



Mandatory Mediation - Changes and Update 2010

Jeff Morris, Gary Furlong, David Bristow

On January 1, 2010, significant changes to the mandatory mediation Rule 24.1 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. "Proportionality", in other words, matters, i.e. it should not cost \$50,000 for each party to litigate a \$30,000 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rule has been kept largely intact, even though Rule 78 (the old Toronto Civil Case Management Pilot Project) has been repealed.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.
- An increase in the Small Claims limit from \$10,000 to \$25,000.
- Mandatory mediations must be held as follows:
 - 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.
 - An assigned mediator must fix a date for the mediation session within 90 days after appointment unless the court orders otherwise.
- The Court is 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. This continues to backstop the timeframes.
 - 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.

- Summary Judgment:
 - This rule has changed significantly. Previously, the standard or bar for winning on summary judgment was set very high, with little ability for a judge to reach a determination on the substantive matter before them. They essentially determined whether there was a genuine issue for trial, or not.
 - Now, the following has been added to the Rules:

Powers (20.04)

(2.1) In determining under clause (2) (a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:

1. Weighing the evidence.
2. Evaluating the credibility of a deponent.
3. Drawing any reasonable inference from the evidence. O. Reg. 438/08, s. 13 (3).

This means, essentially, that a judge can weigh evidence, accept testimony on the evidence, evaluate credibility, and reach a substantive decision as needed to end the matter.

- Documentary Discovery
 - In the past, parties had to produce any documents "relating to any matter in issue". This has change, and now only documents "relevant to any matter in issue" will be producible. This could

significantly reduce the amount of documents sought and exchanged.