FEDERATION OF ONTARIO LAW ASSOCIATIONS
FÉDÉRATION DES ASSOCIATIONS DU BARREAU DE L'ONTARIO

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FOLA Submission to MAG Regarding Mandatory Mediation Program and Single-Judge Model

(Reference No. M-2020-10192)

Submitted to: Ms. Amanda Iarusso, Director of Policy and Legal Affairs, MAG, amanda.iarusso@ontario.ca

Submitted on: Friday, September 11, 2020

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Introduction

The Federation of Ontario Law Associations (FOLA) appreciates the opportunity to respond to the Attorney General's request for input and perspective on potential changes to the mandatory mediation program and the one-judge model in the Superior Court of Justice.

FOLA is an organization that represents the 46 local law associations across Ontario. Together with our associate member, The Toronto Lawyers Association, FOLA represents approximately 12,000 lawyers, most of whom are in private practice in firms across the province.

It is noted that mandatory mediations have been imposed in three regions for many years. Given the requirement for the filing of a mediator's report in Rule 24.1.15 it is expected that MAG would have statistics which would provide insight as to whether the settlement rate is greater in those three jurisdictions as a rationale for expanding mandatory mediation throughout the Province. Although mediation can be effective in securing a resolution, imposing it upon parties may create a further step with an attendance cost.

In our view, consideration should be given to blending the mandatory mediation program and one-judge model into a reformed civil justice system that promotes out-of-court settlement and / or streamlined civil proceedings. In our submission, we will endeavour to respond to the questions posted in the request for consultation and will put forward a suggested reformed model for civil proceedings. The objective is to establish an expedient system for civil proceedings that is cost effective for both litigants and the justice system.

Mediation can be an effective mechanism for litigants to resolve their disputes, but it may not be effective in every case. Accordingly, making it a blanket requirement for all cases would not be ideal; it could end up imposing an added step, with attendant costs, on the parties. With that being said, mandatory mediation has been imposed in three regions for many years. We would be interested to see the statistics on the mediation-settlement rates in these regions. If the mediation-settlement rates in these regions are significantly higher than in regions without mandatory mediation, that could be a justification for expansion of mandatory mediation. Regardless, of the statistics, we think our proposed reformed model effectively harasses mediation's potential for resolving cases without making mediation mandatory in a one-size-fits-all manner.

A final preliminary comment relates to the impact that such changes might have on the role of the judiciary. It will be vital to ensure that any proposed changes do not in any way infringe upon the independence of the Court as well as to make sure that sufficient resources both in terms of judges and staff are available to practically meet the

demands created by a one judge model. We believe that it is critical for the judiciary to provide input and comment to determine whether any plan can be implemented before legislation is enacted.

General Overview - Proposed Reformed Model

We suggest that a reformed model for civil proceedings be considered that includes the following steps:

1. At close of pleadings, parties will have the option of filing an agreed upon timetable with the Court. The timetable shall include a plan for production of documents, discovery (if required), and mediation. If the parties are unable to successfully resolve the claim at mediation, they will enter the case management regime.

2. If the parties cannot agree upon a timetable at the outset, they will enter the case management regime. A Case Management Official ("CMO") will be assigned to the file - either a judge or master - and will work with the parties to establish a timetable. The CMO will have the power to order the parties to attend at a mediation or may exempt the parties from having to participate in a mediation.

3. Parties who are ordered to mediate may hire a private or roster mediator.

4. The CMO will hear all Pre-trial proceedings and will conduct the Pre-trial.

5. If a Trial is required, it shall be assigned to someone other than the CMO.

In many cases, parties can agree to a process that is most cost-effective and expeditious without the assistance of the Court. For those parties, it makes sense to provide an exemption to early case management intervention or stringent timetables for mandatory mediation. Essentially, if the parties are *ad idem* to an approach, there is then no need to impose additional requirements. An agreed-upon timetable can be filed with the Court and no judicial intervention will be required unless there is a need for an interlocutory motion or mediation fails.

However, if parties are unable to agree upon a timetable at the outset, they will attend before a CMO who will manage the matter up to the conclusion of the Pre-trial. If the CMO is of the opinion that a mediation would assist the parties in coming to a resolution, they can order the parties to mediate. If the CMO is of the opinion that forcing the

parties to mediate would be futile, the CMO can relieve the parties from having to participate in a mandatory mediation.

Under this model, the CMO will manage a file until the conclusion of the Pre-trial. If a Trial is required, it will be assigned to someone other than the CMO.

Comments on Mandatory Mediations Generally

While mediations are currently only mandated by the *Rules of Civil Procedure* in certain jurisdictions, legislation and case law have effectively made mediations mandatory for many practice areas in Ontario.

For example, in automobile claims, section 258.1(1) and (2) of the *Insurance Act* RSO 1990, c. I.8 obligate an insurer to participate in mediation when requested. Recent costs decisions have penalized parties who refused to mediate (*Canfield v. Brockville Ontario Speedway*, 2018 ONSC 3288 at paras 41-57). Accordingly, mediation is effectively mandatory.

For these types of cases (usually personal injury or disability claims), the parties are generally represented by experienced counsel and can successfully navigate most files without undue intervention from the Court. It is appropriate to allow these parties to be exempt from early case management under the circumstances.

Timing of Mediations

Under the proposed regime, either the parties will agree to a timetable that includes mediation or the CMO will order the parties to participate in a mediation. The parties and / or the CMO will have the discretion to determine when the appropriate time would be to mediate during the life of the file. In some circumstances, the parties may agree to mediation prior to discovery. The parties or the CMO may also determine that certain discovery evidence or documentary production is required before the parties participate in a mediation. Under the proposed model there is discretion and flexibility. It is not a "one size fits all" approach.

Mediators / CMOs / Assignment of Files

If parties can agree on a private mediation, in most cases, they will be able to jointly choose a mediator who has the skills and expertise for the particular subject matter. If a mediation is ordered by the Court, the parties may find their mediator by consulting the mediator roster.

In our view, the mediator roster should provide particulars of a mediator's expertise so that parties can make an informed decision as to whom can best assist them in resolving their dispute.

FOLA advocates for an increase in fees for roster mediators. The fees for roster mediators have not been increased for many years and do not reflect the time required to effectively prepare and conduct a mediation. Increasing rates will likely attract a wider variety of mediators with greater levels of expertise and experience for inclusion on the roster.

As access to justice is an important issue, there should be a list of mediators who would be willing to provide pro bono services. Additionally, under the proposed model a CMO would have the ability to relieve parties from having to participate in a mediation. The ability of the parties to pay for such services would be one factor that a CMO could consider before ordering the parties to mediate. The CMO could also make orders with respect to how the parties should fund the costs of the mediation.

With respect to the assignment of files to CMOs, FOLA appreciates the scarcity of Court resources and the challenges of seizing judges and / or masters with files - particularly when these officials are required to rotate to different locations within a judicial region. In the proposed model, CMOs would have to be provided with sufficient time in their schedules to provide case management functions. It is also recognized that despite the increasing demands placed upon the Courts with the rising population, the appointment and complement of judges remains under the federal jurisdiction.

Effective case management and pre-trials require specialized skills. For the proposed model to work, it is important that judges and masters are appropriately trained for case management and that only appropriately trained judges and masters are assigned to manage cases up to and including pre-trials.

To the extent possible, FOLA advocates for the assignment of CMOs to files based on expertise in the subject matter of the case (e.g., construction law, personal injury, family). The notion is that if a CMO has more experience with a subject matter, their case management would be better received by the parties. It is important to FOLA that a balance be struck between assigning files to CMOs with expertise and having those CMOs have some appreciation of the local culture. To allow for this to occur, it makes sense to assign CMOs to files within a judicial region. Case management interventions can take place virtually in most circumstances.

In order to provide parties with the best opportunity to resolve their disputes without the need for trial, both mediators and CMOs should be properly educated with respect to dispute resolution. While CMOs will manage the litigation and try to assist the parties

in moving towards an efficient trial, they will also have a role in trying to resolve the dispute and should be trained to do so.

Summary

FOLA recognizes that greater efficiencies need to be created within our current system; however, imposing a mandatory mediation as a further step must be carefully considered in order to avoid creating a further expense to the litigants with very little benefit in some instances.

It is also recognized that within the civil litigation practice, mediation is regularly agreed to by parties to work towards resolution and avoid the expense and delay of proceeding to trial.

We believe there is value in having some form of case management where it is required; but, also recognize that this has the potential to create another burden upon a system whose judicial resources are already stretched to meet current demands.

Finally, although the current Covid-19 pandemic has forced the implementation of virtual platforms, we believe it is important to maintain some regional representation in this process so that justice can be done within the litigant's community.

We thank you for consulting with FOLA on the proposed changes to Ontario's justice system. Should you find additional consultation beneficial, we would be pleased to provide further input.

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