

CHAPTER 10

Confidentiality and Judicial Mediation in Canada

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INTRODUCTION

[10.10] Increasing access to justice is an important goal within Canada's court system, as delays and expense and their associated frustrations create obstacles for many litigants in the traditional trial process. One strategy for reducing these obstacles has been the promotion of mediation as a way to settle conflicts. Alongside the place of private mediation as an alternative to the trial process, court-annexed mediation programs have also come to occupy a position of considerable importance within the reformed civil justice system across the country.¹ These programs have become numerous in recent years and have expanded to courts beyond the trial level. Courts have created a variety of special mediation programs, presided over either by judge-mediators or by private mediators.

1 On court-connected mediation in Canada, see, in addition to the works cited below, H F Landerkin and A J Pirie, "Judges as Mediators: What's the Problem with Judicial Dispute Resolution in Canada?" (2003) 82 *Canadian Bar Review* 249; L Otis and E H Reiter, "Judicial Mediation in Québec", in N Alexander (ed), *Global Trends in Mediation* (2nd ed, Kluwer Law International, Alphen aan den Rijn, 2006), 107; J-F Roberge, "Could Judicial Mediation Deliver a Better Justice? Supposing We Trained Judges as Experts?" (2010-11) 1(1) *Journal of Arbitration and Mediation* 1.

These programs are now an established part of the Canadian legal landscape, but a challenge confronts their continued development: the uncertainty surrounding the protection of the confidentiality of mediation proceedings. This Chapter will address this challenge by, first, providing a cross-Canada review of the different judicial mediation programs and, secondly, assessing the protection of confidentiality within these programs.² From the start, the ideal has been strict protection for the confidentiality of mediation communications and process. In practice, however, this ideal has begun to be tested with the increased use of court-connected mediation programs. Questions have arisen about the appropriate level of protection and, more fundamentally, about the nature and justification of that protection. These challenges are the focus of this Chapter.

JUDICIAL MEDIATION PROGRAMS IN CANADA

[10.20] A general trend in Canada favours the use of mediation procedures in courts. As of today, all Canadian provinces and territories have some form of mediation procedure as part of the judicial process for at least some types of cases and often within the courts themselves.³ The constitutional division of power in Canada, which puts administration of justice under provincial jurisdiction, means that there is a diversity of judicial mediation programs, with distinct legislative frameworks. In this section, we provide a brief overview of the current state of judicial mediation in some of the provinces where mediation programs are most developed. This will provide a foundation for the detailed consideration of confidentiality protection below.

Québec

[10.30] After introducing mediation by judges at the Court of Appeal in 1997, in 2002 Québec became the first (and still only) jurisdiction in the world to create a fully hybrid system of mediational and adjudicative justice in all courts and administrative tribunals.⁴ Today, consensual mediation supported by judges acting as neutral facilitators is available to all litigants in all courts and in every area of law, including family, civil, commercial, administrative and (in the form of “facilitation” session) criminal. The result is an integrated system of justice, bringing together traditional and alternative models of conflict resolution.

2 Given the diverse forms of mediation programs within the Canadian courts, it is useful at this point to define what we mean by “judicial mediation”. The term as we use it refers to a mode of legal dispute resolution based on negotiation and integrated within the formal system of justice. Depending on the province, judicial mediation can be consensual or mandatory and the mediator can be a judge, an institutional mediator (such as prothonotary or a master) or a private mediator acting pursuant to a reference order. Some of the different permutations of judicial mediation programs that have emerged in various provinces will be analysed below.

3 For the purpose of this Chapter, mediation is defined as a consensual mode of legal dispute resolution based on negotiation and integrated within the formal judicial system. Judicial mediation is conducted by a judge acting as a neutral negotiator or a mediator: see L Otis, “La Conciliation Judiciaire à la Cour d’appel du Québec” (2003) 1(2) *Revue de Prévention et de Règlement des Différends* 1.

4 L Otis and E H Reiter, “Mediation by Judges: A New Phenomenon in the Transformation of Justice” (2006) 6 *Pepperdine Dispute Resolution Law Journal* 351 at 352-353.

The general procedural framework is set out in the *Code of Civil Procedure* (Québec) for first instance courts and the Court of Appeal.⁵ The process is always voluntary and without cost to participants: parties may present a “Joint Request for Mediation” at any point in the judicial process, and the Chief Justice of the court in question may encourage (but never compel) the parties to seek mediation.⁶ The filing of a request for mediation suspends the running of the time limits prescribed by law, but does not suspend the proceedings.⁷ The settlement conference is presided over by a judge acting as mediator, who facilitates dialogue between the parties and helps them to explore mutually satisfactory solutions. Judge-mediators in Québec generally refrain from expressing their opinion on the legal merits of the dispute.⁸ If the parties come to an agreement, the settlement is homologated by the court in question, which makes it enforceable like a traditional court judgment.

The use of judges as mediators gives the Québec system a particular character. Judge-mediators remain judges, bringing their background and experience – as well as their particular ethical responsibilities – to the mediation process.⁹ However, this also creates particular challenges, since judges mediating within a courthouse continue to operate within the traditional court system’s values of impartiality and independence. The implications of this for mediation confidentiality will be addressed below.

The integration of judicial mediation within the Québec justice system has not replaced mediation conducted by private mediators, and parties may always bring their conflict to private mediation. Unlike some other provinces, however, Québec does not have mandatory or court-annexed mediation services, with the exception of family law cases.¹⁰

Ontario

[10.40] Ontario has a well-developed mediation system involving three distinct types of process at courts of first instance: mandatory mediation conducted by private mediators, pre-trial conferences, and so-called “designated hitter” mediation.¹¹ Judges also perform mediation on an ad hoc basis. At the appellate level, mediation is available for certain types of case.

5 *Code of Civil Procedure* (Québec), Arts 151.14 – 151.23 (first instance), Arts 508.1 – 508.4 (appeal). See also, for the Court of Appeal, *Rules of the Court of Appeal of Québec in Civil Matters*, r 14, ss 40-44.

6 *Code of Civil Procedure* (Québec), Art 508.1, al 2.

7 *Code of Civil Procedure* (Québec), Arts 151.18, 508.1, al 2.

8 L Otis and E H Reiter, “Mediation by Judges: A New Phenomenon in the Transformation of Justice” (2006) 6 *Pepperdine Dispute Resolution Law Journal* 351 at 367. While this is the practice of judge-mediators, the rules are not explicit on this point. However, the framework set out in the *Code of Civil Procedure* (Québec), with its focus on the agency of the parties, would appear to point towards this constrained role of the judge-mediator. See *Code of Civil Procedure* (Québec), Arts 151.16, 151.18.

9 L Otis and E H Reiter, “Mediation by Judges: A New Phenomenon in the Transformation of Justice” (2006) 6 *Pepperdine Dispute Resolution Law Journal* 351 at 364-371.

10 *Code of Civil Procedure* (Québec), Art 815.2.1.

11 W K Winkler, “Access to Justice – Mediation: Panacea or Pariah?” (2007) 16 *Canadian Arbitration & Mediation Journal* 1.

Mandatory mediation is now an integral part of the Ontario legal system.¹² Parties in litigation are required to attempt to settle a dispute through negotiation conducted by a neutral intermediary.¹³ Only a few specific types of cases are excluded from this mandatory program, notably class actions and bankruptcy and insolvency proceedings.¹⁴ The parties must meet for mediation within 180 days of filing a defence, and both the parties and their counsel must be present at the session.¹⁵ Parties must select a mediator from the private sector and are responsible for the cost; if they fail to select a mediator within the 180-day period, the local mediator coordinator assigns one to them.¹⁶ Parties must also prepare a “Statement of Issues” that identifies the matters in dispute and the parties’ positions and interests.¹⁷ Parties who wish to opt out of mandatory mediation must apply to the court for a ruling of exemption.¹⁸ This mandatory program was begun as a pilot program in 1999 in Toronto and Ottawa and was expanded in 2002 to include the Windsor area.

Pre-trial conferences, also mandated by the *Rules of Civil Procedure 1990* (Ontario), provide a different alternative mechanism of conflict resolution.¹⁹ The conferences are not facilitative mediation, but rather are meant to be neutral evaluations, in which a judge expresses an opinion about the case, assessing the parties’ positions and the probable outcome of the pending litigation. The conferences usually take place early in the pre-trial process and are conducted in chambers with counsel (the parties themselves are usually absent). After the session, the parties are meant to use the judge’s views as a foundation for settlement negotiations.²⁰

Since 2004, the Toronto courts have offered a third form of court-connected alternative dispute resolution (ADR), known as “designated hitter” mediation. Used in cases where the parties have already undergone private mediation and pre-trial conferences, yet where mediation might still be useful, this process involves mediation by specially chosen judges (the “designated hitters”) with

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- 12 J Macfarlane, “Culture Change? A Tale of Two Cities and Mandatory Court-Connected Mediation” [2002] *Journal of Dispute Resolution* 241 at 244.
- 13 *Rules of Civil Procedure 1990* (Ontario), reg 194 (as amended), r 24.1 (mandatory mediation in almost all civil cases), r 75.1 (mandatory mediation in matters involving contested estates, trusts and substitute decisions).
- 14 *Rules of Civil Procedure 1990* (Ontario), reg 194 (as amended) at r 24.1.04(2).
- 15 *Rules of Civil Procedure 1990* (Ontario), reg 194 (as amended) at rr 24.1.09(1), 24.1.11(1); J Macfarlane, “Culture Change? A Tale of Two Cities and Mandatory Court-Connected Mediation” [2002] *Journal of Dispute Resolution* 241 at 245.
- 16 *Rules of Civil Procedure 1990* (Ontario), reg 194 (as amended) at r 24.1.09(6).
- 17 *Rules of Civil Procedure 1990* (Ontario), reg 194 (as amended) at r 24.1.10.
- 18 *Rules of Civil Procedure 1990* (Ontario), reg 194 (as amended) at r 24.1.05; J Macfarlane, “Culture Change? A Tale of Two Cities and Mandatory Court-Connected Mediation” [2002] *Journal of Dispute Resolution* 241 at 244.
- 19 *Rules of Civil Procedure 1990* (Ontario), reg 194 (as amended) at r 50.
- 20 W K Winkler, “Access to Justice – Mediation: Panacea or Pariah?” (2007) 16 *Canadian Arbitration & Mediation Journal* 1.

expertise in the particular subject matter of the dispute.²¹ This practice is not formally governed by the *Rules of Civil Procedure 1990* (Ontario), and no formal guidelines or ethical rules apply.

Beyond these options, some Ontario judges also perform ad hoc mediations, subject to the discretion of the Chief Judge of the court in question. According to Warren Winkler, Chief Justice of Ontario, “access to willing and able facilitative judicial mediators ebbs and flows, depending on the availability of the appropriate judge and on whether it is felt that mediation ought to be made available in the circumstances”.²²

Finally, judicial mediation is also performed at the appellate level, although again this is an informal process that is not explicitly set out in the *Rules of Civil Procedure 1990* (Ontario).²³ A designated panel of judges has adopted pre-hearing mediation for certain family law cases and, on a more limited basis, for civil cases. Judicial mediation at this level can be particularly advantageous to the parties in cases where traditional adjudication would not provide a global solution to a multi-dimensional conflict.²⁴

Alberta

[10.50] In November 2010, Alberta undertook a reform of its *Alberta Rules of Court*, which introduced various forms of ADR into the procedure at both trial and appeal. The rules require the parties to manage their litigation, which includes a duty to pursue at least one of the dispute resolution processes set out in the rules, among them private mediation, court-annexed dispute resolution and “Judicial Dispute Resolution” (JDR).²⁵ Moreover, this requirement is a condition for receiving a trial date, and its fulfilment must be certified by the court.²⁶ Actions may be put under the supervision of a case management judge, whose duties include facilitating the parties’ efforts to settle their dispute.²⁷

The introduction of JDR is particularly interesting. At both the Court of Queen’s Bench and the Court of Appeal, judicial mediation is conducted within the court, with judge-mediators mandated to work actively with the parties to facilitate the resolution process.²⁸ The process gives the parties a great deal of

21 W K Winkler, “Some Reflections on Judicial Mediation: Reality or Fantasy?” (2010) 29 *Advocates’ Society Journal* 3.

22 W K Winkler, “Access to Justice – Mediation: Panacea or Pariah?” (2007) 16 *Canadian Arbitration & Mediation Journal* 1 at 3.

23 A Dekany, “Judges increasingly mediating in Ontario and Québec” *Lawyers Weekly* (21 January 2005).

24 W K Winkler, “Access to Justice – Mediation: Panacea or Pariah?” (2007) 16 *Canadian Arbitration & Mediation Journal* 1 at 4.

25 *Alberta Rules of Court*, reg 124/2010 at rr 4.2(e), 4.4(1)(c), 4.16(1). The court may waive this requirement in special circumstances.

26 *Alberta Rules of Court*, reg 124/2010 at r 8.4(3)(a).

27 *Alberta Rules of Court*, reg 124/2010 at r 4.14(1)(e).

28 Justice J H Goss of the Alberta Court of Queen’s Bench, personal interview (5 December 2011); *Alberta Rules of Court*, reg 124/2010 at r 4.17ff.

control: they may choose which judge they wish to lead the JDR, and they determine the process to be used, which matters are to be subject to settlement and the judge's role.²⁹

The Alberta framework does not specify that mediation must be done by judges, and so the parties retain considerable scope for designing a process tailored to the specifics of their dispute. Moreover, the rules are general enough – they do not use the word “mediation” – so that they would apply equally well to arbitration or a hybrid mediation–arbitration process as to traditional mediation.

Manitoba

[10.60] Since 1997, the Manitoba Court of Queen's Bench has used a form of ADR called “Judicially Assisted Dispute Resolution” (JADR).³⁰ This procedure is a form of judicial mediation, with nearly all of the judges of the General Division available to assist litigants in achieving a mediated resolution of their dispute. The parties may effectively pre-select their judge-mediator, since the Chief Justice must name a judge-mediator from a list of three drafted by the parties. The process is voluntary and cannot be ordered by the court; even so, reports indicate that the vast majority of civil litigants request a JADR session before a trial is conducted.³¹

The JADR process is not contained in the *Court of Queen's Bench Rules* (Manitoba Regulation 553/88), and no formalised mediation rules have been introduced in Manitoba. The rationale has been described as an attempt to keep the process as free as possible of rules, the view being that overly rigid and complex rules lie behind many of the problems with existing civil litigation procedure.³²

The only mandatory alternative to litigation is the requirement of pre-trial conferences for all civil cases, without which no trial date will be assigned.³³ Additionally, for family matters, a case management process is mandatory, but this is not a mediation process per se.³⁴

29 Justice R A Graesser of the Alberta Court of Queen's Bench, personal interview (25 November 2011); *Alberta Rules of Court*, reg 124/2010 at r 4.18.

30 See generally K Fulham, “Dispute Resolution in Manitoba” (Winter 2011) *Canadian Court Communiqué* 10 at 11-12, available at <http://www.acca-aaajc.ca>.

31 Manitoba ADR (Alternative Dispute Resolution) Section, *Report to the National Alternative Dispute Resolution Section of the Canadian Bar Association, 2008–2009* (Nd), 5 (George Derwin, chair), available at [http://www.cba.org/cba/sections_adr/pdf/ADR_BranchReport_\(Manitoba\).pdf](http://www.cba.org/cba/sections_adr/pdf/ADR_BranchReport_(Manitoba).pdf) (accessed 24 August 2012).

32 Manitoba ADR (Alternative Dispute Resolution) Section, *Report to the National Alternative Dispute Resolution Section of the Canadian Bar Association, 2008–2009* (Nd), 4 (George Derwin, chair), available at [http://www.cba.org/cba/sections_adr/pdf/ADR_BranchReport_\(Manitoba\).pdf](http://www.cba.org/cba/sections_adr/pdf/ADR_BranchReport_(Manitoba).pdf) (accessed 24 August 2012).

33 *Court of Queen's Bench Rules* (Man Reg 553/88), r 48.01(3).

34 *Court of Queen's Bench Rules* (Man Reg 553/88), r 70.

Saskatchewan

[10.70] In 1994, Saskatchewan became the first province in Canada to implement a mandatory mediation program in a superior court.³⁵ Today, the *Queen's Bench Act 1998* (Saskatchewan), supplemented by the *Queen's Bench Regulations*, requires that parties to all civil cases attend a mediation session unless formally exempted.³⁶ Furthermore, a judge may order mediation at any time during proceedings, on whatever terms the judge deems appropriate.³⁷ Mediators are employed and appointed by the Mediation Services Branch of Saskatchewan Justice, and the mediation program is highly integrated with the court process.³⁸ It is now offered in major centres and applies to about 80 per cent of all non-family civil cases.³⁹

Other than this mandatory mediation program, pre-trial conferences are also offered at the Court of Queen's Bench. The existing rules provide few details on the procedure to be followed within a conference, but these are to be reformed in 2013, with a view to providing foundational rules to better promote early resolution of disputes by settlement.⁴⁰ While there is currently no specific judicial mediation in Saskatchewan, these pre-trial conferences are similar to formal judicial mediation programs as found in other Canadian provinces. During a pre-trial conference, judges provide each side with a realistic assessment of what they believe will happen at trial. The judge is also to facilitate settlement discussions between parties as they arise. These conferences usually take place as a last step before trial. If the case does not settle, the pre-trial judge is excluded from the hearing.

The Federal Court of Canada

[10.80] ADR processes are also offered at the Federal Court of Canada, both at first instance and on appeal. Under the *Federal Courts Rules* (Canada), after close of pleadings, parties are required to "discuss the possibility of settling any or all of the issues in the action and of bringing a motion to refer any unsettled issues to a dispute resolution conference".⁴¹ During this conference, the judge or prothonotary, at his or her discretion, may act as mediator to facilitate settlement

35 R M Goldschmid, *Discussion Paper: Major Themes of Civil Justice Reform* (Civil Justice Reform Working Group, B C Ministry of Attorney General, January, 2006), 13. Goldschmid notes that, already during the farm crisis of the 1980s, Saskatchewan required mandatory mediation between lenders and landowners before foreclosure proceedings could be undertaken.

36 *Queen's Bench Act 1998* (Saskatchewan), s 42. The *Queen's Bench Regulations*, reg 1, ss 5(1)–(2), stipulates that the civil mediation rule applies only to certain judicial centres and that specific exceptions to the general rule apply (notably judicial review proceedings, interlocutory matters and class actions).

37 *Queen's Bench Act 1998* (Saskatchewan), s 42(5.1).

38 R M Goldschmid, *Discussion Paper: Major Themes of Civil Justice Reform* (Civil Justice Reform Working Group, B C Ministry of Attorney General, January, 2006), 13; M Keet and T B Salamone, "From Litigation to Mediation: Using Advocacy Skills for Success in Mandatory or Court-Connected Mediation" (2001) 64 *Saskatchewan Law Review* 57 at 57.

39 J Macfarlane and M Keet, "Civil Justice Reform and Mandatory Civil Mediation in Saskatchewan: Lessons from a Maturing Program" (2005) 42 *Alberta Law Review* 677.

40 The implementation of the new rules has been delayed until 1 July 2013: see <http://www.sasklawcourts.ca> (accessed 24 August 2012).

41 *Federal Courts Rules* (Canada), SOR/98-106, *Federal Courts Rules* 257. Rule 263(a) also makes reference to dispute resolution conferences.

or conduct an early neutral evaluation or a mini-trial in which they render a non-binding opinion as to the probable outcome of the case.⁴² In practice, few judges undertake these conferences, and those who do focus primarily on cases in which they are confident a settlement can be reached, to avoid being barred from hearing the case should negotiations fail.⁴³ Nevertheless, conferences have been used to settle cases involving Aboriginal issues and post-traumatic stress disorders of Canadian military personnel.⁴⁴

THE ROLE OF CONFIDENTIALITY PROTECTION IN JUDICIAL MEDIATION

[10.90] Confidentiality is one of the basic principles of most forms of mediation, and the expectation of confidentiality on the part of participants and the mediator can be critical to a successful mediation process.⁴⁵ Confidentiality of mediation communications ensures that anything said or exchanged during mediation will not be voluntarily disclosed outside of the mediation process by any of the participants, barring rare and exceptional circumstances.⁴⁶

The overall purpose of strong protection of mediation confidentiality is to enhance the prospect that mediation will result in an agreement.⁴⁷ In this section, we explore some of the public policy reasons for keeping mediation communication confidential, before turning to survey existing protections in Canada.

Confidentiality ensures forthright participation in the mediation process

[10.100] Since mediation is a process that invites parties to disclose their underlying needs and interests, confidentiality protection is especially important to establish the necessary climate of trust for forthright and full participation in the process. As the mediation process unfolds, parties may need to admit certain

42 *Federal Courts Rules* (Canada), SOR/98-106, r 387.

43 Justice M M J Shore of the Federal Court of Canada, private interview (14 December 2011). Under *Federal Courts Rules* (Canada), SOR/98-106, r 391, the judge who presides over the conference cannot hear the action, unless all parties consent.

44 Justice M M J Shore of the Federal Court of Canada, private interview (14 December 2011).

45 On confidentiality in mediation, see especially Anonymous, "Protecting Confidentiality in Mediation" Note (1984) 98 *Harvard Law Review* 441; L Freedman and M L Prigoff, "Confidentiality in Mediation: The Need for Protection" (1986) 2 *Ohio State Journal on Dispute Resolution* 37; K L Brown, "Confidentiality in Mediation: Status and Implications" (1991) 1(2) *Journal of Dispute Resolution* 307; O V Gray, "Protecting the Confidentiality of Communications in Mediation" (1998) 36 *Osgoode Hall Law Journal* 667; J W Hamilton, "Protecting Confidentiality in Mandatory Mediation: Lessons from Ontario and Saskatchewan" (1999) 24 *Queen's Law Journal* 561; A M Burr, "Confidentiality in Mediation Communications: A Privilege Worth Protecting" (2002) 57-APR *Dispute Resolution Journal* 64; S R Cole, "Protecting Confidentiality in Mediation: A Promise Unfulfilled?" (2006) 54 *University of Kansas Law Review* 1419; P Pengelley, "Confidentiality and Disclosure in Mediation: When the Chicken Won't Talk" (2007) 33 *Advocates' Quarterly* 473.

46 Exceptions are discussed in [10.130].

47 O V Gray, "Protecting the Confidentiality of Communications in Mediation" (1998) 36 *Osgoode Hall Law Journal* 667 at 688.

facts, accept some responsibility, apologise, discuss concessions that they would be ready to make or present settlement options, all of which would be highly risky in a traditional adversarial process. Confidentiality is therefore crucial to encouraging sincere participation and negotiation, since without it parties would fear that the opposing party might use their statements against them, whether or not they come to an agreement at the end of the mediation process.⁴⁸

Additionally, much of the information shared during mediation is not always considered legally relevant, but rather consists of personal motives, emotions and interests.⁴⁹ Given that this information is at once highly personally sensitive and crucial to a full understanding of the conflict at issue, parties need to trust that this information will not be used against them (or even disclosed) later on.

Finally, parties must also be sure that mediators will not disclose confidential information learned during the mediation process. In caucus meetings especially, participants are specifically invited to share confidential information to the mediator, and they need assurances that the mediator will not later be asked or compelled to testify and share this confidential information.⁵⁰ Caucus meetings are particularly important for the overall mediation process, and weak confidentiality protection could impede this crucial step by making parties reluctant to share information with the mediator.

Confidentiality allows mediators to fulfill their role

[10.110] Mediation confidentiality is crucial to the mediator's neutral role and mandate. The presumption of confidentiality helps mediators to get the parties in a dispute speaking frankly, which in turn helps the mediator fulfill his or her role. In this way, mediation confidentiality is similar to the well-established confidentiality protection between lawyers and their clients. A full and frank disclosure to mediators enables them to guide each party in the best possible way.

Weak confidentiality protection, on the other hand, could lead to mediators being forced to testify about the proceedings. This entails a significant danger to the appearance of neutrality central to the mediator's role, which in turn could affect the relationship between the mediator and the parties, if the latter feared that their statements could be used against them in subsequent legal proceedings. The effects of weak confidentiality protection on how mediators work can be profound: mediators might minimise their interventions, limit their comments or hesitate to guide parties to a resolution, all of which would gravely handicap their role as facilitators.

48 S Zimmerman, "Judges Gone Wild: Why Breaking The Mediation Confidentiality Privilege for Acting in "Bad Faith" Should Be Reevaluated in Court-Ordered Mandatory Mediation" (2009) 11 *Cardozo Journal of Conflict Resolution* 353 at 367.

49 J W Hamilton, "Protecting Confidentiality in Mandatory Mediation: Lessons from Ontario and Saskatchewan" (1999) 24 *Queen's Law Journal* 561 at 570.

50 L Freedman and M L Prigoff, "Confidentiality in Mediation: The Need for Protection" (1986) 2 *Ohio State Journal on Dispute Resolution* 37 at 38.

Confidentiality safeguards the neutrality of adjudication in courts and ensures the public's confidence in the integrity of judicial mediation processes

[10.120] In the case of judicial mediation, confidentiality is important for institutional purposes, as a safeguard of the neutrality of adjudication in the court system and of the public's confidence in the integrity of judicial mediation processes. Protection of mediation confidentiality protects courts from the perception of bias that could arise from unprotected judicial mediation. In the case of judge-mediators, confidentiality is more important still, because even when acting as mediators, they are still judges within the court system. A judge-mediator giving (or being compelled to give) testimony about a closed mediation session gives the impression that that judge is under the power of one of the parties or of another judge, an impression inimical to the judge-mediator's impartiality and neutrality as well as to the legitimacy of the court system generally.

Finally, another institutional argument in favour of confidentiality in mediation is to ensure that parties who decide to submit their conflict to mediation are not disadvantaged compared to others going the traditional route. If mediation confidentiality were not protected, a mediator could be compelled to testify in court, which would penalise the affected party in comparison to other parties in litigation who decided not to try an alternative method of dispute resolution.

Exceptions

[10.130] Although broad and effective confidentiality protections are indispensable to the functioning of mediation, some specific exceptions have been recognised as necessary. In the case of judicial mediation, the arguments for protecting confidentiality must be balanced against the public interest in the administration of justice. Given the compelling importance of the protection of confidentiality, these exceptions have been and, we would argue, must be rare. Examples frequently encountered include cases of manifest injustice, threats to public security, divulgence of criminality or other violations of law or gross negligence.

PROTECTION OF CONFIDENTIALITY IN JUDICIAL MEDIATION IN CANADA

In Canada, existing mediation confidentiality safeguards vary from jurisdiction to jurisdiction. Most provinces and territories have recognised the importance of confidentiality for mediation by incorporating mediation confidentiality provisions within their statutory system and their rules of civil procedure. This section will analyse some of the principal statutory safeguards across Canada, as well as key extra-statutory protections. We argue that, although existing protections go some way towards safeguarding mediation confidentiality, none of the individual regimes on their own offers sufficient protection against parties or third parties seeking divulgence of information from within the "black box" of the mediation session.

A useful point of comparison to keep in mind while surveying the Canadian protections is the American *Uniform Mediation Act 2001* (UMA), adopted in 2001

by the National Conference of Commissioners on Uniform State Laws.⁵¹ The recommended Act, which to date has been enacted in ten States and the District of Columbia and has been introduced in the legislatures of two other States, provides wide-ranging protection for mediation confidentiality.⁵² It combines detailed rules on privilege of mediation communications with a broad statement of the protection of confidentiality. The blanket privilege applies to all mediations except where certain enumerated exceptions arise (such as waiver by the parties, provision of law, disclosure of criminal activity, child abuse, complaints of mediator malpractice).⁵³ The privilege allows parties, mediators and non-party participants to refuse to disclose mediation communications in legal actions and also to prevent disclosure by third parties.⁵⁴ Beyond privilege, the UMA also protects communications by a rule of confidentiality that extends the protection beyond court proceedings and therefore to non-parties.⁵⁵ The UMA distills the main concerns about disclosure and its effects on the mediation process into a detailed model of confidentiality protection. As we will see, Canadian legislatures could learn much from its provisions.

Statutory law

[10.140] Many jurisdictions in Canada have codified some form of judicial mediation confidentiality protection. This next section will review the statutory scheme in three Canadian provinces: Saskatchewan, Québec and Ontario.

Saskatchewan

[10.150] Saskatchewan, which in 1994 became the first province to codify a strong statutory protection of mediation confidentiality, currently provides extensive protection of mediation confidentiality in the *Queen's Bench Act 1998* (Saskatchewan).⁵⁶ All communications made "in the course of mediation" as well as any evidence directly arising from such communications are confidential and

51 *Uniform Mediation Act 2001* (UMA), available at Uniform Law Commission, http://www.uniformlaws.org/shared/docs/mediation/uma_final_03.pdf (accessed 27 August 2012). On the Act, see especially M Rausch, "The Uniform Mediation Act" (2003) 18 *Ohio State Journal Dispute Resolution* 603; R C Reuben, "The Sound of Dust Settling: A Response to Criticisms of the UMA" (2003) 1 *Journal of Dispute Resolution* 99; D G Tomeo, "Be Careful What You Say: One Court's Look at Confidentiality Under the Uniform Mediation Act" (2006) 31 *Seton Hall Legislation Journal* 65. Some States have enacted their own mediation confidentiality legislation. On Florida's Act, see F L Tetunic, "Act Deux: Confidentiality after the Florida Mediation Confidentiality and Privilege Act" (2011) 36 *Nova Law Review* 79.

52 On its enactment status, see Uniform Law Commission, available at <http://www.uniformlaws.org/Act.aspx?title=Mediation%20Act> (accessed 27 August 2012).

53 *Uniform Mediation Act 2001* (UMA), ss 5 – 6, available at Uniform Law Commission, http://www.uniformlaws.org/shared/docs/mediation/uma_final_03.pdf (accessed 27 August 2012).

54 *Uniform Mediation Act 2001* (UMA), s 4, available at Uniform Law Commission, http://www.uniformlaws.org/shared/docs/mediation/uma_final_03.pdf (accessed 27 August 2012).

55 *Uniform Mediation Act 2001* (UMA), s 8, available at Uniform Law Commission, http://www.uniformlaws.org/shared/docs/mediation/uma_final_03.pdf (accessed 27 August 2012).

56 *Queen's Bench Act 1998* (Saskatchewan), s 43, which reads as follows: 43. Except with the written consent of the mediator and all parties to the proceeding in which the mediator acted, the following types of evidence are not admissible in any civil, administrative,

may not be raised as evidence in any legal proceedings.⁵⁷ Furthermore, all participants in the mediation, including the mediator and witnesses, fall within its scope and are prohibited from disclosing any mediation communications.

Two related reservations arise, however. First, it is notable that the provision sets out no exceptions to mediation confidentiality, except where the parties and the mediator unanimously agree to waive it. Secondly, the provision's apparent absolute protection can be problematically over-inclusive, as Hamilton points out.⁵⁸ For example, what is the scope of "communications made in the course of mediation"? Do they include any documents prepared for the mediation or only those documents used during mediation?⁵⁹ Additionally, would the provision cover a party (or a third party) divulging details about the mediation process in the media? The provision as written does not suggest answers to these questions.

Québec

[10.160] In Québec, confidentiality in judicial mediation is protected through provisions in the *Code of Civil Procedure*. The provisions regarding mediation at first instance state that: "Anything said or written during a settlement conference is confidential".⁶⁰ For appeals, the Code states simply that settlement conferences are "confidential".⁶¹ Additionally, judges presiding over settlement conferences at both trial and appeal preserve their judicial immunity, which prohibits them from testifying in future judicial proceedings.⁶²

Two cases have explored the limits of this protection, with the Court of Appeal confirming the protection of confidentiality in both. In *Kosko v Bijimine*, the appellant sued his lawyer for having, in a settlement conference in an earlier action, failed to react to remarks by the judge-mediator that induced him to accept an inordinately unfavourable settlement. In support of his claim, he sought to introduce the judge-mediator's remarks as evidence.⁶³ The Court of Appeal upheld mediation confidentiality and asserted the crucial role of confidentiality in the judicial mediation process in particular, noting that it rests on the values of judicial independence and impartiality.⁶⁴

regulatory or summary conviction proceeding: (a) evidence directly arising from anything said in the course of mediation; (b) evidence of anything said in the course of mediation; (c) evidence of an admission or communication made in the course of mediation.

57 J W Hamilton, "Protecting Confidentiality in Mandatory Mediation: Lessons from Ontario and Saskatchewan" (1999) 24 *Queen's Law Journal* 561 at 619.

58 J W Hamilton, "Protecting Confidentiality in Mandatory Mediation: Lessons from Ontario and Saskatchewan" (1999) 24 *Queen's Law Journal* 561 at 618.

59 Hamilton provides an exhaustive analysis of the different aspects of this provision; J W Hamilton, "Protecting Confidentiality in Mandatory Mediation: Lessons from Ontario and Saskatchewan" (1999) 24 *Queen's Law Journal* 561 at 919-922.

60 *Code of Civil Procedure* (Québec), Art 151.21. Although the code refers to "settlement conference," in practice the process is facilitative mediation.

61 *Code of Civil Procedure* (Québec), Art 508.1, al 3.

62 *Code of Civil Procedure* (Québec), Arts 508.1, al 3, 151.14.

63 *Kosko v Bijimine* 2006 QCCA 671.

64 *Kosko v Bijimine* 2006 QCCA 671 at [69]. The court also acknowledged the existence of a restrictive list of exceptions to the confidentiality rule, such as cases of child abuse, criminal offence and public safety, none of which applied to the case: at [70].

In 2009, the Court of Appeal revisited the issue in *Gesca ltée v Groupe Polygone*.⁶⁵ In that case, newspaper publisher Gesca had published an article about the status of settlement negotiations between the Canadian Government and Groupe Polygone. The court had to decide whether or not this publication constituted a breach of confidentiality and whether or not the court could order a ban on the publication of the status of settlement negotiations. The court held that the appellant had not breached confidentiality by publishing the information since it was neither a party to the negotiations nor present at them and so was not covered by the obligation of confidentiality.⁶⁶ Through this case, the court did confirm that parties participating in settlement negotiation, whether within or outside the legislative framework set out in the *Code of Civil Procedure* – that is including any mediation whether or not presided over by a judge-mediator – are bound by the obligation of confidentiality.⁶⁷ Nevertheless, *Gesca* confirmed a limit to this obligation by only imposing it to the parties of the negotiation settlement. Specifically to judicial mediation, this case therefore indicates that Québec’s statutory confidentiality protection does not extend to strangers to the mediation process.

This interpretation received a strong general confirmation by the Supreme Court of Canada in *Globe and Mail v Canada (Attorney General)*, an appeal from the Québec Court of Appeal.⁶⁸ In a wide-ranging case that brought up (among other issues) a situation similar to *Gesca*, the Supreme Court confirmed that “maintaining the confidentiality of settlement negotiations is a public policy goal of the utmost importance ...”.⁶⁹ As in *Gesca*, however, this obligation binds only parties to settlement negotiations and their agents, not third parties, although the court did note that other actions – besides the publication ban sought in the case – might lie against the negotiating partner or even the party directly responsible for the breach.⁷⁰ The court’s reasons in *Globe and Mail* are the strongest affirmation to date of the importance of confidentiality in settlement negotiations and mediation communications.

A recent decision by the Québec Court of Appeal, however, suggests that despite this general principle the scope of protection is still at least a partly open question. In *Bloom Films 1998 v Christal Films Productions*, the court addressed in brief reasons confidentiality protection within a hybrid mediation–arbitration procedure designed by the parties.⁷¹ Although in the particular circumstances of the case confidentiality was covered by a contractual agreement between the parties, the court left open the question of whether or not confidentiality protection as defined in *Kosko* necessarily applied to a hybrid mediation–arbitration procedure.⁷² It remains to be seen how far the general principle as articulated by the Québec Court of Appeal in *Kosko* and confirmed by the

65 *Gesca ltée v Groupe Polygone Éditeurs inc (Malcom Média inc)* 2009 QCCA 1534 at [47].

66 *Gesca ltée v Groupe Polygone Éditeurs inc (Malcom Média inc)* 2009 QCCA 1534 at [40].

67 *Gesca ltée v Groupe Polygone Éditeurs inc (Malcom Média inc)* 2009 QCCA 1534 at [47].

68 *Globe and Mail v Canada (Attorney General)* 2010 SCC 41, [2010] 2 SCR 592.

69 *Globe and Mail v Canada (Attorney General)* 2010 SCC 41 at [81], [2010] 2 SCR 592.

70 *Globe and Mail v Canada (Attorney General)* 2010 SCC 41 at [81], 95, [2010] 2 SCR 592.

71 *Bloom Films 1998 v Christal Films Productions* 2011 QCCA 1171.

72 *Bloom Films 1998 v Christal Films Productions* 2011 QCCA 1171 at [3].

Supreme Court of Canada, which makes mediation confidentiality into a principle of public order, will extend among alternative dispute resolution processes.

Finally, it should be noted that major reforms to the *Code of Civil Procedure* (Québec) have been tabled in the National Assembly, and these include provision on mediation confidentiality that are both promising and worrying.⁷³ On the one hand, the revision broadens protection to include “[a]nything said, written or done” during mediation; the addition of “done” strengthens confidentiality protections within the judicial mediation system.⁷⁴ On the other hand, the draft’s general provision on mediation confidentiality appears to restrict the protection by suggesting that it rests on an undertaking of the parties involved.⁷⁵ The draft also includes no clear statement that what is said, written or done during the mediation would be inadmissible as evidence in a subsequent trial. In our opinion, this has the potential to seriously weaken confidentiality protections.

Ontario

[10.170] In Ontario, mediation confidentiality rests on statutory provisions that deem all mediation communications and documents to be “without prejudice settlement discussions”.⁷⁶ This framework was interpreted by the Ontario Court of Appeal in *Rogacki v Belz*.⁷⁷

Rogacki involved the availability of a contempt order against a party to mandatory mediation negotiations who had published an article in a newspaper that referred to the status of the mediation process. While the article disclosed no information exchanged at the mediation, it did mention the failure of negotiations and that the plaintiff had rejected the defendant’s (unspecified) settlement offers. Before the mediation, the parties had signed a mediation agreement, stating that “everything said or done in the mediation is strictly confidential and privileged, and no reference will be made to anyone other than the parties or their solicitors of anything that is said during the process”.⁷⁸ The Court of Appeal concluded that contempt proceedings, because of their criminal nature, could not provide a

73 *Draft Bill to enact the new Code of Civil Procedure*, 2d Sess, 39th Leg, Québec, 2011 (introduced 29 September 2011).

74 *Draft Bill to enact the new Code of Civil Procedure*, 2d Sess, 39th Leg, Québec, 2011, Art 159, al 3. The full paragraph reads: “Anything said, written or done during the settlement conference is confidential.”

75 *Draft Bill to enact the new Code of Civil Procedure*, 2d Sess, 39th Leg, Québec, 2011, Art 4, which reads: “Parties who choose to engage in a private dispute prevention or resolution process, and the third person involved in the process, undertake to preserve the confidentiality of anything said, written or done during the process, subject to any agreement between them on the subject, to any special provisions of the law and to their own remedies before the courts.” This criticism has been voiced by the Institut de médiation et d’arbitrage du Québec; see *Mémoire de l’institut de médiation et d’arbitrage du Québec sur l’avant projet de loi instituant le nouveau Code de procédure civile* (13 December 2011), 22, available at <http://www.imaq.org/wp-content/uploads/2012/01/MEMOIRE.pdf> (accessed 29 August 2012).

76 *Rules of Civil Procedure 1990* (Ontario), reg 194 (as amended), r 24.1.14.

77 *Rogacki v Belz* [2003] 67 OR (3d) 330 (CA).

78 *Rogacki v Belz* [2003] 67 OR (3d) 330 (CA) at [3].

remedy for the breach of *Rules of Civil Procedure 1990* (Ontario), r 24.1, nor of a confidentiality provision in a mediation agreement.⁷⁹

Interestingly, the court noted that r 24.1.14 was not to be read as providing that mediation sessions are confidential, but only that they are without prejudice settlement negotiations.⁸⁰ The majority held that r 24.1.14 simply codifies the common law principle of settlement privilege, which protects mediation communications by making them inadmissible as evidence unless they result in a concluded resolution of the dispute.⁸¹ This interpretation, the majority continued, is consistent with the public interest in promoting frank settlement discussions, since it protects communications from compelled disclosure in subsequent proceedings in cases where the mediation fails. The majority opinion gave the same interpretation to the mediation agreement signed by the parties.

In a concurring opinion, Justice Rosalie Abella (then of the Court of Appeal) agreed with the majority's interpretation that *Rules of Civil Procedure 1990* (Ontario), r 24.1.14, does not create an enforceable guarantee of confidentiality, but went further in affirming the importance of confidentiality in mediation. She stressed the importance of ensuring that the mediation process be confidential because of the significant public policy reasons for doing so, in particular providing an effective and fair alternative to costly trials.⁸²

With its narrow reading of existing protections in Ontario, *Rogacki* affirmed the inadequacy of r 24.1.14 as a thorough protection of mediation confidentiality. At the same time, the Court of Appeal's underscoring of the public policy importance of mediation confidentiality provides a spur to the legislature to revisit the statutory framework.

Extra-statutory protections

Common law privilege for settlement communications: the "without prejudice" rule

[10.180] In Canadian common law jurisdictions, communications are said to be privileged when they are not admissible as evidence before a court, unless the privilege is waived or precluded pursuant a statute.⁸³ In the common law, this idea of privilege has long been used to safeguard communications made in settlement attempts, to further the policy interest of encouraging parties to resolve their private disputes without involving the courts.⁸⁴ As a result, Canadian common law excludes evidence of unsuccessful settlement negotiations in subsequent legal proceedings.⁸⁵

79 *Rogacki v Belz* [2003] 67 OR (3d) 330 (CA) at [32].

80 *Rogacki v Belz* [2003] 67 OR (3d) 330 (CA) at [18].

81 *Rogacki v Belz* [2003] 67 OR (3d) 330 (CA) at [18].

82 *Rogacki v Belz* [2003] 67 OR (3d) 330 (CA) at [37], [47]-[48].

83 O V Gray, "Protecting the Confidentiality of Communications in Mediation" (1998) 36 *Osgoode Hall Law Journal* 667 at 675-676.

84 P Pengelley, "Confidentiality and Disclosure in Mediation: When the Chicken Won't Talk" (2007) 33 *Advocates' Quarterly* 473 at 476.

85 O V Gray, "Protecting the Confidentiality of Communications in Mediation" (1998) 36 *Osgoode Hall Law Journal* 667 at 675.

Canadian courts have used this privilege to protect mediation communications from disclosure in proceedings between the mediation participants, since mediation is in itself an attempt to settle a dispute.⁸⁶ While this privilege can be implied, the parties can also explicitly invoke it by signing an agreement to mediate containing a “without prejudice” provision, protected by contract law remedies. Influenced by the common law, Québec courts also have formally recognised the privileged nature of communications made during settlement negotiations.⁸⁷

In practice, however, the limits of protecting mediation confidentiality with the “without prejudice” rule are evident. First, and most basically, the rule protects only against compelled disclosure in subsequent proceedings involving the parties to the negotiations, and so does not cover disclosures made outside the courts by third parties.⁸⁸

Secondly, the privilege ceases to apply once a matter has been finally settled or the litigation has been resolved.⁸⁹ The rationale is to ensure the enforcement of settlements,⁹⁰ but this only applies in certain circumstances. If, for example, a party sought disclosure of confidential communications after settlement for a purpose other than enforcement of the agreement, the courts would not be able to rely on settlement privilege to protect the communication. While this common law privilege does provide protection for some mediation communications, it does not assure complete protection of the confidentiality of the mediation process.

A third difficulty with the “without prejudice” rule is evident in the Saskatchewan Court of Appeal’s decision in *Re Springridge Farms Ltd.*⁹¹ In that case, a bank seeking to petition a debtor into bankruptcy was permitted to introduce evidence of a demand for payment it had made during an unsuccessful mediation session with the debtor. The court held that, while some elements of negotiations are protected, others may be “a legitimate subject of testimony” and so severable from the protected elements.⁹² Distinguishing between parts of discussions for the purpose of protecting or overriding confidentiality protection is clearly difficult if not impossible to do in advance, and so much relies on the discretion of a subsequent court hearing a motion for admission. *Springridge* thus introduced an element of significant risk to settlement negotiations, a risk that cannot easily be assessed in advance by a party debating whether or not to raise a matter during mediation.

86 J W Hamilton, “Protecting Confidentiality in Mandatory Mediation: Lessons from Ontario and Saskatchewan” (1999) 24 *Queen’s Law Journal* 561 at 575.

87 *Kosko v Bijimine* 2006 QCCA 671 at [49]-[50].

88 An example is *Rogacki v Belz* [2003] 67 OR (3d) 330 (CA).

89 P Pengelley, “Confidentiality and Disclosure in Mediation: When the Chicken Won’t Talk” (2007) 33 *Advocates’ Quarterly* 473 at 475. Again, an example is *Rogacki v Belz* [2003] 67 OR (3d) 330 (CA) at [18].

90 O V Gray, “Protecting the Confidentiality of Communications in Mediation” (1998) 36 *Osgoode Hall Law Journal* 667 at 677.

91 *Re Springridge Farms Ltd* (1991) 79 DLR (4th) 88.

92 *Re Springridge Farms Ltd* (1991) 79 DLR (4th) 88 at 92. See the discussion in J W Hamilton, “Protecting Confidentiality in Mandatory Mediation: Lessons from Ontario and Saskatchewan” (1999) 24 *Queen’s Law Journal* 561 at 578.

Agreements to mediate: contractual confidentiality undertakings

[10.190] Participants to mediation often secure confidentiality protection through an agreement to mediate, a formal document signed at the outset of a mediation by the parties, lawyers, mediators and others present and containing an undertaking not to reveal mediation communications. Such agreements to mediate can also explicitly invoke the “without prejudice” rule.⁹³

Some of the difficulties with these agreements to mediate arose in *Rogacki*. At the start of the mediation, the parties signed an agreement to mediate that provided confidentiality. A handwritten addendum at the end of the agreement, signed by all the parties, further stated that: “The parties agree that everything that is said or done in the mediation is strictly confidential and privileged, and no reference will be made to anyone other than the parties or their solicitors of anything that is said during the process.”⁹⁴ The Ontario Court of Appeal held that the confidentiality agreement in question was to be interpreted in accordance with the “without prejudice” rule, and so protected only against disclosure at a subsequent trial and not disclosure to the media by a third party as was the situation at issue.⁹⁵

Nevertheless, in 2006, the Ontario Divisional Court in *Rudd v Trossacs Investments* distinguished *Rogacki* and upheld the confidentiality provisions in an agreement to mediate.⁹⁶ In that case, after mandatory mediation had resulted in a settlement, a dispute arose as to whether one particular party was or was not a party to the agreement. An interim order was sought to compel the mediator to testify about communications made during the mediation. On review, the order was refused. One of the salient points that emerged was that courts should respect the parties’ agreements regarding mediation confidentiality unless an “overriding public interest in disclosure” weighs against protection.⁹⁷ While *Rudd* might suggest that the balance is shifting towards protection of confidentiality, it is clear that the protection provided by contractual undertakings to respect mediation confidentiality is still uncertain.

New privilege in the common law? The Wigmore test

[10.200] The confidential aspect of mediation is a foundation for frank and honest communications and defines the relationship between the parties and the mediator. Given this importance, the question arises whether or not mediation communications can and should be protected by a specific blanket privilege, similar to the solicitor–client relationship. Although Canadian courts have been

93 An example is Ministry of Justice, British Columbia, *Sample Agreement to Mediate*, available at <http://www.ag.gov.bc.ca/dro/mediation-in-bc/sample-agreement.htm> (accessed 21 August 2012). The confidentiality clause specifies that “All communications between the parties, either with one another or with the Mediator privately, are settlement negotiations conducted on a without prejudice basis. All communications occurring in the context of the mediation are confidential, and are inadmissible in any legal proceeding.”

94 *Rogacki v Belz* [2003] 67 OR (3d) 330 (CA) at [2]-[3].

95 *Rogacki v Belz* [2003] 67 OR (3d) 330 (CA) at [18].

96 *Rudd v Trossacs Investments* (2006) 79 OR (3d) 687 (DC).

97 *Rudd v Trossacs Investments* (2006) 79 OR (3d) 687 (DC) at [37].

reluctant to create new blanket categories of privilege and have not (yet) created a new category of privileged communications for mediation, judges have created partial case-by-case privileges.⁹⁸

The test for whether or not a privilege should be recognised is based on the so-called Wigmore criteria, and these have been used by the courts on a case-by-case basis to decide whether or not communication during mediation should be treated as privileged. The test establishes four conditions that must be satisfied for mediation communications to be treated as privileged and so as inadmissible as evidence in court: 1) the communications must be confidential in origin; 2) this confidentiality must be essential to maintaining the relation between the parties; 3) the relation must be one that ought to be fostered; 4) the injury to the relation from disclosure must outweigh the benefit to the correct outcome of the litigation.⁹⁹ If these conditions are met, the resulting privilege is restricted to the particular case; it does not constitute a new general category of blanket privilege for mediation communication.

A number of courts have applied the Wigmore conditions to determine whether or not communications during mediation are privileged.¹⁰⁰ In *Rudd*, for example, the Divisional Court used the Wigmore test to characterise the relationship between the parties and the mediator, and so found that the public interest in maintaining the confidentiality of the mediation process outweighed the particular interest in compelling the mediator to disclose information from that process.¹⁰¹

The application of the Wigmore test even outside the common law provinces was recently reconfirmed by the Supreme Court of Canada in *Globe and Mail*.¹⁰² After an examination of the interactions between the *Civil Code of Québec*, the *Code of Civil Procedure* (Québec) and common law principles, the Supreme Court affirmed that Wigmore or “Wigmore-like” principles applied also in Québec.¹⁰³

In these cases, the application of the Wigmore test has resulted in rulings that mediation communications are privileged. Nevertheless, this case-by-case approach is highly uncertain and hard to predict. Unfortunately, no new general category of blanket privilege for mediation communications has yet emerged.

CONCLUSIONS

[10.210] Confidentiality is a hallmark of most mediation processes, and the success or failure of a mediation will to a large extent, rely on the assurance that communications will be confidential and not used against any of the participants. In the specific case of judicial mediation, where judge-mediators play a special

98 O V Gray, “Protecting the Confidentiality of Communications in Mediation” (1998) 36 *Osgoode Hall Law Journal* 667 at 680; *M(A) v Ryan* [1997] 1 SCR 157 at [18].

99 See O V Gray, “Protecting the Confidentiality of Communications in Mediation” (1998) 36 *Osgoode Hall Law Journal* 667 at 680.

100 For example, *Porter v Porter* (1983) 40 OR (2d) 417 (UFC); *Sinclair v Roy* (1985) 20 DLR (4th) 748 (BCSC); *Pearson v Pearson* [1992] YJ No 106 (SCYT); *Sambasivam v Sambasivam* (1988) 73 Sask R 230 at 231 (CA); *AH v JTH* [2005] BCJ No 321 at [31]-[33] (BCSC).

101 *Rudd v Trossacs Investments* (2006) 79 OR (3d) 687 (DC).

102 *Globe and Mail v Canada (Attorney General)* 2010 SCC 41, [2010] 2 SCR 592.

103 *Globe and Mail v Canada (Attorney General)* 2010 SCC 41, [2010] 2 SCR 592 at [53].

role that straddles the informality of ADR and the formality of the judicial function, confidentiality is crucial to the broader institutional success of the judicial mediation process in Canadian courts.

This Chapter has examined the different mechanisms used to protect mediation confidentiality in Canada: statutory protections, the “without prejudice” rule, confidentiality undertakings in mediation agreements, and the case-by-case privilege based on the Wigmore test. While these mechanisms provide a certain protection, we would argue that mediation confidentiality still receives only patchwork protection, as a look at some of the jurisprudence shows. Uncertainty still reigns, creating potential hazards for parties and mediators alike.

We submit that the best solution would be the recognition of a blanket privilege for mediation communications. This would ensure to parties and mediators alike that they can share information in circumstances of protected confidentiality. We recognise that such blanket-type privilege should be subject to some exceptions. Examples of such exceptions include presence of manifest injustice, threats to public security, violations of law, gross negligence, waivers by the parties, disclosure of criminal activity, child abuse, commission of or threat of crime during the mediation, and complaints of mediator malpractice. The enumerated exceptions in the *Uniform Mediation Act 2001* could be used as a model.

While blanket protection would be best, we acknowledge that this depends greatly on the will of the courts to overcome their traditional hesitation to recognise new types of privilege. In the meantime, provincial legislatures should revisit statutory provisions on mediation confidentiality and provide more explicit and clear protection of confidentiality within court-connected mediation programs.

