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Thomas Heintzman is the author of ***Heintzman & Goldsmith on Canadian Building Contracts,*** 4th Edition which provides an analysis of the law of contracts as it applies to building contracts in Canada.

Does A Mediation Agreement Suspend The Limitation Period Or The Period To Set Down A Lien For Trial?

An agreement to mediate is often found in arbitration and building contracts. Yet, the impact of mediation upon court or arbitral proceedings is uncertain. Does an agreement to mediate mean that, until the mediation occurs, there is no cause of action and therefore there is no entitlement to commence arbitration or an action? In that case, the limitation period would be effectively extended. In ***L-3 Communication Spar Aerospace Limited v. CAE Inc.****, 2010 ONSC 7133, 2011 ONCA 435,* the Ontario Court of Appeal held that, until a contractual obligation to negotiate a compromise had been fulfilled or terminated, no cause of action arose and the limitation period was not running.

Or is an agreement to mediate simply not enforceable because an agreement to negotiate is not enforceable? If this is the case, then the limitation period is running and either party can ignore the mediation agreement and go to court or commence arbitration. The Ontario Court of Appeal so held in ***Federation Insurance Co. of Canada v. Markel Insurance Co of Canada***, 2012 ONCA 218.

The uncertainty about the enforceability of mediation agreements creates real dangers for those engaged in dispute resolution under arbitration and building contracts. Fortunately, in Ontario there may be at least a partial solution in section 11 ("section 11") of the ***Limitations Act, 2002*** of Ontario ("*Limitations Act")*. This solution is often forgotten but in the recent decision in ***Tribury v. Sandro***, the court held that a mediation agreement, once made, does effectively stop the limitation period from running.

However, there are other dangers arising from mediation agreements and limitation and procedural periods. The *Tribury* decision did not expressly determine whether the mediation agreement would suspend the limitation period even if it was not an <u>enforceable</u> agreement to mediate. In addition, section 11 only applies to limitation periods prescribed under the *Limitations Act*. Thus, in *Tribury,* the court did not apply section 11 to the two year period for setting a lien action down for trial under section 37 of the ***Construction Lien Act*** *("*section 37"). What is the effect of mediations on all the other procedural and limitation sections found in Ontario statutes?

Section 11(1) states as follows:

> " 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."

Background

Tribury was the general contractor on a construction project for Laurentian University. Sandro was the structural steel subcontractor and Edward was Sandro's structural steel consultant. The project started in 2006 and ground to a halt in June 2007 due to the alleged failure of certain steel connections. Apparently, all parties accepted that the claims between the parties were "discovered" in June 2007 for the purposes of the ***Limitations Act***. As will be seen later, one of the issues in the motions in question was whether some of the subsequent proceedings were brought within the basic two year limitation period set out in section 4 of the Ontario *Limitations Act* or, in effect, by June 2009.

In October 2008, Sandro commenced a construction lien claim against Tribury and Laurentian. The other issue in the motions in question was whether Sandro had set that lien claim down for trial within two years of that date as required by section 37 of the *Construction Lien Act,* or, in effect, by October 2010.

In December 2008, Tribury counterclaimed in Sandro's lien action. In April 2009, Tribury started its own action which was substantially the same as its counterclaim in Sandro's lien action. While Tribury agreed to withdraw that counterclaim, the order dismissing the counterclaim was not made until November 2010.

The Mediation

In March 2009, Sandro suggested mediation to all parties. In April 2009, counsel for all the parties participated in a conference call and all the parties, with the exception of one party, agreed to participate in mediation. That agreement was confirmed by a letter from Tribury which suggested the names of mediators, proposed deadlines for the mediation briefs and confirmed the parties' tentative consent to a cost sharing for the mediator's fees. In July, 2009, Sandro delivered its mediation brief to Edward. In March, 2010 the parties chose a mediator. In August, 2010, a mediation date in November 2010, was scheduled. On November 10, 2010, counsel for Edward advised the other parties that Edward was not prepared to mediate the "Sandro remediation costs", namely the remediation costs which Sandro itself had incurred and was now claiming against Edward (as opposed to remediation claims being asserted by others against Sandro which Sandro claimed over against Edward). The mediation was cancelled.

The Impugned Proceedings

On December 3, 2010, Sandro issued a new Statement of Claim against Edward. On December 6, 2010, in Tribury's 2009 action Sandro served a Statement of Defence, Crossclaim (against Edward) and Counterclaim (against Tribury).

The Motions

Edward then brought a motion to dismiss the December 2010 action and cross claim against it on the ground that the limitation period had expired.

Tribury bought a motion to dismiss Sandro's lien action on the ground that it had not been set down within the two years period set forth in Section 37 of the Construction Lien Act. Section 37 requires that, within two years of the lien action that perfected the lien, an order must be made for the trial of an action in which the lien may be enforced, or an action in which the lien may be enforced must be set down for trial. Otherwise, the lien action must be dismissed.

Tibury also sought an order dismissing Sandro's December 2010 counterclaim on the basis that, by December 2010, the limitation period had expired for that counterclaim to be brought.

The Decision

1. Section 11

So far as Sandro's December 2010 claim and cross claim against Edward and its December 2010 counterclaim against Tribury, the Court held that the limitation period for commencing those claims was extended during the whole period from April 2009 to November 2010, and had not expired by the time that Sandro's December 2010 claim, cross claim and counterclaim were commenced, by virtue of the mediation and the effect of section 11 of the *Limitations Act.*

First, the Court held that an agreement under section 11 did not have to specify that the limitation period was suspended until the conclusion of the mediation. The suspension of the limitation period was effected by section 11 itself, without the parties having to say so. Their agreement to mediate, not any words agreeing to a suspension of the limitation period, caused the suspension.

The Court distinguished section 23(3) from section 11 of the *Limitations Act.* Sub-section 23(3) is the general provision allowing parties to agree to suspend or extend the limitation period. That sub-section depends, for it to be activated, on the parties' agreement to do exactly that, namely, suspend or extend the limitation period. In contract, section 11 depends, for it to be activated, upon the parties' agreement to mediate. If there is an agreement to mediate, it is section 11 which then suspends the limitation period. The Court said:

> Edward has not convinced me that the agreement referred to in section 11 of the *Limitations Act* requires specific language suspending or extending applicable limitation periods for its efficacy. In my view, what is required is an agreement which is entered into after a dispute has arisen whereby the parties agree to have a third party assist in resolving the dispute, nothing more. In the case before the court, the parties entered into an agreement to mediate in response to a dispute which had arisen among them. They have therefore met the requisite test.

Whether there was an agreement to mediate was disputed. After reviewing the evidence, The Court held there was an agreement to mediate and that it included the Sandro remediation costs. The Court found as follows:

> The correspondence between the parties confirms their mutual intention to mediate the issues which arose following the failure of the steel connectors and I find that all parties decided to mediate these issues on the understanding that all outstanding damages issues would be mediated. Although the confirming letter did not specify which issues were to comprise the subject of the mediation, the agreement was open ended and not restricted in scope. There was a stated requirement in the

letter confirming the mediation that both Sandro and Tribury submit damages briefs and there is no evidence that the parties intended that only some of the issues resulting from the failure of the steel connectors were to be mediated.

2. Section 37

So far as Sandro's lien claim, the Ontario Superior Court exercised its discretion to permit that claim to proceed as an ordinary contract claim, and struck out the lien itself on the ground that the action had not been set down within the two year period set forth in section 37. In so deciding, it did not consider whether the mediation, and section 11 of the *Limitations Act,* could extend the time set forth in section 37. Since section 11 only refers to limitation periods in the *Limitation Act,* the Court presumably thought that it was self-evident that section 11 did not apply to section 37.

Discussion

There is good news (with a condition), bad news and two warnings arising from this decision.

First the conditional good news. If parties who are involved in a dispute agree to mediate, they thereby suspend the limitation period under section 11. This is a power that is often forgotten. The parties are not necessarily faced with a "do or die" alternative between commencing the proceeding on the one hand, or mediating and potentially letting the limitation period run out on the other hand. By reason of section 11, they are protected against the running of the limitation period by a proper mediation agreement.

The condition to the good news is this. In *Tribury* the Court held that the mediation agreement suspended the limitation period without inquiring whether the mediation agreement was an enforceable mediation agreement, so far as the obligation to mediate is concerned. That is, the Court did not consider whether the mediation agreement contained enough details to make it an enforceable agreement to mediate. There are many recent cases, particularly in the United Kingdom, holding that an agreement to mediate is not enforceable unless that agreement contains sufficient procedural details.

One explanation of the *Tribury* decision could be that it is not essential that mediation agreement be enforceable as such for it to activate section 11: a mediation agreement is enforceable to suspend the limitation period by virtue of section 11, even if it does not compel the parties to mediate.

Another explanation is that this issue was simply not considered, and that it is open for another court to conclude that, unless the mediation agreement contains sufficient details, it does not activate section 11.

Second, the bad news. Sections 11 and 23 only refer to limitation periods contained in the *Limitations Act*. They do not refer to limitation periods in any other Act, including the *Construction Lien Act.* For this reason, the parties cannot rely on sections 11 or 23 to extend by agreement the limitation periods for the commencement of a lien action or the statutory period for setting a lien action down for trial.

Nor do sections 11 or 23 apply to limitation periods, or periods for taking steps, in other statutes. For example, the ***Arbitration Act, 1991*** of Ontario contains a number of limitation periods. Section 52(1) of that Act says that limitation period for an arbitral claim is the same limitation period as for an action. So presumably, sections 11 and 23 should apply to arbitral claims. Section 47of the *Arbitration Act, 1991* establishes a 30 day period for commencing an appeal from an award or an application to set aside an award. Section 52(3) establishes a 2 year period for enforcing an award. Section 3 says that the contracting parties may agree to vary or exclude any provision of the Act, except certain specific mandatory sections. Sections 47, 52 and 53 are not among the mandatory sections. So the parties should be able to vary the limitation periods set forth in those sections.

Article 34(3) of the Model Law attached to the **Ontario *International Commercial Arbitration Act*** ("ICAA") establishes a three month period for bringing an application to set aside an international commercial arbitral award. Article 52(3) establishes a two year limitation period for commencing an application to enforce the award. The ICAA and the Model Law do not contain any express power to grant relief from, or contract out of, those articles. While the two year enforcement period seems to be based on the two year general limitation period in the *Limitations Act,* it appears that the parties can vary the latter but not the former, unless a court were to find that parties can generally contract out of the ICAA .

Third - two warnings:

First, the mediation agreement should be carefully documented. An exchange of correspondence should not be relied upon as that exchange may be subject to dispute and interpretation. The dispute or disputes that fall within the mediation agreement should be specified. In the present case, Sandro was fortunate that the exchange of correspondence was interpreted by the Court to include all the issues between all the parties.

Second, in a construction lien action, attention should be paid to intersecting limitation and procedural periods, some of which may not be suspended by a mediation agreement. The same warning applies to any action or arbitration involving statutory limitation periods or periods for taking steps which could result in the proceeding being dismissed if not taken. In the present case, Sandro may have thought that the mediation agreement suspended all periods for taking procedural steps. But it didn't. It didn't suspend the two year period for setting the lien action down for trial.

See *Heintzman and Goldsmith on Canadian Building Contracts*, 4th ed., Chapter 6, introduction, and Chapter 10, part 6.

***Tribury v. Sandro*, 2013 ONSC 658**

Construction Law - Building Contracts - Construction and Builders Liens - Arbitration - Mediation - Limitation Periods

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