

**CONFIDENTIALITY IN MEDIATION -
RIGHT OR RISK**
**ARTICLE PUBLISHED IN THE
INTERNATIONAL BAR ASSOCIATION
MEDIATION NEWSLETTER**
JUNE 2005
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It is fundamental to mediation that the process be confidential. Or is it? Debates on this issue have been occurring for some time and will probably continue to do so.

There are at least three apparent ways that the matter of confidentiality can be addressed in mediation which arises in civil proceedings. Firstly, by statute; secondly, by a rule of practice; and thirdly, by common law. In this relatively short analysis, I want to address some of the considerations and events that have occurred with respect to confidentiality in mediation in Ontario, Canada.

In Ontario, unlike a number of American states, there is no statute to protect the concept of confidentiality in mediation. While mandatory mediation is an inherent part of our civil procedure, confidentiality has been established first by rule of practice, and then by judicial practice direction. The legislature has not as yet seen fit to develop legislation making confidentiality a statutory right of the parties in mediation.

For a period in excess of five years, we had a rule of practice relating to mandatory mediation which said, "all communications at a mediation session and the mediator's notes and records shall be deemed to be without prejudice settlement discussions". While the language of the rule itself used the term "without prejudice", the rule had the heading "CONFIDENTIALITY". By and large, I think that both mediators and lawyers in civil practice recognize that these terms would be appropriate in mediation agreements signed by the parties before attendance. Most mediators I know certainly have a provision in their mediation agreements indicating that the process is confidential, that the mediator's notes and records are not compellable by subpoena, nor is the mediator compellable as a witness in court. Some mediators seek to clothe themselves with the same protection given to judges in this respect under our *Courts of Justice Act*.

As of January 1, 2005, the larger rule embracing the confidentiality concept was suspended for a period of three years and a practice direction was put in place by the Regional Senior Justice.

Where was one to turn to look for authority for confidentiality in the circumstances of there being no statute and no rule of practice? The answer, of course, lies in the common law. Hence the importance of developing case law.

In 2003, the Ontario Court of Appeal released a decision in the case of *Rogacki v. Belz*. In this case, the plaintiff brought a libel action against a publisher and the parties entered into a mandatory mediation. The publisher later published an article referring to

the mediation process, not particularly disclosing any information exchanged at the mediation. The plaintiff sought an order of contempt against the publisher. There had been a Mediation Agreement in which the parties agreed not to disclose any oral or written communication that had occurred in the mediation. The published article did say that the mediation did not result in a settlement. The motion was brought on the authority of the rule above quoted as it then existed. The motion's judge found the defendant in contempt and the defendant appealed.

There were two written decisions in the Court of Appeal. The majority decision said that the rule under which the plaintiff moved for contempt was not available because there was no court order prohibiting the publication. The decision of the Court of Appeal also said that the motion's judge misinterpreted "the confidentiality" rule as not addressing confidentiality, but simply confirming the principle that without prejudice negotiations were not admissible in evidence unless they resulted in a resolution of the dispute.

The second judgment was a concurring judgment but with different reasoning and it was the decision of Madam Justice Abella, then of the Ontario Court of Appeal, now of the Supreme Court of Canada. Madam Justice Abella wrote that she agreed with the conclusions and excellent reasons of Borins J.A., but added that important policy questions about the mandatory mediation process arose out of the case. She agreed that the rule quoted "does not create an enforceable guarantee of confidentiality, but that does not mean that there do not exist significant public policy reasons for keeping the mediation sessions confidential". She went on to say, "The purpose of protecting confidentiality in the mandatory mediation process is to further the public policy goal of encouraging settlement discussions...". Further Madam Justice Abella wrote, "The failure to protect confidentiality could profoundly prejudice the effectiveness of mandatory mediation. It is difficult to see how anyone would agree to be open and frank in discussions designed to effect settlement - discussions they have no choice about participating in - when there is no protection for the confidentiality of the process".

Madam Justice Abella concluded by saying, "In the absence of a Rule or legislative provision explicitly declaring what most lawyers and participants to the mandatory mediation process likely assume, namely, that is confidential, no such clarity exists at this time sufficient to justify attracting so powerful a remedy [as a contempt finding]".

The language of Madam Justice Abella in the *Rogacki* case may find its way into further debate on the confidentiality issue, particularly now that Her Ladyship is a Justice of the Supreme Court of Canada.

In 2004, the case of *Rudd v. Trossacs Investments Inc.* came before the Ontario Superior Court of Justice.

In the case report, Justice Lederman writes as follows: "On this motion, the

plaintiffs seek an interim order requiring the mediator to give evidence as to what transpired at a mediation between the parties held on January 12 and 28, 2004, including the terms of the settlement reached. This is in aid of the plaintiffs' main motion which is in essence for rectification of the written minutes of settlement to correctly reflect the oral agreement arrived at in the mediation and for its enforcement. It is the position of the plaintiffs that the minutes of settlement, which were handwritten by the mediator with the input of counsel and executed at the mediation, inadvertently left out Morris Kaiser ("Kaiser") as a party to the settlement when, clearly, the intention was that he be made a party.

The defendants deny that Morris Kaiser was a party to the settlement".

Justice Lederman went on with some of the background detail of the case and then wrote, "In an effort to promote the settlement of disputes, the privilege for settlement discussions is well-recognized. In the absence of such protection, few parties would initiate settlement negotiations for fear that any concession they would be prepared to offer or admission that they may make could be used to their detriment if no settlement agreement was forthcoming". His Honour also made reference to the Rule of Practice and the case of *Rogacki v. Belz*. Perhaps of even more importance, His Honour made reference to the mediation agreement between the parties which contained the following terms in respect of confidentiality:

"Confidentiality

The parties agree that all communications and documents shared, which are not otherwise discoverable, shall be without prejudice and shall be kept confidential as against the outside world, and shall not be used in discovery, cross-examination, at trial, in this or any other proceeding, or in any other way.

The mediator's notes and recollections cannot be subpoenaed (sic) in this or any other proceeding."

Interestingly, Justice Lederman also made reference to the language of Justice Abella in the *Rogacki* case referred to above. His Honour even went on to say, "Having said that, since privilege and confidentiality are critical to the success of the mediation process, they should not be lightly disturbed. Some evidence must be adduced on the motion to demonstrate that the mediator's evidence is likely to be probative to the issue and that the benefit gained by the disclosure for the correct disposal of the litigation will be greater than any injury to the mediation process by the disclosure of discussions that took place".

Despite all of the above, Justice Lederman felt that the mediator was in a position to provide important information as to whether the minutes of settlement as executed were inconsistent with any prior or oral agreement among the parties. The order was made for the examination of the mediator as a witness on the pending motion

with questions being limited to his knowledge and understanding, if any, as to whether Kaiser was or was not a party to the settlement agreement that was arrived at in the mediation.

Leave to appeal this decision was sought at the Divisional Court. The issue, of course, was of great importance to mediators and civil counsel. In my capacity as Chair of the Ontario Bar Association, ADR Section, I brought this case to the attention of my Executive and a significant debate ensued. There was an unanimous decision to bring the case to the attention of the Canadian Bar Association for direction as to whether it would seek to intervene in the case, or whether the Ontario Bar Association should seek to intervene. Ultimately, the CBA National Executive left the issue with Ontario, the jurisdiction in which these developments had occurred, to decide on the action it should take. I personally made the submissions to the Ontario Bar Association Executive as to why the OBA should seek intervenor status in this important case. The Ontario Bar Association Executive subsequently decided to seek intervenor status.

On March 4, 2005, the Divisional Court heard argument on the case from the parties and from the OBA. Mr. Justice Howden delivered written reasons on March 7, 2005 permitting the Ontario Bar Association leave to intervene, and permitting leave to appeal the decision of Justice Lederman. Justice Howden wrote, "It is desirable that leave be granted because any added exceptions to the confidentiality principle in mediation will arise again, and as compelling testimony by order is per se an interlocutory matter there is no other way for the issue to be determined". He went on to say that he doubted the correctness of the earlier decision, "because it requires a mediator to in effect cast a tie-breaking vote in a case where he wrote the agreement during the latter stages of the mediation session with input from counsel". His Honour went on to say, "The public importance of this (as the first decision re: exception to mediation confidentiality known to counsel who appeared before me) issue in respect of the expectation and significance of confidentiality in mandatory mediation is, I think, self evident".

It is important that Justice Howden recognized that a mediator ordered to testify would essentially become a witness against one party no matter what he said. This would fly in the face of the neutrality concept which applies to every mediator. The earlier decision also appears to disrespect the agreement of the parties despite the judge recognizing that agreement was in place. When a jurisdiction has no statute and no rule governing confidentiality in mandatory mediation, it is of critical importance to have good case law. A panel of the Divisional Court will be hearing the appeal including the intervenor OBA's submissions, most likely in the fall of this year.

