

## contractual dispute resolution – court confirms you can talk freely

"A rose by any other name would smell as sweet" is a commonly quoted verse in Shakespeare's *Romeo and Juliet*, where Juliet argues that the *names* of things do not matter, only what things are.

On December 19, 2012, Justice Parfett of the Ontario Superior Court of Justice delivered a brief, but very important decision that followed this philosophy. The motion before her was *Ledcor Construction Limited v Canada (Attorney General)*, 2012 ONSC 7501, Court File No. 07-CV-39937B1. At issue was whether a party could include in its court materials the opinions and recommendations of an evaluator hired by the parties pursuant to a construction contract in order to assist in resolving issues arising from a construction project.

The contract between the parties stipulated that, when faced with a dispute, the parties would first attempt to resolve their dispute through some sort of alternative dispute resolution process, such as a party-organized mediation. Although the case law is quite settled when dealing with mediations conducted under the rules of Civil Procedure (specifically, Rule 24.1.14), the law was less settled in regards to settlement/mediation discussions between the parties that were conducted pursuant to their contractual obligations. The Respondent in this case argued that the process engaged by the parties was not a true mediation and the confidentiality rule did not apply. By contrast, the Applicants argued that mediation discussions and recommendations are *prima facie* confidential if parties are contemplating litigation.

Ultimately, Justice Parfett stated that "the important factor is not what the parties call the process, but what the process actually was. It is clear from the documentation that both parties filed that the process was an effort to settle their disputes." She stated that settlement/mediation discussions are privileged if they meet certain criteria:

- A litigious dispute must be in existence or within contemplation
- The communication must be made with the express or implied intention that it would not be disclosed to the court in the event negotiations failed; and
- The purpose of the communication must be to attempt to effect a settlement.

In the matter before Justice Parfett, she determined that the disputes were litigious and that the entire purpose of the contractually-constructed mediation between the parties were to effect a settlement. Therefore, those discussions and the evaluator's recommendations were without prejudice and confidential.

This is an important step for settlement disputes conducted by parties prior to engaging legal counsel. This decision, although in the context of a summary judgment motion, brings clarity to the world of contractually mandated settlement discussions. Contracting parties can now effect settlement/mediation clauses within their contracts while having some reassurance that resulting discussions can remain confidential and privileged if they meet certain criteria.

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**a cautionary note**

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