



## **Confidentiality and Mediation**

by Hilary Linton.

The question of the enforceability of confidentiality provisions in a mediation agreement was addressed by the Court of Appeal for Ontario in the recent *Rogacki v. Belz* case.

The parties had a mandatory mediation under Rule 24.1 of the Rules of Civil Procedure. They signed a mediation agreement containing relatively standard confidentiality terms. The agreement provided that neither the parties nor the mediator would disclose to anyone who was not a party to the mediation any information or documents submitted to the mediator, subject to certain standard exceptions. They also agreed that “everything said or done in the mediation is strictly confidential and privileged, and no reference will be made to anyone other than the parties or their solicitors of anything that is said during the process.”

Following the mediation, the defendant Belz published a newspaper story about the mediation, stating that the plaintiff had rejected the defendants' settlement offer. No further details about the mediation were published.

The plaintiff brought a motion seeking a contempt of court order against the defendant. The motions judge found Belz in contempt of court.

However, the decision was reversed on appeal. The Court of Appeal noted that Rule 24.1 does not provide for confidentiality of the mediation session; that rule only provides that the mediation is a without prejudice settlement negotiation. The Appeal court also reviewed the contempt rule and found that it provided no remedy for breach of the confidentiality provisions of the mediation agreement. The agreement is not, the Court found, an order within the meaning of Rule 60 and thus is not enforceable by the contempt power.

The Court of Appeal decision also found that, because the article in question did not prejudice the plaintiff's right to a fair trial, this was not a case for applying the court's inherent contempt jurisdiction.

In separate reasons, Justice Abella wrote that there are significant public policy reasons for keeping mediation confidential, and indirectly called upon the legislature to amend the mandatory mediation rule to provide that the process is confidential.

Until that happens, parties in mediation, their lawyers and mediators should address the issue at the outset of the mediation, to ensure that everyone has the same understanding about confidentiality of the process. If parties wish to have an enforceable remedy for the breach of any confidentiality provisions of their mediation agreement, they will have to specify those remedies in the agreement.