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A Branch of the CANADIAN BAR ASSOCIATION

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November 18, 2008

John Kromkamp
Senior Legal Officer
Court of Appeal for Ontario
130 Queen St W.
Toronto, ON M5H 2N5

Dear John:

On behalf of the Ontario Bar Association (OBA) I am pleased to provide you with our submission on the proposed amendments to the Rules of Civil Procedure.

The OBA represents more than 18,000 lawyers in each practice area and region across Ontario making us well positioned to offer advice on this important issue.

I trust you will find the enclosed submission both informative and helpful.

Yours truly,

Jamie Trimble
President
Ontario Bar Association



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OBA Submission on proposed amendments to the Rules of Civil Procedure

Submitted on *November 18, 2008*

Submitted by:

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Submitted to:

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About the Ontario Bar Association

The Ontario Bar Association (OBA) is the voice of the legal profession in Ontario. As a branch of the Canadian Bar Association, the OBA represents more than 18,000 lawyers, judges, law professors and law students across the province. The OBA is a voluntary association which provides a broad range of services to its membership, including education and representation in relations with government on matter of importance to OBA members and the public. The OBA advances reasoned positions to governments, the public and the Law Society of Upper Canada for the benefit of our members and to improve the law and the administration of justice in Ontario.

Introduction

Following a lengthy review, the Ontario Bar Association has made certain recommendations regarding proposed changes to Rules 24.1 and Rule 34.12 of the Civil Rules.

Rule 24.1

The OBA supports the appropriate use of mediation in civil litigation matters as is reasonable in the circumstances of each case.

A mandatory mediation scheme is an important impetus for early resolution of civil disputes. The 2001 Report on the Ontario Mandatory Mediation Program Pilot Project for Rule 24.1 (the Report on the OMMP) did show positive results with respect to *early* mandatory mediation, although lawyers in Toronto and Ottawa were sharply divided on the timing of mediation (those in Toronto favouring a more flexible timing, and those in Ottawa supporting the existing timing).

In order to avoid unnecessary costs and delays, all cases under Rule 24.1 should be mediated well before the pre-trial conference, as an early resolution of a litigated case is beneficial to the litigants.

The primary concerns raised with the structure of the original rule 24.1 or the Practice Direction include diverse opinions that there may have been:

- Overly tight and rigid timelines on counsel and excessive administrative time commitments on the Court under the Original Rules;
- Overly lenient timelines, delayed resolutions, and increased legal costs under the Practice Direction;
- Too many demands on Court judicial and administrative time and resources dealing with Rule 77 and Rule 24.1 issues;
- Procedural challenges relating to confidentiality, choice of mediators, mediator payment in non-compliance cases, selecting mediation dates, and the appropriate scope of the mandatory mediation program.

The OBA endorses incorporating dispute resolution and mediation into the civil justice system in effective and appropriate ways that:

- maximize the benefits to party litigants in terms of cost, time, and satisfaction with both result and process;
- minimize unnecessary demand on Court administrative and judicial resources (in terms of procedural demand in individual cases and overall case load);
- impose timelines and procedures on counsel that are reasonable, practical, case-appropriate, cost-effective and flexible.

However, to make fully informed recommendations on how to achieve these goals, it would help if there were greater clarity on the policy goals for the proposed changes to Rule 24.1, based on a survey of the key stakeholders and the thoughts of those impacted by the Practice Direction. For example, what is driving the move away from the Practice Direction in Toronto, when the 2008 report of the outgoing Regional Senior Justice (now Chief Justice of Ontario) reported that a more flexible approach to mediation was so successful? An evaluation similar to that of the Report on the OMMP would be very helpful in charting the best future direction. Such an evaluation should also consider the viability and effectiveness of mandatory mediation in other jurisdictions.

With answers to these questions the OBA would be in an even better position to respond in a more constructive fashion to the proposed rule changes.

The OBA offers the following specific recommendations regarding Rule 24.1:

1. "Timeline Trigger" - Rule 24.1.09

There was general agreement that, if a timeline is imposed for mediation to take place in 180 days or thereabouts, it would be more appropriate if the time ran from the "close of pleadings" as opposed to the filing of the first defence. The latter method creates inherent challenges in cases involving multiple defendants, absent or reluctant defendants, third party claims and similar complications.

2. Scope of Rule 24.1

The scope of the application of draft Rule 24.1 needs to be clarified.

Draft Rule 24.1.01 states that the Rule provides for mandatory mediation in "assigned actions". However, there is no guidance in the Draft Rule as to what will qualify as an "assigned action".

Draft Rule 24.1.04 indicates that the Rule will apply to "actions that are commenced in one of the following counties and assigned to mandatory mediation by the registrar, acting under the direction of the regional senior judge...."

It is not clear from draft Rule 24.1.04 if all cases (in Toronto, for example) are going to be "assigned to mandatory mediation by the registrar" under the direction of the Regional Senior Judge or only some cases. Is a further defining practice direction in each jurisdiction expected to clarify the scope of application of New Rule 24.1 in each jurisdiction?

In any case, the draft Rule should have a clearer direction on which cases are or are not subject to Mandatory Mediation. This comment also applies to 24.1.09.1(3) which revokes 24.1.09.1 on July 1, 2009. Do the wrongful dismissal cases default to 24.1.04 on that date or do they get removed from the scope of Rule 24.1 entirely? It was not entirely clear from the draft new Rule. This should be clarified.

3. Time frame for mediation

There was a strong view expressed by some members of the ADR Section that certain types of cases are not as amenable to early resolution, including serious personal injury claims and complex commercial litigation matters, and that the timing of mediation in those cases should be left to counsel, as the current Practice Direction in force in Toronto provides. The rationale for this is that counsel is in the best position to know how much time is required for the completion of examinations for discovery, and for obtaining important expert reports. This evidence is often crucial to have in hand before any meaningful settlement discussions can occur. However, it was agreed that most other cases clearly lend themselves to resolution at a very early stage of the litigation, such as wrongful dismissal cases and matters brought under the Simplified Rules, where examinations for discovery and expert reports are rarely required.

A second strongly held view by other members of the ADR Section was that the timelines for mediation in Rule 24.1 should be revised along the lines of the draft rule to obtain the demonstrated benefits of early mediation in as many cases as possible, so long as the new rule incorporates simple flexible extension processes so as to be responsive to more complex cases (see Time Extensions below). Such a model would arguably encourage mandatory mediation to take place at the earliest opportunity at which it is likely to be effective, regardless of case type without overburdening either the Court or Counsel.

Ideally, what the ADR Section would like to see is a blending of the two concepts by providing counsel with flexibility in scheduling their mediations depending on the type of case they are litigating, while still encouraging mandatory mediation at the earliest possible opportunity at which it is likely to be effective.

4. Time Extensions

The ADR Section has some concerns with respect to the broad extension powers found in this part of the draft Rule. On a reading of Rule 24.1.09(3), together with paragraphs (5), (6) (6.1) and (7.1), the draft Rule would allow parties to extend the time for mediation on consent with no clear time limit. Such an open-ended rule opens up an easy to use black hole of time that could result in some counsel simply putting off mediation so they have one less task to worry about. In our view, with the exception of more complex matters, it would be better to build in a reasonable and easy to use extension process, such as, a capped extension of up to an additional 180 days and the use of simplified procedures before the Court (rather than motions) for obtaining further extensions beyond the 180 day extension cap in complicated cases.

5. Application of the Rule - Wrongful Dismissal and Simplified Rules

In our view, mediation should be mandatory for wrongful dismissal and simplified rules actions. The monetary value of these cases in relation to the costs of trial makes these cases particularly amenable to mediation. The draft OBA recommendations on improving access to justice in the wrongful dismissal arena (the Wrongful Dismissal Task Force report is currently being finalized) have recommended expansion of mandatory mediation in these cases province-wide.

The previous deadline with respect to these cases was 150 days from the close of pleadings. If we are moving to 180 days for regular actions, it might be simpler to harmonize the timelines and procedural rules and apply a 180 day timeline for all cases, with the exception of complex cases as identified above. It would be less confusing for counsel, the court and mediators.

6. Attendance - Rule 24.1.11

In our view, the wording of Rule 24.1.11(1) and (1.1) should be adapted to remove the technical requirement for both the party and the insurer to be present for the mediation session. This draft provision does not reflect the reality of insurance defence litigation and can create large burdens when parties may be geographically distant and singularly uninvolved in the case. It also does not reflect current practice in the Insurance bar. As the draft Rule currently stands, it could be used by plaintiff's counsel to pressure an insurer to bear unnecessary procedural costs.

A better wording might mirror proposed Rule 77.08(2), which refers to "the parties, or a representative of the parties responsible for making decisions regarding the proceeding and instructing the lawyer". The provision could be limited to cases involving insurers to prevent abuse.

Alternatively, one could instead just change (1.1) by adding a sentence like "Notwithstanding (1) above, where such an insurer is not contesting coverage of their insured party and the applicable limits of insurance in question are not likely to be exceeded by a settlement at the mediation, the insured party is not required to attend."

7. Confidentiality - Rule 24.1.14

In our view, draft Rule 24.1.14 should contain a clause stating that mediations are 'confidential', unless the parties otherwise agree (right now they are just "without prejudice" under the Rule). Making them completely confidential without the right to contract out would limit the right of parties to disclose information to necessary people like relatives, financial advisors etc.

A related issue is that the Court currently lacks the power to enforce the without prejudice provision of Rule 24.1.14, a challenge made apparent by the Court of Appeal in *Rogacki v. Belz*, (67 O.R. (3d) 330).

Somewhere in draft Rule 24.1, the Court should be given powers to remedy breaches of 24.1 generally (similar to the specific powers under 24.1.13 for non-compliance certificates).

8. Transition to New Rules

Given the interrelation between old and draft Rules 24.1 and 77 and the Practice Direction, the transition provisions need to be sufficiently clear. For example, on July 1 2009, a case that was started one year previously under the Practice Direction has not mediated yet. The Practice Direction gave the parties approximately two years to mediate, but the draft Rule says mediation must occur within 180 days from the filing of the first defence (in which case the parties are already in default). It is not clear which version of the Rule will apply in such a case.

Rule 34.12

The proposed rule change (Schedule A) requires questions to be answered except if the answers are privileged or manifestly irrelevant.

This is contrary to the Civil Justice Reform Project (Osborne) which opposed same and stated:

" . . . I do not recommend the adoption of a new rule which would require parties to answer questions objected to on the basis of evidence."

The Civil Rules Committee of the LSUC, by memorandum dated October 1, 2008, in proposing this rule change suggests, however, that this amendment "at least not in [its] current form" was not expressly considered as part of the formal recommendations by Osborne. This appears to be an error as it was expressly rejected by Osborne.

The CRC has two reasons for its proposal:

- (a) to reduce the number of motions dealing with refusals; and
- (b) to facilitate the limited time discovery norm (generally one day).

The proposed rule change would likely not facilitate either of the proposed objectives. Osborne's position is to be preferred and no change in the rule is warranted. If the rule change is implemented we will still have motions on privilege and whether a question is manifestly irrelevant. In addition, we will still have a motion to ensure they can put that evidence before the court which has been the subject of the objection. See proposed Rule 34.12(2.1).

The Osborne report proposed the time limited discovery which is to be implemented concurrently. (The OBA supported time limited discovery). Osborne did not think Rule 34.12 needed to be changed to facilitate time limited discoveries. We agree with Osborne. It is difficult to say there is any material time difference between:

- (a) a regime in which one has to say objection on the basis of irrelevancy, have a motion on the issue, and possibly have a re-attendance; and
- (b) one in which one has to say objection on the basis of irrelevancy, get the answer possibly to a number of unnecessary questions, and, in any event, later have a motion to allow the introduction of the necessary evidence to which an improper objection was put on the record, notwithstanding that the question was answered at the time of the discovery.

Unless there is some clear empirical evidence that the rule change will speed things up and not increase costs, the rule should be left unchanged.

The suggested rule change may well generate a significant number of motions devoted to whether something is "manifestly" irrelevant as opposed to just plainly, clearly or some

other shade of irrelevant. These types of motions will replace the current refusals' motion in which the objection is generally that the question asked is irrelevant.

Furthermore, if questions are permitted to go far afield and have to be answered, it may also have the impact of lengthening discovery, not limiting it.