# MEDIATION LEGAL UPDATE – SPRING 2024

**Steven C. Gaon, B.A., JD, C. Med**
www.adrottawa.com
info@adrottawa.com
Tel: (613) 565-6215

I wish to offer some insights into the law as it relates to the mediation of legal cases in Ontario based on some recently decided cases.[1]

Many of you practice civil litigation but even those of you who don't, doubtlessly will have been involved – or may become involved – in the mediation of client legal disputes during the course of your careers.

Historically, there has not been a great deal of jurisprudence relating to mediation, principally because mediations are almost always conducted in a confidential and without prejudice manner. However, I wish to highlight some key cases decided over the last couple of years to shed light on how the Court deals with the enforceability of settlements reached at mediation, and the mediation process generally.

## ***Sipidias v. Sipidias***, 2024 ONSC 1000

**This case highlights the importance of clear, mutual intent to settle, the role of judicial mediation in achieving resolution, and the careful consideration required when dealing with parties under legal disability. It underscores the judiciary's preference for upholding settlement agreements reached in mediation, provided they meet the criteria of a binding contract and serve the best interests of all parties involved, including vulnerable beneficiaries.**

Facts

This case involved protracted litigation following the death of Basile Sipidias, who died on September 6, 2011. Mr. Sipidias' wife predeceased him and Mr. Sipidias was survived by five children: Ted, Vangie, Irena, Dan and George, the latter of whom was developmentally delayed.

Justice Sutherland, who presided at the November 3, 2022 Case Conference, agreed on consent of the parties to conduct a mediation on December 15, 2022. Some, but not all issues were resolved on December 15. Justice Sutherland ordered the mediation continue before him on January 17, 2023.

On January 9, 2023, Dan discharged his lawyer and advised that he would represent himself. He had apparently retained five different lawyers by this time.

At the January 17, 2023 mediation session, Sutherland J. endorsed the record as: "Matter tentatively settled. Parties have to complete the settlement and finalizing settlement documents and serve the [Office of the Public Guardian and Trustee] and all beneficiaries to obtain their written consent." Subsequent to the date, calculations errors for the division of

[1] I would like to acknowledge Gareth Spanglett, a student in the University of Ottawa Common Law course I teach (Mediation Theory & Practice) for his excellent research and assistance.

the estate were noted by the parties and corrected in the spreadsheet for the proposed estate distribution.

On February 6, 2023, Dan advised the other parties that he could not move forward with the results of the mediation and refused to sign the Minutes of Settlement.

A motion to enforce the settlement was brought before Justice Charney. Dan argued that the fact that the spreadsheet was amended twice after the mediation was evidence the parties did not reach an agreement at the January 2023 mediation. He argued in the alternative that any agreement must be vitiated because Vangie withheld or misrepresented important information about a joint bank account she held with Mr. Sipidias. Indeed, evidence subsequent to the settlement indicated that the information was not correct.

Finding

Relying in part on the endorsement by Sutherland J., Charney J. was satisfied that the final estate calculations did not change the substance of what had been agreed to on January 17, 2023, but corrected mathematical errors and was consistent with the essential terms established for the distribution of the estate at the January 17, 2023 judicial mediation.

Vangie's misrepresentation was found to have an innocent one, and that an error of approximately $6,000 – about 1% of the value of the Estate – was not sufficiently material to merit recission of the settlement agreement. Justice Charney also found that the agreement achieved at mediation was in George's best interest. The Minutes of Settlement were ordered to be enforced.

### ***Raymond Fortune v. KPM Simcoe Inc. et al,*** 2023 ONSC 4059

**This case illustrates the complexities involved in scheduling mediation in litigation when discovery processes reveal outstanding issues that may affect the mediation's effectiveness. The decision stresses the importance of flexibility, cooperation, and practical problem-solving in litigation, aiming to avoid unnecessary delays and costs while facilitating fair and efficient resolutions.**

Facts

Following the issuance of the Statement of Claim in a slip and fall action and completion of examinations for discovery, the parties disputed over scheduling the mediation and unresolved undertakings.

The plaintiff brought a motion in July 2023 before Associate Justice Rappos for the mediation to occur on or before September 25, 2023, among other matters. The plaintiff cited **Rule 24.1.09 of the *Rules of Civil Procedure***, emphasizing the lack of prejudice to the defendant if the mediation was to proceed as requested. The defendant opposed the motion, preferring a later date, and pointing to unresolved undertakings that were, in the defendant's view, crucial for a full appreciation of the plaintiff's claims, arguing that early mediation would undermine the process's purpose.

Finding

Associate Justice Rappos dismissed the motion, instead ordering a Case Conference to be held in September 2023. The Court noted that Rule 24.1.09 mandates mediation within 180 days after filing the first defence but that this rule needed to be balanced against the practicalities and fairness of proceeding with mediation when significant information (undertakings) remains outstanding. The Court noted that the principle cited in ***Capstack Advisory v. Northern Lights***, 2023 ONSC 2934, which emphasized that the "Three C's" of the Commercial List – cooperation, communication, and common sense – are equally applicable in civil proceedings.

***Arbuckle v. Arbuckle***, 2023 ONCA 80

**This case underscores the Court's deference to settlements reached at mediation, even in the absence of a written settlement agreement. It highlights the Court's reliance on the credibility of the mediator and other participants in affirming the existence of a settlement agreement and demonstrates the Court's commitment to upholding the principles of finality and efficiency in legal proceedings.**

Facts

Krista and John Arbuckle were parties in a family law dispute. The parties entered into private mediation on May 2, 2019. Despite the absence of a written settlement agreement, evidence indicated that a settlement was reached at mediation, including evidence from the mediator and other attendees. Mr. Arbuckle's credibility was also found questionable by the motion judge, Justice Lemon, who found the settlement enforceable. Mr. Arbuckle appealed, eventually to the Ontario Court of Appeal.

There was an important prior decision by Lemon J., in which Ms. Arbuckle had brought a motion to compel production of the mediator's notes from the mediation (***Arbuckle v. Arbuckle***, 2019 ONSC 7453). Justice Lemon ruled that in the absence of a written confidentiality agreement and given the relevance of the notes in determining whether a settlement had taken place, the notes should be released. The Court noted the common law rule of evidence "Settlement Privilege" rule (also known as the "Without Prejudice" rule), as described by the Supreme Court of Canada in ***Bombardier Inc. v. Union Carbide*** [2014] 1 S.C.R. 800. The rule protects party communications when they try to settle a dispute. The Supreme Court emphasized that this rule exists to allow attempts to negotiate settlements without fear that information disclosed will be used against them in litigation – thus promoting "honest and frank discussions between the parties". Justice Lemon balanced that rule against the importance of having relevant documents produced that assist in determining whether an agreement had been reached, adding that he was not ruling on the admissibility of the mediator's notes going forward, merely the "producibility" of the notes. In essence, Lemon J. found this case to be an exception to the Settlement Privilege rule.

Finding

The Court of Appeal rejected Mr. Arbuckle's claim that the settlement was merely an agreement to agree, finding that the terms were sufficiently clear and complete to constitute

a binding agreement, noting the Lemon J.'s reliance on substantial evidence, including evidence from the mediator's notes and others present at the mediation.

### ***Butler v. Butler***, 2022 ONSC 4675

**The ruling is based on the lack of a meeting of the minds at the mediation's conclusion. It demonstrates the complexities surrounding the enforceability of agreements stemming from mediation, and the need for clear, mutual consent to the terms of agreements for them to be considered binding.**

Facts

This was a family law case in the Superior Court of Justice. Justice Himel heard a motion by the applicant father to enforce a Memorandum of Understanding (MOU) that dealt with property and support, which was dictated at the conclusion of a mediation held January 18, 2022 and subsequently provided to the parties. The respondent mother opposed the motion, arguing that there had not been a complete meeting of minds with respect to the MOU.

Finding

Drawing upon the Supreme Court of Canada's decision in ***Association de médiation familiale du Québec v. Bouvier*** 2021 SCC 54,[2] the Court found that an exception to Settlement Privilege should be applied, that is to say, that one of the key exceptions is to allow evidence to prove the existence of a settlement agreement. However, Himmel J. found the MOU unenforceable for the following reasons:

- The lateness of the hour when the mediator dictated the MOU following a long day of negotiation.
- The lack of opportunity on January 18, 2022 for each party to review the written MOU (which has twelve topics and various subtopics) with their lawyers privately.
- The mediator's statement that, "the parties will have the opportunity to canvas any concerns with respect to the terms of this memorandum of understanding with me, on notice to the other party. Such concerns must be received by me by 5 p.m. on Tuesday, January 25, 2022. If necessary, I will convene a further brief videoconference to address any potential concerns."
- The absence of evidence that either party stated that they agreed with, disagreed with, or wished to vary any of the terms of the MOU, after hearing the mediator's dictation.
- The disagreement between the parties as to whether there are errors in the written MOU and the calculations, or whether the mother merely changed her mind.
- The e-mail sent by the mother on January 25, 2022, clearly indicating that she did not agree to certain terms in the MOU.

---

[2] This was a seminal 2021 decision by the Supreme Court of Canada, providing that Settlement Privilege is a rule of evidence protecting the confidentiality of communications and information exchanged for the purpose of settling a dispute – but that unlike a confidentiality clause in a contract, the privilege applies to all communications that lead up to a settlement, even after a mediation session has concluded. The Court found the privilege is not absolute and includes a "settlement exception" allowing protected communications to be disclosed to prove the existence or scope of a settlement arising from mediation.

***Stronach v. Belinda Stronach in her Personal Capacity and as Trustee of the Andrew Stronach 445 Family Trust***, 2021 ONSC 5758

**The case signifies the court's reticence to interfere with Settlement Privilege, as well as the importance of upholding the integrity and confidentiality of the settlement process. It underscores the judiciary's commitment to fairness in legal proceedings and reaffirms that the confidentiality and without prejudice nature of discussions are essential for dispute resolution. A related case demonstrates that courts will not play an adjudicative role at the negotiating table; there must be clarity and a meeting of minds for there to be an enforceable settlement.**

Facts

This decision was but one piece of prolonged litigation involving the Stronach family. Andrew Stronach and his daughter, Selena Stronach were plaintiffs in two separate actions. The defendants were Belinda Stronach, Nicole Walker and Frank Walker, Alon Ossip, Elfriede Stronach, and Stronach Consulting Corp. The plaintiffs brought a motion to strike out portions of the Fresh as Amended Statements of Defence on the ground that they cited documents and communications that were subject to Settlement Privilege.

There was a judicial mediation which began on May 25-26, 2020 and continued for more than seven months. The Statements of Defence in question contained reference to the involvement of observers who attended the mediation sessions, a valuation document prepared for use at the mediation, and e-mails exchanged between counsel during the mediation sessions.

The responding parties asserted that justice required that they be able to respond to the allegations, and that this was a public interest which outweighed the public interest in encouraging settlement.

Finding

Justice Cavanagh found in favour of the plaintiffs, striking portions of the Statements of Defence. The Court ruled that Settlement Privilege is a class of privilege in which there is a *prima facie* presumption of inadmissibility, and that as per the Supreme Court of Canada in ***Sable Offshore Energy Inc. v. Ameron International Corp.***, 2013 SCC 37, exceptions will be found "when the justice of the case requires it". Justice Cavanagh found that the moving parties had discharged the onus of establishing Settlement Privilege and that the responding parties failed to demonstrate a public interest that outweighed the confidential nature of settlement discussions taking place in the mediation process.

[There was also a subsequent motion in which Andrew Stronach as plaintiff moved to enforce a purported settlement document as against other Stronach defendants (***Stronach v. Stronach***, 2023 ONSC 3817). Justice Penny dismissed the motion due to a plethora of unresolved outstanding issues, finding the motion, in effect, an attempt "to require the court to preside over the negotiating table in an adjudicative role".]

***For all your mediation and arbitration needs, call (613) 565-6215,***
***e-mail info@adrottawa.com or check out our website at www.adrottawa.com***
***We will be more than happy to help!***