

**CONFIDENTIALITY, PRIVILEGE
AND COMPELLABILITY
IN THE MEDIATION PROCESS**

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December 21, 2009*

Introduction

One may say that confidentiality is the hallmark of the settlement process. The ability to participate in discussions without fear of disclosure of what is communicated by one party to another, whether such disclosure is in an effort to gain an advantage in the context of litigation or to cause public embarrassment, is believed to facilitate the settlement of disputes. Indeed, the common law has historically “recognized a privilege for confidential communications in certain important societal relationships”.¹ In the Province of Ontario, the *Rules of Civil Procedure*² have codified “the principle that communications made without prejudice in an attempt to resolve a dispute are not admissible in evidence unless they result in a concluded resolution of the dispute.”³ Once a resolution is reached, disclosure may be required in order to enforce a settlement.

Is the confidential and privileged nature of settlement discussions absolute? Is it inviolable? Are there circumstances where parties, mediators, facilitators and others involved in the settlement process may disclose information conveyed by another participant, thereby breaching the confidential and privileged nature of such communications? Is the principle of confidentiality alive and well, or is it eroding?

¹ *Rudd v. Trossacs Investments Inc.*, 2006 CarswellOnt 1417 at paragraph 26 (Ontario Divisional Court).

² *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (hereinafter sometimes “*Rules*”).

³ *Rogacki v. Belz*, 2003 CarswellOnt 3717 at paragraph 18 (Ontario Court of Appeal; leave to appeal to the Supreme Court of Canada denied: 2005 CarswellOnt 1110).

In Ontario, perhaps not surprisingly, and on the well-known premise that there are exceptions to every rule, the confidential and privileged nature of settlement discussions, such as may take place in a mediation, is not absolute.

Given the absence of a statutory regime protecting such confidentiality and privilege, one must turn to the common law, which seeks to recognize a common law privilege applying to mediators and the mediation process.⁴ The applicable test, as will be seen further below, is that applicable to any other person claiming such privilege, such as a psychiatrist who has taken a patient into his professional confidence. Notwithstanding that such a privilege is not absolute, there is a strong presumption in its favour. Displacing such confidentiality and privilege in order to get at information that otherwise would not be available is a matter that is left to the common law and the weighing of competing private interests as well as private and public interests that may be at odds.

My intention is to review the rules that apply in the Province of Ontario to court-annexed mediation in the context of civil disputes and ascertain the state of the law as it pertains to the confidentiality of mediation and the privilege that applies to it. The terms “confidentiality” and “privilege” are, to a large extent, used interchangeably since they appear to, ultimately, refer to the same thing. If necessary, one may think of privilege as the legal protection that is afforded to communications, information and documents that are exchanged in the expectation that they will be maintained in confidence by the recipient. Reference is made to case law that has evolved and that seeks to explain the extent to which we should jealously guard these principles and the limited circumstances

⁴ Adams, George W., *Mediating Justice: Legal Dispute Negotiations* (CCH Canadian Limited: Toronto, 2003) at page 297.

in which we should dispense with them. Lastly, some analysis will be provided in an effort to consolidate the competing policy considerations that dictate the debate between openness and privacy.

The Nature of Confidentiality and Privilege

What is confidentiality? It is “the reasonable expectation that information, documents and opinions that are exchanged in a professional setting will not be shared with others”.⁵ A duty of confidentiality on the part of a mediator may stem from various sources, including, as stated by George W. Adams:

- a. the private nature of the subject mediated;
- b. an express or implied contractual provision;
- c. professional ethics or standards; or,
- d. as a result of the wording of a statute.⁶

A breach on the part of a mediator of the duty of confidentiality impressed upon her may result in “an action for breach of contract; a tort action for invasion of privacy; a breach of the fiduciary duty of confidentiality; and an action for negligence.”⁷

There are two essential aspects to confidentiality. One deals with disclosure of confidential information by a mediator to third parties not engaged in the mediation process. In this regard, Adams writes (emphasis is mine):

This aspect of confidentiality is related to the rule of inadmissibility of offers to compromise a disputed claim in civil suits. While sometimes characterized as “privileged communications”, the rule is actually a rule of evidence against admitting previous offers to settle and is based on relevance and policy considerations. ... The stronger basis for the rule is to promote the settling of

⁵ Adams, *supra*, page 290, citing J. Folberg, “*Confidentiality and Privilege in Divorce Mediation*”, at pages 320 to 322, in Folberg, J. and A. Milne, eds., *Divorce Mediation – Theory and Practice* (New York: Guildford Press, 1988).

⁶ Adams, *supra*, page 291.

⁷ Adams, *supra*, page 291, citing Folberg at pages 320 to 322.

disputes which would be discouraged if offers of compromise were admitted". Historically, the rule did not apply to an admission of fact made by either party during the course of negotiations unless stated hypothetically or expressly made "without prejudice" or inseparably connected to the offer. However, this restrictive approach was eventually judged to impair the free flow of communications needed for resolving differences. Therefore, the trend is now to extend the doctrine of exclusion to all statements made in compromise negotiations.⁸

The other aspect deals with the treatment of confidential information given to a mediator by a party to a mediation in caucus, that is, in the absence of the other party or parties to the mediation, and whether or not such information should be disclosed to the others. In that respect:

While much turns on the trust accorded to the mediator and the custom of the context in which the parties and the mediator are operating, the predominant practice of mediators is to generally assure the parties of the confidentiality of the caucus sessions and to honour these assurances in the breach. However, they do so by disguising this disclosure, and by making ambiguous, indirect, or oblique statements. And they do so with the implicit approval of the parties. In short, mediators and parties do not consider this approach as constituting a breach of the confidentiality of earlier caucus sessions. On the contrary, they understand that some form of controlled disclosure is central to the mediation function. Indeed, much of what is discussed in caucus is not confidential and is intended to be shared with the opposing party.⁹

Insofar as confidences shared in caucus are concerned, I would suggest that the preferable approach is to set out the ground rules at the commencement of the mediation, such that all concerned will know whether or not the caucus discussions are or are not confidential *vis-à-vis* the other party or parties. Not sharing information may, it is argued, compromise the mediator's neutrality, at least as perceived by the parties.

A mediator cannot compel participants in a mediation to disclose information. It is the expectation, however, that participants will voluntarily share such information given "the informal private setting of a mediation, coupled with an implicit understanding

⁸ Adams, *supra*, page 291, citing in part Strong, J.W. et al., eds., *McCormick on Evidence*, vol. 1, 5th ed. (St. Paul, MN, 1999) at 301.

⁹ Adams, *supra*, page 291 to 292, citing in part Brown, J.G. and I. Ayres, *Economic Rationales for Mediation*, (1994) 80 Va. L. Rev. 323 at 327.

that communications are without prejudice, which encourages candour on the part of the participants.”¹⁰

I should note in passing that the concept of confidentiality, seemingly a positive premise that assists parties to settle disputes, is not without detractors. One of the criticisms levelled at out of court settlements is that, precisely because they take place in what may be termed secret conditions, they are not subject to public scrutiny, nor does the disposition of matters in that fashion contribute to the evolution of the body of law and the rules that have evolved over time to govern us as an organized and civilized society.

For instance, Owen Fiss states:

In my view, the purpose of adjudication should be understood in broader terms. Adjudication uses public resources, and employs not strangers chosen by the parties but public officials chosen by a process in which the public participates. These officials, like members of the legislature and executive branches, possess a power that has been defined and conferred by public law, not by private agreement. Their job is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them. This duty is not discharged when the parties settle.¹¹

With respect to what may be seen as a turn towards expediency at the expense of the administration of justice, Fiss goes on to write:

I recognize that judges often announce settlements not with a sense of frustration or disappointment, as my account of adjudication might suggest, but with a sigh of relief. But this sigh should be seen for precisely what it is. It is not a recognition that a job is done, nor an acknowledgement that a job need not be done because justice has been secured. It is instead based on another sentiment altogether, namely, that another has been “moved along,” which is true whether or not justice has been done or even needs to be done. Or the sigh might be based on the fact that the agony of judgment has been avoided.¹²

¹⁰ Adams, *supra*, page 290.

¹¹ Fiss, Owen M., *Against Settlement*, (1984), 93 *Yale Law Journal* 1073, cited in Macfarlane, Julie: *Dispute Resolution: Readings and Case Studies*, 2d ed. (Emond Montgomery Publications Limited, Toronto: 2003) at page 69.

¹² Fiss, *supra*, at page 70.

Of course, in coming to his conclusions, Fiss makes certain assumptions which are not, in my view, reasonable: namely that he presupposes that individuals have the unbridled ability to litigate and that the state has unlimited resources to provide all of the court facilities and judges that might be needed. The reality is that the systems of courts now in place cannot effectively adjudicate on all matters that may come before them.¹³

The Statutory Framework in Ontario

Since 1999, in one incarnation or another, and with certain prescribed exceptions, mediation has been mandatory in some jurisdictions in the Province of Ontario. The most current revisions to the mandatory mediation provisions in the *Rules of Civil Procedure* will come into effect on January 1, 2010.

The *Rules* provide as follows (the emphasis is mine):

This Rule provides for mandatory mediation in specified actions, in order to reduce cost and delay in litigation and facilitate the early and fair resolution of disputes.¹⁴

All communications at a mediation session and the mediator's notes and records shall be deemed to be without prejudice settlement discussions.¹⁵

The notion that communications at a mediation shall be deemed to be without prejudice and, therefore, confidential, is also prevalent in other provisions in the *Rules*, the objective of which is to facilitate the relatively early and cost-effective resolution of civil actions. For instance, the *Rules* provide, in respect of a pre-trial, the objective of which is to narrow the issues and attempt settlement, as follows:

No communication shall be made to the judge or officer presiding at the hearing of the proceeding or a motion or reference in the proceeding with respect to any statement made at a pre-trial conference, except as disclosed in the memorandum or order under rule 50.02.¹⁶

¹³ In referring to Fiss, I borrow from my Plan of Study.

¹⁴ Rule 24.1.01 of the *Rules* (in effect January 1, 2010; all further references are to the revised rules).

¹⁵ Rule 24.1.14 of the *Rules*.

With respect to formal settlement offers as may be made under the *Rules*, they provide for similar confidentiality:

No statement of the fact that an offer to settle has been made shall be contained in any pleading.¹⁷

Where an offer to settle is not accepted, no communication respecting the offer shall be made to the court at the hearing of the proceeding until all questions of liability and the relief to be granted, other than costs, have been determined.¹⁸

An offer to settle shall not be filed until all questions of liability and the relief to be granted in the proceeding, other than costs, have been determined.¹⁹

In the normal course, mediations are subject to a mediation agreement to which all parties, their counsel and the mediator are signatories. These agreements generally follow the same form and include a confidentiality clause. One of the better agreements that I have seen provides as follows (emphasis in original):

This is a closed mediation process. The mediator will not voluntarily disclose to anyone who is not a party to the mediation, anything said or any materials submitted to the mediator, except:

- a. on consent of the parties;
- b. to the lawyers for the parties, at such times as deemed necessary by the mediator;
- c. for research or educational purposes, on an anonymous basis;
- d. where ordered to do so by a judicial authority or where required to do so by law;
- e. where the information suggests an actual or potential threat to human life or safety.

The parties acknowledge that the mediator cannot be called as a witness to give any evidence or to make any report in legal proceedings, whether current or contemplated. The parties further agree that evidence of anything said or any admission, or any communication made in the course of mediation is inadmissible in any current or any further litigation and that all communications at the mediation session and the mediator's notes are to be treated as *without prejudice settlement discussions*.²⁰

¹⁶ Rule 50.03 of the *Rules*. Rule 50.02 provides that, at a pre-trial, the parties may enter into a memorandum setting out the results of the pre-trial and, further, that, if the pre-trial is presided over by a judge, she may make such order as is considered necessary or advisable with respect to the conduct of the proceeding. Rule 50.04 provides that a judge that conducts a pre-trial may not preside at the trial of the action or application in respect of which the pre-trial is held, as she would be privy to statements made on a "without prejudice" basis.

¹⁷ Rule 49.06(1) of the *Rules*.

¹⁸ Rule 49.06(2) of the *Rules*.

¹⁹ Rule 49.06(3) of the *Rules*.

²⁰ Excerpt from Mandatory Mediation Contract utilized by mediator Eric Gossin, Stancer Gossin Rose LLP, Toronto, Ontario.

Court-annexed mediation in Ontario takes place against the above-noted backdrop, which seemingly provides for fairly stringent regulatory and contractual protections concerning confidentiality and the privilege that attaches to without prejudice discussions meant to further the cause of settlement.²¹

The Common Law Privilege

As mentioned above, absent a statutorily imposed privilege, some Canadian judicial decisions have held that mediators are protected by a common law privilege premised on four conditions.²² The conditions are those enumerated by John Henry Wigmore²³. They are, as cited with approval by the Supreme Court of Canada in *Slavutych v. Baker*²⁴ (emphasis in original):

1. The communications must originate in a *confidence* that they will not be disclosed.
2. This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
3. The *relation* must be one which in the opinion of the community ought to be sedulously²⁵ *fostered*.

²¹ While not directly on point, worth mentioning as part of the backdrop set out above is the *Apology Act, 2009*, S.O. 2009, Chap. 3. Recently enacted in Ontario, the Act provides parties with an opportunity to apologize, express regret or contrition over an act or event without such apology or expression constituting an express or implied admission of fault or liability. This legislation, which no doubt aims to bring parties to a dispute closer together, similarly encourages candour without fear of legal repercussions resulting therefrom. Section 2(3) of the Act provides:

Despite any other Act or law, evidence of an apology made by or on behalf of a person in connection with any matter is not admissible in any civil proceeding, administrative proceeding or arbitration as evidence of the fault or liability of any person in connection with that matter.

²² Adams, *supra*, page 297.

²³ *Wigmore on Evidence*, 3rd ed., McNaughton Revision, 1961, vol. 8, paragraph 2285.

²⁴ *Slavutych v. Baker*, 1975 CarswellAlta 39, at paragraph 15.

²⁵ *The Concise Oxford Dictionary* defines sedulous as “diligent, persevering, assiduous; deliberately and consciously continued, painstaking” (Oxford University Press: New York, 1982).

4. The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.

Effectively, the common law rule is that privilege will attach where communications are meant to take place in confidence, such confidentiality is essential in order to have parties act in good faith and with candour during the mediation process, it is in the public interest that confidentiality be maintained in order that such parties may be encouraged to resolve their disputes and, perhaps most significantly, greater prejudice would result to the parties from disclosure than is justified for the appropriate disposition of litigation.

The Case Law

In applying the four-part Wigmore test, as George Adams writes, “there has been no uniform approach adopted by the courts”.²⁶ I would suggest, however, that there has been an underlying reluctance to interfere with such privilege and to do so only in circumstances where serious harm might result, for instance, to children enmeshed in contentious matrimonial or family proceedings, or where it is perceived that the proper administration of justice requires it.

Rogacki is a decision of the Court of Appeal for Ontario. It arose in the context of a libel action in respect of which mandatory mediation had taken place. The mediation was subject to a confidentiality agreement that provided as follows:

The mediator will not disclose to anyone who is not a party to the mediation any information or documents submitted to the mediator, EXCEPT:

²⁶ Adams, *supra*, page 297.

- a. to the lawyers, or any experts retained by the parties, as deemed appropriate by the mediator;
- b. where ordered to do so by judicial authority or where required to do so by law;
- c. with the consent of all parties.

The parties agree that they will not require the mediator to testify in court, to submit any report for use in legal proceedings or otherwise to disclose any written or oral communication that has taken place during the mediation.²⁷

An addendum to the agreement read:

The parties agree that everything that is said or done in the mediation is strictly confidential and privileged, and no reference will be made to anyone other than the parties or their solicitors of anything that is said during the process.²⁸

Following the mediation, the defendant publisher wrote and published an article concerning the mediation, in which he stated that no settlement had been reached and that the plaintiff rejected his proposal for what might have resulted in a settlement. The plaintiff moved for an order declaring the plaintiff in contempt of court for, amongst other things, breaching the confidentiality of the mediation. While such an order issued in the lower court, the Court of Appeal held that, insofar as the breach of confidentiality is concerned, the remedy of contempt is not available since the mediation did not (as they never do) result in an order of the Court that, if disobeyed, might result in a contempt order. That aside, the Court's decision deals with the issue of confidentiality and privilege surrounding mediation. The Court concluded that the Ontario mediation rule does not "create an enforceable guarantee of confidentiality". Borins J.A. appears to have concluded that, while discussions in mediations are privileged "and not admissible in evidence unless they result in a concluded resolution of the dispute", the privilege is not absolute.²⁹ Presumably, discussions that took place within the confines of a

²⁷ *Rogacki*, supra, paragraph 2

²⁸ *Rogacki*, supra, paragraph 3

²⁹ *Rogacki*, supra, at paragraph 18.

mediation that does *not* result in a resolution would remain admissible if they satisfied the Wigmore common law test.

Justice Borins writes:

[18] ... the motion judge appeared to interpret rule 24.1.14 as providing for the “confidentiality of the mediation process”. ... This is not what rule 24.1.14 states, nor is there any other subrule within Rule 24.1 that addresses the confidentiality of the mandatory mediation process. By deeming “all communications at a mediation session and the mediator’s notes and records ... to be without prejudice settlement discussions”, rule 24.1.14 codifies the principle that communications made without prejudice in an attempt to resolve a dispute are not admissible in evidence unless they result in a concluded resolution of the dispute. As such, Rule 24.1.14 is a necessary ingredient of Rule 24.1 as it furthers the public in promoting free and frank settlement discussions by protecting communications for that purpose from compelled disclosure in subsequent proceedings involving the parties to the settlement discussions, such as discovery or trial, in circumstances where the mediation fails to resolve the litigation.³⁰

While concurring in the Court’s decision, Abella J.A. (as she then was) spoke to the underlying public policy reasons for maintaining confidentiality in the context of mandatory mediation, in which parties are compelled to participate. Justice Abella seems to take a more “protective” stance, although she concurs with the proposition that there is no absolute guarantee of confidentiality:

[35] Rule 24.1 compels parties to attend mediation and to exchange information. Rule 24.1.14 provides that the settlement discussions are “without prejudice”.

[36] I agree with Borins J.A. that rule 24.1.14 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.

[37] The purpose of protecting confidentiality in the mandatory mediation process is to further the public policy goal of encouraging settlement discussions. ...

[38] 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.³¹

Whether mediation is mandatory or not, it would seem that the principle of confidentiality is the same, as mediation, compelled or otherwise, serves the same purpose, namely, giving disputants a mechanism to resolve their disputes without

³⁰ *Rogacki*, supra, at paragraph 18.

³¹ *Rogacki*, supra, at paragraphs 35 to 38.

recourse (or, if litigation has already ensued, without further and continued recourse) to the courts.

Even in circumstances where there is a contractual obligation to maintain confidentiality, such as one contained in a mediation agreement entered into by parties to a mediation, their counsel and the mediator (such as the one referred to above), there is no assurance that a court will enforce such contractual provisions and it may require that the subject communications “meet the Wigmore test to be privileged or inadmissible, notwithstanding the existence of a confidentiality agreement between the parties and the mediator.”³²

In *Flexi-Coil Ltd. v. Smith-Roles Ltd.*, while the Court did not rule on the substantive aspects of the case on the basis of a lack of jurisdiction, it held:

[17] ... a contract which has a tendency, however slight, to impede the administration of justice is illegal and void and that it is contempt to interfere with the freedom of a witness to give evidence.³³

In *Flexi-Coil*, a defendant to a patent infringement action had, in the context of a settlement agreement in that action, agreed not to lend assistance to other parties that might subsequently be sued by the plaintiff for similar alleged infringements. The settlement agreement provided, in part, that the defendant agreed “not to give any assistance whatsoever in any manner whatsoever to any party which might become the subject of allegations of infringement.”³⁴

In considering the elements of the Wigmore test, not surprisingly in my view, courts seem to debate the fourth component most. It is, in some respects, the most subjective and important. Determining whether communications are intended to be

³² Adams, *supra*, page 298, citing Folberg at pages 328 to 329.

³³ *Flexi-Coil Ltd. v. Smith-Roles Ltd.*, 1980 CarswellNat 123.

³⁴ *Flexi-Coil*, *supra*, at paragraph 8.

confidential, being the subject of the first component of the test, appears to be more of a mechanical, objective exercise that lends itself to factual findings. Presumably, on the basis of affidavit or other evidence, a court should be able to determine whether parties meant to communicate in confidence and if such expectation was essential to such communications. The existence of an executed mediation agreement providing for confidentiality may similarly determine the issue.

The second component, whether confidentiality is essential to the proper functioning of a mediation, can similarly be objectively determined but is, in my view, self-evident and it does not seem that there should be much debate in that regard. Owen V. Gray writes:

The mediator encourages the parties to be candid with the mediator and each other, not just about their willingness to compromise but also and especially about the needs and interests that underlie their positions. As those needs and interests surface, the possibility of finding a satisfactory resolution increases. The parties will be wary and guarded in their communications if they think that the information they reveal may later be used outside of the mediation process to their possible disadvantage. When they have resorted to mediation in an attempt to settle pending or threatened litigation, they will be particularly alert to the possibility that information they reveal to others in mediation may later be used against them by those others in that, or other, litigation. The parties may also be concerned that their communications might be used by other adversaries or potential adversaries, including public authorities, in other present or future conflicts. The possibility of prejudice to legal rights, or of exposure to legal liability or prosecution, may not be a party's only concern. Parties may also be concerned that disclosure of information they reveal in the mediation process may prejudice them in commercial dealings or embarrass them in their personal lives. Accordingly, mediation works best if the parties are assured that their discussions with each other and with the mediator will be kept confidential.³⁵

The third, whether, in the opinion of the community, the relationship is one that ought to be “sedulously fostered”, appears to receive general deference and application, given the emphasis placed on the resolution of disputes without lengthy, costly and emotionally-draining litigation.

³⁵ Gray, Owen V., *Protecting the Confidentiality of Communications in Mediation*, (1998), 36 Osgoode hall L.J. 667 at 671, cited in *Rudd*, 2006 CarswellOnt 1417 at paragraph 32. Gray provides a compelling argument in favour of confidentiality and sets out a number of circumstances where confidentiality may be critical for parties to mediation, including the fear of public prosecution should communications otherwise meant to be confidential are revealed.

The weighing of competing interests required by the fourth component is, of necessity, more difficult and subjective and appears to give rise to the most debate. It requires striking a balance between disclosure, arguably a public interest in certain situations, and the interest of a party in maintaining confidentiality.

In *Pearson v. Pearson*, a decision of the Yukon Territory Supreme Court, Kroft J. held (emphasis is mine):

[5] The rules pertaining to privileged communications to which I have referred are, of course, the four Wigmore rules. They have been considered in many contexts and in many cases.

[6] Mr. Veale properly acknowledged that the first three of the four criteria for establishing a privileged communication, not subject to communicating even in a Court of Law, have been met.

[7] The entire issue before me comes down to the fourth rule. That is to say, is there an overriding concern for the public interest of a nature that would justify my ordering Ms. Lewis to testify as to matters that would otherwise be confidential?

[8] This kind of question, almost by definition, arises before one really knows the full story. Courts must and do proceed on the basis of there being a reasonable or probable concern, for there is nothing which, at the time the evidence is being sought, can be proved. If you required more, then you would get into a vicious circle of never being able to deal with the issue.

[9] I have not received the whole explanation as to what risk the Pearson children are being exposed [to], if any.

[10] I have, though, heard enough relating to pending criminal charges and observations of various authorities in the social welfare system who are concerned, to convince me that, at this stage of the proceedings it cannot be said that the fear of harm is unfounded. When there is a serious concern to be addressed pertaining to the safety of children, it is one of the most fundamental type[s] of concerns that a court can have.

[11] For these rambling reasons, I have come to the conclusion that, based entirely on the fourth of the Wigmore rules, the evidence which would clearly in other circumstances be of a privileged nature should be communicated to this Court; and I therefore order that the privilege claim be set aside and Ms. Lewis proceed to testify with respect to the matters pertaining to the mediation.³⁶

As is evident from the judge's reasons, *Pearson* concerned the welfare of children that might have been in peril. Notwithstanding the absence of a complete record before the Court, it was held that privilege attaching to a mediation in which potentially relevant information might have been communicated concerning the well-being of the children,

³⁶ *Pearson v. Pearson*, 1992 CarswellYukon 14.

such privilege ought to be dispensed with. It is difficult to argue with such a conclusion given the gravity of the situation and the potential harm that might result from a slavish adherence to confidentiality.

To the same effect, In *Kunzelman v. Kunzelman*, a motion was brought to expunge an affidavit containing, as an appended exhibit, a letter from a mediator containing a narrative of events that had transpired as between the parties to the litigation.

The Court held:

[3] This single affidavit is sworn by an administrative paralegal. The affidavit simply attaches a letter from a Ms. Penny Stewart of Family Conciliation Manitoba. The attachment narrates certain events which occurred between the parties to this action. The letter is directed to the presiding magistrate in Gladstone, Manitoba. The respondent submits that section 48 of the *Court of Queen's Bench Act* is the governing law:

48. Unless the parties agree,
- (a) a mediator who renders services:
 - (i) under section 47; or
 - (ii) at the request of the parties; or
 - (b) a party to a mediation

[5] The petitioner takes the position that while in normal circumstances, all communications between the mediator and the parties are privileged in this particular, s. 18(1) of the Child and Family Services Act (L.M. 1985-86 C80) allows disclosure. The provisions of the section are as follows:

18(1) Subject to subsection (1.1), where a person has information that leads the person reasonably to believe that a child is or might be in need of protection as provided in section 17, the person shall forthwith report the information to an agency or to a parent or guardian of the child.

18(2) Notwithstanding the provision of any other Act, subsection (1) applies even where the person has acquired the information through the discharge of professional duties or within a confidential relationship, but nothing in this subsection abrogates any privilege that may exist because of the relationship between a solicitor and the solicitor's client.

[6] The issue is whether the disclosure of the mediator should be evidence in the case at bar. In my opinion, it is essential that the justice hearing the matter be aware that a statutory disclosure was made. To exclude this evidence is to deny a very relevant fact which impacts directly upon the court's determination of the children's rights. The application to expunge this evidence is therefore denied.³⁷

³⁷ *Kunzelman v. Kunzelman*, 1995 CarswellMan 557

In contrast, in *Porter v. Porter*, a decision of the Ontario United Family Court, a request by one party to have privilege attaching to the report prepared by a registered psychologist that had acted as a mediator in a family dispute (at the behest of both parties) and which allegedly contained adverse findings in respect of one party's ability to have custody of the children was rejected by the Court. Citing *Slavutych*, it was stated that:

[6] ... whatever the arrangements may have been at the time between the parties and no matter what the source of the alleged privilege, the report cannot be privileged because it contains important evidence relating to custody of a child and the availability of this evidence is of far greater benefit than any injury that might result from its disclosure.³⁸

In *Porter*, the report in question had been prepared prior to the commencement of litigation.

United Family Court Judge Gravely concluded that the contents of the report were not relevant to a determination of the issues before the Court and, therefore, it would seem, no determination as to privilege had to be made. The judge went on to say, however, that:

[7] ... the existence or otherwise of the privilege must be determined as of the time that the relationship of privilege is said to have been formed. Once that relationship is established it is not open to the court thereafter to weigh the information generated through the relationship by reference to Wigmore's four conditions. For example, in a clearly established solicitor-client relationship, I do not think the court would be entitled to direct disclosure of information no matter how crucial the information might be to the litigation in question.³⁹

Arguably, the solicitor-client relationship to which Justice Gravely refers is more fundamental and entrenched than those relating to other professions and the comparison is, perhaps, not as useful as it might be. It would seem to me that the position set out in *Porter* is not entirely consistent with the state of the law, as it stands today.

³⁸ *Porter v. Porter*, 1983 CarswellOnt 255, at paragraph 6.

³⁹ *Porter*, supra, at paragraph 8.

The Wigmore test applied in *Pearson* was reaffirmed by the Supreme Court of Canada in 1997, in the case of *M.(A.) v. Ryan*⁴⁰. The case concerned disclosure of counselling records in the context of an action brought for damages resulting from alleged sexual abuse. The claimant had undergone psychiatric counselling as a consequence of the abuse. The defendant sought disclosure of the counselling records and such disclosure was ordered, albeit with conditions meant to strictly limit the distribution and dissemination of the records to the defendant's lawyers and his experts (but not the defendant himself). In its decision, the Court applied the Wigmore test, but also canvassed the effect of the *Canadian Charter of Rights and Freedoms*⁴¹ (not in effect at the time of the decision in *Slavutych*). For the majority of the Court, McLauchlin C.J.C., wrote (footnotes are mine):

[29] The fourth requirement is that the interests served by protecting the communications from disclosure outweigh the interest of pursuing the truth and disposing correctly of the litigation. This requires first an assessment of the interests served by protecting the communications from disclosure. These include injury to the appellant's ongoing relationship with Dr. Parfitt [the psychiatrist whose records were sought] and her future treatment. They also include the effect that a finding of no privilege would have on the ability of other persons suffering from similar trauma to obtain needed treatment and of psychiatrists to provide it. The interests served by non-disclosure must extend to any effect on society of the failure of individuals to obtain treatment restoring them to healthy and contributing members of society. Finally the interests served by protection from disclosure must include the privacy interest of the person claiming privilege and inequalities which may be perpetuated by the absence of protection.

[30] As noted, the common law must develop in a way that reflects emerging *Charter* values. It follows that the factors balanced under the fourth part of the test for privilege should be updated to reflect relevant *Charter* values. One such value is the interest affirmed by s. 8⁴² of the Charter of each person in privacy. Another is the right of every person embodied in s. 15⁴³ of the Charter

⁴⁰ *M.(A.) v. Ryan*, [1997] 1 S.C.R. 157.

⁴¹ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, enacted as Schedule B to the *Canada Act 1982*, (U.K.) 1982, c. 11.

⁴² Section 8 of the *Charter* reads:

Everyone has the right to be secure against unreasonable search and seizure.

⁴³ Section 15(1) of the *Charter* reads:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

to equal treatment and benefit of the law. A rule of privilege which fails to protect confidential doctor/patient communications in the context of an action arising out of sexual assault perpetuates the disadvantage felt by victims of sexual assault, often women.

...

[32] At this stage, the court considering an application for privilege must balance one alternative against the other. The exercise is essentially one of common sense and good judgment. This said, it is important to establish the outer limits of acceptability. I for one cannot accept the proposition that “occasional injustice” should be accepted as the price of the privilege.

...

[37] My conclusion is that it is open to a judge to conclude that psychiatrist-patient records are privileged in certain circumstances. Once the first three requirements are met and a compelling *prima facie* case for protection is established, the focus will be on the balancing under the fourth head. A document relevant to a defence or claim may be required to be disclosed, notwithstanding the high interest of the plaintiff in keeping it confidential. On the other hand, documents of questionable relevance or which contain information available from other sources may be declared privileged. The result depends on the balance of the competing interests of disclosure and privacy in each case. It must be borne in mind that in most cases, the majority of the communications between a psychiatrist and her patient will have little or no bearing on the case at bar and can safely be excluded from production. Fishing expeditions are not appropriate where there is a compelling privacy interest at stake, even at the discovery stage. Finally, where justice requires that communications be disclosed, the court should consider qualifying the disclosure by imposing limits aimed at permitting the opponent to have the access justice requires while preserving the confidential nature of the documents to the greatest degree possible.

Notwithstanding Justice McLauchlin’s comments with respect to the claimant’s *Charter* rights, a limited form of disclosure was upheld. *Charter* considerations may form part of a court’s analysis in weighing the competing interests of parties in disclosure or non-disclosure, however, it does seem as if such rights trump, nor should they trump, the ultimate discretion of a judge to render a decision that is just and appropriate in the circumstances of a particular case.⁴⁴

M.A. and the Wigmore test were cited by the Ontario Divisional Court in *Rudd*.⁴⁵ *Rudd* raised the issue as to whether a mediator that conducted a mandatory mediation pursuant to the *Rules* can be compelled to testify as to her understanding of matters discussed during the mediation. The mediator’s evidence was sought in an effort to

⁴⁴ It is not, in any event, my contention that the Court in *M. (A.)* proposed that *Charter* rights should be given such supremacy.

⁴⁵ *Rudd*, supra.

determine whether a party was actually a party to the settlement reached at the mediation.

The mediation was subject to a confidentiality agreement that read:

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] in this or any other proceeding.⁴⁶

In the Court below, the motions' court judge concluded that, while, at common law, settlement discussions are privileged, where settlement has been reached but the terms of such settlement are in doubt, the disclosure of mediation discussions might be necessary. Accordingly, an order issued permitting the examination of the mediator, questions being limited to the mediator's knowledge and understanding, if any, as to whether the party in question was or was not a party to the settlement. Leave to appeal to the Divisional Court was granted and, in light of the importance of the issue to be determined, intervenor status was granted to the Ontario Bar Association.⁴⁷ The Respondents on the appeal, who sought to have the order upheld, claimed that "the motions judge correctly concluded that the mediator's evidence was necessary to prevent a miscarriage of justice."⁴⁸ The Appellants, who sought to have the order set aside, contended that discussions with the mediator are privileged at common law and that, accordingly, no such order should have been made.⁴⁹

The Divisional Court concluded that, in addressing only the "without prejudice settlement privilege", the motions' court judge erred. Instead, he should have applied the Wigmore test. The Court concluded that, while "[i]t is true that the mediator's evidence

⁴⁶ *Rudd*, supra, at paragraph 6.

⁴⁷ The Ontario Bar Association supported the Appellants' position. *Rudd*, supra, at paragraph 19.

⁴⁸ *Rudd*, supra, at paragraph 20.

⁴⁹ *Rudd*, supra, at paragraph 19.

might be of some assistance in determining the terms of the settlement ... it is not the only evidence available on the scope of the parties' agreement.”⁵⁰ The Court also held that, in applying the Wigmore conditions, several courts have concluded that communications during mediations are privileged and that their disclosure can only be justified where there are “overarching interests in disclosure”, such as the safety of children.⁵¹

In applying the Wigmore test, Justice Swinton, writing for the Divisional Court, canvassed each element, and concluded:

[31] ... it is clear that the communications to the mediator originated in confidence and, therefore, the first Wigmore condition has been satisfied. The parties to this mediation signed a confidentiality agreement, which expressly stated that the communications at the mediation were to be confidential. More importantly, the parties agreed that the mediator's notes and recollections could not be subpoenaed in this litigation.

[32] The second condition requires a determination that confidentiality of communications during the mediation is essential to the functioning of the mediation process in which the parties were engaged. In order for mediation to succeed, parties must be assured of confidentiality, so that discussions can be free and frank.

[33] The third Wigmore condition requires a determination whether the relationship in which the communication is given is one which should be “sedulously fostered”. The Rules of Civil Procedure require mandatory mediation of many civil disputes in order to assist the parties in arriving at settlement and thus reduce the costs of litigation. There is clearly a significant public interest in protecting the confidentiality of discussions at mediation in order to make the process as effective as possible.

[34] That brings me to the fourth stage of the Wigmore test, where it is necessary to balance the public interest in disclosure against the interest in preserving the confidentiality of communications during the mediation process. In this case, the Respondents seek to examine the mediator as a witness on a pending motion in which they seek rectification of the written settlement agreement.

[35] The motions judge was of the view that the disclosure of the settlement discussions would not undermine the mediation process, since the disclosure is “sought not as an admission against a party's interest, but solely for the purpose of determining the specific terms of an agreement that both parties have arrived at”.⁵²

⁵⁰ *Rudd*, supra, at paragraphs 30 and 36.

⁵¹ *Rudd*, supra, at paragraph 29.

⁵² *Rudd*, supra.

Following the application of the Wigmore test, Justice Swinton went on to state, giving effect to the confidentiality agreement that had been entered into (emphasis is mine):

[37] Weighing against disclosure is the fact that the parties entered into a confidentiality agreement in which they agreed not to make the mediator a witness. This is not a case where the parties, by their confidentiality agreement, seek to block a third party's access to information that is important for the resolution of a case. Here, the parties agreed on the rules for the mediation, which included confidentiality and noncompellability of the mediator. Absent an overriding public interest in disclosure, their agreement should be respected.

...

[39] The ability of parties to engage in full and frank disclosure is fundamental to the mediation process and to the likelihood that it will lead to resolution of a dispute. There is a danger that they will be less candid if the parties are not assured that their discussions will remain confidential, absent overarching considerations such as the revelation of criminal activity.⁵³

The Court went on to point out that the motions' court judge was wrong in assuming "that the reason for the privilege claimed was to protect parties from disclosure against interest". The Court concluded that, in addition, confidentiality is important because "[p]arties may also reveal information to a mediator which they wish to keep confidential even after a settlement is reached, perhaps because the information is private, or because it may injure a relationship with others."⁵⁴

Further, it was held in *Rudd* that compelling a mediator's testimony may well result in the mediator losing "the appearance of neutrality".⁵⁵ Referring to *Rogacki* and the concurring reasons of Abella J.A., Justice Swinton cites Jonnette Watson Hamilton, who writes in respect of mandatory mediation:

In any process forced upon parties, they must have confidence in the integrity of the process and those who have a major role in it. One of the results of requiring mediators to testify or produce documents may be a perception that the mediator, the program or the process itself does not keep

⁵³ *Rudd*, supra.

⁵⁴ *Rudd*, supra, at paragraph 38.

⁵⁵ *Rudd*, supra, at paragraph 40.

confidences. While such a perception might normally cause parties to avoid mediation, they cannot do so where it is mandatory. They might, however, treat mediation as a mere formality.⁵⁶

The Divisional Court's decision appears to be consistent with that of the Supreme Court of Canada in *Slavutych*, where, as I understand it, a distinction was drawn between the doctrine of privilege simply as an evidentiary one and a doctrine dealing with the revelation of confidential communications. In *Slavutych*, the Court held:

[17] On the other hand, if the matter be considered on the question of privilege, I am not of the same view. I address myself to the four fundamental conditions outline by Wigmore and which I have quoted above. As to the first condition the communication did originate in a confidence, a confidence stressed in the very words of the form which the appellant was asked to complete and repeated and emphasized by the head of the department when he requested the appellant to complete the form. As to the second condition, certainly confidentiality was essential to the operation of a procedure whereby fellow members of the university staff were requested to give their opinions as to an application for such an important right as tenure. These persons were working every day together and it would be simply impossible to have the statement made by one at the request of the university authorities in reference to the worth of another known either to him or to the balance of the staff. As to the third condition, surely it is in the interest of the university community that the relationship between colleagues must be fostered and that the proper procedures for granting tenure to members of the university staff must be furthered. As to the fourth condition, all of the elements which I have just recited stress the desirability of the preservation of the confidential nature of the communication. There is, of course, an interest in the operation of the proper procedures for dismissal and it might be said, although I do not think it can be properly said, that such interest would justify the breach of the confidentiality of the communication but I do not think that it can be said that this latter interest is any greater than the interest in the retention of its confidentiality and if the two interest were of equal weight surely the greater effect should be to support the confidentiality of a document given upon the firm, agreement of both parties that it should remain confidential, indeed it should be destroyed so soon as it had been read and perused, especially when the party who proposes the breach of that confidentiality, i.e., the University of Alberta, is the party who made the firm commitment that the confidentiality should be absolute.

[18] I would, therefore, be of the opinion that considering this matter only as an evidentiary one and under the doctrine of privilege as so ably considered in Wigmore the confidential documents should have been ruled inadmissible. Any charge based thereon would, therefore, have failed,

[19] I am, however, of the opinion, as was Sinclair J.A., that this is not to be considered as a matter of the application of the doctrine of privilege in the light of evidence but rather, in view of the circumstance to which I have already referred, that the document came into being and the confidence was attached thereto by the proper officers of the University of Alberta, to wit, the head of the Department of Slavonic Languages. As I pointed out, the document is headed

⁵⁶ Hamilton, Jonnette Watson, *Protecting Confidentiality in Mandatory Mediation: Lessons from Ontario and Saskatchewan*, (1999) 24 Queen's L.J. 561 at 574, cited in *Rogacki*, supra, at paragraph 37 and *Rudd*, supra, at paragraph 40. Hamilton makes the excellent point that parties that are subject to mandatory (as opposed to voluntary) mediation, a process not of their own choosing and one that is foisted upon them by the *Rules*, should be able to reasonably expect that their communications will be maintained confidential. As has been seen, however, mandatory mediation and the communications resulting therefrom are subject to disclosure should the requisite test be met.

“Confidential” and the directions for the submissions thereof request that it be forwarded in a “sealed envelope marked ‘CONFIDENTIAL’”. Moreover, the appellant stated, and he was not contradicted, that he was informed by Dr. Schwaarschmidt, the head of the department, that the information received would be kept strictly confidential until the tenure committee met and then the sheet would be destroyed.⁵⁷

Consistent with the decision in *Rudd* and other cases cited here, courts in Ontario have held that “[t]he reason for the privilege rule is that most settlements will require a compromise. However, if settlement is not reached the parties should be able to assert in the action, with full force, their original positions.”⁵⁸ To the same effect, it has been found that:

Effective mediation requires freedom to freely and frankly discuss resolution including a variety of outcomes that may or may not mirror the outcome at trial. It is important that parties have the freedom to discuss strengths and weaknesses of their positions with the mediator and it is critical in order to foster such discussion that the information disclosed in mediation may not be misused. This is frequently addressed by the parties and the mediator by way of a mediation agreement but in mandatory mediation there is not always a contractual relationship.⁵⁹

Conclusions

Mediation as a dispute resolution mechanism, whether court-annexed or voluntary, is gaining increasing acceptance, as the costs and delays inherent in the conventional litigation process escalate and its ability to resolve civil disputes in an efficient and effective manner further diminishes.

As the concept and practice of mediation grows in application and acceptance, it would be advantageous if relatively uniform rules are developed concerning the

⁵⁷ *Slavutych*, supra. *Slavutych* dealt with the confidential nature of opinions provided by fellow tenured faculty members upon the application for tenure of an untenured colleague.

⁵⁸ *Delisser v. State Farm Mutual Automobile Insurance Co.*, 2004 CarswellOnt 1340 at paragraph 15 (Ontario Superior Court of Justice). *Delisser* is a case in which the defendant moved to strike portions of a statement of claim on the basis that it contained privileged information disclosed in a mandatory mediation held under the provisions of the *Financial Services Commission of Ontario Act, 1997*, S.O. 1997, c. 28.

⁵⁹ *Marshall v. Ensil*, 2005 CarswellOnt 803 (Ontario Master). *Marshall* makes the point that, in the context of involuntary, or mandatory, mediation, a contractual relationship between the parties and the mediator compelling them to maintain communications in confidence is not always present. Given the capacity of the courts to set such agreements aside where it serves the administration of justice, I am not certain that having such an agreement in place really enhances the parties’ positions insofar as confidentiality is concerned,

circumstances in which the privilege that attaches to confidential communications during mediation may be effectively challenged. While there are no such clear rules as might, conceivably, be established by a statutory regime (which would, in any event, be open to interpretation), there has been significant effort on the part of the courts to “keep the common law in this area current and effective.”⁶⁰ *Slavutych*⁶¹ and, more recently, *M.(A.)*⁶², are indicative of that effort. In both cases, the Supreme Court of Canada confirmed the application of the Wigmore conditions, the latter case perhaps moving its application somewhat to render consistent with *Charter* values.

While it might, nonetheless, be argued that the case law concerning mediation privilege is in a state of flux and is still evolving, it does seem that an overall consistent approach has developed when it comes to lifting mediation privilege. The courts appear to be in agreement as to the application of the Wigmore principles in determining whether or not to maintain privilege. These are the same principles that apply to the privilege claimed by other professionals, such as medical practitioners, counsellors and therapists. As the case law also indicates, each instance is assessed on its merits, on a case by case basis, applying what ultimately might be described as a common sense approach. Given the different considerations that may be at play in different cases, the application of the Wigmore principles to each fact situation may give the impression that such application is haphazard and without consistency.

Communications in the course of mediations are, *prima facie*, privileged and inadmissible in evidence before the courts. As the case law referred to indicates, there are exceptions to this general rule. While an exhaustive list of circumstances in which

⁶⁰ Adams, *supra*, page 298.

⁶¹ *Slavutych*, *supra*.

⁶² *M. (A.)*, *supra*.

such privilege will be lifted is likely not possible (since instances where such relief is sought are determined on a case by case basis and, as has been noted, in a common sense manner), Adams provides what is an illustrative and as complete a list as is likely possible:

1. the reporting of child abuse;
2. medical emergencies;
3. a person poses a clear and immediate danger to others;
4. providing information to persons conducting research, valuation, peer review and audits;
5. sharing information within an agency between professionals; and,
6. where a client sues the provider of the service.⁶³

Adams goes on to state that:

[q]ualifications to an otherwise absolute immunity of mediators from testifying is best illustrated in those cases where it has been held that the protection of children from abuse must be preferred over the need to encourage patients to seek therapy on the assurance that their confidential communications will be protected.⁶⁴

I would suggest that what the above-mentioned list indicates is that, in assessing whether privilege should be lifted, the overriding concern is the public interest, that is, what we as a society collectively deem to be of importance, and the protection of those who are most vulnerable, such as children and the elderly (in this respect, I refer to the first, second and third items listed). Arguably, while mediators play an important social role, the number of instances where such considerations might come into play is likely diminished relative to other professions, such as doctors or social workers who are, one

⁶³ Adams, *supra*, page 300, citing Folberg, at page 323.

⁶⁴ Adams, *supra*, page 300. In this regard, reference may be had to *Pearson and Kunzelman*, *supra*.

may say, further in the front-lines in their interactions with the weak and vulnerable in society.

The fourth and fifth items reflect what may be found to be private or public interests, depending on the circumstances; they do not seem to require the involvement of a court and the exchange of confidential information provided for would, I presume, take place in a voluntary or anonymous manner.

Insofar as the sixth item is concerned, it is trite law that, should the mediator be the subject of a lawsuit at the hands of a party, that party is deemed to have waived privilege as it is necessary in order to permit the defendant the ability to mount a full defence.

Absent the presence of such an overriding public interest, as one would reasonably expect, it appears that the presumption in favour of maintaining privilege and mediation communications confidential remains strong. But, as has also been seen, it is not absolute and privilege will be set aside where social norms so dictate.

Whether, as mediators in court-annexed mediation assume greater quasi-judicial or “judicial-like” roles, which may come to be as the conventional court system recedes in relevance to the general public, they are afforded greater protection and deference insofar as their communications are concerned, remains to be seen.

STATUTES AND REGULATIONS REFERRED TO

1. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, enacted as Schedule B to the *Canada Act 1982*, (U.K.) 1982, c. 11.
2. *Apology Act*, 2009, S.O. 2009, Chap. 3.
3. *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

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