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Does an Informal Agreement to Mediate Stop the Limitation Period from Running?

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Users of mediation need to be aware that mediation has a trap: the limitation period. A party may enter into mediation and let the limitation period go by. This article provides commentary on three decisions which provide an essential legal framework for the impact of mediation on the limitation period as well as providing constructive advice on how to avoid this potential pitfall.

Mediation seems like apple juice: no harm in taking it and it might do some good. But mediation has a trap: the limitation period. A party may enter into mediation and let the limitation period go by. Fortunately, there is protection in Section 11 of the Limitations Act, 2002. In **Sandro Steel Fabrication Ltd. v. Chiesa**, the Ontario Court of Appeal recently held that section 11 applies if there is an agreement to appoint a mediator, whether the agreement is formal or informal.

Section 11(1) states that “if a person with a claim and a person against whom the claim is made have agreed to have an independent third party resolve the claim or assist them in resolving it, the limitation periods established by sections 4 and 15 do not run from the date the agreement is made until (a) the date the claim is resolved; (b) the date the attempted resolution process is terminated; or (c) the date a party terminates or withdraws from the agreement .” Five aspects of this section should be noticed.

First, the section does not depend on a contract to mediate, only an agreement to mediate. So the mediation agreement does not have to meet the requirements of a contract, such as consideration, certainty of terms, etc. All there has to be is an agreement to mediate.

Second, the agreement need not be in any particular form. The respondent in the **Sandro** case asserted that section 11 could “only be triggered by express written agreement referencing the specific claim [which met] all essential terms required by the law of contract.” The Court of Appeal rejected that submission and held that as long as there was an agreement to mediate, the limitation period was suspended.

Third, section 11 states the events which terminate the protection against the running of the limitation period. Each of the terminating events mentioned in section 11 can be determined with objective certainty. Section 11 does not state uncertain events for the end to the protection, such as the end of “good faith efforts” to settle as some mediation clauses do.

Fourth, section 11 does not provide for the termination of a mediation agreement, only the limitations protection of that agreement. So once the protection under section 11 ends the party wishing to make a claim must commence the claim within the re-started limitation period even if the obligation to mediate continues. For this reason, those drafting mediation clauses should use the termination language in section 11 so that there is no disconnect between the obligation to mediate and the limitation period protection.

Fifth, section 11 provides protection that can be used whenever a decision to mediate is made. The protection does not have to be in the original contract under which the dispute arises, if there was such a contract. Section 11 could apply to a tort or other non-contractual claim. So section 11 is a convenient protection whenever a dispute arises.

Any parties contemplating mediation should use this safe harbour carefully, by copying the wording of section 11 into the mediation agreement, or at least into an email confirming the agreement to mediate: “this confirms our agreement to have an independent third party resolve the claim or assist the parties in resolving it.”

The need for a safe harbour is demonstrated by the decision in *Markel Insurance Company of Canada v. ING Insurance Company of Canada*, 2012 ONCA 218. The parties had settlement negotiations between themselves. The defendant said that the limitation period started when the plaintiff made a demand, and the plaintiff said that it started when the defendant finally denied the demand after the negotiations. The Court of Appeal agreed with the defendant. As a result the limitation period had expired during the negotiations. The parties had not mediated and there was no reference to section 11 in this decision.

A third important decision is *L-3 Communication SPAR Aerospace Ltd. v. CAE Inc.*, 2011 ONCA 435, (Ont. C.A.). In that case the Court of Appeal held that under the contract in question, mediation was a pre-condition to a cause of action arising, so the limitation period did not commence until the mediation was concluded.

These three decisions provide an essential legal framework for the impact of mediation on the limitation period and vice versa.

***Sandro Steel Fabrication Ltd. v. Chiesa*, 2013 CarswellOnt 8520, 2013 ONCA 434.**

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