Confidentiality in Construction Mediation after the Ontario *Commercial Mediation Act, 2010*

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Confidentiality has long been considered one of the cornerstones of mediation because of the fundamental importance of candor for the process and the concern that such candor might be curbed if something revealed during mediation could be used against the party making the revelation in a later proceeding.[1] It has been suggested that a strong judicial commitment to confidentiality in mediation is crucial to the success of the mediation process as a means of dispute resolution.[2] It has also been argued that alongside such judicial protection, legislatures should strive towards uniformity in creating rules mandating confidentiality.[3] While Ontario's courts have provided the necessary judicial commitment, Ontario has stepped away from uniformity with the enactment of its *Commercial Mediation Act, 2010*. Uniquely among all other legislation reviewed, the Ontario Act allows for the disclosure of information about the parties' conduct at the mediation after the final resolution of the dispute. It is submitted that this exception to the general confidentiality rule erodes one of the most fundamental requirements for successful mediations.

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[1]See, for example, L. R. Freedman & M. L. Prigoff, "Confidentiality in Mediation – The Need for Protection" (1986) 2 Ohio St. J. on Disp. Resol. 37; O. V. Gray, "Protecting the Confidentiality of Communications in Mediation" (1998) 36 Osgoode Hall L.J. 667 at 671.

[2]J. A. Lee & C. Giesler, "Confidentiality in Mediation" (1998) 3 Harv. Negot. L. Rev. 285.

[3]E. E. Deason, "The Quest for Uniformity in Mediation Confidentialty: Foolish Consistency or Crucial Predictability?" (2001) 85 Marq. L. Rev. 79 at 80; P. D. Johnson, Jr., "Confidentiality in Mediation: What Can Florida Glean from the *Uniform Mediation Act*?" (2003) 30 Fla. St. U.L. Rev. 487 at 501-2.

The United Nations Commission on International Trade Law adopted a *Model Law on International Commercial Mediation* in 2002.[4] Articles 9 and 10 of the *Model Law* govern confidentiality:

9. Confidentiality

Unless otherwise agreed by the parties, all information relating to the conciliation proceedings shall be kept confidential, except where disclosure is required under the law or for the purposes of implementation or enforcement of a settlement agreement.

10. Admissibility of evidence in other proceedings

1. A party to the conciliation proceedings, the conciliator and any third person, including those involved in the administration of the conciliation proceedings, shall not in arbitral, judicial or similar proceedings rely on, introduce as evidence or give testimony or evidence regarding any of the following:

(a) An invitation by a party to engage in conciliation proceedings or the fact that a party was willing to participate in conciliation proceedings;

(b) Views expressed or suggestions made by a party in the conciliation in respect of a possible settlement of the dispute;

(c) Statements or admissions made by a party in the course of the conciliation proceedings;

(d) Proposals made by the conciliator;

(e) The fact that a party had indicated its willingness to accept a proposal for settlement made by the conciliator;

(f) A document prepared solely for purposes of the conciliation proceedings.

2. Paragraph 1 of this article applies irrespective of the form of the information or evidence referred to therein.

3. The disclosure of the information referred to in paragraph 1 of this article shall not be ordered by an arbitral tribunal, court or other competent governmental authority and, if such information is offered as evidence in contravention of paragraph 1 of this article, that evidence shall be treated as inadmissible. Nevertheless, such information may

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[4] Online: <http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03-90953_Ebook.pdf>.

> be disclosed or admitted in evidence to the extent required under the law or for the purposes of implementation or enforcement of a settlement agreement.
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> 4. The provisions of paragraphs 1, 2 and 3 of this article apply whether or not the arbitral, judicial or similar proceedings relate to the dispute that is or was the subject matter of the conciliation proceedings.
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> 5. Subject to the limitations of paragraph 1 of this article, evidence that is otherwise admissible in arbitral or judicial or similar proceedings does not become inadmissible as a consequence of having been used in a conciliation.

Legislation based on the *Model Law* has since been adopted in ten countries, among them Canada and the United States.[5] In the United States, the National Conference of Commissioners on Uniform State Laws adopted a *Uniform Mediation Act* based on the principles underlying the *Model Law* in 2001. Section 4 of the *Uniform Mediation Act* provides as follows:

> (a) Except as otherwise provided in Section 6, a mediation communication is privileged as provided in subsection (b) and is not subject to discovery or admissible in evidence in a proceeding unless waived or precluded as provided by Section 5.
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> (b) In a proceeding, the following privileges apply:
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> > (1) A mediation party may refuse to disclose, and may prevent any other person from disclosing, a mediation communication.
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> > (2) A mediator may refuse to disclose a mediation communication, and may prevent any other person from disclosing a mediation communication of the mediator.
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> > (3) A nonparty participant may refuse to disclose, and may prevent any other person from disclosing, a mediation communication of the nonparty participant.
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> (c) Evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its disclosure or use in a mediation.

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[5]Online: <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2002/Model_conciliation_status.html>.

"Mediation Communication" is defined as "a statement, whether oral or in a record or verbal or nonverbal, that occurs during a mediation or is made for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator".

The *Uniform Mediation Act* has since been enacted in the District of Columbia, Idaho, Illinois, Iowa, Nebraska, New Jersey, Ohio, South Dakota, Utah, Vermont and Washington. In New York, the Advisory Committee on Civil Practice has recommended that the Act be enacted in that jurisdiction.[6] The Committee gave the following reasons for its recommendation (p. 79):

> The Committee is in full agreement with the prime concern of the UMA: keeping mediation communications confidential. New York has no statewide rule applicable to the confidentiality of submissions and statements made during mediation proceedings.
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> [. . .]
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> Mediation is a process by which a third party facilitates communication and negotiation between parties to a dispute to assist them in reaching a voluntary agreement resolving that dispute. The central rule of the UMA is that a mediation communication is confidential, and, if privileged, is not subject to discovery or admission into evidence in a formal proceeding. In proceedings following a mediation, a party may refuse to disclose, and prevent any other person from disclosing, a mediation communication. Mediators and non-party participants may refuse to disclose their own statements made during mediation, and may prevent others from disclosing them, as well. Waiver of these privileges must be in a record or made orally during a proceeding to be effective.

In 2013, Bills introducing the Act have been tabled in New York, Hawaii and Massachusetts.[7]

European Union members have not adopted the *Model Law*. Instead, the European Union issued a Mediation Directive in 2008,[8] with a requirement that all member states had to implement the provisions in the Direc-

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[6]Online: <http://nycourts.gov/ip/judiciaryslegislative/2012-CivilPractice-ADV-Report.pdf>.

[7]Online: <http://uniformlaws.org/Act.aspx?title=Mediation%20Act>.

[8]EU Mediation Directive (2008/52/EC).

tive within three years. The Directive makes confidentiality a key requirement of all mediations. Paragraph 23 of the Recitals provides as follows:

> (23) Confidentiality in the mediation process is important and this Directive should therefore provide for a minimum degree of compatibility of civil procedural rules with regard to how to protect the confidentiality of mediation in any subsequent civil and commercial judicial proceedings or arbitration.

Article 7 of the Directive governs confidentiality:

> **Article 7: Confidentiality of mediation**
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> 1. Given that mediation is intended to take place in a manner which respects confidentiality, Member States shall ensure that, unless the parties agree otherwise, neither mediators nor those involved in the administration of the mediation process shall be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process, except:
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> > (a) where this is necessary for overriding considerations of public policy of the Member State concerned, in particular when required to ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person; or
> >
> > (b) where disclosure of the content of the agreement resulting from mediation is necessary in order to implement or enforce that agreement.
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> 2. Nothing in paragraph 1 shall preclude Member States from enacting stricter measures to protect the confidentiality of mediation.

Among the issues that some states found difficult to implement was confidentiality. A policy document prepared at the request of the European Parliament's Directorate-General for Internal Policies states that Germany, for example, found the most significant problem in practice to be how to exclude confidential information from the mediation as evidence

in subsequent proceedings.[9] In the end, however, a law was passed in 2012 that ensured confidentiality as per the Directive.[10]

All this makes it abundantly clear that confidentiality is of the utmost importance in mediations.

Two Canadian jurisdictions have enacted legislation based on the *Model Law*. Nova Scotia enacted its *Commercial Mediation Act* in 2005, and Ontario followed suit in 2010.[11]

The Nova Scotia Act provides as follows:

> **Disclosure of information between parties**
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> 11. (1) A mediator may disclose to a party any information relating to a mediation that the mediator receives from another party unless that other party has expressly asked the mediator not to disclose the information.
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> (2) With respect to third parties, all information relating to a mediation must be kept confidential unless
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> > (a) all the parties agree to the disclosure;
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> > (b) the disclosure is required under the law;
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> > (c) the disclosure is required for the purposes of carrying out or enforcing a settlement agreement; or
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> > (d) the disclosure is required for a mediator to respond to a claim of misconduct.

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[9]C. Duve, "Lessons learnt from the implementation of the EU Mediation Directive in Germany: the point of view of Lawyers", online: <http: //www.europarl.europa.eu/document/activities/cont/201105/20110518ATT19590/20110518ATT19590EN.pdf>.

[10]German Mediation Law (Gesetz zur Förderung der Mediation und anderer Verfahren der aubergerichtlichen Konfliktbeilegung), BGBl. I, 2012, S. 1577, §4. In the UK, the requirement of confidentiality was implemented by *Civil Procedure Rule* 78.26.

[11]*Commercial Mediation Act*, S.N.S. 2005, c. 36; *Commercial Mediation Act, 2010*, S.O. 2010, c. 16, Sched. 3.

Admissibility

12. (1) None of the following information, in any form, is admissible in evidence in an arbitral, judicial or administrative proceeding:

(a) an invitation by a party to mediate, a party's willingness or refusal to mediate a dispute, information exchanged between the parties before a mediation commences and any agreement to mediate;

(b) a document prepared solely for the purposes of a mediation;

(c) views expressed or suggestions made by a party during a mediation concerning a possible settlement of the dispute;

(d) statements or admissions made by a party during a mediation;

(e) proposals for settlement made by the mediator;

(f) the fact that a party had indicated its willingness to accept a proposal for settlement made by the mediator;

(g) the fact that a party terminated the mediation.

(2) Notwithstanding subsection (1), the information may be admitted in evidence to the extent required

(a) under the law;

(b) for the purposes of carrying out or enforcing a settlement agreement; or

(c) for a mediator to respond to a claim of misconduct.

(3) Except for the limitations set out in subsection (1), information created for purposes other than a mediation does not become inadmissible because it was used in a mediation.

(4) Subsections (1) and (2) apply whether or not the arbitral, judicial or administrative proceeding relates to a dispute that is or was the subject of a mediation.

Thus, the Nova Scotia language closely mirrors the *Model Law.*

The Ontario Act provides as follows:

Disclosure of information between parties

8. (1) A mediator may disclose to a party any information relating to the mediation that the mediator receives from another party unless

that other party expressly asks the mediator not to disclose the information.

Duty to keep confidential

(2) Information relating to the mediation must be kept confidential by the parties, the mediator and any other persons involved in the conduct of the mediation unless,

(a) all the parties agree to the disclosure and, if the information relates to the mediator, the mediator agrees to the disclosure;

(b) the disclosure is required by law;

(c) the disclosure is required for the purposes of carrying out or enforcing a settlement agreement;

(d) the disclosure is required for a mediator to respond to a claim of misconduct; or

(e) the disclosure is required to protect the health or safety of any person.

Exception

(3) The requirement to keep information relating to the mediation confidential does not apply to information,

(a) that is publicly available;

(b) that the parties, by their conduct, do not treat as confidential; or

(c) that is relevant in determining if the mediator has failed to make a disclosure required under subsection 6(3).

Admissibility of information

9. (1) Subject to subsections (2) and (3), none of the following information, in any form, is discoverable or admissible in evidence in arbitral, judicial or administrative proceedings:

1. An invitation by a party to mediate a commercial dispute, a party's willingness or refusal to mediate the dispute, information exchanged between the parties before the mediation commences and any agreement to mediate the dispute.

2. A document prepared solely for the purposes of the mediation.

3. Views expressed or suggestions made by a party during the mediation concerning a possible settlement of the dispute.

4. Statements or admissions made by a party during the mediation.

5. Statements or proposals for settlement made by the mediator.

6. The fact that a party indicated a willingness to accept a proposal for settlement made by the mediator.

7. The fact that a party or the mediator terminated the mediation. 2010, c. 16, Sched. 3, s. 9(1).

Exceptions

(2) The information referred to in subsection (1) may be admitted in evidence to the extent required,

(a) by law;

(b) for the purposes of carrying out or enforcing a settlement agreement;

(c) by a mediator to respond to a claim of misconduct; or

(d) if all of the parties to the mediation consent and, if the information relates to the mediator, the mediator consents.

Same, to determine costs

(3) Information about the conduct of a party to the mediation or the conduct of the mediator may be disclosed after the final resolution of the dispute to which the mediation relates for the purpose of determining costs of the mediation or of proceedings taken because the mediation did not succeed.

Other information used in a mediation

(4) Except for the limitations set out in subsection (1), information created for purposes other than a mediation does not become inadmissible only because it was used in the mediation.

Application of subss. (1) and (2)

(5) Subsections (1) and (2) apply whether or not the arbitral, judicial or administrative proceedings relate to a dispute that is or was the subject of the mediation.

Again, most of this reflects the *Model Law*, except for the addition of ss. 9(3), which allows information about the conduct of a party to the mediation or the conduct of the mediator to be disclosed after the final resolution of the dispute to determine costs of the mediation or of proceedings taken because the mediation did not succeed. Among all legislation reviewed above, this exception is unique.

A couple of points are worth mentioning. The section is worded broadly. Subsection 9(1) is made subject to ss. 9(2) and (3). Does that mean that the information listed in ss. 9(1) as not admissible becomes admissible to prove certain conduct of a party to the mediation? What constitutes "conduct" of a party? Can a statement or admission made by a party during the mediation be introduced as evidence as to conduct?

The information may only be disclosed "after the final resolution of the dispute to which the mediation relates". The rule clearly contemplates that the information should not affect the outcome of the case as such, but only the costs award. Is the dispute finally resolved when the trial judgment is released? An appeal always delays the final resolution of the dispute.[12] Does that mean that the information cannot be disclosed until all routes of appeal are exhausted?

It has been suggested that the purpose of the exception was to discourage bad behaviour in mediations.[13] Presumably, the Act seeks to punish behaviour during a mediation that goes beyond tough bargaining and borders on bad faith and unreasonableness, i.e. the type of behaviour that might trigger substantial indemnity costs. In any major construction case, the difference between a costs award on a regular scale and an increased scale can be very significant, increasing a party's incentive to bring forward any information that might induce a court to award the higher scale.

There is as of yet no case law on this issue. Until such time as courts draw some guidelines, it is submitted that parties can no longer go into mediations in Ontario with the certainty that nothing they say during those mediations will end up on the public record. It has been suggested that until such time as the law is clarified on these points, it would be

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[12]See *Vickers v. Dunton*, 2011 CarswellBC 2778 (C.A.).

[13]R. Weiler, "Good Intentions Gone Bad – Ontario *Commercial Mediation Act, 2010*", online: <http://kluwermediationblog.com/2012/01/22/good-intentions-gone-bad-ontario-commercial-mediation-act-2010>.

prudent to opt out of the *Mediation Act, 2010*.[14] In light of the fundamental importance of candor to the entire process and the negative effect s. 9(3) might have on that candor, it is submitted that opting out or modifying the application of the Act[15] would indeed be a prudent thing to do.

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[14]Ibid.

[15]Section 2(2) allows for party agreement to modify the application of the Act.