
Resolving financial disputes in the context of Australian and Canadian civil justice reform

Shahla Ali and Felicia Lee

In recent years, many countries have increased their use of alternative mechanisms of dispute resolution to resolve a growing number of financial and commercial disputes. This trend has been supported by civil justice reforms taking place throughout the world, including those within Australia, and Canada. Such reforms have aimed at encouraging cost-effective, expeditious and amicable case handling within the civil justice system. This article will analyse the increasing use of mediation to resolve financial and commercial disputes in countries undergoing civil justice reform, review the scope and nature of these reforms and examine lessons learned.

<DIV>INCREASING USE OF MEDIATION TO RESOLVE FINANCIAL DISPUTES

Since the mid 2000s, the use of mediation and other forms of alternative dispute resolution (ADR) to resolve a growing number of financial and commercial disputes has grown in many regions of the world including Australia and Canada. Support for such initiatives by civil justice reforms has resulted in growth in the number of such programs.

The Australian Financial Ombudsman Service recorded a 52% increase in disputes between January and the end of April 2009 compared to 2008.¹ In light of the recent financial crisis, the Australian Securities and Investment Commission (ASIC) has revised its early dispute resolution (EDR) scheme and increased the upper limit of compensation to AU\$500,000. It has also implemented other changes to improve consumer access such as giving EDR schemes the power to award interest in addition to compensation awards where appropriate.

A growing number of financial and commercial disputes are being resolved through the Canadian court-sponsored mediation programs. Through an extensive and ongoing process of evaluation, the Ontario *Rules of Civil Procedure* were revised to provide for the use of mediation within 180 days following the initiation of a lawsuit.

Given the growth in the number of cases brought to mediate financial disputes, it is necessary to investigate the wider judicial environment encouraging the use of mediation to resolve civil disputes. The following sections will examine recent reforms in Australia and Canada.

<DIV>REVIEW OF GLOBAL CIVIL JUSTICE REFORMS

Global civil justice reform activities in Australia and Canada have empowered courts to encourage the use of mediation in selected civil and commercial cases. This next section examines the background and development of such reforms.

<subdiv>Canada

Canada has a federal system in which jurisdiction is divided between the federal government and its various states.² Both the federal government and the state governments can make laws within their

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¹ Cooper J (ASIC), *Financial Services – the Changing Landscape*, Presented at the [Financial Ombudsman Service 2009 National Conference](#) (Melbourne, 11 June 2009).

² Department of Justice, Canada, *Canada's System of Justice*, <http://www.justice.gc.ca/eng/dept-min/pub/just/05.html> viewed April 2011.

assigned jurisdictions. Laws made by the state governments, however, only apply within the province's borders. Each province in Canada has its own *Rules of Civil Procedure*. For the purpose of this article, only the recent civil justice reform in the province of Ontario will be discussed.

In 1994, Ontario established a Civil Justice Review Task Force "to develop an overall strategy for the civil justice system in an effort to provide a speedier, more streamlined and more efficient structure which will maximize the utilization of public resources allocated to civil justice".³ A review of the civil justice system in Ontario was needed because civil litigation in Ontario was too expensive and too slow. The time to trial for a civil case was on average five to seven years. Further, the average legal costs borne by each party was as much as C\$38,000.⁴

After extensive consultation, the Task Force published its First Report in March 1995 and a Supplemental and Final Report in November 1996 in which the Task Force made many recommendations on how to improve the civil justice system in Ontario.⁵ As regards to the use of ADR, one of the recommendations was "that there be mandatory referral of all civil, non-family, cases to a three hour mediation session, to be held following the delivery of the first statement of defence, with a provision for 'opting-out' only upon leave of a Judge or Case Management Master".⁶

In January 1999, a new r 24.1 was introduced into Ontario's *Rules of Civil Procedure* on a trial basis. Rule 24.1 mandates early mediation for all non-family, civil case-managed cases filed in the Ontario Superior Court of Justice in Ottawa and Toronto. This mediation pilot project was to carry on for 23 months, and thereafter be evaluated on the following four major objectives of mandatory mediation under r 24.1: (1) does the rule improve the pace of litigation?; (2) does it reduce the costs to the participants in the litigation process?; (3) does it improve the quality of disposition outcomes?; and (4) does it improve the operation of the mediation and litigation process? The key overall finding of the evaluation exercise was that:

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In light of its demonstrated positive impact on the pace, costs and outcomes of litigation, Rule 24.1 must be generally regarded as a successful addition to the case management and dispute resolution mechanisms available through the Ontario Superior Court of Justice in both Toronto and Ottawa.⁷</blockquote>

In addition to the improvements identified in some specific areas, the evaluation recommended that: (1) the rule be extended for the current types of cases covered beyond 4 July 2001; (2) the rule be amended, or other procedural changes be made in line with the findings in this report, as part of a process of continuous improvement of r 24.1; and (3) the rule be extended to other civil cases in Toronto and across the province as part of the expansion of case management.⁸

As a result of this evaluation, r 24.1, entitled "Mandatory Mediation", was formally enacted; however, its introduction has had different impacts on different jurisdictions within Ontario.

³ Ontario Civil Justice Review, *First Report of the Civil Justice Review* (1995) pp 3-4; Ontario Civil Justice Review, *Supplemental Report and Final Report of the Civil Justice Review* (1996) p 2.

⁴ Beaudoin RN, "Special Topic: Alternative Dispute Resolution: University of Windsor Mediation Services 10th Anniversary: Remarks on the Civil Justice Review Task Force" (2006) 21 *Windsor Review of Legal and Social* 5.

⁵ Ontario Ministry of the Attorney General, *Supplemental and Final Report* (November, 1996), "Executive Summary", <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjr/suppreport/exesummary.asp> viewed April 2011.

⁶ Ontario Ministry of the Attorney General, *Supplemental and Final Report* (November, 1996), "List of Recommendations", <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjr/suppreport/recommendations.asp> viewed April 2011.

⁷ Hann RG and Baar C, *Evaluation of the Ontario Mandatory Mediation Program (Rule 24.1): Executive Summary and Recommendations* (2001) p 1. More specifically, the evaluation provides strong evidence that: "Mandatory mediation under the Rule has resulted in significant reductions in the time taken to dispose of cases. Mandatory mediation has resulted in decreased costs to the litigants. Mandatory mediation has resulted in a high proportion of cases (roughly 40% overall) being completely settled earlier in the litigation process – with other benefits being noted in many of the other cases that do not completely settle. In general, litigants and lawyers have expressed considerable satisfaction with the mediation process under Rule 24.1. Although there were at times variations from one type of case to another, these positive findings applied generally to all case types – and to cases in both Ottawa and Toronto."

⁸ *iRiver Hong Kong Ltd v Thakral Corp (HK) Ltd* [2008] 4 HKLRD 1000.

In Toronto, the introduction of mandatory mediation caused undesirable effects in the first few years after implementation. As the Hon Warren K Winkler, Chief Justice of Ontario, commented:

<blockquote>

the case management rules prescribed extremely short deadlines for conducting the mediation. However, in practice the parties would frequently not communicate or cooperate in scheduling the mediation session ... Not surprisingly, the vast majority of these forced early mediations did not result in settlement. The upshot of all of this was that the mediation became an unavoidable, costly and useless obstacle in the path of the party who wanted to move the lawsuit forward (normally the plaintiff).⁹</blockquote>

A Case Management Implementation Review Committee was established by the Toronto Regional Senior Justice to review the results of the mandatory mediation program in Toronto. The Committee suggested that mediation should only take place “when litigants have sufficient information to make an informed decision as to a fair resolution of the litigation and before legal costs preclude early and fair resolution”.¹⁰ The Committee also published statistics relating to the use of mediation, which indicated that the rate for partially settled cases dropped from about 20% to about 7% in 2003. Furthermore, the use of 60-day consent postponements of mediation increased from 31% in 1999 to about 54% in 2003 and orders for extensions increased from about 4% in 1999 to 40% in 2003.

As a result of the report published by the Committee and after extensive consultations with lawyers, judges, masters, mediators and court administrators both inside and outside of Toronto, the Superior Court of Justice of Toronto issued a new Practice Direction. This Practice Direction came into force on 31 December 2004 and provided that:

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Mediation continues to be mandatory for all cases but the timeframes for conducting them have been significantly extended, reflecting the adage that mediation is about “timing, timing, timing”. Parties are expected to conduct their mediations at the earliest stage in the proceeding at which it is likely to be effective, and in any event, no later than 90 days after the action is set down for trial by any party.¹¹</blockquote>

After the implementation of the Practice Direction, the success rate of mandatory mediations had almost doubled.¹²

It should be noted, however, that the experience in Ottawa was quite different from that of Toronto. Master Beaudoin of the Superior Court of Justice of Ottawa stated in March 2006 that:

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the implementation of these measures [including mandatory referral to mediation] has transformed our court from one with the worst delays to one of the most efficient courts in the province... Referral to mediation has consistently resulted in the settlement of 42.5% of our cases at the mediation session. If I take into account the “mediation factor,” 50% of our cases are resolved between the time of filing of the first defence and the settlement conference. While these settlement rates are important, they should not obscure an even more significant result. Whereas fewer than 10% of the litigants had any opportunity to participate in the dispute resolution process in the past,

⁹ The Hon WK Winkler “Civil Justice Reform – The Toronto Experience” (2007) 39(1) *Ottawa Law Review* 99, based on a speech delivered at the University of Ottawa’s Faculty of Law (12 September 2007). When referring to “short deadlines”, his Honour meant the old r 24.1.09 which provided that “A mediation session shall take place within 90 days after the first defence has been filed, unless the court orders otherwise”.

¹⁰ Goldschmid RM, *Major Themes of Civil Justice Reform*, Discussion Paper (January, 2006), http://www.bcjusticereview.org/working_groups/civil_justice/cjrwg_paper_01_18_06.pdf viewed April 2011, pp 16-17.

¹¹ The Hon Chief Justice WK Winkler, *Evaluation of Civil Case Management in the Toronto Region – A Report on the Implementation of the Toronto Practice Direction and Rule 78* (February, 2008), <http://www.ontariocourts.on.ca/coa/en/ps/reports/rule78.pdf> viewed April 2011.

¹² Winkler, n 9 at 99.

now, nearly 100% of all parties to a defended dispute have an opportunity to participate in a 3 hour mediation session where they do, in fact, get to tell their story.¹³

After another round of civil justice reforms in December 2008, the time limit for conducting mediation was formally amended¹⁴ – r 24.1.09 of the Ontario *Rules of Civil Procedure* now provides that “a mediation session shall take place within 180 days after the first defence has been filed, unless the court orders otherwise”. Further, there is no longer a restriction on the time allowed to postpone a mediation session by consent of the parties, whereas there used to be a time limit of 60 days. It remains to be seen whether these reforms will further increase the success rate of mediations in Ontario.

Australia

Australia, like Canada, has a federal system in which each State has its own independent court system. For this discussion, only the civil justice reform in New South Wales will be discussed. It is worth noting that New South Wales is one of the jurisdictions that has the most developed systems of dispute settlement.¹⁵

In October 1993, the Attorney-General and the Minister for Justice of Australia appointed the Access to Justice Advisory Committee to “make recommendations for reform of the administration of the Commonwealth justice and legal system in order to enhance access to justice and render the system fairer, more efficient and more effective”.¹⁶ The appointment was in response to a “crisis of confidence: in the legal system.”¹⁷ The Committee made a number of recommendations on how to improve access to justice, including encouraging the use of ADR methods.

Starting in late 1994, there were changes in the legislation in New South Wales to encourage the use of ADR methods. In November 1994, the *Courts Legislation (Mediation and Evaluation) Amendment Act 1994* (NSW) introduced Pt 7B into the *Supreme Court Act 1970* (NSW). The case of *Idoport Pty Ltd v National Australia Bank Ltd* contains a concise summary the reasons for this addition:

<blockquote>

The 1994 amendments introducing Part 7B to the Act reflected the Government’s growing interest in alternative dispute resolution as a means to improving legal services and providing greater access to justice ... A contrast was also drawn between the speedy and effective “win-win” outcome that is produced through mediation; and the “win-lose” situation that results from the lengthy litigation process. Furthermore, mediation encourages settlement at an earlier stage of the procedure, precluding the investment of hefty legal costs which would otherwise arise. Mediation was also said to allow the relationship between the parties to remain intact following the resolution of the matter.¹⁸

¹³ Beaudoin, n 4.

¹⁴ The new r 24.1.09 came into effect on 1 January 2010.

¹⁵ National Australian Dispute Resolution Advisory Council (NADRAC), *ADR Statistics* (2003), http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/Publications_PublicationsbyDate_ADRStatistics2003 viewed April 2011.

¹⁶ Parliamentary Research Service, *Access to Justice – An Action Plan* (1995), <http://www.aph.gov.au/library/pubs/rn/1994-95/95rn30.pdf> viewed April 2011.

¹⁷ As the Minister for Justice, the Hon Duncan Kerr MP, stated in his address to the Annual Regional Conference of the Law Society of New South Wales on 28 October 1993, there were problems relating to the legal profession’s work practices and the costs of using the courts in Australia.

¹⁸ *Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 427 at [17] citing New South Wales Legislative Council, *Parliamentary Debates*, Courts Legislation (Mediation and Evaluation) Amendment Bill, Second Reading Speech, the Hon RJ Webster (4 May 1994).

It was against this background that court-referred mediation was introduced into the *Supreme Court Act 1970*.¹⁹ Following the addition of Pt 7B, the Supreme Court of New South Wales was able to refer a matter to mediation if it considered the circumstances appropriate and the parties consented to the referral and agreed to the mediator. Attendance at and participation in mediation sessions were voluntary, and parties could withdraw at any time (ss 110K(1) and 110L).

Six years after the introduction of court-referred mediation, there were further changes to the Act. The old s 110K was replaced by the following provision,

<blockquote>

(1) If it considers the circumstances appropriate, the Court may, by order, refer any proceedings, or part of any proceedings, before it (other than any or part of any criminal proceedings) for mediation or neutral evaluation, and may do so either *with or without the consent of the parties* to the proceedings concerned.

(2) The mediation or neutral evaluation is to be undertaken by a mediator or evaluator agreed to by the parties or, if the parties cannot agree, by a mediator or evaluator appointed by the Court, who (in either case) may, but need not, be a person whose name is on a list compiled under this Part.²⁰

Hence, there are two forms of mediation in New South Wales: court-annexed mediation and private mediation.²¹ As Einstein J stated in *Idoport Pty Ltd*:

<blockquote>

The legislative introduction of mandatory mediation in 2000 appears to have been primarily motivated by the perceived efficiencies associated with ADR ... The amendments raised some debate surrounding the appropriateness of mandatory mediation. Some view this notion as a contradiction in terms, opposing the culture of ADR which generally encompasses a voluntary, consensual process. It is important to note however, that whilst parties may be compelled to attend mediation sessions, they are not forced to settle and may continue with litigation without penalty. Furthermore, Part 7B requires that referrals follow a screening process by the Court, and that mediation sessions are conducted by qualified and experienced mediators.²²</blockquote>

It should be noted that the courts in New South Wales adopted different approaches in deciding whether to order mediation. In *Morrow v Chinadotcom Corp*,²³ Barrett J refused to order mediation on the ground that if a party is unwilling to participate, the process would likely be a time and money consuming undertaking. In this case, one of the parties sought an order for compulsory mediation pursuant to s 110K of the *Supreme Court Act 1970*²⁴ when the other party refused to participate in mediation because they believed the matter to be urgent and best dealt with by the ordinary processes of the court.

Barrett J began his analysis by endorsing what Perry J stated in *Hopcroft v Olsen*:

<blockquote>

Be that as it may, it does not appear to me that precedent is of much assistance in determining the present application. Every case involves different circumstances. What might be an appropriate procedure in one case, may clearly be inappropriate in another.²⁵</blockquote>

¹⁹ Similar provisions providing for court-referred mediation were also introduced into the *Compensation Court Act 1984* (NSW), the *District Court Act 1973* (NSW), the *Industrial Relations Act 1991* (NSW), the *Land and Environment Court Act 1979* (NSW) and the *Local Courts (Civil Claims) Act 1970* (NSW).

²⁰ Section 110K of the *Supreme Court Act 1970* (NSW) (emphasis added).

²¹ Supreme Court of New South Wales, *Mediation – Supreme Court: Lawlink NSW*, http://www.lawlink.nsw.gov.au/lawlink/supreme_court/l1_sc.nsf/pages/SCO_mediation#4 viewed April 2011. It should be noted that for court-annexed mediation, there is no charge for the mediation or the use of rooms, whereas for private mediation, there are usually fees for the mediator and the use of rooms.

²² *Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 427 at [21], [24].

²³ *Morrow v Chinadotcom Corp* [2001] NSWSC 209.

²⁴ The wording of s 110K of the *Supreme Court Act 1970* (NSW) is identical to s 26 of the *Civil Procedure Act 2005* (NSW).

²⁵ *Hopcroft v Olsen* [1998] SASC 7009 cited in *Morrow v Chinadotcom Corp* [2001] NSWSC 209 at [39].

He then looked at the particular circumstances of the present case and concluded that:

<blockquote>

the clearly stated preference of one party to continue with the litigation which that party sees as the most appropriate means of dispute resolution must cause a Court to think very carefully before compelling what, on the face of things, may well turn out to be an exercise in futility attended by delay and expense.²⁶</blockquote>

In consequence, Barrett J dismissed the applicant's application for court-ordered mediation.

In *Idoport Pty Ltd v National Australia Bank Ltd*,²⁷ however, the Supreme Court of New South Wales ordered mediation despite the objection of one of the parties. In this case, the court held that because of the statutory requirement to negotiate in good faith during mediation and the fact that the hearing need not be disrupted, the proceedings should be sent to mediation. Further, the public interest in promoting mediation outweighed the objections by one of the parties. Einstein J, in deciding whether to order mediation, considered different materials, including Pt 1, r 3 of the *Supreme Court Rules*, the provisions of Pt 7B of the *Supreme Court Act*, Practice Note 118, and the extra-curial statements of the Chief Justice.²⁸ In particular, Einstein J, when referring to the extra-curial statements of the Chief Justice, placed much emphasis on the following statements:

<blockquote>

No doubt it is true to say that at least some people, perhaps many people, compelled to mediate will not approach the process in a frame of mind likely to lead to a successful mediation. There is, however, a substantial body of opinion – albeit not unanimous – that some persons who do not agree to mediate, or who express a reluctance to do so, nevertheless participate in the process often leading to a successful resolution of the dispute ... if directed to do so by a Judge ... There is a category of disputants who are reluctant starters, but who become willing participants. It is to that category that the new power is directed.²⁹</blockquote>

The development of mediation legislation in New South Wales still continued and further changes were made in 2005. Schedule 5 of the *Civil Procedure Act 2005* (NSW) omitted provisions in the *Supreme Court Act 1970* and the *District Court Act 1973* (NSW) relating to mediation and replaced them with s 26 of the *Civil Procedure Act 2005*, which is identical to s 110K of the *Supreme Court Act 1970* cited above and s 164A of the *District Court Act 1973*.

The *Civil Procedure Act 2005*, which applies to all civil proceedings in the Supreme, District and Local Courts and the Dust Diseases Tribunal, contains relatively comprehensive provisions on mediation. It should first be noted that, unlike many other countries, this State Act provides in s 25 a definition of mediation as “a structured negotiation process in which the mediator, as a neutral and independent party, assists the parties to a dispute to achieve their own resolution of the dispute”.

The Act expressly provides in s 27 that there is a duty on the parties to participate in court-annexed mediation in good faith. Further, there are provisions regarding the costs of court-annexed mediation. Section 28 states that:

<blockquote>

The costs of mediation, including the costs payable to the mediator, are payable:

- (a) if the court makes an order as to the payment of those costs, by one or more of the parties in such manner as the order may specify, or
- (b) in any other case, by the parties in such proportions as they may agree among themselves.</blockquote>

²⁶ *Morrow v Chinadotcom Corp* [2001] NSWSC 209 at [44].

²⁷ *Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 427.

²⁸ Notably in a speech presented to the LEADR Dinner (9 November 2000) and his restatement of that speech in the *Law Society Journal: The Hon JJ Spigelman, “Mediation and the Court”* (2001) 39(2) LSJ 63.

²⁹ Spigelman, n 28 at 63.

This is an important provision; because the court may order mediation without the consent of the parties, it is important to have clear guidelines on how the costs of such court-ordered mediation are payable by the parties.

The Court of Appeal of the Supreme Court of New South Wales recently held in *Newcastle City Council v Wieland*³⁰ that the costs of the proceedings should include the costs of mediation. In this case, the mediation between the parties was ordered by the court in accordance with s 26 of the *Civil Procedure Act 2005*. As such, it was not possible on the facts of the case to contend that the mediation did not form part of the court's procedures. Further, the court considered that there were compelling policy reasons to support that the costs of mediation should be included in the costs of the proceedings.³¹ However, the court also noted that:

there may be cases where, even though the costs of the proceedings will generally include the costs of a court-ordered mediation under Pt 4 of the *Civil Procedure Act*, a pre-existing agreement so strongly conveys that the costs of the mediation are to be treated entirely separately from other costs of the proceedings as to justify a conclusion that a later consent order (or possibly even a judge-impose order where the judge knows of the pre-existing agreement) concerning the costs of the proceedings was not intended to include the costs of the mediation.³²

<DIV>LESSONS LEARNED

The use of mediation as an ADR method to resolve civil and commercial cases has only been recently introduced and promoted in a number of jurisdictions. It is too early to evaluate the results of the reforms. It remains to be seen whether mediation will be more widely used by parties to a dispute (in particular commercial and financial disputes) and whether mediation will increase the settlement rate or improve the access of the civil justice system.

It will be important to monitor the implementation of these mediation-promoting initiatives and to evaluate the results of such initiatives from time to time. Ontario is an example that demonstrated how regular evaluation can help to fine-tune mediation rules in order to maximise their effectiveness. Without the establishment of the Case Management Implementation Review Committee in Toronto, it would not be apparent that the mandatory mediation program in Toronto was in fact non-effective, and that the time limit for conducting mediation was not long enough.

It is also important to keep track of the results of such initiatives. A useful evaluation model developed to evaluate the 23-month mediation pilot project in Ontario can be examined as a useful framework. Efforts should be made to collect data for evaluating whether the use of mediation has improved the pace of litigation, reduced the costs borne by the parties, improved the quality of disposition outcomes and improved the operation of the mediation and litigation process.

Besides the importance of regularly evaluating the impact of mediation-promoting initiatives, another lesson to be learnt from the countries discussed is that it takes time to promote the use of mediation. For example, when court-referred mediation was first introduced in New South Wales in 1994, courts were only able to refer a case to mediation if the parties consented to the referral. It was only after the perceived efficiencies of mediation were known to the general public that mandatory mediation (in a sense that mediation can be ordered without the consent of the parties) was introduced to New South Wales six years later.

Progressively developing mediation-promoting initiatives appears to be the more effective option. It should be remembered that encouraging the use of mediation to resolve disputes does not require compelling parties to opt for mediation. One of the overarching observations of the civil justice reform in Toronto was that "mediation has become an integral part of our justice system. Yet, not every type of case is amenable to mediation".³³ Ultimately, the aim of mediation is to assist

³⁰ *Newcastle City Council v Wieland* (2009) 74 NSWLR 173.

³¹ The Court of Appeal referred to the cases of *Higgins v Nicol (No 2)* (1972) 21 FLR 34 and *Charlick Trading Pty Ltd v Australian National Railways Commission* [2001] FCA 629.

³² *Newcastle City Council v Wieland* (2009) 74 NSWLR 173 at [4] (Hodgson JA).

³³ Winkler, n 11.

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parties to civil, commercial and financial disputes to arrive at just and equitable settlements, and not just settlement.