DCLC
Durham Community Legal Clinic

SUBMISSION TO THE ATTORNEY GENERAL (ONTARIO) ON MANDATORY MEDIATION IN ONTARIO

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About the Durham Community Legal Clinic

The Durham Community Legal Clinic ("DCLC") was founded in 1985. The vast majority of DCLC's funding comes from Legal Aid Ontario ("LAO"). In addition to providing direct legal services relating to housing law, social benefits, employment law, WSIB, and human rights, DCLC is also actively involved in public legal education, advocacy and law reform initiatives.

Beyond the services above funded by Legal Aid Ontario (LAO), DCLC has been involved in the development of innovative models to expand services. One example of this has been the Durham Access to Justice Hub®, launched in 2019. The Hub is located in the clinic and involves a partnership with The Regional Municipality of Durham, Durham College, John Howard Society of Durham, Durham Mental Health Services, Community Development Council Durham (CDCD), DRIVEN Durham (a Hub for domestic violence and sexual abuse that includes Bethesda House, Catholic Family Services of Durham, the Domestic Violence Sexual Assault Care Centre, Durham Rape Crisis Centre, Region of Durham Family Services, Herizon House, Luke's Place, The Denise House, and YMCA Durham), Brain Injury Association of Durham (BIAD), Durham Region Unemployed Help Centre, Canadian Mental Health Association Durham, Durham Welcome Centre Immigrant Services, and others.

The goal of this Hub is to improve inter-agency collaboration, reduce administrative barriers and silos, and develop a better client-centered focus and avoid costly and inefficient litigation. In doing so, the clinic promotes efficiency and ensures responsiveness to client needs

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and changing environmental factors. Our experiences illustrate that many of the issues that result in delays, complexities, and unnecessary expense in the legal industry relate more to social, emotional or financial factors, more than they do with any particular legal issue themselves. Adopting this holistic approach to client-centered legal services typically allows for earlier resolution of matters, because we can assist our clients in finding the necessary resources that they need in the community in order to focus on the actual legal issues. It also allows us to better identify the inabilities of others working in the justice system, especially on the other side of some of our files, to properly recognize these same social, emotional or financial issues as the actual barrier to settlement. In this way, and through public submissions like this, we can better help the legal profession and the justice system understand how to address contentious legal cases in a more effective manner.

The Hub focus is essential to DCLC's strategy to proactively adopt measures consistent with the changes under Bill 161[1] to amend the *Legal Aid Services Act*,[2] specifically to promote access to justice[3], provide cost-effective and high-quality legal services to low-income individuals[4], and implement innovative provision of legal services.[5] These initiatives are also consistent with LAO's efforts to respond to these changes to the Legal Aid Act, through its

[1] *Smarter and Stronger Justice Act, 2020*, receiving Royal Assent on July 8, 2020.
[2] 1998, SO 1998, c 26 [the "*Legal Aid Services Act*"]
[3] *Ibid*, s 1.
[4] *Ibid*, ss 4(a), 12(1), 92.
[5] *Ibid*, s 1(b).

modernization framework that also includes principles such as providing services in a client-focused manner, and being responsive to the needs of low-income individuals and marginalized and disadvantaged communities.

One example of an initiative currently being developed by DCLC in cooperation with the Hub involves a Family Law Community Hubs Project. This shared initiative strives to identify and resolve issues that commonly arise in family law disputes early and amicably. For example, clients are connected with domestic violence service providers if needed, provided with alternative dispute resolution options if appropriate, and referred to members of the local bar for independent legal advice when required. The goal of the Family Law Community Hubs Project is to set out client options at the outset of a family law matter in the hopes of preventing often arduous and financially draining legal disputes. Diversion to alternative dispute resolution streams is a primary goal of this project given the success that mediation can have in preventing increased financial and emotional burden on the individuals involved and increased burdens on an already strained court system. The importance of a community hub-based system was emphasized in the Canadian Bar Association's 2013 Equal Justice Report:[6]

> Perhaps the greatest single innovation required right now is an effective triage system in each jurisdiction. This is not a new idea. Community based legal clinics or offices were initially designed to play this function, efficiently linking community resources and the justice system. Where clinics exist and resources permit, many continue this function.

[6] Canadian Bar Association, "Reaching Equal Justice: an invitation to envision and act," Report of the CBA Access to Justice Committee (November 2013) at 73, available at: <https://www.cba.org/Publications-Resources/Resources/Equal-Justice-Initiative/Reaching-Equal-Justice-An-Invitation-to-Envisi-(1)>.

DCLC's primary goal in the community is to seek the resolution of legal issues. As mentioned, our unique approach assists in developing creative resolution of those issues by ensuring we look beyond what appears to be the legal issue on the surface. The use of effective triage throughout the justice system, in the form of referrals to community partners and diversions away from the traditional adversarial litigation process, is one of the best ways we can assist our clients in getting the most out of the legal situation they may find themselves in.

Introduction

DCLC appreciates the opportunity to weigh in on the importance of mandatory mediation in relation to access to justice in Ontario. In particular, we intend to address the following questions:

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?
2. Is mandatory mediation facilitating early resolution of civil disputes in your cases?
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?

1. Mandatory Mediation should be expanded to apply throughout Ontario

Mediation is fundamentally different from trial, as the parties in mediation negotiate their own resolution to a dispute, albeit with the help of a mediator. Mediators help parties set ground rules for negotiation, help parties identify a common ground, and mitigate power imbalances between parties. Trials in comparison are adversarial in nature, meaning one party is perceived to win and the other is perceived to lose, in most cases. In mediation, however, the goal is to find a solution that best meets the needs of everyone involved. This approach invariably provides clients on both sides a better result. Despite a professional responsibility under Rule 3.2-4 of the *Rules of Professional Conduct*[7] to advise and encourage clients to compromise or settle a dispute on a reasonable basis, in many cases lawyers fail to meet the definition of a "competent lawyer" to properly implement alternative dispute resolution, as defined in Rule 3.1-1. The inability to do so is defined as facilitating the commencement or continuation of "useless legal proceedings," and are therefore of direct importance to the sustainability of the justice system, and its ability to prioritize cases of more complex, urgent or *Charter*-based[8] need.

Mandatory mediation should theoretically reduce legal costs because of the expected increase in settlements earlier in the civil litigation process, and less use of the justice system subsequent to that. Any reduction in legal costs means a concurrent increase in access to justice for all litigants;

[7] Law Society of Ontario, "Complete Rules of Professional Conduct," available at: < https://lso.ca/about-lso/legislation-rules/rules-of-professional-conduct/complete-rules-of-professional-conduct>.
[8] *R. v. Jordan*, 2016 SCC 27 (CanLII), [2016] 1 SCR 631; *R. v. Cody*, 2017 SCC 31 (CanLII), [2017] 1 SCR 659.

in particular, low-income individuals who would otherwise not be able to afford the costs associated with a full trial. As set out below, the experience in Ontario has been that mandatory mediation has generally had the effect of decreasing costs, along with other beneficial effects. However, there may be ways to improve its efficacy, in particular through mechanisms that create greater accountability for those who proceed past the mandatory mediation stage.

Mediation has been required in many civil proceedings in Toronto, Ottawa and Windsor through Ontario's Mandatory Mediation Program (OMMP). When first introduced, many skeptics believed mandatory mediation would be costly and ineffective. Supporters believed mandatory mediation would decrease legal costs and delays. Legal costs and inefficiency are major obstacles to access to justice, and are oft cited reasons for overall low satisfaction with the civil justice system.[9]

The findings in the 2001 Robert G. Hann's Report provided strong evidence of the efficacy of the Ontario's mandatory mediation program. For example, the Report demonstrated that mediation imposed by Rule 24 resulted in dramatic decreases in time taken to resolve cases, an overall decreased expense to litigants, a significant caseload being settled earlier in litigation (~40%), and overall satisfaction with the mediation process as reported by lawyers and litigants.[10] Although

[9] Jennifer Egsgard, "Mandatory Mediation In Ontario: Taking Stock After 20 Years," (2020), Ontario Bar Association.
[10] Robert Hann et al, "Evaluation of the Ontario Mandatory Mediation Program (Rule 24.1): Final Report The First 23 Months," (2001), at 2, available at: <https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1142&context=faculty_books>.

members of the judiciary may not be polled in this manner, for legitimate reasons of maintaining decorum, we have strong reason to believe that the senior bench would report great satisfaction with the results over the past twenty years as well.

The Hann Report does suggest that cases that did not settle likely implemented mediation far too early in the civil litigation process. The required timelines when the Report occurred have now loosened, and the new flexibility with scheduling mediations demonstrate an increase in the proportion of settlements at the mediation stage.[11] Determining the appropriate time for a mandatory mediation remains an open question, and may ultimately be contingent on the manner in which counsel truly cooperate to explore areas of resolution, including the non-legal aspects of a dispute.

Even prior to the Hann Report, an evaluation of an earlier pilot implemented in 1994, the Alternative Dispute Resolution (ADR) Pilot Project, demonstrated that cases referred to the ADR Pilot for mediation resulted in cost savings to litigants, was quicker, and resulted in increased satisfaction of parties involved, in comparison to a control group of cases. Lawyers that took part in the ADR Pilot also indicated that their legal fees were lower, regardless of whether the case settled, because litigants were required to examine the merits of their case at an earlier stage.[12] This contradiction between a legitimate interest in implementing dispute resolution techniques as

[11] Chief Justice Warren K. Winkler, "Report on the Implementation of the Toronto Practice Direction and Rule 78," February 2008, at 19, available at: <https://www.ontariocourts.ca/coa/en/ps/reports/rule78.pdf>.
[12] *Ibid* at p. 3.

a professional obligation, as contrasted with the pecuniary self-interest that is only present in private practice, may explain why some files are less amenable to mandatory mediation. The fault lies not necessarily with the parties or the challenges in the case, but much deeper issues related to the self-governing nature of the professions.

More recently, the Ontario Bar Association (OBA) administered two surveys to its members in June/July of 2019 and December of 2019, regarding the mandatory mediation program in Ontario, and whether it should be expanded outside of Toronto, Ottawa, and Windsor. The results showed that a large majority of respondents were in favor of expanding mandatory mediation (90% support and 70% support respectively).[13] However, this membership reflects less than a third of the profession, and cannot be properly relied upon as the experience of the profession as a whole. The high cost of professional membership in some organizations necessarily excludes many members of the profession, especially those who work in areas of law that serve low-income and marginalized populations. This divide, which ultimately reflects broader patterns of power imbalances between the parties and also the lawyers reflecting parties that are differently socially situated, bears a specific area of scrutiny. Mandatory mediation will not equally be effective to all parties in all circumstances, with those with less inherent power typically benefiting less from these procedures than others.

[13] Ontario Bar Association, "Expanding Mandatory Mediation in Ontario, Submission to the Attorney General" (2020) at: <https://www.oba.org/CMSPages/GetFile.aspx?guid=f6b82a20-84ee-4d90-8138-c488a07157c9>.

Further support for mandatory mediation can be gleaned from positions taken by the judiciary. One of the best ways to ensure accountability of the parties in proceedings are through its cost implications. Costs are ultimately discretionary,[14] which is why the success of any mandatory mediation is highly contingent on the willingness and ability of the judiciary to impose accountability on the parties for their ability to competently perform their professional obligations to properly implement alternative dispute resolution techniques. The consequences for improperly failing to consider alternatives have been highlighted even in jurisdictions not bound by the mandatory mediation rules. For example, in disallowing a portion of costs claimed by a Defendant that refused to mediate in an action where the Plaintiff was successful at trial, Justice Mew stated,[15]

> …the defendant's refusal to mediate is a relevant factor. That refusal was unreasonable. It deprived the parties of an opportunity to settle the case without the necessity for a trial.

Justice Mew emphasized that the determination of the quantum of costs is not a mechanical exercise that a judge may engage in,[16] and should be based on a fair and reasonable amount within the expectation of the parties.[17] This might mean however that the expectation of sophisticated parties, who have more extensive access to counsel and perhaps even more experience with

[14] *Courts of Justice Act*, RSO 1990, c C.43, s. 131; *Rules of Civil Procedure*, RRO 1990, Reg 194, s. 57.
[15] *Canfield v. Brockville Ontario Speedway*, 2018 ONSC 3288 at para 70.
[16] *Agius v. Home Depot Holdings Inc.*, 2011 ONSC 5272 (CanLII) at para. 11.
[17] *Zesta Engineering Ltd. v. Cloutier* (2002), 19 A.C.W.S. (3d) 341 (Ont. C.A.) at para 4*; Boucher v. Public Accountants Council for the Province of Ontario* (2004), 2004 CanLII 14579 (ON CA), 71 O.R. (3d) 291 (C.A.). Costs assessments such as these suggest that the courtrooms outside of the scope of the OMMP are finding other ways to push for mediation. Further, *s. 258.6 of the Insurance Act, R.S.O. 1990, c. I.8* provides that failing to participate in mediation must be a consideration in assessing costs.

litigation, may be awarded more significant costs inadvertently under the guide of fairness and expectations, as opposed to a low-income or marginalized litigant. Although proportionality does not override other considerations, it should not be used as a sword to undercompensate a litigant for costs legitimately incurred.[18] In the public interest or legal aid context, these legitimately incurred costs on behalf of the litigant are ultimately from the public purse. Conduct worthy of disapprobation on these files may be worthy of significant scrutiny in respect to proportionality, especially where significant efforts by counsel representing these low-income or marginalized parties have made repeated efforts to resolve a dispute without a trial.

As another stop-gap between pleadings and trial, and as yet another alternative or consequence of mediation, the courts have also placed additional emphasis on the use of partial summary judgments The Supreme Court of Canada has also recognized the importance of mediation in facilitating access to justice when evaluating this procedure in this context,[19]

> However, undue process and protracted trials, with unnecessary expense and delay, can prevent the fair and just resolution of disputes. The full trial has become largely illusory because, except where government funding is available, ordinary Canadians cannot afford to access the adjudication of civil disputes. The cost and delay associated with the traditional process means that… the trial process denies ordinary people the opportunity to have adjudication. And while going to trial has long been seen as a last resort, other dispute resolution mechanisms such as mediation and settlement are more likely to produce fair and just results when adjudication remains a realistic alternative.
> [emphasis added]

[18] *Aacurate General Contracting Ltd. v. Tarasco*, 2015 ONSC 5980, at paras 13-17; *Dang v. Anderson*, 2017 ONSC 2150, paras 12-15.
[19] *Hryniak v. Mauldin*, 2014 CSC 7, [2014] 1 R.C.S. 87 at para 24.

The Court's comments in this context of "ordinary people" are often the people who are well above the threshold for legal aid services. For low-income or marginalized populations, the threat of trial and the refusal to engage in mediation can constitute a negotiating tactic reflecting distasteful exercises of inappropriate power imbalances, once again, as the expense of the public. Making this type of mediation mandatory, and ensuring the parties properly utilize this mediation to resolve the dispute through cost consequences, provides better protection against the abuse of power by those who are not "ordinary people."

Expanding mandatory mediation beyond the areas of the OMMP pilot project throughout the province should allow more low-income and marginalized populations to utilize it as an early dispute mechanism that promotes fairness and justice. This will only be effective though with the full support participation of the parties, their counsel, and the justice system, which can only be achieved through ensuring accountability.

2. **Should the types of civil actions that mandatory mediation applies to under Rule 24.1 be expanded?**

DCLC's position that mandatory mediation can be expanded to other areas, in particular in family law. These cases have the potential to be particularly amenable to the mandatory mediation process, as they are the conflicts that are most characterized by social, emotional and financial problems rather than complex legal issues. The often-contentious relationship between the parties

in the family law context, and the inability of counsel to competently utilize dispute resolution skills, require an authoritative approach towards settlement. Facilitative non-judicial mediators may be more effective at encouraging settlement than family court judges, specifically because of their inherent characteristics such as authority and autonomy.[20] The use of what is referred to as "facilitative mediation" within the family law context would allow conflicted parties to arrive at their own self-generated solutions, thus permitting both Applicant and Respondent in a family law matter leaving the mediation process feeling as if they contributed to the outcome through an act of self-empowerment.[21]

Some degree of empirical and anecdotal evidence that the expansion of mandatory mediation into family law areas will produce higher settlement rates. Mediated family law cases have produced some form of reported settlement in as high as 94% of cases.[22] In Australia, where mandatory mediation in family law matters was introduced in 2006, one study concluded that the total number of child-related family court applications dropped from 19,188 in 2004-2005 to 14,549 in 2008-2009. The authors of the study credited this in large part to the introduction of mandatory mediation.[23]

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[20] Noel Semple, "Judicial Settlement-Seeking in Parenting Cases: A Mock Trial," 2013 CanLIIDocs 494, at p 30, available at: <http://www.canlii.org/t/sk63>.
[21] *Ibid.*
[22] Center for Families Children and the Courts, Snapshot Study, 2008, at p. 18, available at: <http://www.courts.ca.gov/documents/Snapshot_2008_summary_findings_FINAL_Oct11_update.pdf>
[23] Rae Kaspview et al., Evaluation of the 2006 Family Law Reforms E4 (2009), at p. 305, available at: <http://www.aifs.gov.au/institute/pubs/fle/>

Although any mandatory mediation program may seek higher rates of settlement alongside reduced costs for both the parties and the judicial system as their two primary goals, they may not be necessarily satisfied with the process. This satisfaction is an important factor in the context of family law, as it is an area that deals with parties' most sensitive and intimate issues of a social, emotional and financial nature. According to a study by Beck and Sales, participant satisfaction rates in divorce matters with mediation were in the 60-80% range.[24] In a 2007 study from California's mediation program, 87% of mediation participants agreed with the phrase "mediation is a good way to come up with a parenting plan," and 88% would be willing to recommend it to their friends.[25] The potential for greater satisfaction in family law, the area of greatest contention among the public about the justice system, should be a public policy priority.[26]

One oft-cited concern about mandatory mediation in family law matters would be the potential for personal and confrontational interactions between the Applicant and Respondent that can put the parties in uncomfortable -- and even psychologically/mentally vulnerable -- situations. This was the case in *G.O. et al v C.D.H.*, a sexual assault case where a party was seeking an exemption from a mandatory mediation pilot project in a civil matter, out of fear that personal interaction with the other side during mediation would cause her to incur psychological trauma.[27] The issues raised

[24] Beck & Bruce Dennis Sales, "Family Mediation: Facts, Myths, and Future Prospects" (1st ed., 2001) at p. 77.
[25] *Supra* note 22 at 21.
[26] Omar Ha-Redeye, Family Law Profiled at Opening of the Ontario Courts," Slaw, Sept. 18, 2011, available at: <http://www.slaw.ca/2011/09/18/family-law-profiled-at-opening-of-the-ontario-courts/>.
[27] *G.O. et al v C.D.H.*, 2000 CanLII 22691 (ON SC), 50 OR (3d) 82.

by this party was similar to issues associated with some family law disputes where similar power imbalances can be pronounced. As part of the pilot project under Rule 24.1, it was within the court's discretion to make an order on a party's motion exempting them from the mandatory mediation process.[28]

In rejecting the request for an exemption from mandatory mediation, Kiteley J. summarized potential safeguards for mandatory mediation that makes it particularly amenable to the type of issues that arise in the family law context. First, Justice Kitely J. explains how it is not, in fact, a requirement that the plaintiff and defendant be in the same room or interact with one another at any time during the course of the mediation, in a form of alternative dispute resolution often referred to as "shuttle mediation."[29] To this end, mediators with a background in family law mediation are trained and adept at identifying issues between parties associated with domestic violence and other forms of abuse. Before every mediation concerning a family law matter, the roster mediators in the Toronto Family Mediation Pilot Project are required to spend thirty minutes pre-screening each party for issues relating to abuse in the relationship, and be satisfied: [30]

- that abuse has not occurred that has rendered either party incapable of mediating;
- that no harm will come to either party as a result of mediating;

[28] *Ibid* at para 6.
[29] *Ibid* at para 15.
[30] *Ibid* at para 16.

- that the parties' desire to mediate is voluntary;
- that any inequality in bargaining power can be managed so as to ensure that negotiations are balanced and procedurally fair;
- that parties are psychologically ready to mediate and have the capacity to do so;
- that the complexity of the case does not exceed the mediator's education, training and competence.

Justice Kitely J. concluded that these concerns can be properly addressed by "(a) selecting a mediator with skills to address issues of [domestic] violence; and (b) exploring with that mediator whether the mediation can proceed without the necessity of the plaintiff...and the defendant being present in the same room."[31]

Issues of power imbalance, domestic violence, and trauma associated with family law does not necessarily mean that mandatory mediation is not a viable path to resolution. There are mediators that specialize in identifying and dealing with these issues. Judges recognize the availability of these mediators, the potential efficacy of mediation in such contexts, and will direct litigants to mediate, even when these issues exist.

[31] *Ibid* at para 19.

Expanding mandatory mediation to the area of family law will be especially beneficial for low-income individuals, who disproportionately experience the consequences protracted and unwieldly family law disputes. These individuals would have mandated access to the benefits of mediation, with the confidence that any concerns regarding power imbalance, domestic violence, and past trauma will be properly accounted for by a trained mediator.

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?**

DCLC's position is that mandatory mediation ought to be introduced prior to filing an action with the court, perhaps beginning with a pilot project for specific actions that typically experience a very high settlement rate at mediation, such as wrongful dismissal suits.[32] Mandating mediation prior to filing an action in wrongful dismissal suits will reduce legal expenses for clients, and will reduce burdens on the court and court administrative processes by keeping straightforward matters out of the litigation process. The summary judgment process for non-contentious wrongful dismissal matters is also a useful tool for reducing costs and burdens, but mandatory mediation prior to filing a wrongful dismissal action would serve to keep simple matters out of the courts to begin with.

[32] *Supra* note 9 at 33.

Mediation fees are not a substantial area of concern with regards to access to justice. The Hann report demonstrated that mandatory mediation results in significant costs savings.[33] The maximum a roster mediator can charge in a typical two-party dispute is $600 plus HST. This is a nominal amount relative to the floor of damages for civil litigation at the Superior Court of Justice ($35,000). Low-income individuals can obtain legal aid certificates that essentially act as a fee waiver for mediation. Additionally, individuals who will potentially suffer financial hardship because of mediation fees can choose to apply for pro bono mediation services offered through the OMMP Access Plan.[34] DCLC submits that these options be retained for low-income clients if implementation of mandatory mediation prior to filing an action is enacted, and DCLC already assists many clients in Durham Region in obtaining fee waivers for court proceedings through their partners in the Hub.

Conclusions

Far too many people in the justice system, including the counsel representing these parties, have a distorted sense of the efficiency of litigation for dispute resolution. This misconception is informed in large measure by romantic stereotypes perpetrated by entertainment and mass media. While these individuals only devote a cursory effort to dispute resolution independent of the courts, they focus the majority of their time, energy, and money on the litigation itself. Mediation serves

[33] Supra note 9 at 9-10.
[34] *Administration of Justice Act*, O Reg. 451/98, s.7

to only operate as a checkbox, which once raised is indefinitely addressed from a professional context. These approaches are all deeply misguided, fail to produce the best results to their clients, and are ultimately an ineffective use of public resources.

The government has an imperative in this context, especially where cost savings have taken a strategic priority, to take further actions to curb abuse of private disputes unnecessarily playing out in the public forum on the public's dime The implementation of mandatory mediation in Ontario would formalize a step that all parties must adhere to, and as a result would be required to focus their attention on fully for that particular step. This can be implemented across a broader spectrum of cases than just the civil context, and should be introduced in family law as well. There are sufficient protections and options within the mediation process to ensure the safety of participants in this context. The potential for this procedure to streamline cases in the justice, and to ensure that mediation is not yet another procedural step to delay proceedings by parties who have more power and resources, the efforts made by the parties to resolve a dispute, including mediation attempts, necessarily requires the justice system to uphold these same values through cost consequences.