September 16, 2020

VIA EMAIL: attorneygeneral@ontario.ca

The Honourable Doug Downey, M.P.P.
Attorney General of Ontario
Ministry of the Attorney General
McMurtry-Scott Building
720 Bay Street, 11th floor
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Dear Attorney General:

RE: Mandatory Mediation Program and Single-Judge Proceedings

The Advocates' Society (the "Society"), established in 1963, is a not-for-profit association of more than 6,000 members throughout Canada, including approximately 5,000 in Ontario. The Society's mandate includes, among other things, making submissions to governments and others on matters that affect access to justice, the administration of justice, and the practice of law by advocates.

The Society has received your letter dated August 24, 2020, inviting the Society to provide input on potential legislative changes to the mandatory mediation program and the single-judge model in the Superior Court of Justice. The Society is grateful for the opportunity to consult with the government about these initiatives, aimed at increasing access to justice and facilitating the efficient resolution of Ontarians' legal disputes.

The Society struck a Task Force composed of advocates with extensive experience with mandatory mediation, as well as advocates who have participated in the one-judge pilot program or other similar regimes, to discuss the government's questions. While the Society's Task Force represented various constituencies within the Society, including young advocates, mid-career advocates, and senior counsel, the Society was not able to consult its membership at large or full Board of Directors on these questions owing to the time constraints associated with this consultation. With these caveats in mind, the Society's feedback is outlined below for your consideration.

I. Mandatory Mediation Program

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

The pilot program has been in effect in Toronto, Ottawa, and Windsor for nearly 20 years, influencing the attitudes of multiple generations of legal professionals and litigants about mediation and making them more favourably disposed to participating in the process. The Society's members are of the view that mediation is a useful tool to resolve legal disputes. However, the Society's members hold differing views

on the value of *mandatory* mediation, which may reflect regional differences and variations among practice areas.

In the view of the many members of the Society who support mandatory mediation, a major benefit of the mandatory mediation regime is that it gives all parties equal access to a process that respects party autonomy over the resolution of their own disputes, whether their particular lawyers are pro-mediation or prefer taking their cases to trial. Furthermore, making mediation a required step in litigation eliminates the posturing that can occur where parties or their lawyers may be reluctant to propose mediation, for fear of giving the impression that their case is weak on the merits. Similarly, mandatory mediation makes it easier for counsel to get buy-in from their clients who may be less familiar with the process, and may be reticent to participate in an optional mediation for fear of losing out on their 'day in court' or sending a message of weakness to their adversaries.

In multi-party cases, mandatory mediation is especially useful where a disinterested party could otherwise resist mediation and hinder the rest of the parties' desire to mediate. While the other parties could engage in a mediation process with a view to effecting a partial settlement among them, absent a rule requiring all parties to mediate, they would be denied the benefit of a process that could result in a full and final settlement of all the elements of a multi-party action.

Further, making mediation a mandatory step in litigation across the province will eliminate the strategic forum-shopping that some of the members of the Society's Task Force have reported experiencing, with parties commencing or moving cases either into or out of a pilot city in order to avoid or compel mediation. This places an unnecessary burden on courts who are using judicial resources to hear cases (or venue change motions) that are not otherwise connected to their counties.

However, other members of the Society are of the view that mediation will only be effective when both parties are interested in participating in mediation and are ready for mediation; in those cases, parties will engage in mediation with a mediator of their choice when the time is right. In cases where there is no realistic prospect for settlement or the parties require further information about each other's cases before engaging in settlement discussions, mandatory mediation within the timeline in the *Rules of Civil Procedure* can become an administrative hurdle that adds unnecessary delay and expense for the parties. In certain cases, this has led to parties conducting abbreviated mandatory mediations with roster mediators over the telephone in order to set the action down for trial.

As such, the Society is overall in favour of expanding mandatory mediation throughout Ontario, but with certain important caveats with regards to (i) timing, and (ii) the creation of an "off ramp" from the mandatory mediation regime, on the consent of all parties.

(i) Timing. The optimal timing for mediation depends on the nature of the dispute, the availability of key documents and information, and the dynamics in play between the parties. Employment disputes, for example, are often successfully mediated on a thin record early in the process; conversely, in personal injury cases, mediation is generally more beneficial after expert reports have been delivered, discoveries have been completed, and damages have crystallized. As a result, counsel and parties should have flexibility in deciding the most appropriate time to mediate their cases.

Currently, Rule 24.1.09(1) requires the parties to mediate within 180 days after the first defence has been filed, unless the court orders otherwise. In the experience of the Society's members, there is widespread benevolent non-compliance with this deadline; instead, in practice, the parties work together to agree on

an appropriate timeframe for mediating their dispute based on the exigencies of their particular case. The Society suggests that consideration be given to amending the rule by simply requiring that cases subject to mandatory mediation must mediate and file a mediator's report within a reasonable time period before trial. If the mediation has not occurred by the time of the pre-trial conference, the pre-trial conference judge could set the date by which mediation is to occur.

(ii) Consent Off Ramp. Parties to litigation should be able to forego mandatory mediation if all the parties to the proceeding consent. In this model, the default position is that mediation is mandatory before trial, and one party can require mediation of the dispute by withholding their consent. However, if all parties agree that mediation will not be beneficial to resolving their dispute, they can avoid the time and cost associated with a mandatory mediation.

If these caveats are incorporated, the Society believes it is desirable for mandatory mediation to apply as broadly as possible to civil actions, taking into account special circumstances where they exist. For instance, if a mediation is required in a certain class of cases by another statute or rule, those cases can be exempt from Rule 24.1, as the purpose of the Rule will be achieved by the requirement that parties attend a mediation under another statute or rule. Parties should not be required to attend multiple mediations.

The Society believes that cases to which Rule 75.1 (Mandatory Mediation – Estates, Trusts and Substitute Decisions) applies can continue to be exempt from Rule 24.1, as long as the application of Rule 75.1 is also expanded beyond the pilot cities, mirroring the geographic expansion of Rule 24.1, so estates matters across Ontario can benefit from early resolution.

The Society notes that the term "mandatory" mediation may have unintended negative connotations – particularly for those unfamiliar with the regime and inexperienced litigants – suggesting that parties are forced to negotiate or even settle in mediation. To remove the stigma associated with these connotations, the Society suggests that consideration be given to removing the word "mandatory" from the Rule, and simply referring to "mediation" as a required step in the litigation, just like examinations for discovery or pre-trial conferences, which are also mandatory but not labelled as such. In the alternative, Rule 24.1 could stipulate "automatic referral to mediation" instead of "mandatory mediation".

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

The experience of many members of the Society who practise in the pilot cities is that mandatory mediation is facilitating early resolution of their cases, thereby saving parties significant litigation costs, and freeing up judicial resources for those cases that are settlement-resistant.

Even in cases where mandatory mediation does not result in settlement, ancillary benefits can include:

- parties and counsel are provided with an opportunity to better understand the perspectives and priorities of other parties, assess credibility, and appreciate advocacy styles;
- counsel are encouraged to engage in earlier and more thorough litigation risk assessments and cost/benefit analyses;
- counsel are better able to manage client expectations heading into the pre-trial and trial;
- parties often benefit from the objective views of a mediator in identifying factual or legal weaknesses. Litigants may then take steps to bolster the record, retain experts, or address weak points in their cases prior to trial; and

- the parties can often agree to narrow the issues that must be decided by the court, and settle part of a case, or decide to bifurcate, or otherwise streamline the rest of the litigation process.

Members of the Society's Task Force from outside the pilot cities report a tendency to mediate, if at all, later in the process – often at a pre-trial conference or on the courthouse steps – which results in less significant cost and resource savings.

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

The Society is not in favour of requiring mediation to take place before an action is commenced. Pre-filing mediations are often not appropriate as the parties have not yet framed their cases or marshalled the evidence to support their claims or defences. In the absence of proper investigation and analysis, most disputes are not yet 'ripe' for settlement, and efforts taken to settle at this very early stage are rarely successful. In addition, a party is statutorily required to preserve its legal rights by commencing a proceeding before the expiry of the relevant limitation period. It is important that a party's ability to preserve its legal rights within the relevant limitation period not be impeded by a requirement to mediate before it can file an action with the court.

Questions 4-7, and 9: The Roster System[1]

The members of the Society's Task Force had limited experience with the roster mediation regime. However, in their experience, roster mediators are perceived to be less effective than more costly non-roster mediators; and the perception is that roster mediators that are particularly effective quickly move off the roster. It was noted that the roster rates are very low, and mediator retention and quality might increase if the rates are evaluated periodically to ensure they are reasonable for the time commitment required. Further, there is a reported inconsistency in the training and experience of roster mediators.

However, the Society remains supportive of the roster mediation system and appreciates that it can help improve access to justice by enabling affordable mediation. In addition to facilitating early resolution of matters resulting in potentially significant cost and time savings, ancillary benefits of mediation are set out in response to Question 2 above.

The Society expects that many improvements to the roster system can now be made in light of the recent surge in virtual mediations due to the COVID-19 pandemic. In our experience, virtual mediations have been extremely effective and accessible. The widespread acceptability of virtual mediation can help drive the following improvements to the roster system:

- ***Centralization of Coordination:*** A more centralized approach to coordinating roster mediations, especially virtual ones, could streamline mediation scheduling. Existing challenges with roster mediator availability could be reduced.

[1] 4. How often have you/your organization's members used the mediation roster used in your region? ; 5. Where you/your organization's members have used the roster, has the mediator been selected on consent of the parties or appointed by the mediation coordinator? ; 6. Are mediation rosters adequately supporting mandatory mediation requirements under the Rules (e.g. mediator availability, mediator expertise)? Why or why not? ; 7. What are the challenges/issues facing the current mediation roster process and how could this process be improved? ; 9. What are other improvements that can be made to the mandatory mediation program to make it faster, easier, and more affordable for litigants?

- ***Reduced Regional Bias:*** The availability of virtual mediations could improve access to roster mediators across the province. This could reduce the perception of a regional bias in cases where there are a limited number of local roster mediators.

- ***Affordability of Mediation:*** Roster mediation is already very reasonably priced when compared with the other costs associated with litigation (e.g. discoveries). A move toward virtual mediation would decrease mediation costs by drastically reducing or eliminating travel, venue, and food costs.

- ***Qualifications and Specialization of Roster Mediators:*** Members of the Society's Task Force noted that roster mediators are perceived to be less experienced and specialized than non-roster mediators. Although the Society does not wish to bog down the roster mediation process by introducing formal qualification or specialization criteria, it would be helpful if information about the qualifications and experience of roster mediators were more readily available.

In light of the benefits identified above, the Society recommends amending the *Rules of Civil Procedure* to permit virtual mediations, unless all parties agree it would be more beneficial to mediate in person.

The government may further wish to consider implementing a simple mechanism for litigants to provide feedback, both positive and negative, on the roster mediation process. This information could be of assistance in continuing to improve the roster mediation system after it is expanded across the province.

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

The Society supports the existing regime for sharing the cost of mandatory mediation. In reality, parties often negotiate alternate ways to allocate mediation fees in order to alleviate the financial strain on an impecunious or financially disadvantaged party. As noted above, the accessibility of virtual mediation could drastically reduce the cost of mediation.

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

The members of the Society's Task Force were not aware of or did not have experience with the Access Plan. To the extent that resources are available to litigants struggling with the cost of mediation, the Society recommends further communicating and promoting those resources to make mediation more accessible.

II. Single-Judge Proceedings

The Society supports legislative reforms which would accomplish the objectives set out in the government's letter. Based on the experiences of the members of the Society's Task Force with the single-judge case management model in different jurisdictions in Canada and the United States, the single-judge model may promote those objectives. We understand that the single-judge model has worked reasonably well in our Federal Court. Success is dependent on the availability of judicial resources across the province to handle the substantial additional judicial responsibilities associated with a single-judge model.

The Society is concerned, however, that there has been insufficient experience in Ontario with the single-judge model to apply it to all civil proceedings in Ontario. The Society notes that the current pilot project is limited to cases where both parties consent to participating in the single-judge case management model, and are selected by the Regional Senior Justice to participate in the single-judge model. The Society's members have had limited first-hand experience with the pilot project. The Society notes that the current pilot project was also launched less than two years ago, in February 2019. As such, many matters included in the pilot program are still ongoing, making it difficult to assess and provide feedback on the strengths and weaknesses of the program. To the Society's knowledge, there has been no study or reporting on the experience of counsel or litigants involved in the pilot project.

As such, before the contemplated legislative reforms are instituted in Ontario, the Society recommends that the current pilot project be expanded in a number of specifically selected regions. The Society suggests that the regions selected for the expanded pilot project represent a diversity of caseloads and available judicial resources. This will permit an assessment of how effective the program will be in regions with varying resources and demands. In deciding how and where to expand the pilot, and in assessing its impact, the sufficiency of judicial resources must be carefully considered. Based on the experiences in the expanded pilot project, the government may then consider expanding the single-judge model across Ontario.

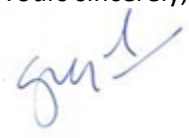
In the expanded pilot project, the Society also recommends that participation be mandatory for all civil proceedings in the selected region, or in the alternative, that a number of civil proceedings be randomly selected for mandatory inclusion in the program. This will permit a meaningful assessment of how the program will work in practice.

One of the concerns expressed by members of the Society who have experience with the single-judge model is whether the case management judge should also be the judge who determines the merits of a case, either on a motion or at trial. Parties are entitled to a judge with an open mind, and certain interlocutory motions require the judge to make substantive decisions about credibility or merits. In any expanded pilot project, the Society recommends that consideration be given to the mechanism for addressing this issue within the structure of the single-judge model. In particular, we recommend that clear guidelines be established for the case management judge to consider in deciding whether they should act as the trial judge or the judge on any motion where the merits of the case are to be considered or the parties' credibility might be in issue, such as a summary judgment motion, such that the onus is not placed on counsel to raise this issue with their case management judge or to bring a recusal motion. The experiences of counsel and litigants who have participated in matters which have been completed under the single-judge model will be critical to assessing how to best address that issue.

In implementing the single-judge model, either in the pilot phase or subsequently, regard should be had for maintaining the crucial principle of the administrative independence of the judiciary.

Thank you for providing the Society with the opportunity to make these submissions. I would be pleased to discuss our submissions with you at your convenience.

Yours sincerely,



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