Mandatory Mediation- Must for today's World

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On January 4, 1999, Rule 24.1 introduced- on a test basis - a common set of rules and procedures mandating mediation for non-family civil case-managed cases in the Ontario Superior Court of Justice in Ottawa and Toronto, Canada.' Continuation of the Rule past July 4, 2001 was to be in large part dependent on the results of a thorough and independent 23-month evaluation and the ultimate goal of the evaluation was to determine whether Rule 24.1's introduction of a procedure for mandatory mediation in case managed cases made a positive or negative contribution to the administration of justice in the Province of Ontario.[2] The evaluation was to be in accordance with an undertaking given by the former Attorney General Charles Harnick for this Ministry to pay for an independent evaluation substantially in accord with the evaluation framework prepared by Professor Carl Baar and Mr. Robert Hann entitled *"Mandatory Mediation in Case Managed Civil Cases: Evaluation Framework.*

Just what Rule 24.1 described by the Chair of the Civil Rules Committee at the time as "the largest single change in civil procedure since the institution of the Rules of Civil Procedure) in the 1880's"[3] - intends to achieve, and why, is a matter of intense debate. For government primary objectives are cost savings and a reduction in the court backlog. The potential that mandatory mediation appears to offer for early negotiated settlement can also be understood as enhancing access to justice for disputants either unwilling or unable to finance protracted litigation.[4] The introduction in Ontario of mandatory early mediation requiring attendance - and often the direct participation - of the client is a further challenge to the traditional model of autonomous, lawyer-driven decision-making.[5]

Rule 24.1 is a pilot project in Ottawa and Toronto. It mandates a mediation session for case managed actions within 90 days of the filing of the first statement of defense with a right in standard track actions to postpone the mediation for 60 days if the parties consent. For all actions, the court has the jurisdiction on a party's motion to make an order exempting an action from mandatory mediation, and it has the jurisdiction to abridge or extend the timefor the mediation session. There is a roaster of mediators appointed and supervised by a local mediation committee, and litigants may select a roaster or non-roaster mediator. If the litigants do not choose the mediator, then the local mediation co-ordinator, who is charged with the responsibility for the administration of mediation in the county, will appoint a mediator from the roster. At least seven. days before the mediation session, every party is obliged to prepare a statement of issues and provide a copy to
every other party and the mediator, and the plaintiff provides the mediator with a copy of the

pleadings. The statement of issues identifies the factual and legal issues in dispute and briefly set outs the position and interests of the party making the statement. The parties, and their lawyers, if the parties are represented, are required to attend the mediation session, unless the court orders otherwise. Within 10 days, after the mediation session is concluded, the mediator must give the local mediation co-ordinator and the parties a report on the mediation. [6]

In Ottawa, the cases under the simplified procedure rule (Rule 76) qualified for mandatory mediation, while in Toronto, these cases were excluded from Rule 24.1. (Simplified procedure cases were excluded because, coincidentally, they were being evaluated under another evaluation project and their inclusion under Rule 24.1 would have impaired that evaluation.) The inclusion of Rule 76 cases in Ottawa is significant because it turns out that they have a high degree of successful mediation sessions.'

The major conclusions and recommendations of the Evaluation Committee Report were that: (1) sunset provision of Rule 24.1 be revoked and that the rule should be made a permanent feature of the *Rules of Civil Procedure;* and (2) provisions in the Rule 24.1 about the timing of the mediation session not be changed but that efforts should be made to increase the awareness of the availability of extensions under subrules 24.1.09(1) and (2) which subrules should be modestly amended .[8] The responses from the questionnaires supported the conclusion that mandatory mediation reduces the cost of litigation. The response from focus groups on this factor was less strong but still positive. Although these responses are anecdotal and quite subjective, one overall conclusion was that when cases settle at or soon after the mandatory session, lawyers and litigants believed that money had been saved in avoided legal expenses. Litigants who were questioned after the dispositions of their cases were positive (86% in Ottawa and 84% in Toronto) that costs had been reduced. The lawyer response was similarly very positive (80% in Ottawa and 78% in Toronto). Given the finding noted above that even in failed mediation sessions, the cases settled earlier, there would also appear to be savings in cases that do not settle at or soon after the mediation session.'

Ten-years ago, as court-connected mediation was being introduced across the United States in much the same say as it is now being introduced into Canada, one leading scholar wrote " (A)n important question that must be confronted is whether forcing ADR to adapt to a legal culture or environment maybe counterproductive to the transformations proponents of ADR would like to see in our disputing practices."[10] This question has now come of age in Canada.[11] Early settlement efforts which include interests-based bargaining in mediation imply not only a different analysis of the conflict itself and its appropriate resolution, but also a reconceptualisation of the traditional role of the lawyer as zealous advocate. As Carrie Menkel-Meadow had written, "The zealous advocate who jealously guards (and does not share) information, who does not reveal adverse facts (and in some cases, adverse law) to the other side, who seeks to maximise gains for his client, may be successful in arbitrations and some forms of mini-trials and summary jury trials.

However, the zealous advocate will likely prove a failure in mediation, where creativity, focus on the opposing sides" interests and a broadening, not a narrowing of issues, may be more valued skills." [12] Furthermore, a more consensus on issues seen to be of normative significance is critical to the stability of the profession's monopoly over their market.[13] Whatever the motivation, it seems that once change has become inevitable, lawyers will embrace it.[14]

In its article entitled "Unwilling Actors: Why voluntary mediation works, why mandatory mediation might not"(1998), Gay Smith has advocated the usefulness of voluntary mediation. My experience supports the view that such a discretion is generally a lawyer driven rather litigant's and it is my belief that the concept of R. 24.1 (mandatory mediation) inserted in Ontario's *Rules of Civil Procedure is* an excellent step towards resolution of disputes at early stage and made a positive contribution to the administration of justice. For instance in the Indian common law jurisdiction, the concept of mediation falls within Part V titled Special Provisions of the Code of Civil Procedure, 1908 and states: Rule 89[15]:

Settlement of disputes outside the Court - (1) Where it appears to the court that there exists elements of a settlement which may be acceptable to the parties, the court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the court may reformulate the terms of a possible settlement and refer the same for

(d) mediation.

Thus It can be easily concluded that the procedure is voluntary and subject to the approval of the court. My experience as litigator shows otherwise. I strongly believe that if the provisions like *mandatory mediation* are also brought into Indian legal system, there would be a radical change in disposition of law suits which are pending to the tune of millions and where *`judicial delays has long been the single largest grievance of the litigants*[16]. Ian Roland in its article titled "Mediation has become an essential litigation skill" (Law Times, Nov. 24) said, "In a very short time, mediation has become an integral part of the litigation process. It's become a huge part of an advocate's everyday work, especially with mandatory mediation. Advocates need to become proficient at it."
I after studying and practicing the aspects of mandatory mediation in Canadian legal system and in a position of comparative analysis between the two countries - shall advocate for it's favour.

1.See, for example Evaluation of the Ontario Mandatory Mediation Program (Rule 24.1): Executive Summary and Recommendations, March 12, 2001

2. *Ibid*

3. Attributed to former Associate Chief Justice John Morden, Chair of the Civil Rules Committee during the debate over the formulation and introduction of Rule 24.1

4. Culture Change? Commercial Litigators and the Ontario Mandatory Program by Law Commission of Canada see Online www.lcc.gc.ca

5../bid

6. Supra note 2

7. Ibid

8. Ibid

9. Ibid

10 Menkel-Meadow, C, "Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or "The Law of ADR" (1991) 19 Florida State University Law Review 1 at 3

11. Supra note 4

12.Menkel-Meadow, C, "Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities" 38 South Texas Law Review (1997) 407 at 427

13. Larson, M, The Rise of Professionalism: : A Sociological Analysis Berkeley University Press, 1977

14.Supra note 11

15.Inserted by Act. 46 of 1999, s.7, previously repealed by Act 10 of 1940, s. 49 & Soh. III

16.See for example, article by Manoj Mitta of the Indian Express titled "Fast track only for judges" Online: www.indianexpress.com