

# Kluwer Mediation Blog

## Mediation Roundup from the Polar Vortex

Rick Weiler (Weiler ADR Inc.) · Saturday, February 22nd, 2014

Greetings from the heart of the [Polar Vortex](#)!

Yes, it's been a brutally cold and snowy winter here in Ontario, Canada, but now, in late February, the lengthening days and (relatively) warmer temperatures remind me of that point in a mediation when it seems that all hope of resolution has forever frozen over and yet, with mediator encouragement and persistence, small cracks appears in the ice, the parties' attitudes slowly begin to thaw and one can discern the stirring buds of resolution, just below the surface, imbued with nature's force, striving to burst forth into the sunlight. (*Ed. note: enough, surely!*)

### Agreements to Mediate and Limitation Periods

Section 11 of the *Limitations Act* (Ontario) reads as follows:

**S. 11(1)** If a person with a claim and a person against whom a 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.

The purpose of this section is to encourage parties to seek third party assistance (primarily mediation) in the resolution of their disputes before having resort to the Courts. The recent Ontario Superior Court [Motion](#) and [Appeal](#) decisions in *Sandro Steel Fabrication v. Chisea et al* highlight the risks of imprecision regarding exactly what is and what is not to be mediated. An excellent summary of the case by Sean Lawler, counsel for Sandro, can be seen in the Lawyer's Weekly Article, [Stopping the Limitation Period Clock](#).

In my view, although the plaintiff dodged the bullet in this case, plaintiff counsel should not take too much comfort. In the Motion decision Justice Koke wrote the following:

[69] In *Hodaie v. RBC Dominion Securities*, Justice M.R. Dambrot stated that the purpose of section 11 was to "encourage efforts to settle by providing that there is no limitation period penalty for plaintiffs who agree to enter into third party resolution

processes”. I agree. In my view, if the purpose of the section is to encourage settlement it should be interpreted broadly. In circumstances where there is ambiguity in what the parties agreed to mediate or when one of the parties to the litigation does not immediately consent to participate in the mediation process, the limitation period should still be suspended. Otherwise, plaintiffs will be reluctant to engage in a mediation process for fear that they will be ‘caught out’ in the event they did not set out a comprehensive mediation agreement.

But the Ontario Court of Appeal included this in their short Endorsement:

[3] The appellant also argues that in para. 69 of the motions judge’s decision, he suggested *s. 11(1)* applies even in situations where there is ambiguity surrounding the existence of an agreement.

[4] **This decision should not be taken as endorsing that statement** (*emphasis added*). The disposition of this case turns on the finding by the motions judge that, based on the evidence, there was an agreement to mediate all the claims.

The takeaway for all counsel is to be precise as to the subject matter of the mediation at the time you agree to mediate.

#### **Mediation approved for Lac-Megantic train blast**

This week brought the announcement that the parties will engage in mediation to sort out the process for the distribution of the (CAD)\$25 Million paid out by insurers in relation to the horrendous train derailment, explosion and fire that devastated Lac-Megantic, Quebec, killing 47 in early July 2013. According to an [article from the QMI News Agency](#), Quebec Superior Court judge Gaetan Dumas ruled that he will preside over the closed-door hearing, along with lawyers for Canadian and U.S. creditors as well as survivors.

One interesting aspect of this announcement is that the Judge himself will serve as the mediator. Judges mediating is very much the norm in Quebec, a Civil Code jurisdiction, where there is currently very little private commercial or insurance mediation, unlike most other common law provinces in Canada where mediation is frequently employed.

#### **The Demise of Heenan Blaikie law firm**

Although not strictly speaking a mediation story, the biggest news in legal circles in Canada this month has been the sudden demise of leading Canadian firm Heenan Blaikie. There are many takes offered on the reasons for the breakup of this storied firm that served as home to many illustrious counsel including former Canadian prime ministers Trudeau and Chretien. Ian Holloway’s Legal Post article can be seen [here](#).

While undoubtedly the causes of Heenan’s collapse are overdetermined – in other words, there are many – there is certainly no doubt, based on the anecdotal evidence gleaned from the mediation palaces in downtown Toronto, that there are ever-increasing financial pressures on law firms, large and small. Insurance defense counsel, in particular, are often heard to lament the penny pinching ways of their clients and many mediators have observed the impact this can have on the mediation process: cases that should have settled at noon settling at 5 pm and mediations that should have settled on the day being unnecessarily scuttled apparently to allow a few more hours to be spent on the file.

It would be interesting to hear from other jurisdictions as to whether similar phenomena are being observed.

Well, enough for now. I've got to get back to shoveling out the driveway and pulling the snow off the roof!

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