

Mediation Confidentiality in Ontario

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As I open each mediation session I remind everyone that the mediation is "confidential", "without prejudice", "off the record". I acknowledged that these three concepts don't mean precisely the same thing at law but that for practical purposes it is our common intention and agreement that "what's said here, stays here."

I know there's more I could say but I generally don't, concerned that to dwell on the exceptions to confidentiality in mediation might get people thinking twice which might, in turn, lead to participants being more guarded with each other and with me. Besides, I tell myself, I'm not here to give legal advice and virtually all parties in my mediations are represented by counsel.

In over 20 years of conducting commercial mediations there hasn't been a problem (and I appreciate that could change at any time).

In Ontario, Canada this mediation confidentiality issue arises before the Courts from time to time and we are fortunate to have the recent, well-reasoned decision of Madam Justice J. Mackinnon of the Ontario Superior Court in [Johnston v. Locke et al.](#)

The ruling was on an objection to the admissibility of an email written by a party during an ongoing mediation. The Court ruled, correctly in my view, that the communication was covered by settlement privilege and therefore inadmissible. The decision provides an excellent summary of the Ontario law in this area as it stands today and rather than paraphrase it, I urge you to read the full decision linked above.

In reviewing the Ontario case law the Court noted that, "**Not everything that is said or done at mediation automatically falls within the description of settlement privilege. Therefore, the Divisional Court in *Rudd v. Trossacs Investments Inc.* 2006 CanLII 7034 (ON SCDC), (2006), 79 O.R. (3d) 687 ruled that whether a mediator could be compelled to disclose whether or not a particular individual was a party to the settlement agreement reached at the mediation had to be determined by application of the Wigmore principles.**"

For those readers interested in a full review of these issues I recommend Moses Moyal's excellent 2009 paper, **CONFIDENTIALITY, PRIVILEGE AND COMPELLABILITY IN THE MEDIATION PROCESS**

I know that different jurisdictions have different rules and approaches to the scope of confidentiality in commercial mediation. I would very much appreciate hearing from mediators and others as to the real and practical issues they have faced dealing with mediation confidentiality. I certainly have more to say on this topic, particularly as it relates to the [Ontario Commercial Mediation Act](#), but I'm going to hold that for the next blog post.

In the meantime I'd like to wish all my fellow bloggers on the Kluwer Mediation Blog and all of you readers a very joyous Holiday Season and much happiness in the New Year.