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Abstract

This article explores the justifications for protecting mediation communications from disclosure. It reviews the existing legal protections for mediated dispute settlement discussions. The major issues that seem to arise when statutory reform is considered are identified, and a recent study of the issue by the Manitoba Law Reform Commission is described and critiqued. The author argues that a distinction should be made between circumstances in which a party is required or permitted to testify about what took place in mediation, and circumstances in which the mediator may be required to do so. He suggests that mere extension to mediation of the common law privilege for settlement discussions is inadequate, particularly as a basis for determining whether the mediator should be compelled to testify.

Keywords

Mediation; Confidential communications; Manitoba

PROTECTING THE CONFIDENTIALITY OF COMMUNICATIONS IN MEDIATION©

BY OWEN V. GRAY*

This article explores the justifications for protecting mediation communications from disclosure. It reviews the existing legal protections for mediated dispute settlement discussions. The major issues that seem to arise when statutory reform is considered are identified, and a recent study of the issue by the Manitoba Law Reform Commission is described and critiqued. The author argues that a distinction should be made between circumstances in which a party is required or permitted to testify about what took place in mediation, and circumstances in which the mediator may be required to do so. He suggests that mere extension to mediation of the common law privilege for settlement discussions is inadequate, particularly as a basis for determining whether the mediator should be compelled to testify.

Cet article explore les justifications données pour la protection des communications concernant la médiation contre la divulgation. Il rend compte des protections légales existant pour les discussions qui visent le règlement des disputes par arbitrage. Les questions majeures qui semblent soulevées lorsqu'on introduit une réforme législative, sont identifiées. Une récente étude de la question effectuée par La Commission de la Reforme Législative au Manitoba, se trouve décrite et critiquée. L'auteur discute les raisons pour lesquelles une distinction devrait être faite entre les circonstances dans lesquelles une partie se trouve requise ou permise de témoigner sur ce qui s'est passé dans la médiation, et les circonstances dans lesquelles le médiateur pourrait être requis de faire de même. Il suggère que la simple extension du privilège du droit commun aux discussions du règlement est inadéquate, particulièrement en tant que fondement pour déterminer si le médiateur devrait être obligé de témoigner.

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I. INTRODUCTION

Mediation is increasingly being used as a means of resolving disputes. Disputants are resorting to it in growing numbers, and in widening varieties of circumstances. Courts and tribunals are encouraging the voluntary use of mediation and are even mandating participation in mediation. Participants in mediation are told, and have an expectation, that their discussions will be kept confidential. It seems unlikely that they would participate in a meaningful and productive way without that assurance and expectation. In the long run, mediation may not flourish if reasonable expectations of confidentiality are not met.

Mediators cannot promise that the mediation process will be entirely confidential, however. Disclosure may be compelled by the legal system for various reasons. Indeed, the very interests served by maintaining the confidentiality of communications in mediation require that there be some exceptions to that confidentiality. With the increased use of mediation will come increased testing of the limits of confidentiality in mediation. The nature of the protection that is, or ought to be, available is a matter of debate and concern for mediators and for those using or considering using mediation.

This article explores the justifications for protecting mediation communications from voluntary or compelled disclosure. It reviews the existing legal protections for mediated dispute settlement discussions. The major issues that seem to arise when statutory reform is considered are identified, and a recent Canadian study of the issue is described and critiqued.

II. THE NATURE OF MEDIATION

Mediation is assisted negotiation. The negotiating parties are assisted in their endeavours by an acceptable third party, the mediator, who has no personal interest in the subject matter of the negotiation. The mediator has no power to impose a result on the parties, who retain for themselves the power to determine the outcome: to agree on a resolution to the problem or opportunity that is the subject of the negotiation, or to choose, instead, to pursue whatever alternatives to agreement are available to them.

The mediator's function is to help the parties work their way through the process of negotiation by facilitating and enhancing their communication with one another. To that end, a mediator may perform a variety of roles:

> The *opener of communication channels*, who initiates communication or facilitates better communication if the parties are already talking.
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> The *legitimizer*, who helps all parties recognize the right of others to be involved in negotiations.
>
> The *process facilitator*, who provides a procedure and often formally chairs the negotiation session.
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> The *trainer*, who educates novice, unskilled, or unprepared negotiators in the bargaining process.
>
> The *resource expander*, who provides procedural assistance to the parties and links them to outside experts and resources (for example, lawyers, technical experts, decision makers, or additional goods for exchange) that may enable them to enlarge acceptable settlement options.
>
> The *problem explorer*, who enables people in dispute to examine a problem from a variety of viewpoints, assists in defining basic issues and interests, and looks for mutually satisfactory options.
>
> The *agent of reality*, who helps build a reasonable and implementable settlement and questions and challenges parties who have extreme and unrealistic goals.
>
> The *scapegoat*, who may take some of the responsibility or blame for an unpopular decision that the parties are nevertheless willing to accept. This enables them to maintain their integrity and, when appropriate, gain the support of their constituents.
>
> The *leader*, who takes the initiative to move the negotiations forward by procedural—or on occasion, substantive—suggestions.[1]

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[1] C.W. Moore, *The Mediation Process: Practical Strategies for Resolving Conflict*, 2d ed. (San Francisco: Jossey-Bass, 1996) [hereinafter *The Mediation Process*] at 18-19 [emphasis in original].

As the mediation progresses, these roles may be played both in meetings with the parties together in joint session, and in meetings in caucus with one party separately from the other(s). The process may require more than just encouragement of candour, reflection, recognition, and empathy. It may also involve reframing and even filtering the parties' communications, while moving between them as a shuttle diplomat.

Lon Fuller offered his view of what the mediator adds to ordinary, unassisted negotiations:

> Where the bargaining process proceeds without the aid of a mediator the usual course pursued by experienced negotiators is something like this: the parties begin by simply talking about the various proposals, explaining in general terms why they want this and why they are opposed to that. During this exploratory or "sounding out" process, which proceeds without any clear-cut offers of settlement, each party conveys—sometimes explicitly, sometimes tacitly, sometimes intentionally, sometimes inadvertently—something about his relative evaluations of the various items under discussion. After these discussions have proceeded for some time, one party is likely to offer a "package deal," proposing in general terms a contract that will settle all the issues under discussion. This offer may be accepted by the other party or he may accept it subject to certain stipulated changes.
>
> Now it is obvious that the process just described can often be greatly facilitated through the services of a skillful mediator. His assistance can speed the negotiations, reduce the likelihood of miscalculation, and generally help the parties to reach a sounder agreement, an adjustment of their divergent valuations that will produce something like an optimum yield of the gains of reciprocity. These things the mediator can accomplish by holding separate confidential meetings with the parties, where each party gives the mediator a relatively full and candid account of the internal posture of his own interests. Armed with this information, but without making a premature disclosure of its details, the mediator can then help to shape the negotiations in such a way that they will proceed most directly to their goal, with a minimum of waste and friction.[2]

These generic descriptions of mediation and the mediator's role apply whether the mediation is concerned with resolving a dispute or reaching an agreement on the terms of a business relationship or transaction.

III. THE NEED FOR CONFIDENTIALITY IN MEDIATION

It is generally thought that an expectation of confidentiality on the part of participants is critical to a successful mediation process.[3]

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[2] L.L. Fuller, "Mediation—Its Forms and Functions" (1971) 44 S. Cal. L. Rev. 305 at 318 [footnote omitted].

[3] See J. Folberg & A. Taylor, *Mediation: A Comprehensive Guide to Resolving Conflicts Without Litigation* (San Francisco: Jossey-Bass, 1984) at 264; L.R. Freedman & M.L. Prigoff, "Confidentiality in Mediation: The Need for Protection" (1986) 2 Ohio St. J. on Disp. Resol. 37; M.L. Prigoff, "Toward Candor or Chaos: The Case of Confidentiality in Mediation" (1988) 12

The mediator encourages the parties to be candid with the mediator and each other, not just about their willingness to compromise, but also and especially about the needs and interests that underlie their positions. As those needs and interests surface, the possibility of finding a satisfactory resolution increases. The parties will be wary and guarded in their communications if they think that the information they reveal may later be used outside of the mediation process to their possible disadvantage. When they have resorted to mediation in an attempt to settle pending or threatened litigation, they will be particularly alert to the possibility that information they reveal to others in mediation may later be used against them by those others in that, or other, litigation. The parties may also be concerned that their communications might be used by other adversaries or potential adversaries, including public authorities, in other present or future conflicts. The possibility of prejudice to legal rights, or of exposure to legal liability or prosecution, may not be a party's only concern. Parties may also be concerned that disclosure of information they reveal in the mediation process may prejudice them in commercial dealings or embarrass them in their personal lives. Accordingly, mediation works best if the parties are assured that their discussions with each other and with the mediator will be kept confidential.

The need for confidentiality exists in all settlement negotiations, mediated and unmediated. Nonetheless, the addition of a mediator to the negotiation process creates additional issues about confidentiality.

In addition to discussions in joint session, in which both (or all) parties are present with the mediator and each hears what the other(s) says, mediation often involves the mediator's meeting with parties separately, in "caucus." During a caucus, the mediator may explore a party's motivations and expectations, provide education and coaching with respect to the negotiation process, act as a sounding board, engage in reality checking, and assist in identifying options that might be brought to the bargaining table.[4] The mediator may also test the acceptability of proposals that he or she has generated, or of proposals

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Seton Hall Legis. J. 1; A. Kirtley, "The Mediation Privilege's Transition from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest" (1995) J. of Disp. Resol. 1 at 8; and "Protecting Confidentiality in Mediation" Note (1984) 98 Harv. L. Rev. 441 at 444-45 [hereinafter "Protecting Confidentiality in Mediation"]. Critics argue that there is no evidence that mediation requires absolute confidentiality in order to function effectively: see E.D. Green, "A Heretical View of the Mediation Privilege" (1986) 2 Ohio St. J. on Disp. Resol. 1; and K. Gibson, "Confidentiality in Mediation: A Moral Reassessment" (1992) J. of Disp. Resol. 25 at 40.

[4] See *The Mediation Process*, *supra* note 1 at 319-20. See generally C.W. Moore, "The Caucus: Private Meetings That Promote Settlement" (1987) 16 Mediation Q. 87.

generated by the opposite party in caucus but presented as the mediator's own. A party may wish, or be encouraged, to share with the mediator information that he or she is not prepared to communicate to, and wishes to be kept confidential from, the other during the mediation process.[5] Parties will be reluctant to do this without the assurance that the mediator is both willing and able to maintain the desired confidentiality.

A party's concern that certain communications with the mediator be kept confidential within the mediation process may sometimes be temporary. The information may be such that its revelation at an appropriate time and in an appropriate way during the mediation process may be beneficial. The party may eventually be persuaded that the potential benefit to the process of disclosure outweighs the perceived risk. On the other hand, the information may be of a sort that would not advance the negotiations if revealed, or the party may not be persuaded that it should be revealed. Even then, the information may have assisted the mediator in moving the process forward. In any event, potentially useful information would not be available to the mediator in caucus without a clear understanding that caucus communications designated or understood to be confidential would be kept confidential by the mediator both within and outside the mediation process.

Mediating parties and mediators are naturally concerned, therefore, about the extent to which communications in mediation can, or should, be kept confidential. They will usually address this in the contract or rules that they agree will govern the mediation.[6] These will generally provide that all participants will keep mediation communications confidential and that the parties will not seek to compel the mediator to testify about mediation communications, or to produce his or her notes of those communications, in any subsequent legal proceeding. These contractual rules may provide for exceptions reflecting the parties' sense of the circumstances in which they or the mediator should be free to (or may be required to) disclose something about their discussions. Whether or not exceptions to confidentiality are expressly provided in the rules that the parties and the mediator

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[5] See *The Mediation Process*, *supra* note 1 at 323-26.

[6] See A.J. Stitt, "Mediation" in A.J. Stitt, ed., *Alternative Dispute Resolution Practice Manual*, looseleaf (Toronto: CCH Canadian Ltd., 1998) para. 2000 at 2030; C.U.C. MacLeod, "Liability of ADR Neutrals," in *ibid.*, para. 50,180 at 50,195; "Arbitration and Mediation Institute of Canada Inc.: Rules of Procedure for Commercial Mediation" in *ibid.*, para. 123,000 at 123,050 (14-15); and "Arbitration and Mediation Institute of Ontario: Rules of Procedure for Mediation" in *ibid.*, para. 129,000 at 129,030 (23-24).

establish for their mediation, there will be legal limits on their ability to maintain confidentiality with respect to what takes place in mediation.

Either the mediator or a mediation participant may be under a legal obligation to report certain information to others if they receive it. For example, many jurisdictions require that information concerning harm done, or a risk of harm, to a child be reported to the appropriate authorities.[7] Health professionals, and perhaps others, may have an obligation to report threats to harm a third party to that third party.[8] Further, members of professional organizations may have a duty to report the apparent misconduct or incompetence of other members to their profession's governing body.[9]

There is also the prospect that a court or tribunal may require that a party or the mediator testify about information received or observations made during mediation. The contractual rules under which the mediation was conducted may not effectively preclude this, particularly if the testimony is sought by a stranger to the mediation. A stranger will not be bound by a contract between the parties and the mediator. Indeed, the parties themselves may not be bound by their contract in this respect, as such an agreement may be void as contrary to public policy to the extent that it purports to prevent the introduction into evidence of relevant information not privileged from disclosure as a matter of law.[10]

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[7] In Ontario, for example, this obligation arises under section 72 of the *Child and Family Services Act*, R.S.O. 1990, c. C-11.

[8] See J.R. Murphy III, "In the Wake of *Tarasoff*: Mediation and the Duty to Disclose" (1985-86) 35 Cath. U. L. Rev. 209; and R.D. Manes & M.P. Silver, *The Law of Confidential Communications in Canada* (Markham, Ont.: Butterworths, 1996) at 31-33.

[9] See C.C. Hess, "To Disclose or Not to Disclose: The Relationship Between Confidentiality in Mediation and the Model Rules of Professional Conduct" (1991) 95 Dick. L. Rev. 601; M. Irvine, "Serving Two Masters: The Obligation Under the Rules of Professional Conduct to Report Attorney Misconduct in a Confidential Mediation" (1994) 26 Rutgers L. J. 155; and 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 at 612ff.

[10] See "Protecting Confidentiality in Mediation," *supra* note 3 at 450-51; Freedman & Prigoff, *supra* note 3 at 41; Prigoff, *supra* note 3 at 7; and Manitoba Law Reform Commission, *Confidentiality of Mediation Proceedings* (Winnipeg: Manitoba Law Reform Commission, 1996) at 31, note 26 [hereinafter *Confidentiality of Mediation Proceedings*]. An argument may be made that by entering into the agreement each of the parties has encouraged the other to reveal confidential information which neither may then use "as a springboard for activities detrimental to the person who made the confidential communication": *Slavutych* v. *Baker*, [1976] 1 S.C.R. 254 at 262 [hereinafter *Slavutych*], Spence J. quoting with approval from Lord Denning, M.R. in *Seager* v. *Copydex, Ltd.*, [1967] 2 All E.R. 415 at 417 (C.A.). This is an instance in which the information is privileged from disclosure by operation of a rule of equity, however, and the critical question remains the scope of the law's protection and not that of the agreement. The equitable principle applied in *Slavutych* appears to

The issue of confidentiality is addressed in standards of practice promulgated by organizations of dispute resolution professionals. These typically require that mediators meet the reasonable expectations of the parties with regard to confidentiality;[11] that mediators discuss those expectations with the parties; that they "inform the parties of the limitations of confidentiality such as statutory, judicially or ethically mandated reporting prior to undertaking the mediation;"[12] and in some cases, even that mediators "inform the parties of circumstances under which mediators may be compelled to testify in court."[13]

Mediators are generally concerned that they not be compelled to testify about information received from mediation participants, or disclose notes made or opinions formed during a mediation, for reasons that go beyond meeting the expectations of confidentiality of the parties to that mediation. Those who might in future make use of that mediator's services will be deterred if they feel that the mediator will not or cannot maintain confidentiality. Once a mediator has been compelled to testify against the interests of a mediating party, it is likely that that party, at least, will no longer regard the mediator as impartial, no matter how objective the testimony may have been.[14] The spectre of the mediator's having testified "for" or "against" other mediating parties may undermine the faith that prospective mediation participants might otherwise have had in the impartiality of the mediator and in the mediation process itself.

Disputants may be deterred from resorting to mediation voluntarily, or from participating meaningfully in a mandatory mediation, if they know that a mediator may later be compelled to testify against their interests. The prospect of having to testify may lead mediators to alter the way they conduct mediations, to the possible

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be subject to a fairly broad "public interest" exception that may severely limit its application: see J.A. Epp, "Civil Pretrial Conference Privilege: 'A Cosmic Black Hole'?" (1993) 72 Can. Bar. Rev. 337 at 359.

11 See American Arbitration Association, American Bar Association and the Society of Professionals in Dispute Resolution, *Model Standards of Conduct for Mediators* (Washington, D.C.: AAA, ABA, SPIDR, 1995) Standard V.

12 American Bar Association Family Law Section Taskforce, *Proposed Standards of Practice for Lawyers Who Conduct Divorce and Family Mediation*, Standard VIII, Comment (C), online: Family Mediation Standards <http://www.mediate.com/ethics/abafamstds.cfm> (date accessed: 9 June 1999).

13 Academy of Family Mediators and the Association of Family and Conciliation Courts, *Standards of Practice for Divorce and Family Mediation*, online: AFM-AFCC Standards of Practice <http://www.mediate.com/ethics/afmstd.cfm> (date accessed: 9 June 1999).

14 See P.J. Harter, "Neither Cop Nor Collection Agent: Encouraging Administrative Settlements by Ensuring Mediator Confidentiality" (1989) 41 Admin. L. Rev. 315 at 325.

detriment of the process. For example, some mediators may be more restrained in making notes they might otherwise use to record their insights for later use in formulating or revising their mediation plans.[15] Others may limit the information they solicit in order to limit the prospect of being called to testify or the impact their testimony may have on the parties. They may increase their note-taking so that they can be better prepared to testify if called upon to do so.[16]

IV. LEGAL BASES FOR PROTECTING MEDIATED SETTLEMENT DISCUSSIONS

One basic premise of adversarial litigation is that all relevant probative evidence relating to the issues in dispute should be available to the court or tribunal called upon to resolve the dispute. Witnesses may be compelled to provide such evidence, even if it arose out of communications that the participants regarded as confidential. Relevant, trustworthy, and probative evidence may be excluded, however, if doing so serves some judicial or public policy that outweighs the public interest in having all relevant and probative evidence admitted. This is the basis on which a limited range of confidential communications are treated as privileged and inadmissible at common law.[17] Solicitor-client communications, for example, are given this protection because such communications are regarded as essential to the effective operation of the legal system.[18]

A. *The Common Law Privilege For Settlement Communications*

Communications made by the parties in an attempt to settle a dispute that is the subject of pending or contemplated litigation are generally treated as inadmissible at common law.[19] There is more than

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[15] See *ibid.*

[16] See J.P. McCrory, "Confidentiality in Mediation of Matrimonial Disputes" (1988) 51 Mod. L. Rev. 442 at 454.

[17] See *R.* v. *Gruenke*, [1991] 3 S.C.R. 263 at 295, L'Heureux-Dubé J. [hereinafter *Gruenke*].

[18] See *ibid.* at 288-89, Lamer C.J.

[19] See *Pirie* v. *Wyld* (1886), 11 O.R. 422 (C.A.) [hereinafter *Pirie*].

one possible rationale for this.[20] One explanation is that concessions and offers made in settlement discussions are excluded as irrelevant because they are hypothetical, conditional, or reflect only a desire to purchase peace, and therefore cannot constitute admissions. Another is that when parties to a dispute engage in communications made expressly or impliedly "without prejudice," they do so subject to an implied agreement to preserve confidentiality. The third possible explanation is that settlement communications are excluded on grounds of public policy, because there is a public interest in encouraging the settlement of disputes without involving the courts.

The relevancy rationale appears to be the basis for the common law exclusion in the United States.[21] As a result, the common law exclusion there is rather narrow, applying only to offers of settlement themselves and not to any surrounding discussion severable from such offers. Rule 408 of the United States Federal Rules of Evidence provides a broader exclusion of "evidence of conduct or statements made in compromise negotiations."[22] This rule, however, only makes the evidence inadmissible as proof of liability for, or invalidity of, a claim or its amount. It does not exclude such evidence when offered for some other purpose, such as to prove the bias or prejudice of a witness or to negative a contention of undue delay. The rule does not create a privilege and, so, does not restrict compelled disclosure during discovery[23] or in administrative or legislative proceedings. A mediation party who is not party to the litigation in which disclosure is sought

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[20] See D. Vaver, "'Without Prejudice' Communications—Their Admissibility and Effect" (1974) 9 U.B.C. L. Rev. 85; P.M. Perell, "The Problems of Without Prejudice" (1992) 71 Can. Bar Rev. 223; and J. Sopinka, S.N. Lederman & A.W. Bryant, *The Law of Evidence in Canada* (Markham, Ont.: Butterworths, 1992) at 719-22.

[21] See K.L. Brown, "Confidentiality in Mediation: Status and Implications" (1991) 1:2 J. of Disp. Resol. 307 at 312; Freedman & Prigoff, *supra* note 3 at 40; Green, *supra* note 3; Kirtley, *supra* note 3 at 11-13; "Protecting Confidentiality in Mediation," *supra* note 3 at 447; and Harter, *supra* note 14 at 328ff.

[22] Fed. R. Evid. 408 provides:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay or proving an effort to obstruct a criminal investigation or prosecution.

[23] See Harter, *supra* note 14 at 330; and Kirtley, *supra* note 3 at 13.

cannot raise an objection to the admission of confidential communications.[24]

In Anglo-Canadian law, on the other hand, a public or judicial policy of encouraging settlement is the predominant explanation for the exclusion of evidence of settlement communications.[25] A privilege applies to communications made when a litigious dispute was in existence or within contemplation, for the purpose of attempting to effect a settlement, with the express or implied intention that it would not be disclosed to the court if the attempt failed. [26] The privilege applies both at discovery and at trial.[27] It operates to exclude evidence of settlement discussions in proceedings between the mediation participants. It will also operate against strangers to the discussions in at least some situations.[28]

The privilege for settlement communications does not apply to all communications made in the attempt to settle a legal dispute, however. When it is alleged that settlement discussions resulted in an agreement, evidence about the discussions will be admitted to prove the existence or terms of the alleged agreement.[29] If it were otherwise, such agreements could not be enforced, and the objective of applying the privilege—encouraging settlement—would be substantially undermined. It would seem to follow that evidence of the settlement discussions that led to an agreement would also be received on issues going to the enforceability of the agreement, where it is alleged that the agreement achieved at mediation was obtained by fraud, misrepresentation, duress, undue influence, and the like.

Criminal law does not attach a privilege to settlement communications made outside of a plea-bargaining structure.

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[24] See Prigoff, *supra* note 3 at 4.

[25] See Sopinka, Lederman & Bryant, *supra* note 20 at 719; S.B. McNicol, *The Law of Privilege* (Sydney: Law Book, 1992) c. 8; U.K., Law Reform Committee, *Privilege in Civil Proceedings*, Cmnd. 3472 (London: Her Majesty's Stationery Office, 1967) at 14; *Pirie*, *supra* note 19 at 427; and *Middelkamp* v. *Fraser Valley Real Estate Board* (1992), 71 B.C.L.R. (2d) 276 (C.A.) [hereinafter *Middelkamp*].

[26] See Sopinka, Lederman & Bryant, *supra* note 20 at 722.

[27] See *I. Waxman & Sons Ltd.* v. *Texaco Canada Ltd. et al.*, [1968] 1 O.R. 642 (H.C.J.), aff'd [1968] 2 O.R. 452 (C.A.) [hereinafter *Waxman & Sons*]; and Sopinka, Lederman & Bryant, *supra* note 20 at 721.

[28] See *Waxman & Sons*, *supra* note 27; *Ed Miller Sales & Rentals Ltd.* v. *Caterpillar Tractor Co.*, [1990] 4 W.W.R. 39 (Alta. Q.B.), aff'd. [1990] 5 W.W.R. 377 (Alta. C.A.); and *Middelkamp*, *supra* note 25.

[29] See Sopinka, Lederman & Bryant, *supra* note 20 at 730; and McNicol, *supra* note 25 at 461ff.

Admissions made during an attempt to settle civil proceedings may later be introduced in criminal proceedings.[30] A statement made during settlement discussions about a debt to the effect that the debtor is unable to pay his or her debts is an act of bankruptcy, and may be introduced as evidence in subsequent bankruptcy proceedings to prove the commission of an act of bankruptcy.[31]

The courts have also held that the settlement communications privilege will not preclude evidence of threats made during settlement discussions.[32] This exception is not limited to threats of criminal conduct, contempt, or breach of statute, but will permit evidence of a threat to introduce into the litigation factual issues that would publicly embarrass the other party,[33] unless the court is satisfied that those issues would be relevant to the legal dispute between them.[34] This notion that relevance to the legal issues determines whether communications are privileged may extend so far as to permit the admission of any statement made during settlement discussions that was not relevant to the issues then being discussed.[35] Indeed, one provincial court of appeal has suggested that communications during settlement discussions are not privileged unless they constitute an offer of settlement or are adjudged "conducive to arriving at a settlement."[36]

Courts have held that discussions between spouses for the purpose of effecting a reconciliation are entitled to the same privilege as

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[30] See *R.* v. *Pabani* (1994), 17 O.R. (3d) 659 (C.A.), leave to appeal to S.C.C. refused [1994] 3 S.C.R. ix, where admissions made by a husband during mediation with his wife concerning his past physical abuse of her were admitted during his trial for her subsequent murder.

[31] See *In re Daintrey, ex parte Holt,* [1893] 2 Q.B. 116.

[32] See *Kurtz and Company* v. *Spence and Sons* (1887), 58 L.T. 438 (Ch.D.) (threat to challenge the validity of a patent, such threats being prohibited by statute); *Greenwood* v. *Fitts* (1961), 29 D.L.R. (2d) 260 (B.C.C.A.) (threat during settlement discussions that party would commit perjury and suborn witnesses to perjure themselves at trial if the dispute were not settled on his terms, and would flee the jurisdiction if judgment went against him, admitted to show he did not think he had a good case); and *725952 Ontario Ltd.* v. *Desuri Homes Inc.*, [1995] O.J. No. 1208 (Ont. Ct. (Gen. Div.)) (QL) (court refused to strike out portions of an affidavit alleging that during settlement discussions the opposite party admitted that he had lied during earlier proceedings, stated he would make up things to complicate the proceedings and make the affiants' lives miserable, and made a suggestion that the affiants took as an invitation to lie in connection with other proceedings against a third party).

[33] See *Underwood* v. *Cox* (1912), 26 O.L.R. 303 (Div. Ct.).

[34] See *Gagne* v. *Smooth Rock Falls Hospital* (1991), 39 C.C.E.L. 274 (Ont. Ct. (Gen. Div.)).

[35] See *Waldridge* v. *Kennison* (1794), 1 Esp. 143, 170 E.R. 306 (N.P.), and see discussion of this case in Perell, *supra* note 20 at 230; and Vaver, *supra* note 20 at 156-57.

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

discussions aimed at settling pending or contemplated litigation.[37] A series of English cases concerning reconciliation discussions established that the privilege for these discussions extends also to the evidence of persons who assist in the negotiations as mediators.[38] It was found to protect evidence with respect to communications between the mediator and one party in the absence of the other,[39] as well as communications between the parties. The privilege was held to belong to the parties, however, so that if they chose to waive it the mediator could be compelled to testify.[40]

In Ontario, the question of whether a privilege attached to communications between the disputants and the mediator was addressed in *Porter* v. *Porter*.[41] There, the parties had retained a psychologist to assist them as mediator in resolving a custody and access dispute, agreeing that he was not to be called as a witness in the litigation of their dispute if the mediation did not result in agreement. When it did not, however, one spouse sought to introduce into evidence a report the mediator had written. The court refused to receive it, holding that it was privileged. It found that a privilege arose both because the parties were engaged in settlement discussions and because Wigmore's four conditions for a professional or relationship privilege[42] were satisfied in the circumstances. That conclusion has been cited with approval in a decision in at least one non-matrimonial civil case.[43]

B. Privilege Based on the Wigmore Test For Privilege

The mere fact that communications result from and take place in a confidential relationship does not mean that they will be treated as

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[37] See *McTaggart* v. *McTaggart*, [1948] 2 All E.R. 754 (C.A.) [hereinafter *McTaggart*].

[38] See *ibid.* See also *Mole* v. *Mole*, [1950] 2 All E.R. 328 (C.A.) [hereinafter *Mole*]; *Henley* v. *Henley*, [1955] 1 All E.R. 590 (P.D. & A.) [hereinafter *Henley*]; *Theodoropoulas* v. *Theodoropoulas*, [1963] 2 All E.R. 772 (P.D. & A.); and *Pais* v. *Pais*, [1970] 3 All E.R. 491 (P.D. & A.); and McCrory, *supra* note 16.

[39] See *Mole*, *supra* note 38; and *Henley*, *supra* note 38.

[40] See *McTaggart*, *supra* note 37.

[41] (1983), 40 O.R. (2d) 417 (Unif. Fam. Ct.) [hereinafter *Porter*].

[42] See J.H. Wigmore, *Evidence in Trials at Common Law*, rev. by J.T. McNaughton (Boston: Little Brown, 1961) vol. 8 at para. 2285.

[43] See *Marchand (Litigation Guardian of)* v. *Public General Hospital of Chatham* [1997] O.J. No. 1805 (Ont. Ct. (Gen. Div.)) (QL).

privileged by the court.[44] Wigmore proposed that such communications should be treated as privileged only if the following four conditions are satisfied:

> (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.[45]

This test was cited with approval by the Supreme Court of Canada in *Slavutych*[46] and *Gruenke*.[47]

In *Gruenke*, the Court observed that privileges fall into two categories: "class" or "blanket" privilege on the one hand, and "case-by-case" privilege on the other.[48] The former refers to a privilege for which there is a presumption of inadmissibility when the relationship falls within the class, a presumption that is rebuttable if the party seeking admission can show that the communication falls within an exception to the rule. The Court described the solicitor-client privilege as falling within that category of privilege. Communications arising out of a relationship not covered by a blanket privilege, on the other hand, are presumed admissible unless it can be demonstrated, using the Wigmore test, that the communications should be treated as privileged. The demonstration must be made on a case-by-case basis, hence the label used by the Court to describe that category of privilege.

At issue in *Gruenke* was the admissibility in a murder trial of statements made by an accused to her church pastor and a lay church counsellor concerning the murder. Chief Justice Lamer noted that there would be no basis for a "class" or *prima facie* privilege for religious communications unless the policy reasons to support such a privilege were as compelling as those for the solicitor-client privilege.[49] He observed that

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[44] See Sopinka, Lederman & Bryant, *supra* note 20 at 623ff.

[45] Wigmore, *supra* note 42 [emphasis in original].

[46] *Supra* note 10.

[47] *Supra* note 17.

[48] See *ibid.* at 286-87.

[49] *Ibid.* at 288-89.

> [t]he *prima facie* protection for solicitor-client communications is based on the fact that the relationship and the communications between solicitor and client are essential to the effective operation of the legal system. Such communications are inextricably linked with the very system which desires the disclosure of the communication ... .[50]

As religious communications did not share these characteristics, he rejected the claim that they should enjoy a class privilege.

It can be argued that during mediation of a dispute that might otherwise require the courts' adjudication, the mediator and the parties are engaged in a process inextricably linked with the legal system. While their communications are not made for the same purpose as solicitor-client communications, the purpose of the communications is certainly one that attracts a *prima facie* privilege on policy grounds when parties communicate for that purpose without the assistance of a mediator. The relationship between mediator and disputants should therefore be a suitable candidate for *prima facie* protection on the basis of the analysis in *Gruenke.*

In *Porter,*[51] Gravely J. noted that the difficulty in applying the fourth condition in the context of a matrimonial dispute was the prospect that the mediation process would generate information of importance in deciding the future of a child.[52] Thus, it was the public interest in the correct disposal of litigation concerning the welfare of children that had to be balanced against the interest in fostering the mediator-disputant relationship and supporting the mediator's role in the justice system. Judge Gravely concluded that as a general rule it was "of far greater importance that parties, with the aid of a mediator, are able to engage in frank and open discussion that can lead to agreed upon arrangements in the interests of children than that some information may be lost to a court in a subsequent proceeding."[53] Other judges, however, have not been prepared to be as categorical.[54] Notwithstanding the important role played by mediation in the resolution of matters involving the interests of children, in that context the mediation relationship seems only to have been accorded a case-by-case privilege in Ontario.

Labour relations tribunals have been strongly protective of the mediator's role and have refused to compel mediators to give testimony

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[50] *Ibid.* at 289.

[51] *Supra* note 41.

[52] See *ibid.* at 421.

[53] *Ibid.*

[54] See, for example, *Welch* v. *Welch* (1994), 27 C.P.C. (3d) 190 (Ont. Ct. (Gen. Div.)).

about negotiations they have mediated even when evidence of the parties' direct negotiations would have been admissible. In *Carmelo Pelleriti* v. *Hotel and Restaurant Employees' and Bartenders' International Union*,[55] for example, a discharged employee complained that his trade union had not represented him fairly during mediation with his former employer in a grievance arising out of the termination of his employment. The respondent trade union sought to compel the testimony of the mediator, a grievance settlement officer employed by the ministry of labour. The mediator objected to giving evidence. The relevant statute was silent about whether the mediator was compellable. Applying the Wigmore test, the Board ruled that he was not compellable and that his settlement efforts were privileged.

Labour relations legislation in Ontario and other Canadian jurisdictions has for decades provided for the appointment of a conciliation officer or mediator to assist the parties in their attempts to make a collective agreement. While negotiations for a collective agreement may be said to involve a "dispute," it is not a dispute about alleged legal rights. Accordingly, the contents of the parties' unassisted negotiations are not privileged from admission into evidence in any subsequent legal dispute in which they are relevant. For example, evidence about the parties' negotiations would be central to a complaint that a party to collective bargaining had breached its statutory duty to bargain in good faith and make every reasonable effort to make a collective agreement.

In 1964, before the governing statute was amended to address this issue, the Ontario Labour Relations Board (OLRB) ruled that a conciliation board chairman should not be compelled to testify in an application by a union for consent to prosecute the employer for bargaining in bad faith, and that communications between one party and the conciliator in the absence of the other party were confidential and should be treated as inadmissible.[56] Although the Board's decision did not expressly refer to the Wigmore test, the following passage from its analysis focused on the elements of that test and, particularly, the balancing of interests contemplated by the fourth component of the test:

> It will usually be an essential first step to any settlement of their differences, through the efforts of a conciliator, that the parties are willing, frankly and openly, to discuss their respective positions in private with the conciliator without fear that he will later divulge

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55 [1986] O.L.R.B. Rep. 1759.

56 See *Building Service Employees' International Union, Local 183 and Trenton Memorial Hospital* (1964), 64 C.L.L.C. ¶16,302 (O.L.R.B.) [hereinafter *Trenton Memorial Hospital*]. See also *Retail Clerks Union, Local 401 and 4 Way Wholesale Ltd.*, [1979] 3 Can. L.R.B.R. 295 (Alta. L.R.B.).

> the confidences of their conversations to the opposite party. One must also take cognizance of the fact that in bargaining for collective agreement, parties are often driven, for one reason or another, to adopt rigid or intransigent positions. In such circumstances, the conciliator will have to utilize all the diplomatic skills at his disposal to break the resultant stalemate. His capacity to persuade the parties to move from entrenched positions and to compromise their differences will, in a large measure, depend upon their willingness to communicate freely to him explanations and information concerning the matters which induce or compel them to adopt their respective positions and what compromises or alternatives they might or might not be persuaded to accept in lieu thereof and in what circumstances....
>
> [I]t cannot be doubted that much of the explanations and information itself contained in these communications ... will originate only in the confidence that the contents of the conversations themselves will not later be disclosed to the other party. It seems to us that the element of confidentiality is indispensable to the inception and maintenance of any satisfactory or effective conciliatory relationship between the conciliator and the parties. It is not unreasonable to expect, therefore, subject to any exceptional and compelling reasons to the contrary which may exist in the particular case, that the mandatory and indiscriminate disclosure of these private and confidential communications would probably result in seriously undermining and damaging the relationship and the conciliation process as a whole. The resultant detriment to the labour-relations community and to the public at large which would be occasioned by such disclosure, would likely eclipse and outweigh any near-sighted benefit to be gained to the party seeking their disclosure for the immediate purposes of a particular case.[57]

Labour tribunals and courts in the United States have also addressed these issues. In *NLRB* v. *Joseph Macaluso, Inc.*,[58] for example, one of the issues in unfair labour practice proceedings before the National Labor Relations Board (NLRB) had been whether the respondent employer and the union representing its workers had come to an oral agreement on the terms of a collective agreement, which the employer later refused to execute in writing. On a motion by the Federal Mediation and Conciliation Service (FMCS), the NLRB quashed a summons directed to a mediator from the FMCS who had been involved in the meetings that the union claimed had resulted in agreement. The Ninth Circuit Court of Appeals upheld that decision. It acknowledged that the mediator's "tie-breaking" testimony would have been relevant and, indeed, probably determinative of the conflict in the testimony given by employer and union witnesses about what had taken place during negotiations. The court nevertheless accepted the view expressed by the NLRB in an earlier case, that

> [t]o execute successfully their function of assisting in the settlement of labor disputes, the conciliators must maintain a reputation for impartiality, and the parties to conciliation conferences must feel free to talk without any fear that the conciliator may subsequently make disclosures as a witness in some other proceeding, to the possible disadvantage of a

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[57] *Trenton Memorial Hospital*, *supra* note 56 at 1245.

[58] 104 L.R.R.M. 2097 (9th Cir. 1980) [hereinafter *Macaluso*].

> party to the conference. If conciliators were permitted or required to testify about their activities, or if the production of notes or reports of their activities could be required, not even the strictest adherence to purely factual matters would prevent the evidence from favoring or seeming to favor one side or the other. The inevitable result would be that the usefulness of the [FMCS] in the settlement of future disputes would be seriously impaired, if not destroyed. The resultant injury to the public interest would clearly outweigh the benefit to be derived from making their testimony available in particular cases.[59]

The court concluded that "the complete exclusion of mediator testimony is necessary to the preservation of an effective system of labor mediation, and that labor mediation is essential to continued industrial stability, a public interest sufficiently great to outweigh the interest in obtaining every person's evidence."[60]

After the OLRB decision in *Trenton Memorial Hospital*,[61] the Ontario Legislature amended the *Labour Relations Act* to provide that ministry officials and appointees are not competent or compellable witnesses respecting any information they receive when involved in collective agreement negotiations as mediator or conciliator,[62] and that no report of a conciliation officer and "[n]o information or material furnished to or received by a conciliation officer or a mediator" could be disclosed except to the minister of labour or certain ministry officials.[63] The latter prohibition has been interpreted as precluding a party from introducing into evidence what was said to or by a mediator in the absence of the opposite party, when offered to establish that the opposite party must have knowledge of what was said to, or heard from, the mediator,[64] even if the opposite party does not object to it.[65] The protection afforded by these limitations on disclosure is not solely for the benefit of the parties in the particular negotiations about which a question of disclosure later arose; it is for the benefit of the mediation process itself and cannot be waived by those parties alone.

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[59] *Ibid.* at 2100, Wallace J. quoting with approval from *Tomlinson of High Point Inc.* v. *United Brotherhood of Carpenters & Joiners of America, Local 3023*, 74 N.L.R.B. Dec. 681 at 685 (N.L.R.B. 1947).

[60] *Supra* note 58 at 2100.

[61] *Supra* note 56.

[62] See *Labour Relations Amendment Act, 1964*, S.O. 1964, c. 53, s. 11; now *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A, s. 120(1).

[63] *Ibid.* s. 119(2).

[64] See *Re United Steelworkers of America* v. *Shaw-Almex Industries Limited*, [1984] O.L.R.B. Rep. 109 at para. 15-16. See also *Re Overwaitea Food Group*, [1996] B.C.L.R.B. Dec. 278.

[65] See *United Brotherhood of Carpenters and Joiners of America* v. *Aristokraft Vinyl Inc.*, [1985] O.L.R.B. Rep. 799 at para. 14.

V. ISSUES IN REFORM—CRAFTING A STATUTORY MEDIATION PRIVILEGE

A. *Impressions of the American Experience*

Most states in the United States have statutes or court rules that address the confidentiality of mediation communications.[66] Some of these provide a "blanket" privilege: they simply make all communications during a mediation inadmissible.[67] Others more carefully define the terms used and provide for exceptions where the interest served by protecting confidentiality is seen as being outweighed by other interests. The appropriate form and scope of legislated protection have been mooted in the literature,[68] which cumulatively offers some guidance as to the issues that could or should be addressed in crafting a mediation privilege.

1. Defining the rule

Enforced confidentiality can be a burden as well as a benefit. To the extent that what is said and done during mediation cannot be the subject of testimony in any subsequent proceeding, rights and remedies that might otherwise flow from the words or actions of other participants cannot be enforced and do not effectively exist. The participants are in a different legal regime when they enter the defined circumstances. How will they know that?[69] Must they do something to signify their intention or consent to enter that different regime? Is an agreement to enter into mediation sufficient to signify that intention or consent? Must there be a written agreement to mediate that expressly provides for confidentiality? Will this different legal regime arise only in a court-connected mediation, or in one performed by persons who are approved or have particular credentials?

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66 See C.H. Macturk, "Confidentiality in Mediation: The Best Protection Has Exceptions" (1995) 19 Am. J. Trial Advoc. 411 at 422ff.

67 See Brown, *supra* note 21 at 331.

68 See, for example, Macturk, *supra* note 66; Brown, *supra* note 21; Harter, *supra* note 14; Kirtley, *supra* note 3; J.M. Hyman, "The Model Mediator Confidentiality Rule: A Commentary" (1998) 12 Seton Hall Legis. J. 17; "Protecting Confidentiality in Mediation," *supra* note 3; and M.A. Perino, "Drafting Mediation Privileges: Lessons From the Civil Justice Reform Act" (1995) 26 Seton Hall L. Rev. 1.

69 See Hyman, *supra* note 68 at 19.

There is the matter of defining the circumstances in which the protection will apply. What is a "mediation" for these purposes?[70] How is it distinguishable from arbitration and other forms of third party intervention in disputes? If a teacher intervenes in a playground dispute, or a bystander intervenes in an argument between two drivers following an accident, will they be obliged to keep what they hear confidential thereafter?[71]

There is also the issue of when the protection begins. Is it when the disputants meet with the mediator to engage in assisted mediation? What about an initial exploratory discussion between the disputants, or between a disputant and a mediator or mediation program staff, about whether they will or why they should have a mediation?[72] Similarly, when do the protected circumstances end?

What communications will be privileged: all of them, or just those relating to "the dispute"? Statutes in some states of the United States apply only to the latter.[73] In that event, is "the dispute" confined to the rights dispute that might otherwise have been the subject of litigation? Must the parties' dispute include a justiciable issue—a dispute about legally enforceable rights and obligations—before it can receive this protection? Is it sufficient that one of the parties subjectively believes there is a justiciable dispute, or must this be objectively true?

What constitutes a communication: is it limited to speech and writing, or is non-verbal conduct included? Must a communication occur in the presence of the mediator to be protected, or would communications between the parties while the mediator is out of the room be covered? Are all documents prepared for the purpose of the mediation covered, or only those that are exchanged by the parties or provided to the mediator?

In addition to defining the communications to be protected from disclosure in evidence, a carefully crafted mediation privilege should be clear about the sort of proceedings in which evidence of the communications will be inadmissible. Is the protection available only in pending proceedings arising out of the dispute being mediated[74] or to all

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[70] See Brown, *supra* note 21 at 326-29.

[71] See Kirtley, *supra* note 3 at 22.

[72] See Brown, *supra* note 21 at 329.

[73] See *ibid.* at 318; and Kirtley, *supra* note 3 at 35-39.

[74] In some provinces, the protection afforded to discussions in settlement conferences is limited in that manner: see Epp, *supra* note 10.

proceedings regardless of subject matter? Does the protection preclude reference to the communication in a subsequent mediation?[75] Does it operate against persons who were not participants in the mediation? It seems prudent to be clear also about whether the protection extends to pre-trial discovery or to proceedings before tribunals other than courts.[76]

In Canada, there is the added complication that provincial legislation cannot dictate rules of evidence in criminal proceedings and, presumably, other matters within federal jurisdiction. Thus, while provincial provisions may appear to make evidence of mediation communications inadmissible in all proceedings, this will not be so as a matter of law. This is a potential trap for unwary mediators and mediation participants.

2. Defining the exceptions

Otherwise discoverable documents should not be precluded from proof in subsequent proceedings merely because they are disclosed during mediation: "the privilege should not permit mediation to become a black hole into which parties can purposefully bury unhelpful evidence."[77] There is, however, a concern that mediation may become a discovery process in which protected communications become the means by which parties are alerted to facts of which they may then seek "otherwise discoverable" evidence.[78] Such a restriction could complicate litigation with inquiries into how parties discovered the evidence they present, when it is alleged that the issue was addressed in mediation. It would be worrisome to go to mediation before completing examinations for discovery in a regime with a mediation privilege that extends to "evidence arising" from mediation communications.

General provisions for mediation privilege should be clear about how the mediator or a mediation participant is to resolve conflicts between the provision's requirement that mediation communications be kept confidential, and disclosure requirements imposed by other statutes

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[75] See Hyman, *supra* note 68 at 33.

[76] See Kirtley, *supra* note 3 at 27-28.

[77] *Ibid.* at 39-41. See also Hyman, *supra* note 68 at 32.

[78] The reference to "evidence arising from anything said" in a Saskatchewan provision, referred to *infra* note 93 and accompanying text, appears to be an attempt to address that concern.

or by the rules governing professions to which a mediator or mediation participant may belong.[79]

When a public body participates in or provides mediation, there will be questions whether privilege provisions are overridden by, or override, freedom of information legislation or the provision of any "sunshine" law requiring that proceedings of the public body take place in public. A provision of general application with respect to mediation privilege should explicitly address those conflicts as well as conflicts between the general provisions and provisions of other legislation governing mediation in specific circumstances.

Assessments of the extent to which an exception may be warranted for communications about criminal conduct generally distinguish between admissions of past criminal behaviour, on the one hand, and admissions of ongoing criminal conduct and threats or expressions of intent to commit crimes in the future, on the other. The nature of the crime is also a consideration. A problem frequently mooted is whether privilege should apply to communications indicating that a participant intends to cause serious physical harm or death to another mediation participant or to a third party.[80] Legislation may provide an exception in those circumstances, allowing the mediator or any other participant in receipt of such communications to warn the intended victim. Commentators have suggested that admissions of past crime do not raise a comparable concern, and that excepting such admissions from the privilege would unduly chill the mediation process.[81]

The purpose of a strong mediation privilege is to enhance the prospect that an agreement will result from mediation. If privilege precludes evidence of all mediation communications, however, then an agreement that results from offer and acceptance communicated during mediation will be unenforceable. The object of the privilege warrants an exception for disclosure to prove the terms of, and enforce, an agreement that results from mediation.[82] It follows that disclosure should likewise be permitted to defend against enforcement where fraud, duress, misrepresentation, and the like are alleged to have

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[79] See Said, *supra* note 9; Hess, *supra* note 9; and Irvine, *supra* note 9.

[80] See E.L. Kuester, "Confidentiality in Mediation: A Trail of Broken Promises" (1995) 16 Hamline J. Pub. L. & Pol'y 573 at 593.

[81] See Kirtley, *supra* note 3 at 45.

[82] See "Protecting Confidentiality in Mediation," *supra* note 3 at 452-54.

occurred during mediation.[83] Some American statutes provide that these exceptions for enforcement and defence apply only to written agreements.[84]

Issues also arise about whether the existence or terms of an agreement that results from mediation can be kept confidential from third parties. Maintaining the confidentiality of the resultant agreement is, arguably, not as essential to the efficacy of the mediation process as is maintaining the confidentiality of the surrounding discussions.[85] Commentators have suggested that third parties should at least be entitled to disclosure of such agreements to prove fraud, illegality, or duress,[86] or where disclosure of the agreement would otherwise be required by law.[87]

A mediation privilege will not foster confidence in the mediation process if it is seen as a potential cloak for mediator misconduct. Thus, an exception for disclosure in actions by a mediating party against the mediator is often seen as appropriate.[88] If the time frame covered by the privilege begins before the parties and mediator enter into an agreement to mediate, an exception will be necessary also to permit enforcement of the terms of that agreement, including enforcement by the mediator of the parties' obligations with respect to the mediator's fees and disbursements.

A distinction should be made between circumstances in which a party is required or permitted to testify about, or introduce evidence of, mediation communications, and circumstances in which the mediator may be required to do so. Except in actions by or against the mediator, there is, arguably, no reason to permit or require the mediator to testify that outweighs the attendant potential for damage to the mediation process. With the exception of the mediator's notes, recollections, and private opinions, any relevant information known to the mediator will be

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[83] See *ibid.* at 453; and Kirtley, *supra* note 3 at 51.

[84] See J.M. Assey Jr., "Mum's the Word on Mediation: Confidentiality and *Snyder-Falkinham v. Stockburger*" (1996) 9 Geo. J. Legal Ethics 991; and Kuester, *supra* note 80 at 581-82.

[85] See Kirtley, *supra* note 3 at 43.

[86] See Kuester, *supra* note 80 at 591.

[87] One example is when there has been a "Mary Carter" agreement, pursuant to which the plaintiff in an action settles with a co-defendant on terms that leave the defendant in the action, but limit its liability to an amount that depends on the amount recovered at trial from the co-defendant(s) who did not settle: see Hyman, *supra* note 68 at 49.

[88] See Hyman, *supra* note 68 at 37-38; and Kirtley, *supra* note 3 at 49.

known to at least one other mediation participant.[89] The temptation to secure independent or "tie-breaking" evidence should be resisted for the reasons elaborated in the labour relations jurisprudence.

B. *Canadian Legislation*

In contrast with the comprehensive legislation that has developed in at least some states of the United States, Canadian legislation providing for mediation of disputes has used a variety of simple formulae for the protection of confidentiality. A federal statute on environmental assessment, for example, provides that

> [n]o 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.[90]

The Ontario *Children's Law Reform Act*[91] provides that if the parties so request, a court to which an application for custody of or access to a child is made may appoint a person selected by the parties to mediate any matter specified in the order. If the parties agree that the mediator is to report to the court only on whether or not they have come to agreement, then the statute provides that "evidence of anything said or of any admission or communication made in the course of the mediation is not admissible in any proceeding except with the consent of all parties to the proceeding in which the order was made ... ."[92] Court-annexed mediation in Saskatchewan is protected by this provision:

> Evidence arising from anything said, evidence of anything said or evidence of an admission or communication made in the course of mediation or in a mediation screening and orientation session is not admissible in any cause or matter or proceeding before a court, except with the written consent of the mediator and all parties to the cause or matter in which the mediator acted.[93]

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[89] See Harter, *supra* note 14 at 349.

[90] *Canadian Environmental Assessment Act*, S.C. 1992, c. 37, s. 32(2).

[91] R.S.O. 1990, c. C-12, s. 31.

[92] *Ibid.* s. 31(7).

[93] *The Queen's Bench Act*, R.S.S. 1978, c. Q-1, as am. by *The Queen's Bench (Mediation) Amendment Act, 1994*, S.S. 1994, c. 20, s. 54.3.

The Practice Directions issued by the Ontario Court (General Division) in 1994[94] and 1995[95] concerning its Toronto Region Alternative Dispute Resolution Pilot Project provided that:

> 5.1 Prior to participating in an A.D.R. session, the parties are required to enter into and file at the A.D.R. Centre an agreement in Form 3, indicating their agreement that
>
> (a) statements made and documents produced in an A.D.R. Session or in the pre-session conference, and not otherwise discoverable, are not subject to disclosure through discovery or any other process and are not admissible into evidence for any purpose, including impeaching credibility,
>
> (b) the notes, record, and recollections of the judge or dispute resolution officer conducting the A.D.R. Session are confidential and protected from disclosure for all purposes,
>
> ...
>
> 5.2 Users of private A.D.R. services may wish to enter into express agreements addressing, among other things, the matters described in paragraph 5.1, clauses (a) and (b).[96]

Rules promulgated by the Ontario Courts' Civil Rules Committee for the Mandatory Mediation Program that came into effect in January 1999, however, provide only that "[a]ll communications at a mediation session and the mediator's notes and records shall be deemed to be without prejudice to settlement discussions."[97] This leaves the confidentiality of mediations in that program subject to all the vagaries of the law concerning the settlement discussion privilege, including the potential difficulties for interest-based mediation of the rights and relevance orientation of the case law. Mediators may be obliged to testify about mediation communications whenever parties would be permitted to do so, as when there is a dispute about the existence, meaning, or enforceability of an agreement alleged to have arisen from mediation. By tying confidentiality to a privilege that is the parties' to enforce or waive in their own interests, the new rule does not appear to afford the mediation process the sort of independent protection that it arguably should have.

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[94] See The Honourable R. Roy McMurtry, Chief Justice of the Ontario Court and The Honourable A.G. Campbell, Regional Senior Justice, "Practice Directions—Alternative Dispute Resolution—1994" (1994), 16 O.R. (3d) 481.

[95] See The Honourable R. Roy McMurtry, Chief Justice of the Ontario Court and The Honourable A.G. Campbell, Regional Senior Justice, "Practice Directions—Alternative Dispute Resolution—1995" (1995), 24 O.R. (3d) 161.

[96] *Ibid.* at 169.

[97] Ontario, *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as am. by O. Reg. 453/98, r. 24.1.14.

VI. THE 1996 MANITOBA LAW REFORM COMMISSION STUDY

The Manitoba Law Reform Commission ("Commission") recently studied the question of confidentiality of mediation proceedings at the suggestion of the Manitoba Bar Association's Alternative Dispute Resolution Section.[98] Its April 1996 report on the subject addressed the question of whether a statutory privilege should attach to all mediation communications, so as to make evidence about them inadmissible in subsequent proceedings.

The Commission took note of two difficulties with the coverage afforded by the common law privilege for settlement discussions. One was that communications may not be protected if a court later concludes that they were not "for the purpose of settlement" of issues raised by the parties' legal dispute. The Commission observed that this "leads to the advisability of employing lawyers to conduct carefully-worded negotiations,"[99] and that

> [t]he *Springridge* case illustrates why advocates of mediation privilege do not favour simply extending the common law privilege to cover mediation as well. In "lawyerless, freewheeling" 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. 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.[100]

The other difficulty noted by the Commission was the uncertainty about whether the common law privilege protects negotiations against discovery or admission into evidence by a third party who was a stranger both to the negotiations and to the dispute with which those negotiations were concerned.[101]

The Commission recited many of the arguments made in the literature for and against according a privilege, particularly a "blanket" privilege affording protection without exception.[102] It also referred to and reaffirmed the conclusion it had reached when it earlier studied the need for a medical privilege: that new privileges should not be created by

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98 See *Confidentiality of Mediation Proceedings, supra* note 10 at 2.

99 *Ibid.* at 6.

100 *Ibid.* at 7, referring to *Re Springridge Farms Ltd., supra* note 36 [footnote omitted].

101 See *Confidentiality of Mediation Proceedings, supra* note 10 at 7-8.

102 *Ibid.* at 13-18.

statute but, rather, it should be left to the courts to apply privilege in accordance with the Wigmore test on a case-by-case basis.[103]

The Commission was prepared, however, to recommend a more limited statutory protection grounded on the principle that litigants who attempt to resolve their differences through mediation should be neither advantaged nor disadvantaged relative to those who do so by resorting to negotiation without a mediator. The Commission assumed that a court would likely extend the common law privilege for settlement negotiations to communications for which the mediating parties and the mediator were all present. Thus, it said "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."[104]

The Commission stated that its proposed reform would focus 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.[105]

To that end, it proposed that the Manitoba *Evidence Act*[106] be amended to provide that mediators are non-competent and non-compellable as witnesses concerning mediation communications. Thus, a mediator[107] could neither be compelled to testify, nor voluntarily testify, in any legal proceeding[108] about information acquired or opinions formed while acting as a mediator,[109] nor to produce notes made in that capacity. This

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[103] *Ibid.* at 18-19.

[104] *Ibid.* at 19.

[105] *Ibid.*

[106] R.S.M. 1987, c. E150.

[107] The Commission considered whether to define "mediator" by reference to the circumstances giving rise to the mediation or the qualifications of the mediator. It concluded that for this purpose "mediator" should be defined to mean someone whom mediating parties have identified as the mediator in a written agreement executed prior to the mediation, whether he or she is to be paid or not, and that the protection should extend to an agent or employee of the mediator: see *Confidentiality of Mediation Proceedings*, *supra* note 10 at 22-25.

[108] The Commission recommended that this testimonial immunity be extended to legal proceedings that are subject to provincial constitutional authority, noting that provincial legislation could not provide testimonial immunity in matters, such as criminal proceedings, in which the federal government has constitutional authority over the law of evidence: see *ibid.* at 28-29.

[109] *Ibid.* at 27.

immunity would apply whether or not the issue in the subsequent proceeding was the same as any issue in the mediation, and regardless whether the issues in mediation had been resolved or not. The Commission observed that this would "create 'a level playing field' by ensuring that 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."[110]

The Commission also proposed that the testimonial immunity afforded by its proposed statutory amendments should not apply (1) if the decisionmaker 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 (described by the Commission as a "Discretionary Override to Protect the Public Interest");[111] (2) 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);[112] (3) where the mediator and mediation parties agree in writing to waive its application;[113] or (4) to a mediator who conducts a mediation under another Act or regulation.[114]

The Commission prefaced its study and recommendations with the observation that "[a]ny 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."[115] Applied to the issue at hand, this framed the interest in protecting confidentiality as an individual interest, and set it up against an interest of the justice system and, hence, a public interest. The interest in protecting confidentiality could have been framed as a public interest. The interest in the availability of evidence to the litigation of a dispute, particularly a private civil dispute, could have been framed as an individual interest of the disputants. Each interest can be viewed from both an individual and a public interest perspective.

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[110] *Ibid.* at 19-20.

[111] *Ibid.* at 30-31.

[112] *Ibid.* at 31-32.

[113] *Ibid.* at 32-33.

[114] *Ibid.* at 33-34.

[115] *Ibid.* at 2.

The competing interests have to be compared from the same perspective. The question ought to be "which of the competing public interests—the interest in encouraging settlement or the interest in having all relevant evidence available to the court or tribunal—is more compelling in the circumstances?" The appropriate framing of the competing interests is of particular concern when it is suggested that decisionmakers be given a power to authorize disclosure of confidential communications after the fact "to protect the public interest."

In formulating its recommendations for reform, the Commission took the approach that disputants should be neither advantaged nor disadvantaged, as regards the protection from disclosure of their settlement negotiations, by resorting to mediated rather than unmediated negotiation. It therefore focused on identifying the differences between mediated and unmediated negotiation and assessing whether and to what extent those differences warranted differential treatment.

The Commission seems to have thought that the only relevant difference between unmediated negotiations and mediated negotiations in joint session, when each party hears what the other says, is that the mediator is present as a witness. All that was required to level the playing field with respect to communications in joint session, therefore, was to preclude the possibility of the mediator's testifying. It is not apparent whether the Commission thought this was the only respect in which communications in mediated joint sessions might differ from those in unmediated negotiations, or whether it simply felt that such differences as there might be did not warrant protection different from that accorded to unmediated negotiations.

The Commission did acknowledge, as I have already noted, that the existing state of the law concerning the privilege attaching to settlement discussions made it advisable that lawyers be employed to conduct the negotiations.[116] It also noted that advocates of mediation privilege speak of "lawyerless, freewheeling" mediation sessions in which the issues discussed go beyond those upon which negotiations between litigation lawyers would "narrowly and legalistically focus."[117] The implications of that dichotomy want further consideration.

In fact, unmediated negotiations about the settlement of litigation are typically conducted by lawyers as spokespersons for, and generally in the absence of, the disputants they represent. They tend to

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[116] *Ibid.* at 6.

[117] *Ibid.* at 7.

focus on what the lawyers are engaged to focus on: the outcome each party seeks if the matter goes to a third-party decisionmaker for determination, the likelihood of success based on the disputed legal and factual issues, and the costs and uncertainties associated with pursuing the process. The lawyers exchange offers of settlement in an attempt to find a compromise they can sell to their respective clients as a fair measure of their legal entitlement suitably discounted to reflect those considerations.[118] Any accompanying explanation tends to focus on allegations relevant to the legal issues and the client's willingness to buy peace by compromising—communications that judges are likely to regard as sufficiently connected with their conception of settlement negotiations to warrant treating them as privileged.

By contrast, direct communication by and between disputants is generally encouraged in mediation. The disputants' lawyers, if present, may play a less controlling role, serving more as advisors and resources to their clients and less as advocates for them. Discussions in mediation tend to focus on issues of importance to the disputants without limiting the discussion to considerations that would be relevant to a determination of the parties' legal rights, or to outcomes that fall within the range of remedies available from a court in vindication of those rights. The participants are encouraged to explore alternatives without first committing to them, to go behind opening positions to the interests they reflect. An interest-oriented or problem-solving approach in mediation does not ignore the rights issues at stake,[119] but encourages thinking outside or without regard to the box drawn by those issues, in the search for solutions that may be more satisfactory to both parties than any that lie within that box. As communications range outside that box, however, they may also be venturing outside the protection from disclosure that a court or tribunal might later afford them.

It might be argued that the differences between typical unmediated and mediated negotiations described here warrant extending the privilege that attaches to mediated negotiations, so as to ensure that what actually takes place in one is as fully protected as what actually takes place in the other.

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[118] See generally C. Menkel-Meadow, "Toward Another View of Legal Negotiation: The Structure of Problem Solving" (1984) 31 U.C.L.A. L. Rev. 754; and C. Menkel-Meadow, "Lawyer Negotiations: Theories and Realities—What We Learn From Mediation" (1993) 56 Mod. L. Rev. 361.

[119] Rights-oriented considerations form part of the BATNA (Best Alternatives to a Negotiated Agreement) against which disputants will assess their willingness to adopt any option generated by an interest-oriented or problem-solving process.

It might also be argued that the differences described are not the necessary consequence of introducing a mediator into settlement negotiations. Processes described as mediation can be as rights-oriented as typical unmediated, lawyer-conducted settlement negotiations—and some are. More importantly, perhaps, unmediated negotiations can take a more interest-oriented or problem-solving approach. They can be structured so that the parties play a more direct role. Communications in unmediated negotiation can be as wide-ranging as mediation communications are said to be. One of the benefits parties may derive from participating in mediation is an increased ability to resolve disputes in an interest-based way without the assistance of a mediator.[120] Thus, if the existing law concerning privilege for settlement communications is problematic for joint sessions in mediation then, arguably, it is similarly problematic for unmediated settlement negotiations. While it may be true, therefore, that the scope of privilege for settlement discussions should be the same for unmediated negotiations as for joint sessions in mediation, it does not follow that no change in that scope is needed to give mediation communications appropriate protection.

Even if the focus and manner of the underlying negotiation is in all possible respects the same with or without a mediator, the mediator still adds something to the process by helping the parties overcome or tunnel through psychological and other barriers to agreement that are inherent in unassisted negotiation.[121] It may be that introducing mediated settlement negotiation into the litigation process at some stage is more likely to achieve settlements—or to do so at less cost to the disputants and with less consumption of public resources—than when settlement is the subject only of unmediated negotiations. That is certainly one of the major premises of court-connected programs that mandate attendance on a mediator as part of the litigation process. Canadian law recognizes a public policy interest in encouraging the negotiated settlement of disputes. That is the policy basis for the common law privilege presently accorded to settlement discussions, mediated or otherwise. Mediation may better advance that public interest and, accordingly, may warrant advantaging mediation over other forms of negotiation when balancing the need for protection of communications in mediation against other competing interests.

The Commission acknowledged the argument that advantaging mediation would encourage resort to it and increase the likelihood of

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[120] See McCrory, *supra* note 16 at 443.

[121] See R.A.B. Bush, "'What Do We Need a Mediator For?': Mediation's 'Value-Added' For Negotiators" (1996) 12 Ohio St. J. on Disp. Resol. 1.

settlements occurring without resort to litigation. It seemed to accept one commentator's assertion that this argument is based on "the same justifications of expediency used to justify plea-bargaining when it became an accepted and necessary practice."[122] The Commission then aligned that argument with criticisms of the efficacy of the justice system, which it said it could not assess without engaging in an "in-depth consideration of the strengths and weaknesses of the entire Canadian justice system" that, in turn, was beyond the scope of the question it had set out to study.[123]

Some advocates of mediation do position it as an alternative to adjudication, and offer criticisms of the traditional justice system in its support. A more positive perspective is that mediated negotiation is an alternative to unmediated negotiation, which is well established as an alternative to and complement of adjudication. The justice system already values the negotiated settlement of disputes that might otherwise require adjudication. In practical terms, at least, negotiated settlement and adjudication each depend on the efficacy of the other for its own efficacy. If mediated settlement negotiation is more efficacious than the unmediated sort, then it is no slight to the justice system to suggest that the benefits of increased protection of confidential settlement discussions in mediation outweigh the disadvantages such protection might create.

The Commission's approach to the problem of confidentiality in mediation helpfully underscores the need to distinguish between the protection appropriate to the parties and the protection appropriate to the mediator. Any assessment of the protection from disclosure that communications in mediation should receive must take into account the two features identified by the Commission: (1) that in caucus mediators may receive information from one party that is intended to be, and is, kept confidential from the other party, and (2) that the mediator may take notes of and form opinions about and is, in any event, a witness to communications in joint session and caucus.

It does seem appropriate to adopt a basic rule that the mediator cannot testify or be compelled to testify about information obtained while acting as mediator, and to apply the rule to all future proceedings and against third parties as well as the mediating parties. The provision that this forced testimonial immunity could be waived by the mediating parties and the mediator, and not just by the mediating parties alone, is

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[122] *Confidentiality of Mediation Proceedings*, *supra* note 10 at 14-15, citing Murphy, *supra* note 8 at 241.

[123] *Confidentiality of Mediation Proceedings*, *supra* note 10 at 15.

sensible, as is the provision that the mediator may testify in subsequent proceedings in which a party sues the mediator, or *vice versa*.

The Commission said it did not believe that the proposed "discretionary override" would be used by decisionmakers to restrict the protection "more than necessary," since the fact that the immunity had been conferred on mediators in general terms would signify that the immunity was to have priority over the need for a mediator's evidence in all but extraordinary circumstances. The Commission suggested that such circumstances might exist "[w]here ... 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'."[124]

A court or other decisionmaker might interpret the proposed legislation as having simply removed uncertainty about whether caucus communications that are not revealed to the opposite party, and which for that reason might not be treated as settlement discussions between disputants, should nevertheless be as protected as settlement discussions conducted between disputants directly or through agents. On that view, the proposed discretionary public interest override might be used to carve out of the mediator immunity the same sort of exceptions that apply to unmediated settlement discussions. That would unnecessarily undermine the role of mediators in the manner previously discussed. A more narrowly framed exception could address the identified problem of mediations with unlawful purposes without putting the scope of protection in as much doubt.

The Commission offered this explanation for its proposal that mediator immunity should not apply in any subsequent action between the mediating parties to enforce, amend, or set aside any agreement that results from the mediation:

> 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,
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> > 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

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[124] *Ibid.* at 31.

> reached agreement should not be forced to purchase free discussion at the cost of waiving traditional contract law protection against unfairness.[125]

The protection statutes criticized in the commentary quoted by the Commission are statutes that "grant blanket protection to all communications made in mediation,"[126] thus proscribing testimony by the parties as well as by the mediator. The author of that commentary did identify two situations in which confidentiality should yield to the need for evidence in order to preserve the integrity of the mediation process: (1) when one of the parties sues to enforce or rescind an agreement that results from mediation, and (2) when a party brings suit alleging breach of duty by another party or the mediator during the mediation process. The author argued that a party should be allowed to adduce evidence of mediation communications in those circumstances. The author observed, however, that "[t]he decision to allow the admission into evidence of certain communications made in mediation does not determine who should be allowed to testify to them."[127] The author went on to review the arguments for a separate mediator privilege not to testify concerning even communications that fall within an exception to the privilege for party-party communications, about which the parties themselves would therefore be free to testify.[128]

The exception proposed by the Commission is not needed to make the parties' testimony about, and documents from, mediation discussions admissible in an action to enforce or set aside an agreement reached in mediation. Without the proposed exception, the parties are deprived only of the mediator's "tie-breaking" testimony. In that respect they are in the same position as parties to unmediated negotiations, who must rely on direct communication, written or oral, in order to have proof of the terms of any agreement they may think they have reached. They have the same means at their disposal to minimize potential problems of proof. As the jurisprudence of labour tribunals suggests, the public interest in providing a "tie-breaking" witness is not as great as the public interest in ensuring the integrity and efficacy of the mediation process.

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125 *Ibid.*, citing "Protecting Confidentiality in Mediation," *supra* note 3 at 453.

126 "Protecting Confidentiality in Mediation," *supra* note 3 at 452.

127 *Ibid.* at 454.

128 See *ibid.* at 454-57.

VII. CONCLUSION

The common law protection for settlement discussions is intended to foster the negotiated settlement of disputes without unduly compromising other important interests served by the legal system. In formulating that protection and exceptions to its application, the courts have had to balance many of the considerations that must be weighed in crafting appropriate protection for the confidentiality of communications in mediation. That has been done, naturally enough, from a perspective that reflects the way lawyers have traditionally approached the settlement of disputes that they first define and then value in legal terms. This is reflected in, among other things, the courts' use of notions of relevance to determine boundaries between communications that serve the purpose of the privilege, and should therefore be protected, and those that do not and should not. This rights-based approach may disadvantage the kind of negotiation mediation encourages. On that basis alone, the common law privilege may have to be rethought, clarified, and adjusted to facilitate the growing use of mediation as a means of resolving disputes.

This is not to say that the common law position should be ignored or abandoned in favour of a blanket privilege. That may harm a core interest otherwise served by protecting confidentiality: it may make it difficult to enforce any agreement reached in mediation, for example, or create a bargaining environment that is uncomfortable because while the parties are in it, rules that would normally constrain improper conduct will be harder to enforce. An overly broad confidentiality statute or rule for mediated negotiation may attract a limiting judicial interpretation if it appears not to have addressed important concerns reflected in the existing case law.

The Manitoba Law Reform Commission so defined the questions it addressed that an important issue remained unstudied: whether the scope of the privilege that attaches to inter-party settlement discussions should be clarified or changed for mediation in ways that would also bear application to unmediated negotiation. It may be unduly confining to focus only on the need for reform of protection for direct negotiations conducted in the presence of a mediator.

Any effort at crafting appropriate protection for confidential mediation communications must address two distinct but related questions: (1) what communications should be protected from disclosure of any kind, and (2) what testimonial immunity the mediator should have. The principles that guide assessment of the first issue are not the

only ones relevant to the second. The interest of mediators in maintaining the appearance of impartiality, and the public interest in the efficacy of mediation, ought to be given significant weight. For the reasons elaborated by labour relations tribunals, mediators should not become the potential eyes and ears of the court or tribunal during mediation merely so that possible conflicts in the parties' later testimony can be more easily resolved.

Exceptions to privilege for actions to enforce or to set aside a mediated agreement, and for actions between the parties and the mediator, exemplify a more general issue about maintaining the enforceability of the legal obligations that, but for the privilege, would exist or arise enforceably during the mediation process. There seems to be no compelling reason why evidence of serious criminal conduct committed during mediation should be inadmissible in proceedings to prosecute the perpetrator. Similarly, evidence of tortious misconduct that occurs during mediation—conversion, assault, or defamation, for example—should be admissible in an action to remedy that misconduct. A privilege should likewise permit the admission of evidence of mediation communications in an action for an injunction to restrain a continuing or threatened breach of a contractual or statutory obligation to keep such communications confidential,[129] or for damages for a breach of that obligation, for example.

Overly broad and simply worded confidentiality provisions may do unnecessary harm as well as the intended good. In the long term, it is in the interest of the mediation process that such provisions evolve to reflect a finer balance of the interests in play, while at the same time providing clarity and certainty, and reducing the dependence of disputants on lawyers to keep settlement discussions within protected bounds.

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[129] See Hyman, *supra* note 68 at 51.