

Mandatory Mediation - Changes and Update 2010

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On January 1, 2010, significant changes to the mandatory mediation Rule 24.1 will come into force. These changes come out of a recent Civil Justice Reform Project review conducted by the Honourable Coulter A. Osborne, Q.C., with a focus on issues of access to justice for all Ontarians. The review's central recommendation was that the time and expense of any proceeding should be proportionate to the amount in dispute and the importance of the issues at stake. In other words, it should not cost \$50,000 for each party to litigate a \$40,000 matter. To that end, many of the changes are intended to keep the costs and process steps in proportion to the size of the matter itself.

In general, the mandatory mediation rule has been kept largely intact, even though Rule 78 (the old Toronto Civil Case Management Pilot Project) has been repealed. Mandatory mediation is now governed by the new Rule 24.1, with the most significant amendments being focused around a change to the timeframe within which a mandatory mediation must be conducted, and the ability for parties to extend the time, on consent, when they actually conduct the mediation.

Other noteworthy changes to the Rules include an increase in the limit for Simplified Procedure Rule cases from \$50,000 to \$100,000; an allowance for up to 2 hours of discovery on Simplified Procedure Rule cases and a limit of 7 hours of discovery on standard cases; and an increase in the Small Claims limit from \$10,000 to \$25,000. In addition, there has apparently been significant discussion in the Ministry about the possibility of making mediation mandatory in all Small Claims cases as well, but it isn't known how that would be accomplished, or who would be mediating.

This article answers some key questions about the amendments that you may have as a mediator or as legal counsel.

What cases are subject to mandatory mediation?

The new Rule 24.1 applies to all actions governed by the previous rule, and continues to apply to all new actions commenced in Ottawa, Toronto or Essex County after January 1, 2010, with certain exceptions.

What cases are not subject to mandatory mediation?

The following types of cases continue to fall outside of mandatory mediation, as clarified in the new Rule 24.1:

1. actions to which Rule 75.1 (Mandatory Mediation ? Estates, Trusts and Substitute Decisions) applies;
2. 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 before the delivery of the first defence in the action;
3. actions placed on the Commercial List established by practice direction in the Toronto Region;
4. actions under Rule 64 (Mortgage Actions);
5. actions under the Construction Lien Act, except trust claims; and
6. actions under the Bankruptcy and Insolvency Act.

What about actions under the Class Proceedings Act, 1992?

Rule 24.1 applies to an action commenced under the Class Proceedings Act, 1992 only if certification as a class proceeding has been denied. The Rule does not apply to actions certified as class proceedings under the Class Proceedings Act, 1992.

When must a mandatory mediation be held?

For existing actions in Toronto commenced prior to January 1, 2010 that were subject to mandatory mediation, the mediation must be completed within 180 days from January 1, 2010 as per the new rule.

For existing actions commenced in Ottawa and Windsor prior to January 1, 2010, the requirement to mediate within 90 days of the filing of the first defence continues to apply if the 90 days expire prior to January 1, 2010. If the 90-day clock expires after January 1, 2010, it is the authors' interpretation of the Transition Rule (24.1.09 (2.1)) that in this case, parties will have until June 30, 2010 to complete their mediation.

For all new actions commenced in Toronto, Ottawa and the County of Essex on or after January 1, 2010, the mediation must take place within 180 days after the first defence is filed, unless some action is taken to extend the time, as described below. This is a significant change from the system in Toronto under Rule 78 (repealed on January 1st, 2010), where the rule stated that mediations could be held "at the stage at which the parties agree that mediation is most likely to be effective."

It should also be noted that all other former mediation timelines in Rule 78 in Toronto have been revoked, including the 150 day timeline for wrongful dismissal and Simplified Procedure Rules cases. These deadlines will no longer be in force as of January 1, 2010.

The new rule has given parties a right to extend the time for mediation beyond the single 180 day deadline. To do so, however, they must have written consent of all parties, they must have a specific date (not a generalized "later time"), and they must file this consent with the mediation co-ordinator. Generally speaking, parties will continue to be required to have completed mediation in order to set the matter down for trial.

What happens if the parties do not take any steps to proceed to mediation within the 180 day period?

If the mediation co-ordinator does not receive a Court order or a consent signed by the parties extending the time for the holding of the mediation within 180 days after the first defence has been filed, or a Form 24.1A stating the name of the mediator and date of the session, or a mediator's report, or a notice that the action has been settled, then a mediator from the roster list shall be assigned to conduct the mediation, unless the court orders otherwise.

Likewise, if the parties do not file appropriate paperwork or conduct a mediation and the action is set down for trial, a mediator from the roster list shall be assigned to conduct a mediation. It should also be noted that the system currently in place prevents matters from being set down for trial unless a mediation has taken place, so it remains to be seen whether any matters will be set down for trial without having been mediated.

When must an assigned mediator hold the mediation?

The assigned mediator must fix a date for the mediation session within 90 days after appointment unless the court orders otherwise.

Does an insured party have to attend the mediation, if an insurer is involved?

Unless the court otherwise orders, an insured party is not required to attend the mediation session, but a representative of the insurer is still required to attend.

What must be filed before the action can be set down for Trial?

One of the parties must file with the mediation co-ordinator either (a) a notice (Form 24.1A) stating the mediator's name and the date of the mediation session; or (b) a mediator's report under subrule 24.1.15 (1) indicating that the mediation has been concluded.

Is the Court going to continue to send Status Review notices under Rule 48.14 at the 2 year mark if a matter has not been set down for trial?

According to the Mediation Co-ordinator, this practice will continue as a backstop to ensure parties are moving cases forward. If mediation has not been conducted by the time a Status Review notice has been sent, it must be included on the timetable for the matter.

What has changed for Simplified Procedure Rules cases?

Rules for Simplified Procedure Cases have changed. As noted, the limit has now been raised to \$100,000 from \$50,000. In addition, the ban on oral discovery has now been lifted, allowing parties each a maximum of 2 hours of oral discovery (regardless of the number of parties to discover).

In addition, the courts have allowed limited examination and cross-examination of witnesses in Simplified Procedure Rules cases, meaning that trials under these rules will likely take a bit longer and cost a bit more, given that the limits, and stakes, are now higher.

What other changes have been made that might affect mandatory mediations?

One other possibly significant change is the use of experts and expert reports. Currently, parties may retain experts and file expert reports as they see fit. This has frequently lead to the practice of experts essentially working for one side or the other, contravening the concept that experts should not be on either “side”. To change this, a new rule, Rule 4.1.01, has been added as follows:

DUTY OF EXPERT

4.1.01 (1) It is the duty of every expert engaged by or on behalf of a party to provide evidence in relation to a proceeding under these rules,

(a) to provide opinion evidence that is fair, objective and non-partisan;

(b) to provide opinion evidence that is related only to matters that are within the expert’s area of expertise; and

(c) to provide such additional assistance as the court may reasonably require to determine a matter in issue. O. Reg. 438/08, s. 8.

Duty Prevails

(2) The duty in subrule (1) prevails over any obligation owed by the expert to the party by whom or on whose behalf he or she is engaged. O. Reg. 438/08, s. 8.

The goal of this rule is to ensure the expert's duty is to the court, not the party retaining them. It will remain to be seen what impact this rule will have on the use of experts and quality of reports, but mediators should be aware of this change in order to work effectively with these reports at mediation.

In summary, while the changes from a mediation point of view are not dramatic, they will affect how and when parties mediate, and that will have impact on the mediations themselves. Mediators should become familiar with the changes to help the parties get the most out of the mediation process.