Mandatory mediation at the Small Claims Division: Merchants, be prepared!

January 19, 2016

Authors

Despina Mandilaras

Partner, Lawyer

Myriam Brixi

Partner, Lawyer

Lavery closely monitors new developments in consumer law and is committed to keeping the business community informed of the latest developments in this area of the law by regularly publishing newsletters dealing with new case law or legislative changes which may impact, influence, or even transform practices in the retail sector.

The current projects of the legislator respecting judiciary case management of consumer law may very well modify the manner in which merchants handle customer complaints. In this respect, consumer law is a privileged child of the *Code of civil procedure* reform.
Indeed, the Quebec government recently implemented a mandatory mediation pilot project for the Small Claims Division of the Court of Québec. On May 15, 2015, the *Regulation to establish a pilot project on mandatory mediation for the recovery of small claims arising out of consumer contracts*[1] (the "**Regulation**")[2] came into force. Pursuant to the Regulation, mandatory mediation is imposed on the parties where the claim before the Small Claims Division arises from a consumer contract. A consumer contract includes any agreement between a merchant and a consumer for the acquisition of goods or services.[3] When one considers that the Small Claims Division has jurisdiction to hear cases with a value of up to $15,000, it follows that a significant portion of the retail industry is covered by this pilot project.

The pilot project, which is established for 3 years, only covers the judicial districts of Gatineau and Terrebonne,[4] but we expect that the government will make it applicable throughout the province if the results are positive. To a certain extent, Quebec would follow suit with neighbouring Ontario, where mediation is mandatory for all matters that come before the Small Claims Court.[5]

WHAT JUSTIFIES MANDATORY MEDIATION?

Copyright (c) Lavery, de Billy, S.E.N.C.R.L. - L.L.P.

Mandatory mediation gives concrete expression to one of the guiding principles of the new Code of Civil Procedure (hereinafter, the "**NCCP**") that came into force on January 1, 2016, which is to ensure accessibility to the courts and swiftness of civil justice. This is particularly illustrated by the fact that the legislator dedicated Title I of Book I of the NCCP to private dispute prevention and resolution processes. Contrary to these private dispute prevention and resolution processes such as negotiation, mediation and arbitration chosen by mutual agreement of the parties,[6] the pilot project establishes mandatory mediation. The legislator therefore gives preferred treatment to judiciary claims between consumers and merchants, which may be explained by two objectives:

(i) Free up the courts and promote swift access to justice

Approximately 25% of the cases at the Small Claims Division concern claims involving consumer contracts.[7] In addition, a study of the Office de la protection du consommateur published in 2010 reveals that 83% of the merchants continue to refuse mediation.[8] One may think that the legislator wishes to reverse the trend and compel the parties to reestablish their communication in order to settle their disputes according to mutually agreed upon conditions. This measure will free up the courts, thus promoting swift access to justice.

(ii) Restore the balance between the parties in a consumer contract

The imbalance between consumers and merchants[9] has always been a source of concern for the legislator. By making mediation mandatory as part of the pilot project, the government reaffirms its will to protect consumers by requiring merchants to discuss with them before an impartial third party in order to settle a dispute which ended up before the courts. Making consumer contracts subject to mandatory mediation a priority is explained by the fact that consumer contracts rank among the most common contracts, with personal consumption expenses in Quebec representing more than 100 billion dollars (which includes the automobile and food sectors).[10] The obligation to submit these cases to mediation thus promotes maintaining harmony between the parties, which is an essential element to the sector's health.

WHAT MAY WE EXPECT?

The process begins when the Small Claims Court clerk notifies the parties that they are subject to mediation.[11] Our interpretation of the Regulation makes us conclude that this notice will be sent by the clerk once the defence is filed with the Court. The clerk must offer the mediation mandate to a mediator whose name is on the list of mediators that he has drawn.[12] These mediators are lawyers or notaries certified by their professional orders.[13]

Once appointed, the mediator communicates with the parties to agree on a date and time for the mediation session.[14] The process is intended to be swift: the mediator must hold the mediation session within 30 days following the date on which his mandate has been confirmed to him in writing.[15] When a party fails to attend the mediation session so fixed or to agree on holding such a session, the mediator files with the court office a report stating that it is impossible to proceed with the mediation and the case may therefore be heard by the court.[16] However, the court may penalize a party's failure to participate in the mandatory mediation by condemning such party to pay the legal costs or damages or, if the faulty party is the creditor, by reducing or cancelling the interests payable to that party.[17]

If the mediation is successful, the parties file either a notice that the case has been settled or the agreement they have signed.[18] If it is not, the mediator sends to the clerk, within 10 days of the mediation session, a report giving an account of the facts, the positions of the parties and the questions of law raised.[19] The case may then be heard by the court.[20]

Copyright (c) Lavery, de Billy, S.E.N.C.R.L. - L.L.P.

MAY ONE REQUEST TO BE EXEMPTED?

Having a vested interest for the pilot project to be successful, the government has provided that a party may only be exempted from participating in the mandatory mediation session for a serious reason.[21] A party who wishes to be exempted from mandatory mediation must make an application in writing to the court not later than 20 days after being notified by the clerk that a case is subject to mediation.[22] The clerk informs the other parties of the application; they then have 10 days to present their observations in writing.[23]

HOW TO PREPARE FOR MEDIATION?

By making mediation mandatory, the government sends a clear message to merchants: they will have to modify some of their complaint processing practices. In order to make the process efficient, and taking into account the fact that time with the mediator is limited, the prior preparation of the mediation session will have a significant impact on its orientation and on the outcome of the dispute. By being well prepared, a merchant will better understand his case, both from a factual and legal point of view, and will be able to highlight the weaknesses of the consumer's case, if any.

In order to be well prepared in the event that the merchant would face a suit and would then have to attend a mediation session, it is crucial for the merchant to do his homework in advance. Thus, he may find it beneficial to establish a clear complaint and claim management policy. Although the structure of the management policy may depend on the nature and the scope of the operations of the enterprise, merchants should minimally address the following questions when developing his policy:

a Are calls with consumers recorded? With their consent?
b Are reliable notes of all communications and interventions with consumers taken? In which way?
c Is there a particular person or persons assigned full-time to complaint and claim management or is the file entrusted with the representative who knows best about the facts of the case?
d Does the merchant wish to examine the goods which are the subject of the dispute?
e Does he want to give a mandate to an expert? How should he proceed?
f Is a response to the demand letter to be sent? In which cases? In which cases will the customer be contacted by phone?
g Are third parties or witnesses involved in the matter?
h May compensation, other than monetary compensation, be offered to the consumer in order to settle the dispute?

Once this policy is established, the following has to be done for each matter:

a establish the facts in dispute in chronological order
b prepare the documentary or material evidence (ex.: invoices, correspondence, recordings, etc.)
c determine what are the practices of the sector in similar situations
d determine the position and the arguments
e quantify the claim
f fix a scale to calculate how much the merchant would be prepared to pay to settle the claim

Lastly, the merchant would be well-advised to hold regular meetings with legal counsel to take stock of the claims subject to mandatory mediation. This will allow him to validate the legal framework of his file and the strategy to adopt at the mediation session. If the merchant establishes a clear complaint and claim management policy and ensures that it is well implemented in his enterprise, these periodic meetings will be quick and efficient.

WHAT ARE THE BENEFITS?

Mandatory mediation offers definite benefits to the merchant. Firstly, the process is swift and cost-

Copyright (c) Lavery, de Billy, S.E.N.C.R.L. - L.L.P.

efficient. In fact, the services of the mediator are free since his fees are assumed by the Ministère de la Justice.[24] As for the consumer, he can only be satisfied to be offered the opportunity to present his case to an impartial person without being subject to the usual judicial formalities before the court. Secondly, a successful mediation allows the merchant to avoid the risk of seeing the name of his enterprise associated with an unfavourable judgment, sometimes being cited out of context, thus allowing him to protect his image. Thirdly, mediation is a flexible process, the parties are free to negotiate the parameters of their settlement to achieve a mutually satisfying solution.

Moreover, since mediation is confidential,[25] the information shared during the process cannot be used in legal proceedings if mediation is unsuccessful. Lastly, the process may allow the merchant to better understand the consumer's case and prepare accordingly for a trial should mediation fail. However, this statement is subject to a caveat: even if the mediation session reveals the other party's cards, one must always remember that the parties are required to participate in good faith.[26] In other words, the merchant should not participate in the mediation session for the sole purpose of verifying the solidity of the consumer's case, but rather attend with the sole objective of trying to find a solution to the dispute.[27]

WHAT IS THE BOTTOM LINE?

One has to keep in mind that with the pilot project which subjects the claims arising from a consumer contract to mandatory mediation, the legislator wants to promote the dialogue between consumers and merchants. The merchant may participate in this dialogue in an effective manner by establishing a clear complaint and claim mangement policy, which may also include a resolution process which would take place before matters are submitted to the court. Such an approach allows the merchant to quickly demonstrate the seriousness of his file, thus maximizing his chances of achieving a profitable settlement.

A merchant can only derive benefits from the process, as establishing a dialogue with consumers shows that he has a clear understanding of his customers' needs.

---

1. *Regulation to establish a pilot project on mandatory mediation for the recovery of small claims arising out of consumer contracts*, CQLR, c. C-25.01, r. 1.
2. In accordance with articles 28 and 836 of the Act to establish the new *Code of Civil Procedure*, S.Q. 2014 c. 1.
3. According to section 1 of the Regulation, the definition given to the expression "consumer contract" is that set out in article 1384 of the *Civil Code of Québec*, that is, "*a contract whereby one of the parties, being a natural person, the consumer, acquires, leases, borrows or obtains in any other manner, for personal, family or domestic purposes, property or services from the other party, who offers such property and services as part of an enterprise which he carries on.*"
4. Prec., note 1, s. 1.
5. *Rules of the Small Claims Court*, Reg. 258/98 (Ont.), s. 13.01.
6. Prec., note 2, art. 1.
7. Pierre-Claude LAFOND, *L'accès à la justice civile au Québec : portrait général*, Cowansville, Éditions Yvon Blais, 2012, p. 140.
8. Pierre-Claude LAFOND, *L'accès à la justice civile au Québec : portrait général*, Cowansville, Éditions Yvon Blais, 2012, p. 138.
9. Pierre E. AUDET, "La médiation obligatoire pour les petites créances d'au plus 15 000 $ découlant d'un contrat de consommation", *Justice privée et décrochage judiciaire*, Les Entretiens Jacques-Cartier, Montréal, October 3, 2014.
10. Luc THIBAUDEAU, *Guide pratique de la société de consommation*, Cowansville, Éditions Yvon Blais, 2013, p. 157. In 2014, the retail sector has represented in excess of 505 billion dollars in Canada: http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/trad15a-eng.htm.
11. *Id.*
12. Prec., note 1, s. 6.
13. *Id.*, s. 7.
14. *Id.*, s. 22.
15. *Id.*, s. 21..
16. *Id.*, s. 26.
17. *Id.*, s. 27.
18. Préc., note 1, s. 28.
19. *Id.*, s. 29.

Copyright (c) Lavery, de Billy, S.E.N.C.R.L. - L.L.P.

20. *Id.*
21. *Id.*, s. 2. For the purposes of the Regulation, the expression serious reason particularly means the existence of an order preventing a party from being in the presence of the other party, the fact that the travelling expenses related to the party's participation in the mediation exceed the possible advantages or the fact that the parties have already participated in a mediation session for the same dispute.
22. *Id.*, s. 3.
23. *Id.*
24. Prec., note 1, s. 12.
25. *Id.*, s. 18 to 20.
26. *Id.*, s. 16.
27. *Id.*, s. 16.

Copyright (c) Lavery, de Billy, S.E.N.C.R.L. - L.L.P.