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WHEN IS MEDIATION MANDATORY? A COMPARATIVE ANALYSIS OF MANDATORY MEDIATION ACROSS CANADA

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Trials are expensive. The costs associated with litigating a matter to trial can sometimes outweigh the potential reward being sought. Justice is not cheap, but there are alternatives for a resolution when the parties are reasonable and realistic.

The Supreme Court of Canada has recognized the need for a culture shift in order to create an environment that promotes timely and affordable access to the civil justice system. The court has stated that:

"while going to trial has long been seen as a last resort, other dispute resolution mechanisms such as mediation and settlement are more likely to produce fair and just results when adjudication remains a realistic alternative.[1]"

Mediations, both court mandated and ad hoc, play a crucial role in our nation's litigation process. Over 90% of litigated matters will eventually come to some form of settlement prior to trial and mediations are a large part of that.

Not all provinces however require a mediation prior to trial and there are different rules and requirements depending in which forum the litigation takes place. Some jurisdictions have mediation requirements which can include private mediation, whereas others involve court appointed mediators or judges only.

While Alberta, Ontario and Quebec all have some form of mandatory dispute resolution requirement, in British Columbia a "settlement conference" is only required if requested by the parties, or ordered by a judge.

Below is a summary of the different requirements, dependent on the jurisdiction:

Province	Rules	Mandatory

AB	Alberta Rules of Court, Alta Reg 124/2010	As of January 1, 2019 the Court of Queen's Bench of Alberta will not schedule a trial unless the parties certify that they have participated in a form of dispute resolution such as a judicial dispute resolution or a private mediation. Rule 4.16(1) requires parties to consider and engage in one or more dispute resolution processes outlined in the rule unless the Court waives the requirement.

ON	*Rules of Civil Procedure*, RRO 1990, Reg 194	Mandatory mediation (r 24.1) applies to actions (a) governed by the rule before January 1, 2010; (b) commenced in the City of Ottawa, City of Toronto, or the City of Essex on or after January 1, 2010; or (c) transferred to a county listed in the above subsection on or after January 1, 2014, unless the court orders otherwise. This rule does not apply to actions covered under rule 75.1 (mandatory mediation – estates, trusts and substitute decisions); actions in relation to a matter that was the subject of a mediation under section 258.6 of the Insurance Act, if the mediation was conducted less than a year prior to the delivery of the first defence in the action; actions placed on the Commercial List established by practice direction in the Toronto region; actions under rule 64 (mortgage actions); actions under the Construction Act, except trust claims; and actions under the Bankruptcy and Insolvency Act (Canada). The rule also does not apply to actions certified as class proceedings under the Class Proceedings Act, 1992. (rules 24.1.04(2 and 2.1)) A mediation session shall take place within 180 days after the first defence has been filed, unless the court orders otherwise.

BC	*Supreme Court Civil Rules,* BC Reg 168/2009	In the Supreme Court, parties can jointly request a settlement conference by filing a requisition in Form 17 or a judge or master can direct the parties to attend a settlement conference. The parties must attend before a judge or master who must, in private and without hearing witnesses, explore all possibilities of settlement of the issues that are outstanding (r 9-2(1)). At a case planning conference, the presiding judge or master may require the parties to attend one or more of a mediation, a settlement conference or any other dispute resolution process, and give directions for the conduct of the mediation, settlement conference, or other dispute resolution process (r 5-3(1)(o)).
QB	*Code of Civil Procedure,* CQLR c C-25.01	Quebec established a new Code of Civil Procedure in 2016 with the intention of improving access to justice, and at the same time providing for a requirement that parties must consider alternate forms of dispute resolution. Parties must consider private prevention and resolution processes before referring their dispute to the courts. Options include: negotiation, mediation, arbitration or any other process that suits the parties. Private dispute prevention and resolution is voluntary and parties may participate by mutual agreement (s 1). At any stage of a proceeding but before a trial, either by the request of the parties or by the request of the chief justice or chief judge, a judge may preside over a settlement conference.

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[1] Hryniak v. Mauldin, 2014 SCC 7

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.