A RECENT COMPARATIVE HISTORY OF MANDATORY MEDIATION VS VOLUNTARY MEDIATION IN ONTARIO, CANADA

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In the mid-1990's, the Attorney General's office of Ontario established a Mediation Centre employing a few staff mediators. A judge of our Superior Court was appointed to oversee the project. Trained mediators were asked to volunteer to take on selected mediations at the Centre during the pilot project which ran for about two years.

Also in the 1990's one of our Superior Court Justices had undertaken an extensive Civil Justice Review. One of the recommendations that arose from that study was to install a system of Case Management in selected areas of Ontario.

As a result, mediation and case management were both introduced into the Toronto legal community in the late 1990's. By 1999, enough time and experience had passed that the system of Case Management was installed for many areas of the civil litigation practice. Around the same time, a Mandatory Mediation system was commenced under a rule of practice. The other options for initiating mandatory mediations were provincial legislation or a practice direction from the Superior Court. The Attorney General wanted to use a rule and there was a significant and lengthy process through which issues surrounding mediation were vetted through the Rules Committee which consists of both lawyers and judges. The rule as it was published, became quite extensive, and included a host of procedures. Also, mandatory mediation was tied to case management which was under the direction of Masters and Judges of the Superior Court. At the time, there was a mixed reaction in the litigation community to the installation of case management because of the two schools of thought: those counsel who preferred to manage their cases on their own without interference by the courts, and those who felt that cases would be handled more efficiently if the courts were on top of them. In my view it was unfortunate that mandatory mediation was tied to the case management regime. As a result, it may not have had the best start.

As of 1999 then, mandatory mediations were established to take place within 90 days of the delivery of the first Statement of Defence. This in itself led to all kinds of problems. For personal injury cases, it was typically found that mediations were being called for too early, before serious injuries had fully resolved and were capable of proper assessment of damages. That led to many motions at court for extensions of time. There was a provision for a consent extension to be made by the officer in charge of mediations, but typically longer times were necessary in personal injury cases. So resort had to be made to the Masters.

Another problem which was commonplace was that in cases involving multiple defendants, especially defendants out of the jurisdiction, longer time periods were available for service of process. If a party defendant was served in Ontario and was able to enter a defence more quickly, parties who might not yet have been served outside of Ontario, were bound by a rule requiring them to conduct mediation possibly even before their defence was delivered. This made no sense at all and, of course, led to more motions before the Masters. The system was tied as I have said to case management, and case management was heavily focused on the clock rather than the parties. Timetables were set by the court which had to be adhered to or further motions had to be brought for extensions of time.

Compare all of this with voluntary mediations. In the case of voluntary mediations, counsel and their clients decide when they are ready to mediate. The lawyers obviously have to speak to each other in order to agree to conduct a mediation. At the same time, they can determine the timing of that mediation, and maybe every bit as importantly, they can agree on the mediator to be used in their case. While our mandatory mediation system did allow for selection of mediators, the rule also provided that if the mediator was not picked in a very short time, the system assigned a mediator. Counsel were then stuck with that mediator whether they would have wanted him or her, or not. Perhaps the statistic which arose from the two systems, tells the story. In the case of mandatory mediations, several years into the system, settlement rates were barely above 40%. In the case of voluntary mediations, the success level typically ran 70-75%. After thousands of mediations had been conducted in the mandatory system, and several years had passed, the statistics were not improving.

Also, with the passage of time, other developments had taken place. The two judges who had last been Regional Senior Judges in Toronto, had both been elevated to the Court of Appeal. In 2004, a longstanding and very practical-minded Superior Court Judge was appointed Regional Senior Justice for Toronto. I keep mentioning Toronto because as London is, Toronto is the hub of commercial activity and litigation activity in Ontario. Further, the case management and mandatory mediation regimes were focused in Toronto and Ottawa (and more recently, Windsor, Ontario), but have not been rolled out across the Province.

The incoming Regional Senior Justice inherited a system filled with backlogs of cases, insufficient judges to try them, overworked Masters, and no additional government funding. His Honour took a very careful look at the system and decided that some changes were necessary and they had to be made quickly. He undertook the process with the intention of establishing a Practice Direction which would suspend the Case Management Rule and the Mandatory Mediation Rule as they had been run for some five years. He knew the success rate comparison between mandatory and voluntary mediation and also recognized that cases could be managed where necessary, but Case Management

was not necessary in every case. His Honour worked with the legal and ADR communities extensively. As Chair of the ADR Section of the Ontario Bar Association, I was heavily involved with the Regional Senior Justice in meetings, negotiations, and drafting submissions in respect of the intended Practice Direction. There were widespread meetings of the legal community and ADR community and considerable input provided to His Honour. That work went on from August through November 2004.

The new Practice Direction was published December 3, 2004 and came into effect January 1, 2005. It suspended the Rules governing case management and mandatory mediation for three years. The new Practice Direction makes provision for counsel to decide on the most effective timing for mediation. As a result, while a mediation is mandatory, the timing and the details are left to counsel to decide. It is fully expected that this item alone will lead to increased success rates in the Mandatory Mediation regime. There is a further provision that the mediation must take place no later than 90 days after the case has been set down for trial. There is also provision in other parts of the Practice Direction for a Pre-Trial or Settlement Conference. A judge will hold that conference and at that stage there is an opportunity to send the case off to mediation once more if it has not settled at an earlier attempt. One other factor at this stage is that the pre-trial judge will set the trial date for the case so that counsel will know there is a courtroom door awaiting them on an appointed date. Typically, these fixed dates for trial will not enjoy the prospect of adjournments. Accordingly, if the case is not settled earlier, counsel have one last kick at the can, while the courtroom door is opening if they fail to settle.

This Practice Direction is the subject matter of numerous presentations by our Law Society, Bar Association, and Advocates' Society at the time of this writing. I believe the Practice Direction is being well received by counsel and the ADR community. The Regional Senior Justice's intention is to save judges for trials, use Masters on procedural motions which are expected to be far fewer than during case management, and to have private mediators conduct mediations, both mandatory and voluntary, in an effort to settle the cases. It is fully expected that the success ratio of mandatory mediations will rise substantially as a result.

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