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2 St. Clair Avenue West
Suite 900
Toronto, Ontario
M4V 1L5

T. (416) 967-6111
F. (416) 967-2778
info@goldhartlaw.com

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Mediation Confidentiality

Cheryl A. Goldhart
and
Kristen Normandin
Goldhart & Associates

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Mediation Confidentiality

by Cheryl Goldhart / Kristen Normandin

The topic of this paper is confined to the issue of mediation confidentiality/privilege. Specifically, we will provide a review of the caselaw which sets out the circumstances under which the court may determine that mediation confidentiality is not absolute.

The Rules of Civil Procedure provide for mandatory mediation and Rule 24.2.01 as follows:

> "This Rule provides 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."

The *Family Law Rules* do not provide for mandatory mediation however, it is common practice to encourage parties to attend for mediation. Some courts (ie. Superior Court of Justice in Toronto, Family Law Division) provide for mandatory mediation in some cases (motions to change) in the form of an attendance with a Dispute Resolution Officer with a senior family law practitioner at the first appearance.

The Courts encourage mediation as a vehicle for parties to settle disputes and in doing so clearly state the overriding principle of mediation is to encourage parties to be frank and candid in attempting to negotiate a resolution to litigation without concern that anything that they may have said at the mediation being used against them.

While considering this overriding principle, the question therefore becomes, under what circumstances will the court compel disclosure from mediation, where the communication is deemed to be privileged?

MEDIATION CONFIDENTIALITY - CIVIL LITIGATION

1) *Rudd* v. *Trossacs Investments Inc.*

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On appeal from the decision of Lederman J., the Divisional Court was asked to determine whether or not a mediator can be compelled to testify about communications, during the mediation, to assist in determining the terms of the settlement, if they are in dispute.

Ontario Superior Court of Justice
Reasons of Lederman J.dated July 8, 2004

In the first instance of *Rudd* v. *Trossacs Investments Inc*[1]., the plaintiff appeared before Justice Lederman on a motion, seeking rectification of Minutes of Settlement reached at mediation. The plaintiffs claimed that the Minutes of Settlement reached did not reflect the oral agreement due to the fact that one of the defendants, Mr. Kaiser, was not a party to the Minutes of Settlement. Mr. Kaiser also took the position that he was not party to the Minutes of Settlement. In fact, prior to the parties' attendance at mediation on January 28, 2004, Mr. Kaiser, brought a motion for summary judgment and all claims against him were dismissed with costs awarded to him.

The plaintiffs argued that the mediator should be compelled to give evidence with respect to events that transpired at the mediation, particularly whether or not Mr. Kaiser was a party to the Minutes of Settlement, despite the omission of his name on the signing page (which was copied from the title of proceedings).

Lederman J., ordered that the mediator be examined as a witness at the plaintiff's motion, with questions being limited to his understanding as to whether or not Mr. Kaiser was a party to the Minutes of Settlement.

Ontario Superior Court of Justice
Reasons of the Honourable Justice Howden dated March 7, 2006

In *Rudd* v. *Trossacs Investments Inc.*[2], the defendants sought leave to appeal from the Lederman decision. Further, the Ontario Bar Association sought leave to intervene in the appeal.

[1] [2004] O.J. No. 2918
[2] [2005] O.J. No 2024

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The Honourable Justice Howden granted leave to appeal and in doing so indicated doubt as to the correctness of the Lederman decision due to the fact that the mediator effectively had to "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."

The Ontario Bar Association was granted leave to intervene due to the fact that the Lederman decision would affect members who regularly attend for Alternative Dispute Resolution. Further, Howdon J., indicated the public importance of the expectation of mediation privilege / confidentiality by stating that importance is "self – evident".

Ontario Superior Court of Justice
Divisional Court
Reasons of Honorable Justices Swinton, Then and Carnwath dated March 9, 2006

The Divisional Court set aside the Lederman decision on appeal[3]. In doing so, Justice Swinton, Then and Carnwath cited *Slavutych* v. *Baker*[4], with approval and set out an analysis of the Wigmore test in order to determine whether communications are privileged as follows:

> "(1) The communications must originate in a confidence that they will not be disclosed.
>
> (2) The element of confidentiality must be essential to the maintenance of the relationship in which the communications arose.
>
> (3) The relationship must be one which, in the opinion of the community ought to be "sedulously fostered."
>
> (4) The injury caused to the relationship by disclosure of the communications must be greater than the benefit gained for the correct disposal of the litigation."

Justice Swinton, Then and Carnwath, go on to state that the Lederman decision did not

[3] [2006] O.J. No 922
[4] (1975) 55 D.L.R. (3d) 224

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provide an analysis of the Wigmore Test.

Wigmore Analysis

Applying the Wigmore[5] test to the case at bar, the Division Court held that first condition of the test was satisfied. The parties entered into a Confidentiality Agreement that provided the communications from the mediation were confidential.

The analysis of the second condition of the test was also met due to the overriding principle that governs mediation. "In order for mediation to succeed, parties must be assured of confidentiality, so that discussions can be free and frank."

The Rules of Civil Procedure[6] along with considerations of public interest resulted in Justices Swinton, Then and Carnwath affirming the third condition of the test had been met. In doing so, the court considers the importance of mediation in reducing the costs of litigation and further that without protecting the confidentiality of discussions in mediation, the process will not be effective.

The last factor to be considered is the balancing of the public interest in disclosure v. preserving confidentiality in mediation. In this case, the court found there was no overriding public interest that would oust the Confidentiality Agreement that the parties entered into in advance of the mediation. Justices Swinton, Then and Carnwath agreed with Howden J.'s statement that compelling the mediator to give evidence, he was essentially a "tiebreaker." The court further expressed concern that in the face of mediators being compelled to give evidence, they will lose the appearance of neutrality.

2) Hagel v. *Giles*

[5] 8 Wigmore on Evidence, 3rd ed (McNaughton Revision, 1961). See also 41 D.L.R. (3d) 71 and 55 D.L.R. (3d) 224
[6] R.R.O. 1990, Reg. 194

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In *Hagel* v. *Giles*[7], Mr. Hagel issued a statement of claim seeking general damages from two (2) Ontario Police Department officers and the Province of Ontario. The parties, along with counsel attended for mandatory mediation with mediator Ms. Mullins on July 20, 2005. That same day, the parties orally entered into a full and final settlement of all issues and on August 2, 2005, Ms. Mullins' Mediator's Report indicated that a "complete settlement occurred at the end of the mediation session."

After the attendance with Ms. Mullins, Mr. Hagel disputed the terms of the settlement, indicating that he felt "coerced" into the settlement and the agreement was not signed, (contrary to Rule 24. 1.15(3) of the *Rules of Civil Procedure* (supra)). Mr. Hagel further maintained that an oral agreement or settlement reached during mediation is unenforceable. On the other hand, the defendants sought to enforce terms of the settlement and in doing so proffered evidence from the mediator, Ms. Mullins, by affidavit[8]. The defendant's adduced further evidence as to the terms of the settlement in support of their position that the parties agreed to the settlement.

In enforcing the agreement reached between the parties on July 20, 2005, Power J., states, ".....the requirement of confidentiality cannot be relied on to prevent a party from attempting to establish that a settlement was reached at mediation." Power J., went on to state that despite the fact that the agreement was not signed, the court has the inherent jurisdiction to enforce oral agreements, and Rule 24 did not "oust the court's jurisdiction" to do so.

<u>Ontario Court of Appeal</u>
<u>Reasons of the Honourable Justices Laskin, MacPherson and Cronk</u>

The Ontario Court of Appeal[9] affirmed Power J.'s decision and in doing so stated:

> "Where the enforceability of a settlement agreement is itself in issue, the court is entitled, indeed may be required, to consider evidence of what occurred at the mediation in relation to the agreement."

[7] [2006] O.J. No. 556
[8] The propriety of Ms. Mullins' tendering evidence by affidavit was not addressed by the Court as it was determined that the content would not be considered.
[9] [2006] O.J. No. 3471

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3) Porter v. *Porter*

In *Porter* v. *Porter*[10], the parties attended with a mediator in an effort to resolve issues related to custody and access of their two children. The mediator was provided with Terms of Reference, which identified her role and any restrictions related to the role in the mediation. Particularly, the Terms of Reference provided:

> "Your recommendations and/or proposal are not be used in any court proceeding, but are only for the private purposes of the parties and their solicitors. You will not be called as a witness in this case....."

Upon the parties' separation, the wife brought an interim motion and appended the mediation report to her Affidavit in support of her motion. The husband objected, claiming the report was privileged.

Justice Gravely, who heard the motion, provided a review of three sources of privilege, being:

a) section 21 of the *Divorce Act*[11];
b) Wigmore's Test; and
c) without prejudice negotiations[12].

The Gravely J.'s analysis of the Wigmore Test mirrored that set out in Rudd v. Trossacs (supra) and cited *Slavutych* v. *Baker* (supra) as the authority in using the Wigmore Test. Gravely J., suggests that the first two (2) conditions were clearly met. With respect to the third, again, Gravely J., suggests that parties should be encouraged to resolve issues

[10] (1983), 40 O.R. (2d) 417
[11] Section 21 of the *Divorce Act, 1985, c. 3,* was not relevant to the analysis.
[12] The analysis regarding "without prejudice" discussions is irrelevant for the purposes of this paper however, it is apparent that Gravely J. would have ordered the report not be used in the "without prejudice" realm as well.

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amongst themselves which in turn reduce the conflict. If the parties are unable to rely on the process being confidential, parties may not be inclined to enter into these discussions.

The fourth condition is addressed by referencing section 31 of the *Children's Law Reform Act*[13], which states:

> "(7) Where the parties have decided that the mediator's report is to be in the form described in clause (4) (b), evidence of anything said or of any admission or communication made in the course of the mediation is not admissible in any proceeding except with the consent of all parties to the proceeding in which the order was made under subsection (1)."

Specifically, the enactment of legislation which provides for confidentiality suggests the direction of public policy and is used by the court as an aid in determining public policy. Considering section 31 of the *Children's Law Reform Act* and the overriding principle of full and frank (confidential) negotiations in an effort to promote settlement, Gravely J., ordered the report was privileged and could not be used.

4) Sambasivam v. Sambasivan

Similarly in Sambasivam v. *Sambasivam*[14], the Saskatchewan Court of Appeal addressed the issue of whether or not the trial judge erred in refusing to admit evidence from a mediator, who worked with the family to assist with a custody and access dispute. The mediation report was not admitted into evidence as it was privileged.

In dismissing the appeal and affirming the trial judge's refusal to admit the mediator's evidence, Justices Tallis, Vancise and Wakeling, cite *Slavultych* v. *Baker* (supra) with approval, and state that the inclusion of the evidence would "completely undermine the efficacy of mediation efforts in matrimonial disputes of this kind."

5) Pearson v. *Pearson*

[13] R.S.O. 1990, Chapter C.12
[14] [1988] S.J. No 713

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In contrast, in *Pearson* v. *Pearson*[15], Kroft J., ordered that a family mediator testify about matters related to the mediation. In doing so, the decision was based on the fourth factor of the Wigmore test being met, specifically, there was overriding concern for the public interest. It appears from the reasons that the children were at risk, although the risk is not dealt with in detail. The threshold for the "concern" in this case was not high as Kroft J. indicates he did not have a "whole explanation" for the risk the children were being exposed to, if any. Despite the lack of information, Kroft J., specifically states "When there is a serious concern to be addressed pertaining to the safety of children, it is one of the most fundamental type of concerns that a court can have." Unfortunately, it is unclear from this case the criteria upon which this decision was made as a more thorough analysis of why the mediation report was admitted would be helpful.

CONCLUSION

From a review of the case law, it appears that the courts will go to great lengths to preserve the fundamental component in mediation, which is confidentiality and privilege of communications. The preservation of this principle ensures parties will continue to negotiate between themselves in a frank manner with a view to resolving disputes. To the extent that the court will compel disclosure or communications from a mediator, it will be in extreme cases where there is an apprehension of danger. In the absence of a "fundamental concern" for the court, privilege will be upheld.

[15] [1992] Y.J. No 106