

**AGREEMENT TO MEDIATE**

**Between:**

**And**

(“the Parties”)

**And**

**Janet Whitehead**

(“the Mediator”).

The parties retain the mediator on the following terms:

**Role of the Mediator**

1. The mediator is an impartial third party who provides a neutral and balanced dispute resolution process. The mediator will not make decisions, take sides, or provide legal advice. The responsibility for resolving the outstanding issues remains with the parties, not the mediator.
2. Each party is responsible for seeking and obtaining all necessary advice, including legal advice. **The mediator strongly encourages each party to obtain legal advice throughout the process and before any Agreement is signed.**
3. The Mediator will not provide legal advice to the parties individually or collectively. If, during the course of the mediation, the Mediator expresses an opinion or comments on an issue, the parties acknowledge that the opinion or comment is not to be construed as legal advice in any respect.
4. There is no solicitor-client privilege between the mediator and the parties.

## The Process

5. The mediator will first meet each party separately, to identify issues, goals and concerns of that party. Thereafter, the parties and the mediator will meet together, either with or without their counsel, as they may agree.
6. The mediator may meet or communicate with either party separately at any time. The mediator may, in her discretion, disclose information or documents provided in such private meetings (called a “caucus”) to the other party, and/or to a party’s lawyer, unless agreed otherwise during the caucus.
7. All intake and screening information is confidential between the mediator and the party who completed the screening questionnaire, subject to the confidentiality provisions set out below.
8. Either party may have his or her lawyer attend the mediation. Other professionals or other persons whose presence is required (such as counselors or therapists for children, or financial planners) at the mediation may be present if all parties agree. Any third parties present must agree in writing to be bound by the confidentiality terms of this agreement.
9. Mediation is a voluntary process. Either party or the mediator may terminate the process at any time. The mediator specifically reserves the right to terminate the mediation in the event she believes a party is deliberately providing false or misleading information to the other.
- 10. The parties are advised to obtain, from independent legal and other advisors, all necessary legal, tax and other advice at the outset of the mediation process, and are advised to also obtain independent advice on the terms of any proposed settlement. Legal advice will help the parties to better understand their respective rights and obligations with respect to the outstanding issues and better appreciate what may be required to reach a reasonable agreement. They understand and acknowledge that an agreement reached without the benefit of legal and other necessary advice may be invalid, may later be set aside, or may have unintended consequences.**
11. The mediation sessions are designed to encourage open and constructive dialogue between the parties in order to resolve disputes. However, if at any time either party feels intimidated in any way when speaking honestly and freely about relevant matters, that party will immediately alert the mediator, and may do so privately.
12. The mediator may at the parties’ request prepare a draft contract, setting out mediator’s understanding of the terms of the agreement reached between the parties in mediation. However, the parties agree that they will **not** conclude a binding agreement in mediation. Any binding agreement shall be made by the parties following the mediation with the advice of lawyers retained by each of them to provide independent legal advice.

13. The parties fully indemnify the mediator from any claims arising out of any agreements entered into following this process whether they have obtained legal advice or not.
14. The parties authorize the mediator to discuss all aspects of the mediation with each other's lawyers and other advisors, excepting information that has been agreed to be confidential as per paragraph 6. The parties authorize the mediator to provide the parties' respective lawyers with all progress notes and all documents provided to the mediator for the purpose of mediation or prepared during the mediation, unless those documents are subject to a specific confidentiality agreement between the party that provided the document and the mediator.
15. The mediation will be held in private. Other professionals or persons may be in attendance with the consent of all parties and the mediator. All third parties must agree to be bound by paragraphs 14-17 herein.

### **Without Prejudice Communications**

16. All information, documents, notes, memos, correspondence (including e-mail), progress notes, memoranda of understanding, drafts, or other communications prepared or provided by any person for the purpose of the mediation shall, unless otherwise discoverable, be treated as without-prejudice settlement discussions, and shall be inadmissible for use by anyone in any proceeding for any purpose. The parties agree that they will not summons, subpoena, or seek access to any documents prepared or provided in connection with the mediation, including the file and notes of the mediator. The mediator shall not be called as a witness in any proceeding.
17. Closed mediation is a confidential, off-the-record process. Although the mediator cannot guarantee confidentiality, the purpose of a confidentiality rule is to help parties feel comfortable freely exchanging information, ideas, options, offers and concerns. The parties agree not to divulge communications made during the mediation process to anyone who was not present, including progress notes and e-mails from or to the mediator or between themselves, unless they all consent. **This rule does not prevent the parties from providing necessary information and documents to people whose advice they need in order to make informed decisions.**
18. The mediator agrees to be bound by these confidentiality provisions. However, the mediator may breach the rule of confidentiality in the following situations:
  - a) to communicate with the lawyers for the parties, and to third party advisors retained by a party or both parties;
  - b) for research, writing or educational purposes, on a non-identifying basis;
  - c) where ordered to do so by a judicial authority;

- d) where required to do so by law, including obligations to report a child in need of protection;
  - e) where the information discloses an actual or potential threat to human life or safety; and
  - f) Where the mediator deems that disclosure is necessary to ensure payment of her account (such as to the client's counsel).
19. The confidentiality provisions of this Agreement apply to any assistant, intern, co-mediator or observer in the mediation. Clients hereby acknowledge and accept that the Mediator and her assistant may discuss matters related to clients' mediation for the purpose of file management, document production, and supervision and consent to such limited sharing of information within her office.
20. The parties specifically acknowledge that the fact that the mediation has been held or that the parties entered into this Mediation Agreement is not confidential in relation to the Court process. They authorize the Mediator to disclose to a Court, through the use of a Mediation Report, a) that the mediation has been held, and b) whether or not agreement was reached, if requested to do so by either party. No other information shall be disclosed by the Mediator to the Court unless paragraph 16(c) herein applies.
21. The Mediator maintains client files in accordance with the requirements of the Law Society of Upper Canada and clients hereby consent to same.

### **Risks and Limitations of Mediation**

22. The parties acknowledge that there is no guarantee that they will resolve all issues in mediation, nor that they will be fully satisfied with the outcome. The parties further acknowledge that if no settlement is reached in mediation, any subsequent litigation may be more difficult than if the parties had not mediated.
23. The mediator cannot guarantee physical safety during the mediation process. The mediator cannot guarantee against bad faith or abuse of process by either party.
24. The parties acknowledge that there is a risk of loss of confidentiality through the use of e-mail and/or facsimile communication. They authorize the mediator and her assistant to communicate with them by email and facsimile notwithstanding this risk.

### **Document Drafting**

25. The mediator may draft interim memoranda or “progress notes” at the end of meetings and a final memorandum or a draft contract when the mediation concludes. All such memoranda are without prejudice settlement proposals; none are binding on a party until they have been finalized into legal agreements with the assistance of the lawyers for the parties.
26. During the course of the mediation, the mediator may assist the parties by preparing support calculations and calculations regarding equalization payments using industry specific software used by family lawyers, such as SupportMate or DivorceMate. The purpose of using industry specific software in this fashion is to organize supporting information in a manner convenient for family law lawyers and to facilitate the provision of independent legal advice. The mediator does not warrant the accuracy of these calculations. The use of such software is not intended in any way to constitute the provision of legal advice.

### **Adversarial Processes Suspended**

27. The parties agree that they will not commence or advance any court proceedings, nor will they instruct their lawyers to correspond with each other with respect to issues in mediation while they are engaged in a mediation process, without first advising the other parties and the mediator.

### **Mediator’s Fees**

28. The parties agree to abide by the mediator’s fee schedule, attached as Schedule “A” to this Agreement. They also agree to abide by the mediator’s cancellation policy, which is as follows:
  - Cancellation notice received **less than 72 hours** in advance of the scheduled commencement of the mediation: the fee for all preparation completed by the time notice of cancellation is received, plus \$600.00, plus actual expenses and disbursements incurred by the mediator to that date, plus HST.
  - Cancellation notice **more than 72 hours** but less than one week before the scheduled commencement of the mediation: the fee for all preparation completed by the time the notice of cancellation is received, plus \$300.00, plus actual expenses and disbursements incurred by the mediator to that date, plus HST.
  - Cancellation more than one week before the scheduled commencement of the mediation: There is no cancellation fee, but parties will be required to pay for all preparation completed by the time notice of cancellation is received, plus any actual expenses and disbursements incurred by the mediator to that date, plus HST.

29. On execution of this Agreement, the parties will provide the mediator with payment of **\$5,650.00** either by each paying 50% of the total (\$2,825.00 each) or in some other proportion as the parties may agree. Payment of the full amount of the fees is required prior to the commencement of the mediation session. These fees will be held in trust until services have been provided and progress bills are rendered to the parties. In the event the mediation is cancelled and not rescheduled, any remaining portion will be returned to the parties, subject to progress bills rendered for work actually conducted, together with the cancellation provisions in paragraph 28 of this Agreement.

**The parties affirm that they have had full opportunity to read and understand this agreement.**

_____	_____	_____
Janet M. Whitehead	Witness	Date
Mediator		

_____	_____	_____
	Witness	Date

_____	_____	_____
	Witness	Date

**If a supervisor or intern is present during part or all of the mediation process, he or she hereby agrees to abide by all of the terms respecting confidentiality as set out in this Agreement.**

_____	_____	_____
Supervisor/Intern	Witness	Date

## 2017 Mediation Fee Schedule

### Janet Whitehead (Comprehensive Mediator)

**Fee:** \$5,000.00 plus HST

Including individual intake meetings, preparation, up to 3 mediation sessions of an approximate duration of 2-3 hours each, preparation of progress notes and preparation of a draft separation agreement for review by each party's counsel

Hourly mediation rate for additional mediation sessions \$300.00 plus HST

Mediator's hourly rate for phone-calls, emails, letters with parties or counsel after draft agreement prepared \$300.00 plus HST

### Other:

Travel time/mileage:

flat negotiable fee

Courier:

actual disbursement cost