

MEDIATION – CONFIDENTIALITY PRESERVED

By Justin de Vries¹

Mediation is now widely regarded as an important tool in the arsenal of any litigator. There is some debate as to when the parties to an action should mediate. Many counsel believe that early mediation provides a golden opportunity to settle disputes in the initial stages without incurring significant legal fees. Other counsel believe that their client's position is compromised, and a mediated result next to impossible, if they have not first formally examined the opposing party.

Fairly recent changes to the mandatory mediation rules for civil actions in Ontario now largely leave the decision as to when to mediate in the hands of counsel. The expectation is that many mediations will take place after examinations for discovery have been completed.

However, the estate litigation world is somewhat unique. Many counsel, together with the courts, are proponents of early mediation. It seems obvious to many that very little good can come of families fighting over what could be considered a windfall and a mediated result brings the bloodletting to a relatively quick end. Moreover, mandatory mediation is often required and mediation is routinely conducted early on in many estate actions. Where mediation is not mandatory, counsel will often agree to early mediation.

However, where mediation takes place before examinations for discovery have been conducted, the parties should exchange affidavits of documents in advance so that they can at least familiarize themselves with the issues raised and the relevant documents. For example, and for obvious reasons, medical records should be reviewed beforehand where testamentary capacity is raised.

It is generally recognized that mediation is confidential and a mediator cannot be called as a witness, or his/her notes produced, at a later date. Parties are encouraged to speak freely in order to facilitate settlement and a mediation is conducted on a "without prejudice" basis. Communications made during mediation, including any settlement offers, remain confidential and cannot be used against or by a party to the mediation at a later date.

In a relatively recent decision, *Rudd v. Trossacs Investments Inc.*², the Divisional Court considered the issue of whether a mediator could be called as a witness.

In *Rudd*, the parties entered into a settlement agreement following mandatory mediation. A dispute arose as to whether a particular party was a party to the settlement agreement. A motion was then brought to enforce the settlement. An interim order was sought to compel the mediator to testify about communications at the mediation.

The motions judge ordered that the mediator could be examined as a witness on the pending motion to enforce the settlement. The motions judge discussed the common law principle that settlement discussions are privileged, but concluded that once a settlement had been reached and

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² (2006), 79 O.R. (3d) 687 [hereinafter "*Rudd*"]

its interpretation is in question, it might be necessary to disclose mediation discussions to ensure “substantive justice”.

Not surprisingly, the decision was appealed to the Divisional Court, which ultimately allowed the appeal. The Ontario Bar Association had been granted intervenor status when leave to appeal was originally given. The Ontario Bar Association took the position that discussions with the mediator were privileged at common law, and the motions judge erred in ordering the mediator to testify.

According to the Divisional Court, the motions judge erred in dealing only with “without prejudice” settlement privilege and failing to consider whether there was a general mediation privilege or privilege protecting mediators from testifying based on the *Wigmore* principles.

In *Slavutych v. Baker*³, the Supreme Court of Canada held that the four conditions from *Wigmore on Evidence* should be applied to determine whether communications are privileged in certain important societal relationships:

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.

The Supreme Court has subsequently reaffirmed the approach in *Slavutych*⁴.

In *Rudd*, the Divisional Court held that communications at mediation between parties and the mediator originated in confidence and so should not be disclosed. In fact, all parties had signed a confidentiality agreement that expressly stated that the communications at the mediation were to be confidential and that the mediator’s notes and recollections could not be subpoenaed later in the litigation. The mediation was also conducted pursuant to Rule 24.1 (mandatory mediation in civil matters). Rule 24.1.14 states that all communications at mediation and the mediator’s notes and records are deemed to be without prejudice settlement discussions.

The Divisional Court was also satisfied that the confidentiality of communications during the mediation was essential to the functioning of the mediation process. The Court recognized the significant public interest in protecting the confidentiality of discussions at mediation in order to make the process as effective as possible. In fact, the Divisional Court commented that

³ [1976] 1 S.C.R. 254 [hereinafter “*Slavutych*”]

⁴ *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157

mandatory mediation was required in many civil disputes in order to assist the parties in arriving at a settlement.

The Divisional Court noted that the ability of the parties to engage in full and frank disclosure was also fundamental to the mediation process and to the likelihood that it would lead to a resolution of the dispute. Parties would likely be less candid if they knew or were not assured that their discussions would remain confidential.

The Divisional Court also expressed concern that the mediator would lose the appearance of neutrality if required to testify in a proceeding between the parties. According to the Court, there was an important public interest in maintaining the confidentiality of the mediation process.

In conclusion, the Divisional Court was satisfied that the four conditions from *Wigmore on Evidence* were satisfied. The Court held that the mediator could not be compelled to be a witness on the pending motion. The confidentiality of communications at mediation was therefore preserved. In the aftermath of the *Rudd* decision, mediation should continue to be embraced by counsel as an important alternative dispute mechanism.