

LEGAL BULLETIN

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Weakening of the principle of confidentiality in family mediation: 2021 CSC 54 ([CanLII](#)), [2021] 3 RCS 805

Introduction

Family mediation is a conflict resolution process that helps to relieve congestion in the courts while ensuring the protection of vulnerable individuals. It aims to restore balance between the parties, promote fairness and restructure family relationships. Its goal is to re-establish, improve or strengthen ties between family members in a respectful and constructive environment.

Since it was first introduced in Quebec, family mediation has proven to be an effective solution thanks to its speed, low cost and confidentiality. However, Supreme Court decision “2021 SCC 54”, which authorizes the lifting of the confidentiality of certain communications in family mediation, weakens this fundamental principle guaranteeing the security and trust of the parties. In order to explore the issue further, the said decision will be the subject of this analysis.



Case Background

At the end of their de facto union, Isabelle Bisaillon (Isabelle) and Michel Bouvier (Michel) decided to resort to family mediation in order to resolve their differences concerning parental custody and the division of property, in particular the building that served as their residence. In addition, Isabelle wanted to be compensated for the damage that taking care of the children had had on her career. At the end of the negotiations, a “summary of agreements” was recorded by the certified mediator chosen by the parties.

However, with a view to obtaining more compensation, Isabelle took her case to court. Michel, in his defense, invoked the existence of a contract resulting from the mediation and sought to defeat Isabelle’s action. The latter contested the existence of such a contract and objected to the

admission of the summary as evidence, invoking the principle of confidentiality applicable in family mediation.

The Court dismissed Isabelle’s claim, recognized the non-absolute nature of the principle of confidentiality and concluded that a contract existed by way of an analogous interpretation of *Union Carbide Canada Inc. v. Bombardier Inc.*, 2014 SCC 35, [2014] 1 S.C.R. 800, which deals with commercial mediation.

Isabelle appealed the decision, but the Court of Appeal upheld the initial ruling. While not pursuing the case, the Association de médiation familiale du Québec sought leave to appeal to the Supreme Court, given the importance of the issue raised and the objective of making it a “test case.”

I) Analysis of the majority's decision: Infringement of the inviolability of the principle of confidentiality in family mediation

The Association de médiation familiale du Québec, as appellant, based its action on the importance of confidentiality in the family mediation process. In its view, confidentiality is essential if the mediation “process is to function fairly and effectively”. It protects vulnerable spouses from the risks associated with power imbalances, promotes trust in the process and encourages cooperation between the parties.

The majority recognized the importance of confidentiality in family mediation, but did not share the Association's position on its absolute scope. For Kasirer J., writing for the majority, confidentiality fosters the sincerity of exchanges, but the protection of vulnerable individuals cannot be guaranteed by its absolute nature. In his view, this protection is provided by “procedural safeguards”, in particular:

- Confirmation of any future agreement by a judge.
- Intervention by a government-certified family mediator chosen by the parties;

It should be noted in this regard that the conditions for certification determined by regulation (art. 619 N.C.C.P.; see also arts. 827.2 to 827.4 F.C.C.P.; *Regulation*), require in particular that a mediator receive training in the legal and psychological aspects of the breakdown of a relationship (*Regulation*, ss. 1 and 2). Section 2 of the *Regulation* provides that the training must pertain in part to “obstacles to negotiation and the balance of forces between the parties” and to “domestic violence”. Echoing the *Regulation*, the *Guide* imposes a duty on certified family mediators to take into account any signs of domestic violence (2016 *Guide*, at p. 15; 2012 *Guide*, at p. 13)).

Kasirer J. stressed the sensitive nature of family mediation owing to the personal turmoil involved. He also noted that parties are not allowed to be accompanied by a legal advisor during mediation sessions, while specifying that parties may consult a legal adviser outside the sessions.

Despite these specific characteristics, he believes that the application of *Union Carbide Canada Inc. v. Bombardier Inc.*, which results from commercial mediation, is relevant in family mediation. This decision allows for an exception to confidentiality, making it possible to disclose certain communications under specific circumstances. By applying this logic, the Supreme Court has made confidentiality in family mediation less airtight.

Consequently the *Association de médiation familiale du Québec* witnessed the dismissal of its appeal and was ordered to pay costs of \$15,000.

However, this decision, which weakens the protection provided by the principle of confidentiality, did not obtain the unanimous approval of the Supreme Court. Let us now examine the position of the other judges.

II) Analysis of the minority's decision: Insufficient protection of confidentiality in family mediation

The position of the minority was presented by Karakatsanis J. Although she too dismissed the appeal, her reasons were different from those of the majority. For her, the main issue resides in the value attached to confidentiality in family mediation.

In her reasons, Karakatsanis J. stressed that “family law settlements are unique”, which should limit the application of commercial law rules in this area. In her opinion, family disputes require a distinct approach that takes into account the sensitive nature of the issues, in particular interpersonal relationships in a context of conflict and emotional instability. The principles of commercial law are not adapted to the realities of family law, where the parties are less in search of protecting economic interests than in preserving their integrity and that of their family.

In family mediation, confidentiality is essential to the transparency and success of the process. The parties must be able to express themselves freely, without fearing that what they say will be used against them in the future. They focus on expressing their emotions and protecting their vulnerability, rather than on strictly defending their legal interests. Introducing an exception to confidentiality, based on a precedent in commercial law, could undermine the

parties' confidence in mediation and compromise its effectiveness as a family dispute resolution mechanism.

In addition, Karakatsanis J. stressed that the question raised by the Association de médiation familiale

du Québec is of fundamental importance for both the evolution of the law and the general interest of Canadian society. She also believes that ordering the Association to pay costs is not justified and could deter other parties from taking similar steps in the future.

Conclusion

The infringement of the principle of confidentiality in family mediation cannot be minimized for it constitutes a real step backward in the building of family violence victims' confidence in justice. In this context, a significant change in case law is required for the well-being of victims, the protection of vulnerable parties and procedural stability. Karakatsanis J.'s contrary opinion gives hope that there might be a change.

In addition, conditions for certification requiring that FV mediators receive training is also encouraging, even though FV screening and the protection of individuals subjected to FV is not always available and can vary. Indeed, mediators do not always follow best screening practices, such as systematic use of a validated tool (Godbout et al., 2024).

Bibliography

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