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Mr. Heintzman practiced with McCarthy Tétrault LLP for over 40 years with an emphasis in commercial disputes relating to securities law and shareholders' rights, government contracts, insurance, broadcasting and telecommunications, construction and environmental law. He was an elected bencher of the Law Society of Canada for 8 years and is an elected Fellow of the American College of Trial Lawyers and of the International Academy of Trial Lawyers.

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 An Informal Agreement To Mediate Stop The Limitation Period From Running?

Mediation seems like apple juice: no harm in taking it and it might do some good. But mediation has a trap: the limitation period. If a party enters into mediation and lets the limitation period go by, then that's real harm.

In a number of reported cases, one party to a mediation did exactly that because it entered into a mediation agreement that was not enforceable. When the other party mediated until the limitation period passed, the first party was left without a remedy. That is what happened in

Federated Insurance Co of Canada v. Markel Insurance Co. of Canada, 2012 ONCA 218, 2012 CarswellOnt 4051 (Ont. C.A.).

Fortunately, there is protection for this situation in Ontario which is not well known. It is found in Section 11 of the Limitations Act, 2002. By reason of a recent decision of the Ontario Court of Appeal, that protection just improved.

In ***Sandro Steel Fabrication Ltd. v. Chiesa***, the Ontario Court of Appeal held that section 11 applies whenever there is an agreement to appoint a mediator, whether the agreement is formal or informal. That means that section 11 provides broad and practical protection against the expiry of the limitation period during mediation.

Section 11 states as follows:

> "**11.** (1) 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 section does not state that the agreement must meet the requirements of a contract, such as consideration, certainty of terms, etc. All there has to be is an agreement to mediate.

Second, and this is the point of the ***Santro*** decision, the agreement need not be in any particular form. It need not be a formal written agreement and it need not refer specifically to section 11. The respondent in the ***Sandro*** case asserted that section 11 could "only be triggered by express written agreement referencing the specific claim sought to be tolled and, in this case, the alleged agreement to mediate …was void for want of mutual intention to the agreement in all essential terms required by the law of contract."

The Court of Appeal rejected that submission. It held as follows:

> "… the motions judge made a finding that there was an agreement to mediate the claim resulting from the collapse of the building which included the Sandro remediation damages. This finding is owed deference. Based on the evidence

before him, this was a reasonable conclusion. As such, by virtue of s. 11(1) of the ***Limitations Act****, 2002*, the limitation period was suspended."

The motion judge also held that section 11 applied even if there is ambiguity surrounding the existence of an agreement. The Court of Appeal was not prepared to endorse that view, but was satisfied that the motion judge had correctly held that there was an agreement to mediate.

Third, section 11 states with relative certainty the events which terminate the protection against the running of the limitation period. Each of the three events mentioned in sub-section 11 can be determined with objective certainty, and presumably it is the earliest of these events which ends the protection. Section 11 does not provide an uncertain event for the end to that protection, such as the termination of "good faith efforts" to settle as some mediation clauses do.

Fourth, section 11 does not terminate a mediation agreement, only the limitations protection of that agreement. So even if the obligation to mediate under the mediation clause continues, the protection against the running of the limitation clause does not. In these circumstances, 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 not a 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. Indeed, section 11 could apply to a tort or other non-contractual claim. So section 11 is a convenient protection to use whenever a dispute exists which the parties wish to mediate.

The ***Sandro*** decision confirms that there is a safe harbour for mediation against the possibility of the limitation period expiring during the mediation. 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 a letter or 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 ***Santos*** **and** ***Federated Insurance*** decisions are two of the triumvirate of cases decided recently by the Ontario court of Appeal dealing with mediation and limitations. The third is ***L-3 Communication SPAR Aerospace Ltd. v. CAE Inc.*****,** 2010 ONSC 7133, 2010 CarswellOnt 10046 (Ont. S.C.J.), affirmed 2011 ONCA 435, 2011 CarswellOnt 4543 (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.

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

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

mediation - building contracts - limitation period

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