Toronto Lawyers ASSOCIATION TLA

September 11, 2020

The Honourable Doug Downey, MPP
Attorney General
McMurtry-Scott Building
720 Bay Street
11th Floor
Toronto, ON M7A 2S9

Via Email: amanda.iarusso@ontario.ca

Dear Attorney General Downey,

RE: MAG Consultation Regarding Mandatory Mediation Program and Single-Judge Model (Your Reference No. M-2020-10192)

I am writing to you on behalf of the Toronto Lawyers Association ("TLA"). The TLA is the voice of its 3,700 members who practice law in all disciplines across the Greater Toronto Area.

We understand that the Ministry of the Attorney General is interested in identifying reforms to Ontario's civil justice system that would lead to the early resolution of civil disputes and increase access to justice in civil proceedings through the potential expansion of the Mandatory Mediation Program, and one judge model.

Mandatory Mediation Program

We have carefully considered the ten questions posed in your letter to Joan Rataic-Lang, the TLA's Executive Director, dated August 24, 2020 and we are pleased to provide you with the TLA's views on each of those questions as set out below:

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 TLA supports the expansion of mandatory mediation throughout Ontario. Where matters have been (or will be) mediated pursuant to s. 258.6 of the *Insurance Act*, we believe those matters should be exempt from mandatory mediation under Rule 24.1. We believe that the remainder of the current exemptions to Rule 24.1 (as set out in Rules 24.1.04 (2) and (2.1)) should be maintained.

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

The degree to which mandatory mediation facilitates early resolution of civil disputes varies from case to case, and is dependent upon a constellation of unique factors. In some cases, the need for evidentiary disclosure or for damages to crystallize prevents the parties from conducting mediation early in the litigation process. In other cases, particularly those that are not document-intensive or where there is no significant factual dispute, mediation early in the litigation process is possible and can often lead to a successful resolution of the dispute. Accordingly, the TLA supports the Ministry's efforts to encourage mandatory mediation at an early stage in litigation; however a one-size-fits-all approach is not appropriate. As such, the TLA supports the use of mandatory mediation at a *relatively early* stage in the litigation process, but not until the parties believe they have sufficient information to successfully negotiate a resolution, and the clients are at a point where they are prepared to compromise.

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 TLA does not believe that mediation should be made mandatory prior to filing an action with the Court. Imposing such an obligation may have unintended effects on a claimant's ability to initiate proceedings prior to the expiration of the applicable limitation period. It may also give rise to circumstances where parties are forced to mediate without sufficient documentary disclosure and are left with no judicial remedy in terms of obtaining appropriate documentary disclosure prior to mediation. Mandatory mediation is also not appropriate in certain types of proceedings. For example, requiring a mandatory mediation before a claim may be brought would be antithetical to Mareva injunctions and those seeking an Anton Pillar order. Imposing mandatory mediation prior to filing an action with the Court would also be impossible if a defendant intends to challenge Ontario as the appropriate jurisdiction for an action, as this could be considered an act of attorning to the Ontario court.

Furthermore, and importantly, imposing mandatory mediation before an action could be brought raises a financial and procedural barrier to access to the courts. It would also provide defendants with the ability to forestall litigation indefinitely simply by refusing to participate in or delaying the mediation. A non-party cannot be compelled to participate in mediation, and will very likely be reluctant to pay for the privilege of giving the plaintiff the ability to bring action against it. In our view, compelling a consensual dispute resolution process prior to the commencement of an action is simply not workable.

4. *How often have you/your organization's members used the mediation roster used in your region?*

The TLA is comprised of lawyers who maintain a broad range of practices, from sole practitioners to lawyers in large firms. While the TLA did not conduct a member survey in advance of providing the Ministry with this response to its August 24, 2020 consultation request, the TLA's Advocacy Committee is able to provide anecdotal evidence based on its members' experience with the mediation roster. The TLA's Advocacy Committee members often recommend non-roster mediators for their clients' mediations. Non-roster mediators are often selected as they may offer greater expertise in a particular area of law or they may be known for being particularly effective in resolving disputes. With that being said, our Advocacy Committee members have also used roster mediators for cases that are relatively uncomplicated and do not warrant paying the fees charged by non-roster mediators. As a practical matter, roster mediators are also sometimes selected in cases where the parties believe the mediation will fail, and therefore the additional expense of a private mediator cannot be justified. In those cases, they are selected strictly as a means of keeping mediation costs to a minimum, and allowing the parties to proceed to set the matter down for a trial without further delays.

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?*

Anecdotally, it has been the TLA Advocacy Committee members' experience that the vast majority of mediations conducted with a roster mediator have proceeded with the parties consenting to the choice of mediator.

6. *Are mediation rosters adequately supporting mandatory mediation requirements under the Rules (e.g. mediator availability, mediator expertise)? Why or why not?*

At this time, we are unaware of any empirical evidence suggesting that mediation rosters are not adequately supporting mandatory mediation requirements under the Rules. Anecdotally, the TLA Advocacy Committee members do not note any particular issue with the adequacy of mediation rosters in supporting the mandatory mediation program in Ontario.

7. *What are the challenges/issues facing the current mediation roster process and how could this process be improved?*

In March 2001, a comprehensive evaluation of the mandatory mediation pilot program was completed and a detailed report was submitted to the Civil Rules Committee: Evaluation Committee for the Mandatory Mediation Pilot Project[1]. At page 107 of the report, the procedures for the selection, training and monitoring of mediators are evaluated. Some of the issues identified in the report included the following: a concern that there is no professional

[1] See the report entitled *Evaluation of the Mandatory Mediation Program (Rule 24.1): Final Report – The First 23 Months* dated March 12, 2001 at https://collections.ola.org/mon/1000/10294958.pdf

standard of qualification to be a mediator; that there are difficulties with verifying the quality of continuing education programs in a non-certified environment, such as the one in which mediators operate; that there should be more information about each mediator available to parties as part of the mediator selection process; that there need to be greater professional development opportunities for mediators; and that it may be appropriate to create specialized panels of mediators with expertise in certain areas of law. To the extent that any of these issues continue to be of concern to the Ontario bar (which may only be confirmed with updated empirical data), the TLA suggests that the Ministry take steps to address these issues as part of its expansion of mandatory mediation across the province.

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

The TLA is of the view that the current requirement for each party to pay an equal share of the mediator's fees in Rule 24.1 mediations should not be changed. The requirement for parties to pay an equal share of the process represents a fair approach to mandatory mediation. If, upon resolution of the dispute, the parties ultimately agree that a different approach should be taken, then it remains within the parties' power to negotiate a different outcome. However, the TLA believes that the most appropriate approach would be to maintain the requirement that each party pay an equal share of the mediator's fees.

9. *What are other improvements that can be made to the mandatory mediation program to make it faster, easier and more affordable for litigants?*

During the course of this consultation process, the TLA's Advocacy Committee has been receptive to other legal organizations' views on the potential expansion of the mandatory mediation process. Some have voiced the possibility that mandatory mediation and a mandatory one-judge model might be blended to produce an even greater positive effect on making the civil dispute resolution process faster, easier and more affordable for litigants. In particular, it may be worthwhile to explore whether parties may be exempt from the one-judge model if they opt to conduct mediation at a very early stage in the litigation process. In the event that mediation fails, the action would then be governed by the one-judge model as per the usual course (assuming the one-judge model becomes mandatory). The TLA is of the view that this potential amendment to the mandatory mediation program may increase litigants' motivation to settle disputes earlier in the litigation process.

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

It is our understanding that roster mediators are required to provide up to twelve hours of pro bono mediation services per year as a condition of maintaining their status on the mediation

roster. We also understand that the Access Plan provides certain income, liquidity and net worth tests that are used to determine if litigants may be entitled to pro bono mediation services. Based on our review of these tests, the needs of litigants with limited financial resources are not being met by pro bono mediation services and/or the Access Plan. For example, a single person with a gross income of more than $18,000 per year would not qualify for pro bono mediation services under the current model. Where the total value of a litigant's liquid assets exceed the liquidity measure of $1500, they will not qualify for pro bono mediation services. Where a litigant's net worth totals more than $6000, they will not qualify for pro bono mediation services. These tests represent a significant barrier to accessing justice for many low-income Ontarians. If the Ministry is intent upon expanding mandatory mediation, it must also turn its mind to significantly increasing funding to Ontario's pro bono and legal aid services, including making a significant increase to the threshold levels for pro bono mediation under the Access Plan.

Single Judge Proceedings

The TLA has been an advocate in favour of the one-judge pilot project and is in favour of the expansion of this model broadly across the Province. It endorses the "*Working Smarter but not Harder in Canada*" Report by the Judiciary Committee of the American College of Trial Lawyers. In our view, the US experience plainly demonstrates that this model is effective, reduces interlocutory sparring between the parties, and improves efficiency in the courtroom.

In answer to the questions posed:

1. *Should a single-judge model be applied to all civil proceedings in Ontario? If not, what exceptions to the single-judge model would you propose and why?*

The TLA is of the view that all civil proceedings are appropriate for the single-judge model subject to our above response to question #9 inviting that consideration be given to exempt parties from the one Judge model where they have opted at a very early stage for early mediation. If settlement is not achieved at mediation, then the case will proceed in court under the single-judge model. .

2. *Should parties' consent be required prior to a proceeding becoming a single-judge proceeding?*

No, consent should not be necessary before a proceeding becomes a single-judge proceeding. The cases that will benefit the most from this model are those where one party or their lawyer is taking unnecessarily aggressive stances, delaying, being unresponsive or otherwise engaging in obstructionist tactics. These parties would, to the same end, be those least likely to consent to participation in the single-judge model, as the model's objective is contrary to the obstructionist tactics at play.

3. *In what, if any, circumstances, should a single-judge proceeding be able to be reassigned to another judge?*

It is appropriate for another judge to hear pre-trials in the single-judge process. Also, if allegations of bias are raised against the judge, it may be appropriate for that unique issue to be determined by another judge. Where an issue has been determined by the judge, appealed, and the appellate court directs that the issue that was originally determined should be re-tried by another judge, then those issues should be heard by another judge as well. However, in the vast majority of proceedings, the single judge should be just that – the adjudicator of all aspects of the proceeding from start to finish, excluding the pretrial.

Thank you for considering these comments. Our Advocacy Committee would be pleased to discuss these comments with your team at your convenience, should you find additional consultation beneficial.

Yours very truly,

Brett Harrison
President
Toronto Lawyers Association

cc: Jennifer Arduini, Dutton Brock LLP, TLA Director and member of the Advocacy Committee