

## ALTERNATIVE DISPUTE RESOLUTION

# Pilot project eliminates automatic assignment to case management

Lynn Bevan looks at the “Practice Direction Concerning Delays in the Civil Justice System in Toronto Region” and its effects on mandatory mediation.

By Lynn Bevan

The “Practice Direction Concerning Delays in the Civil Justice System in Toronto Region”, or the “Backlog Reduction Practice Direction” is a three-year long pilot project that started Dec. 31, 2004.

There will be no more automatic assignments to case management under Rule 77. (Windsor has just changed its time limits too, by requiring mediation to be completed 90 days prior to the Settlement Conference. Since the Conference must be held 15 months from the filing of the first defence, the mediation must take place within one year after the defence has been filed.)

Mandatory mediation in Toronto is not gone, but when it must take place has shifted. Hence, the pig moves through the python. The backlog may well show up in about a year or a year and a half from now, depending on what type of case is involved.

Under the old system, mandatory mediation had to take place at the front end of litigation – within

90 days of the filing of the defence, or 150 days if the parties agreed to the automatic 60-day extension. No question that many cases were not ready for mediation, and mediators and counsel have addressed this in a variety of ways, including starting, and adjourning, the mediation to a later date.

The Practice Direction provides that parties are to conduct mediation at the “most effective” time. Whatever that means to one party will mean something else to the

co-operate in scheduling or attending at a “timely” mediation by requiring the party in a hurry to get an order, which could result in the case being assigned to case management and an adverse costs order. It will be interesting to see on what basis one party will be able to establish that a particular stage in the litigation is the earliest at which mediation is likely to be effective, when the other doesn’t agree. Sources who were present at the consultations say that this is unlikely to happen.

**“The Practice Direction provides that parties are to conduct mediation at the ‘most effective’ time. Whatever that means to one party will mean something else to the other, since one party always benefits from delay.”**

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The Practice Direction addresses the refusal of a party to

dismissal cases and Rule 76 cases (Simplified Procedure), where the mediation must occur within 150 days after the close of pleadings. This is at the back end of the litigation, after a lot of money has been spent.

If the parties don’t agree on a mediator, the Practice Direction provides that they may ask the mediation co-ordinator to assign a roster mediator, who is to conduct the mediation within 90 days of the appointment or such other times as the parties agree, but no later than 90 days of the action having been set down for trial. Although the term used “may”, the common view is that the mediation co-ordinator will assign a mediator if either party asks for one.

Assigned mediators must accept the current fee structure but mediators are not bound to the



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Practice Direction, just like the Rule before it, doesn’t address this issue.

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With or without agreement, a mediation must occur not later than 90 days after an action is set down for trial, except for wrongful

tariff. Mediators will want to continue to have agreements that ensure that neither they nor their notes are compellable, since the