Report of the Evaluation Committee

for the

Mandatory Mediation Rule Pilot Project

Evaluation Committee of the Ontario Civil Rules Committee
March 12, 2001

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A. Introduction

When the Civil Rules Committee enacted Rule 24.1 (Mandatory Mediation), it included a provision that the Rule would sunset on July 4, 2001 and it constituted an Evaluation Committee of members of the bench, bar, mediation community, and the public to oversee an evaluation of the Rule. The evaluation was to be in accordance with an undertaking given by the former Attorney General Charles Harnick for his 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*." The role of the Evaluation Committee was to oversee this evaluation and to ensure that the Civil Rules Committee has adequate information to make a decision about the future of the mandatory mediation rule. This is the report of the Evaluation Committee to the Civil Rules Committee.

The major conclusions and recommendations of the Evaluation Committee Report are that: (1) Rule 24.1 should be made a permanent feature of the *Rules of Civil Procedure;* and (2) the Rule should be amended to allow greater flexibility about the time of the mediation.

The members of the Evaluation Committee are: Justice Robert Blair, Superior Court; Bryan A. Carroll, Borden Ladner Gervais LLP; Jonathan Fidler, Malach & Fidler; Stanley G. Fisher, Heenan, Blaikie; Jerry Friedman; Anne E. Grant, Mediated Solutions Incorporated; Peter H. Griffin, Lenczner, Slaght, Royce, Smith, Griffin; Carolyn J. Horkins, Smith, Lyons; Andrew S. Mathers; James E. McNamara, Marcus, Parnega & McNamara; Ann Merritt, Ministry of the Attorney General; Paul F. Morrison, McCarthy, Tétrault; John P. O'Toole, Gowling, Strathy & Henderson; Debra Paulseth, Toronto Regional Director Courts Administration; Paul Perell, Weir & Foulds (chair); Giovanna Roccamo, Nelligan O'Brien Payne; Felicia Smith, The Law Society of Upper Canada; and Garry D. Watson, Osgoode Hall Law School. The Evaluation Committee was assisted by Susan Charendoff, Senior Policy Advisor, Ministry of the Attorney General; and, Heather Daley, Local Mediation Co-ordinator, Toronto, Ministry of the Attorney General.

The Ministry of the Attorney General retained Robert Hann and Associates Limited to prepare the independent evaluation. The evaluation is entitled *Evaluation of the Ontario Mediation Program (Rule 24.1): Final Report - The First 23 Months*. It was submitted by Robert G. Hann and Carl Baar with Lee Axon, Susan Binnie and Fred Zemans to the Evaluation Committee. In this report, we will refer to the evaluator's final report simply as the *Evaluator's Report*.

In the *Evaluator's Report*, the evaluators acknowledge and express thanks to an impressive group of members of the bench, bar, mediation community, Ministry, and public who contributed to the very considerable effort made to evaluate both Rule 24.1 and also the Ministry's mandatory mediation program and its infrastructure. The Evaluation Committee echoes this gratitude and adds its thanks to Mr. Hann, Professor Baar and their team for their dedication, enthusiasm and interest in this evaluation project. The *Evaluator's Report* makes a valuable contribution not only for Ontario but also for other jurisdictions interested in the role of mandatory mediation in the administration of justice.

The Evaluation Committee's Report is divided into six sections as follows:

A. Introduction
B. The Question and the Methodology
C. The Case For and the Case Against Rule 24.1
D. The Timing and the Duration of the Mediation
E. Potential Problems
F. Recommendations

B. The Question and the Methodology

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 defence 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 time for the mediation session. There is a roster of mediators appointed and supervised by a local mediation committee, and litigants may select a roster or non-roster 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. The mediators are paid in accordance with a fee schedule established under Ont. Reg. 451/98 which sets the fee for one-half hour of preparation time for each party and for up to three hours of actual mediation. If the mediation session lasts longer than 3 hours, then the mediator's fee for the additional time is a matter of private contract with the mediator.

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. In order to make this determination, the evaluators with the assistance and supervision of the Evaluation Committee, evaluated the actual impact or effect of the Rule in Ottawa and Toronto. The evaluators investigated the actual impact of Rule 24.1 and also how the rule performed in terms of the expectations and perceptions of the litigant, lawyer, mediator, and administrator participant in the mandatory mediation program. The effect of the Rule in four major areas was examined. The four areas were: (1) the Rule's effect on the pace of the litigation, that is, whether it caused earlier or later dispositions or otherwise affected the timing of events in the proceeding; (2) the Rule's effect on the cost of litigation; (3) the Rule's effect on the quality of disposition outcomes, that is, whether, amongst other things, the mediation session yielded complete or partial settlements, and (4) the Rule's effect on the mediation itself and on the litigation process.

Given the somewhat different circumstances in Ottawa and Toronto and the four areas of impact to be studied, the evaluator's methodology was to use a variety of techniques to gather data about the effect of Rule 24.1 in Ottawa and in Toronto. The mediator's reports after the mediation, which are required by the Rule, were analyzed. Comprehensive questionnaires that were completed by litigants, lawyers, and the mediators after the mediation were collected and analyzed. Statistics were gathered

from the database administered by the Ministry of the Attorney General. A control group of Toronto case managed cases that did not experience mandatory mediation was established to compare with the group of Toronto case managed cases that did undergo mandatory mediation. Indeed, establishing a statistically reliable control group was a major achievement of the evaluation methodology. Focus groups and interviews were conducted. Literature was reviewed. The data was organized, tested, and analyzed, and results from Ottawa were compared and contrasted with the results from Toronto.

The performance of Rule 24.1 was evaluated separately for both Ottawa and Toronto and also for the aggregate of both centers. To understand the results and our observations below, it is helpful to appreciate that Rule 24.1 operated in different environments in Ottawa and Toronto. There are four major contrasts. First, in Ottawa, Rule 24.1 was a norm of the civil litigation practice, while in Toronto, Rule 24.1 was an exception to the norm. More specifically, in Ottawa about 90% of the civil non-family cases are subject to mandatory mediation, while in Toronto about 14% of the cases are subject to mandatory mediation. Second, 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. Third, in Ottawa, Rule 24.1 was not an innovation because Ottawa had already introduced a similar mandatory mediation scheme under a Practice Direction two years earlier, while in Toronto, the practice under Rule 24.1 was essentially new. Toronto's prior experience with mediation was under another practice direction that established an essentially voluntary pilot project that provided a free mediation service from a small roster of mediators for a small number of cases. Fourth, probably because of its greater familiarity with mediation as a norm of practice, the Ottawa lawyers select mediators from the roster more often than do lawyers in Toronto, who allow the local mediation co-ordinator to appoint the mediator in a greater proportion of cases; viz., Ottawa lawyers select the mediator from the roster in 82 % of the cases versus 53% of the cases in Toronto. The degree of mediator selection is significant because it turns out that the circumstance that the mediator is selected by the parties rather than appointed by the local mediation co-ordinator is a significant factor in the likelihood of a successful mediation session and the extent of the mediator's prior experience with Rule 24.1 is a significant factor.

Recognizing the different situation or environment in Ottawa and Toronto is important in understanding the *Evaluator's Report* and this report because the evaluation methodology, described above, examined and responded to the circumstances of both centers. Further, the observations and conclusions about the results from the two centers took into account similarities and differences. In evaluating the observations and conclusions, it is helpful to keep in mind the possibility that Ottawa may be predisposed to the Rule and Toronto more resistant to it because it mandatory mediation is the norm in Ottawa but not in Toronto and because Ottawa's experience, but not Toronto's, includes Rule 76 cases. If these possibilities are true, then it may be anticipated that the results will be positive in Ottawa (which is in fact what occurred) but consistent and positive results in Toronto will be impressive (which is also what occurred). It may also follow that Toronto's results may move toward Ottawa's when mandatory mediation becomes a norm in Toronto.

C. The Case For and the Case Against Rule 24.1

Based on the *Evaluator's Report*, the case for making Rule 24.1 a permanent part of the *Rules of Civil Procedure* is strong and the case for its discontinuance, weak. While the results in the *Evaluator's Report* indicate that there is room for improvement (particularly with respect to the need to allow greater flexibility about the time of the mediation) and that the Rule may not yet be operating optimally, mandatory mediation under the Rules appears to have been a positive phenomena.

In a very significant finding, the *Evaluator's Report* (Chapter 3) indicates that case managed cases of all types are disposed of sooner under Rule 24.1 than comparable case managed cases operating without Rule 24.1. Mandatory mediation cases of all types proceed to disposition more expeditiously than cases not subject to mandatory mediation. This positive result was demonstrated by comparing Toronto case managed cases subject to Rule 24.1 to a Toronto control group of case managed cases defended prior to the introduction of Rule 24. When Toronto case managed cases are compared to similar cases in Ottawa also governed by Rule 24.1, the pace of disposition is even faster in Ottawa, and this reinforces the conclusion that mandatory mediation yields earlier dispositions for all types of cases. The results in Ottawa also suggest that the positive results in Toronto might have even been higher had Rule 24.1 been the norm and not the exception. The results in Ottawa were even better under the former Practice Direction, and this indicates perhaps that even better results for mandatory mediation are possible in both Ottawa and Toronto.

A remarkable and important aspect of the phenomena of earlier disposition times for cases that have undergone mandatory mediation is that this effect applies to cases that do not settle at the mediation session. In other words, the effect of mandatory mediation persists after the mediation session. Another positive aspect is that the effect of mandatory mediation is felt even in the cases with the lowest rate of settlements after a mediation session. In other words, a medical malpractice case, which is a type of case that has a low rate of complete settlements at mediation, still settles earlier than control group medical malpractice cases that did not experience mandatory mediation.

The *Evaluator's Report* showed that a session of mandatory mediation yields a complete settlement in about 4 out of 10 cases in the aggregate, which is a significant number of cases that settle at an early stage of the proceedings with likely savings of costs to the litigants. (Results for particular case types differed, of which more will be said below.) This result was observed in both Ottawa and Toronto and was fairly consistent throughout the 23 months of the evaluation.

The *Evaluator's Report* showed that a session of mandatory mediation yields a partial settlement in about 2 out of 10 cases. However, taking a positive credit for a partial settlement is problematic because it is difficult to determine whether an issue has been genuinely settled since the litigation continues and there is a large subjective aspect in any report of a partial settlement. That said, the credibility of giving credit for these partial settlement results was enhanced in the *Evaluator's Report* because the questionnaire prepared by the evaluators tested whether settled issues were matched with issues that the parties had identified in the statement of issues as issues to be settled. As noted above, the statement of issues is prepared before the mediation session, and in Ottawa, in 96% of the partially settled cases, the issues that were settled were included in whole or in part in the statement of issues. The comparable figure in Toronto was 67%.

The *Evaluator's Report* showed that balanced against the complete and partial settlements, in about 4 out of 10 cases in the aggregate, which is a very significant number of cases, no settlement was

reached even partially. These significant negative results would seem at first blush to bolster the case for the discontinuance of mandatory mediation program because of the wasted time and expense incurred in these cases. However, the *Evaluator's Report* provides data that suggests that it may be possible to reduce the negative results. For example, there is the prospect, discussed in a later section of this report, that mediation may come too early for some types of cases and that if the timing of the mediation could be adjusted for these cases - which is one of our recommendations - then better results might be achieved. In any event, other measures in the *Evaluator's Report* indicate that there are benefits or perceived benefits from a mandatory mediation even if it did not yield an immediate complete or partial settlement. For example, as already noted above, there is the phenomena that mandatory mediated cases tend to settle earlier even if they do not settle at the mediation, and, as will be noted below, the subjective response to mandatory mediation by the participants was generally positive.

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 mediation 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. (See Figure 4.4 in *Evaluator's Report*.) The lawyer response was similarly very positive (80% in Ottawa and 78% in Toronto). (See Figure 4.5 in *Evaluator's Report*). Given the finding noted above that even in failed mediation sessions, the cases settle earlier, there would also appear to be savings in cases that do not settle at or soon after the mediation session.

The subjective response to mandatory mediation was generally positive, particularly in Ottawa, where Rule 24.1 is the practice norm. A sample of the responses of Ottawa participants follows.

- 80% of Ottawa lawyers agreed with the statement "I was satisfied with the overall mandatory mediation experience."
- 82% of Ottawa litigants agreed with the statement "I was satisfied with the overall mandatory mediation experience."
- 61% of Ottawa lawyers agreed with the statement "justice was served by this process."
- 61% of Ottawa litigants agreed with the statement "justice was served by this process."
- 86% of Ottawa lawyers agreed with the statement "assuming you had the choice, would you use mandatory mediation again to resolve similar disputes under similar circumstances."
- 88 % of Ottawa litigants agreed with the statement "assuming you had the choice, would you use mandatory mediation again to resolve similar disputes under similar circumstances."

Turning to Toronto, a sample of participant responses follows.

- 59% of Toronto lawyers agreed with the statement "I was satisfied with the overall mandatory mediation experience."
- 65% of Toronto litigants agreed with the statement "I was satisfied with the overall mandatory mediation experience."
- 43% of Toronto lawyers agreed with the statement "justice was served by this process."
- 39% of Toronto litigants agreed with the statement "justice was served by this process."
- 66% of Toronto lawyers agreed with the statement "assuming you had the choice, would you use mandatory mediation again to resolve similar disputes under similar circumstances."

- 73 % of Toronto litigants agreed with the statement "assuming you had the choice, would you use mandatory mediation again to resolve similar disputes under similar circumstances."

Other positive elements are that the *Evaluator's Report* indicates that a factor in higher complete settlement rates is the experience of the mediator. In other words, mediators with greater experience settle more cases. This element is positive because it suggests that as individual mediator experience grows, and as more mediators gain experience, the results of the mandatory mediation program may improve. Also positive is the fact that both lawyers and litigants expressed high levels of satisfaction with the skills of the mediators in moving all parties towards an agreement. Based on questionnaire results, in Ottawa, 83% of lawyers and 82% of litigants and, in Toronto, 67% of lawyers and 69% of litigants expressed satisfaction. Similarly, there was a high level of agreement that the mediator showed an understanding of the legal issues that were important to the case. In Ottawa, 90% of lawyers and 84% of litigants and, in Toronto, 72% of lawyers and 74% of litigants expressed satisfaction.

The Evaluation Committee therefore concludes and recommends that the sunset provision in Rule 24.1 be revoked and that the rule should be made a permanent feature of the *Rules of Civil Procedure*. Below, we make several recommendations about possible amendments to improve the Rule.

D. The Timing and the Duration of the Mediation

Timing of the Mediation

The timing of the mediation session raises several issues that are explored in the *Evaluator's Report*. Under Rule 24.1, the mandatory mediation session is to take place within 90 days after the first defence has been filed, unless the court orders otherwise, but in a case on the standard track, the mediation session may be postponed for up to 60 days if the consent of the parties is filed with the mediation co-ordinator.

One issue associated with the timing of the mediation is whether the time periods provided by the Rule are appropriate and are working. The data from the *Evaluator's Report* indicates that, generally speaking, the answer here is yes. Approximately 85% of the cases complete their mandatory mediation within 150 days, and it would be hard to make a case for a change to the timing based on these results. Further, the *Evaluator's Report* raises the possibility that the cases mediated outside the 150 day period may reveal that there is a backlog in the program's ability to service cases. (This prospect is discussed in a later section of this report.) If that explanation were true, then there is even less reason to change the time periods provided by the rule. Moreover, the policy idea behind mandatory mediation is to mediate early so as to maximize the savings in the costs of litigation achieved by an early or earlier settlement, and this policy stands against changing the 90 day and 150 day periods now provided by the Rule.

These comments, however, do not end the issues associated with the timing of the mediation session. The matter of the timing of the mediation needs to be considered in light of the findings in the *Evaluator's Report* about the perceptions of mediators, lawyers, and litigants (expressed in their answers to questionnaires about their own mediation sessions and also expressed at focus groups) that for certain cases the mediation session should have come later in the proceedings. The issue of timing also needs to be considered in light of the evaluator's findings about the significance of case

types to the success of a mediation. As for perceptions, this was an area in which the questionnaire responses differed greatly between Ottawa and Toronto. In Ottawa 18% and in Toronto 42% of the mediators responded that a later mediation would have been an improvement. In Ottawa 22% and in Toronto 54 % of lawyers responded that the mediation should have come later. In Ottawa 9 % and in Toronto 31% of litigants responded that the mediation should have come later. As for the significance of case types, the *Evaluator's Report* indicates that in Toronto two types of cases, Trust and Fiduciary Duties and Medical Malpractice, have a relatively low likelihood of a complete settlement, while in Ottawa the same two types of case and also contract commercial cases have a relatively low likelihood of a complete settlement.

Even if one discounts the Toronto responses as being a product of mandatory mediation not being the norm in Toronto, there remains a persistent view that mandatory mediation may come too early for some cases. This view is supported by the evaluator's findings about case types, and common sense would also suggest that not all types of cases are appropriate for an early mandatory mediation. It likely follows that the chances of a successful mediation would increase if the mediation sessions for certain types of cases was delayed. What then to do about this situation? It appears that two responses are available. First, the rule could be amended to identify particular case types and provide special treatment for these types of cases. For example, medical negligence cases might be granted a postponement until after examinations for discovery if the consent of the parties is filed. Second, and this is a simpler response, efforts could be made to increase awareness about the availability of subrules 24.1.09 (1) and (2), which provide for extensions of time, and these rules could be amended for greater flexibility. These rules now state:

Time Limits

24.1.09 (1) A mediation session shall take place within 90 days after the first defence has been filed, unless the court orders otherwise.

Extensions or abridgment of time

(2) In considering whether to exercise the power conferred by subrule (1), the court shall
take into account all the circumstances, including,

(a) the number of parties and the complexity of the issues in the action;

(b) whether the party intends to bring a motion under Rule 20 (Summary Judgment), Rule 21 (Determination of an Issue Before Trial) or Rule 22 (Special Case);
(c) whether the mediation will be more likely to succeed if postponed to allow the parties to acquire more information.

Awareness of these rules might be increased perhaps by continuing legal education programs or through information material provided to participants in the mandatory mediation program.

The recommendation of the Evaluation Committee is to go with the second response. In other words, the Committee recommends that the provisions in Rule 24.1 about the timing of the mediation session not be changed to provide specialized treatment for different case types but that efforts be made to emphasize the availability of extensions under revised subrules 24.1.09 (1) and (2). As we see it,

there are problems with the response of special treatment for particular types of case. The problems include making Rule 24.1 more difficult to administer and the possibility that parties will abuse the right to postpone by disingenuously classifying their particular case. There is also the difficulty of classifying cases that might fall into more than one class. There is the further difficulty that case types are not uniform in their operative characteristics. For example, while most medical malpractice cases might benefit from a later mandatory mediation, this will not always be the case, and some of any type of case will be suitable for a mandatory mediation. The *Evaluator's Report* confirms this observation by noting successful mediations in every type of case. The Evaluation Committee therefore believes that it is preferable to continue to require the parties to justify a postponement under subrules 24.1.09 (1) and (2). However, we recommend that these rules be more generous and flexible in allowing abridgements or extensions. A more flexible version of subrule 24.1.09 (2) is set out below with the changes underlined.

Extensions or abridgment of time

(2) In considering whether to exercise the power conferred by subrule (1), the court shall take into account all the circumstances, including,

(a) the number of parties and the complexity of the issues in the action;

(b) whether the party intends to bring a motion under Rule 20 (Summary Judgment), Rule 21 (Determination of an Issue Before Trial) or Rule 22 (Special Case);

(c) whether the mediation will be more likely to succeed if postponed to allow the parties to <u>obtain evidence under,</u>

<u>(i) Rule 30 (documentary discovery),</u>
<u>(ii) Rule 31 (examination for discovery),</u>
<u>(iii) Rule 32 (inspection of property),</u>
<u>(iv) Rule 33 (medical examination), or</u>
<u>(v) Rule 35 (examination for discovery by written questions),</u>

<u>(d) whether, given the nature of the particular case or the circumstances of the parties, the mediation will be more likely to succeed if the time for the mediation session is abridged or postponed.</u>

Duration of the Mediation

Ont. Reg. 451/98 regulates mediators' fees and establishes a fee schedule for one-half hour of preparation time for each party and up to three hours of actual mediation. The *Evaluator's Report* indicates that 44% of the mediation sessions in Ottawa and 34% of the mediation sessions in Toronto lasted longer than three hours. The *Evaluator's Report* indicates that 19% of the mediation sessions in Ottawa and 16% of the mediation sessions in Toronto lasted longer than four hours. Arguably, these figures suggest that it may be desirable to regulate the fees for a four-hour period, which would capture about 80% of all mediation sessions. This is a contentious issue because litigants, who pay, and mediators, who get paid, may differ about the fee schedule. It is also a matter outside the jurisdiction of the Civil Rules Committee but of interest to it. The issue of mediator remuneration and other mediator related concerns are discussed in the next section of this report.

E. Other Issues and Potential Problems

Mediator Supply and Demand

As noted above in the discussion of the timing of the mediation, approximately 15% of the mediation sessions are taking place after the maximum 150 day period provided for under the Rule. In the *Evaluator's Report*, the evaluators reflect whether a backlog may be developing, particularly in Ottawa. The evaluators recommend that the situation be monitored. The Evaluation Committee concurs in this recommendation.

The question of a backlog directs attention to several other related concerns, some of which are not considered in any detail in the *Evaluator's Report*. When the Civil Rules Committee was debating the introduction of Rule 24.1, there was a concern about whether there would be enough qualified mediators for the rosters to be established in Ottawa and Toronto. This problem did not develop, and there are large rosters of mediators in both Ottawa and Toronto, although a small number of mediators accounted for a large number of mediations. The *Evaluator's Report* indicates that there is a relatively high degree of litigant and lawyer satisfaction with skills of the mediators that were involved in mediation sessions in both Ottawa and Toronto. (See Figures 6.1 and 6.2 in the *Evaluator's Report.*). There are mediators available to eliminate any backlog, but it may be that litigants and lawyers in Ottawa are delaying the mediation to accommodate the schedule of their chosen mediator. In this regard, it should be recalled that in Ottawa most mediators are selected rather than appointed. The Evaluation Committee recommends that this situation of possible backlog be investigated and monitored. In any event, there may not be a genuine problem because although mediation sessions may be delayed to accommodate particular mediators, this may result in more settlements, given that the *Evaluator's Report* indicates that selecting the mediator improves the chances of a settlement. We also recommend that local mandatory mediation committees monitor the phenomena of a small number of mediators accounting for a large number of mediations. If this phenomena continues, it will affect how to manage the roster of mediators.

Mediator Remuneration

The Evaluation Committee received a letter from a mediator, who wrote on behalf of several mediators. The Committee also received a copy of a letter from a lawyer addressed to the Attorney General. A copy of a third letter, which included a report from the Canadian Bar Association (Ontario) - ADR Section, the Arbitration and Mediation Institute of Ontario Inc. and the Dispute Resolution Alliance of Ontario, was also received. These letters raise issues about mediator remuneration. For example, the mediator suggests that the tariff, which is enacted by the provincial government, should make it clear that mediators may with the agreement of the parties charge a market rate for preparation time beyond the usual one-hour provided under the tariff. Second, he suggests that the tariff should be raised to $200.00 per hour with periodic increases to account for inflation. He states that this increase is necessary to discourage qualified mediators from leaving the roster. Third, he advises that mediators, particularly assigned mediators, are experiencing difficulties getting paid and he suggests that Rule 24.1 be amended to provide that failure to pay a mediator should be grounds to have a party's pleading stuck out. In his letter, the lawyer describes a mediation session conducted by an assigned mediator who refused to commence the mediation unless the counsel for the parties signed an agreement to be responsible for the mediator's fee. The lawyer states that this put counsel in an intolerable situation in the context of a compulsory procedure.

As already noted above, the matter of mediator remuneration is outside the authority of the Civil Rules Committee. It was also a matter that was not explored in any depth by the evaluators or by the Evaluation Committee. The main observations that the Evaluation Committee has are the obvious ones that the success of Rule 24.1 depends, in part, on the participation of competent mediators and that, to date, there has not been a problem securing adequate mediator participation. One recommendation we have is that the Civil Rules Committee recommend to the Ministry of the Attorney General and to the local mediation committees that they continually monitor the matter of mediator remuneration and its effect on membership on the roster of mediators and that the province adjust the tariff as needed to maintain the quality of the mandatory mediation program.

As for the mediator's suggestion that the rules provide that pleadings be struck out if the mediator is not paid, this, like the lawyer's report, concerns the difficulties of the circumstance that the mediators are paid by parties that have no choice but to incur the expense of the mediation. However, making appropriate financial arrangements with the mediator would not appear to be a problem in Ottawa because most mediators are chosen by the parties, and incidents like the one reported by the lawyer may be more of a problem in Toronto where more mediators are assigned. As a response to these problems, the Evaluation Committee does not favour the idea that the payment of the mediators should become an interlocutory matter in a proceeding. In our view, there is no readily available rules-based solution to problems associated with the arrangements between the parties and the mediator and these problems must be addressed by the local mediation committee.

Rule 76 - The Simplified Procedure

Whether Rule 76 cases, that is simplified procedure cases, should be subject to mandatory mediation, as they were in Ottawa, is a matter of some controversy. Simplified procedure cases fared well under mandatory mediation in Ottawa; 51% of this type of case completely settled at or within 7 days of mediation. Another 10 % achieved partial settlements. As noted above, Rule 76 was only excluded from the pilot project in Toronto so as to not compromise an evaluation of the merits of Rule 76. Simplified procedure cases clearly are suitable for mandatory mediation.

The controversial question, however, is whether the cost associated with mandatory mediation outweighs the benefit for a type of case for which the procedure is meant to be minimalist and inexpensive. To quote the October 2000 Evaluation Report of the Simplified Procedure Subcommittee at pp. 24-5:

At present the Evaluation Committee has concerns about the cost of introducing a separate mandatory-mediation step into the Simplified Procedure. The Simplified Procedure's purpose, of ensuring wide access to the Courts through the elimination of costly interlocutory steps, would be contradicted if a mandatory-mediation step were introduced. It is the view of the Evaluation Committee that an early, mediative pre-trial, with clients in attendance will serve a variety of important functions. Most importantly, a mediative pre-trial would provide an opportunity to resolve matters at an early stage in the proceeding, before significant costs have been expended. In cases of lower monetary amounts, costs are often a barrier to settlement. It appears that the Simplified Procedure cases are being resolved in a timely fashion without the extra cost and delay of a mediation step.

The argument of the Simplified Procedure Subcommittee appears to be that mandatory mediation is not as needed for Rule 76 cases and that the benefit of a mandatory mediation, which might yield an earlier settlement, is not worth the additional cost. This argument is bolstered by the fact that the evaluation of Rule 76 revealed that the simplified procedure cases unaided by mandatory mediation are disposed of more quickly that comparable cases were disposed of before the introduction of Rule 76. The independent evaluation of the simplified procedure indicated that for actions commenced in 1998, 79% of all simplified procedure cases were resolved within 1½ years of the filing of the statement of defence. This compares to 39.2% for pre-Rule 76 cases. After 2 years, 84.1 % of the Rule 76 cases commenced in 1998 had been disposed of. This compares to 45.6% before the introduction of Rule 76.

The Evaluation Committee thinks that there may not be an absolute answer to this debate. Put somewhat differently, litigants and lawyers in some communities might wish to include Rule 76 cases in their local mandatory mediation program, while lawyers and litigants in other places where legal expenses are higher might not wish to increase the costs of a simplified procedure by a mandatory mediation session. There are also perhaps differences in community resources that would be relevant to deciding whether Rule 76 cases should be included in the inventory of cases to be mediated. The Evaluation Committee therefore recommends that the regional senior judge after consultation with the local mediation committees decide whether Rule 76 cases are subject to mandatory mediation under Rule 24.1 in his or her region. This recommendation could be implemented by an amendment to Rule 24.1.04 (2) to provide that the Rule does not apply to an action under Rule 76 (Simplified Procedure) unless the regional senior judge so directs.

Commercial List Cases

Actions on the Toronto Commercial List have not been subject to mandatory mediation because they have not been governed by Rule 77 but rather by their own case management process. We cannot comment about the appropriateness of including or excluding these cases from the mandatory mediation program. We think, however, that this issue should not be overlooked. We therefore recommend that the Commercial List Users' Committee be asked to examine the role of mandatory mediation in commercial list actions and to make a recommendation to the Civil Rules Committee.

Construction Lien Cases

Construction Lien Cases are excluded from mandatory mediation because they are excluded from case management under Rule 77. The Evaluation Committee received a letter from the Arbitration and Mediation Institute of Ontario Inc. ("AMIO") dated December 7, 2000. The letter states:
AMIO proposes that construction lien cases be added to the OMMP. Many of the companies that comprise the construction community are small businesses. They cannot afford the long delays associated with the adjudication of construction lien cases. We understand that litigants are unable to obtain trial dates before 2002. If many of the current cases on the list could be resolved earlier through mediation, the trial dates for those that remain could be moved ahead. Construction cases are particularly well suited for mediation due to their inherent complexity and the magnitude of some of the claims.

The Evaluation Committee cannot think of a reason for excluding construction lien cases from mandatory mediation and recommends that either Rule 77 be amended to include these cases, in which case, they would fall within Rule 24.1, or that Rule 24.1 be amended to add construction lien cases. The latter solution may be preferable because it may not be practical to combine the procedural requirements of the *Construction Lien Act* with Rule 77.

Authority to Settle

In Chapter 6 of the *Evaluator's Report*, based on questionnaire responses, the evaluator's indicate that 15% of the lawyers in Ottawa and 18% of the lawyers in Toronto agreed with the statement "At least one of the parties [at the mediation session] did not have authority to reach an agreement." The evaluators then report that 19% of the mediators in Ottawa and 18% of the mediators in Toronto said that there likely would have been an improvement in the mediation session in settling or narrowing the issues if one or more additional parties with authority to settle had been present at the mediation. These results suggest that the participants are not sufficiently aware of subrule 24.1.11 (2) which provides that a party who requires another person's approval before agreeing to a settlement, shall, before the mediation session, arrange to have ready telephone access to the other person throughout the session, whether it takes place during or after regular business hours. The Subcommittee recommends that efforts should be made to increase the awareness of the participants to the requirements of subrule 24.1.11 (2).

F. Recommendations

The Evaluation Committee makes the following recommendations.

1. We recommend that the sunset provision in Rule 24.1 be revoked and that the rule should be made a permanent feature of the *Rules of Civil Procedure*.

2. We recommend that the provisions in 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, as set out above.

3. We recommend that steps be taken to monitor whether there are backlogs in the completion of the mediation session within the 150 day period prescribed by Rule 24.1.

4. We recommend that local mandatory mediation committees monitor the phenomena of a small number of mediators accounting for a large number of mediations.

5. We recommend that the Ministry of the Attorney General and the local mediation committees continually monitor the matter of mediator remuneration and its effect on membership on the roster of mediators and that the province adjust the tariff as needed to maintain the quality of the mandatory mediation program.

6. We recommend that the Regional Senior Judge after consultation with the local mediation committees decide whether Rule 76 cases are subject to mandatory mediation under Rule 24.1 in his or her region.

7. We recommend that the Commercial List Users' Committee be asked to examine the role of mandatory mediation in commercial list actions and to make a recommendation to the Civil Rules Committee.

8. We recommend that either Rule 77 be amended to include construction lien cases, in which case, they would fall within Rule 24.1, or that Rule 24.1 be amended to add construction lien cases.

9. We recommend that efforts should be made to increase the awareness of the participants in mediation sessions to the requirements of subrule 24.1.11 (2) about authority to settle.