

# Civil Litigation

CIVIL LITIGATION SECTION / SECTION DU LITIGE CIVIL

## Mandatory Mediation in Toronto

*Master Calum U.C. MacLeod\**

There is a great deal of “urban myth” surrounding the mandatory mediation program and case management as it operates in Toronto. In my view it is premature to truly evaluate the impact of the rule because we do not yet have sufficient experience with mandatory mediation at 100%. Although Toronto Region implemented case management and mandatory mediation for 100% of eligible civil actions in July of 2001, the impact of mediation only began to be felt towards the end of that year.<sup>1</sup> Many cases commenced in 2002 have not yet been mediated. The number of cases in case management and mandatory mediation, even after a year and a half is dwarfed by those cases which remain outstanding from earlier years.<sup>2</sup>

Some facts about the program may be useful. Rule 24.1 requires the parties to appoint a mediator within 30 days of the date on which the first defendant delivers a defence<sup>3</sup> and requires the mediation to be completed within 90 days. If the parties do not agree on a mediator, the mediation co-ordinator is required to appoint a mediator from the roster. The mediator once appointed is required to fix a date for the mediation. In standard track cases, the parties may have a one time extension for completing the mediation for up to 60 days by filing a consent with the mediation office. As with all times in case managed actions, the times under

the mandatory mediation rule may otherwise be extended only with leave of the court.

Leave of the court may be obtained on motion or at a case conference. The masters will often grant extensions if they are on consent by means of an “in writing” case conference. An “in writing” case conference frequently takes place by way of an agreed upon timetable including necessary extensions of time submitted to the master for approval with supporting rationale. There is no regulated form for such a case conference but there is a form readily available from the case management registrars or at trial scheduling court that may be used. If agreement on a timetable is not obtained, the master may be asked to convene a case conference by attendance at the courthouse or by conference call.

I have recently reviewed some of the statistics which are available. In actions commenced in the first year of 100% mandatory mediation that is between July of 2001 and June of 2002 60 day consent postponements were requested in 1,980 cases or 35% of actions subject to Rule 24.1. There were orders to extend the time for mediation in 938 cases or just over 16% of such actions. No figures are available to determine how many of those orders were in

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cases where a 60-day extension had already been obtained but experience would suggest there is considerable overlap in those numbers.

It should also be noted that almost 85% of the extension orders were granted at case conferences rather than on motion and more than 90% of the requests for extension orders were granted. Experience suggests that those which were refused were primarily cases where no supporting rationale was given. It may be interesting to note there were only 8 contested motions requesting extensions and of those 6 were granted.

Data for the second half of 2002 suggests these patterns are continuing although it appears there may be some reduction in the numbers of cases in which there are 60-day extension requests or orders sought. Roughly 90% of extension requests continue to be granted and the vast majority of those are obtained by case conference — most of those are on consent and in writing.

Suggestions that there is no flexibility in the mandatory mediation regime or that the court is reluctant to grant extensions are simply not borne out. My own experience has been that extensions are refused if no basis is provided by which the court can evaluate the request. The case management regime requires court approval for most extensions of time and that approval is not intended to be an empty exercise. Approval generally means the court must be satisfied the extension of time is reasonable taking into account the circumstances of the case and the intent and purpose of the rules.<sup>4</sup> Of particular note is the fact that Rule 24.1 contains mandatory criteria which the court is required to consider when extending the time for completion of mediation. That criteria appears in Rule 24.1.09 (2) as follows:

- (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 a 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 it is postponed to allow the parties to acquire more information.**

Another order that the court is frequently asked to make is one permitting the parties to name their own mediator after a roster mediator has been appointed. Some times this order is sought because the parties simply failed to act within the 30-day period provided by Rule 24.1 — either by appointing their own mediator or seeking an extension of time. In other cases the request is occasioned by the addition of a party or an order that one or more actions be tried together. There is no specific power in Rule 24.1 to grant such relief but those orders are frequently — although not invariably — granted.

Although there are no criteria for setting aside the appointment of a mediator, Master Albert has suggested criteria in *HSBC Bank of Canada v. Jackson* [2002] O.J. No. 302 as follows:

In case managed actions counsel should not expect relief from the court on consent, without providing evidence of why the relief sought is appropriate. Rule 77.01(4) prevails over rule 3.02(4). Where counsel seek to remove a mediator assigned by the mediation co-ordinator from the roster, several criteria should be considered, including:

- (a) Why do counsel want to replace the roster mediator? Is it likely that the proposed change of mediator will reduce unnecessary cost and delay, facilitate early and fair settlement of the claim or bring the proceedings expeditiously to a just determination?
- (b) What steps has the assigned roster mediator taken? Has she or he agreed to step aside?
- (c) Is there a conflict of interest issue?
- (d) Have the parties provided the information required by Form 24.1A (proposed mediator's name and date of mediation session)?
- (e) Will the proposed change of mediator delay the proceedings significantly?

I would just add that the court will generally expect the roster mediator to have been treated

fairly and to avoid having to make the mediator a party to the motion or case conference, will require confirmation that the order sought does not adversely affect the roster mediator. Generally that requires the roster mediator to have stepped aside voluntarily or the cancellation fee to be paid.

In conclusion, it will be some time before we can accurately measure the impact of the mandatory mediation rule on litigation practice in Toronto — at least through statistical means. In the meantime, it seems important to dispel the myth that the rule is inflexible or that the process of obtaining discretionary relief need be cumbersome or expensive.

Currently under the case management regime in Toronto there are four principle deadlines which cause the court to initiate action: the case expiry date,<sup>5</sup> the date for appointing a mediator,<sup>6</sup> the time for participating in mediation,<sup>7</sup> and the time within which a settlement conference must take place.<sup>8</sup> Ideally, counsel will confer and agree on a litigation plan which will include the appropriate timing of each of these steps and will then submit the plan for approval with supporting rationale.<sup>9</sup> If agreement cannot be obtained, an urgent case conference or a motion may be required but in most instances a case conference in writing is all that is necessary.

*\* Master MacLeod is a case management master in the Superior Court of Justice, Toronto Region. The views expressed in this article are not necessarily the views of the court. Although the statistics referred to are generated by the Ministry of the Attorney General, the calculations and conclusions are those of Master MacLeod.*

<sup>1</sup> Ottawa, by contrast has been at 100% case management and mandatory mediation since 1997. Rules 77 and 24.1 were just implemented in Windsor in January of this year. At the moment, these are the only three jurisdictions in Ontario where case management and mandatory mediation are in force.

<sup>2</sup> Gradually to be dealt with by Call Over Court. There were roughly 50,000 such actions outstanding when the call over court process began.

<sup>3</sup> Defined to include a notice of intent to defend. Time starts to run when any defendant files.

<sup>4</sup> See Rule 24.1.01 which states that the purpose of mandatory mediation is reduce cost and delay in litigation and facilitate the early and fair resolution of disputes. Rule 77.02 states that the purpose of case management is to reduce unnecessary cost and delay in civil litigation facilitate early and fair settlements and bring proceedings expeditiously to a just determination while allowing sufficient time for the conduct of the proceeding.

<sup>5</sup> See rule 77.08

<sup>6</sup> By filing form 24.1A — see rule 24.1.09 (6)

<sup>7</sup> See rules 24.1.09 (7) & 24.1.10

<sup>8</sup> 150 days or 240 days from the first defence — see rule 77.14 (1) In Toronto in fast track actions, a notice of settlement conference will be sent and in standard track actions, a notice of trial scheduling court.

<sup>9</sup> in advance of the deadlines.

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# Proscription Periods Under the New *Limitations Act*

Roger Chown\*

The new *Limitations Act* has been passed. Once it is proclaimed, it will introduce a major change in the law surrounding proscription periods in insurance policies.

The new legislation enacts a basic time limit of two years to bring a lawsuit for most types of claims. The time limit starts to run when the claim is discovered. This two-year time limit replaces most limitation periods found in the existing *Limitations Act* and in a host of other statutes.

## Act Applies Despite Agreements

Under section 22 of the new Act, the basic two-year time limit applies “despite any agreement to vary or exclude it”. This provision appears to abrogate the proscription periods contained in most types of insurance policies. As will be discussed below, there are exceptions for fire policies, accident benefits claims and auto property damage claims, but for long term disability policies, life policies, theft policies, and other types of policies, it would seem that any policy provision suggesting a proscription period other than two years from the date the claim is discovered will not be valid.

## Exceptions

There remain numerous exceptions to the basic two-year time limit contained in the new Act. In fact, a schedule to the new Act lists 68 limitation periods in 42 different statutes that remain as exceptions to the basic two year rule. Three of these exceptions are of particular interest in insurance cases.

Firstly, statutory condition 14 under section 148 of the *Insurance Act* remains in force so that there remains a time limit of one year from the

date of loss for commencing an action against an insurer for fire claims under a fire policy. The Court of Appeal has previously held that this proscription period only applies for *fire policies* and it does not necessarily apply for household or commercial multi-peril or all-risks policies. In this regard, the legislation will create confusion for both insurers and insureds (this issue is discussed further below).

Secondly, a new section will be added to the *Insurance Act* (s. 259.1) which will require that “A proceeding against an insurer under a contract in respect of loss or damage to an automobile or its contents shall be commenced within one year after the happening of the loss or damage.” The current time limit is of course one year under the policy provisions (see statutory condition 9(4) under OAP 1) so this new section of the *Insurance Act* will simply maintain the status quo.

Thirdly, a new section will be added to the *Insurance Act* (s. 281.1) to maintain the rule that an insured must dispute a denial of accident benefits within two years after the insurer’s refusal to pay the benefit claimed, as opposed to two years from the date the claim was “discovered” as mandated under the new Act. This simply preserves the existing rule under s. 51 of the Statutory Accident Benefits Schedule for accidents on or after November 1, 1996.

## Fire Policies v. Multi-Peril or All Risks Policies

Statutory condition 14 for fire policies in Ontario states that “Every action or proceeding against the insurer for the recovery of a claim under or by virtue of this contract is absolutely barred unless commenced within one year next after the loss or damage occurs.” This statutory condition has been specifically identified as an exception

to the basic limitation period under the new Act. In other words, for fire policies the proscription period is still one year from the date of loss.

However, there are numerous cases in which our courts have held that statutory condition 14 only applies to true fire policies. This result flows from s. 143 of the *Insurance Act*, which says that the statutory condition “applies to insurance against loss of or damage to property arising from the peril of fire in any contract made in Ontario...” In 1979, the Ontario Court of Appeal in *Slijepcevic v. State Farm Fire & Casualty Co.* (1979), 26 O.R. (2d) 566 considered s. 143 and held: “whether a ‘Homeowners Policy’ can be classified as a fire policy depends on all the circumstances including the package of coverage provided by the insurer”. Thus statutory condition 14 does not necessarily apply to multi-peril or all-risks policies. Subsequent to this decision, most insurers ensured that their policy wordings specifically incorporated the statutory conditions to apply to all claims and all risks insured under the policy. Typically, multi-peril and all-risks policies include a phrase such as “...all of the Conditions set forth under the titles Statutory Conditions and Additional Conditions apply with respect to all of the perils insured by this policy...”.

By 1997 one judge held: “It is well established that an insurer may incorporate statutory conditions, including conditions relating to limitation periods, into a contract of insurance and such provisions are binding so long as they are clear and the insured is not misled.” (*Matte v. Canadian General Insurance*, [1997] O.J. 4893.) This was recently re-affirmed by the Ontario Court of Appeal in *International Movie Conversions Ltd. v. ITT Hartford Canada* (2002), 57 O.R. (3d) 652. In other words, the statutory conditions for fire policies are not incorporated by operation of law into multi-peril policies, but insurers could incorporate them into the wordings of a multi-peril policy. The issue became “whether clause 14 was clearly and unambiguously included in the policy as a matter of contract, so as to bind the insured under the normal rules of contract law”. In the *International Movie Conversions* case the condition had been unambiguously incorporated and the one-year proscription period applied.

Consider the situation that will apply after the new Act is proclaimed. The new Act contains a provision that specifically says statutory condition 14 continues in force. However, based on the existing case law described above, statutory condition 14 only applies to fire policies and does not necessarily apply to multi-peril or all-risks policies. The new Act also says that the basic limitation period under the new Act applies “despite any agreement to vary or exclude it”. It therefore seems that statutory condition 14 will only be effective in those policies in which it is incorporated by operation of law (i.e. for true fire policies as defined by s. 143 of the *Insurance Act*). It seems that statutory condition 14 will not necessarily apply in cases in which the insurer has incorporated the statutory condition into the wordings of a multi-peril or all-risks policy.

All of this is further complicated by additional, apparently unrelated, pending changes to the *Insurance Act*. The *Insurance Act* has been amended (but again the amendments are not yet proclaimed in force) to remove reference to classes of insurance. Included in the amendments are provisions which repeal the definition of “fire insurance”, and which amend s. 143. “Insurance against loss or damage through theft, wrongful conversion, burglary, house-breaking, robbery or forgery” will be specifically excluded from application of the fire statutory conditions. This would seem to make it even less likely that household policies will be considered fire policies. That being the case, it seems that the basic two year limitation period will supercede most proscription periods in claims arising from multi-peril or all-risks policies.

## Waiving a Proscription Period

Because the two year time limit applies “despite any agreement to vary or exclude it”, it is no longer an option for an insurer and claimant to mutually agree to waive a proscription period pending settlement negotiations. It is unclear whether this provision also means that an insurer can no longer waive a proscription period for fire claims. Since there is an exception for fire policies, it seems that the old rules for true fire policies will continue to apply, but not for most multi-peril or all-risks policies.

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## Discoverability and Proscription Periods

It is also important to note that the time limit under the new Act is not two years from the date of loss. It is two years from the date the claim is discovered. And a claim is not discovered until all of the elements of the cause of action are or ought to be known by the claimant. Thus, for example, in a flood claim the proscription period will likely be two years from the date the insured is informed of the insurer's denial, and not two years from the date of the flood. Insurers and adjusters may be wise to take advantage of section 14 of the new Act, which allows for a "notice of possible claim" to be served on the person who may have the claim. If the notice meets certain requirements, "The fact that a notice of possible claim has been served on a person may be considered by a court in determining when the limitation period in respect of the person's claim began to run" (section 14). Thus to defeat any discoverability argument, insurers should perhaps serve a notice of possible claim with any denial of a claim.

## Proclamation

As of the date of writing this article, the government has not announced when the new Act will be proclaimed in force.

## Conclusion

The new Act is welcome but in respect of proscription of fire claims under insurance policies, the provisions of the new Act yield a strange state of affairs. The new Act creates a two-year time limit for most every type of claim, despite what the policy provisions may indicate. But the new Act allows an exception for 'fire policies', which continue to have a statutory one-year proscription period. However, the existing case law says that 'fire policies' are limited to true fire policies and do not necessarily include most multi-peril or all-risks policies. Thus the proscription period under most multi-peril or all-risks policies will become two years from the

date the claim is discovered. As these policies represent the vast majority of the market, it would seem that in most fire claims, the new two-year rule will apply despite the exception in the new Act.

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# Court of Appeal Affirms Summary Judgment Based on Written Agreement

*Ben Hanuka\**

On March 26, 2003, the Ontario Court of Appeal released a very brief, yet decisive, decision in *Sigfusson Northern Ltd. v. Cantera Mining Ltd.*, [2003] Docket C38541 (Ont. C.A.), upholding a summary judgment based on the terms of a written agreement.

The appellant argued that there was an oral agreement for different payment terms, which therefore required a trial of the issues. However, the Court of Appeal disagreed and wrote that where the terms of the written agreement are clear and unambiguous, an alleged oral agreement to the contrary which “does not explain or qualify the terms of the written agreement, but rather contradicts those terms”, will be taken as “nothing more than an attempt to alter the terms of the written agreement...”:

[1] We agree with the motion judge that this was a proper case for summary judgment. The terms of the January written agreement are clear and unambiguous. The context in which that agreement was written does not suggest any ambiguity. The appellant’s contention that it and the respondent entered into a further oral agreement at the same time, as the written agreement cannot withstand scrutiny. The oral agreement put forward by the appellant is nothing more than an attempt to alter the terms of the written agreement as they relate to the appellant’s obligation to make the payments set out in the written agreement. The purported oral agreement does not explain or qualify the terms of the written agreement, but rather contradicts those terms. Evidence of an oral agreement cannot be admitted for that purpose: G. Fridman, *The Law of Contract in Canada* (1999), 4th ed.

While this doctrine is well established, nevertheless this decision is reassuring, given an apparent trend in Ontario trial-level courts

in recent years (in the franchising context as well as in various other contract areas) to avoid confronting such contractual/evidentiary rules, and instead allow everything into evidence, subject to weight.

The clear decision of the Court of Appeal in this case, with its very distinguished panel of Justices Doherty, Abella and Laskin, is binding on trial level courts with similar facts, and should serve as a signal that in certain cases, a stricter and more formal approach to admissibility of evidence issues in contract litigation ought to be applied.

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# Notice re. Access to the Court House at 361 University Ave. in Toronto

Please take notice that effective April 7, 2003; access to the Court House at 361 University Avenue in Toronto will be strictly controlled. This is a direct result of security risks at the Court House.

The public may enter only through the University Ave. entrance, and must pass through a metal detector, and possibly be subject to a magnetic wand search.

Lawyers may by-pass this by presenting a bar association or Law Society photo ID card.

Counsel may also enter through the MTLA entrance off the quadrangle between Osgoode and 361 University, with a photo ID card.

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# Franchising Sub-Site Launched

[http://www.oba.org/en/civil/civil\\_en/franchising.asp](http://www.oba.org/en/civil/civil_en/franchising.asp)

The Joint Subcommittee on Franchising is pleased to announce the launch of its sub-site under the Civil Litigation Section Web page at the above link.

The following are the items available on the sub-site for all section members:

## Franchising

Mandate: The Forum for Ontario Franchise Lawyers (Litigators and Solicitors)

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How The Courts are applying GOOD FAITH/Fair Dealing Under the new Act

Drafting For Fair Dealing — Sample Clause #1

The Duty of Fair Dealing and Common Sense  
A Pre-case Law Primer of Drafting Principles1

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