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CHAPTER 1

INTRODUCTION

Mediation is gaining popularity as an alternative method of resolving disputes. The mediation process differs significantly from an adjudication process like litigation in the courts or arbitration because it is essentially a form of negotiation. It is the parties, not the neutral mediator, who shape the agenda for discussion and (if successful) the voluntarily-reached agreement. A mediator's presence can often act as a catalyst for overcoming impasse in the negotiation process -- the mediator encourages accommodation and helps the parties to identify issues and explore options. Unlike a judge or arbitrator, however, a mediator has no coercive power over the parties, cannot compel information and does not render a decision or judgment after hearing reasoned arguments.[1] Instead, the mediator's crucial role is to facilitate effective communication between the parties.

> The mediator can identify and help in the narrowing of issues; help identify and crystallize each side's underlying interests and concerns; carry less subtle messages and information between the parties; explore bases for agreement and the consequences of not settling; and develop a co-operative, problem-solving approach. By learning the confidential concerns and positions of the parties, the mediator can often identify options beyond the parties' original perceptions. The common denominator to all these efforts is the enhancement of communications between the parties in conflict. Mediators, by their presence, tend to inject civility into the communications and to induce a principled analysis of outstanding differences.[2]

A mediator will often meet with the parties separately, as well as together. During a "private caucus", a party may confide confidential and sensitive information to the mediator which the party will not want revealed to the other party or to anyone else.

> A skillful mediator can speed negotiations and increase chances for agreement by holding separate confidential meetings with the parties, where each party may give the mediator a relatively full and candid account of its own interests (rather than its litigating position), discuss what it would be willing to accept, and consider alternative approaches. The mediator, armed with this information but avoiding premature disclosure of its details, can then help to shape the negotiations in such a way that they will proceed most directly to their goal. The mediator may also carry messages between the parties, launch "trial balloons," and act as an agent of reality to reduce the likelihood of miscalculation. This structure can make it safe for the parties to talk candidly and to raise sensitive issues and creative ideas.[3]

A major issue of concern in the mediation field is the extent to which mediation confidentiality can be maintained against subsequent attempts to adduce mediation information as evidence in litigation. Mediators and parties often enter confidentiality agreements in which

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[1]Note, "Protecting Confidentiality in Mediation" (1984-85), 98 Harv. L. Rev. 441 at 444.

[2]G.W. Adams and N.L. Bussin, "Alternative Dispute Resolution and Canadian Courts: A Time for Change" (1995), 17 Advocates' Q. 133 at 137.

[3]Administrative Conference of the United States, *Recommendation 88-11* (1988) in P.J. Harter, "Neither Cop Nor Collection Agent: Encouraging Administrative Settlements by Ensuring Mediator Confidentiality" (1989), 41 Admin. L. Rev. 315 at 358.

they all agree that, in any subsequent proceeding, they will not subpoena each other to testify about the mediation or attempt to compel that information through the discovery process.

This approach has two weaknesses. First, it is legally questionable whether a court would enforce such agreements in derogation of the court's own power to compel evidence.[4] Secondly, these private agreements cannot bind third parties (who are strangers to the contract) who may wish to discover or subpoena evidence from a mediation. "For example, a company and a complainant may settle a discrimination case through mediation, and another employee may seek to learn the details of the settlement because it may be helpful to a suit that person brought against the same company."[5]

There has been a movement in the United States over the past fifteen years to create varying degrees of statutory privilege to protect mediation confidentiality. "Blanket" provisions offer near-absolute protection for mediation communications and are more likely to shield mediation from third parties who seek to obtain information by using the discovery process or a subpoena in a subsequent unrelated action. Most American provisions, however, are more limited or restricted about what is privileged and the conditions under which the privilege can be invoked. Since there can be any number of substantive variables in designing a statutory privilege, a wide variety of provisions is possible and, indeed, there is little uniformity among the American states having such provisions.[6]

The issue of privilege is also of concern to Canadian mediators. Indeed, this project was suggested to the Commission by the Manitoba Bar Association's Alternative Dispute Resolution Section. During the course of preparing this Report, Commission staff consulted selected people who are experienced in the mediation process, as well as some who brought a litigation perspective to the issues. These included Bruce Thompson of the MBA ADR Section, Jan P. Schmidt, Yvonne LeSage and Dorothy Barg Neufeld of Mediation Services (a non-profit organization in Winnipeg which conducts community-based mediation), Gervin Greasley of the Winnipeg Construction Association Inc., Hon. A.C. Hamilton and John Cox of the Arbitration and Mediation Institute of Manitoba Inc., and Winnipeg lawyers Patrick Riley and Bill Olson. Their viewpoints were of invaluable assistance to the Commission in our consideration of this issue and we thank them for generously giving us the benefit of their time and experience.

Any issue of privilege raises a fundamental conflict between the desire for confidentiality on the part of the privilege-seeker and the need of the traditional justice system for access to all relevant evidence so that a fair legal judgment may be rendered. This issue is no less acute when considering mediation privilege. While the Commission understands that there are valid bases for some of the concerns behind advocacy of mediation privilege, it has concluded that privilege is neither the best nor most appropriate response. The Commission will propose a different approach which it believes represents a better balance between the overriding social need for a public justice system with access to all relevant and probative evidence and the developing role of mediation as a method of alternative dispute resolution.

Chapter 2 notes the current legislation and common law in this area, including a description of the American situation. Chapter 3 outlines the Commission's framework for

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[4]". . . [T]he protection offered by confidentiality agreements is illusory. Agreements limiting access to information disclosed in mediation could be declared void as against public policy.": E.L. Kuester, "Confidentiality in Mediation: A Trail of Broken Promises" (1995), 16 Hamline J. Pub. L. & Pol'y 573 at 577-578. This result will follow if the agreement is successfully characterized as an agreement to suppress evidence. However, a court might be persuaded to enforce a confidentiality agreement where one of its signatories is nevertheless attempting to subpoena mediation evidence "because permitting one party to repudiate the agreement may result in sharp practices.": N.H. Rogers and C.A. McEwen, *Mediation: Law Policy Practice* (1989) 137.

[5]Harter, *supra* n. 3, at 327.

[6]J.M. Nolan-Haley, *Alternative Dispute Resolution in a Nutshell* (1992) 94. Over half the states now recognize some form or another of mediation privilege: J.P. Rosenberg, "Keeping the Lid on Confidentiality: Mediation Privilege and Conflict of Laws" (1994), 10 Ohio St. J. on Disp. Resol. 157 at 158.

reform, exploring all the variables for and against the possible approaches dealing with the issue of mediation confidentiality. Chapter 4 discusses and explains the Commission's proposed reform solutions. Chapter 5 contains a list of the recommendations made in this Report.

The draft amending legislation proposed by the Commission is contained in Appendix A. Appendix B outlines the types of limited privilege provisions currently found in Manitoba statutes.

CHAPTER 2

THE CURRENT LAW

A. INTRODUCTION

This Report focuses on a major issue in the mediation field, namely, the extent to which mediation confidentiality can be maintained against subsequent attempts to use mediation information as evidence in litigation.

> Confidentiality typically will become an issue in the following situations: (1) when the . . . [mediation] results in no agreement, and one or more of the parties desires to later utilize information from the proceeding in trial; (2) when there is a settlement but there is a disagreement over the terms, or there are later problems with its enforcement; or (3) when third parties not part of the original . . . [mediation] seek to discover and/or utilize information from it in subsequent and different litigation or other matters.[1]

Factual examples of the third scenario could include the following types of cases:

(a) A plaintiff subcontracting company sues a defendant main contractor for damages it sustained due to the defendant's alleged rigged bidding. A year ago, the defendant company had settled through mediation an unfair competition lawsuit with some other companies. The plaintiff alleges that the confidential mediation agreement was really an illegal price fixing agreement. The plaintiff wants to subpoena the mediator.[2]

(b) A public utility settles a couple of lawsuits through mediation and pays big settlements. It then obtains a rate increase, citing those financial factors among its reasons. A public interest group is challenging the rate increase in court and wants to subpoena the mediator to produce her notes and impressions of the parties' presentations.[3]

Apart from a few notable exceptions for specific types of mediation, there does not currently exist in Manitoba or Canada any statutory or common law privilege which would protect mediation confidentiality in general.

B. WHAT IS PRIVILEGE?

Communications are said to be "privileged" when they cannot be adduced as evidence before a court. A witness can validly refuse to answer or supply information about anything that is privileged, even though such evidence might be highly relevant and important to the issue being tried by the court.

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[1]M.L. Merrill, "Ethics and Confidentiality" in A.L. Greenspan, ed., *Handbook of Alternative Dispute Resolution* (2nd ed., 1990) 269 at 271.

[2]E.D. Green, "A Heretical View of the Mediation Privilege" (1986), 2 Ohio St. J. on Disp. Resol. 1 at 12-14.

[3]*Id.*, at 13-14.

> Hearsay, opinion and character evidence are barred generally because these types of evidence possess inherent unreliability, lack of probative worth and susceptibility to fabrication. . . . The exclusionary rule of privilege, however, rests upon a different foundation. It is based upon social values, external to the trial process. Although such evidence is relevant, probative and trustworthy, and would thus advance the just resolution of disputes, it is excluded because of overriding social interests.[4]

Since privilege "obstructs the truth-finding process, . . . the law has been reluctant to proliferate the areas of privilege unless an external social policy is demonstrated to be of such unequivocal importance that it demands protection."[5] The modern law's tendency has been to reduce areas of privilege both in number and in scope.[6]

C. COMMON LAW PRIVILEGE

There is currently no common law privilege in Canada which would protect mediation proceedings generally from subsequent use as evidence in court. There are two ways such a common law privilege could be developed by the judiciary, were it to be persuaded in appropriate cases to do so: (1) creation of a new category of privilege or (2) extension to mediation of the existing common law privilege which protects settlement negotiations in traditional litigation.

1. Creation of a New Category of Privilege

In the cases of *Slavutych* v. *Baker*[7] and *R.* v. *Gruenke*,[8] the Supreme Court of Canada has confirmed that Canadian courts may protect confidential communications by creating new categories of privilege.[9] To do so, a court's need for evidence must be balanced with those policy considerations which favour maintenance of confidentiality in the particular relationship. This balance is determined using the four criteria contained in the "Wigmore test", all of which must be met in order to create a new category of common law privilege. As quoted in *R.* v. *Gruenke*, these criteria are:

> (1) The communications must originate in a *confidence* that they will not be disclosed.
> (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
> (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*.
> (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.[10]

Despite the ability of Canadian courts to create new categories of privilege, case law shows that they are slow and reluctant to do so. "In all but a very few cases the courts have ultimately

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[4]J. Sopinka, S.N. Lederman and A.W. Bryant, *The Law of Evidence in Canada* (1992) 623.

[5]J. Sopinka and S.N. Lederman, *The Law of Evidence in Civil Cases* (1974) 157.

[6]*Cross on Evidence* (7th ed., 1990) 416.

[7]*Slavutych* v. *Baker* (1975), 55 D.L.R. (3d) 224 (S.C.C.).

[8]*R.* v. *Gruenke*, [1991] 6 W.W.R. 673 (*sub nom. R.* v. *Fosty*) (S.C.C.).

[9]The traditional common law categories of privilege protect the solicitor-client relationship, as well as the area of settlement negotiations in litigation. Contrary to popular belief, common law privilege does not protect confidential relationships such as doctor-patient, psychiatrist-patient, clergy-parishioner, etc.

[10]Wigmore, *Evidence in Trials at Common Law*, vol. 8, McNaughton Revision, para. 2285, cited in *R.* v. *Gruenke*, *supra* n. 8, at 685. [emphasis in original]

concluded that Wigmore's four conditions were not met and that the non-traditional confidential communication was therefore admissible as evidence."[11] Even where the Wigmore criteria are met, the court usually restricts the privilege to the particular case before it, rather than creating a new general category of blanket privilege. For example, in the *Gruenke* case, Lamer C.J.C. (speaking for the majority) would not recognize a new blanket privilege for all religious advisor-advisee communications, but was prepared to acknowledge that a case-by-case privilege could exist, depending on the circumstances of each case. The drawback to this approach, of course, is that privilege is determined on an individual basis "after the fact" and cannot therefore be predicted or guaranteed in advance.

2. Extension of Settlement Negotiation Privilege

When parties to a lawsuit attempt to settle before trial, a common law privilege attaches to written or oral negotiation communications which have as their purpose attempted settlement. Such communications are wider than the particular communication which constitutes the actual offer of settlement; however, to be protected by the privilege, "the communication must be part of a correspondence which the parties intend will reasonably lead to a compromise or settlement of the dispute."[12] Such communications cannot be used later by the parties to prove liability, prove damages or to attack a cause of action. However, if an admission or statement of fact cannot be characterized as being for the purpose of settlement, it is not privileged and is subsequently admissible. This leads to the advisability of employing lawyers to conduct carefully-worded negotiations.

There are two contradictory policy rationales which justify this privilege. The "conditional admissibility" theory, which is favoured in the United States, states that:

> The concern was not particularly that of fostering settlements. Rather, it was because the information derived from the negotiations may not be all that reliable since the parties may be more interested in buying peace than in the accuracy of their statements. Thus, the evidence derived from settlement negotiations was excluded on grounds of accuracy and relevance, not to improve the efficiency of the process itself.[13]

The "public policy" theory, which is favoured in Canada,[14] states the opposite:

> It has long been recognized as a policy interest worth fostering that parties be encouraged to resolve their private disputes without recourse to litigation, or if an action has been commenced, encouraged to effect a compromise without a resort to trial.[15]

By characterizing mediation as a form of settlement negotiation also subject to the policy rationale underlying the privilege, it is open to the judiciary to extend this existing common law protection for settlement negotiations to include mediation proceedings. To date, Canadian courts have been willing to extend this common law protection to mediation that arises in the

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[11]B. Cotton, "Is There a Qualified Privilege at Common Law for Non-traditional Classes of Confidential Communications? Maybe" (1991), 12 Advocates' Q. 195 at 202.

[12]Sopinka, Lederman and Bryant, *supra* n. 4, at 725.

[13]P.J. Harter, "Neither Cop Nor Collection Agent: Encouraging Administrative Settlements by Ensuring Mediator Confidentiality" (1989), 41 Admin. L. Rev. 315 at 328.

[14]*Ed Miller Sales & Rentals Ltd.* v. *Caterpillar Tractor Co.*, [1990] 4 W.W.R. 39 at 49 (Alta. Q.B.), aff'd [1990] 5 W.W.R. 377 (C.A.); *Middelkamp* v. *Fraser Valley Real Estate Board* (1992), 71 B.C.L.R. (2d) 276 (C.A.). The *Middelkamp* case overturned a previous line of British Columbia case law which had adopted the "conditional admissibility" theory, namely, *Schetky* v. *Cochrane*, [1918] 1 W.W.R. 821 (B.C.C.A.) and *Derco Industries Ltd.* v. *A.R. Grimwood Ltd.*, [1985] 2 W.W.R. 137 (B.C.C.A.).

[15]Sopinka, Lederman and Bryant, *supra* n. 4, at 719, citing *16th Report of the English Law Reform Committee on Privilege in Civil Proceedings*, 1967, Cmnd. 3472, at 14.

context of family law litigation about child custody/access or marital reconciliation attempts.[16] Common law protection for this specific type of mediation has now largely been superseded by statutory protection, as will be discussed shortly.

Canadian courts have thus far been rarely asked to extend the common law settlement negotiations privilege to mediations concerning other types of private legal disputes, such as those arising out of business dealings. In *Re Springridge Farms Ltd.*, a bank seeking to petition a debtor into bankruptcy wanted to introduce evidence that it had made a demand for payment on the debtor during the unsuccessful mediation which preceded that application. Without that evidence, the bank's petition would fail for technical reasons. The Saskatchewan Court of Queen's Bench extended the common law privilege to include mediation and held the evidence inadmissible.[17] However, the Court of Appeal, while appearing to accept without much discussion that the general common law privilege could be applied to mediation proceedings, held that the statement was nevertheless admissible because:

> it is not every statement made at such a meeting which is protected. Clearly, offers of settlement and discussions which are conducive to arriving at a settlement are protected. However, a repetition of the original demand does not fall within this definition. Just as portions of documents headed "Without Prejudice" may be admissible if they are severable from the negotiations and relevant on other matters, portions of a discussion, even if a settlement discussion, may contain other matters which are the legitimate subject of testimony. It is difficult to see how the bare repetition of a demand for payment is in any way in need of protection to foster the process of voluntary settlement of disputes.[18]

The *Springridge* case illustrates why advocates of mediation privilege do not favour simply extending the common law privilege to cover mediation as well. In "lawyerless, free-wheeling" mediation sessions, it is asserted, parties get to the "real issues" between them, which are often not those upon which litigation negotiating would narrowly and legalistically focus.[19] Parties must feel confident that they can discuss absolutely anything in an unhindered manner. This cannot be achieved if parties must worry that some statements could be severed as independent from the settlement negotiations and later used as evidence.

A further difficulty with this common law privilege is that the law is not fully clear about the extent to which the privilege shields the settlement negotiations from use by third parties, especially if they are strangers to the litigation.[20] Such protection is a central concern of those who advocate mediation privilege.

If the third party is a stranger to the negotiations between some disputants but not a stranger to the original dispute in which they were all involved, Canadian courts have held that this "remote party" would be unable to discover or subpoena negotiation information in the same or any subsequent lawsuit with some or all of those parties.[21] In other words, communications expressed without prejudice and with a view to settlement of issues between A and C are not

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[16]Sopinka, Lederman and Bryant, *supra* n. 4, at 732-733.

[17]*Re Springridge Farms Ltd.* (1990), 79 C.B.R. 220 (Sask. Q.B.).

[18]*Re Springridge Farms Ltd.* (1991), 79 D.L.R. (4th) 88 at 92 (Sask. C.A.).

[19]Harter, *supra* n. 13, at 328; Note, "Protecting Confidentiality in Mediation" (1984-85), 98 Harv. L. Rev. 441 at 448; L.R. Freedman and M.L. Prigoff, "Confidentiality in Mediation: The Need for Protection" (1986), 2 Ohio St. J. on Disp. Resol. 37 at 40.

[20]J.A. Epp, "Civil Pretrial Conference Privilege: 'A Cosmic Black Hole'?" (1993), 72 Can. Bar Rev. 337 at 357-358; P.M. Perell, "The Problems of Without Prejudice" (1992), 71 Can. Bar Rev. 223 at 247-254.

[21]*I. Waxman & Sons Ltd.* v. *Texaco Canada Ltd.* (1968), 67 D.L.R. (2d) 295 (Ont. H.C.), aff'd [1968] 2 O.R. 452 (C.A.); *Ed Miller Sales & Rentals Ltd.* v. *Caterpillar Tractor Co.*, *supra* n. 14; *Middelkamp* v. *Fraser Valley Real Estate Board*, *supra* n. 14. This is also the preferred position of the House of Lords: *Rush & Tompkins Ltd.* v. *Greater London Council*, [1988] 3 All E.R. 737 (H.L.).

compellable by B in subsequent litigation between A and B on the same (or closely related) subject-matter with which the correspondence in question was concerned.

Will the privilege protect negotiations where the third party who seeks discovery is also a stranger to the original common dispute or litigation? Two courts have expressly refrained from any comments on that point,[22] suggesting that a court might strike a different balance in that situation. On the other hand, a judge in one decision has commented that

> [a]s to the future, and always apart from fraud, any production to a third party, be they either a true third party or a stranger, ought not to be ordered if the court is persuaded in the particular circumstances of that future case that the disclosure could fairly be said to inhibit the parties from settling that action or any other actions.[23]

D. STATUTORY PRIVILEGE

Privilege may be statutorily created but, again, legislatures are slow to do so unless social policy justifies rendering evidence unavailable to the judicial process. Even when a privilege is created, it is often only a partial protection applicable to an extremely specific type of activity or report. (By way of illustration, Appendix B contains a short review of the types of privilege found in Manitoba statutes.)

No general statutory privilege exists in Manitoba or other Canadian provinces to shield all mediation proceedings from subsequent use in court, although there is statutory protection for some specific kinds of mediation.

1. Court-related Family Mediation

There is protection for family mediation if it occurs in the course of court proceedings. Where the proceeding is a divorce, the court may adjourn the proceedings for the parties to receive counselling or guidance in achieving reconciliation. The court nominates the counsellor (mediator).[24] That person is not "competent or compellable in any legal proceedings to disclose any admission or communication"[25] arising out of the process. There is also a general privilege covering those communications: "Evidence of anything said or of any admission or communication made in the course of assisting spouses to achieve a reconciliation is not admissible in any legal proceedings."[26]

In Manitoba, under *The Court of Queen's Bench Act*, masters and judges of that court's Family Division may refer disputes within its jurisdiction to a mediator appointed by the provincial Minister of Justice.[27] This is wide enough to include disputes about child custody and access, financial support, and marital property as well as reconciliation issues. The statute

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[22]Both the Alberta Court of Queen's Bench and Court of Appeal so refrained in *Ed Miller Sales & Rentals Ltd.* v. *Caterpillar Tractor Co.*, *supra* n. 14.

[23]*Middelkamp* v. *Fraser Valley Real Estate Board*, *supra* n. 14, at 301 per Locke J.A. In this case, Middelkamp and the Board were involved in the original dispute out of which Middelkamp's civil action arose. The original dispute also led to criminal charges being laid against the Board. The Board and the Crown negotiated a consentual disposition of the charges. Middelkamp then sought pre-trial discovery of the correspondence between the Board and the Crown.

[24]*Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), s. 10(2)(b).

[25]*Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), s. 10(4).

[26]*Divorce Act*, R.S.C. 1985, c. 3 (2nd Suppl.), s. 10(5).

[27]*The Court of Queen's Bench Act*, C.C.S.M. c. C280, ss. 47 and 41.

prevents both the mediator and the parties from giving subsequent testimony about the mediation:

> **Confidentiality**
> **48** Unless the parties otherwise agree,
> (a) a mediator who renders services
> (i) under section 47, or
> (ii) at the request of the parties; or
> (b) a party to a mediation;
> is not competent to give evidence in respect of
> (c) a written or oral statement made by a party during the mediation, or
> (d) knowledge or information acquired during the mediation by a person under clauses (a) or (b).

This provision would not, it is submitted, extend privilege to family mediations which occur prior to, or in the absence of, ongoing legal proceedings. Section 41 defines "mediator" for the entire relevant part of the statute as being a person appointed by the Minister of Justice. Such a mediator would be used only where the court is involved in establishing the mediation, either at the request of the parties or on its own initiative. The appointed mediators are in fact civil servants who work for the Department of Family Services' Family Conciliation office (the "social services arm of the court"); the Minister does not appoint private mediators to act in this capacity.[28]

Further protection is found in *The Family Maintenance Act* of Manitoba, where a court may adjourn any proceeding under that statute and direct the spouses to consult a marriage counsellor "or some other suitable person"[29] to explore the possibility of reconciliation. Such a counsellor is not competent or compellable in that proceeding "or otherwise" and any evidence concerning the reconcilation efforts is not admissible "for or against either spouse in the proceeding."[30]

Other provinces have joined Manitoba and the federal government in protecting family mediation in the course of court proceedings.[31] As stated, these legislative developments have largely superseded the case law which had already arisen on this point, although common law protection would remain relevant where a family mediation does not meet the prerequisites for statutory protection. Given the civil, social and economic importance attached to marriage by our society, it is not surprising that legislatures have decided that privilege should protect mediation which could preserve the marital relationship or at least smooth the legal and human consequences of its breakdown.

2. Labour Mediation

Another area of Canadian law where statutory protection is well established is labour mediation. This is understandable, given the critical social and economic importance of maintaining harmonious labour relations. In Manitoba, *The Labour Relations Act* provides protection for mediations conducted by conciliation boards (appointed by the Minister of

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[28]Telephone conversation with Jean Boyes, Family Conciliation, Department of Family Services (February 29, 1996).

[29]*The Family Maintenance Act*, C.C.S.M. c. F20, s. 12(1).

[30]*The Family Maintenance Act*, C.C.S.M. c. F20, s. 47(2).

[31]Ontario, Newfoundland, the Yukon and Saskatchewan have such legislation: *Children's Law Reform Act*, R.S.O. 1990, c. C.12, s. 31; *Family Law Act*, R.S.O. 1990, c. F.3, s. 3; *Children's Law Act*, R.S.N. 1990, c. C-13, ss. 37 and 41; *Family Law Act*, R.S.N. 1990, c. F-2, s. 4; *Children's Act*, R.S.Y. 1986, c. 22, s. 42; *The Children's Law Act*, S.S. 1990-91, c. C-8.1, s. 10; *The Family Maintenance Act*, S.S. 1990-91, c. F-6.1, s. 13. Québec has enacted a provision but has not yet proclaimed it: *An Act to amend the Code of Civil Procedure regarding family mediation*, S.Q. 1993, c. 1.

Labour), mediators (appointed by the Minister of Labour) and grievance mediators (appointed by the Minister of Labour or agreed by the parties in the collective agreement).

Testimony or proceedings before the conciliation board or mediator are not admissible in any subsequent legal proceeding. The report of the conciliation board or mediator is also inadmissible. Furthermore, neither the members of a conciliation board nor a mediator are competent or compellable witnesses thereafter concerning the mediation.[32] An exception to these protections occurs where the subsequent proceeding is to enforce the binding mediation result.[33]

Grievance mediators are not competent or compellable in any subsequent legal proceeding, but there is no privilege covering the proceedings of the grievance mediation itself.[34]

A further privilege is created in *The Department of Labour Act* to protect anything said or done by the Minister of Labour, Deputy Minister, a conciliation officer, member of the conciliation board, the registrar, or a departmental employee during the course of efforts to "settle an industrial dispute".[35] This could include mediation, but is probably even broader in its application.

3. Pre-trial Conferences

Many Canadian jurisdictions have instituted civil pre-trial conferences in the litigation process. In Manitoba, all civil cases are pre-tried unless a judge rules otherwise.[36] Pre-trial conferences have two main purposes. First, they are an opportunity for parties to discuss settlement, with the judge acting essentially as a mediator.[37] Secondly, if the parties cannot settle, the judge can help streamline the case to produce a more efficient trial. Pre-trial conferences are used by the court as a case management tool.[38]

Half the provinces have enacted widely varying provisions addressing the issue of privilege for pre-trial settlement communications (ranging from almost complete protection in Saskatchewan to ineffectual minimal protection in British Columbia and the Yukon).

Manitoba Queen's Bench Rule 50.01(9) provides that "Discussions at a pre-trial conference are without prejudice and shall not be referred to in subsequent motions or at the trial of the action . . . ."

Thus, Manitoba "seeks to confer on all discussions, not just settlement discussions, the privilege accorded without prejudice settlement discussions at common law."[39] The protection

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[32]*The Labour Relations Act*, C.C.S.M. c. L10, s. 107(1).

[33]*The Labour Relations Act*, C.C.S.M. c. L10, s. 107(2).

[34]*The Labour Relations Act*, C.C.S.M. c. L10, s. 131.

[35]*The Department of Labour Act*, C.C.S.M. c. L20, s. 11(1).

[36]*Queen's Bench Rules*, R. 48.01(3).

[37]One litigator/mediator with whom we conferred advised us that use of pre-trial conferences as mediations occurs only very rarely, perhaps once out of every ten pre-trials. Even then, the mediation would be so basic and rudimentary that it scarcely amounts to mediation at all. Critical differences with private mediation are that the parties are not voluntary participants in the process and they do not get to choose their mediator, thereby losing the element of trust or confidence that the "right" mediator is being used.

[38]Epp, *supra* n. 20, at 338.

[39]Epp, *supra* n. 20, at 346.

has two significant limitations: (1) the meaning of "discussions" would not protect all types of communications (for example, gestures); and (2) the protection is limited to subsequent proceedings within the same cause of action only. The provision appears to be wide enough to extend to statements made by the judge as well.[40]

4. Unprotected Statutory Mediation

It is not unusual for the Legislature to create a statutory right or access to mediation and remain silent on the question of subsequent use of mediation information in litigation. For example, there is no statutory privilege created as an accompaniment to legislated mediation of environmental issues,[41] surface rights disputes,[42] or human rights complaints.[43] Presumably such protection was not perceived as necessary or justified by any social policy concerns.

E. THE AMERICAN SITUATION

As stated in Chapter 1, there has been a movement in the United States over the past 15 years to create varying degrees of statutory privilege to protect mediation confidentiality. This legislative movement matches the increasing institutionalization of alternative dispute resolution processes in the United States as an adjunct to its traditional court system.[44] "Court-annexed" mediation programs are quite common and allow a court, as part of the litigation or prosecutorial process, to divert cases from the judicial system to a mediation system established by the court or government.

> There is a diverse range of effective ADR programmes in the United States. This is due in part to the federal *Civil Justice Reform Act* of 1990, which spurred a wave of ADR programme adoption. The Act requires every federal district to promulgate a civil justice expense and delay reduction plan and suggests the utilization of ADR programmes in appropriate cases. Similarly, in recent years a growing number of states have established task forces or commissions to undertake comprehensive planning for court-connected ADR on a state-wide basis. These efforts have resulted in new legislation and court rules governing referral of civil cases to ADR programmes both within and outside of the courts.[45]

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[40]This protection could prove to be crucial, since it may be arguable that a judge's non-compellable status as a judge is lost once she or he commences acting in a "non-judicial role" as a mediator.

[41]*The Environment Act*, C.C.S.M. c. E125, s. 3(3).

[42]*The Surface Rights Act*, C.C.S.M. c. S235, s. 10(f).

[43]*The Human Rights Code*, C.C.S.M. c. H175, s. 29(2).

[44]This institutionalization has not yet occurred in Canada. Indeed, it has scarcely begun. The main court-annexed program for civil litigation is an experimental two-year pilot project in Toronto: G.W. Adams and N.L. Bussin, "Alternative Dispute Resolution and Canadian Courts: A Time for Change" (1995), 17 Advocates' Q. 133 at 134 and 150-152. Its operation has recently been extended for a further six month period by Ontario's Attorney General, who promises to establish mandatory ADR to reduce court case intake: J. Furlong, "Ont. AG vows major overhaul to justice system", *The Lawyers Weekly*, February 9, 1996, 1.

Saskatchewan also has a court-annexed project operating in the judicial centres of Regina and Swift Current. Parties to most contested civil proceedings in the Court of Queen's Bench are required to attend a mediation session upon close of pleadings, which will be "arranged" by the court registrar; the project also applies to Queen's Bench family law proceedings. The legislation does not identify who the mediator should be; presumably the mediator is court staff so that the process remains court-controlled. After the mandatory session, the parties may continue to mediate or may resume their litigation. Saskatchewan has created a statutory privilege to protect these court-annexed mediation proceedings: *The Queen's Bench Act*, R.S.S. 1978, c. Q-1, ss. 54.2-54.5, as enacted by *The Queen's Bench (Mediation) Amendment Act, 1994*, S.S. 1994, c. 20; *The Queen's Bench (Civil Mediation) Regulations*, R.R.S. 1994, c. Q-1 Reg 6.

[45]Adams and Bussin, *supra* n. 44, at 152.

However, there is little uniformity in the statutory privilege provisions legislated by various states. Statutes vary widely both in scope and content of coverage. Many are criticized for being over-inclusive (protecting some mediation information that should not be in the state's interest to protect), under-inclusive (applying to mediation parties yet leaving mediation open to discovery from third parties), or for simply being thinly-disguised attempts to set standards of practice for mediators by specifying qualifications they must meet in order to receive the statute's protection.[46]

> Over half the states now recognize some kind of mediation privilege. . . .
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> Generally, courts have created mediation privileges with an eye toward protecting the loss of information. There is a rift between states that grant the mediator and mediation proceedings an absolute privilege and those that extend only a limited or qualified privilege. Courts prefer qualified privileges, which exclude the use of evidence only when the benefit created by the privilege exceeds the need for evidence in a particular case.[47]

A handful of states provide near-absolute blanket protection for communications made in mediation both among the parties and with the mediator, including Florida, New York, Oklahoma,[48] Oregon[49] and Texas.[50] It is more common, however, for the statutory protection to be qualified or limited, as in California[51] or Colorado.[52]

A major problem in devising a mediation privilege is that, without some kind of limiting definition, the concepts of "mediation" and "mediator" are extremely broad entities upon which to confer a powerful privilege: the "class of persons or processes on which . . . [the privilege] may be conferred cannot readily be ascertained."[53]

American states have generally responded to this problem in two ways: (1) by restricting the privilege's operation to a particular type of mediation or mediation program (for example, family mediation, labour mediation, court-annexed mediation) or (2) by limiting the privilege to mediators who meet specified training or other requirements.[54] One exception, however, is the Texas legislation, which is probably the broadest and most comprehensive privilege created in the U.S. "In an effort to expand the scope significantly, the Texas privilege attaches without regard to these limitations, but only to the portion of the mediation relating to the subject matter of any civil or criminal dispute."[55]

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[46]Green, *supra* n. 2, at 29-30.

[47]J.P. Rosenberg, "Keeping the Lid on Confidentiality: Mediation Privilege and Conflict of Laws" (1994), 10 Ohio St. J. on Disp. Resol. 157 at 158-159.

[48]Note, *supra* n. 19, at 452, n. 79.

[49]K.L. Liepmann, "Confidentiality in Environmental Mediation: Should Third Parties Have Access to the Process?" (1986-87), 14 Boston Coll. Envtl. Aff. L. Rev. 93 at 97, n. 19.

[50]Merrill, *supra* n. 1, at 272 and 286-287.

[51]Rosenberg, *supra* n. 47, at 158-159, n. 13.

[52]Liepmann, *supra* n. 49, at 97, n. 19.

[53]New South Wales Law Reform Commission, *Alternative Dispute Resolution: Training and Accreditation of Mediators* (Report #67, 1991) 63.

[54]N.H. Rogers and C.A. McEwen, *Mediation: Law Policy Practice* (1989) 116 and 120.

[55]*Id.*, at 120.

CHAPTER 3

BACKGROUND TO REFORM

Advocates of reform in this area usually urge the adoption of a general statutory privilege that will attach to all communications during the mediation process. A number of arguments are typically advanced to justify why such a privilege is the best way to protect mediation confidentiality. These arguments are discussed in this Chapter, after which we set out our suggested framework for reform.

A. ARGUMENTS FOR AND AGAINST PRIVILEGE

A main argument in support of a mediation privilege is derived from the observation that effective mediation requires candour between the mediator and the parties and between the parties themselves. The mediator, it is argued, would not be able to work effectively with the parties if they were always looking over their shoulders, fearful that their statements could subsequently be used against them. Mediation often involves the revelation of confidential information or deep-seated feelings on sensitive issues.[1]

> Without confidentiality, the mediation process becomes a house of cards subject to complete disarray by a variety of potential disruptions. Thus, many practitioners feel that one well-publicized case of disclosure could deeply taint their efforts. Parties will be more reluctant to enter a process where there is fear that it might be used against them in subsequent legal action. Even if they do participate, the caution in negotiating, which the threat of disclosure would require, would, in many instances, render the process a *pro forma* nullity.[2]

A related argument asserts that, if for no other reason, a privilege is needed simply to reduce confusion and meet participants' existing expectations. A 1986 American Bar Association survey of 288 community mediation programs in the U.S.[3] revealed that most mediation "is now done under the assumption that communications are privileged under the law, even if they really are not privileged. . . . This widespread perception of protection underscores the need to enact a privilege in order to match reality with belief."[4] Some American commentators assert that confusion about the limits of mediation confidentiality "is now grave enough that it places mediation programs in jeopardy."[5]

The counter-argument to these positions is that practical evidence of this "mediation chill" appears to be largely anecdotal or impressionistic. E.D. Green, an American mediator and

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[1]L.R. Freedman and M.L. Prigoff, "Confidentiality in Mediation: The Need for Protection" (1986), 2 Ohio St. J. on Disp. Resol. 37 at 38. See also Note, "Protecting Confidentiality in Mediation" (1984-85), 98 Harv. L. Rev. 441 at 445.

[2]Freedman and Prigoff, *supra* n. 1, at 44.

[3]E.L. Kuester, "Confidentiality in Mediation: A Trail of Broken Promises" (1995), 16 Hamline J. Pub. L. & Pol'y 573.

[4]Freedman and Prigoff, *supra* n. 1, at 42.

[5]J.P. Rosenberg, "Keeping the Lid on Confidentiality: Mediation Privilege and Conflict of Laws" (1994), 10 Ohio St. J. on Disp. Resol. 157 at 163.

outspoken critic of general mediation privilege, states that "[c]laims for the need for a mediation privilege are characterized both by the forcefulness of their assertion and the dearth of evidence to support such assertions."[6] He further states that "[a]lthough most mediators assert that confidentiality is essential to the process, there is no data of which I am aware that supports this claim, and I am dubious that such data could be collected."[7]

If anything, anectodal evidence could equally well support the argument against the need for privilege. "The enthusiasm of those favoring broadened confidentiality is not dampened by the fact that mediation programs flourish in jurisdictions where no privilege exists or by reports that only a few mediators have been subpoenaed."[8]

Based on our (admittedly selective and non-comprehensive) consultations with certain Manitobans experienced in conducting mediations, it appears to be a rare occurrence among them to be subsequently subpoenaed. Mediating parties do, however, sometimes express concern about confidentiality and can occasionally be more reticent or uncooperative as a result of those concerns. One mediator acknowledged that the feared consequences resulting from a lack of mediation privilege could be characterized as basically a theoretical problem since, although the problems may arise, typically they do not. He stressed, however, that the most significant consideration is that fear of potential loss of confidentiality is in the minds of mediation participants and this fear will hinder mediation openness, whether or not the feared loss occurs.[9]

An instructive example is furnished by the experience of Mediation Services. Since 1979, this Manitoba non-profit organization has operated a successful victim-offender mediation program. Appropriate criminal or young offender cases are diverted from the court system to mediation (with consent of the Crown, the victim and the accused). In 80 to 85% of cases where the parties agree to mediate, a completed agreement is achieved. This program works as well as it does because there is an unwritten but mutually understood "agreement" between the Crown, defence counsel and Mediation Services that its mediators will not be subpoenaed if the mediation is unsuccessful and the charges proceed to court. The Crown's support of this program is especially critical to its success; in other jurisdictions where Crown support is lacking, such mediation diversion programs do not work nearly so well. Mediation Services' size and success rate place it among "the top five" diversion programs in North America.[10]

Over the course of Mediation Services' 16-year operation and thousands of mediations, there have been only a few instances where subpoenas were issued. Staff recalled and described four such incidents to us. In each case, the situation was resolved before the subpoenaed mediation caseworker actually had to give evidence in court. Incidences are probably kept this low because of the effectiveness of the previously-mentioned unwritten agreement among the participants.[11]

Another main argument is that, if mediation proceedings were privileged, it would encourage people to use mediation and thus, increase the likelihood of settlements occurring without resort to the expensive and time-consuming litigation process. Proponents assert that "the same justifications of expediency used to justify plea bargaining when it became an

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[6]E.D. Green, "A Heretical View of the Mediation Privilege" (1986) 2 Ohio State J. on Disp. Resol. 1, n. 2.

[7]*Id.*, at 32.

[8]N.H. Rogers and C.A. McEwen, *Mediation: Law Policy Practice* (1989) 99-100.

[9]Interview with Bruce Thompson, Co-chair of Alternative Dispute Resolution Section, Manitoba Bar Association (July 13, 1995).

[10]Interview with Jan P. Schmidt, Yvonne LeSage and Dorothy Barg Neufeld, Mediation Services (July 27, 1995).

[11]*Id.*

accepted and necessary practice"[12] could justify the creation of a statutory privilege for mediation.

However, opponents argue that, even if a mediation privilege would foster settlements, it is not worth the cost of lost evidence to the public justice system.[13] Excluding relevant evidence on too broad a basis can bring the entire justice system into disrepute; "the integrity of the judicial system depends on full disclosure of all the relevant facts."[14]

Following a discussion paper and consultation, the New South Wales Law Reform Commission rejected recommending a blanket mediation privilege.[15] Unless numerous exceptions to the privilege are stated in the legislation, the provision will inevitably suffer from overbreadth, said the Commission, which makes its cost too high:

> Because privileges deny the trier of fact even highly probative evidence, the overbreadth is likely to be costly, perhaps resulting in inaccurate fact-finding and erroneous judgments. To avoid such unnecessary costs, the mediation privilege should be narrowed by providing that the privilege yield when required by the interests of justice, by carving out a variety of exceptions, by authorizing broad waiver provisions, by limiting applicability to the kinds of disputes in which societal stakes in settlement are highest, or by narrowing the scope of the privilege or forums affected.[16]

A variant of the previous pro-privilege argument asserts that the current justice system is inadequate and no longer provides the best service to disputants; its costliness in time and money puts justice beyond the reach of all but wealthy people and corporations. Thus, the relative speed and lower cost of mediation allow the "average person" to have access to justice that might otherwise be inaccessible. Mediation, in this view, is not a challenge to the traditional justice system but a reform of it. Since mediation has the same objectives as the justice system, avoids its inhibiting factors and serves justice as well or better (this argument asserts), surely mediation should be allowed to offer participants the same protections as the justice system itself.

To assess fairly the worth of this argument would involve an in-depth consideration of the strengths and weaknesses of the entire Canadian justice system which is, quite frankly, beyond the scope of this Report. While the Commission notes those concerns about the relative nature and worth of the traditional justice system and mediation, the conclusion does not automatically follow from those concerns that mediation is necessarily the best or only solution to the alleged problems. American analyses of its litigation problems and attempted solutions can and should not simply be uncritically assumed to be equally applicable to Canadian reality. Moreover, there needs to be serious examination of whether large-scale substitution of mediation for the courts would undermine the stabilizing social function of a state justice system which enunciates shared values and expectations. As stated by the former Chief Justice of Canada, Brian Dickson:

> we must be extremely careful to avoid confusing problems that have to do with ensuring that cases that belong before the courts are heard promptly and at no more expense to the parties than is necessary, with problems that have to do with determining the forum that is best suited to resolving particular disputes. Nothing would be worse than to have cases that really do belong before the courts pushed into ADR because the courts are incapable of coping with the volume of cases that come before them.

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[12]J.R. Murphy III, "In the Wake of *Tarasoff*: Mediation and the Duty to Disclose" (1985-86), 35 Cath. U.L. Rev. 209 at 241.

[13]Rogers and McEwen, *supra* n. 8, at 100.

[14]K.L. Liepmann, "Confidentiality in Environmental Mediation: Should Third Parties Have Access to the Process?" (1986-87), 14 Boston Coll. Envtl. Aff. L. Rev. 93 at 95.

[15]New South Wales Law Reform Commission, *Alternative Dispute Resolution: Training and Accreditation of Mediators* (Report #67, 1991) 63.

[16]Rogers and McEwen, *supra* n. 8, at 146.

. . . .

> [A]s we round out the judicial process with other settings in which to resolve disputes, we need to be extremely careful that the values that underlie those other settings are consistent with those that have evolved over many centuries and that lie at the heart of our judicial system. For it is these values which ensure that our system of justice is respected.[17]

Another argument often advanced by proponents of a general mediation privilege is that simple procedural fairness to the disputants requires confidentiality. Mediation does not have the safeguards which are present in litigation, like qualified legal counsel and specific rules of evidence and procedure. Without privilege, it is argued, mediation could be used as a discovery device against the legally naive.[18]

Of course, in one sense this is true for any confidential relationship unprotected by privilege. The risk of subsequent use of confidential information by a legal opponent is present when a person confesses to a religious advisor, undergoes therapy with a psychologist or other counsellor, seeks medical advice from a doctor, and so on. Sometimes it can seem legally naive to seek help. On the other hand, the mediation scenario is more insidious because the opposing party can directly control the situation by initiating or facilitating mediation for the sole covert purpose of determining the strength of the naive party's case.

Another argument is based on the role of the mediator. To be effective, the mediator must remain neutral in fact and in perception. The mediator, it is argued, cannot do this if he or she is a potential adversary in a subsequent legal proceeding. It would destroy the mediator's efficacy because the parties would be reluctant to confide their thoughts.[19]

However, some opponents of privilege would assert the opposite and argue that mediators and their records must be discoverable to deter dishonest practices, since there are no licensing or quality control procedures to ensure ethical behaviour by mediators and keep them accountable. "[U]ntil accreditation, procedural, and sanctioning regulations similar to those governing labor mediators are established for . . . [other kinds of] mediators, the threat of possible judicial review may be the best way to police . . . mediators and . . . mediation."[20]

A popular argument for privilege is derived from the fact that privacy is "often a primary motivator"[21] for many who choose mediation. Indeed, some commercial parties will go to great lengths in order to mediate their disputes privately and to reduce the risk of attracting press or public attention, including moving the venue of the mediation to another city.[22] Publicity which may follow from litigating in the public courts can be a major disincentive for parties to use the public system. This desire for privacy would be accommodated by enactment of a statutory mediation privilege.

This argument, however, ignores the social values served by an open, public litigation process. Open courts serve the public's right to know what is occurring in our society. If mediation is privileged, opponents argue, it could simply result in mediation serving as a convenient shield from public scrutiny for parties who want to avoid public disclosure of certain

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[17]B. Dickson, "ADR, The Courts and The Judicial System: The Canadian Context" (1994), 28 L. Soc. Gaz. 231 at 233-234.

[18]Freedman and Prigoff, *supra* n. 1, at 38.

[19]Freedman and Prigoff, *supra* n. 1, at 38.

[20]Liepmann, *supra* n. 14, at 107. The author was referring specifically to environmental mediation.

[21]Freedman and Prigoff, *supra* n. 8, at 38.

[22]Interview with Bruce Thompson, *supra* n. 9.

facts or the creation of adverse precedent.[23] On the other hand, this effect can more or less be obtained now by settling litigation out of court, with a confidentiality agreement binding the parties to silence as part of the settlement, so the net effect on the "public's right to know" may be similar in any event.[24] However, a significant difference is that a shield created and sanctioned by the state would directly imply "official condonation" of the practice and would explicitly derogate from a commitment to openness to public scrutiny, one of the fundamental values underlying our judicial system.

Moreover, some would argue that mediation shielded by privilege could "backfire" and result in

> a public backlash against this "secretive" type of dispute resolution. The benefits of a blanket confidentiality privilege are minimal at best, and do not outweigh the tremendous harm that will result from the public perception that a mediation that takes place behind a curtain of confidentiality may produce unfair results.[25]

This criticism bears particularly on dispute resolution proceedings having public policy implications, where government or public agencies are involved.[26]

A further argument in favour of a general mediation privilege asserts that mediators and mediation programs need protection against distraction and harassment. Time and resources should not be spent on fighting subpoenas. For mediation programs, "[f]requent subpoenas can encumber staff time, and dissuade volunteers from participating as mediators."[27] In the absence of statutory protection, some mediators and mediation programs seek to protect themselves by returning all documents provided during the negotiations, destroying their own notes and records, not maintaining data on hearing results, or keeping detailed knowledge from their chief officer. In other words, they may be compelled to testify, but will be unable to produce written records or any in-depth knowledge. This ensures the maintenance of confidentiality but at the high cost of program efficiency, continuity and research potential.[28]

Whatever the strength of this argument may be, it is directly dependent on the reality of frequent subpoenas being sought. As previously discussed, this does not seem to be the case. Moreover, it is an argument which can be equally asserted by other professions which require confidentiality but which do not enjoy privilege to protect their clients' communications. For example, sexual assault counsellors and programs could also argue that their valuable time and limited resources should not be spent fighting subpoenas. Yet this has not moved any legislature to provide a privilege to protect their sensitive information from subsequent subpoena, since it has not been seen to outweigh the greater concern about loss of evidence for the public justice system.

In determining whether a general statutory privilege is needed in this area, another consideration which must be faced is the traditional reluctance of Canadian legislatures to create

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[23]Liepmann, *supra* n. 14, at 95.

[24]For a discussion of various aspects of the confidentiality issue, see Dickson, *supra* n. 17, at 234-235; and K. Griffin, "Lack of public scrutiny in ADR bothers some lawyers", *Law Times*, August 9 - September 4, 1994, 9. This article states that approximately 95% of all civil litigation cases are in fact settled out of court.

[25]Green, *supra* n. 6, at 11.

[26]P.J. Harter, "Neither Cop Nor Collection Agent: Encouraging Administrative Settlements by Ensuring Mediator Confidentiality" (1989), 41 Admin. L. Rev. 315 at 341.

[27]Freedman and Prigoff, *supra* n. 1, at 38.

[28]Harter, *supra* n. 26, at 343; E.P. Friedman, "Protection of Confidentiality in the Mediation of Minor Disputes" (1981-82), 11 Cap. U.L. Rev. 181 at 202.

new blanket privileges in the absence of compelling social policy reasons. There are many professional relationships benefitting people and society which have compelling confidentiality concerns equal to those of mediation yet are not granted statutory privilege (or automatic common law privilege): psychiatrist-patient, doctor-patient, clergy-parishioner, journalist-source, sexual assault counsellor-assault victim, etc. A crucial need for confidentiality does not make the need for privilege automatically self-evident. There must be some virtually incontrovertible social policy justification for shielding and removing an entire area of evidence from the public court system.

When considering the types of confidential relationships to which the law does traditionally extend privilege (such as the solicitor-client relationship), an argument can be made that a mediation relationship is, in fact, qualitatively different from those protected relationships. Traditionally privileged relationships

> turn on activities that society seeks to foster, and for which there are no realistic alternatives. . . .
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> Mediation differs from these activities because there is another way to achieve its goal - litigation. It is only because this recourse to litigation exists that the confidentiality of the mediator versus concealment of the facts issue arises. . . . For . . . mediators to persuade courts to protect confidentiality of communications, . . . [t]hey must also show that, in some cases, litigation is not a realistic alternative because it would neither serve the courts' search for the truth, nor the aims of the interested parties.[29]

B. OUR FRAMEWORK FOR REFORM

The Commission has given long consideration to all these factors and arguments. Many of the arguments outlining the need for a privilege appear to have some value and undoubtedly address real problems and concerns. Yet the Commission is not persuaded that the creation of a blanket statutory privilege for all mediation communications is the solution which would be in the best interests of justice.

This Commission has made its opinion known in the past concerning the creation of new general statutory privileges. Its 1983 Report on *Medical Privilege*[30] rejected the creation of a statutory physician-patient privilege in Manitoba (although such statutory privileges are common in the U.S.).[31] The Commission's reasoning went beyond the specific issue of medical privilege and expressed disapproval generally of creating new privileges by statute. Instead, the Commission advocated leaving such matters to the courts to extend privilege in appropriate circumstances on a case-by-case basis and, for that purpose, endorsed the criteria expressed in the Wigmore test.[32]

> We believe that in order to ensure that there will not be a proliferation of new, and questionable, privilege, the better approach is one which begins with an assumption that all evidence is admissible. That approach is the Wigmore test.
>
> In our view, the common law respecting evidentiary privilege has shown itself capable of adjusting itself to society's changing needs, and . . . consequently, statutory reform is undesirable. This view is shared by the Federal Provincial Task Force on

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[29]Liepmann, *supra* n. 14, at 96.

[30]Manitoba Law Reform Commission, *Medical Privilege* (Report #56, 1983).

[31]Indeed, as many states have statutory physician-patient privileges as do those who have statutory mediation privileges: Rogers and McEwen, *supra* n. 8, at 145.

[32]The Wigmore test is outlined in Chapter 2, page 5.

Uniform Rules of Evidence which has recently concluded that there is no need for statutory change because of the developing nature of the common law.[33]

This opinion continues to hold true for the general question of mediation privilege. We are not convinced that a statutory blanket privilege automatically covering all mediation communications is necessary. The courts have every conceptual precedent needed to handle this matter; they could most likely be persuaded (at the very least) to extend to mediation the common law privilege which currently protects settlement negotiations and may possibly even be open to crafting a stronger privilege on a case-by-case basis if the Wigmore test could be met in a mediation setting. Other participants in confidential relationships which are just as widespread and important in our society as mediation must rely on the courts to protect them in appropriate cases; we have not perceived anything about mediation which warrants special treatment in that regard.

However, this is not to say that a different, more limited form of statutory protection is inappropriate. Our guiding principle in considering reform in this area is as follows. People who choose to resolve their legal problems through mediation rather than litigation should not, by virtue of that choice, be either:

(a) advantaged or favoured by being protected at trial in a way unavailable to other litigants who did not first attempt mediation; nor

(b) penalized by being in a worse position if they go to trial than if they had not attempted mediation in the first place.

Mediating parties who subsequently litigate would be advantaged compared to other litigating parties if mediation communications receive a stronger statutory privilege than that which is currently available for litigating parties who attempt settlement through traditional negotiation without a mediator. Therefore, for this reason as well, the Commission does not favour creating a blanket statutory privilege to protect all mediation communications. If the parties want to protect communications which occur in the presence of themselves and the mediator during mediation, they can ask the court to extend to their mediation the common law privilege which protects settlement negotiations.[34] In our opinion, a court would likely extend this protection. Thus, the discussions between the mediating parties in the mediator's presence will be as privileged or not privileged as would have been the case had they negotiated in the absence of a mediator.

Our reform focus is on the one factor which makes mediation different from other types of settlement negotiations: the presence of a mediator (1) who is privy to secrets which the parties confided to the mediator in private caucus and which they do not know about each other, and (2) who takes personal notes and forms his or her own opinions and impressions about the issues, parties and merits of the dispute, even though these are not used to impose any resolution. If the mediator could be compelled to testify about that kind of confidential or personal knowledge, mediating parties who subsequently litigate would be penalized compared to other litigating parties who have no such source that can be used against them.

Therefore, rather than extend privilege to the mediation proceedings themselves and to the mediating parties, the Commission recommends creating non-competence and non-compellability for the mediator. In other words, the mediator could not be called as a witness in subsequent legal proceedings. This reform would create "a level playing field" by ensuring that

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[33]Manitoba Law Reform Commission, *supra* n. 30, at 44-45.

[34]This request would be made whenever the issue arises -- by bringing an interim motion if mediation information is sought in the pre-trial civil discovery process or by seeking a judicial ruling during the trial itself if mediation information is subpoenaed.

mediating parties will not be worse off than other litigants -- they will not have to fear that the mediator could disclose confidences revealed only to the mediator or be used as an adverse source of unique information.

> The mediator will virtually *never* have information or evidence that is not shared by at least one other person, excepting of course the mediator's own notes, recollections, and judgments. All the documents and statements of the parties to each other would exist but for the mediator. Thus, shielding the mediator from being the source of information about the negotiations does not restrict the availability of evidence beyond that which would exist if the mediator did not serve. . . .
>
> The only *new* evidence that exists because of the presence of the mediator is the mediator's own notes and impressions.[35]

The legal doctrines of competence, compellability and privilege are conceptually separate and distinct from each other, although there can be some relationship in their interaction. In the absence of a common law or statutory exception, every mentally competent person is "competent" to give evidence as a witness in court. A competent witness may testify if he or she desires. "Compellability" concerns whether a competent witness can be forced to attend court and to testify against his or her will. With a few exceptions, the law provides that competent witnesses are compellable. As a result, a compellable witness who is subpoenaed to give evidence will be punished by contempt proceedings upon failure to appear at court or refusal to testify.[36] "The testimonial obligation to attend at court extends also to the production of documents."[37]

The doctrines of competence and compellability regulate whether a witness may or must take the stand. However, once a witness is on the stand, different rules (including the doctrine of privilege) regulate what questions the witness must answer. "In some circumstances a witness who is both competent and compellable may refuse to give relevant, material and otherwise admissible evidence relying upon a privilege conferred by the law . . . ."[38]

While each doctrine is thus conceptually distinct, the practical, evidentiary consequences of non-competence, non-compellability or privilege are the same: certain evidence will not be available to the court. However, it seems to the Commission that excluding evidence through the method of non-competence and non-compellability of the mediator rather than through statutory creation of a blanket privilege for the process itself, allows a more precise, limited and controllable response to this issue. Such a reform strikes an acceptable balance between the many competing values at stake. It protects the most sensitive of information confided during mediation without creating an overly broad class of excluded evidence rendered unavailable to the justice system in subsequent litigation. It gives mediating parties a greater sense of security without placing them at an unfair advantage compared to litigating parties who negotiated in the traditional manner. Finally, it facilitates the existence of private mediation as a complement to the traditional justice system rather than establishing it as an alternative, entirely self-contained and sealed challenge to the public court system.

RECOMMENDATION 1

A blanket statutory privilege applying generally to the mediation process and its parties should not be created.

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[35]Harter, *supra* n. 26, at 349. [emphasis in original]

[36]J. Sopinka, S.N. Lederman and A.W. Bryant, *The Law of Evidence in Canada* (1992) 577; *Cross on Evidence* (7th ed., 1990) 201.

[37]G.D. Cudmore, *Civil Evidence Handbook* (1994) (release 5, 1995) 6-12.

[38]*Cross on Evidence*, *supra* n. 35, at 201.

RECOMMENDATION 2

Subject to the limitations contained in subsequent recommendations, mediators should be statutorily made non-competent and non-compellable as witnesses in respect of a mediation in any legal proceedings.

In order to give effect to our recommendations, it will be necessary to amend existing legislation. To facilitate this and to help explain and illustrate our proposals, Appendix A contains a draft amending statute that we have prepared, namely *The Manitoba Evidence Amendment Act*. As an aid to our readers, all references to relevant sections of our draft statute appear in italics and square brackets throughout the text of this Report.

RECOMMENDATION 3

The recommendations contained in this Report should be implemented by enactment of an amending statute similar to the draft Manitoba Evidence Amendment Act set out in Appendix A.

The Manitoba Evidence Act would be the logical place to implement this reform since this statute contains standard evidentiary provisions to govern the general conduct of many types of legal proceedings. Within that statute, we have placed our draft section 10.1 in Part I ("Respecting Evidence Generally"), Division I ("Evidence of Witnesses"), among those sections which follow the heading "Competency of Witnesses".

CHAPTER 4

PROPOSED REFORM

In this Chapter, we explore the issues which arise from the proposed reform of making mediators non-competent and non-compellable as witnesses in legal proceedings subsequent to a mediation.

A. DEFINING "MEDIATION" AND "MEDIATOR"

Regardless of whether statutory reform is achieved by the creation of a privilege or a non-competent, non-compellable mediator, one issue remains constant: "mediation" and "mediator" are such broad categories and concepts that, without control being exercised, the "class of persons or processes on which . . . [the protection] may be conferred cannot readily be ascertained."[1] This danger of overbreadth carries two serious consequences: (1) the protection could unintentionally extend to people or groups whose negotiations should not be protected, and (2) the statute's protection becomes subject to deliberate exploitation and abuse by those who wish to keep evidence out of the public justice system by erecting a facade of mediation.

> . . . [A] broad definition of mediation that applies to private and public mediators alike might even include some types of negotiations which there was no public policy reason to foster. For example, it was reported that prime evidence in a recent trial on racketeering charges against twenty-one defendants was testimony about a "mediation" of sorts by the "boys from New Jersey," called in to settle a controversy between rival groups claiming ownership of a Florida investment operation. Under a broad definition of "mediation," that evidence might have been unavailable to the jury.[2]

There are a number of potential ways to limit or define the concepts of "mediation" and "mediator".

1. Litigation in Progress or in Contemplation

One possible limitation is to restrict the protection to those mediations which are held where litigation is in progress or in contemplation. It could be argued that this would exclude frivolous, casual or questionable mediations. However, in most disputes, litigation is always a possible option and usually is contemplated as such by the parties at some stage in the process. There are very few disputes which are not amenable to resolution by litigation, cost considerations aside. In reality, therefore, this method of limitation is so broad as to amount to no limitation at all.

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[1]New South Wales Law Reform Commission, *Alternative Dispute Resolution: Training and Accreditation of Mediators* (Report #67, 1991) 63.

[2]N.H. Rogers and C.A. McEwen, *Mediation: Law Policy Practice* (1989) 115-116.

2. Specifying the Type of Mediation or Mediation Program

This is a common and favourite way chosen by legislators to control the breadth of mediation protection. As discussed in Chapter 2, Canadian and Manitoban use of this method has resulted in protections restricted to court-related family mediation, labour mediation and pre-trial conferences in the court system. This method is also very common in the United States, where "court-annexed" mediation programs are increasingly becoming institutionalized (unlike in Canada).

However, since the Commission is considering this issue precisely in regard to mediation generally, rather than presuming to recommend the expenditure of public funds to create court-annexed programs for the diversion of litigation from the public court system, this option is clearly not a viable solution and is discussed for the sake of completeness only.

3. Professional Regulation or Licensing of Mediators by Separate Statute

This option (again, discussed for the sake of completeness only) would require the creation of a statutory scheme to govern the training, qualifications and practice standards which must be met before someone would be legally authorized to work as a mediator. Were such a regulatory scheme to exist, it would then be a simple matter of limiting the meaning of "mediator" by cross-reference to the regulatory statute. Obviously, the implications of this option go far beyond the needs of this Report to define a category for the purpose of conferring an evidentiary protection. The necessity for such professional regulation should, of course, be properly determined by serious consideration of other factors, notably, whether there is a need to protect the public from harm resulting from the improper performance of an occupational service. As the Commission has recommended elsewhere,[3] such regulation should be designed and implemented solely in the interests of consumers and other affected persons; the interests of practitioners should not be considered.

4. Specifying Certain Qualifications in the Protection Provision

In the absence of a separate statute which formally regulates mediators as a profession, could not the protection provision itself just specify a few basic qualifications (by training or other distinguishing factors) to separate "legitimate" mediators from more questionable ones? There are two main objections to this approach. First,

> [m]any commentators do not believe the field of mediation is ready for restrictive standards and licensure. And if standards of training and experience are going to be set, it should be done as a part of an explicit standard setting process, not through the back door as a definition in a privilege statute.[4]

Secondly, by using (essentially arbitrarily chosen) qualifications, training or other distinguishing factors to determine who is and is not a "mediator", the protection provision will end up simply creating unfair "guild" legislation that gives a competitive business edge to those mediators who qualify under it and can thereby "guarantee" confidentiality to their clients.

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[3]Manitoba Law Reform Commission, *Regulating Professions and Occupations* (Report #84, 1994).

[4]E.D. Green, "A Heretical View of the Mediation Privilege" (1986), 2 Ohio St. J. on Disp. Resol. 1 at 30.

5. Definition by Court Decision

One option is to leave the term "mediator" undefined in the statute and let its meaning be determined over time through litigation and court decisions. It would be the judiciary's task to figure out what, if any, limitations should be brought to bear on the application of the protection. This option is unsatisfactory for many reasons. This method requires many years to build up the necessary precedent of court decisions. Meanwhile, the law and its application would be uncertain. Since court decisions are rendered only after the fact, it would be difficult to predict whether certain categories of mediator would be protected or not, until the courts have definitively spoken. Finally, on a more philosophical note, while it is the function of courts to interpret legislation, it is not fair for legislators simply to abdicate to the judiciary the responsibility of solving a problem which is fundamental to the entire legislative purpose of a provision.

6. Appointment List of "Approved Mediators"

This alternative would limit the statutory protection to pre-approved private mediators named in a list prepared under state or court auspices. An example of this method is found in a federal statutory scheme which provides for mediation of environmental assessment issues; the Minister of the Environment "may establish a roster of persons to act as mediators"[5] and may use that roster when appointing mediators for specific disputes.[6] The statute creates a fairly comprehensive privilege for such mediation proceedings[7] and this reflects, it is submitted, the greater control vested in the state to determine which mediators and mediations will receive that special protection.

A variation of this method can occur in labour mediation. When collective bargaining stalls or breaks down but the parties do not voluntarily seek mediation or some other way of resolving the dispute, the Minister of Labour can intervene and appoint a mediator.[8] In exercising this rarely used power, the minister will choose from the small number of private labour mediators known to be available in Manitoba, taking into consideration such factors as expertise, availability to conduct the mediation and acceptability to the parties. Occasionally a mediator is brought in from outside Manitoba. The choice is made at the discretion of the minister; there is no formal list or rotation.[9]

While this type of option may work well when used occasionally or in specialized or exceptional circumstances, it is less attractive when proposed as an ongoing method of routinely conferring status on those who conduct general mediation. Using such an option on a mass scale would simply "beg the question" of which criteria should be used to confer approval on selected mediators. It raises the same issues and problems as in the previously discussed options of regulating or licensing mediators by separate statute or by specifying basic qualifications in the protection provision. Those problems are not relieved simply by transferring the ongoing selection of mediators from the statute to a government or judicial official.

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[5] *Canadian Environmental Assessment Act*, S.C. 1992, c. 37, s. 30(2).

[6] *Canadian Environmental Assessment Act*, S.C. 1992, c. 37, s. 30(1)(a)(ii).

[7] *Canadian Environmental Assessment Act*, S.C. 1992, c. 37, s. 32(2): "No evidence of or relating to a statement made by a mediator or a participant to the mediation during the course of and for the purposes of the mediation is admissible without the consent of the mediator or participant, in any proceeding before a review panel, court, tribunal, body or person with jurisdiction to compel the production of evidence."

[8] *The Labour Relations Act*, C.C.S.M. c. L10, s. 95(2).

[9] Telephone conversation with Jim Davage, Director of Conciliation and Mediation Services Branch, Department of Labour (March 1, 1996).

7. Mediator Named in Written Agreement by Parties

This option would limit the statutory protection to the expressly identified person whom the mediating parties have named as mediator in a written agreement executed prior to the mediation. This approach to the difficult limitation issue was suggested by some of the mediators consulted by the Commission and we agree that this is the most workable solution, in combination with the added protection of a discretionary override of the testimonial immunity[10] (discussed later at page 30).

Entering a written agreement to govern the conduct of the mediation is a fairly standard practice in formal mediations and is used by most professional mediators precisely to cover such matters as confidentiality. Such agreements would continue to be valuable for this purpose even upon implementation of mediator non-competence and non-compellability, since there is still the matter of confidentiality as between the parties to consider.

An attractive feature of this option is that the protected status of any given mediator is conferred by the mediating parties, not by the state. The status must also be conferred before the mediator acquires the information or knowledge later sought to be compelled.

The definition of "mediator" in the Commission's draft amending Act in Appendix A adds two further glosses to this solution *[s. 10.1(1)]*. First, it clarifies that a mediator may include a volunteer mediator -- one who is not paid for his or her services. This will make the protection available in non-commercial settings as well. Secondly, "mediator" is defined to include an agent or employee of the mediator. People who assist or work for a mediator can sometimes gain mediation information by virtue of that association and so must also come within the testimonial immunity so as not to defeat its purpose.[11]

RECOMMENDATION 4

The statutory protection should apply to any person who is specifically named as a mediator in an agreement executed between that person and mediating parties prior to the mediation proceedings.

RECOMMENDATION 5

The testimonial immunity should apply regardless of whether the mediator is paid or is a volunteer.

RECOMMENDATION 6

The mediator's testimonial protection should also extend to an agent or employee of the mediator.

While the Commission believes it is crucial to control and define the term "mediator", our draft amending statute does not attempt to define the underlying concept of "mediation". There are a number of reasons for this. First, there are apparently many styles of mediation within the

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[10]Throughout this Report, we use the phrase "testimonial immunity" to encompass both non-competence and non-compellability.

[11]This aspect responds to a concern expressed to us during consultation with Mediation Services, whose paid staff caseworkers often know as much about the details of a mediation as the volunteer mediators. Under our draft provision, the mediating parties would enter the written agreement with Mediation Services (an incorporated non-profit organization), which would be the "mediator" for the purposes of the testimonial immunity. The protection would extend to its employees (caseworkers) and agents (volunteer mediators).

"mediation movement"; different styles often reflect a difference of opinion about whether the principal goal of mediation should be dispute resolution or conflict management.[12] At one end of the spectrum, mediation (especially if conducted in the commercial field) can be seen simply as another kind of legal mechanism and is typically conducted with a "settlement-driven" motivation and a greater emphasis on facts rather than emotions. At the other end of the spectrum, mediation (especially if conducted to repair personal or community relationships) can be seen as a mechanism designed to achieve "true justice" in a distinctly different manner than that of the traditionally-understood legal system. This approach places as much emphasis on emotional considerations as on factual ones. Advocates of this mediation style assert that, since feelings can influence how people remember factual details, it is important to recognize the dynamics of this interaction when conducting a mediation.[13]

Such differences in perception about the true nature and function of mediation are only to be expected in a movement which is still forming and evolving. A second reason for not attempting an overly-detailed, inclusive definition of "mediation" is that such a definition might inadvertently hinder or alter the natural development of the field; the danger is that people would mold their proceedings to fit the statutory definition in order to obtain the protection rather than letting mediation style develop to reflect their genuine needs.

At this point, the only fair definition of "mediation" would be a very basic, unelaborated, "common sense" definition such as: mediation is a "[p]rivate, informal dispute resolution process in which a neutral third person, the mediator, helps disputing parties to reach an agreement . . . [but who has] no power to impose a decision on the parties."[14] However, the conventions of statutory drafting discourage inclusion of any definition which merely repeats the common understanding of a term. Any court called upon to determine whether a process constitutes "mediation" would start from this "dictionary definition" anyway, so its inclusion in a statute would be superfluous. We believe that the courts are well-equipped to distinguish between proceedings which are truly mediations and those which are not, without the need for statutory direction.

An elaborate and precise definition of "mediation" would be more critical where a blanket privilege is being conferred. The all-encompassing nature of that shield, which removes all mediation evidence from the court system, encourages deception and collusion by the dishonest, who would seek to obtain protection by establishing a false mediation scenario to cover their negotiations or other settlement attempts. Since our proposed plan protects only the mediator, leaving the parties to rely on seeking a potential extension of the common law to shield their own or others' communications, there is less incentive to set up a bogus mediator or mediation.[15]

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[12]E.L. Kuester, "Confidentiality in Mediation: A Trail of Broken Promises" (1995), 16 Hamline J. Pub. L. & Pol'y 573 at 575.

[13]Interview with Jan P. Schmidt, Yvonne LeSage and Dorothy Barg Neufeld, Mediation Services (July 27, 1995).

[14]*Black's Law Dictionary* (6th ed., 1990) 981.

[15]This may be an appropriate place to note that, had the Commission recommended the creation of a statutory privilege for mediation communications (rather than the creation of a statutory testimonial immunity for mediators), it would have raised some entirely different issues that would have needed resolution. For example, a privilege creates an actual right of confidentiality vested (usually) in the client. Testimonial immunity does not. It simply prevents evidence from being given in subsequent legal proceedings; it does not address whether or when a mediator can otherwise reveal mediation information. Therefore, if a privilege were created, one difficult issue would be the extent to which a mediator bound by privilege should or must reveal information in certain circumstances, breaking the client's right to confidentiality. Is a mediator under a duty to warn a third party threatened with imminent harm during a mediation (or to contact the police or inform a superior)? What about knowledge gained concerning serious crimes or abuse? See J.R. Murphy III, "In the Wake of *Tarasoff*: Mediation and the Duty to Disclose" (1985-86), 35 Cath. U.L. Rev. 209; K. Gibson, "Confidentiality in Mediation: A Moral Reassessment", [1992] Ohio St. J. on Disp. Resol. 25; I.S. Said, "The Mediator's Dilemma: The Legal Requirements Exception to Confidentiality Under the Texas ADR Statute" (1995), 36 S. Tex. L. Rev. 579. In the absence of a privilege, this issue must be dealt with as a matter of professional ethics. However, we should point out that, in Manitoba, mediators are already obliged to report information about child abuse revealed during mediation, despite any confidentiality arrangement: *The Child and Family Services Act*, C.C.S.M. c. C80, ss. 18(1)-(2).

B. NON-COMPETENCE AND NON-COMPELLABILITY

1. When Is the Protection Available?

The definition of "mediator" limits *who* will receive the statutory protection; the substantive subsection which confers non-competence and non-compellability limits *when* that protection will be available.

Our draft amending statute provides that ". . . a mediator is not competent or compellable in any action or legal proceeding to give evidence about any oral or written information acquired or opinion formed by the mediator *in his or her capacity as mediator" [s. 10.1(2)].*

In conjunction with the definition of "mediator", this wording means that, to receive the statutory protection, a person must meet two requirements: (1) she or he must be a "mediator" as defined by the statute and (2) she or he must have been acting in the capacity of a mediator when the information was acquired or opinion formed which is now sought to be subpoenaed. So, for example, a person who meets the definition of "mediator" but who is shown to have in fact conducted an arbitration should not receive the statutory protection.[16]

RECOMMENDATION 7

To obtain testimonial immunity, a mediator must have been acting in the capacity of a mediator when the information was acquired or opinion formed which is then sought to be subpoenaed.

2. Protection from Whose Subpoena?

Our draft amending statute simply provides that a mediator is not competent or compellable, without specifying as against or by whom *[s.10.1(2)].* This produces a wide exclusionary effect. Since the mediator is non-competent, the mediator cannot voluntarily choose to testify. Since the mediator is non-compellable, no one else can force the mediator to testify. Thus the mediator is shielded from the subpoenas of the original mediation parties and of third parties. Examples of third parties who might seek a mediator's testimony include existing or future parties to civil litigation involving one of the mediation parties and the Crown for the purposes of prosecuting a regulatory offence.

RECOMMENDATION 8

A mediator should be unable to testify voluntarily, and no mediating party or third party should be able to force a mediator to testify.

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[16]An issue which the courts may have to resolve is whether this statutory protection should apply in whole or in part to a person who is conducting "med/arb". "Med/arb is a process by which both mediation and arbitration are agreed upon as the means by which parties intend to resolve their dispute. Typically, although by no means always, one person is appointed both to mediate and, if mediation fails, to arbitrate the dispute.": D.C. Elliott, "Med/Arb: Fraught with Danger or Ripe with Opportunity?" (1995), 34 Alta. L. Rev. 163. There are many variations of the med/arb process. The inherent problems in that process of conflict, bias and natural justice difficulties cause the author (quite rightly) to state that "[t]he thought of mixing mediation and arbitration, with one person playing the role of both mediator and arbitrator, sends shudders through many lawyers.": *Id.* at 166.

3. What Is Protected?

Everything which a mediator learns during the course of a mediation should be protected by the mediator's testimonial immunity. This includes anything told to the mediator by a mediating party (whether in private caucus or otherwise), anything told to the mediator by a participant in the mediation (such as a witness), any document given to the mediator by anyone for purposes of the mediation, and any notes, impressions or opinions made personally by the mediator. To achieve this effect, our draft amending statute broadly states that the mediator is not competent or compellable "to give evidence about *any oral or written information acquired or opinion formed by the mediator* in his or her capacity as mediator" *[s. 10.1(2)]*.

It is important to keep in mind, however, that some (if not much) of this information will also be available through other sources which will be subject to subpoena, namely the mediating parties and any other participants in the mediation (unless they can convince a court to shield that evidence with a common law privilege). The extent to which those sources may disclose mediation matters either voluntarily or under compulsion is independent of the protection for the mediator.

RECOMMENDATION 9

The statutory testimonial immunity should extend to all oral and written information acquired from parties or participants by a mediator during a mediation, as well as the mediator's own notes, impressions and opinions.

4. Protection in Which Subsequent Proceedings?

Should the testimonial immunity of a mediator extend to every subsequent legal proceeding, including administrative proceedings, civil pre-trial discovery procedures, civil trials and criminal or quasi-criminal prosecutions by the Crown?

Limiting the scope of the immunity's effect only to certain subsequent proceedings would defeat the very reason for its creation. If the protection and the "level playing field" which it fosters are to have any significance, the mediator must be unable to testify subsequently, no matter what the proceeding or issue may concern. This proposition is easily supportable when the subsequent proceeding is civil in nature (in other words, between private parties), such as administrative proceedings, civil pre-trial discovery mechanisms and civil trials.

The proposition may seem more challenging when the subsequent proceeding is a prosecution of a criminal or regulatory offence. Does not society and the state have a greater interest than in civil matters in making as much evidence as possible available for prosecution and defence purposes? Yet, if the state could subpoena any mediator in support of a prosecution, would it not have an inhibiting effect on the conduct of civil mediations?

Regulatory (or "quasi-criminal") offences are created by provincial legislation within an area of provincial constitutional competence. Their purpose is to enforce compliance with provincial regulatory systems, such as highway traffic laws, liquor control laws, environmental protection, business practices and so on. Criminal offences are created by Parliament under the federal constitutional responsibility for criminal law. These offences typically deal with extremely serious criminal behaviours like murder, kidnapping, sexual assault, drug trafficking, theft, robbery and so on.

A provincially-enacted testimonial immunity for mediators would have little effect on a court hearing a federal criminal matter. *The Canada Evidence Act*, which establishes some of

the rules of evidence governing federal criminal prosecutions, does explicitly incorporate the provincial law of evidence in force in whichever province the prosecution occurs.[17] Despite the apparently wide wording of the incorporation section, however, the Supreme Court of Canada has indicated that it should be given an extremely narrow interpretation so as to avoid "unacceptable differences from province to province on fundamental matters of criminal evidence."[18] Minor provincial evidentiary procedures might be successfully incorporated to the federal arena through this route, but it is unlikely that a testimonial immunity could be so incorporated.

In any event, since the federal government's constitutional authority over criminal law also includes matters of criminal evidence and procedure, the Supreme Court has settled that, as a matter of constitutional law,

> [t]he provinces cannot enact laws that would have the effect of excluding evidence from a criminal trial. For example, a province cannot exclude from criminal proceedings evidence of an admission made in civil proceedings. Nor can a province provide that an accident report, made under the compulsion of a provincial statute, is inadmissible in criminal proceedings.[19]

While mediator non-competence and non-compellability could not be extended to federal criminal prosecutions,[20] it could extend to the prosecution of provincial regulatory offences. The Commission recommends that this occur, even though it means that some relevant, probative evidence may be excluded from a provincial prosecution (to the extent that it cannot be introduced through other means, including a party). This exclusion will, however, be subject to the safeguard of the decision-maker's discretion in appropriate cases (see the immediately following discussion in item C.1. of the recommended discretionary override for protection of the public interest). In the prosecution of a very serious provincial offence where a mediator's evidence is critical to a conviction, the Crown could attempt to persuade the court to override the immunity due to the "public interest in the proper administration of justice" *[s. 10.1(3)(c)]*.

RECOMMENDATION 10

The testimonial immunity for mediators should extend to every subsequent legal proceeding subject to provincial constitutional authority, including administrative hearings, civil pre-trial proceedings, civil trials and the prosecution of provincial regulatory offences.

Our draft amending statute provides that a mediator is not competent or compellable "in any action or legal proceeding" *[s. 10.1(2)]*. *The Manitoba Evidence Act* (which is the statute that would be amended to provide the testimonial immunity) defines both "action"[21] and "legal

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[17]*The Canada Evidence Act*, R.S.C. 1985, c. C-5, s. 40: "In all proceedings over which Parliament has legislative authority, the laws of evidence in force in the province in which those proceedings are taken, including the laws of proof of service of any warrant, summons, subpoena or other document, subject to this Act and other Acts of Parliament, apply to those proceedings."

[18]*Albright* v. *The Queen* (1987), 37 C.C.C. (3d) 105 at 113 (S.C.C.) per Lamer J., as he then was. See also P.K. McWilliams, *Canadian Criminal Evidence* (3rd ed., 1988) (release 15, 1995) 2-7 to 2-8.

[19]P.W. Hogg, *Constitutional Law of Canada* (3rd ed., 1992) 504, citing *Klein* v. *Bell*, [1955] S.C.R. 309 and *Marshall* v. *The Queen*, [1961] S.C.R. 123.

[20]Therefore, a provincially-created mediator immunity would not affect mediation cases diverted from the criminal system to a program like Mediation Services. They would continue to need a "gentlemen's agreement" with the Crown not to subpoena their mediators in those cases. However, Mediation Services' other mediation programs in civil areas or concerning regulatory offences (some of the diverted criminal cases must concern provincial offences) would benefit from the statutory mediation immunity.

[21]"'[A]ction' includes any civil proceeding, inquiry, arbitration, and a prosecution for an offence committed against a statute of the province or against a by-law or regulation made under the authority of any such statute, and any other prosecution or proceeding authorized or permitted to be tried, heard, had, or taken, by or before a court under the law of the province": *The Manitoba Evidence Act*, C.C.S.M. c. E150, s. 1.

proceeding".[22] It appears that "action" is the wider term since (unlike "legal proceeding") it also applies to the enforcement of by-laws and regulations and other provincially-authorized prosecutions and proceedings. For the purposes of a special section of the statute, the meaning of "legal proceeding" is expanded in subsection 9(6) to include the enforcement of regulations and proceedings before a tribunal, board or commission.[23]

Since a mediator testimonial immunity should apply broadly to as many subsequent legal proceedings as possible (within constitutional limitations), we have sought the broadest possible application by using in our draft provision both the term "action" and the expanded, section 9(6) meaning of the term "legal proceeding". As we want the protection to extend to the civil pre-trial discovery process as well, we must depend on it being encompassed in the phrase "civil proceeding" included in the definitions of both "action" and "legal proceeding".

Beyond the types of proceedings to which the Commission recommends the mediator testimonial immunity should apply, there are no restrictions on the nature of the subsequent proceeding. It is irrelevant whether the issue in the subsequent legal proceeding is the same or different from the issue in the mediation. It is also irrelevant whether the subsequent legal proceeding occurs during the pendency of the original claim or mediation or after it has been resolved.

RECOMMENDATION 11

It should be irrelevant to the application of the testimonial immunity whether the issue in the subsequent legal proceeding is the same or different from the issue in the mediation, or whether the subsequent legal proceeding occurs during the pendency of the original claim or mediation or after it has been resolved.

C. EXCEPTIONS

The Commission does not recommend that the non-competence and non-compellability of mediators should be absolute. A more flexible approach is desirable. The following exceptions are contemplated.

1. Discretionary Override to Protect the Public Interest

Even with an attempt to narrow and define the concept of "mediator", this statutory protection will still be conferred on a largely unascertainable group of people conducting purported mediations in an endless variety of unknown and untried contexts and scenarios. Until experience in the protection's operation is obtained, it is appropriate at this preliminary stage to proceed gradually and cautiously.

For that reason, the Commission recommends that the protection should not apply if the decision-maker in the subsequent action or legal proceeding[24] concludes that the mediator's

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[22]"'[L]egal proceeding' means any civil proceeding, inquiry, or arbitration, in which evidence is or may be given, and includes an action or proceeding for the imposition of punishment by fine, penalty, or imprisonment, to enforce any Act of the Legislature": *The Manitoba Evidence Act*, C.C.S.M. c. E150, s. 1.

[23]"In this section 'legal proceeding' in addition to having the meaning given to that expression under section 1, includes an action or proceeding for the imposition of punishment by fine, penalty, or imprisonment to enforce any regulation made under an Act of the Legislature and any proceeding before any tribunal, board, or commission": *The Manitoba Evidence Act*, C.C.S.M. c. E150, s. 9(6).

[24]This decision-maker will be a judge where the subsequent action is court litigation, but will sometimes be an administrative tribunal where the subsequent legal proceeding is before a board, commission or tribunal.

statutory immunity is outweighed in importance by the public interest in the proper administration of justice *[s. 10.1(3)(c)]*.[25] This gives discretion to that decision-maker to control attempted misuse, abuse or inappropriate use of the protection. While the discretion is wide, the Commission does not believe that it would be used to restrict or confine the operation of the protection more than necessary. The fact that the Legislature has conferred the protection in general terms in the first place shows that the immunity has priority over the need for a mediator's evidence in all but extraordinary circumstances.

Where, for example, parties retain a mediator for tortious or unlawful purposes, or create a false façade of a mediation in order to confer non-compellability on a disreputable person with key knowledge by casting that person as "the mediator", there are two ways the statute could bar such misuse of the mediator protection. First, it is arguable that any agreement made with a mediator under those circumstances is void as against public policy[26] and thus could not be used to meet the definition of "mediator" under the statute. Secondly, even if the statute did apply, the decision-maker could disallow the protection on the basis that such improper misuse of the statutory decision-maker would be against the public interest in the proper administration of justice.

RECOMMENDATION 12

The statutory protection should not apply if the decision-maker in the subsequent action or legal proceeding concludes in the circumstances of the case that the public interest in the proper administration of justice outweighs in importance the mediator's testimonial immunity.

2. Action Concerning the Mediated Agreement or Mediator

Where a mediation has been successful and a mediated agreement has been reached, the mediator's testimony may be crucial if a subsequent proceeding is required to enforce, amend or set aside that agreement. Mediator non-competence and non-compellability would serve only to work an injustice in these circumstances. If an exception were not made here,

> the . . . [protection statute would] undermine parties' legitimate interests both in realizing the fruits of mediation and in protecting themselves from fraud, duress, and mistake. . . . Although confidentiality is crucial to preserving the position of parties that have failed to reach an agreement, parties that have reached agreement should not be forced to purchase free discussion at the cost of waiving traditional contract law protection against unfairness.[27]

Similarly, where the mediator and the mediating parties have cause to sue each other following a mediation, the mediator should remain competent and compellable. For example, a party may want to sue a mediator for breach of duty or a mediator may need to sue a party for payment of fees. A mediator's testimonial immunity would serve only as an unjust shield or hindrance in these circumstances.

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[25]We have based the wording of this exception on the statutory precedent of ss. 28(6)(c) and 30(5)(b) of the *Canadian Transportation Accident Investigation and Safety Board Act*, S.C. 1989, c. 3.

[26]"Any agreement that has as its purpose the performance of an act which would affect the proper administration of justice by the courts is illegal and void as against public policy.": G.H.L. Fridman, *The Law of Contract in Canada* (3rd ed., 1994) 378. This principle applies both to civil and criminal matters. Among other things, it invalidates agreements to suppress evidence -- for example, by agreeing not to testify or to give evidence only for one side: *Cheshire, Fifoot and Furmston's Law of Contract* (12th ed., 1991) 368. Surely an attempt to obtain by false means statutory protection from the ability or obligation to testify is an analogous attempt to suppress evidence.

[27]Note, "Protecting Confidentiality in Mediation" (1984-85), 98 Harv. L. Rev. 441 at 453.

An exception for these circumstances is contained in section 10.1(3)(b) of our draft amending statute.

RECOMMENDATION 13

A mediator's testimonial immunity should not apply where the subsequent legal proceeding is to enforce, amend or set aside the mediated agreement or is brought by the mediator against a mediation party (or vice versa).

Although this matter is outside the scope of our Report, the Commission would like to address briefly the issue of creating a statutory immunity for mediators from lawsuits arising out of their acts or omissions during the course of mediation. Immunity from liability is currently statutorily given to labour mediators in Manitoba,[28] but not to family mediators.

Not only does our Report not recommend immunity from liability for mediators generally, it specifically contemplates that mediators can be sued personally by making an exception to testimonial immunity for that circumstance *[s. 10.1(3)(b)]*.

Our Report is based on a "contract view" of mediation: the mediating parties agree with their chosen mediator to confer the statutory status of "mediator" by contract. If the mediating parties want to confer immunity from liability on the mediator, they can easily do so by contract as well. This is properly their decision, not the state's.

Mediators contract with the parties to provide a service. Like any other service provider in society, they should be held accountable for their performance unless the client agrees to waive any claim. To confer automatic statutory personal immunity on a group of service providers who are otherwise unregulated or statutorily unaccountable for their actions fails to protect, and actually does a disservice to, the consumers of mediation services by removing their remedy for mediator incompetence.

3. With Consent of All Parties and the Mediator

Apart from the type of actions discussed in the preceding exception, there may occasionally be other circumstances in which the parties to a mediation would want the mediator to be able to testify in a subsequent proceeding or, at least, would not mind if the mediator were called as a witness. This raises the issue of whether the mediation parties and mediator should be able (individually or collectively) to waive the testimonial immunity.

By way of analogy, American states which provide for a statutory mediation privilege differ about whether that privilege belongs to and may be waived by the mediator (for example, Colorado), the parties to the mediation (for example, Arizona, Kansas and New York), or even by the mediation program (California). About half of American mediation privilege statutes fail to state who may assert or waive the privilege, with the probable result that it cannot be waived by anyone.[29]

The Commission's reform model is based on contract principles, so that whether the statutory testimonial immunity is granted depends on the parties and the mediator collectively agreeing to confer the immunity. Since both the parties' and the mediator's agreement is required to confer the immunity, it seems only fair and logical that removal or waiver of the immunity should require no less.

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[28]*The Labour Relations Act*, C.C.S.M. c. L10, ss. 107(3) and 131(b).

[29]J.P. Rosenberg, "Keeping the Lid on Confidentiality: Mediation Privilege and Conflict of Laws" (1994), 10 Ohio St. J. on Disp. Resol. 157 at 159-160.

RECOMMENDATION 14

A mediator's testimonial immunity should not apply where the mediator and the mediation parties agree in writing to waive its application.

There is nothing in our draft amending statute *[s. 10.1(3)(a)]* to govern when waiver may occur. If mediation parties and the mediator know from the start that they do not want testimonial immunity for the mediator, yet want to govern the conduct of the mediation by written agreement, they can waive the statutory protection right in the governing agreement and thus avoid its application. The parties and the mediator can also waive the protection at any stage during or after the mediation if they all agree. This allows for maximum flexibility.

D. OTHER ISSUES

1. Notice and Cost Issues Concerning a Subpoena

When a mediator is subpoenaed, should the mediator be obliged to notify the mediating parties and non-party participants (witnesses) of the attempt to compel the disclosure of confidential material, so they can assist the mediator in protecting their integrity by resisting the application? Should the parties be obliged to help the mediator pay any costs of asserting the testimonial immunity against the subpoena? These practical issues, which are rarely considered in academic writings in this area, are raised in an article written by an American lawyer in private practice.[30]

Here, as elsewhere, the Commission's opinion concerning these issues is based on its contract view of mediation. Mediators and parties who want to make arrangements to address either of these issues can easily do so in the written agreement which governs the conduct of the mediation and the mediation relationship. Such details are properly left to the agreed choice of the parties and mediator; the state has no interest to protect and so need not address these matters in legislation.

RECOMMENDATION 15

A mediator should not be statutorily obliged to give notice to the mediating parties or participants of the service of any subpoena arising out of the mediation, nor should the parties be statutorily obliged to contribute to the mediator's costs of asserting testimonial immunity.

2. Application of Statutory Provision

The Commission's draft amending statute states that the general testimonial immunity for mediators should not apply to any mediator who conducts a mediation pursuant to an Act or regulation *[s. 10.1(4)]*.

This provision addresses two concerns. First, where a statute already provides protection for a mediator in specific and sometimes different terms (as in some family mediations, labour mediations and pre-trial conference mediations),[31] the Legislature has already decided what the

[30]P.J. Harter, "Neither Cop Nor Collection Agent: Encouraging Administrative Settlements by Ensuring Mediator Confidentiality" (1989), 41 Admin. L. Rev. 315 at 355.

[31]The statutory privilege for these types of mediation is discussed in Chapter 2, pp. 8-11.

nature and extent of protection should be in those circumstances. The new testimonial immunity provision should not modify or alter (either by increasing or decreasing) the protection already attached to those situations. Secondly, where a statute provides for mediation in a given situation but confers no testimonial immunity or privilege,[32] the Legislature has presumably considered whether protection was needed and decided against conferring any. It would be inappropriate, therefore, for the new general testimonial immunity provision to accomplish indirectly what the Legislature did not see fit to do directly.

We should note here that, in the absence of amendments to other statutes to harmonize the protection available for the various types of mediation, there would be no consequential amendments necessitated by enacting our draft statutory provision.

RECOMMENDATION 16

A general, statutory testimonial immunity should not apply to any mediator who conducts a mediation under another Act or regulation.

3. Transitional

The Commission's draft amending statute does not contain a transitional provision. We believe that fair legal consequences would result from the general law which governs the temporal operation and application of new legislation, and so a transitional provision is not needed to alter those consequences.

As a new rule of evidence, the testimonial immunity amendment would be used only at the stage of a legal proceeding subsequent to the mediation, when someone tries to subpoena the mediator. Since this amendment would likely be held to concern procedure only, not substantive law,[33] testimonial immunity would be effective in any such legal proceeding which is pending at or occurs after the date the amending legislation comes into effect. (A pending proceeding would be commenced prior to the amending legislation's coming into effect, but completed afterwards.)

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[32]Examples of statutory mediation without immunity or privilege are given in Chapter 2, p. 11.

[33]Generally, the rules of evidence are considered to be purely procedural rules.

> Statutes dealing with rules of evidence are not directly related to the existence of a substantive right. They deal, rather, with the various elements which may influence the judge in ruling on the right's existence; that is, with the legal means of asserting a right rather than with its existence. As these rules regulate the actions of the judge and the parties during a trial, it would seem normal that the applicable rules of evidence be those in force at the time of administration of the evidence.

P.-A. Côté, *The Interpretation of Legislation in Canada* (2nd ed., 1991) 167.

An amendment which made formerly inadmissible evidence admissible was held by the Supreme Court of Canada to be procedural only and immediately applicable to an action, even though the evidence to be thus proven had all occurred prior to the commencement of the new law: R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed., 1994) 547.

When it comes to privilege and testimonial immunity, the Supreme Court of Canada draws a distinction between privilege that is rooted in an independent right of confidentiality and privilege that is not. Solicitor-client privilege is grounded in the client's right to confidentiality, which is a substantive right conferred independently of whether litigation occurs or not. Therefore, solicitor-client privilege is not procedural, but a substantive right. However, the non-competence and non-compellability of spouses to testify against each other is not the result of a substantive right to confidentiality. "Spouses do not have a substantive right to the confidentiality as to what either was seen doing by the other or to the confidentiality of what was to the other communicated by either.": *Wildman* v. *The Queen* (1984), 12 D.L.R. (4th) 641 at 658 (S.C.C.). This testimonial immunity/privilege is a matter of pure procedure only. So although an accused's wife was not competent to testify against him at the date of the crime and at his original trial, where that non-competence is removed by statutory amendment prior to his appeal, she will be competent to testify against him at the re-trial of the matter.

In other words, the scope of the amendment's application will be "immediate and general" (also known as "retrospective"). Whether the legal proceeding at which testimonial immunity is invoked is pending at or occurs after the date the legislation comes into force, the preconditions to the operation of the testimonial immunity (written agreement to mediate naming a specific mediator, and the conduct of a mediation) can either or both occur before the amendment comes into force; the retrospectivity of those occurrences would not prevent the mediator from subsequently being non-competent and non-compellable.

CHAPTER 5

LIST OF RECOMMENDATIONS

The following is a list of the recommendations contained in this Report.

1. A blanket statutory privilege applying generally to the mediation process and its parties should not be created. (p. 20)

2. Subject to the limitations contained in subsequent recommendations, mediators should be statutorily made non-competent and non-compellable as witnesses in respect of a mediation in any legal proceedings. (p. 21)

3. The recommendations contained in this Report should be implemented by enactment of an amending statute similar to the draft Manitoba Evidence Amendment Act set out in Appendix A. (p. 21)

4. The statutory protection should apply to any person who is specifically named as a mediator in an agreement executed between that person and mediating parties prior to the mediation proceedings. (p. 25)

5. The testimonial immunity should apply regardless of whether the mediator is paid or is a volunteer. (p. 25)

6. The mediator's testimonial protection should also extend to an agent or employee of the mediator. (p. 25)

7. To obtain testimonial immunity, a mediator must have been acting in the capacity of a mediator when the information was acquired or opinion formed which is then sought to be subpoenaed. (p. 27)

8. A mediator should be unable to testify voluntarily, and no mediating party or third party should be able to force a mediator to testify. (p. 27)

9. The statutory testimonial immunity should extend to all oral and written information acquired from parties or participants by a mediator during a mediation, as well as the mediator's own notes, impressions and opinions. (p. 28)

10. The testimonial immunity for mediators should extend to every subsequent legal proceeding subject to provincial constitutional authority, including administrative hearings, civil pre-trial proceedings, civil trials and the prosecution of provincial regulatory offences. (p. 29)

11. It should be irrelevant to the application of the testimonial immunity whether the issue in the subsequent legal proceeding is the same or different from the issue in the mediation, or whether the subsequent legal proceeding occurs during the pendency of the original claim or mediation or after it has been resolved. (p. 30)

12. The statutory protection should not apply if the decision-maker in the subsequent action or legal proceeding concludes in the circumstances of the case that the public interest in the proper administration of justice outweighs in importance the mediator's testimonial immunity. (p. 31)

13. A mediator's testimonial immunity should not apply where the subsequent legal proceeding is to enforce, amend or set aside the mediated agreement or is brought by the mediator against a mediation party (or vice versa). (p. 32)

14. A mediator's testimonial immunity should not apply where the mediator and the mediation parties agree in writing to waive its application. (p. 33)

15. A mediator should not be statutorily obliged to give notice to the mediating parties or participants of the service of any subpoena arising out of the mediation, nor should the parties be statutorily obliged to contribute to the mediator's costs of asserting testimonial immunity. (p. 33)

16. A general, statutory testimonial immunity should not apply to any mediator who conducts a mediation under another Act or regulation. (p. 34)

This is a Report pursuant to section 15 of *The Law Reform Commission Act*, C.C.S.M. c. L95, signed this 23rd day of April 1996.

Clifford H.C. Edwards, President

John C. Irvine, Commissioner

Gerald O. Jewers, Commissioner

Eleanor R. Dawson, Commissioner

Pearl K. McGonigal, Commissioner

APPENDIX A

THE MANITOBA EVIDENCE AMENDMENT ACT

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows:

C.C.S.M. c. E150 amended

1 The Manitoba Evidence Act is amended by this Act.

2 The following is added after section 10:

Definition

10.1(1) In this section,

"legal proceeding" has the same meaning as in subsection 9(6);

"mediator" means a person who is, regardless of remuneration, named as mediator in a written agreement executed by that person and the mediating parties prior to the mediation and includes an agent or employee of the mediator.

Not competent or compellable

10.1(2) Subject to subsection (3), a mediator is not competent or compellable in any action or legal proceeding to give evidence about any oral or written information acquired or opinion formed by the mediator in his or her capacity as mediator.

Exceptions

10.1(3) Subsection (2) does not apply where

(a) the mediator and mediating parties agree in writing to waive its application;

(b) the subsequent action or legal proceeding is to enforce, amend or set aside the mediated agreement or is brought by or against the mediator against or by a party to the mediation; or

(c) the decision-maker in the subsequent action or legal proceeding concludes in the circumstances of the case that the public interest in the proper administration of justice outweighs in importance the immunity of the mediator by virtue of that subsection.

Application of section

10.1(4) This section does not apply to any mediator who conducts a mediation pursuant to an Act or regulation.

Coming into force

3 This Act comes into force on the day it receives royal assent.

APPENDIX B

PRIVILEGE IN MANITOBA STATUTES

As stated in Chapter 2, privileges may be created by statute but legislatures (including Manitoba) are slow to do so unless social policy justifies rendering evidence unavailable to the judicial process. Even when a privilege is created, it is often only a partial protection applicable to an extremely specific type of activity, report or subsequent proceeding. This Appendix briefly reviews the types of privilege found in Manitoba statutes, including some of the testimonial immunities also created by statute.

1. Privileges Created in Certain Mediation or Court Proceedings

Anything a person says to the provincial or civic ombudsman (who in many ways functions as a mediator) in the course of an investigation or proceeding is inadmissible in evidence. This privilege does not apply where the subsequent proceeding is a perjury trial.[1]

Elections in a local authority are challenged through an election petition tried in open court. Any statement made by any witness in such a trial is not admissible in any other proceeding.[2]

In court proceedings, not everything is necessarily part of the public record. If it is not, it is confidential and presumably would not be obtainable for other court proceedings. The Court of Queen's Bench can order any document in a civil proceeding to be sealed and not form part of the public record.[3] In family maintenance proceedings, any examination and cross-examination on financial information, accountings or documents ordered produced do not form part of the public record.[4]

Statutory mediation privilege exists for family mediation during the course of court proceedings. Masters and judges of the Court of Queen's Bench (Family Division) may refer disputes within its jurisdiction to a mediator appointed by the Minister of Justice. This could include disputes about child custody and access, financial support and marital property, as well as reconciliation issues. Both the parties and the mediator are barred from giving subsequent testimony about the mediation.[5]

As well, a court may adjourn any separation proceeding and direct the spouses to consult a marriage counsellor "or some other suitable person" to explore the possibility of reconciliation. Such a counsellor is not competent or compellable in that proceeding "or otherwise" and any

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[1] *The Ombudsman Act*, C.C.S.M. c. O45, s. 33; *The City of Winnipeg Act*, S.M. 1989-90, c. 10, s. 70(6).

[2] *The Local Authorities Election Act*, C.C.S.M. c. L180, s. 170(1).

[3] *The Court of Queen's Bench Act*, C.C.S.M. c. C280, s. 77(1).

[4] *The Family Maintenance Act*, C.C.S.M. c. F20, s. 10(1)(g).

[5] *The Court of Queen's Bench Act*, C.C.S.M. c. C280, ss. 47-48.

evidence concerning the reconciliation efforts is not admissible "for or against either spouse in the proceeding."[6]

Statutory privilege exists for labour mediation under *The Labour Relations Act*. Certain mediators are appointed by the Minister of Labour;[7] grievance mediators are appointed by the Minister or named in the collective agreement.[8] Another statute creates a further privilege to protect anything said or done by the Minister of Labour, Deputy Minister of Labour, a conciliation officer, member of the conciliation board, the registrar or a departmental employee during the course of efforts to "settle an industrial dispute".[9] This would include mediation, but is probably even broader in its effect.

No report of or testimony before an arbitration board dealing with a civil service collective bargaining dispute is "receivable in evidence" in any court that hears a matter under a provincial statute or law, although this does not apply where the court proceeding is to enforce a binding award of the arbitration board.[10]

2. Privileges Created for Confidential Information Given to Government Departments, Agencies or Other Bodies

Many statutes create confidentiality provisions to protect the privacy of those who give information to public bodies. The great majority of these statutes, however, do not extend full or even partial privilege to the confidential information. Often the confidentiality is explicitly stated to be subject to the "order of the court" or revealable to anyone who is "by law entitled to [the information]" -- in other words, the confidential information can be compelled as testimony. Only a few statutes create any kind of privilege to accompany their confidentiality provisions.

A limited privilege attaches to proceedings before and reports made to specified hospital committees, provided that the evidence is not otherwise compellable.[11]

Some statutes provide that employees who administer a specific statutory program shall not reveal specified, or any, information except in proceedings to enforce or administer that particular Act. This creates a wide privilege which would prevent evidence from being given in unrelated proceedings.[12]

Other statutes have a similarly wide privilege as the one just discussed, but would further allow the information to be revealed in proceedings to administer or enforce any other provincial Act which imposes "a tax or levy".[13]

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[6] *The Family Maintenance Act*, C.C.S.M. c. F20, ss. 12(1) and 47(2).

[7] *The Labour Relations Act*, C.C.S.M. c. L10, ss. 95(1) and 107(1).

[8] *The Labour Relations Act*, C.C.S.M. c. L10, ss. 130(8) and 131.

[9] *The Department of Labour Act*, C.C.S.M. c. L20, s. 11(1).

[10] *The Civil Service Act*, C.C.S.M. c. C110, s. 55(1) and (2).

[11] *The Manitoba Evidence Act*, C.C.S.M. c. E150, ss. 9-10.

[12] *The Energy Act*, C.C.S.M. c. E112, s. 8(1) (this protection is also expressly subject to *The Freedom of Information Act*); *The Business Practices Act*, C.C.S.M. c. B120, s. 27; *The Mineral Exploration Incentive Program Act*, C.C.S.M. c. M145, s. 8.

[13] *The Mining Tax Act*, C.C.S.M. c. M195, s. 29(1); *The Health and Post Secondary Education Tax Levy Act*, C.C.S.M. c. H24, s. 19(1); *The Corporation Capital Tax Act*, C.C.S.M. c. C226, s. 32(1).

Information furnished to the City of Winnipeg about construction costs is confidential and may not be revealed by City employees except in court proceedings to recover fees or charges owing to the City.[14]

Any information obtained through the administration and enforcement of *The Prescription Drugs Cost Assistance Act* is confidential and not to be revealed, except in certain situations, including:

- the administration and enforcement of that Act, or of any other Manitoba statute, other provincial statute or federal statute relating to the same subject matter;[15]

- revelation to any health-care governing body which is investigating drug and prescription-related abuses.[16]

Any information acquired by the registrar, minister or someone conducting an inquiry or investigation under *The Private Investigators and Security Guards Act* shall not be disclosed except with ministerial consent or for the purposes of an appeal under that Act.[17]

3. Privileges Created for Statutorily-Mandated Reports

Doctors and optometrists are obliged to report anyone medically incapable of holding a driver's licence. This report is privileged and inadmissible in any action or proceeding in court (except to prove compliance with having made the report).[18]

Accident reports and statements made by operators of vehicles or by garage owners concerning damaged vehicles are not admissible in evidence against their makers.[19]

The Registrar of Motor Vehicles may require a driver, owner, person in charge or peace officer to make a supplemental accident report. This supplemental report is explicitly privileged and inadmissible in any civil or criminal trial arising out of the accident. It is admissible only to prove compliance with the order to report.[20]

Various kinds of health care providers are obliged to provide reports to the Workers Compensation Board concerning injured workers. These reports are given a limited privilege; they are inadmissible in any court or tribunal action against the maker, unless the report was made maliciously.[21]

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[14] *The City of Winnipeg Act*, S.M. 1989-90, c. 10, s. 476(1).

[15] *The Prescription Drugs Cost Assistance Act*, C.C.S.M. c. P115, ss. 10(4), 10(5)(f).

[16] *The Prescription Drugs Cost Assistance Act*, C.C.S.M. c. P115, ss. 10(4), 10(5)(h).

[17] *The Private Investigators and Security Guards Act*, C.C.S.M. c. P132, s. 23.

[18] *The Highway Traffic Act*, C.C.S.M. c. H60, ss. 157(1) and (7).

[19] *The Highway Traffic Act*, C.C.S.M. c. H60, s. 158(1).

[20] *The Highway Traffic Act*, C.C.S.M. c. H60, ss. 159 and 247(1).

[21] *The Workers Compensation Act*, C.C.S.M. c. W200, s. 20.1.

4. Testimonial Immunities Created for Certain Officials

A testimonial immunity may be created for board members and employees of regulatory agencies which administer significant public programs or powers. For example, board members and employees of the Workers Compensation Board,[22] the Securities Commission,[23] the Public Utilities Board,[24] the Municipal Board,[25] the Manitoba Public Insurance Corporation and the Automobile Injury Compensation Appeal Commission[26] are all protected in this manner. Such immunity is typically restricted to civil actions to which the official's board or commission is not a party. The board members and employees of the Labour Relations Board are also not required to testify "in any other proceeding whatsoever", including a proceeding before their own board.[27]

A testimonial immunity is created for the Registrar of Motor Vehicles who is empowered to enter, inspect, seize and copy records of motor carriers. The immunity prevents someone unrelated to the investigation from compelling (for other purposes) testimony or documents obtained by the Registrar during a search. The testimonial immunity extends to any "civil suit or proceeding", not to a prosecution of any regulatory offence.[28]

During a certification proceeding, the Labour Relations Board may assign a board representative to gather information and write a report on certain issues. While the report is admissible in the certification hearing, the report maker is not a compellable witness in that hearing.[29]

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[22] *The Workers Compensation Act*, C.C.S.M. c. W200, s. 62.

[23] *The Securities Act*, C.C.S.M. c. S50, s. 142(3).

[24] *The Public Utilities Board Act*, C.C.S.M. c. P280, s. 26(2).

[25] *The Municipal Board Act*, C.C.S.M. c. M240, s. 26(2).

[26] *The Manitoba Public Insurance Corporation Act*, C.C.S.M. c. P215, s. 199(2).

[27] *The Labour Relations Act*, C.C.S.M. c. L10, s. 144(1).

[28] *The Highway Traffic Act*, C.C.S.M. c. H60, ss. 318.10(5)-(6).

[29] *The Labour Relations Act*, C.C.S.M. c. L10, ss. 46(2)-(3).

EXECUTIVE SUMMARY OF

REPORT ON CONFIDENTIALITY OF MEDIATION PROCEEDINGS

EXECUTIVE SUMMARY

INTRODUCTION

Mediation is an alternative dispute resolution mechanism used by disputing parties to negotiate a settlement with the assistance of a neutral mediator. Unlike a judge or arbitrator, a mediator has no coercive power over the parties, cannot compel information and does not render a decision or judgment after hearing reasoned arguments. Instead, the mediator's crucial role is to facilitate effective communication between the parties and help overcome negotiation impasse so that the parties can reach a settlement by creating their own solutions.

Should a statutory privilege be created to protect all mediation proceedings from being subsequently used as evidence in court or other legal proceedings? The Manitoba Law Reform Commission's Report on *Confidentiality of Mediation Proceedings* rejects the creation of a statutory blanket privilege that would shield all participants and the entirety of the proceedings. The Commission instead recommends that a conditional testimonial immunity should be statutorily extended to mediators alone so that they will be non-competent and non-compellable as witnesses in most subsequent proceedings.

THE CURRENT LAW

Except for a couple of specific types of mediation (most notably, court-related family mediation and labour mediation), there is no common law or statutory privilege to protect the confidentiality of general mediation proceedings. This means that mediation information can be subpoenaed as evidence in a subsequent legal proceeding by one of the parties to the mediation or even by a person uninvolved in the original mediation.

BACKGROUND TO REFORM

Privilege excludes from use in the judicial decision-making process evidence that is relevant, probative and trustworthy--indeed, evidence that might be crucial to the just resolution of a legal dispute. Since privilege actually obstructs the truth-finding process, courts and legislatures have been slow to create privilege in the absence of an overriding social policy of unequivocal importance.

Courts already have the ability at common law to extend privilege on a case-by-case basis to protect confidential relationships or to create an entirely new category of privilege using established principles. While there are several good arguments both for and against the creation of a statutory blanket privilege to protect mediation proceedings, the Commission believes that any extension of privilege in this area should be left to the courts to determine. Other participants in confidential relationships which are just as widespread and important in our society as mediation must rely on the courts to protect them in appropriate cases; the Commission has not perceived anything about mediation which warrants special treatment in that regard.

Notwithstanding its rejection of privilege, the Commission recognizes that a different, more limited form of statutory protection is appropriate for mediation. Our guiding principle of reform is that people who choose to resolve their legal problems through mediation rather than

litigation should not, by virtue of that choice, be either (a) advantaged or favoured by being protected at trial in a way unavailable to other litigants who did not first attempt mediation, nor (b) penalized by being in a worse position if they go to trial than if they had not attempted mediation in the first place.

Mediating parties who subsequently litigate would be advantaged compared to other litigating parties if mediation communications receive a stronger statutory privilege than that which is currently available at common law for litigating parties who attempt settlement through traditional negotiation without a mediator. Therefore, for this reason as well, the Commission does not favour creating a blanket statutory privilege to protect all mediation communications. If the parties want to protect communications which occur in the presence of themselves and the mediator during mediation, they can ask the court to extend to their mediation the common law privilege which protects settlement negotiations. In our opinion, a court would likely extend this protection. Thus, the discussions between the mediating parties in the mediator's presence will be as privileged or not privileged as would have been the case had they negotiated in the absence of a mediator.

The Commission's reform focus is on the one factor which makes mediation different from other types of settlement negotiations: the presence of a mediator who is, first, privy to secrets which the parties individually confided to the mediator in "private caucus" and which they do not know about each other and who, secondly, takes personal notes and forms his or her own opinions and impressions about the issues, parties and merits of the dispute, even though these are not used to impose any resolution. If the mediator could be compelled to testify about that kind of confidential or personal knowledge, mediating parties who subsequently litigate would be penalized compared to other litigating parties who have no such source that can be used against them.

Therefore, rather than extend privilege to the mediation proceedings themselves and to the mediating parties, the Commission recommends creating non-competence and non-compellability for the mediator (in most situations). In other words, the mediator could neither volunteer to be a witness in subsequent legal proceedings nor could the mediator be forced by subpoena to take the stand.

The doctrines of competence and compellability regulate whether a witness may or must take the stand, whereas the doctrine of privilege regulates what questions a witness may or must answer once on the stand. While these legal doctrines are conceptually separate and distinct from each other, the practical, evidentiary consequences of non-competence, non-compellability or privilege are the same: certain evidence will not be available to the court.

However, it seems to the Commission that excluding evidence through the method of non-competence and non-compellability of the mediator rather than through statutory creation of a blanket privilege for the process itself, allows a more precise, limited and controllable response to this issue. Such a reform strikes an acceptable balance between the many competing values at stake. It protects the most sensitive of information confided during mediation without creating an overly broad class of excluded evidence rendered unavailable to the justice system in subsequent litigation. It gives mediating parties a greater sense of security without placing them at an unfair advantage compared to litigating parties who negotiated in the traditional manner. Finally, it facilitates the existence of private mediation as a complement to the traditional justice system rather than establishing it as an alternative, entirely self-contained and sealed challenge to the public court system.

RECOMMENDATIONS FOR REFORM

Overbreadth of application poses a major problem for attempted reform in this area. The class of persons and processes on which a testimonial immunity may be conferred cannot readily be ascertained. Therefore, the protection could unintentionally extend to people or groups whose negotiations should not be protected. Also, the statute's protection becomes subject to deliberate exploitation and abuse by those who wish to keep evidence out of the public justice system by erecting a facade of mediation. The usual way of controlling overbreadth in this area is to limit protection to specific kinds of mediation (like family or labour mediation) or to limit the protection to mediation diverted from (and under the control of) the court system ("court-annexed" mediation). However, these methods are inapplicable when trying to craft a protection for general mediation conducted privately.

The Commission recommends controlling overbreadth in two ways: (1) by limiting the testimonial immunity to a person who is specifically named as a mediator in a written agreement executed between that person and the mediating parties prior to the mediation, and (2) by giving discretion to the decision-maker in the subsequent legal proceeding (a court or administrative tribunal) to override the protection where it concludes in the circumstances of the case that the public interest in the proper administration of justice outweighs in importance the mediator's testimonial immunity.

To obtain the testimonial immunity, a mediator must have been acting in the capacity of a mediator when the information was acquired or opinion formed which is then sought to be subpoenaed. The protection should apply regardless of whether the mediator is paid or is a volunteer and it should also extend to an agent or employee of the mediator.

The effect of the testimonial immunity is that a mediator should be unable to testify voluntarily and no mediating party or third party should be able to force a mediator to testify. The protection should extend to all oral and written information acquired from parties or participants by a mediator during a mediation, as well as the mediator's own notes, impressions and opinions. It is important to note, however, that some (if not much) of this information will still be subject to subpoena through other sources, namely the mediating parties and any other participants in the mediation (unless they can convince a court to shield that evidence with a common law privilege).

The mediator's inability to testify should extend to every subsequent legal proceeding within provincial constitutional authority, including administrative proceedings, civil pre-trial discovery procedures, civil trials and Crown prosecutions of provincial regulatory offences. For constitutional reasons, this testimonial immunity would be ineffective in a prosecution of a federal criminal offence.

It should be irrelevant to the application of the testimonial immunity whether the issue in the subsequent legal proceeding is the same or different from the issue in the mediation, or whether the subsequent legal proceeding occurs during the pendency of the original claim or mediation or after it has been resolved.

Apart from the discretionary override of the testimonial immunity in appropriate cases, the protection should also not apply where the subsequent legal proceeding is to enforce, amend or set aside the mediated agreement or is brought by the mediator against a mediation party (or vice versa). It should also not apply where the mediator and the mediation parties agree in writing to waive its application.

The Commission further recommends that this general, statutory testimonial immunity should not apply to any mediator who conducts a mediation under another statute or regulation.

The Legislature has already determined what the nature and extent of the statutory protection, if any, should be under those other statutes and the new general provision should not alter or modify that situation.

Finally, the Commission proposes draft amendments to *The Manitoba Evidence Act* to give effect to its recommendations.

SOMMAIRE DU RAPPORT SUR

LA CONFIDENTIALITÉ DES PROCÉDURES DE MÉDIATION

SOMMAIRE

INTRODUCTION

La médiation est un mécanisme de règlement extrajudiciaire des conflits utilisé par les parties en cause pour négocier un règlement avec l'aide d'un médiateur impartial. Contrairement à un juge ou à un arbitre de différends, le médiateur n'a aucun pouvoir coercitif sur les parties, ne peut les contraindre à divulguer des renseignements et ne rend pas de décision ou de jugement après avoir entendu les arguments raisonnés. Le rôle essentiel du médiateur est plutôt de faciliter la communication efficace entre les parties et de les aider à surmonter l'impasse où se trouvent les négociations afin que les parties puissent en venir à un règlement en créant leurs propres solutions.

Devrait-on créer un privilège d'origine législative pour protéger toutes les procédures de médiation afin qu'elles ne puissent être ensuite utilisées comme éléments de preuve au tribunal ou dans toute autre poursuite judiciaire? Le rapport de la Commission de réforme du droit du Manitoba sur la confidentialité des procédures de médiation rejette la création d'un privilège général d'origine législative qui protègerait tous les participants et s'appliquerait à l'ensemble des poursuites. La Commission recommande plutôt qu'une immunité testimoniale conditionnelle soit étendue de façon législative aux seuls médiateurs afin qu'ils ne soient ni habiles ni contraignables à témoigner dans la plupart des poursuites subséquentes.

LE DROIT ACTUEL

A l'exception de quelques types précis de médiation (surtout la médiation annexée au tribunal dans les domaines de la famille et du travail), il n'existe pas de privilège jurisprudentiel ou d'origine législative pour protéger la confidentialité des procédures générales de médiation. Cela signifie que les renseignements concernant la médiation peuvent être assignés comme preuve dans le cadre d'une poursuite judiciaire subséquente par l'une des parties de la médiation ou même par une personne n'ayant aucun lien avec la médiation initiale.

CONTEXTE DE LA RÉFORME

Dans le processus décisionnel des tribunaux, le privilège empêche l'utilisation de preuves qui sont pertinentes, probantes et dignes de foi; de preuves qui pourraient être essentielles au règlement équitable d'un litige. Comme le privilège interfère en fait avec le processus de recherche de la vérité, les tribunaux et les assemblées législatives ont montré peu d'empressement à accorder un privilège en l'absence de considérations sociales prééminentes.

Les tribunaux ont déjà la capacité en common law d'étendre un privilège sur une base individuelle pour protéger les liens confidentiels ou pour créer une catégorie entièrement nouvelle de privilèges en utilisant des principes établis. Lorsqu'il existe de nombreux arguments valables à la fois pour et contre la création d'un privilège général d'origine législative pour protéger les procédures de médiation, la Commission croit que toute extension de privilège dans ce domaine devrait être du ressort du tribunal. D'autres participants ayant des liens confidentiels, tout aussi communs et importants dans notre société que l'est la médiation, doivent également compter sur les tribunaux pour les protéger dans les cas appropriés; la Commission

n'a fait aucune constatation qui justifie que la médiation fasse l'objet d'un traitement de faveur à cet égard.

Même si elle rejette le privilège, la Commission reconnaît qu'une forme différente et plus restreinte de protection d'origine législative est appropriée pour la médiation. Le principe directeur de la réforme est que les personnes qui choisissent de résoudre leurs problèmes juridiques par la médiation plutôt que par le litige ne devraient pas, à cause de ce choix, être soit (a) avantagées ou favorisées par le fait qu'elles sont protégées au tribunal d'une façon qui n'est pas offerte aux autres personnes n'ayant pas d'abord essayé la médiation, ou (b) pénalisées par le fait qu'elles se trouvent dans une situation pire que si elles n'avaient pas tout d'abord essayé la médiation.

Les parties en médiation qui vont ensuite au tribunal seraient avantagées par rapport aux parties allant directement au tribunal si les renseignements entendus en médiation faisaient l'objet d'un privilège d'origine législative plus important que ce qui est actuellement offert en common law pour les parties qui essaient de régler leur litige par la négociation traditionnelle sans médiateur. Ainsi, pour cette raison également, la Commission ne favorise pas la création d'un privilège général d'origine législative pour protéger toutes les communications entendues en médiation. Si les parties veulent protéger les communications qui ont lieu en leur présence et en celle du médiateur pendant la médiation, elles peuvent demander au tribunal d'étendre à leur médiation les privilèges jurisprudentiels qui protègent les négociations de règlements. À notre avis, un tribunal étendrait probablement cette protection. Ainsi, les discussions entre les parties en médiation en présence du médiateur seraient aussi privilégiées ou non privilégiées que si elles avaient lieu en l'absence d'un médiateur.

La réforme de la Commission met l'accent sur ce qui rend la médiation différente d'autres types de négociation de règlements: la présence d'un médiateur qui est, en premier lieu, au courant de secrets que les parties lui ont individuellement confiés en aparté et qu'elles ignorent mutuellement, et qui, en second lieu, prend des notes personnelles et forme sa propre opinion quant à l'objet, aux parties et au mérite du conflit, même s'il ne les utilise pas pour imposer un règlement. Si le médiateur pouvait être contraint à témoigner sur ce genre de renseignements confidentiels et personnels, les parties en médiation qui vont ensuite au tribunal seraient pénalisées par rapport aux autres parties contre lesquelles de telles sources ne peuvent être utilisées.

Ainsi, plutôt que d'étendre le privilège aux procédures de médiation elles-mêmes et aux parties en médiation, la Commission recommande la création d'un statut de non-habilité et de non-contraignabilité pour le médiateur (dans la plupart des situations). En d'autres mots, le médiateur ne pourra pas se porter volontaire pour témoigner pas plus qu'il ne pourra être assigné à témoigner dans aucune poursuite judiciaire subséquente.

Les principes d'habilité et de contraignabilité s'appliquent pour savoir si un témoin peut ou doit témoigner, alors que le principe de privilège régit les questions auxquelles un témoin peut ou doit répondre une fois à la barre. Même si ces principes juridiques sont conceptuellement séparés et distincts, les conséquences pratiques et probantes de non-habilité, de non-contraignabilité ou de privilège sont les mêmes: le tribunal n'aura pas accès à certaines preuves.

Cependant, la Commission considère que l'exclusion de preuves par la méthode de non-habilité et de non-contraignabilité du médiateur plutôt que par la création d'un privilège général d'origine législative pour le processus lui-même, permet une réponse plus précise, plus limitée et plus contrôlable à cette question. Une telle réforme crée un équilibre acceptable entre les nombreux principes en jeu. Elle protège les renseignements les plus délicats révélés pendant la médiation sans créer une classe trop importante de preuves exclues auxquelles le système judiciaire n'a plus accès dans le cadre de poursuites judiciaires subséquentes. Cela procure aux

parties en médiation un plus grand sens de sécurité sans leur donner un avantage injuste par rapport aux parties qui négocient de façon traditionnelle. Finalement, cela permet à la médiation privée d'exister comme complément au système juridique public traditionnel plutôt que d'être une solution de rechange, qui soit entièrement autonome et qui lui fasse concurrence.

RECOMMANDATIONS POUR LA RÉFORME

Une portée d'application excessive constitue un problème important pour les réformes tentées dans ce domaine. La catégorie de personnes et de procédés à laquelle on pourrait accorder une immunité testimoniale ne peut être établie facilement. Ainsi, la protection pourrait involontairement être accordée à des gens et à des groupes dont les négociations ne devraient pas être protégées. De plus, la protection du statut devient sujette à une exploitation et à un abus délibérés par les personnes qui souhaitent tenir des preuves à l'écart du système juridique public en érigeant un semblant de médiation. La façon habituelle de contrôler la portée excessive dans ce domaine est de limiter la protection à des types précis de médiation (comme la médiation dans les domaines de la famille et du travail) ou de limiter la protection à la médiation dérivée du système juridique et exercée sous sa surveillance (médiation "annexée" au tribunal). Cependant, ces méthodes ne sont pas applicables lorsque l'on tente de concevoir une protection pour la médiation générale effectuée de façon privée.

La Commission recommande de contrôler la portée excessive de deux façons: (1) en limitant l'immunité testimoniale accordée à une personne qui est spécifiquement nommée comme médiateur dans une entente signée par cette personne et les parties en médiation avant le début de la médiation, et (2) en accordant la possibilité au décideur de toute poursuite judiciaire subséquente (une cour ou un tribunal administratif) de passer outre la protection s'il juge dans les circonstances du cas que l'intérêt public et l'administration adéquate de la justice sont plus importants que l'immunité testimoniale du médiateur.

Pour obtenir l'immunité testimoniale, un médiateur que l'on veut assigner doit avoir agi en tant que médiateur au moment où les renseignements ont été obtenus ou l'opinion formée. La protection devrait s'appliquer, que le médiateur soit payé ou bénévole, et elle devrait également s'étendre au représentant ou employé du médiateur.

L'effet de l'immunité testimoniale est qu'un médiateur ne devrait pas pouvoir témoigner volontairement et que l'une des parties en médiation ou une tierce partie ne devrait pas pouvoir contraindre un médiateur à témoigner. La protection devrait s'étendre à tous les renseignements oraux et écrits obtenus des parties ou des participants par un médiateur durant une médiation, de même qu'aux notes, impressions et opinions du médiateur. Il est important de noter, cependant, que certains de ces renseignements, si ce n'est pas davantage, seront toujours sujets à assignation par d'autres sources, nommément les parties en médiation et tout autre participant à la médiation (à moins qu'ils puissent convaincre un tribunal de protéger ces preuves par un privilège jurisprudentiel).

L'incapacité du médiateur de témoigner devrait s'étendre à toutes les poursuites judiciaires subséquentes du ressort de la province, y compris les poursuites administratives, les procédures de communication préalable au civil, les procès civils et les poursuites engagées par la Couronne pour des infractions aux règlements provinciaux. Pour des raisons constitutionnelles, cette immunité testimoniale ne s'appliquerait pas aux poursuites entamées pour des infractions criminelles au niveau fédéral.

Il ne devrait pas être pertinent à l'application de l'immunité testimoniale que la question en litige dans la poursuite judiciaire subséquente soit identique ou non à la question en litige au moment de la médiation, ou que la poursuite judiciaire subséquente survienne pendant que la demande originale ou la médiation est en cours d'instance ou après qu'elle a été résolue.

À l'exception de la dérogation discrétionnaire concernant l'immunité testimoniale dans les cas appropriés, la protection ne devrait pas non plus s'appliquer lorsque la poursuite judiciaire subséquente a lieu pour exécuter, modifier ou annuler l'entente obtenue par médiation ou est entamée par le médiateur contre une des parties en médiation (ou vice versa). Elle ne devrait pas non plus s'appliquer lorsque le médiateur et les parties en médiation acceptent par écrit de renoncer à son application.

La Commission recommande de plus que cette immunité testimoniale générale d'origine législative ne devrait pas s'appliquer aux médiateurs qui effectuent une médiation en vertu d'une autre loi ou d'un autre règlement. L'Assemblée législative a déjà déterminé quelles devraient être, le cas échéant, la nature et l'étendue de la protection d'origine législative en vertu de ces autres lois, et la nouvelle disposition générale ne devrait pas altérer ou modifier cette situation.

Finalement, la Commission propose des modifications provisoires à la *Loi sur la preuve au Manitoba* pour que ces recommandations prennent effet.