

The Intersection and Confluence of the Existing System of Litigation and Alternative Dispute Resolution

Patrick T. GALLIGAN, Q.C.*

INTRODUCTION 233

I. MEDIATION 234

II. ARBITRATION 235

A. International Arbitration 235

B. Domestic Arbitration 236

C. An Overview of the Act 238

D. Jurisdiction of the Arbitral Tribunal 240

E. Standard of Review 241

CONCLUSION 242

APPENDIX 243

* Formerly of the Ontario Court of Appeal, presently ADR Chambers : An Alternative Dispute Resolution Group, Toronto, Ontario.

The subject assigned to me involves a consideration of where the existing system of litigation, which I will call the courts, and Alternative Dispute Resolution ("ADR") cross one another and where they meet and travel together. I have decided that it is not necessary or appropriate for me to engage in a detailed discussion about either system or to analyze the workings of either in any great detail. Rather, I intend to speak very generally about some of the considerations that seem to me to apply.

While there are many variations on each theme, ADR can be broken down into two main classifications : mediation and arbitration. Simply put, mediation is a process whereby the parties themselves, with the assistance of a third party, arrive at a resolution of their dispute. Arbitration, on the other hand, is a process whereby a third party imposes upon the parties a binding result of their dispute. There is nothing very new about mediation or arbitration. For hundreds of years, human beings have used those processes, perhaps with different names, as methods of resolving their disputes. In relatively recent times in Canada, and for a longer time in the United States, the two processes have become very fashionable. It would be unseemly for me, an ADR practitioner, to advocate an increased use of the processes.

It is my intention to discuss the relationship between the courts and those two broad classifications of ADR. I do not intend to discuss the variations of those processes, nor the hybrid processes that join together some aspects of mediation and arbitration. I will comment briefly upon one of those variations, because I have some personal discomfort with it. It is called "Med-Arb." In that process, a third person conducts the mediation and, if the parties are unable to resolve the dispute themselves, the third party becomes the arbitrator and imposes a resolution upon the parties. The Med-Arb process is well recognized in the ADR field. It is not uncommon to see it used to resolve labour relations disputes. My discomfort with it arises for two reasons. The first is a concern that confidential information, given to the mediator in a private caucus with one party, may consciously or subconsciously affect the decision of that person when he/she dons the arbitrator's hat. The other party does not usually know the information given by the opposite party in caucus and cannot, therefore, respond to it. I see the possibility of a decision being based on, or influenced by, information not known by one party. The second reason for my discomfort is the worry that if the parties know that the person who is the mediator is to become the arbitrator, they may not be as candid with the mediator in caucus meetings as they otherwise would be. My discomfort, as I have said, is a personal one and I know of reputable, competent practitioners in the ADR field who are comfortable with the process and very successful in making it work.

I hope that you do not think me too chauvinistic, when I tell you that I intend to deal with the law in Ontario. The reason is that, in my work, I am dealing with the law in Ontario. Regrettably, for a number of reasons, I have not done a cross-Canada survey of the law respecting mediation and arbitration in other provinces. I propose to divide my remarks into the two broad categories, mediation and arbitration.

I. MEDIATION

Until the middle of this decade, mediation was a private matter. It was not supervised by the courts. The parties to a dispute would choose a mediator, work with the mediator and, in a great many cases, resolve their disputes by the use of that process. Mediation was entirely voluntary and no person could be compelled to participate in it. In some provinces, we are now seeing a fundamental change in that position.

In Ontario, in the mid-1990's, mandatory mediation of certain cases was established in Toronto and Ottawa. Mandatory mediation was established by means of practice directions issued by the court. By a recent amendment to the Ontario Rules of Practice, which enacted rule 24.1, pilot projects have been established in Toronto and Ottawa. They will commence in January 1999. I am advised that Saskatchewan and British Columbia have either implemented, or are in the process of implementing, mandatory mediation in their courts. I have attached, as an Appendix to this paper, a copy of the Ontario rule. It is an example of how one province is proceeding.

Because the full text of the rule is attached, I will only give a brief overview of it. With certain exceptions, mandatory mediation will apply to all case-managed actions commenced in Toronto and Ottawa. The court has authority to exempt any action from the mandatory mediation rule. Mediators will be taken from an approved list of mediators compiled by local mediation committees, unless the parties agree to use someone else. Unless the court orders otherwise, the mediation is required to take place within 90 days after the first defence has been filed. The parties must prepare and provide mediation statements, which identify the factual and legal issues in dispute and set out the position and interests of the party making the statement. Documents of central importance to the action must be attached to the mediation statement. If a party does not comply with the rule, there are stringent sanctions, including the dismissal of the action, if the non-complying party is a plaintiff, or the striking out of the statement of defence, if that party is a defendant. The rule provides for enforcement of an agreement reached as a result of the mediation.

The great change is that, instead of mediation being voluntary and not controlled by the courts, mediation is to become mandatory and under the strict control of the courts.

The provisions of rule 24.1.05 authorize the court to exempt an action from the mandatory mediation. It will be interesting to see the interpretation the courts will give to this subrule. It may be that parties, for one reason or another, may want to mediate outside the rule. While the rule sets out certain circumstances that must be taken into account in deciding whether the court will extend the time within which a mediation session must take place, it does not set out the circumstances that would lead the court to exempt an action from the application of the rule. In view of the fact that the general rule is that

mediation is to be mandatory, I wonder if the courts will only exempt an action from the rule if there is an undertaking by the parties to mediate outside of the rule.

The establishment of mandatory mediation in some of the provinces resolves, at least temporarily in those provinces, the philosophical debate about whether mandatory mediation is a good thing. Those who oppose mandatory mediation contend that mediation is most likely to succeed when the process is undertaken voluntarily by the parties. When it is undertaken voluntarily, it is reasonable to expect that the parties are coming to mediation with a *bona fide* desire to resolve the dispute by agreement. The opponents of mandatory mediation say that forcing people to participate in mediation may mean that one or both of the parties will not engage in it with the same *bona fide* desire to reach an agreement. On the other hand, the reported 64 percent settlement rate of the Ottawa ADR pilot project suggests that, even when it is mandatory, the mediation process is quite successful.

In those provinces that have implemented, or are in the process of implementing, mandatory mediation, there now exists a confluence of the court system and an important branch of ADR. The court system has made the mediation process a part of its machinery. I would think that mediation, to the extent that it is mandatory and under the supervision of the courts, probably should no longer be called an alternative dispute resolution mechanism. It has become a part of the court system.

It remains to be seen whether the success of mandatory mediation will be sufficient to have justified taking away what many see to have been the very important element of voluntariness in participating in the process.

II. ARBITRATION

Arbitrations can be divided into domestic arbitrations and international arbitrations. I propose only to touch on international arbitrations and to pay more attention to domestic arbitrations.

A. International Arbitration

The *International Commercial Arbitration Act*¹ of Ontario governs international commercial arbitration. All of the provinces and the federal government have enacted international commercial arbitration laws, which incorporate the *Model Law on International Commercial Arbitration*² which was adopted, in 1985, by the United Nations Commission on International Law. That *Model Law* is commonly known as the *UNCITRAL Model Law*.

1. R.S.O. 1990, c. I-9 [hereinafter the Act].

2. United Nations document A/40/17, (Annex I) (As adopted by the United Nations Commission on International Trade Law on June 21, 1985).

The UNCITRAL *Model Law* provides for such matters as the nature and form of the arbitration agreement, the composition of the arbitral tribunal, the jurisdiction of the arbitral tribunal, the conduct of arbitral proceedings, the making of awards and termination of proceedings, and recourse to the courts against an award.

The UNCITRAL *Model Law* is of interest not only because it governs the conduct of international arbitrations, but also because it has served as the basis for the domestic arbitration acts now in force federally and in many of the provinces.

B. Domestic Arbitration

Arbitration, in many ways, is similar to a lawsuit in the courts. The hallmarks of arbitration were set out by the Supreme Court of Canada in *Sport Maska Inc. v. Zitrer*.³ Those hallmarks are :

- (a) there must be a dispute existing between the parties;
- (b) the decision-making authority is granted to a neutral third party; and
- (c) the decision-making is conducted in circumstances in which the parties intend for the third party to decide the dispute in a judicial or quasi-judicial manner.

One of the essential differences between arbitration and litigation in the courts is that the arbitrator's jurisdiction is founded upon the "consent" of the parties. The courts' jurisdiction, on the other hand, is founded in the law.

Broadly speaking, there are two main sources of arbitrations. The first is an arbitration clause in an agreement. Arbitration clauses are found in a wide range of agreements. Examples of matters which persons often agree to arbitrate are the fixing of rent on the renewal of a lease, the rights of parties under a share purchase agreement, the rights of parties on the wrongful termination of an agreement, and the valuation of assets on the sale of a business. A full list of examples would be almost endless. The other source of arbitrations is when parties become involved in a dispute and agree to have that dispute resolved by an independent third party. In such cases, there usually will be a specific and detailed arbitration agreement. It has been my experience that the latter type of arbitration moves more smoothly and quickly than does the arbitration which arises out of an arbitration clause in an agreement. Very often, when the arbitration is the result of an arbitration clause in an agreement, one party may be no more anxious to face an arbitrator than he or she would be to face a trial judge. The usual stalling techniques can then be seen.

3. [1988] 1 S.C.R. 564.

The reasons why people agree to arbitrate are many. I have found that the more usual ones are the desire to have privacy, to reduce delay, and to save of costs. I am not certain that there is a great saving of costs in an arbitration over a court proceeding, because, in addition to the usual expenses, the parties must pay for the arbitrator. Reduction of delay can be a significant factor in jurisdictions that have lengthy waiting periods before a case can be reached for trial. The most significant reason, I find, is the desire for privacy. There are many business organizations who simply do not want their private affairs litigated in public.

The current domestic arbitration legislation in Ontario is the *Arbitration Act, 1991*,⁴ It came into force on January 1, 1992. The old *Arbitrations Act* was based upon English legislation enacted in the latter part of the nineteenth century. Under the prior legislation, the courts exercised a broad discretion as to whether they would force people to resort to the arbitration they had agreed upon in their contract. In his paper, "Judicial Scrutiny of Domestic Commercial Arbitral Awards,"⁵ John J. Chapman commented upon the practice under the prior legislation. He said that it :

*[...] created opportunities both for judicial intervention in the arbitration process and for parties to avoid arbitration by resorting to litigation. A party to an arbitration agreement had little difficulty in being obstructive. It could launch preemptive litigation in the courts and seek to derail the arbitration on a number of preliminary bases. Although courts often paid lip service to the principle that a party seeking to avoid arbitration had a heavy onus of showing that arbitration was unsuitable, as a practical matter courts frequently exercised their discretion to permit the court process to continue.*⁶

It seems generally accepted that the new legislation strengthens the arbitration process and limits judicial supervisory intervention. The new tendency of judicial interpretation is found in a frequently quoted extract from the judgment of R. A. Blair J. in *Deluce Holdings Inc. v. Air Canada* :

*[The new] legislation represents a shift in policy towards the resolution of arbitrable disputes outside of court proceedings. Whereas prior to the enactment of this [new] legislation the courts in Ontario had a broad discretion whether or not to stay a court action, the focus has now been reversed : the court must stay the court proceeding and allow the arbitration to go ahead unless the matter either falls within one of the limited exceptions or is not a matter which the parties have agreed to submit to arbitration.*⁷

4. *Arbitration Act, 1991*, S.O. 1991, c. 17.

5. J.J. Chapman, "Judicial Scrutiny of Domestic Commercial Arbitral Awards" (1995) 74 Can. Bar Rev. 401 at 403 and 404.

6. *Ibid.* at 403-404.

7. *Deluce Holdings Inc. v. Air Canada* (1992), 12 O.R. (3d) 131 at 148.

In another case, *Ontario Hydro v. Denison Mines Ltd.*,⁸ the same very experienced commercial judge said that the new Act :

[...] is designed, in my view, to encourage parties to resort to arbitration as a method of resolving their disputes in commercial and other matters, and to require them to hold to that course once they have agreed to do so.

In this latter respect, the new Act entrenches the primacy of arbitration proceedings over judicial proceedings, once the parties have entered into an arbitration agreement, by directing the court, generally not to intervene, and by establishing a 'presumptive' stay of court proceedings in favour of arbitration.

In the light of that new attitude, I propose to give as brief an overview as possible of the provisions of the new Act. I then propose to discuss briefly some of the issues that attract the courts' supervision of the arbitral process.

C. An Overview of the Act

Because arbitration is based, fundamentally, upon consent, section 3 of the Act permits the parties to agree to vary or exclude any provision of the Act, except six very fundamental provisions. Section 6 specifically prohibits court intervention in arbitrations, except to assist in the conduct of the arbitration, to ensure that the arbitration is conducted in accordance with the arbitration agreement, and to prevent unequal or unfair treatment of the parties or to enforce awards. Section 7 provides that the court shall stay a proceeding brought in the face of an arbitration agreement, except where a party entered into the arbitration agreement while under a legal incapacity, the arbitration agreement is invalid, the subject matter of the dispute is not capable of being a subject of arbitration under Ontario law, undue delay in bringing the motion for a stay or the matter is a proper one for default or summary judgment. Section 8 entitles the court to intervene for the preservation and inspection of property, granting of injunctions, appointment of receivers and to determine certain questions of law. The provisions of sections 9 through 16 deal with the composition of the arbitral tribunal.

Sections 17 and 18 deal with the jurisdiction of the arbitral tribunal.

Sections 19 to 30 deal with the conduct of the arbitration. In essence, subject to the requirement that the parties be treated equally and fairly, and that they be given an opportunity to present their case and respond to the other party's case, the arbitral tribunal has broad power to determine the procedure that will be followed. I say, as an aside, that in almost all cases the procedure is established by agreement or consensus among the parties.

Sections 31 through 44 provide for the making of awards and for the termination of the arbitration.

8. *Ontario Hydro v. Denison Mines Ltd.*, [1992] O.J. No. 2948 (QL) at para. 6 and 7.

Sections 45 through 50 deal with remedies. The significant remedies are :

(a) Appeal.

In the absence of an agreement, there is a right of appeal on a question of law, with leave of the court. The parties may agree to a right of appeal, without leave, on a question of law or on a question of mixed fact and law. An appeal from the appeal of first instance can be made to the Court of Appeal, with leave of that Court.

As mentioned above, section 3 of the Act prohibits the parties from contracting out of certain of the provisions of the Act. It does not prohibit the parties from contracting out of their right of appeal. It has recently been held by the Ontario Court of Appeal that, when an arbitration clause in an agreement provides for a resolution of a dispute by "final and binding arbitration," the parties have agreed to exclude a right of appeal.⁹

(b) Application to set aside an award.

The court may set aside an award on any one of the following grounds :

- (i) When a party entered into the arbitration agreement under legal incapacity;
- (ii) the arbitration agreement is invalid or has ceased to exist;
- (iii) the award deals with a dispute that the arbitration agreement does not cover or contains a decision on a matter that is beyond the scope of the agreement;
- (iv) the position of the tribunal was not in accordance with the arbitration agreement or, if the agreement did not deal with the matter, was not in accordance with the Act.
- (v) the subject matter of the dispute is not capable of being the subject of arbitration under Ontario law;
- (vi) the applicant was not treated equally and fairly and was not given an opportunity to present a case or to respond to another party's case or was not given proper notice of the arbitration or of the appointment of the arbitrator;
- (vii) the procedures followed in the arbitration did not comply with the Act;
- (viii) an arbitrator has committed a corrupt or fraudulent act and there is a reasonable apprehension of bias;

9. *L.I.U.N.A., Local 183 v. C.A.W., Local 27* (1997), 34 O.R. (3d) 472.

(ix) the award was obtained by fraud.

Section 48 also permits the application of a party who had not participated in the arbitration to seek a declaration of invalidity on four specific grounds.

The remaining sections of the Act are general provisions respecting the granting of costs, the payment of the arbitrator's fees and expenses, and the awarding of prejudgment interest.

D. Jurisdiction of the Arbitral Tribunal

The issue frequently arises as to which dispute the arbitrator has jurisdiction to resolve. Not infrequently, the arbitration clause in the agreement contains words to the effect that "any disputes arising out of this agreement" must be arbitrated. Such clauses give rise to the question of what is a dispute arising out of the particular agreement. An interesting area of controversy is whether a tort committed by one of the parties to the agreement against another could fall within the jurisdiction of the arbitrator under such a clause.

There is authority that words such as "any dispute arising out of the contract" should be given a very broad interpretation. For example, the authors of *Law and Practice of Commercial Arbitration in England*,¹⁰ express the view that such general words "confer the widest possible jurisdiction." There is American authority that recognizes the jurisdiction of an arbitrator to deal with tort claims arising out of a commercial contract.¹¹ That case involved a contract for the exclusive distribution of certain products. It was alleged that the manufacturer engaged in tortious interference with the performance of the contract, libel, defamation, and certain other tortious conduct. The court held :

*To decide whether an arbitration agreement encompasses a dispute, a court must determine whether the factual allegations underlying the claim are within the scope of the arbitration clause regardless of the legal label assigned to the claim.*¹²

That court held that the tortious conduct complained of took place in the carrying out of the distribution agreement. The court held that the tort claims were subject to arbitration.

*The Playa Langa*¹³ was a case involving a contract for the delivery of goods. Included with a claim for non-delivery was a claim for conversion. The Court of Appeal

10. Sir M.J. Mustill, *Law and Practice of Commercial Arbitration in England* (2d) (Toronto : Butterworths, 1989), at 118.

11. *J.J. Ryan & Sons v. Rhone Poulenc Textile*, 863 F.2d. 315 (4th Cir. 1988).

12. *Ibid.* at 319.

13. *The Playa Langa*, [1983] 2 Lloyd's Rep. 171.

held that the claim in conversion had "a sufficiently close connection with the claims under the contract" to fall within the arbitration clause.¹⁴

A recent Ontario decision on this issue is *Venneri v. Bascom*.¹⁵ That case involved a claim for libel, which arose in connection with a wrongful termination of employment. The collective agreement provided for a grievance procedure in the case of termination. The issue was whether the plaintiff could sue for defamation or whether he was restricted to the grievance under the collective agreement. Dennis Lane J. held that the libel fell within the employment relationship and had to be dealt under the grievance procedure of the collective agreement. He held that, in determining whether a claim arose out of the agreement, "the emphasis is now to be the factual matrix in which the dispute arises." He found that the offending letter and its distribution fell within the ambit of the employer/employee relationship and, therefore, was subject to arbitration under the provisions of the collective agreement and could not be the subject of a lawsuit.

On the other hand, the authors of *Law and Practice of Commercial Arbitration in England* make the following statement :

*The inclusion in a mercantile contract of an arbitration clause in general terms would not endow the arbitrator with jurisdiction over disputes between the parties concerning, say, personal injuries caused by one to the other or allegations of libel.*¹⁶

It seems to me that the determination of what issues fall within a general arbitration clause will largely be determined as a question of fact as to whether there is "a sufficiently close connection" between the agreement and the circumstances giving rise to the tort claim to justify concluding that the parties had agreed that this type of dispute between them would be resolved by arbitration. I think the burden of the cases mentioned is that, if the dispute could reasonably fall within an arbitration clause, the courts will oblige the parties to arbitrate. A rough and ready test, which I have found to be helpful, is to ask myself the question whether the particular dispute is one which the parties would have intended to have arbitrated when they agreed to their arbitration clause.

E. Standard of Review

When an appeal is taken from an arbitrator's decision, the question arises whether the court should accord deference to an arbitrator's decision. The prevailing view, in Ontario, is that the appropriate standard is correctness.¹⁷ As a matter of principle, I cannot see why a higher degree of deference should be paid to the decision of an

14. *Ibid.* at 183.

15. (1996), 28 O.R. (3d) 281.

16. *Supra* note 7 at 118.

17. 887574 *Ontario Inc. v. Pizza Pizza Ltd.* (1995), 23 B.L.R. (2d) 259 (Ont. Gen. Div.); *Petro-Lon Canada Ltd. v. Petrolon Distribution Inc.* (1995), 19 B.L.R. (2d) 123 (Ont. Gen. Div.) and *Kellogg Canada Inc. v. Zurich Insurance Co.*, [1997] O.J. No. 3116 (QL) (Gen. Div.).

arbitrator, on questions of law, than is paid to the decision of a trial judge. In an appeal on a question of mixed fact and law, or on a question of fact, if one is provided for in the arbitration agreement, I can see the same deference being paid to the arbitrator's findings of fact that is usually paid to the findings of fact made by a trial judge. However, when the appeal is on a question of law, I can think of no good reason why an arbitrator would have a greater right to be wrong in law than would a trial judge.

CONCLUSION

It seems to me that, with respect to mediation, it may well be that there is such confluence of the two systems, that we may be on the road to integration of the mediation process into the existing systems of litigation. With respect to arbitration, however, it seems to me that the existing system of litigation and arbitration will continue to travel their separate courses. There will be, and continue to be, intersection of the two systems. That intersection will occur when the courts exercise their statutory power to control the arbitral process and to review its decisions. However, the new legislation and judicial interpretation of it suggests that the control will not be too tight. The courts will continue to hold the reins, but, perhaps, they will be holding them more loosely than in the past.

APPENDIX**REGULATION TO AMEND
REGULATION 194 OF THE REVISED REGULATIONS OF ONTARIO, 1990
MADE UNDER THE
COURTS OF JUSTICE ACT**

Note : Since January 1, 1997, regulation 194 has been amended by Ontario Regulations 118/97, 348/97, 427/97, 442/97, 171/98, 214/98, 217/98 and 292/98. For prior amendments, see the Table of Regulations in the Statutes of Ontario, 1996.

1. Regulation 194 of the *Revised Regulations of Ontario, 1990* is amended by adding the following Rule :

RULE 24.1 MANDATORY MEDIATION**PURPOSE**

24.1.01 This Rule establishes a pilot project for mandatory mediation in case managed actions, in order to reduce cost and delay in litigation and facilitate the early and fair resolution of disputes.

NATURE OF MEDIATION

24.1.02 In mediation, a neutral third party facilitates communication among the parties to a dispute, to assist them in reaching a mutually acceptable resolution.

DEFINITIONS

24.1.03 In rules 24.1.04 to 24.1.16, "defence" means,

- (a) a notice of intent to defend,
- (b) a statement of defence, and
- (c) a notice of motion in response to an action, other than a motion challenging the court's jurisdictions : ("défense").

"mediation co-ordinator" means the person designated under rule 24.1.06 ("coordonnateur de la médiation").

APPLICATION**Scope**

24.1.04 (1) This Rule applies to actions that are,

(a) commenced in a county named in the Schedule to this subrule, on or after the date specified for that county in the Schedule; and

(b) governed by Rule 77 (Civil Case Management).

Schedule

County	Date
City of Toronto	January 4, 1999
Regional Municipality of Ottawa-Carleton	January 4, 1999

Exceptions, Certain actions

(2) This Rule does not apply to :

1. An action under the *Substitute Decision Act*, 1992 or Part V of the *Succession Law Reform Act*.
2. An action that is commenced in the City of Toronto and governed by Rule 76 (Simplified Procedure).
3. An action in relation to a matter that was the subject of a mediation under section 258.6 of the *Insurance Act*, if the mediation was conducted less than a year before the delivery of the first defence in the action.

Proceedings Against the Crown Act

(3) In an action to which the *Proceedings Against the Crown Act* applies, if the notice required by section 7 of that *Act* has not been served, the Crown in right of Ontario is entitled to participate in mediation under this Rule but is not required to do so.

EXEMPTION FROM MEDIATION

24.1.05 The court may make an order on a party's motion exempting the action from this Rule.

MEDIATION CO-ORDINATOR

24.1.06 The Attorney General or his or her delegate may designate a person as mediation co-ordinator for a county named in the Schedule to subrule 24.1.04 (1), to be responsible for the administration of mediation in the county under this Rule.

LOCAL MEDIATION COMMITTEES

Establishment

24.1.07 (1) There shall be a local mediation committee in each county named in the Schedule to subrule 24.1.04 (1).

Membership

(2) The members of each committee shall be appointed by the Attorney General so as to represent lawyers, mediators, the general public and persons employed in the administration of the courts.

(3) The Chief Justice of the Ontario Court shall appoint a judge to be a member of each committee.

Functions

- (4) Each committee shall,
- (a) compile and keep current a list of mediators for the purposes of subrule 24.1.08 (1), in accordance with guidelines approved by the Attorney General;
 - (b) monitor the performance of the mediators named in the list;
 - (c) receive and respond to complaints about mediators named in the list.

MEDIATORS

List of Mediators

24.1.08 (1) The mediation co-ordinator for a county shall maintain a list of mediators for the county, as compiled and kept current by the local mediation committee.

- (2) A mediation under this Rule shall be conducted by :
- (a) a person chosen by the agreement of the parties from the list for a county;
 - (b) a person assigned by the mediation co-ordinator under subrule 24.1.09 (6) from the list for the county; or

- (c) a person who is not named on a list, if the parties consent.

(3) Every person who conducts a mediation under subrule (2), whether named on the list or not, is required to comply with this Rule.

(4) Without limiting the generality of subrule (3), every person who conducts a mediation under subrule (2) shall comply with subrule 24.1.15 (1) (mediator's report).

MEDIATION SESSION

Time Limit

24.1.09 (1) A mediation session shall take place within 90 days after the first defence has been filed, unless the court orders otherwise.

Extension or Abridgment of Time

(2) In considering whether to exercise the power conferred by subrule (1), the court shall take into account all the circumstances, including,

- (a) the number of parties and the complexity of the issues in the action;
- (b) whether a party intends to bring a motion under Rule 20 (Summary Judgment), Rule 21 (Determination of an Issue Before Trial) or Rule 22 (Special Case);
- (c) whether the mediation will be more likely to succeed if it is postponed to allow the parties to acquire more information.

Postponement

(3) Despite subrule (1), in the case of an action on the standard track, the mediation session may be postponed for up to 60 days if the consent of the parties is filed with the mediation co-ordinator.

Selection of Mediator

(4) The parties shall choose a mediator under subrule 24.1.08 (2).

(5) Within 30 days after the filing of the first defence, the plaintiff shall file with the mediation co-ordinator a notice (Form 24.1A) stating the mediator's name and the date of the mediation session.

Assignment of Mediator

(6) If the mediation co-ordinator does not, within the times provided, if any, receive an order under subrule (1), a consent under subrule (3), a notice under subrule (5), a mediator's report or a notice that the action has been settled, he or she shall immediately assign a mediator from the list.

(7) The assigned mediator shall immediately fix a date for the mediation session and shall, at least 20 days before that date, serve on every party a notice (Form 24.1B) stating the place, date and time of the session and advising that attendance is obligatory.

(8) The assigned mediator shall provide a copy of the notice to the mediation co-ordinator.

PROCEDURE BEFORE MEDIATION SESSION**Statement of Issues**

24.1.10 (1) At least seven days before the mediation session, every party shall prepare a statement in Form 24.1C and provide a copy to every other party and to the mediator.

(2) The statement shall identify the factual and legal issues in dispute and briefly set out the position and interests of the party making the statement.

(3) The party making the statement shall attach to it any documents that the party considers of central importance in the action.

Copy of Pleadings

(4) The plaintiff shall include a copy of the pleadings with the copy of the statement that is provided to the mediator.

Non-Compliance

(5) If it is not practical to conduct a mediation session because a party fails to comply with subrule (1), the mediator shall cancel the session and immediately file with the mediation co-ordinator a certificate of non-compliance (Form 24.1D.)

ATTENDANCE AT MEDIATION SESSION**Who is Required to Attend**

24.1.11. (1) The parties, and their lawyers if the parties are represented, are required to attend the mediation session unless the court orders otherwise.

Authority to Settle

(2) A party who requires another person's approval before agreeing to a settlement shall, before the mediation session, arrange to have ready telephone access to the other person throughout the session, whether it takes place during or after regular business hours.

FAILURE TO ATTEND**Non-Compliance**

24.1.12 If it is not practical to conduct a scheduled mediation session because a party fails to attend within the first 30 minutes of the time appointed for the commencement of the session, the mediator shall cancel the session and immediately file with the mediation co-ordinator a certificate of non-compliance (Form 24.1D)

NON-COMPLIANCE

24.1.13 (1) When a certificate of non-compliance is filed, the mediation co-ordinator shall refer the matter to a case management master or case management judge.

(2) The case management master or case management judge may convene a case conference under subrule 77.13 (1), and may,

- (a) establish a timetable for the action;
- (b) strike out any document filed by a party;
- (c) dismiss the action, if the non-complying party is a plaintiff, or strike out the statement of defence, if that party is a defendant;
- (d) order a party to pay costs;
- (e) make any other order that is just.

(3) Subrules 77.13 (7) and 77.14 (9) do not apply to the case conference.

CONFIDENTIALITY

24.1.14 All communications at a mediation session and the mediator's notes and records shall be deemed to be without prejudice settlement discussions.

OUTCOME OF MEDIATION**Mediator's Report**

24.1.15 (1) Within 10 days after the mediation is concluded, the mediator shall give the mediation co-ordinator and the parties a report on the mediation.

(2) The mediation co-ordinator for the county may remove from the list maintained under subrule 24.1.08 (1) the name of a mediator who does not comply with subrule (1).

Agreement

(3) If there is an agreement resolving some or all of the issues in dispute, it shall be signed by the parties or their lawyers.

(4) If the agreement settles the action, the defendant shall file a notice to that effect,

(a) in the case of an unconditional agreement, within 10 days after the agreement is signed;

(b) in the case of a conditional agreement, within 10 days after the condition is satisfied.

Failure to Comply with Signed Agreement

(5) Where a party to a signed agreement fails to comply with its terms, any other party to the agreement may,

(a) make a motion to a judge for judgment in the terms of the agreement, and the judge may grant judgment accordingly; or

(b) continue the proceeding as if there had been no agreement.

CONSENT ORDER FOR ADDITIONAL MEDIATION SESSION

24.1.16 (1) With the consent of the parties the court may, at any stage in the action, make an order requiring the parties to participate in an additional mediation session.

(2) the court may include any necessary direction in the order.

(3) Rules 24.1.09 to 24.1.15 apply in respect of the additional session, with necessary modifications.

REVOCATION

24.1.17 This rule is revoked on July 4, 2001.

2. (1) The Regulation is amended by adding the following Forms :

FORM 24.1A
(General heading)
NOTICE OF NAME OF MEDIATOR AND DATE OF SESSION

TO : MEDIATION CO-ORDINATOR

1. I certify that I have consulted with the parties and that the parties have chosen the following mediator for the mediation session required by Rule 24.1 : (name)

2. The mediator is named in the list of mediator for (name county).

- (or)

2. The mediator is not named in a list of mediators, but has been chosen by the parties under subrule 24.1.08 (3).

3. the mediation session will take place on (date).

(Date)

(Name, address, telephone number and fax number of plaintiff's lawyer or of plaintiff)

Form 24.1B
(General heading)
NOTICE BY ASSIGNED MEDIATOR

TO :
AND TO :

The notice of name of mediator and date of session (Form 24.1A) required by rule 24.1.09 of the *Rules of Civil Procedure* has not been filed in this action. Accordingly, the mediation co-ordinator has assigned me to conduct the mediation session under Rule 24.1. I am a mediator named in the list of mediator for (name county).

The mediation session will take place on (date), from (time) to (time), at (place).

Unless the court orders otherwise, you are required to attend this mediation session. If you have a lawyer representing you in this action, he or she is also required to attend.

You are required to file a statement of issues (Form 24.1C) by (date) (7 days before the mediation session). A blank copy of the form is attached.

When you attend the mediation session, you should bring with you any documents that you consider of central importance in the action. You should plan to remain throughout the scheduled time. If you need another person's approval before agreeing to a settlement, you should make arrangements before the mediation session to ensure that you have ready telephone access to that person throughout the session, even outside regular business hours.

YOU MAY BE PENALIZED UNDER RULE 24.1.13 IF YOU FAIL TO FILE A STATEMENT OF ISSUES OR FAIL TO ATTEND THE MEDIATION SESSION.

(Date)

(Name, address, telephone number and fax number of mediator)

cc. Mediation co-ordinator

Form 24.1C
(general heading)
STATEMENT OF ISSUES

(To be provided to mediator and parties at least seven days before the mediation)

1. FACTUAL AND LEGAL ISSUES IN DISPUTE

The plaintiff (or defendant) states that the following factual and legal issues are in dispute and remain to be resolved.

(Issues should be stated briefly and numbered consecutively.)

2. Party's position and interests (what the party hopes to achieve)

(Brief summary.)

3. Attached documents

Attached to this form are the following documents that the plaintiff (or defendant) considers of central importance in the action : (list)

(date)

(party's signature)

(Name, address, telephone number and fax number of lawyer or party filing statement of issues, or of party)

NOTE : When the plaintiff provides a copy of this form to the mediator, a copy of the pleadings shall also be included.

NOTE : Rule 24.1.14 provides as follows :

All communications at a mediation session and the mediator's notes and records shall be deemed to be without prejudice settlement discussions.

Form 24.1D
(General heading)
CERTIFICATE OF NON-COMPLIANCE

TO : MEDIATION CO-ORDINATOR

I, (name), mediator, certify that this certificate of non-compliance is filed because :

- (1) (Identify party(ies)) failed to provide a copy of a statement of issues to the mediator and the other parties (or to the mediator or to party(ies)).
- (2) (Identify plaintiff) failed to provide a copy of the pleadings to the mediator.
- (3) (Identify party(ies)) failed to attend within the first 30 minutes of a scheduled mediation session.

(Date)

(Name, address, telephone number and fax number, if any, of mediator)

2. (2) Forms 24.1A, 24.1B, 24.1C and 24.1D are revoked on July 4, 2001.

3. (1) Part I of *Tariff A* to the *Regulation* is amended by adding the following item :

1.1 Preparation and attendance at mediation under Rule 24.1, for each party represented,
up to.....\$300

An increased fee may be allowed in the discretion of the assessment officer.

(2) Item 1.1 of *Part I of Tariff A* to the *Regulation* is revoked on July 4, 2001.

(3) *Part II of Tariff A* to the *Regulation* is amended by adding the following item :

23.1 Fees actually paid to a mediator in accordance with (identify regulation) made under the *Administration of Justice Act*.

(4) Item 23.1 of *Part II of Tariff A* to the *Regulation* is revoked on July 4, 2001.