Southwest regions. A number of courts in these regions experience backlogs and consequent lengthy litigation processes. Mandatory mediation results in earlier settlements and thus can help divert cases away from trials, motions and pre-trials, lessening the burden on court.

By contrast, members of the Bar in the regions of Northeast and Northwest have indicated a lack of local mediators in their regions which has led to mediators being flown in for *Insurance Act* and other mediations. Further, there are not the same forum shopping issues that are prevalent in areas that directly neighbour those which currently are subject to OMMP.

Members of the Bar in the Central South Region have indicated that they have not encountered forum shopping issues and that the litigation process works efficiently in their region. Because of the relative size and comraderie of the Bar in this region, mediation often

takes place formally or informally which they feel negates the need for an additional procedural step.

Delaying roll-out to these regions, will allow development of increased capacity in those areas. Additionally, greater consideration should be given to allowing (either as an interim or permanent measure) online dispute resolution, such that existing OMMP region mediators could assist virtually while local mediator capacity builds. Many mediators currently conduct online mediations using inexpensive platforms such as Zoom or Webex, which are free for parties to access. These videoconferencing applications offer parties all the same process and substantive benefits of in-person mediation, with available virtual break-out rooms for private caucusing, and an ability to see and observe the demeanour and body language of all in attendance.

Additional Issues regarding OMMP

The bulk of this report deals with the OBA's position that OMMP should be expanded to other regions of Ontario. A number of additional issues concerning mandatory mediation have been raised by the Ministry of the Attorney General that are ancillary to this question. Below we have provided the OBA's general feedback on the issues raised in those questions.

Expansion of Mandatory Mediation to Other Types of civil actions

While members of the OBA have long advocated for the geographical expansion of OMMP in Ontario, we are not aware of OBA member requests to expand OMMP to other types of actions. We note that some proceedings not currently subject to OMMP have alternate schemes that may negate the need for, or efficacy of, an OMMP regime. For example, proceedings under the *Insurance Act* are already subject to a form of mandatory mediation and proceedings under the *Construction Act* are subject to an early adjudication process.

Mediation prior to filing an action with the court

If there is a likelihood of success and/or an interest by the parties or counsel in having mediation prior to court filing, this should be encouraged. A number of concerns have been raised, however, with respect to requiring mediation before an action is filed with the court including:

- There is no required document or information exchange prior to litigation so parties may not have full information on which to make settlement decisions affecting their rights;
- Given the absence of full information exchange, lawyers are likely to counsel clients not to settle at pre-litigation mediations, causing those mediations to be less effective than mediation in the context of litigation, and thus potentially a waste of time and money; and
- It is unclear how delays resulting from pre-litigation mediation would impact limitation periods.

Mediation Costs

The OBA does not consider the cost of mediation itself to be unaffordable. Indeed, the Hann report found after significant research that mandatory mediation saves litigants a significant amount of money overall in litigated disputes.[23] The maximum fee for a roster mediator in a two-party mediation is $600 plus HST. In the context of disputes involving claims of at least $35,000, and usually far more, $600 is not an impediment. In fact, many mediators are hired at rates much higher than this.

[23] *Hann Report* at pp. 9-10 and ch. 4

Further, parties who possess a valid legal aid certificate are not required to pay mediation fees, and those who may suffer financial hardship as a result of the mediation fees may apply for a pro bono mediation under the OMMP Access Plan.[24]

Rule 24.1 should continue to require equal allocation of mediator fees between the parties. Parties can, and often do, agree to different fee allocation as part of a settlement.

Issues with respect to the Mediation Roster

In areas where OMMP exists, there have been no detailed shortages of available mediators. As set out in this report the two northern Ontario regions, which are not currently subject to OMMP, have expressed concerns about availability of mediators. The use of virtual mediations may alleviate this shortage while local mediation practices develop in those regions.

Anecdotally, members have heard that there may be diversity issues regarding mediator selection, both in terms of diversity of mediators and conscious and unconscious bias during mediator selection. In the United Kingdom, a study was done on this exact issue[25] which made several recommendations; however we are not aware of any similar study in Ontario. As OMMP is expanded, the Ontario Government may wish to consider a similar review. The OBA would welcome the opportunity to be involved in such a review.

Mediators should be encouraged to file reports for settled and unsettled cases so that more robust data is available which can be used to assess mandatory mediation and its efficacy.

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[24] *Administration of Justice Act*, O Reg. 451/98, s.7
[25] Available online at https://mk0cedrxdkly80r1e6.kinstacdn.com/app/uploads/2019/10/Executive-Summary-Report.pdf

Finally, while the Government contemplates reform of the mediation roster, it is important that parties retain the flexibility to determine the best mediator for their dispute and are able to select either a roster or non-roster mediator.

Conclusion

Once again, the OBA appreciates the opportunity to provide this submission on the expansion of mandatory mediation in Ontario. The OBA would be pleased to meet with you and your staff to discuss these issues further, as we work towards the shared goal of improving access to justice and modernization of the judicial process in Ontario.