NOTICE TO MEDIATE (FAMILY)

CONSULTATION PAPER

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1. Introduction

In consultation with the Supreme Court judiciary, CBABC, the Law Society of BC, the Trial Lawyers Association, and other groups with an interest in civil justice reform, the Dispute Resolution Office (DRO) has, since 1998, successfully implemented three Notice to Mediate regulations[1]:

The Notice to Mediate process is unique to British Columbia. Two of its important features are:

- It is party driven; i.e., it allows any party to a specific action to make an informed assessment that mediation would be productive and then requires the other parties to attend a mediation session; and
- parties are compelled to participate in a single mediation session, but they are not compelled to settle.

During consultation on the Notice to Mediate (General) Regulation, many people suggested the process would be very useful in family matters. In fact, the CBABC Provincial Council passed a resolution supporting the expansion of the Notice to Mediate to "appropriate family matters."

The DRO has been exploring the viability of expanding the Notice to Mediate process to family matters in the Supreme Court. This paper explores some of the issues particular to a Notice to Mediate (Family) process and invites discussion and comment from the Family Justice Reform Working Group.

[1] Notice to Mediate Regulation (B.C. Reg. 127/98), April 14, 1998. (*Insurance Motor Vehicle Act*); Notice to Mediate (Residential Construction) Regulation (B.C. Reg. 152/99), May 29, 1999. (*Homeowner Protection Act*); Notice to Mediate (General) Regulation (B.C. Reg. 4/01), February 15, 2001. (*Law and Equity Act*)

2. Issues particular to a Notice to Mediate (Family)

Expanding the Notice to Mediate process to family law cases in the Supreme Court raises a number of issues specific to family law. The following seven issues have been identified:

- The exact nature of the dispute resolution process to which people would be referred.
- Timing of the mediation session.
- What kind of exemptions might apply to the Notice to Mediate (Family).
- How mediators would be chosen.
- How mediation services could be provided to people of modest means.
- Access to independent legal advice (ILA).
- How a Notice to Mediate (Family) could be brought into force.

2.1 The dispute resolution process

Discussion

While this paper is framed as a consideration of a Notice to Mediate for family matters[2], the civil Notice to Mediate model (direct mandatory referral to a face-to-face mediation) may or may not be the best model for family cases. There are a variety of models across Canada, and many in the United States, that promote early settlement of family law cases. For example:

- In Quebec's Superior Family Court, parties must attend an information session about mediation before a contested case involving children will be heard by a judge and parties may, by consent, try mediation.
- Attending a parent education session is mandatory for contested cases in Alberta's Court of Queen's Bench, and anyone who wishes to make an application to Provincial Court with respect to child custody, access or guardianship is automatically referred to the Court Counsellor Program. Also, in Alberta since 2001 a Case Flow Coordinator has authority to refer parties to parent education, to mediation, or directly to court.
- In Saskatchewan, if parties elect to try mediation, they must first attend an information session.

[2] For the purposes of this discussion paper "family matters" captured by the Notice to Mediate will include all matters that are within the purview of either the *Family Relations Act* or the *Divorce Act* namely: custody, guardianship and access of and to children; child and spousal maintenance; division of family assets and debts; enforcement and variation of agreements or orders relating to family matters; other miscellaneous issues.

- In BC, the family bar and family litigants have some experience with mandatory processes aimed at early settlement including mandatory referral to information sessions with Family Justice Counsellors; mandatory Parenting After Separation programs and mandatory referral to judicial case conferences.

However, mandatory referral directly to mediation does not exist in any Canadian jurisdiction. More commonly, such initiatives are designed to provide information about mediation and other services available in the community, and to encourage people to try other dispute resolution options, when appropriate to do so. In B.C. we have been compelling people to attend information sessions (Parenting After Separation) for some time, and quite successfully.

Options: There are several possible models that could be used:

1. Mandatory information session, followed by an optional mediation session - By serving a Notice to Mediate, a party could compel other parties to attend an information session about mediation, while subsequent participation in mediation would be voluntary and optional. This is similar to the approach taken in other Canadian jurisdictions and under the B.C. Provincial Court Rules, where people are referred to information sessions to learn about mediation specifically, other dispute resolution options, and the effects of separation/divorce generally. However, uptake of such an option is certain to be low. Lawyers and litigants may see little value in compelling the other party to attend an information session. Experience to date shows that to be truly effective, referral to a session that provides only information must be court mandated if it is to reach a significant number of people.

2. Party driven mandatory mediation - A party served with a Notice to Mediate could be required to participate in a single mediation session before they could proceed to court. Some exemptions might apply. While this approach is consistent with Notice to Mediate processes in non-family matters it does not build in any mechanism for assessing or screening cases to ensure that mediation is safe or appropriate. Many people express serious concerns about compelling parties to family mediation in cases that might involve violence, abuse or significant power imbalance between the parties. Some method of assessing or screening for these concerns should be in place for potential family mediation cases. It might be argued that screening for abuse or violence is so well recognised as a necessary element of family mediator training, that these concerns could be addressed by requiring that only trained and approved

mediators may mediate when a Notice to Mediate is served. Two organizations, Family Mediation Canada and the B.C. Mediator Roster Society, presently require, as a condition of membership, that family mediators employ adequate assessment procedures.

3. Mediation is mandatory following referral by the mediator from an initial assessment - This would be a two-step process where, after parties first learn about mediation, a highly trained mediator assesses their case to determine if it is appropriate to proceed to the single mediation session. Jurisdictions, such as some California counties, have this two-step process to ensure only appropriate cases are referred to the single mediation session. A two-step process ensures parties are not brought together until an assessment about safety has taken place. Experience and research suggest that preparatory sessions such as the one being proposed here result in faster and effective mediation sessions. In some circumstances parties could be given the ability to bypass the first step.

4. Mediation only with counsel - The process could be structured so that the Notice to Mediate, once served, has the effect of requiring the spouses to mediate, but providing that it may only be served on a party who is represented by legal counsel. It would then be assumed that counsel would, in effect, screen the case by assessing the circumstances to determine whether mediation would a safe and fair forum for the client. Options available after such an assessment is made would include encouraging the client to attend mediation, attending mediation with the client or applying to the court to have the Notice set aside. This has the obvious disadvantage of limiting the number of cases to which the Notice to Mediate (Family) would apply. Another disadvantage is that studies have shown that lawyers may not routinely screen for violence, as they may not have the skills or inclination to do so.[3]

Working Recommendation: It may be viable to combine some of these options. For example, the process could be structured so that when a Notice is served on a represented party it operates as per option #4 above, and if served on an unrepresented party it operates as per option #3 above. In each case continued attendance at mediation after attending a single session would be voluntary.

[3] Neilson, L., *Spousal Abuse, Children and the Legal System: Final Report for Canadian Bar Association, Law for the Futures Fund*, March, 2001 at 222.unb.ca/art/CFVR/spousalabuse.pdf; Zutter, Deb, *Mediation in the Shadow of Abuse*, 20 C.F.L.Q., 65.

2.2 Timing of the mediation session

Discussion

Mediation sessions triggered by delivery of a Notice to Mediate must "fit" within the Supreme Court's family process. In particular, the Notice must not interfere with the timing and conduct of a Judicial Case Conference (JCC). It is suggested that a Notice to Mediate process would in fact complement Rule 60E.

The purpose of the JCC is to assist the parties in coming to an agreement in whole or in part in a just, timely and cost-efficient manner. Settlement discussion at a JCC can take place only with the consent of the parties. If the parties cannot settle, the JCC will focus on case management matters. In order to promote settlement, the judge or master will help parties to clarify the issues in agreement or in dispute and to consider non-trial settlement options (e.g., settlement discussions with legal counsel, mediation, a judicial settlement conference). Judges may direct parties to attend a Parenting After Separation session. Case management tools include reserving pre-trial and trial dates and making orders scheduling examinations for discovery, directing the exchange of expert reports, imposing time limits on interlocutory applications and amending or closing pleadings.

The trigger for scheduling a JCC is the first application for an interlocutory order. The Notice to Mediate process and the JCC could be complementary. For example:

a) If a Notice is delivered after an action has commenced, but before a motion is filed for an interim order, and the parties settle, a JCC would not be required.
b) If a Notice is delivered after an action has commenced, but before a motion is filed for an interim order, and the parties do not settle, the JCC is perhaps more likely to focus entirely on case management.

Based on the experience in this and other jurisdictions we can confidently expect that the majority, possibly a substantial majority, of cases will resolve at mediation. By option b) above, parties and their legal counsel might attend more than one mandatory event, but the focus of the events would be quite different – one on settlement, one on case management. Both events assist the parties in coming to an agreement in a just, timely and cost-efficient manner. Even an

"unsuccessful" mediation is very likely to make the JCC more productive insofar as the parties will know their case better and will certainly have clarified, and probably narrowed, the outstanding issues. Further, the judge's capacity to provide an evaluation of the case or to comment on the possible outcome in a way that the mediator usually cannot, will certainly resolve some issues that do not resolve in mediation.

Note that the existing civil Notice to Mediate Regulations allow parties to apply to the courts for postponements when they have a legitimate reasons to delay or defer the mediation.

Working Recommendation: Allow the Notice to be delivered any time after an action has been commenced and no later than a specified number of days before the date set for a trial. The Notice regulation or rule will address process issues necessary to convene a mediation session.

2.3 What kind of exemptions might apply to the Notice to Mediate (Family)

Discussion

Not all cases will be appropriate for mediation. Earlier in this paper we recommended that highly trained and experienced mediators meet separately with parties before a mediation session is scheduled to determine if the case is appropriate for mediation. Those cases which are assessed as not appropriate would immediately be referred back to the court stream. Those cases which are assessed as being appropriate would proceed to mediation.

However, experience in BC and other jurisdictions where parties are compelled to participate in a dispute resolution forum or attend an information session before proceeding to court suggests that it is desirable (and appropriate) to create early opportunities for exemptions. Exemptions can be offered for pragmatic reasons, such as the fact that the parties have already participated in a dispute resolution forum or, in the context of mandatory attendance of a Parenting After Separation session, a session is not located in the area where a party resides. Additional exemptions can take into account other factors, such as the parties' personal safety. The question of violence is particularly critical in the family context. All three Notice to Mediate regulations provide for both automatic and judicially determined exemptions. In some jurisdictions, government, court or judicial employees make decisions when exemptions are requested. In others, exemption is only by way of judicial discretion.

Working Recommendation: A Notice to Mediate (Family) process include automatic exemptions such as:

- all parties have already tried mediation or another collaborative process; or
- a party need not attend if all parties consent in writing.

The process also address exemptions for which applicants must apply to the court. These might include:

- the court considers participation to be impractical or unfair;
- the court considers the case to be urgent and exceptional; or
- the court considers it appropriate to provide an exemption in the circumstances.

2.4 How mediators would be chosen

Discussion

In 1984 the Law Society of British Columbia became the first law society in Canada to recognize the practice of family law mediation and to regulate that practice. To be designated as a Family Law Mediator, lawyers must have practiced family law for at least three years and completed an approved 40 hour training program.

Increased public support for and public use of mediation resulted in the establishment of the British Columbia Mediator Roster Society in 1998. Litigants, lawyers and judges can confidently and easily access information about mediators on the Society's roster who, at a minimum, meet the society's standards for training and experience and have agreed to follow a code of conduct. These standards were designed to support mediation of civil, non-family, cases in the Supreme Court, including personal injury cases arising from the Notice to Mediate process.

In 2002, the Society established a Family Roster of mediators. The training and experience standards for this roster take into account factors particular to family cases, such as enhanced concerns about domestic violence and power imbalance. For example, mediators must have 80 hours of mediation training, including 24 hours of which are specifically on issues related to family dynamics in separation and divorce, including power imbalances and abuse. Family mediators on the Roster have training sufficient to screen and assess the appropriateness of family mediation.

Mediators who have been accredited by Family Mediation Canada (FMC) are automatically eligible for placement on the Roster Society's Family Roster. FMC's standards and accreditation process result from several years of research and testing and provide a benchmark for family mediation practitioners.

Keeping in mind that parties in family matters in the Supreme Court may not be represented by legal counsel, it is important to ensure that cases arising from a Notice to Mediate process be referred to highly qualified and experienced mediators.

Working Recommendation: We propose that, in cases where one or both parties are unrepresented, a mediator must be chosen from the BC Mediator Roster Society's Family Roster. Where both parties are represented by legal counsel, they may choose any mediator they wish. In both instances, when the parties cannot agree upon the selection of a mediator, the BC Mediator Roster Society will make a selection using a procedure set out in the regulation or rule.

2.5 How mediation services could be provided to people of modest means.

Discussion

Current Notice to Mediate regulations state that mediation costs will be shared equally by the parties, unless the parties consent to some other formula. This is consistent with mediation programs in some other jurisdictions. In some jurisdictions mediation services are provided at no cost to the parties, or the cost of mediation is adjusted according to income. This can be the case when the court or a government agency allocates funding for mediation services, perhaps by way of a surcharge on marriage certificates, or where mediators volunteer their services.

In BC, mediators set their own fees. The cost of mediation is difficult to estimate, depending as it does on the number of issues in dispute and the complexity of the issues, the range of services the parties ask the mediator to deliver, the experience and seniority of the mediator, and whether parties wish lawyers to be present. Private sector mediators typically charge hourly rates ranging from $100 to $250. Only a few mediators charge outside this range. The Notice to Mediate Regulation (Motor Vehicle) obliges parties to attend a three hour mediation

session; such a requirement typically limits the total cost to be shared by the parties to about $750.

Like BC's Notice to Mediate regulations, regulations governing Ontario's civil mandatory mediation program specify that the cost of the mediation must be paid equally by the parties, unless some other basis for payment is negotiated by the parties. Ontario mediator fees for the first three hours of the mediation are set by regulation. Fees are not to exceed $600 for a 2 party mediation of 3 hours or $825 for a mediation involving 5 parties or more.

However, research and experience suggest that resolving disputes through mediation is more economical than litigation. Moreover, even if mediation resolves some, but not all issues in dispute, and a case does proceed to court, there are likely to be fewer and/or shorter court appearances because the issues will have been narrowed significantly. In this way, although mediation may appear to be an additional cost, it results in either conclusion or simplification of the dispute and thus reduces cost.

The evaluation of the Mandatory Parenting After Separation (PAS) project supports this conclusion. In the pilot project, fewer cases proceeded to court when parents had attended a PAS session, and those cases that did proceed to court had fewer appearances. Similarly, the interim evaluation report of a B.C. child protection mediation pilot project found strong support for mediation from legal counsel because of significant savings of court time. An evaluation of the Notice to Mediate Regulation for personal injury cases found that about 75% of cases settled at mediation and 10% of the cases referred to mediation settled after delivery of a Notice but before the mediation session. As well, of the cases that did not settle at mediation, 64% of lawyers involved felt that the mediation was still worthwhile because it narrowed issues and gave them much more information about their case.

Despite the evidence regarding cost savings, there are many family litigants for whom the cost of mediation will be a burden. Some consideration must be given to providing mediation services at little or no cost to persons of modest means. One suggestion is to encourage or require Family Roster members to provide some mediation services at no cost, perhaps as a prerequisite to joining the roster, or as an obligation after a fixed number of mediations have been carried out. In Ontario, for example, mediators on the civil roster provide 12 hours of mediation per year free of charge for those who cannot afford to pay.

Working Recommendation: That parties pay the cost of mediation equally, unless there is agreement to do otherwise, and that the ministry continue to explore opportunities to provide mediation services at little or no cost to persons of modest means.

2.6 Access to independent legal advice (ILA).

Discussion

The CBABC's Equality Committee has expressed concerns about unrepresented parties participating in mediation. The Equality Committee has stressed the importance of parties being informed of their legal rights and options, in advance of and during the mediation process. In particular, it recommended that the victim of an abusive relationship should only proceed with mediation with legal counsel present, who could ensure an appropriate, safe and fair forum for their client.

However, the private practitioners (lawyer/mediators) we have consulted to date do not support restricting a Notice to Mediate (Family) process to cases where both parties are represented by counsel, on the basis that this would deny mediation opportunities to people who cannot hire legal counsel but require assistance to resolve their dispute. Such a policy would exclude an increasing number of litigants from using the Notice, given the growing trend in unrepresented litigants in the Supreme Court.

Concerns about any unrepresented parties attending mediation could be addressed, to some extent, by a process which included an assessment of the suitability of the case for mediation. While cases involving violence would not automatically be excluded from mediation, where violence or other factors affecting the ability of the parties to reach a fair resolution were present, the mediator would not approve the use of mediation.

Working Recommendation: That some form of Notice to Mediate (Family) process be available to both represented and unrepresented litigants.

3. Conclusion

This consultation paper describes some key issues, explores some options to address these issues, and recommends courses of action. These are called "working recommendations" because further exploration of these issues may suggest refinements or other options to consider. In this context, the Dispute Resolution Office invites comments on any of the matters raised in this paper, as well as any related issues that may come to mind.

We invite your comments.

Please send them to the Dispute Resolution Office at:

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