CONFIDENTIALITY AND DISCLOSURE IN MEDIATION: WHEN THE CHICKEN WON'T TALK

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1. Introduction

For reasons that remain unknown to us, one hot summer day in late June, a chicken strutted out to an interstate highway. There was no crosswalk or intersection but the chicken squinted into the hot sun and, believing there to be an absence of traffic, stepped out to cross the black tarmac and was struck by a car. The chicken sued. In hindsight, he should perhaps have been cognizant of the fact that his stubby legs and his "flight-challenged" status would make it difficult for him to move quickly across the road, and that his short stature restricted his visibility to oncoming traffic. Not surprisingly, a counter-claim was served on the chicken claiming negligence for his attempt to cross the road. During litigation, however, the parties attended a mandatory mediation and successfully settled the matter. Subsequently, a dispute arose about the exact terms of the settlement and the driver, to clarify the matter before the court, sought the testimony of the mediator who could, so it was felt, provide the conclusive answer to the question, "Why did the chicken cross the road?" The mediator, made famous by this well-known dispute, merely replied: "I'm sorry, I can't share that information with you unless the chicken authorizes me to tell you." The court agreed.

The litigation process in Ontario has long flirted with mandatory mediation, a process by which parties in litigation are required to attempt to settle a dispute through negotiation conducted by a neutral intermediary.[1] In 1999 Ontario introduced an amendment to the Rules of Civil Procedure, rule 24.1, requiring parties to certain civil actions to enter into mandatory mediation before proceeding to trial.[2] Its purpose is set out in rule 24.1.01: "This rule provides for mandatory mediation in case managed actions, in order to reduce the

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1. *Oxford English Dictionary* (2007).
2. *Regulation to Amend Regulation 194 of the Revised Regulations of Ontario, 1990*, O.Reg. 453/98 (Rule 24.1).

cost and delay in litigation and facilitate the early and fair resolution of disputes."

Similarly, by way of practice directions issued across Ontario, mandatory mediation has become an integral part of the litigation process in many regions, including the Toronto region.[3] As with arbitration, it is assumed by most lawyers that all information disclosed in the mediation, including what is said by the parties, notes that are taken, or disclosure of new information, is all subject to an obligation of confidentiality. Although there are numerous observations in both case law and academic literature about the very great importance of maintaining confidentiality in mediation,[4] as also with arbitration,[5] there is, in fact, no such obligation expressly imposed by the rules.

Rule 24.1.14 provides that all communications in a mediation session and the mediator's notes and records are deemed to be without prejudice settlement discussions. In *Rogacki v. Belz*,[6] the Ontario Court of Appeal considered a motion to hold in contempt a party who had breached the confidentiality of mediation proceedings. The court recognized that rule 24.1.14 codifies the common law principle of settlement privilege which holds, essentially, that communications made in an attempt to settle a dispute are inadmissible in evidence "unless they result in a concluded resolution of the dispute",[7] but that this form of privilege was a different concept from confidentiality *per se*. This distinction is, perhaps, evident in the fact that it is standard practice in most mediations for parties to sign confidentiality agreements which would be redundant if this obligation otherwise existed. This absence of a clear rule or legislative provision subjecting mediations to an

3. See, *e.g.*, Superior Court of Justice — Toronto Region Civil Cases Backlog Reduction/Best Practice Initiative, December 31, 2004, as issued by Regional Senior Justice W. Winkler.
4. See, *e.g.*, Jonette W. Hamilton, "Protecting Confidentiality in Mandatory Mediation: Lessons from Ontario and Saskatchewan" (1999), 24 Queen's L.J. 561 at pp. 569-75; Owen V. Gray, "Protecting the Confidentiality of Communications in Mediation" (1998), 36 Osgoode Hall L.J. 667 at pp. 670-74.
5. See generally Alexis C. Brown, "Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration" (2001), 16 American University Int'l L. Rev. 969.
6. (2003), 67 O.R. (3d) 330, 232 D.L.R. (4th) 523, 177 O.A.C. 133 (C.A.), supp. reasons 236 D.L.R. (4th) 87, 183 O.A.C. 320.
7. *Ibid.*, at para. 18.

automatic obligation of confidentiality was acknowledged by Abella J.A., who stated:[8]

> 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 [*sic*], no such clarity exists at this time sufficient to justify attracting so powerful a remedy [as contempt for breach of confidentiality].

The fact that there is no rule or provision in Ontario that automatically makes what takes place at mandatory mediations confidential does not, however, mean that *no* such protection exists. First, the fact that mediation is deemed to be without prejudice and therefore protected by settlement privilege does preserve the confidentiality of mediation to some extent, at least while litigation is alive. Secondly, Ontario courts have expressly recognized that confidentiality is a necessary component of the mediation process.[9] As a result, in many instances where a party seeks disclosure of something that was said or done during litigation, courts have tended to rule against disclosure so that, directly or indirectly, the confidentiality of the mediation processes is protected.

The difficulty with using settlement privilege as a method by which to maintain confidentiality in mediations is that this form of privilege ceases to apply once a matter has been finally settled or litigation has been finally resolved. Where a party seeks disclosure of confidential communications *after* a final settlement has been reached, there has been a lack of clarity with respect to whether that confidentiality could be preserved, even when settlement privilege could no longer provide a principled basis for such protection. This issue was considered recently by the Ontario Superior Court of Justice, Divisional Court, in *Rudd v. Trossacs Investments Inc*,[10] which, it is contended, has clarified the position and brought greater certainty to

8. *Ibid.*, at para. 48.
9. As stated by Abella J.A., *ibid.*, at para. 47: "Mandatory mediation is a compulsory part of the court's process for resolving disputes in civil litigation. Wilful breaches of the confidentiality it relies on for its legitimacy . . . represent conduct that can create a serious risk to the full and frank disclosures the mandatory mediation process requires. It can significantly prejudice the administration of justice and, in particular, the laudable goal reflected in Rule 24.1 of attempting to resolve disputes effectively and fairly without the expense of a trial."
10. (2006), 79 O.R. (3d) 687, 265 D.L.R. (4th) 718, 208 O.A.C. 95 (Div. Ct.) (Then, Carnwath and Swinton JJ.).

the question of disclosure of communications made during the course of a mediation.

This purpose of this article is to discuss the scope and exceptions to confidentiality in mediation developed by the Divisional Court in *Rudd*. A brief overview of the common law concepts of privilege as they apply to mediation, and a summary of the facts in *Rudd*, will be followed by an analysis of the principled approach employed by the court to determine when confidentiality in mediations should be maintained. Cases where disclosure of communications made during mediation has been sought will be examined in the light of the principles discussed in *Rudd* with a view to answering the question, when the litigation is over and the chicken won't talk, under what circumstances can a mediator be compelled to disclose the fact of *why* the chicken crossed the road?

2. Disclosure, Privilege and Mediation

As explained by the Supreme Court of Canada in *M. (A.) v. Ryan*,[11] it is a fundamental rule that everyone has a duty to give evidence that is relevant to a matter before a court so that truth can be determined. However, the law permits certain exceptions to this duty where it can be shown that the exception is required by a "*public good transcending the normally dominant principle of utilizing all rational means for ascertaining the truth*".[12] These exceptions are referred to as "privileges".

(1) Settlement Privilege

One of the exceptions to the general rule favouring disclosure is that communications made in furtherance of settlement are privileged. The policy behind this "settlement privilege" is to encourage settlement of disputes without court intervention. It is in the public interest that parties be encouraged to resolve their private disputes without recourse to litigation or, if an action has been commenced, to encourage compromise without resort to a trial.[13] The privilege applies to "all communications made when a litigious dispute was in existence or within contemplation, for the purpose of attempting to effect a settlement, with the express or implied intention

11. [1997] 1 S.C.R. 157, 143 D.L.R. (4th) 1, [1997] 4 W.W.R. 1.
12. *Ibid.*, at para. 19, reference omitted.
13. Sopinka, Lederman and Bryant, *The Law of Evidence in Canada*, 2nd ed. (Toronto: Butterworths, 2005), p. 807.

that it would not be disclosed if the attempt failed".[14] For example, admissions made by word or conduct by parties during negotiations to settle litigation have long been protected pursuant to this rule.[15] Even though rule 2.4.1.4 has deemed all mandatory mediations falling within its rubric to constitute privileged settlement discussions, all mediations that attempt to resolve or settle litigation will, in any event, be protected by this common law doctrine during the course of litigation.

With respect to mediations, however, a significant limitation of settlement privilege is that it comes to an end when a settlement agreement is concluded or there is some other final disposition or resolution of litigation. Accordingly, settlement privilege would not preclude disclosure of confidential mediation discussions relating to the fact of a settlement agreement or its interpretation in subsequent litigation.[16] One academic commentator, O.V. Gray, provided the following succinct statement of the reasons for this:[17]

> If it were otherwise, such agreements could not be enforced, and the objective of applying the privilege — encouraging settlement — would be substantially undermined. It would seem to follow that evidence of the settlement discussions that led to an agreement would also be received on issues going to the enforceability of the agreement, where it is alleged that the agreement achieved at mediation was obtained by fraud, misrepresentation, duress, undue influence, and the like.

14. *I. Waxman & Sons Ltd. v. Texaco Canada Ltd.*, [1968] 1 O.R. 642, 67 D.L.R. (2d) 295 (H.C.J.), affd [1968] 2 O.R. 452, 69 D.L.R. (2d) 543 (C.A.).
15. *Pirie v. Wyld* (1886), 11 O.R. 422.
16. Explained by the Nova Scotia Supreme Court Appellate Division in *Nova Scotia (Director of Assessment) v. Begg* (1986), 33 D.L.R. (4th) 239 at p. 242, 75 N.S.R. (2d) 431 *sub nom. Begg v. East Hants (Municipality)*, as follows: "Communications exchanged between solicitors on a without prejudice basis permit parties, through their solicitors, to conduct genuine and serious negotiations toward settlement. If a settlement is not achieved, then the parties can be confident that they will not be prejudiced by their exchanges being introduced as evidence at trial. However, once an unconditional and complete settlement is reached the privilege which hitherto existed is removed." *Begg* must be contrasted with a line of decisions following the House of Lords in *Rush & Tompkins Ltd. v. Greater London Council*, [1988] 3 All E.R. 737, where it was held that a settlement agreement does not automatically end the protection of the privilege. This decision was followed in *Sun Life Trust Co. v. Dewshi* (1993), 99 D.L.R. (4th) 232, 17 C.P.C. (3d) 217 (Ont. Ct. (Gen. Div.)), where the court preferred to find that the privilege continued unless the existence or interpretation of the agreement became an issue in subsequent proceedings.
17. O.V. Gray, *supra*, footnote 4, at p. 677.

The major *problem* with this exception in respect of mediation has been put clearly by another commentator, J.W. Hamilton:[18]

> In a dispute over the meaning of a provision, allowing testimony from the parties or the mediator to resolve it may well avoid inaccuracy or unfairness. However, difficulties in interpretation can be manufactured for almost any agreement, written or oral. The fear is that a party will always be able to find some ambiguity in the terms of an agreement. If interpretation of a settlement agreement is a basis for allowing mediation communications into evidence, there might be nothing left of the protection for mediation confidentiality.

For instance, consider that the chicken, who had drafted the settlement agreement, was confronted with the allegation that his "chicken scratchings" were illegible and that the parties had, in fact, come to a different agreement than that reflected in the written agreement. If settlement privilege were the only mechanism by which the confidentiality of the mediation was protected, the court could presumably compel the mediator to give evidence pertaining to the terms of the agreement and reveal why the chicken crossed the road. Additionally, there are a number of other limitations to settlement privilege that could be raised by a party, whether meritoriously or disingenuously, which could allow mediation communications into evidence. These include allegations of threats made during the course of settlement negotiations, communications highly prejudicial to the recipient (such as an admission of bankruptcy by a debtor), correspondence or discussions leading to a new contractual relationship, and fraud.[19] Other exceptions include admissions of crime, for costs in certain circumstances and also in respect of time limitations. Still other exceptions may exist in respect of mediator or lawyer malpractice during the course of settlement discussions.[20]

Under the common law on settlement privilege, any of these exceptions might be argued in support of disclosure of communications, etc., made during a mediation. If the "protection" provided by deeming mediation communications subject to settlement privilege was indeed the extent of the protection afforded to such communications in Ontario, then the concerns expressed by Abella J.A. in *Rogacki* would be correct and the fears articulated by Hamilton, above, potentially manifest to the detriment of the mediation process. It appears, however, that

18. J.W. Hamilton, *supra,* footnote 4, at pp. 596-97.
19. *Ibid.*
20. *Ibid.*

mediations *are* subject to greater protection than other types of settlement negotiations because of the nature of the relationship between the mediator and the parties. The Divisional Court in *Rudd* has applied a narrower test, or filter, with the result that communications made during the course of a mediation, which might have had to be disclosed under one of the exceptions to settlement privilege, are now much less likely to suffer that fate.

(2) Privilege for Confidential Communications within Special Relationships

Courts have recognized that certain relationships exist between individuals which must be of a confidential nature in order to be viable. The hallmark example is the privilege that has long been extended to solicitor-client communications because, as the Supreme Court said in *R. v. Gruenke*,[21] the confidentiality of the solicitor client relationship is "essential to the effective operation of the legal system",[22] preserving and encouraging particular relationships. In fact, the confidentiality of the solicitor-client relationship is regarded as *so* essential in this regard that such communications are given a "blanket" privilege, which is rebuttable only if the party seeking disclosure can show that there is a relevant exception to the privilege.[23]

Although confidentiality is considered the "cornerstone" for the protection of communications within particular relationships, confidentiality alone does not create a privileged relationship. Other relationships that *prima facie* appear to be of a confidential nature, such as those between a psychiatrist and patient considered by the Supreme Court in *Ryan*, or between confessor and penitent in a religious context, may be subject to a privilege, but this must be determined on a "case-by-case" basis.[24] Privilege may be extended in such situations if certain criteria referred to as the "Wigmore principles", adopted by the Supreme Court in *Slavutych v. Baker*,[25] in *dicta* and confirmed in *Gruenke*, are satisfied. The Wigmore principles, or conditions, provide the following basis for analysis by a court in determining whether communications may be disclosed:

21. [1991] 3 S.C.R. 263, 67 C.C.C. (3d) 289, [1991] 6 W.W.R. 673.
22. *Ibid.*, *per* Lamer C.J.C., at p. 289.
23. *Ibid.*, at p. 286.
24. *Ibid.*
25. [1976] 1 S.C.R. 254, 55 D.L.R. (3d) 224, [1975] 4 W.W.R. 620.

(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"; and
(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.[26]

Whether this "case-by-case" privilege should extend to the tri-party relationship of a mediation has been the subject of dispute. One academic commentator has argued that the confidential nature of the mediation relationship is so essential to the litigation process that it should receive a "blanket" category of privilege similar to that applied to solicitor-client communications.[27] Privilege from disclosure should therefore be accorded unless an exception can be made out. Parties in mediation, goes the argument, are engaged in a process that is "inextricably linked with the legal system". The mediator is not a solicitor for either party, but he or she is nevertheless engaged in private consultation with each in order to achieve a settlement and, as with their own solicitor, parties are likely to divulge information in confidence.

Such is not, however, the situation in Ontario. The relationship that arises in a mediation is not regarded as falling within the same category as solicitor-client communications. One rationale is that the mediator, as a neutral party, does not owe a particular obligation to either party but is there to assist all parties to reach a settlement. The relationship is, therefore, not one to which blanket-type privilege is extended but one to which a claim for privilege must be considered on a case-by-case basis.

3. Rudd: A Case-by-Case Approach to Mediation Privilege

The facts of *Rudd* are straightforward. Several parties engaged in a mandatory mediation, which concluded in a settlement agreement. One of the parties had attended the mediation by way of telephone, however, and a dispute later arose as to whether that party, who had not signed the relevant documents, was nonetheless bound by the

26. *Rudd, supra,* footnote 10, at para. 26.
27. O.V. Gray, *supra,* footnote 4, at p. 680.

agreement. On a motion to enforce the settlement, an order was sought to compel the mediator to testify about what had happened during the mediation. On hearing the motion, Lederman J. based his reasoning on general common law principles with respect to settlement communications,[28] and in particular on the decision of the Court of Appeal in *Rogacki,* above. Lederman J. accordingly acknowledged the importance of maintaining confidentiality of mediation discussions, but granted the motion based on the limits of settlement privilege, restricting the mediator's testimony to his knowledge and understanding, if any, as to whether or not the party in question was in fact a party to the settlement agreement.

Lederman J.'s holding was overturned by the Divisional Court, which held that, while he had been correct to look to relevant common law principles, the *Rogacki* court, on which he had relied, had not dealt exhaustively with the issue of privilege for communications made during a mediation: "While the majority discussed rule 24.1.14, they never addressed the common law principles relating to privilege."[29] The *Rudd* court in particular attacked Lederman J.'s reliance on *Rogacki* to the effect that mediation privilege is not absolute, particularly when the mediation has resulted in a settlement.[30]

The implication arising from the court's decision in *Rudd* is that mediation privilege is, in fact, *absolute.* This seems difficult to maintain in the face of the judgments of both Borins and Abella JJ.A. in *Rogacki,* both of whom, although acknowledging the importance of confidentiality to the mediation process, specifically adverted to and placed great emphasis on the *absence* of a confidentiality provision in Rule 24.1.[31] It is apparent that, despite the seeming implication, the *Rudd* court did not intend to hold that mediation privilege is absolute, but merely imposed a higher test for disclosure than that provided by settlement privilege.

In *Rudd* the Divisional Court stated that the correct approach for an analysis of confidential communications in mediation[32] is that provided by the Supreme Court of Canada, which adopted the "Wigmore principles" or conditions[33] in considering disclosure of information obtained in confidential circumstances in *Slavutych.*[34]

28. *Rudd, supra* footnote 10, at para 16.
29. *Ibid.,* at para. 25.
30. *Ibid.,* at paras. 24-25.
31. *Rogacki,* footnote 6, at para. 18 *per* Borins J.A., at para. 36, *per* Abella J.A.
32. *Rudd,* footnote 10, at para. 26.
33. *Wigmore on Evidence* (Boston: Little Brown, 1961).

The Divisional Court followed *Slavutych* and held that claims for privilege in respect of communications made during the course of mediation must now be filtered through the separate "Wigmore test" analysis set out below.[35]

(1) The Communications Must Originate in a Confidence that They Will Not Be Disclosed

In *Rudd,* the Divisional Court held that it was clear that the communications to the mediator had originated in confidence. As is common practice, the parties had in fact executed a standard form mediation agreement that contained the following confidentiality clause:[36]

> 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 soepenaed [*sic*] in this or any other proceeding.

Yet even without such an agreement, it is clear that a mediation will be presumed to have taken place subject to expectations of confidentiality. The numerous cases and academic writings commenting on the importance of confidentiality to the mediation process are sufficient evidence of this.[37] For instance, in *Marshall v. Ensil Canada Ltd.*, Master C.U.C. MacLeod said that, "[T]he existence of a contract is simply one of the factors to be considered."[38] The Master was also prepared to find the existence of an implied undertaking to maintain confidentiality in appropriate circumstances, saying that such an undertaking could be discerned by a careful reading of *Rogacki.*[39]

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34. *Supra*, footnote 25.
35. The description comes from *Prior v. Sunnybrook and Women's College Health Sciences Centre*, [2006] O.J. No. 2070 (QL), 20 D.E.L.D. 183 (S.C.J.), *per* Master MacLeod at note 5.
36. *Rudd, supra,* footnote 10, at para. 6.
37. See, *e.g., Rogacki, supra,* footnote 6, *per* Abella J.A., at paras. 37-38.
38. [2005] O.J. No. 789 (QL) at para. 12, 10 C.P.C. (6th) 67, 19 D.E.L.D. 118 (S.C.J.).
39. *Ibid.*, at para. 25.

(2) The Element of Confidentiality Must Be Essential to the Maintenance of the Relationship in which the Communications Arose

The second Wigmore condition follows very much from the first. The *Rudd* court held that, for mediation to succeed, "parties must be assured of confidentiality, so that discussions can be free and frank".[40] It incorporated the following passage, deeming it a "useful summary of the reasons that confidentiality is vital to the operation of the mediation process":[41]

> 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 may 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.[42]

This "assumed confidentiality" is one of the principal underpinnings of both mediation and arbitration;[43] however, as the cases have shown, there is no basis for this assumption in common law. Parties nevertheless enter the process of alternative dispute resolution with the expectation that confidentiality *will* be maintained. The absence of such would lead to much less effective negotiations, and, with respect to mandatory mediation, the risk that parties would treat the process as a mere formality.[44]

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40. *Rudd*, *supra*, footnote 10, at para. 32.
41. *Ibid.*
42. *Ibid.*; O.V. Gray, *supra*, footnote 4, at p. 671.
43. See A.C. Brown, *supra*, footnote 5.
44. J.W. Hamilton, *supra*, footnote 4, at p. 571.

(3) The Relationship Must Be one which, in the Opinion of the Community, Ought to Be "Sedulously Fostered"

The *Rudd* court paid scant attention to the third of the Wigmore conditions, holding simply that, "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."[45] This third principle has received little or no attention in other reported cases and is arguably redundant with respect to mandatory mediation. The community, through the legislature, has enacted laws requiring mediation of disputes for the better and swifter resolution of those disputes, and to facilitate the administration of justice. A more comprehensive discussion of the third Wigmore condition in those circumstances would seem to be largely unnecessary.

(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 *Rudd* court reserved most of their attention and analysis for this fourth of the Wigmore criteria. Indeed it may be argued that the first three conditions are trite law in the mediation context. Once a court is satisfied that the general principles expressed in those conditions have been fulfilled, then the fourth condition is the determinative one. The issue is whether, despite the accepted rationale in favour of confidentiality, it is nevertheless in the "public interest" to allow disclosure.

On the facts of *Rudd*, it might have been thought, as indeed the motions judge, Lederman J. did think, that it was in the public interest (*i.e.*, in the better administration of justice) to bring finality to the matter and simply put the question to the mediator. Was the particular party a party to the settlement agreement or not? Surely this was *not* a case where injury would be caused to the mediator, or the process of mediation threatened because of the disclosure of this information? In any case, the rationale for limiting settlement privilege and allowing disclosure subsequent to a concluded agreement, to prove the agreement and resolve any question of its interpretation, is one which Lederman J. was surely justified in applying to the mediation context.

The Divisional Court disagreed. This was, in part, because of the parties' confidentiality agreement, in which they had specifically

45. *Rudd, supra*, footnote 10, at para. 33.

agreed not to compel their mediator to disclose information.[46] The court also found that the required information could be ascertained otherwise than by examining the mediator. "Both the parties and their counsel can give evidence of what the agreement was."[47]

There is a strong implication in the judgment, however, that, despite the foregoing, the court would still have been inclined against permitting disclosure because of the importance they evidently accorded to upholding the confidentiality of communications made during mediation. The court said, "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."[48] The court added, "Moreover there is a danger that a mediator will lose the appearance of neutrality if required to testify in proceedings between the parties."[49]

This is an admirable articulation of the importance of confidentiality to encouraging full and frank discussions leading to a settlement. As noted above, settlement privilege is limited and there is an accepted exception for proving matters in subsequent enforcement proceedings. Although there are practical reasons for this, the *Rudd* court clearly thought that upholding confidentiality was more important. Maintaining respect for and hence the viability of the process is more important, in most cases, than disclosure, even where that would be beneficial. The fourth Wigmore principle provides for a weighing-up of the relative importance of harm caused and benefit to be gained. The *Rudd* court did not refer to the decision in *Strauss v. Goldsack*,[50] although the words of Clement J.A. of the Appellate Division of the Alberta Supreme Court, in reference to the Wigmore principles, are apposite:[51]

> Not only does it provide a rationale: it also leaves room by the third and fourth conditions for adaptation of the principle to changing needs and conditions of society which is essential to the proper function of the common law. Former decisions on privileged documents must now

46. *Ibid.*, at para. 37.
47. *Ibid.*, at para. 36.
48. *Ibid.*, at para. 39.
49. *Ibid.*, at para. 40.
50. [1975] 6 W.W.R. 155, 58 D.L.R. (3d) 397 (Alta. C.A.).
51. *Ibid.*, at p. 160.

derive their authority or guidance from their apparent conformity to the conditions, and on this view many must be passed over.

It is apparent from *Rudd*, and the cases reviewed in the next section, that courts are more concerned about the potential harm that may be done to the mediation process by disclosure than with the benefit to be gained in resolving questions like that raised in *Rudd*.

4. When Should Disclosure Prevail?

Rudd presents a clear case of a court declining to allow the confidentiality of the mediation process to be breached, choosing to uphold and support the process over allowing even the minimal disclosure such as that sought, disclosure which would be unlikely to cause any harm. The court chose, rather, to uphold the integrity of the mediation process, concerned that any breach of confidentiality might bring mediation into disrepute and greatly reduce its utility and efficiency. The court also expressed concerns that, once a mediator had been permitted to take the stand, the examination might lead to further revelations beyond that specifically sought.[52] In terms of the fourth Wigmore condition and the balancing act it requires, the *Rudd* court came down firmly on the side of support for the process itself.

If such an arguably minor and harmless request for information from a mediator does not, therefore, represent an exception that might favour disclosure under the fourth Wigmore condition, what does? It is useful at this point to review some other decisions where, in the context of mediation, disclosure has been sought.

The court said in *Rudd*, "The communications at mediation have been held to be privileged unless there were overarching interests in disclosure — for example, to protect children at risk from criminal activity."[53] *Pearson v. Pearson*[54] is an example of such a finding. A decision of Kroft J. of the Supreme Court of the Yukon Territory in a child custody matter, it typifies the rare case in which the balance was tilted in favour of disclosure under the fourth Wigmore principle. In holding that everything came down to the fourth rule and whether there was an overriding concern for the public interest of a nature justifying requiring the mediator to testify, Kroft J. held that evidence of risk of harm posed to the children was sufficiently serious to warrant disclosure.[55]

52. *Rudd, supra*, footnote 10, at para. 41.
53. *Ibid.*, at para. 29.
54. [1992] Y.J. No. 106 (QL) (Y.T.S.C.).
55. Cf. *Sambasivam v. Sambasivam*, [1988] S.J. No. 713 (QL), 73 Sask. R. 230

In *Porter v. Porter*,[56] a decision of the Ontario Unified Family Court, Gravely U.F.C.J. held that communications made during the course of a mediation over divorce and child custody issues should not be disclosed. In the course of his judgment, Gravely U.F.C.J. referred to the decision of in *Cronkwright v. Cronkwright*, in which Wright J. referred to the public policy importance of maintaining the confidentiality of communications made in privileged circumstances. Wright J. said that, nevertheless,[57]

> They represent, of course, a statement of public policy but not necessarily a value judgment between conflicting public policies. Is it, for example, our public policy that an innocent man should go to gaol for life so that the sanctity of reconciliation be preserved, or that a child be entrusted to a wayward addict rather than the truth about the matter be known? I cannot believe that those results should be law, unless the language of authority is strong enough to justify a specific breach in the dikes of our society.

Porter v. Porter was followed in *Sinclair v. Roy*,[58] also involving a family law mediation. Huddart L.S.J.C. did not consider that it was necessary to consider the Wigmore principles, finding it sufficient that, as the discussions were clearly intended to be without prejudice and that there was a confidential relationship, the privilege applied:[59]

> Because litigation was not only contemplated, but, in fact, commenced; because the conciliation effort had as its sole purpose the settlement of a litigious issue, and because the discussions were clearly designed to be without prejudice, there is no need in this case to consider the four conditions of Wigmore to determine if privilege based on a confidential relationship applies to this case. If there were, I would reach the same conclusion as did Gravely U.F.C.J. in *Porter*.

In *H. (A.) v. H. (J.T.)*,[60] Fisher J. of the B.C. Supreme Court had to consider an application for a mediator to give evidence corroborating what had happened during a mediation in connection with a marriage agreement. Discussions during the mediation were in Hungarian, with the aid of an interpreter, and there was some question of whether the wife had been encouraged to obtain

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(C.A.), where the Saskatchewan Court of Appeal declined to order the mediator to testify.

56. (1983), 40 O.R. (2d) 417, 32 R.F.L. (2d) 413 (U.F.C.).
57. [1970] 3 O.R. 784 at p. 786, 14 D.L.R. (3d) 168, 2 R.F.L. 241.
58. (1985), 20 D.L.R. (4th) 748, 65 B.C.L.R. 219, 47 R.F.L. (2d) 15 (B.C.S.C.).
59. *Ibid.*, at p. 758.
60. [2005] B.C.J. No. 321 (QL), 40 B.C.L.R. (4th) 348, 13 R.F.L. (6th) 149 (S.C.).

independent legal advice. Fisher J. emphasized that the circumstances in which disclosure will be allowed will be rare. He cited *Rudd* at first instance[61] as one of those few rare cases and it is apparent that he would have followed Lederman J. However he held that as evidence of what had happened could be obtained from the interpreter, the mediator's evidence was not critical to determining the issue in question.

It is apparent from the foregoing, and now especially in the light of the Divisional Court decision in *Rudd*, that, in the absence of any statutory provision for confidentiality, courts applying the Wigmore principles to the determination of whether to protect the confidentiality of communications made during the course of a mediation will be inclined to decide against disclosure. They will decide against disclosure, as in *Rudd* and *H. (A.)*, when, if something is needed to be proved to further the process of settlement, there are alternatives. The fact of signed confidentiality agreements, as is now standard practice, will assist the courts in arriving at a conclusion that is antithetical to disclosure. Even without such agreements, and even in the absence of alternatives, it is apparent that the courts are leaning heavily towards maintaining confidentiality. The public interest in maintaining the integrity of the system of mediation is now generally seen to outweigh, under the fourth Wigmore principle, the short-term benefit of resolving individual problems in litigation.

5. Concluding Remarks

In the absence of statutory protection for confidentiality of mediation communications in Ontario, courts must rely on the common law to determine what should be protected and what may be divulged. The protection provided to settlement privilege is limited to the situation where mediation, or negotiations, have not reached a concluded settlement. If that had been the only protection available, then, in *Rudd*, where there was a dispute about the parties to a concluded settlement agreement, the order of Lederman J. would likely have stood and the mediator would have had to testify. In that case, on the facts at issue, the result would perhaps not have mattered very much. In the broader context of doing harm to confidence in the process of mediation in Ontario, and the preservation of

61. (2004), 244 D.L.R. (4th) 758, 72 O.R. (3d) 62, 7 C.P.C. (6th) 1 (S.C.J.), revd *supra*, footnote 10.

communications made in circumstances of supposed confidentiality, the harm may have been very great indeed.[62]

Following the Divisional Court decision in *Rudd*, however, this is not the case. It is submitted that the Divisional Court's holding in *Rudd*, in the face of what seemed a fairly simple request to examine a mediator to determine a specific question of who was and was not a party to settlement agreement, provides solid support for the argument that Ontario does not need to introduce statute-mandated confidentiality along the lines of that which exists in Saskatchewan and most U.S. jurisdictions and as was urged by academic commentators at the time of the introduction of mandatory mediation in Ontario.[63] The protection provided by the codification of the common law rules with respect to settlement privilege in rule 24.1.1, combined with the application of the Wigmore principles through which Ontario courts must filter any request for disclosure, provides sufficient protection. The reported cases have demonstrated as much.

It is submitted that the use of the Wigmore principles by the *Rudd* court provides the elements of both necessary flexibility and sufficient certainty with respect to determining the scope of confidentiality to be accorded privilege in mediation. The fourth of the Wigmore conditions, the requirement for the balancing exercise between the harm done by disclosure and the benefit to be gained by it for the correct disposal of litigation, is really the core of the matter, and it is here that courts must, as in *Rudd*, exercise their discretion to uphold confidentiality in all but the clearest cases. The record of decisions to date shows that courts are in fact cognizant of their duty in this respect and that the lack of clarity bemoaned by Abella J.A. in *Rogacki* has been rectified. In the end result, the chicken may have failed to cross the road, but his reasons for making the attempt may safely remain sacrosanct if revealed in mediation.

62. Which is likely why the Ontario Bar Association sought and was granted intervenor status in *Rudd*.
63. O.V. Gray, *supra*, footnote 4.; J.W. Hamilton, *supra*, footnote 4.