Learning from Experience : An Evaluation of the Saskatchewan Queen's Bench Mandatory Mediation Program

Final Report
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with Professor Michaela Keet

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Acknowledgements and credits

Primary acknowledgement must go to Professor Michaela Keet of the College of Law at the University of Saskatchewan. Professor Keet worked with me as a partner at all stages of the evaluation project, from the development of the evaluation methodology, through the conduct of interviews and discussion groups, to our final reflection on what the data told us. Professor Keet also provided many helpful comments on both the Interim Report and the Final Report. In a more mundane but nonetheless critical role, Michaela was also the official driver and navigator for this project as we traversed the province of Saskatchewan soliciting input from program users. Her insight, analysis, knowledge of the field and intuitive sense of diplomacy have been invaluable throughout this project and I cannot thank her enough.

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As always, the individuals who participated in discussion groups and interviews, submitted written comments, and encouraged their colleagues to do likewise, are owed a debt of gratitude. Thank you for your willingness to contribute to this evaluation, and I hope you will see your many and diverse views reflected herein.

All errors and omissions that remain are my responsibility alone.

Julie Macfarlane, Kingsville, April 2003

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Executive Summary

The evaluation data, both qualitative and quantitative, which has been collected and analyzed for this study illuminates the operation of the Saskatchewan Queen's Bench mediation program and gives voice to the experiences of program users. It provides a detailed picture of the relationship between lawyers, their clients, the mediators and the structure and design of the present program.

The Saskatchewan Queen's Bench mediation program is perceived by almost all the individuals we consulted as appropriate, and its objectives – the faster and more satisfactory reaching of settlement in some civil matters – fully achievable. It became rapidly apparent that the question that respondents were most interested in discussing with us was not whether the program should be maintained, but how it might be improved in order to better achieve those objectives.

The consensus that emerges is that the program is reaching its goals in many individual cases, but not in others. While there is widespread support for both its universal nature and the present timing of mediation, many respondents called for greater *flexibility* in relation to both aspects of program design. In addition, there is an interest in rethinking the role of the mediator to clarify and perhaps sharpen this point of intervention with greater proactivity, and perhaps some type of enlarged role before and after mediation in *certain cases.*

There are also a few clear problems with the design of the present program. One is that some cases proceed to mediation with insufficient preparation, perhaps with little or no exchange of materials in advance of mediation, and just occasionally, an absence of "good faith" to negotiate. Another issue (perhaps related to this) is the somewhat uninformed approach of a small number of members of the Bar in regard to the role they might most effectively adopt in the mediation process. Each of these problems is resulting in some disappointment among clients, and some frustration among some members of the Bar.

None of these issues is unique to the Saskatchewan program – similar challenges are experienced in other mandatory mediation programs. However, the depth of experience with mediation in Saskatchewan – predating the Queen's Bench program to the earlier initiation of the farm debt mediation program – and the clarity and consistency of issues substantiated by this evaluation, present a unique opportunity to address these challenges.

Fourteen Recommendations are made. These include :

- Mediation should remain mandatory for all civil non-family cases, but attention should be given to enhancing access to adjournments and exemptions where an appropriate case can be made
- Mediation should continue to take place early in the litigation process, but with the additional requirement that parties first file their statement of documents in the hope of enhancing the exchange of relevant information before mediation.

- Mediation and pre-trial offer parties two distinctive conflict resolution processes, meeting different party needs at different stages in the life of a file. However, there should be provision for judicial referral of some special cases back to mediation at a later stage in the litigation process.
- A range of additional consumer choices – including the selection of a mediator and access to "enhanced services" including second sessions or longer initial sessions – should be made available to program users (the latter on a pilot basis)
- Mediator training should emphasis a proactive approach to the facilitation of settlement (including a role for the mediator in finalizing settlements), within the acknowledged constraints of non-evaluative model.
- An education and leadership strategy (including the leadership of the Bench) should be devised to further enhance a culture of effective conflict resolution within the Saskatchewan legal community
- The Dispute Resolution Office and the Court of Queen's Bench should consider the development of enhanced data recording systems to support future program evaluations.

PART I : METHODOLOGY

1. Evaluation Goals

The first step in the evaluation process was to frame the primary questions the client (Saskatchewan Justice) wished to have answered. These questions were as follows:

a. To evaluate how far the mediation program in the Queens' Bench meets the needs of the people of Saskatchewan (focusing on discussions with client users);
b. To assess the impact of the mandatory mediation program on civil litigation practice in Saskatchewan (focusing on discussions with members of the Bar);
c. To determine the efficiency of the Queen's Bench program (from available program statistics).

2. A Qualitative Orientation

In order to evaluate the success of the Queen's Bench mediation program in meeting users' expectations and needs, and to assess the systemic "cultural" impact of this major innovation, qualitative methods such as discussion groups and interviews are particularly appropriate (Krueger, 1994). Qualitative data is essential in order to understand the unique internal dynamics of a program and in order to fully differentiate the views and attitudes of different user groups. These methods can focus intensely on the detail of cases and process in order to identify and establish significant patterns (Huberman & Miles, 1993, Palton, 1991). The purpose is to discover as much as possible about individual experiences with the mandatory mediation program.

3. Qualitative Data Collection

May 2002

Our first step was to conduct an initial round of discussion groups with lawyers and clients, and interviews with mediators, at two sites (Saskatoon and Regina), in order to address questions (1) and (2) above. In these sessions participants were presented with the three primary evaluation questions and asked for their responses. While the May discussion groups were informed by what we already know from earlier research on mandatory mediation elsewhere in Canada and the United States, open-ended questions were used and all comments and reactions encouraged in order to discover the particular issues and concerns that are key to answering these questions in Saskatchewan (see Appendix A).

These initial discussion groups included only a small number of lawyers and clients, but immediately produced some clear patterns in response. Client users were very positive about the potential of mediation and generally welcomed the initiative, but many focused on criticisms about the way the process was handled by their lawyers and the role played by lawyers generally in the process, which was seen by these clients as less than constructive. Concern was also expressed by some clients about what they saw as lack of

follow-through after mediation by either the mediator or their counsel; for example, where they believed that an agreement or the basis of an agreement had been reached in mediation, but was never executed or implemented.

Most of the lawyers who participated in the May discussion groups were positive about the program but many had reservations which related to (a) the history of the introduction of the program (seen by many lawyers as implemented without adequate consultation) and (b) a number of program design issues. These latter included :

- the timing of mediation in the litigation process
- the role played by the mediator in mediation
- the role played by (other) counsel in mediation, including preparation, information exchange and bargaining in "good faith"
- the mandatory nature of mediation for all Queen's Bench cases and the exemption system

These themes formed the basis of our next round of discussion groups in September 2002.

September 2002

Our second step was to refocus the questions we were asking of lawyers, clients and mediators to reflect the program design issues that had been consistently described to us during the May visit. In September we returned to conduct a further round of lawyer and client discussion groups, this time including Prince Albert. We also conducted a lawyer discussion group at North Battleford, which afforded us the opportunity to speak with lawyers at a site without formal mandatory mediation.

A conscientious effort was made to ensure that lawyer and client discussion groups were as complete as possible, including lawyers from all areas of civil litigation practice, representing both individuals and corporations, and both institutional and personal litigants (for a complete breakdown, see data sources at (1) above)). This time we saw a total of 31 clients and 62 lawyers.

The September discussion group questions are included at Appendix B. These are more closely structured than the May group questions and as a consequence, the data we collected more specific to program design issues. However, there was still ample opportunity provided for participants to raise other issues and take the discussion in whatever direction they felt was important.

In addition we completed our interviews with mediators, making a total of 13 mediator interviews. The mediator interview questions are included at Appendix C.

October – December 2002

The third and final step in qualitative data collection was to identify individuals with whom we had not yet met, and whose views appeared to us to be important to the overall credibility and completeness of the evaluation. The Chief Justice provided us with a list of five named judges who were interviewed by Professor Keet (see questions at Appendix C). A further 8 interviews were conducted with lawyers and institutional clients (see questions at Appendix D).

4. Qualitative Data Coding and Analysis

Contemporaneous notes were taken of all discussion groups and interviews. Each meeting was also audiotaped to enable checks to be made between the written record and the recording. A file was created for each (electronic) meeting record and identified by location (Saskatoon/Regina/Prince Albert); participant role (lawyer/ client/ judge/mediator); date (May/September 2002); and where necessary numbered. The anonymity of all respondents has been maintained. File names appear through the data analysis presented below at Part II where it is appropriate to identify a source or sources for comments. Where a direct quotation is used, the text unit of the electronic file is also given for reference purposes.

All electronic records of interviews and discussion groups were entered into a data analysis program (NUDIST) which enables the coding of data to identify themes and patterns. The remainder of this Final Report is drawn from an analysis of this data and a review of the coding nodes.

NUDIST works by attaching codes or categories to sentences and/or paragraphs in the electronic text (records of interviews of discussion groups). Settling on codes or categories emerges from an initial analysis of the data, as particular themes and patterns recur. Thus the codes that are ultimately used to organize and structure the data arise from the data itself, and are not preset or externally imposed. The development of the appropriate number and type of codes emerges gradually, slowly evolving changing into a fixed set of codes or categories that appear to take account of all the issues raised by the data (see list below). At this point the entire database can be coded using these categories.

Once the electronic data has been coded in full, the resulting database can then be manipulated and sorted in a variety of ways, for example, to disclose all comments made under a particular code or category, comments made by lawyers or by clients or both, at one or more centers. This enables an accurate collation of the frequency of these comments, how internally consistent or diverse they are, etc.

All electronic records of discussion groups and interviews were coded using the following categories :

Demographics
- centre
- role (lawyer/client/judge)
- gender

General expectations of the mediation program

Evaluative Comments
- positive
- negative

Timing of mediation
- should come later in the process
- should come earlier in the process
- is OK where it is

The mediator's role
- comments regarding evaluative/ facilitative style of mediator
- pre-mediation role of mediators
- role of mediators in drafting settlement outcomes
- post-mediation role of mediators
- overall level of intervention by mediator

Compliance
- positive experiences
- negative experiences
- reasons given for experiences

Collateral benefits of mediation

Culture change among the Bar

Implications for legal education

Suggestions for program modification
- regarding compliance
- regarding the use of conference calls
- regarding the role played by the mediator
- regarding ensuring "good faith" by all parties
- regarding case management as a feature of the mediation process
- regarding voluntariness and allowing exemptions from mediation
- the relationship between mediation and pre-trial

Cost considerations

The coded database is stored by the author for the future use of Saskatchewan Justice.

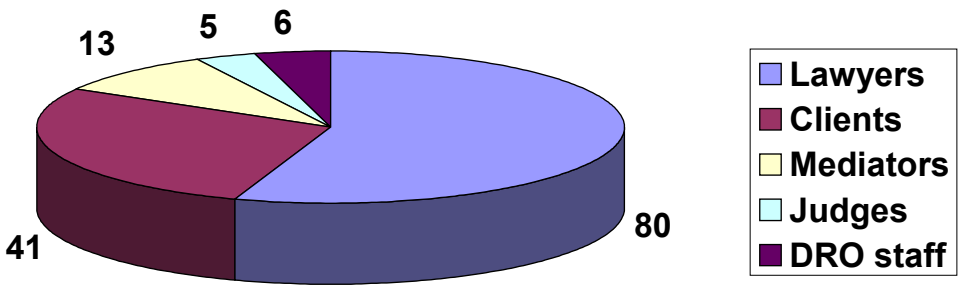
5. Sample size

Each of the individuals we consulted spoke with us for at least 45 minutes, and some for more than one hour. Detailed notes were taken and discussions were also audiotaped. The final numbers for consultation (via participation in discussion groups, interviews, and email communications) in each user group are as follows:

Table One Evaluation respondents

	May Discussion group	September Discussion group	Interviews	Email	Total
Lawyers	11	62	4	3	80
Clients	6	31	4	0	41
Mediators	0	0	13	0	13
Judges	0	0	5	0	5
DRO staff	5	0	1	0	6
Total	22	93	27	3	145

Pie Chart 1 Evaluation respondents



6. Quantitative Data Collection and Analysis

In generating and analyzing quantitative data in relation to the program, three questions were central :

a. What are the outcomes of mediation?

This question includes consideration of the following sub-questions:

i. do case outcomes differ significantly between different centres?
ii. have there been any noticeable changes over the past three years in levels of outcome?
iii. how reliable are the outcomes reported (1-5) by the Dispute Resolution Office?
iv. are case outcomes significantly affected in any way by case type (insofar as data is differentiated), including simplified rules cases?
v. what if any impact do the major "repeat players" have on settlement outcomes?
vi. generally, is the rate of settlement reported for this program comparable with similar programs elsewhere?

These questions are answered by the data presented below at Part II (4) (a).

b. Does mediation reduce time to settlement?

This question was difficult to answer in light of the data presently captured by the Dispute Resolution Office and Court Services. It was further complicated by the absence of a random control group in centers where mandatory mediation applied (foreclosing the possibility of comparing the length of time to settlement for cases inside and outside a mediation stream). Insofar as this was possible, this question is considered further below at Part II (4) (b).

c. Is the system of exempting certain cases from mediation working efficiently without undermining the mandatory nature of mediation?

This question includes consideration of the following sub-questions:

i. do exemption levels differ significantly between different centres?
ii. have there been any noticeable changes over the past three years in level numbers of exemptions granted?

These questions are answered by the data presented below at Part II (4) (c).

PART II : DATA ANALYSIS

The following four sections present the findings of the evaluation. Sections 1-3 present the results of our extensive discussions (in discussion groups and via personal interviews) with lawyers, counsel, mediators, administrators and judges. These findings are supported by our analysis of the records of all these meetings, analyzed in the NUDIST database. Where appropriate, quotations are used and remarks referenced to data sources. The anonymity of respondents has been preserved by indicating only the discussion group or a numbered interview (see the explanation above at Part I(4)).

Section 4 below presents an analysis of the statistics provided by the Dispute Resolution Office. It further examines possible relationships between settlement and case types. Section 4 also includes the results of an audit of reported outcomes.

1. Overview of Benefits of Mediation

The majority of the analysis and conclusions presented in this Report will focus on program enhancement and concerns over issues of program design, it seems appropriate to begin by summarizing the many comments we received from respondents about the more generalized benefits of the mediation program. This is important not only to accurately reflect the balance of positive as well as negative comments we heard – and also because these comments begin to fill in a picture of how mediation is understood as working well by users – both lawyers and clients – of the Queen's Bench program.

a. The value of an opportunity for a structured face-to-face meeting

Benefits consistently mentioned by lawyers include the potential to meet the other side and evaluate their credibility (direct communication rather than filtered via their counsel); to evaluate the credibility of one's own client in a "live" encounter with the other side; to gather new and important information quickly and informally (for example, *lawyerfollow-upinterview.3*) and as a consequence to be able to assess the risk of proceeding with litigation more realistically (for example, *saskatoonlawyersmay.1*).

Several counsel talked about the usefulness of mediation to address and defuse intense emotionality in litigation; for example,

"In some cases, where money is not the ultimate issue, where there are relationship issues, then mediation can be better suited to these cases."

(*reginalawyerssept.1 at 192-194*)

Similarly, mediation can also provide "an non-embarrassing forum in which to offer an apology" (*saskatoonlawyerssept.3 at 53*)

Benefits consistently mentioned by clients include the impact of seeing the other side as a "real person", and hearing from them directly ("put a face to the voice and meet the

people we were dealing with" (*clientfollow-upinterview.1*)); being able to tell one's story directly to the other side and feel listened to (for example, *paclientssept.1*); an opportunity to provide an explanation (for example, city or corporate policy. See *reginaclientsmay.1*) to the other side; an opportunity to "vent" and "offload" (for example, see *reginaclientsept.2*); and as a consequence, an opportunity to possibly restore business relationships. Some institutional clients also described mediation as a useful way to access and exchange information informally (for example, see *reginaclientsmay.1, reginaclientssept.1*)

These benefits were well summarized by one client who expressed his opinion as follows:

"It all started over hurt feelings. But then the lawyers got involved and it escalated. This was the first time we could sit down, face to face, and talk about it. That in itself was worth it".

(reginaclientsept.2 at 64-68)

The next three categories of benefits flowing from mediation were described by smaller numbers of respondents than (i) above, but are worth noting for the sake of completeness.

b. Systemic change outcomes

A small number of lawyers and clients talked about the benefit of mediation negotiations leading to outcomes which could result in changes in the way an organization does business in the future (to avoid future conflicts). This is because of the nature of the discussions in mediation, which may consider outcomes beyond legal remedies. For example, one lawyer described a case involving a client terminally ill with breast cancer:

"We got them (the hospital) to completely redo the protocols regarding how they interact with patients – this was a huge symbolic success for her, even though little money changed hands".

(reginalawyerssept.1 at 114-118)

c. The element of surprise

Some lawyers also mentioned that it was sometimes difficult to anticipate whether a mediation meeting would be useful or not. These lawyers acknowledged that even in circumstances that did not look promising, they were sometimes surprised. It was suggested that this was a reason to always give mediation a try, even if the parties were not initially feeling optimistic about its value (see for example, see *lawyerspasept.2, saskatoonlawyersmay.1)*

d. Access to justice

A few lawyers (for example see *saskatoonlawyersmay.1*) and some clients (for example see *reginaclientsept.2*), understood mediation as a means to engage clients directly in the process of decision-making over their dispute, enabling them to contribute to the outcome in a hands-on way. As one client put it, "it (mediation) is a lot less intimidating" (*reginaclientssept.4 at 128*). Another put it this way:

"I felt I had something to say and to contribute to the process"
(*reginaclientsept.2 at 40-41*)

In these comments, this is described as a generalized access to justice value, rather than at the level of individual engagement.

e. Collateral benefits

Finally, there may be of course be some collateral benefits even for those cases that do not settle in mediation (see for example, *clientinterview.3, lawyerinterview.1*). In many ways, early mediation can function as a reality-check for all parties. As one lawyer described this,

"Even if no settlement is reached, mediation can substantially move things forward and put things into a different perspective, seeing the shades of gray that were apparent to the solicitors."
(*palawyersept.2 at units 34-36*)

Other secondary effects of mediation (Cooley, 1996) cited by respondents included the speeding up an exchange of information, the opportunity to vent and to off-load, to meet first-hand with the other side, and to gauge their credibility.

These results are consistent with work conducted elsewhere on the general benefits of mediation as these are described by lawyers and by clients. For similar findings, see for example Bobbi McAdoo's study of the Minnesota Bar's response to court-connected mediation (McAdoo, 1997), and Roselle Wissler's study of litigant assessments of the mediation process in Ohio (Wissler, 2002).

2. General Criticisms of Mediation

It is noteworthy that program users in Saskatchewan generally placed less emphasis than has been noted in other studies on two historically contentious aspects of court-connected mediation – the mandatory nature of mediation and the timing of mediation. While both of these critiques were raised by some respondents, and therefore reported on below, generally there appears to be widespread acceptance in Saskatchewan of these core features of the present program. This may be a consequence of the length of time that the program has now endured in Saskatchewan, suggesting that it has now reached a period

of "post-legitimacy" (Tolbert and Zucker, 1983) where its essential components are not widely challenged. Similar results have been noted in the Ontario program, especially in Ottawa, where mediation has been mandatory for all civil cases for almost as long as in Saskatchewan (see Macfarlane (1995), Hann et al (2001) and Macfarlane (2002)).

What did emerge as a clear concern among both lawyers and clients was how to ensure that mediators in the Queen's Bench program play the most effective role possible. There was much discussion of mediator proactivity, and the role of the mediator before, during and after mediation. There was also considerable discussion of how to ensure that counsel played the most effective and constructive role in preparing for and participating in mediation. These discussions reflect a level of sophistication in the use of mediation that is unusual in evaluation studies and indicates the depth of experience in Saskatchewan with mediation processes. The concerns and critiques explored in this dialogue have many implications for future program enhancement and these are discussed further below under "Recommendations" at Part III.

a. The Timing of Mediation in the Litigation Process

The issue of the timing of mediation – which must presently be completed before any additional applications are made to the Court – was expected to figure strongly in our discussions with members of the Bar. However, this level of concern did not materialize. A small number of lawyers told us that they would prefer mediation to occur later in the litigation process – after discoveries was the most common suggestion – but very few wished mediation to be *fixed* at a later point in the litigation process. There were just five lawyers who felt that early mediation was never or almost never appropriate.

A far more common suggestion was that there should be greater flexibility in timing and the potential to take a case out of mediation and complete discoveries – or at least some document exchange – before returning to mediation. A number of lawyers spoke about cases in which mediation came too early to be really useful, and where an option to postpone mediation until after discoveries would have been beneficial (for example, see *reginalawyerssept.2* at 63-64, *reginalawyerssept.4 at 39-41*). In particular, residential schools cases (see *saskatoonlawyersmay.1 at 44-47*), medical malpractice cases (see *reginalawyersmay.1* at 60-61 and *palawyersept.2 at 48-51*) insurance cases where liability is denied (see *reginalawyerssept.1* at 45, *lawyeremail communication.2*) were described as cases in which it was often better to conduct discoveries before mediation (although this was by no means a unanimous view – see the debate at *palawyerssept.1*, *reginalawyersept.1*)

The problem articulated by a number of lawyers is not that the timing of mediation is "wrong", but that all cases are necessarily treated the same way (for example, *lawyerfollow-upinterview.2*). Some suggested that there should be more flexibility in allowing adjournments of mediation until after discoveries are completed – at present the only option available to counsel is to apply for an exemption from mediation (although informally, we understand that adjournments are sometimes given by the Director of The Dispute Resolution Office). Many respondents pointed to the benefits of a presumption

of early mediation – it forces a face-to-face meeting early in the process (see above at 1(a)); it prevents the parties from becomingly overly entrenched in their positions (see *reginaclientssept.2*); it overcomes the resistance sometimes observed by clients of their lawyers to "put numbers on the table" (see *reginaclientssept.1 at 104*); and that it avoided the tendency to put off negotiation until later in the process when this might not actually be necessary (some lawyers cited the model of collaborative law in this context; see for example, *reginalawyerssept.1 at 123-124*). Similarly, in interviews with members of the judiciary, most expressed the view that while some cases might benefit from flexibility in the timing of the mediation session, they considered it to be important that the focus should remain on early post-pleadings sessions. In this way mediation can continue to be a very distinctive process from pre-trials, and the two processes remain complementary and not in competition. The relationship between pre-trials and mediation is discussed further below at Part II (2)(c)(i).

The key word here that reoccurs throughout the discussion group and interview transcripts is "flexibility". It was also apparent that some members of the Bar were not aware of the range of options that the present provisions offer in terms of the timing of mediation, assuming that it had to be done as soon as possible after the close of pleadings.

A significant number of lawyers said that while originally skeptical, they now felt that it was appropriate in some cases to go to mediation as early as possible. As one put it, "I am no longer offended by the earlier process." (see *lawyerfollow-upinterview.1 at 38*). Certainly lawyers have a historical bias towards leaving serious negotiations until after discoveries (Barkai & Kassenbaum, 1989) and this assumption is challenged by early mediation (see Macfarlane 2002). Several lawyers stated that they had been surprised with the success of early mediation in some less complex cases and saw this as an important way of reducing costs to the client (for example see *palawyersept.2, saskatoonlawyersmay.1*).

There was a general acknowledgement that in appraising the timing of mediation it was important to ask "do you have all the information you need?" (see *palawyerssept.2 at 100*). The question was how to ensure that sufficient information was on the table to ensure that the mediation was productive. There appears to be a widespread view (see for example *lawyerfollow-upinterview.1*) that no discoveries can take place before mediation. In fact, The Queen's Bench Act only stipulates that no further steps can be taken following the close of pleadings before mediation. It is presently unclear whether this clause means that discoveries (as long as these do not require recourse to the court) are possible before mediation, or whether no discoveries can be commenced before mediation. The Bar appears generally to adopt the latter interpretation. It would be helpful to clarify this interpretation (see also "Recommendations" below at Part III).

A related issue is how information might be exchanged prior to discovery which nonetheless has a significant impact on the usefulness of a mediation session at this stage. The present program does not impose any explicit requirements of documentary or other exchange between the parties before coming to mediation. In other cities with mediation

programs, counsel have had developed an informal practice of exchanging statements or affidavits of documents before mediation, and ensuring that information is furnished to the other side on their request (for example, in Toronto and Ottawa; see Macfarlane 2002). Indeed some Saskatchewan counsel told us that they routinely asked the other side for documents in advance of mediation (for example, this seemed to be established practice in Prince Albert; see both Prince Albert lawyer discussion groups). The mediation program would greatly benefit from formalizing this practice as a requirement before mediation; see also "Recommendations" below at Part III.

Finally, a couple of institutional clients (for example, see *reginaclientssept.3*) expressed an interest in a program that offered mediation *before* litigation was commenced. Several lawyers told us that they now attempted mediation before litigation was commenced in appropriate files, and agreed that they would not have even thought of doing this before the introduction of mandatory mediation.

b. The Mandatory Nature of Mediation / the Exemption System

In keeping with the theme of "flexibility' regarding the timing of mediation, many lawyers expressed a desire for a system that gave counsel the discretion to make arguments that a case was not suitable for mediation and to withdraw with minimal bureaucracy. A number of lawyers described cases in which they believed that an exemption from mandatory mediation would be appropriate. These included medical malpractice cases (see also below at 4(a)(iii)); out-of-province cases (this comment was often linked to a request for greater flexibility around allowing parties to participate by conference call, see also below at 3(a)); cases that were raising frivolous claims or defences; cases involving institutional parties who historically never settled at mediation (for example the Department of Justice and the residential schools cases; see *palawyerssept.1 at 128-129*); and cases where it was painful for a client to retell his or her story where the other side was not likely to be seriously contemplating settlement (for example sexual abuse cases and in particular, residential schools cases). However, it was noteworthy that there were very different views expressed to us on this later point. Some lawyers working on residential schools cases considered the mediation process to be therapeutic and healing (for example *reginalawyersmay.1 at 73-75*); while others decried it as painful and traumatic (for example *reginalawyerssept.1 at 68*).

Certainly some clients have been upset by the mediation process, and found their expectations unmet. One client (the plaintiff in an abuse case) told us that she hated going through the process of telling her story again, and that the anticipation of having to meet with her alleged abuser face-to-face produced enormous anxiety for her (see *reginaclientssept.4 at 101-104*). This client told us that the other side clearly had no intention of settling in mediation. There was also a general feeling that where the parties were not in good faith that a mandatory mediation could be simply an opportunity for game-playing; one lawyer on medical malpractice suits commented that he had sometimes seen defendants coached to offer platitudes in mediation which "only a moron would think are coming from the heart". (*palawyersept.2 at 49-50*)

However, these specific proposals for exempting certain cases did not indicate a lack of support for the universal nature of the program as it presently stands. There were a number of lawyers who were clear that they understood and accepted the need for the program to be mandatory in the first instance, given the potential for lawyers not to use the process otherwise. Many saw the current impact of the program as linked to its "opt-out" mechanism. These lawyers said that they understood why it was important to maintain the program as an "opt-out" scheme, because otherwise lawyers who express themselves as broadly supportive of mediation might fail to use it in their own cases. One institutional client made the point that mediation needed to be mandatory in order to achieve lawyer "buy-in" (*reginaclientsmay.1 at 93*).

Support for the mandatory nature of mediation was expressed by several lawyers as a systemic change that had occurred over time in their own practices. One lawyer commented that the issue of the mandatory nature of mediation no longer seemed to be an issue among members of the Bar, unlike the earlier days of its introduction (*lawyerinterview.2 at 40*). This lawyer commented that he had seen "a huge change in attitudes over time". Another lawyer described systemic changes in his own practice. He provided the example of a pre-litigation mediation on a wrongful dismissal matter that he had participated in the day before. He noted that this mediation – which was successful in resolving the claim and what he described as a very good result for both sides – likely would not have taken place before the days of mandatory mediation. Moreover, "(T)his is something that never would have happened that way without a mediator." (*lawyerinterview.1at 55*)

Although there was widespread acceptance of the case for retaining mandatory mediation for all civil cases, there were also some misgivings expressed by a smaller number of lawyers. These reservations centred on certain case types that some lawyers felt were unsuited to mediation (for example, medical malpractice) and on the principle that lawyers should be allowed to make the determination for themselves and their clients as to whether mediation was appropriate. For example, in Prince Albert two lawyers felt that their small and collegial Bar made it inappropriate to impose mediation, and argued that Prince Albert lawyers would make use of mediation in any case. (see *palawyerssept.1 at 23).* A more pragmatic argument was made by one lawyer in Regina who pointed out there where the parties were unwilling to use mediation it was unlikely to work anyway. (reginalawyers1, at 31). However even this critic appeared to be less concerned about the mandatory nature of mediation if a degree of flexibility were permitted in choosing the timing of the session.

Many of the mediators also expressed some preference for a narrower focus of cases. They felt that sometimes their intervention was doomed to failure from the start where one or more of the parties were convinced that mediation would not work. Some suggested that they would welcome a broader role for the mediator (for example in facilitating document exchange and in follow-up, see below at (c)) in cases where there was a common recognition that mediation represented a real opportunity for full or partial resolution.

c. The Mediator's Role

First, it is important and fair to report that we heard many positive comments about the mediators, especially from clients who particularly appreciated the time and patience taken to ensure their comfort with the process. Many clients commented that their mediators appeared genuinely concerned for their well being, and they were appreciative of this.

There were a cluster of more critical comments about the role played by the mediators which were consistent among lawyers and clients, and between centres. A few of these relate to the facilitative, non-evaluative role played by the mediators in the Saskatchewan program. A larger cluster of remarks from both lawyers and clients suggest that program users want the mediators to take a more proactive role in working for settlement in the session. Clients also spoke of wanting the mediator to take more steps and perhaps have greater powers to move what is agreed in a session into formal compliance. Finally, some clients and lawyers see the potential for the mediator to assist in setting a future timetable for a case not resolved or partially resolved in mediation, instead of simply releasing the parties at the end of the mandatory session.

i. Evaluation by the mediator

The Queen's Bench mediation program adopts an explicitly facilitative, non-evaluative approach to resolution. This is reflected in the fact that most of the present mediators are not legally trained. They do not give an opinion on the legal merits of the case. As one mediator expressed this to us,

"I see my role in these files as being to facilitate, to assist people in their communications, to poke, prod, give gentle nudges, to try to move people forward." (*pamediators*)

The lawyers we spoke with appreciated that most of the present cadre of mediators were not qualified to provide a legal evaluation, and although some questioned this these were a small group (see below under mediator qualifications). Most lawyers appear to accept the mediation as a purely facilitative process, thus distinguishing it clearly from the later pre-trial. A number of lawyers commented that in relation to the present pre-trial process, it made more sense to make mediation a distinctive and earlier process. There was no suggestion that the mediator should act as a judge; in fact, there were many examples of lawyers distinguishing the role of a judge from the role of a mediator. The judicial function was seen as quite different from that of a mediator. For example ,

"Some clients won't settle unless a judge tells them that they're liable." *(clientfollow-upinterview.2 at 33)*

"The pre-trial judge provides evaluation – it is sometimes important for the client to hear what judge says about their case." *(lawyerfollow-upinterview.2 at 32).*

In interviews with members of the judiciary, a majority (although not unanimous) view emerged that once the action proceeds closer to the pre-trial conference stage, the benefits of that more evaluative process tend to overtake those that might come from a later mediation session (although this was not a universal sentiment). Judges interviewed were consistently supportive of early mediation but saw this as a quite distinctive process that generally should occur well in advance of pre-trial (see also "Recommendations", below).

There were some lawyers, however, who stated that they would prefer a more evaluative approach in mediation (for example, four of the five lawyers in *saskatoonlawyersmay.1*). Others said that they could see some types of cases in which an evaluation would be more useful than a purely facilitative approach. While these comments came from a minority, taken with other suggestions about mediator role they suggest that more might be done to provide counsel with choices over mediators (style, expertise, etc). This is discussed further below under "Recommendations" at Part III.

ii. Mediator proactivity

We were struck by how often we heard comments that the mediator could have been more interventionist during the mediation session (and sometimes, though less often, after the session as well; see below). These comments focused on the level of energy, tenacity and the expectations that the mediators placed on the parties, and particularly on counsel.

These comments came from both lawyers and clients. From clients, they sometimes related to how evaluative a role they expected the mediator to take and some disappointment on that score (see, for example, *reginaclientssept.2*). However, clients remarks about mediator proactivity was not restricted to providing a legal evaluation; see the "wish list" below. From lawyers, generally these comments were separate from and unrelated to any desire for an evaluative mediation (see discussion above).

Instead, the reservations we heard suggested a preference for a more directive style or strategy for the mediator. This "wish list" includes:

- standing up to counsel where they are either unwilling to stay in the session or to bargain in good faith (for example, see *saskatooonclientssept.3*)
- holding counsel to account where they have not exchanged adequate information in advance to make the session constructive and worthwhile for everyone
- not letting counsel – or one counsel – dictate the tone of the meeting
- requiring counsel to answer questions and to explain / justify their positions (for example, see *reginaclientssept.1*)
- working harder to keep parties at the table (for example, see *reginalawyerssept.2)*
- being more specific and clear about the possibility of follow-up sessions where agreement appears close (for example, see *saskatooonclientssept.1*)

There were a number of comments about the general level of energy and tenacity evidenced by the mediator or experienced by the parties. For example, "There wasn't enough energy in that person to keep the ball rolling" (*saskatooonclientsmay.1*); and "(T)hey (the mediators should be prepared to get their hands dirty" (*reginalawyerssept.2*).

In summary, there was a clear sense that many lawyers and clients wished for mediators who while not necessarily providing direction regarding the possible legal outcomes in the case, would work hard at steering the parties towards constructive and substantive negotiations, and would take charge where the lawyers appeared to be recalcitrant.

From the mediators themselves we heard a range of views about how proactive they felt they should be in mediation. A number felt that it was important to give primary responsibility to the parties themselves for resolving the matter, and this reflected how proactive they felt they should be in the mediation session. Some of the more experienced mediators however said that they felt comfortable being a little more "pushy", and

working hard to keep the parties at the table. It may be that these mediators are the preferred choice of some lawyers who have had extensive experience at Dispute Resolution Office.

These comments - which were noticeably widespread and consistent between lawyers and clients - give rise to specific Recommendations regarding the role of the mediator and appropriate training (see below at Part III).

iii. The mediator's role in finalizing settlements

One of the points of tension around the level of intervention of the mediator is their role in the drafting of any settlement outcomes or interim agreements. Some of the mediators we spoke with said that they were willing to help draft a summary of matters discussed and agreed in mediation. However others said that they were not comfortable with any role in drafting outcomes or documents that might later be used towards settlement outcomes, and that they saw this as the responsibility of the parties themselves (for example, see *reginamediators.4*). Part of this caution appears to come from a program philosophy about handing off responsibility to the parties to use the results of mediation as they see fit; and part may stem from the difficulties of non-lawyer mediators becoming involved in drafting documents with possible legal effect.

Whatever the strength of these and other arguments that support minimal mediator involvement in the drafting of settlement agreements, we can report that the "hands-off" practice presently adopted among the majority of the mediators attracts considerable client criticism, which may threaten the credibility of the program among some client groups. Some clients simply cannot understand why the apparent agreements made in mediation could not be written down - by someone, anyone – in order to speed the process up after mediation. Typical of this frustration was one clients' comment that he would like the mediator "to light a fire under the other side" (*saskatooonclientssept.3 at 76*). "One-shot" or first-time litigants are usually not clear whose job this is – their lawyer's or the mediator's.

Some repeat clients told us that they have developed the practice of minuting the outcomes of mediation, although this is often not an agreed and shared document (for example, *reginaclientssept.1*). Some lawyers said that they have developed the practice of writing out a memo summarizing the results of mediation and asking the other side to review and sign this in mediation (see for example, *lawyerfollow-upinterview.2, lawyerfollow-upinterview.3*). Some reported that the mediator was very helpful in facilitating this process, and there was a general sense that the assistance of the mediator in this regard would be welcomed, not resented. One lawyer told us that he thought that mediators were generally "…much too cautious about involving themselves in developing agreements." (*lawyerfollow-upinterview.1 at 52-53*). Many clients repeated that they thought that a constructive enhancement to the program would be for the mediator to routinely assist directly in minuting the outcomes of mediation (for example, *reginaclientssept.1*)

These comments are related to further comments on compliance, discussed below at (d).

iv. Beyond facilitation

There was considerable discussion over the role that might be played by the mediator beyond the facilitation of the mediations session itself. This might include work before mediation and follow-up after the session had taken place. In relation to the early stages of a litigation file this might include, for example, assisting the parties in agreeing a schedule of productions and exchanges ahead of the mediation; relationship-building between the parties before the mediation (which might simply mean agreeing on information exchange (see *saskatoonlawyersmay.1*); and perhaps fractionating some smaller issues that could be agreed upon and disposed of. Once mediation had taken place, this role might involve the mediator in following up on next steps and setting a timetable for future events (*saskatooonclientssept.1*).

There was also some discussion among program users of opportunities to reconvene in a second mediation session, or to book a longer first session for a complex case. Many of those who attended discussion groups were unaware that this opportunity was available. There appeared among some clients to be a measure of regret that the mediator did not stay involved in the case to ensure that a second meeting took place (for example *clientfollow-upinterview.1*).

In the September discussion groups, we conceptualized these ideas as a "case manager" role for the mediator. Clients were generally enthusiastic about this suggestion, feeling that mediation often left too many "loose ends" (see also discussion below on compliance). However among lawyers, the suggestion of a "case manager" role for the mediators was greeted with much less enthusiasm. Comments included concern for adding another level of bureaucracy to the litigation process; a sense that mediators had less authority and credibility than judges in setting case management schedules; and a concern that mediators would need greater knowledge of legal procedures than some presently possessed in order to carry out this task properly (see for example, *reginalawyerssept.1, reginalawyerssept.4*). The mediators themselves did not welcome the idea either, and several suggested that they saw their role quite differently to this, and that case management was "treating the symptoms not the causes of the conflict" (*mediator.8 at 140).*

It may be that part of this reaction can be explained by the assumption that a role which we were describing as a "case manager" was perceived by lawyers to be as the same or similar to a judicial case management role. This was not our intent and clearly the role of the judge as case manager is quite distinct. When this was clarified, a number of lawyers stated that if the mediator were to be charged with the responsibility of engaging the parties in a general discussion over their next steps, and a greater degree of proactivity over ensuring that information was exchanged ahead of time, this additional aspect of the mediator's role could be very useful indeed. A number of mediators also described themselves as already informally playing this role (for example, *mediator.5, mediator.7*). The possible enhancement of the mediator's role in these ways was also raised with

judges in our discussions with them. Those members of the judiciary with whom we spoke were very supportive of this idea.

d. Compliance

There were many complaints from personal litigants about would-be agreements that they saw as falling apart from lack of follow-through after mediation. Many of these clients were angry about what they saw as a process "without teeth" (for example, see *reginaclientssept.1*). One client described this as "a disconnect between undertakings in the session and what actually happened". *(reginaclientssept.1 at 33*) Another client said that his experience of non-compliance with an agreement he believed had been made in mediation made him feel like he had been "screwed" by the mediation process *(reginaclientssept.4 at 51).*

Many lawyers and institutional clients also recognized this difficulty, but their comments were more practical. Several suggested that there should be written undertakings made at or immediately following mediation which in the event of non-compliance could then be raised in future proceedings. One lawyer said that his approach to the outcomes of mediation was exactly the same as pre-trial – he took a list of possible undertakings with him to the session, which could be amended as necessary, and if the negotiation was successful would ask the other side to sign off on these, there and then (see *lawyerfollow-upinterview.3*).

More attention to recording the outcomes of mediation would both enhance the legitimacy of the process, and reduce the damage that these client experiences may do to the credibility of mediation. This issue is closely related to the mediator's role in finalizing settlement, discussed above at (c)(iii). It is further addressed below under "Recommendations."

e. The Role of Counsel

Many clients appear to be highly satisfied with the role played by their lawyers in the mediation process. We were told by many clients that their lawyers did an excellent job of preparing them, representing them in the mediation session, and counseling them on settlement options. Several clients noted that the commitment of their lawyer to use the mediation process constructively changed the whole experience for them. For example,

"In the first few mediations, our lawyer told me to speak only when I was asked a question, and the mediation was mostly an exchange between the lawyers. Then the city solicitor changed. He told me that mediation was really for the clients to talk, not the lawyers – that we can use it to do the PR thing and if it's a legitimate case say sorry – and that he would take care of the legal issues. Now my feeling about mediation has totally changed."

(*saskatoonseptclients.3 at 20-22)*

However, we also heard a significant amount of negativity expressed by *some* clients about the role played by *their* lawyers in the mediation process. These comments highlighted in particular a failure to prepare the client for mediation; a failure to prepare the file for mediation for example by exchanging or obtaining information from the other side; a pessimistic outlook on mediation ("it's going to be a waste of time"); and the tendency of some lawyers to "muzzle" their clients (i.e. to instruct them not to talk in the mediation session) (for example, see *clientfollow-upinterview.3*).

It is important to note that these negative comments about the behavior of some counsel came from both clients and lawyers. In fact, these comments were largely the same from lawyers and clients, although it would be fair to say that clients were often more forthright in their criticisms. It is also fair to note that in some cases lawyers may take the view that mediation is not going to be helpful for moving this case along, and therefore choose not to spend time preparing for the session. However, if this is the case it is incumbent on these lawyers to explain this to their clients, some of whom do not appear to fully understand the reasons for their lawyer's attitude towards mediation.

Lawyers themselves were often critical of the approach taken by their colleagues who either failed to prepare or treated the mediation as simply an opportunity for informal examinations; one lawyer suggested that "(T)here should be some way to 'de-lawyerize' the process'." (*saskatoonlawyersmay.1 at 34*) . Another candidly acknowledged "Lawyers sometimes have a vested interest in complicating things, and delaying the resolution of cases" (*lawyer email communication.1*).

There was widespread acceptance among both lawyers and clients that counsel's attitude towards mediation would largely determine how the mediation would go, and how useful and constructive it would be – or not. We heard a number of tales of lawyers who had not prepared their clients in any way for what to expect in mediation (see for example *paclientsept.2*). This appeared to be a consequence of the lawyer's assumption that there was no point in preparing for mediation since the process would not work for this case. These clients suggested that their lawyers' "default position" was not to prepare or take mediation seriously, instead of a default (more appropriate and courteous in a bilateral matter) of treating mediation as a serious settlement opportunity, in all but special circumstances. One large institutional client described the contrast between his experience with a lawyer who was not interested in mediation, compared with a new lawyer for his organization who regarded mediation as important and useful; as a result, he "had a completely different feeling about mediation now" (*saskatoonseptclients.3 at 14*). The negative attitude of some lawyers also stands in contrast with those lawyers who told us that experience had taught them that the results of mediation not infrequently surprised them, and that they had learned that it was sometimes hard to anticipate in advance whether it would be useful in this case, or not (in other words, it was almost always worth trying) (see above at Part II(1)(c)).

A couple of our client discussion groups were largely preoccupied with negative comments about lawyers in the process, while the clients were positive about the program itself (for example, see the discussion in *saskatooonclientsmay.1)*. Several clients in this

group expressed the view that in hindsight they believed that they would have been better off coming to mediation without their lawyer. Some reasoned that attending without counsel – but with access to counsel for advice if a settlement emerges – would be a better option than attending with a lawyer who was neither prepared nor committed to making mediation work (see also *paclientssept.2*). This would at least avoid their paying the lawyers fee for attending at mediation.

Negative comments from lawyers about their colleagues were often framed in terms of an absence of "good faith" in entering the mediation process willing to disclose relevant information and genuinely searching for a solution. A number of lawyers expressed high levels of frustration to us about the likelihood that they prepare conscientiously for mediation, bring their client, only to be confronted by a lawyer on the other side who was not willing to bargain openly or in good faith.

We asked lawyers for their reaction to the possibility of a "good faith" rule for the program. Other jurisdictions in North America, including the farm debt mediation program in Saskatchewan, have a rule that enables the mediator to impose sanctions if s/he believes that one or other party has not come in good faith, adequately prepared and ready to bargain seriously (see generally Lande, 2002). However this idea was not well received, with many lawyers telling us that they were adverse to more "rules" (for example see *palawyerssept.1, reginalawyerssept.4)*.

Instead most lawyers expressed a strong preference for strategy of further lawyer education, combined with strong leadership from the Bench, to overcome this problem. A focus on continuing legal education and the support of the Bench for court-connected mediation may also prove to be the most effective and the most easily accepted means of addressing the problem of a minority group of lawyers coming to mediation without having adequately prepared either themselves, or their clients (Kovach, 1997). Studies elsewhere have highlighted the importance of establishing a culture of legitimacy for mediation, ensuring that lawyers take the process seriously and that a norm of good faith and adequate preparation takes hold within the community (exemplified by the Ottawa experience, which was backed by strong advocates from the Bench and in the Court; see Macfarlane 2002).

The judges interviewed for this evaluation did indicate their clear support for the mediation program, and this may need to be utilized more effectively than at present. It was also notable that judges made the comment in interviews that they encountered similar dynamics – some lawyers' resistance to a settlement oriented process, the failure of some counsel to adequately prepare for the process - in pre-trial conferences (although perhaps to a lesser degree).

A possible education and leadership strategy is outlined further below under "Recommendations".

3. Other Observations

Several other important themes emerged from our discussions with lawyers and clients which are reported here.

a. The use of conference calls

We heard complaints from five lawyers who wanted greater flexibility in substituting attendance at mediation with conference calls for out-of-province clients. However, in the course of these discussions we also heard from other lawyers that conference calls would in their opinion reduce the usefulness of mediation; " you need to have a human face on it in order to facilitate resolution" (*saskatoonlawyersmay.1 at 97*). Several lawyers told us that they resented the request of the other side (often large insurers) to meet by conference call instead of sending a representative to mediation, and that they were happy for the Dispute Resolution Office to generally insist on attendance and participation.

We have concluded that while some lawyers are frustrated over the reluctance to allow conference calls, that the present approach is treating each request on its merits and encouraging face-to-face meeting is broadly supported by all but a small number of counsel.

b. Access to extended mediation sessions and subsequent sessions

We heard from a minority of lawyers that they were aware that they could request both a longer session (regular mediation sessions are scheduled for two hours); and further follow-up sessions to finalize agreements or take negotiations another step forward. Many other lawyers in these discussion groups expressed surprise at this – this does not appear to be widely known. Some of these lawyers said that they would sometimes want to avail themselves of a second session, and/or anticipate the need for a longer first session.

Among clients, there were some comments about a follow-up session being discussed at the end of their mediation session, but not materializing. These clients were usually unclear over who should take this initiative, although a few wished that the mediator would. The mediators themselves seemed to assume that a second session was not widely desired (for example see *mediatorsregina 2*). Other mediators told us that they would like a stronger and clearer role in relation to encouraging parties to return for a second session where real progress was being made (see *saskatoonmediatorsmay.45678*).

If these services are to be made available informally, it seems appropriate now to formalize their availability to all program users. See also "Recommendations", below at Part III.

c. Information for the parties

The Dispute Resolution Office produces explanatory literature for clients which offers a summary of what clients should expect in mediation, and answers some potential user

questions about the program. However, very few of our client respondents indicated that they had seen this information. For *some* (see below), this serves only to exacerbate a feeling of strangeness and lack of preparation in advance of mediation. One client stated that he would have appreciated more information about the procedural dimensions of mediation – precisely the type of information that the Dispute Resolution Office materials do present (*reginaclientsept.2 at 45-46*). Another told us that he was concerned about how confidentiality applied to what was discussed in mediation – a question which went unanswered in this case. Another client said that her lawyer told her to expect something along the lines of a hearing for discovery (*reginaclientsmay.1 at 90*).

Many clients, of course, had been satisfactorily briefed by their lawyers and were not disadvantaged in any way by having not seen the literature provided by the Dispute Resolution Office. However, as a general principle, it is important to try to get this explanatory information into the hands of the clients to whom it is targeted. This ensures at least a baseline of information which counsel can, and should, then supplement in discussions with his or her client. See also "Recommendations", below at Part III.

d. "Culture change"

Most of the lawyers we spoke to, including those who were more negative about mediation, acknowledged a significant shift in the attitude of the Saskatchewan Bar towards mediation in the last 8 years. In addition to identifying a cultural change within the Bar itself – described by one respondent as originally "dragged into this kicking and screaming"(*lawyerfollow-upinterview.2*) - in the degree of openness and receptivity towards mediation (including mandatory mediation), a number of lawyers gave us personal accounts of what was sometimes described as their "conversion" (for example, *lawyerfollow-upinterview.1, lawyerfollow-upinterview.3, palawyersept.2, lawyeremail. 1, reginalawyerssept.1* among many). These lawyers all described their initial reactions to the introduction of mandatory mediation as highly skeptical and/or critical. However they told us that they had become gradually convinced of its real worth in at least a significant number of cases. Even those who were more personally cautious – broadly supportive but entirely convinced - described a significant shift of attitudes among members of the Bar. As one lawyer put it, "mediation is no longer a dirty word" (*reginalawyerssept.2 at 56*).

Some of those counsel who described themselves as having embraced the principles of interests-based mediation were relatively new practitioners, who had been exposed to some ADR education in law school (see below). Many others however were more senior practitioners who explained a shift in their strategy and attitudes towards settlement as the results of pragmatism and experience. As one experienced lawyer put it,

"(W)hen you practice long enough, you'll understand there are some brilliant legal arguments that are not worth making".
(*saskatoonlawyersmay.1 at 189-190*)

Mediators also told us that they had seen signs of real change in the attitude of the Bar. Several spoke of individual lawyers whose commitment to mediations they oversaw had changed radically over the past few years. This change was attributed by the mediators to

a range of possible causes, including enhanced law school education on mediation, and the recent growth of collaborative family lawyering and associated trainings within the province.

e. Implications for legal education

There was widespread agreement on two issues : that legal education in the province has made significant strides towards ensuring that new law school graduates had a better grasp of the essentials of interests-based bargaining and mediation; and that there remained much to be done still in this area to adequately equip lawyers to be as effective as possible in these processes

Many of the lawyers with whom we spoke suggested that an educational strategy was preferable to a rule-based approach to addressing challenges with program structure and design (Kovach, 1997). See also "Recommendations", below at Part III.

4. Quantitative Data Analysis

Efficiency questions inevitably preoccupy program planners and evaluators. Whereas the Saskatchewan Queen's Bench program was not introduced primarily to enhance case processing efficiency – unlike Ontario and British Columbia where the civil justice system has faced a significant backlog of cases and delays in resolution – it is important that the program can be shown to be performing to an acceptable standard of efficiency.

Program efficiency is generally measured by examining the cost and time involved in resolving the dispute, both from the parties perspective (legal costs, delays, other commercial and personal costs) and more generally from the perspective of the justice system itself (court staff time, processing costs, judge time and so on). While there may be some collateral benefits for those cases that do not settle in mediation (see above at Part II(1)(e)), the first question to be answered is how many cases are actually resolving in mediation, or as a result of mediation.

a. What are the outcomes of mediation?

Dispute Resolution Office mediators currently record one of five outcomes for mediation immediately after the session has ended.

Category 1	Agreement reached in mediation
Category 2	Agreement likely
Category 3	Further negotiations pending
Category 4	Proceed to court
Category 5	No interaction (proceed to court)

The following tables set out case outcomes as reported by mediators for the three years 1999/2000, 2000/2001, and 2001/2002.

Table Set Two Reported outcomes in all case categories : by year 1999-2002

Table 2(A) Recorded outcomes 1999/2000

Outcome	Regina		Saskatoon		Prince Albert		Swift Current		Totals	
1	38	12%	52	14%	6	15%	6	24%	102	13%
2	57	18%	71	19%	10	24%	5	20%	143	19%
3	142	44%	137	37%	22	52%	8	32%	309	41%
4	72	22%	75	20%	1	2%	6	24%	154	20%
5	14	4%	38	10%	3	7%	0	0%	55	7%
Totals	323	100%	373	100%	42	100%	25	100%	763	100%

Pie Chart 2(A) Reported outcomes 1999/2000

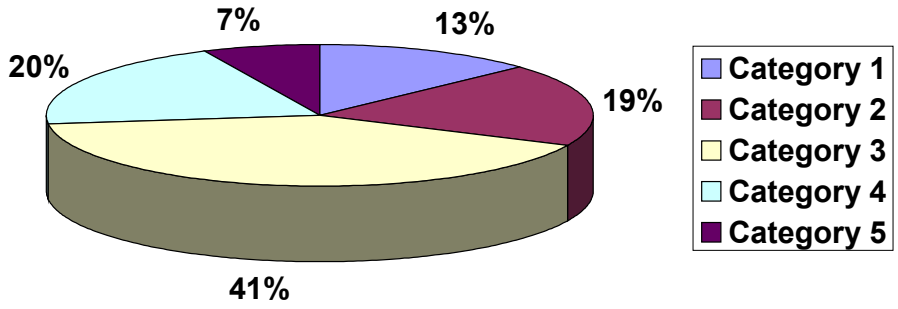


Table 2(B) Reported outcomes 2000/2001

Outcome	Regina		Saskatoon		Prince Albert		Swift Current		Totals	
1	48	13%	53	14%	14	22%	6	33%	121	15%
2	55	15%	48	13%	17	26%	1	6%	121	15%
3	148	40%	140	38%	23	35%	8	44%	319	39%
4	102	28%	109	29%	11	17%	3	17%	225	27%
5	17	4%	23	6%	0	0%	0	0%	40	4%
Totals	370	100%	373	100%	65	100%	18	100%	826	100%

Pie Chart 2(B) Reported outcomes 2000/2001

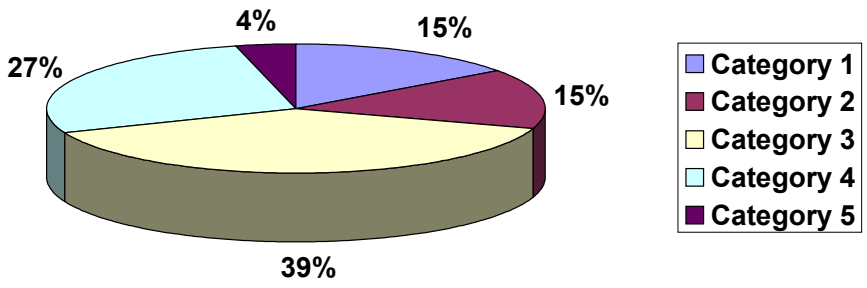
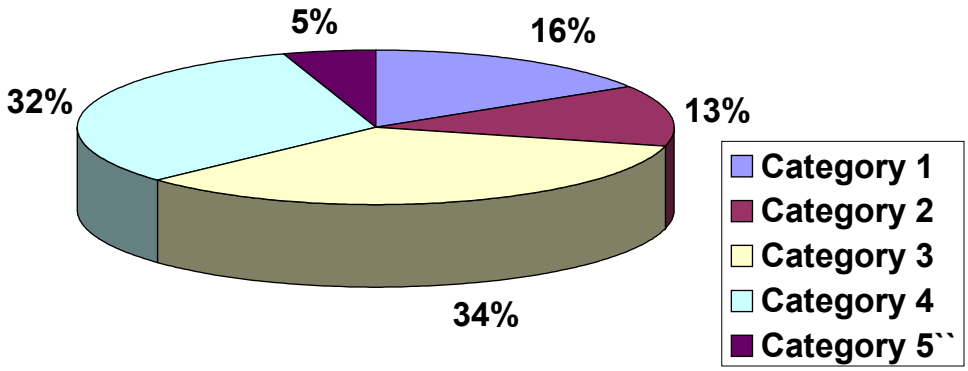


Table 2(C) Reported outcomes 2001/2002

Outcome	Regina		Saskatoon		Prince Albert		Swift Current		Totals	
1	62	18%	50	13%	15	18%	4	23%	131	16%
2	48	14%	44	11%	11	13%	2	11%	105	13%
3	118	35%	138	35%	21	25%	7	39%	284	34%
4	90	27%	138	35%	36	42%	5	28%	269	32%
5	18	5%	24	6%	2	2%	0	0%	44	5%
Totals	336	100%	394	100%	85	100%	18	100%	833	100%

Pie Chart 2(C) Reported outcomes 2001/2002



Over the past three years, the rate at which agreements have been reached in mediation (category 1) across all four centres has remained fairly consistent. This was 13% in 1999/2000; 15% in 2000/2001; and 16% in 2001/2002. In Regina and Saskatoon there are some slight but insignificant differences in settlement rates and reported outcomes from year-to-year. Where variations do appear form year-to-year between the smaller centers – for example, Swift Current reports a 33% agreement rate in 2000/2001, but only 24% in 1999/2000 and 23% in 2001/2002 – these figures should not be taken as conclusive of any significant trend because of the very small volume of cases involved. (The two smaller centres represent a very small fraction of the overall caseload. In 1999/2000 the major centers of Regina and Saskatoon accounted for 91% of the total number of mediations conducted in the province; in 2000/2001 90%; and in 2001/2002 88%.)

These figures also show a similar consistency in outcomes reached between the four centers. The percentile of settled cases recorded appears as slightly higher at the smaller center of Swift Current – and to a lesser extent at Prince Albert. However, a small group of successful or unsuccessful cases may affect percentiles in centres with a small volume of cases.

Table Set Three: All programs, comparison of reported case outcomes in all case categories, 1999-2002 : by reported outcome

Table 3(A): Agreement Reached

Year	Regina	Saskatoon	Prince Albert	Swift Current
1999/2000	12%	14%	15%	24%
2000/2001	13%	14%	22%	33%
2001/2002	18%	13%	18%	23%

Table 3(B): Agreement Likely

Year	Regina	Saskatoon	Prince Albert	Swift Current
1999/2000	18%	19%	24%	20%
2000/2001	15%	13%	26%	6%
2001/2002	14%	11%	13%	11%

Table 3(C): Further Negotiations

Year	Regina	Saskatoon	Prince Albert	Swift Current
1999/2000	44%	37%	52%	32%
2000/2001	40%	38%	35%	44%
2001/2002	35%	35%	25%	39%

Table 3(D): Proceed to Court

Year	Regina	Saskatoon	Prince Albert	Swift Current
1999/2000	22%	20%	7%	0
2000/2001	28%	29%	17%	17%
2001/2002	27%	35%	42%	28%

Table 3(E): Total Bust

Year	Regina	Saskatoon	Prince Albert	Swift Current
1999/2000	4%	10%	7%	0
2000/2001	4%	6%	0	0
2001/2002	6%	6%	2%	0

i. How typical is Saskatchewan's rate of settlement?

In comparing Saskatchewan's settlement rate in mandatory mediation with other programs, it is contentious whether the point of comparison should be with the total Category 1 cases (16% for the year 2001/2002) , or with all cases reported as *either* settled *or* "likely to settle" (Category 2) (29% for the year 2001/2002). It is also arguable that some of the Category 3 ("further negotiations") cases may also proceed to settle shortly after and as a result of mediation (see also below).

If cases reporting Category 1 outcomes ("full settlement") are assumed to be the sum total of settled cases in the Saskatchewan program, this rate of settlement appears to be somewhat lower than other, similar programs report. For example, the most recent evaluation (Hann & Associates 2001) of the Ontario mandatory mediation program (Rule 24.1 Ontario Rules of Civil Procedure RRO 1990, reg 194) reported a full settlement rate in Toronto of 38% and an additional partial settlement rate of 21% ; and in Ottawa 41% of cases settled in full and 13% partially settled. However, the 10 day time lag in filing a report (in the evaluation, mediators were asked to respond to whether the case had settled within 7 days of mediation) *may* mean that this data captures some equivalents to Saskatchewan's category 2 ("likely to settle") cases. If Category 2 cases are added in to Saskatchewan's settlement rate, (making it 29% in 2001/2002; see above), the figures become more comparable between the two programs, although the settlement rate remains still considerably higher in Ontario.

The significance of Ontario as a comparator is that its program is in many respects very similar to the Saskatchewan program. It is an opt-out program (i.e. exemptions have to be requested) and it occurs early in the litigation process (generally before discoveries). However, there are some differences between the two programs which may account for the difference in settlement rates, including the potential for selection of a mediator from a large pool and the different method of reporting outcomes (below). In addition, Ontario requires the parties to exchange statements before mediation outlining the issues in dispute, although it would appear that in practice this appears to add little to levels of preparedness (recognized as a problem in some Ontario cases (Macfarlane, 2002), just as in some cases in Saskatchewan; see the discussion above at Part II (2)(e).

Looking beyond Ontario for possible program comparators, a number of additional variables intrude. For example, many US programs are voluntary (characterized as "opt-in" not "opt-out" as in Ontario and Saskatchewan), and this may account for their often higher rates of settlement. For example, the Illinois Judicial Circuit reports a settlement rate in five circuit courts (statistics variously collected from 1993 to 2003) as high as 60% (www.caadrs.org/statistic/reports). Clarke et al (1995) report a settlement rate of 44% in North Carolina. Both of these programs are opt-in programs.

However, there are apparently exceptions to this trend also. Other evaluations of voluntary programs report much lower rates of settlement. The RAND Report of 1997 which examined settlement in 20 judicial districts in the United States found a settlement rate in (voluntary) court-referred mediations of just 21% (Kakalik et al 1997) (note

however that this study has been widely criticized as based on a very small sample of mediated cases).

Arrangements for lawyers fees in the US (for example whether undertaken on a contingency basis) may also affect settlement levels. Such comparisons may also be affected by differences in reporting practices; for example in Ontario, unlike Saskatchewan where the mediator's report is made immediately after the conclusion of the mediation session, the mediator has up to 10 days to file a report after the conclusion of the mediation, He or she may have been able to follow-up with the parties during that time to ascertain progress towards proposed outcomes. Ontario, along with a number of other US jurisdictions, also reports both "full settlement" and "partial settlement" (of some but not all issues).

Typically, family mediation programs reveal higher rates of settlement than civil non-family programs (Pearson, 1982). In a recent study of voluntary court-connected mediation in Georgia which included both family and other civil cases, family cases settled at a higher rate (35%). Settlement rates in contract and in tort cases (each 21%) were far more comparable to the Saskatchewan figures (Hartley, 2002).

In conclusion, it is important to recognize that so many variables exist among court-connected mediation programs that direct comparison may be unrealistic. Nonetheless, it would be safe to say that typically settlement rates in civil non-family court-connected programs range from one third to two thirds (Wissler, 2002). This would place the Saskatchewan settlement rate "in the ballpark" if Category 1 and 2 cases added together are assumed to represent the overall rate of settlement. This proportion of settled cases might be further swelled if some Category 3 cases could be shown to settle as a result of mediation.

However, because of the manner in which data on outcomes is presently collected in Saskatchewan, this assumption bears further examination. In common with many other programs, mediators are given the responsibility of reporting actual or anticipated outcomes. This raises concerns about the accuracy of this data. It must be emphasized that there is no suggestion here (and we heard none from any parties) that mediators were deliberately misrepresenting outcomes. Instead, the reporting of anticipated results represents a data management challenge

ii. How accurate are reported outcomes?

The 2001/2002 Audit

The decision to implement a random audit of case outcomes in Categories 1 and 2 was made on the advice of the Evaluation Advisory Committee at an early stage of the evaluation. At present, the outcomes of mediation are recorded by the mediators themselves, without independent verification by the parties. Concerns about reporting of outcomes have focused in particular on the prediction that an agreement would likely

follow mediation (Category 2), and this was the focus of this limited audit. Further studies might usefully track outcomes in other categories (see discussion below).

In the absence of any formal requirement (either in Saskatchewan or in any other Canadian province) to file notice of settlement and withdrawal, the only way to ascertain the accuracy of both Category 1 and Category 2 record was to conduct a small random audit of actual outcomes. This task was taken on by the Dispute Resolution Office, and the returns – which are analyzed below - forwarded to the Evaluator.

Category 1 cases

The Dispute Resolution Office sent out surveys to counsel on all cases that had recorded either Category 1 outcomes (agreement reached in mediation) during the year 2001/2002 in Regina, Saskatoon and Prince Albert (a total of 126 cases). Counsel was asked to respond to the following two questions:

2. If there was a settlement reached in mediation, did this get translated into formal Minutes of Settlement or a Settlement Agreement? If not, what happened?
3. To the best of your knowledge, was the agreement reached in mediation complied with by the parties?

Results

70 surveys were returned (an excellent return rate of 55.5%). Of these 70 returns, 2 stated that they could provide no further information. Of the remaining 68, 59 (87%) stated that formal minutes were executed at or shortly after mediation. The 9 cases which did not use formal signed minutes of settlement reported nonetheless that the parties had agreed on an outcome between themselves and in none of these cases were there any reported compliance problems. In two cases, minutes had been drawn up but one party (the defendant in each case) had refused to sign these. Unsurprisingly, in each of these two cases there had been compliance issues. Two other cases – for a total of four – reported compliance problems. One case reported that compliance was partially complete but ongoing. Compliance was complete therefore in 97% of cases.

Analysis

These results appear to substantiate the accuracy of the Category 1 record. They also indicate that in most cases, the parties are executing settlement agreements – but also that where this formality is dispensed with, there is rarely a problem. Compliance appears to be high. There is no reason to believe that compliance with settlement agreements arising out of mediation is any different from compliance where settlement agreements are made outside mediation.

Category 2 cases

The Dispute Resolution Office sent out surveys to counsel on all cases that had recorded either Category 2 outcomes (agreement likely following mediation) during the year 2001/2002 in Regina, Saskatoon and Prince Albert (a total of 106 cases). Counsel was asked to respond to the following three questions:

1. Was there ultimately a settlement in this case?
2. To what extent was the settlement a result of/ influenced by the discussions that took place in mediation?
3. Approximately how long after mediation and at what stage of the case did settlement take place?

Results

35 surveys were returned (a respectable return rate of 33%). Of these 35 returns, 3 stated that they could provide no further information. Of the remaining 32, 14 (44%) stated that no agreement had in fact been reached in this case. A few of these commented that mediation had been less than helpful. For example,

> "Mediation was ineffective. Matters appeared more inflamed following the session."

> "The mediation process was meaningless."

A further 14 (44%) stated that agreement had been reached which was significantly or "somewhat" (three of 14) enabled by the discussions in mediation. Several respondents pointed to the role of mediation in enabling critical documentary and other information exchange. Some of these responses explained the impact that mediation had on moving the settlement discussions along in the following terms:

> "The mediation was really helpful in understanding the issues"

> "The mediation really helped the parties appreciate that it is the process they would like to use to settle their case"

> "The case had been stalled for 9 years. It was resolved as a direct result of the mediation."

> "Hard to say…the mediation was in this instance helpful in bringing all parties together in a non-confrontational atmosphere which I expect promoted settlement."

> "To what extent…? 100%"

In contrast, four respondents (including one counsel on a case otherwise reported by the other side as being settled as a result of mediation) stated that while agreement was

reached it was *not* as a result of mediation. One counsel stated that "it was (as a result of the) co-operation of counsel.". A second stated his view that "(S)ettlement was not in my opinion influenced by the discussions that took place at the mediation to any significant extent." The third stated "I do not know whether (my client) is of the view that the mediation process helped or not. I have not discussed it with him." The fourth described the mediation as "rancorous".

Of the 18 cases which did settle, 15 provided information on the timing of settlement. Eleven of these cases settled within weeks or a few months of mediation, and before any other legal steps were taken (e.g. discoveries). A smaller group (4 cases) were not finalized until 12 months or later. This longer time period did not seem to clearly relate to the usefulness of mediation but rather to the practicalities of finalizing documentation, exchanging necessary information etc.

Analysis

These results suggest that the prediction that an agreement is "likely" following mediation is only accurate about half the time. While Category 2 cases are not presented as having been settled by Dispute Resolution Office, there is certainly a sense created that these cases will probably – although not certainly - settle shortly after mediation. A figure of 50% may be too low to justify this designation.

There are a number of very strong and moderately strong statements in this part of the survey about the positive influence of mediation on settlement discussions. The volume of these comments clearly outweighs negative comments about mediation (examples above).

Nonetheless there is a need to ensure that the Category 2 rating is attributed only when there is adequate information to substantiate this reporting status. This may mean that reports should not be completed immediately other than in situations where there is a clear outcome i.e. an agreement reached and documented in some fashion in mediation, or a "total bust" where parties declare the negotiations to be over. In other cases a follow-up two or four weeks later for the purposes of record keeping may be more appropriate and may achieve greater degree of accuracy.

Having considered these results, modifications to the present system of reporting outcomes are described under "Recommendations" at Part III.

It should also be noted that a future study could usefully examine the outcomes of Category 3 cases (negotiations continuing). It seems likely that further settlements may arise in that group which can be attributed to mediation. The best way to ascertain this would be to undertake an audit similar to that undertaken here in relation to Category 1 & 2 cases.

The 2001/2002 Status Check

Another means of checking on reported outcomes is to access what information exists in the court record on each case in each reporting category. A year end Status Check was carried out for the year 2001/2002 in Saskatoon and Prince Albert, and for each month of this same period in Regina. Each case was checked to ascertain (i) whether a notice of discontinuation had been filed (ii) whether there had been any other or further court activity on the file during this period, which would be a minimum of 6 and a maximum of 16 months after mediation.

Since there is no formal requirement of the filing of a notice of discontinuation in Saskatchewan (in common with other Canadian provinces), this data is at best an incomplete picture of those cases that have settled and withdrawn from litigation. We also know that in North American civil justice systems most (in the region of 95%; see Galanter & Cahill, 1994; Trubek, Sarat, Felstiner, Kritzer & Grossman, 1983) cases settle before trial. Therefore data showing discontinuation and/or no further activity on the file is most useful where it can show patterns which contrast with a control group (e.g. that discontinuation occurred significantly earlier in the mediation stream than in the litigation stream). Such a control group was not available here since all cases in these three centers are referred to mandatory mediation.

Nonetheless, the Status Check reveals a striking number of cases which have been recorded as showing "no further activity" following mediation. No further activity *implies* that the matter had resolved, and without further recourse to the court via motions activity or discoveries. It is important not to overstate the significance of this data – it is impossible to conclusively assert that cases in which there was "no further activity" or which filed a notice of discontinuation *settled as a result of mediation*. In order to demonstrate this causal connection it would be necessary to communicate directly with the parties, as in the audit process above. However, these figures are suggestive of the impact of mediation. This is *especially* so where there was no further activity, and/or discontinuation took place within a few months of the date of mediation.

Table Set Four: Status Checks, 2001/2002

Table 4(A): Prince Albert, Status 6-16 months following mediation

The results of a Status Check on a total of 79 files during the period April 1, 2001, to March 31, 2002 showed almost 60% of Category 3 cases (22 files) and 45% of Category 4 files recorded no further activity following mediation.

Code 1 – Agreement Reached – 13 Files

3	Nothing Further	23.0%
6	Discontinuance/Settlement	46.2%
4	Other Court Action	30.8%

Code 2 – Agreement Likely – 11 Files

7	Nothing Further	63.6%
1	Discontinuance/Settlement	9.1%
3	Other Court Action	7.3%

Code 3 – Further Negotiation – 22 Files

13	Nothing Further	59.1%
2	Discontinuance/Settlement	9.1%
7	Other Court Action	31.8%

Code 4 – Proceed to Court – 31 Files

14	Nothing Further	45.2%
4	Discontinuance/Settlement	12.9%
13	Other Court Action	41.9%

Both the Category 5 files ("total bust") continued to court action.

Table 4(B): Saskatoon, Status 6-16 months following mediation

In Saskatoon, with a much larger number of files (393), quite similar patterns are apparent in the large numbers of Category 3 & 4 cases which record no further activity on the file following mediation.

Code 1 – Agreement Reached – 50 Files

18	Nothing Further	36.0%
27	Discontinuance/Settlement	54.0%
5	Other Court Action	10.0%

Code 2 – Agreement Likely – 39 Files

25	Nothing Further	64.1%
9	Discontinuance/Settlement	23.1%
5	Other Court Action	12.8%

Code 3 – Further Negotiation – 142 Files

72	Nothing Further	50.7%
20	Discontinuance/Settlement	14.1%
50	Other Court Action	35.2%

Code 4 – Proceed to Court – 138 Files

73	Nothing Further	52.9%
12	Discontinuance/Settlement	8.7%
53	Other Court Action	38.4%

Code 5 – No Interaction – 24 Files

7	Nothing Further	29.2%
6	Discontinuance/Settlement	25.0%
11	Other Court Action	45.8%

Table 4(C): Regina, Status 6-18 months following mediation

Finally, the Regina cases (316 files over this period) were subject to the same status checks over a period ranging from 6 – 18 months following mediation. The Regina cases show slightly lower, but still significant numbers of files recording no further activity following mediation.

Code 1 – Agreement Reached – 57 Files

16	Nothing Further	28.1%
33	Discontinuance/Settlement	57.9%
8	Other Court Action	14.0%

Code 2 – Agreement Likely – 38 Files

15	Nothing Further	39.5%
13	Discontinuance/Settlement	34.2%
10	Other Court Action	26.3%

Code 3 – Further Negotiation – 113 Files

49	Nothing Further	43.4%
20	Discontinuance/Settlement	17.7%
44	Other Court Action	38.9%

Code 4 – Proceed to Court – 91 Files

34	Nothing Further	37.4%
11	Discontinuance/Settlement	12.1%
46	Other Court Action	50.5%

Code 5 – No Interaction – 17 Files

5	Nothing Further	29.4%
5	Discontinuance/Settlement	29.4%
7	Other Court Action	41.2%

iii. Are outcomes significantly affected by case type?

Efforts elsewhere to establish statistically significant relationships between case type and the likelihood of settlement to case type have largely proved to be fruitless (see for example, Wissler, 2002). In Canada, there is some work that supports the thesis that wrongful dismissal cases have a slightly higher chance of settlement in mediation (Macfarlane, 1995, Hann et al, 2001). However, research also indicates that case type settlement patterns may also vary between different cities and different legal cultures (Hann et al, 2001, Macfarlane, 2002; see also further the discussion below under "Malpractice"). While program planners would welcome the opportunity to introduce screening based on case type, experience suggests that case type is not a major predictor of outcome in mediation. Other factors such as the experience of the mediator (Brazil, 1999) and the predisposition of the parties (especially the distance between their initial positions; Wissler 2002) appear to be much more significant.

I. Contracts, Personal Injury and Wrongful Dismissal cases

Nonetheless, it is important to examine the Saskatchewan data from the perspective of case type analysis in order to ascertain whether any patterns emerge. In common with other civil jurisdictions, Saskatchewan differentiates between case types by using a small number of very broad categories. In Saskatchewan these classifications are Contracts; Personal Injury; Wrongful Dismissal; Malpractice; and "Other". At the same time as these case types appear very broad, a further problem for data analysis is the very small number of cases in some of these categories (especially Malpractice) – along with the difficulty of drawing any conclusions from the category defined as "Other" (including estates and probate, residential schools cases, property disputes and a myriad of other matters). For these reasons, the Malpractice and the "Other" categories have not been included in the analysis below.

We tried to establish whether these distinctions made any significant difference to the rate at which cases resolved in mediation. The tables below record outcomes in the case categories of contracts, personal injury and wrongful dismissal.

Some caution is advised in the interpretation of these results. The only case type which produces significant numbers of cases on which to base a reliable analysis is the Contracts group. In Regina and Saskatoon between 190-230 Contracts files are mediated each year. Even in these two larger centers, the number of Personal Injury files mediated annually is less than 45, with Wrongful Dismissals lower again – around 30 files per year in each site. Numbers are much lower again in Prince Albert. As a result of these very small numbers, minor fluctuations in settlement levels should not be taken as significant. With this small volume of cases in each case type, it would take only a small group of cases – for example eight suits filed for personal injury against a manufacturer – which

either all settled or all failed to settle to significantly affect the overall settlement rate for that case type.

Second, these case type records were extracted and collated manually. While every care was taken to ensure that all records were pulled and that manual counting was accurate, without a computerized record it is not possible to state definitively that all records were included in the manual count. Note that where "0" is entered, this means that no cases in this category were found with the stipulated outcome from the data available (rather than 0%).

Table Set Five Case type data 1999-2002 : by reported outcome

Table 5(A) : Agreement reached

	Regina			Saskatoon			Prince Albert		
	99/00	00/01	01/02	99/00	00/01	01/02	99/00	00/01	01/02
Contract	17%	20%	25%	18%	21%	17%	27%	20%	27%
Personal injury	11%	10%	10%	2%	7%	9%	20%	17%	10%
Wrongful dismissal	10%	0	0	16%	17%	21%	33%	20%	11%

Table 5(B) : Agreement reached plus Agreement Likely

	Regina			Saskatoon			Prince Albert		
	99/00	00/01	01/02	99/00	00/01	01/02	99/00	00/01	01/02
Contract	25%	34%	41%	35%	29%	31%	38%	25%	34%
Personal injury	24%	30%	22.5%	18%	17%	25%	40%	33%	20%
Wrongful dismissal	27%	24%	0	24%	28%	31%	50%	40%	22%

Table 5(C) : Proceed to Court plus Total Bust

	Regina			Saskatoon			Prince Albert		
	99/00	00/01	01/02	99/00	00/01	01/02	99/00	00/01	01/02
Contract	25%	27%	28%	27%	31%	40%	8%	45%	20%
Personal injury	28%	24%	45%	37%	33%	25%	60%	33%	20%
Wrongful dismissal	28%	0	0	34%	38%	38%	33%	40%	44%

One apparent pattern in this data is that the rate of resolution is higher for Contracts cases than for the other two case types. This remains the case in Table 5(B) (cases settled plus those in which agreement is likely). This *may* mean that generally Contracts cases have been more susceptible to settlement in the Saskatchewan program, but this data is at most moderately suggestive of this conclusion (see discussion above).

Note that the large percentage of unresolved matters in Personal Injury in Prince Albert in 1999/2000 represents just three files.

II. Malpractice cases

It was suggested to us several times by lawyers in discussion groups that medical malpractice cases might be inherently unsuitable for mediation. In the 2001 Ontario evaluation (Hann et al 2001), medical malpractice suits were found to settle at a lower rate than other case types in Toronto (but not in Ottawa, interestingly). Figures for malpractice cases in Saskatchewan have not been included in the analysis above because it is too small to provide a basis for drawing sustainable conclusions. However, the malpractice data for Regina - which carries the largest number of malpractice files – was reviewed. In 1999/2000, 9 malpractice files were mediated in Regina. One was settled, four were deemed "likely to settle" and 9 were recorded as continuing in further negotiations. In 2000/2001, 15 malpractice files were mediated. One was settled, 7 deemed "likely to settle" and five were recorded as continuing in further negotiations. Finally, in 2001/2002, 25 malpractice files were mediated in Regina. One was settled, five were deemed "likely to settle" and 17 were recorded as continuing in further negotiations.

These results may suggest that the rate of settlement is indeed somewhat lower in Malpractice suits than in Contracts cases or even Personal Injuries. However no

statistically supportable conclusion to that effect can be drawn from such a small volume of data. Moreover, these reported outcomes do not account for the other, collateral benefits of mediation – for example, the exchange of information – mentioned by numerous lawyers in the discussion groups and in responding to the audit (see above). Arguably, this may make mediation useful in malpractice suits even where no formal settlement is yet attainable.

III. Simplified Rules cases

Another hypothesis often debated is that mediation is more suited to cases involving smaller rather than larger sums of contests monies. One respondent writes in an email :

"Despite my initial reservations, I must admit that I am a big proponent of mandatory mediation, especially in disputes involving the Simplified Procedure Rules (under $50,000). Given that we have no discoveries for these types of cases, mediation is our first and only pretrial opportunity to assess credibility and to ask a few questions." (*lawyeremail.1*)

The debate over whether mediation is more likely to succeed in cases where smaller amounts of money is involved has not been settled conclusively elsewhere. In Ontario, Simplified Rules cases are excluded from the mandatory mediation program under Rule 24.1, but in British Columbia and many US states, small claims matters (generally under $10,000) were the first to be mandated into mediation. In Saskatchewan, cases proceeding under the Simplified Rules in the Queen's Bench are included in referral to mediation. Are cases that proceed under the Simplified Rules Procedure (for cases under $50,000) settling at any significantly different rate than other cases?

Again this analysis could only be accomplished by manual count and thus some caution must be taken with the results. Because of the difficulty of manual counting, only one center (Saskatoon) was examined. The figures for Saskatoon are set out below. These tables show that the total number of Simplified Rules cases in Contracts and Wrongful Dismissal cases is around 45-50%; and somewhat lower in Personal Injury cases. The tables go on to show that the representation of Simplified Rules cases among the cases settled or deemed likely to settle in each case type runs at a slightly higher percentage.

This analysis suggests that Simplified Rules cases *may* be settling at a slightly higher level than those cases proceeding outside the Simplified Rules; however it does not suggest that *only or mostly* Simplified Rules cases are settling in mediation.

Table Set Six — Settlement by case type 1999-2002, Saskatoon : percentage simplified rules cases

Table 6(A) : 1999/2000 Saskatoon Simplified Rules cases

1999/2000	Total # cases	Percentage simplified rules cases	Total # cases settled/ "agreement likely" in mediation	Percentage simplified rules cases
Contracts	182	41%	64	56%
Personal injury	56	16%	10	20%
Wrongful dismissal	38	47%	9	89%
Totals	276	37%	83	55%

Table 6(B) : 2000/2001 Saskatoon Simplified Rules cases

2000/2001	Total # cases	Percentage simplified rules cases	Total # cases settled/ "agreement likely" in mediation	Percentage simplified rules cases
Contracts	154	51%	45	67%
Personal injury	42	24%	7	0%
Wrongful dismissal	35	54%	10	50%
Totals	231	47%	62	56%

Table 6(C) : 2001/2002 Saskatoon Simplified Rules cases

2001/2002	Total # cases	Percentage simplified rules cases	Total # cases settled/ "agreement likely" in mediation	Percentage simplified rules cases
Contracts	231	41%	71	59%
Personal injury	44	16%	11	27%
Wrongful dismissal	9	47%	9	56%
Totals	284	41%	119	42%

iv. Repeat players

In order to check that the activities of the major repeat players in mediation were not skewing the outcome results, the most frequent participants in mediation were analyzed separately for the year 2000/2001.

This analysis reveals that three of the top four repeat players in the Queen's Bench mediation program show significantly lower than average outcomes reported in Categories 1 and 2. These top three players record between 9 and 9.5% of their files falling into Categories 1 and 2, compared with a rate of 28% for the same period for all cases in Regina, and 27% in Saskatoon. The fourth of the top four players (#2 in terms of numbers of files) records outcomes much closer to the overall norm.

This analysis suggests that it is important to ensure that major players who regularly participate in mediation are fully apprised of how they might use the process to their advantage and that their full "buy-in" is secured. This may mean listening to any particular concerns these parties have about the process (several representatives participated in our discussion groups) and considering how the process may be better fitted to their needs.

b. Does mediation reduce time to settlement?

This question was difficult to answer satisfactorily in the absence of a substantive control group with which to compare timelines. The task is further complicated (as it is elsewhere in Canada and the US) by the lack of required information or information recorded by court databases on the timing of withdrawal from a lawsuit, and the reasons for withdrawal (settlement, party fatigue or lack of resources, moving away, death).

However, some inference may be drawn from timelines to pre-trial for mediated and non-mediated (exempted) cases. In Regina in 2000/2001, 655 files were opened by The Dispute Resolution Office and of these, 13.4% were noted as having a pre-trial date scheduled within this year (presumably in these cases mediation was unsuccessful). For these cases, the average (not median) time from the claim to the pre-date of trial was 633 days. In a quasi-control group of 1974 cases which were filed in Regina in 2000/2001 (cases exempted from mediation either under the statute or by The Dispute Resolution Office or a judge), 0.3% recorded a pre-trial date scheduled during this period. Of these (6) cases, the average time between claim and pre-trial date was 895 days.

This data suggests that in this very small sample, timelines between claim and pre-trial were significantly lower for cases that failed to settle in mediation than for those that did not mediate at all. This is consistent with other studies (see below and Macfarlane, 2002) which suggest that preparing for and participating in mediation focuses counsel earlier than usual on considering settlement options, exchanging information, and generally moves the case along.

Other program evaluations have clearly established that early mediation generally results in a shorter timeline to settlement. Since settlement occurs in between 95-98% of all civil filings, the only real question for program planners and policymakers is how to ensure that settlement occurs sooner, rather than later, in the litigation process (Macfarlane, 2001). An Ontario study by the author in 1995 found that of a sample of 1460 cases filed in the Ontario General Division between January 1991 and August 1995, 6.4% proceeded to trial (Macfarlane, 1995) Similar rates of settlement before trial have been found in US studies; for example, in 1991 just 4% of all cases filed in the US Federal District Court were ended "at or during trial" (Galanter & Cahill, 1994; Trubek, Sarat, Felstiner, Kritzer & Grossman, 1983).

Evidence that mandatory mediation shortens the timeline to settlement (or case disposition) is available from a number of both US and Canadian sources, for example the 2001 Ontario evaluation (Hann et al, 2001), the 1995 Ontario evaluation (Macfarlane, 1995), the high-quality (and widely relied upon) evaluation of North Carolina's mediation programs (Clarke, et al 1994). However, some dissenting notes have also been struck, most significantly by the RAND Report of 1997 (Kakalik et al, 1997) which found no reduction in case processing times for mediated cases and reported that in one court, mediated cases took longer to process to settlement (a conclusion reached by another study of workers compensation mediations in Ohio; Hanson, 1997) (note the critiques of the RAND study, above).

Finally, it is important to recognize when reviewing data on timelines to settlement that the other settlement events offered in that court may have a significant impact on disposition times (for example, whether or not pre-trials or settlement conferences are also offered; whether or not case management is also in place).

c. Is the system of exempting certain cases from mediation working efficiently without undermining the mandatory nature of mediation*?*

While section 5 of The Queen's Bench Act automatically exempts certain cases from mediation (for example, farm foreclosures under The Saskatchewan Farm Security Act, and the Land Contracts Actions Act), matters commenced other than by statement of claim, applications for judicial review), further exemptions may be applied for and granted by both The Dispute Resolution Office and the courts.

The cumulative statistics show the numbers of exemptions granted from the program by both the court and The Dispute Resolution Office, in the regional centers. These statistics show some variation between the granting of exemptions in Regina and Saskatoon, and indicate a slight reduction in the overall numbers of exemptions granted from March 31 2000 and March 31 2001 (but note that these are cumulative figures).

Comparison with yearly statistics for the year ending March 31 1996 and the year ending March 31 1997 (when the project was limited to Regina and Swift Current) show the rate of exemptions granted by the court in each of those years running at 3.3% in each case. There is therefore no evidence that the granting of exemptions has varied significantly from year-to-year.

Table Seven Exemptions

Cumulative year ending	Regina				Saskatoon				All programs			
March 31 2000	Court-ordered		Med. Service		Court-ordered		Med. Service		Court-ordered		Med. Service	
	148	3%	607	12.4%	8	0.4%	80	4.4%	160	2.3%	697	10%
March 31 2002	167	2.4%	665	9.7%	25	0.8%	127	3.4%	200	1.7%	808	7%

Some lawyers in discussion groups remarked that since the process for securing an exemption was itself time-consuming, it was often preferable to simply proceed with the mediation (this may however lead to some lack of preparedness; see above at Part II (2)(e)). This may also reflect some regional disparity. The higher rate of exemptions granted in Regina may reflect the fact that this is where the Director and Assistant Director and the majority of the administrative team for the mediation program are

located. Access to the Director for permission to be exempted may simply be easier and more widely utilized in Regina than in Saskatoon. This hypothesis could be verified by examining the total number of applications for exemptions in each center, and their rate of success; the only figures available at this time are those relating to successful applications for exemptions.

PART III : RECOMMENDATIONS FOR PROGRAM MODIFICATION

The evaluation data, both qualitative and quantitative, which has been collected and analyzed for this study illuminates the operation of the Saskatchewan Queen's Bench mediation program and gives voice to the experiences of program users. It provides a detailed picture of the relationship between lawyers, their clients, the mediators and the structure and design of the present program.

The Saskatchewan Queen's Bench mediation program is perceived by almost all the individuals we consulted as appropriate, and its objectives – the faster and more satisfactory reaching of settlement in some civil matters – fully achievable. It became rapidly apparent that the question that respondents were most interested in discussing with us was not whether the program should be maintained, but how it might be improved in order to better achieve those objectives.

The consensus that emerges is that the program is reaching its goals in many individual cases, but not in others. While there is widespread support for both its universal nature and the present timing of mediation, many respondents called for greater *flexibility* in relation to both aspects of program design. In addition, there is an interest in rethinking the role of the mediator to clarify and perhaps sharpen this point of intervention with greater proactivity, and perhaps some type of enlarged role before and after mediation in *certain cases.*

There are also a few clear problems with the design of the present program. One is that some cases proceed to mediation with insufficient preparation, perhaps with little or no exchange of materials in advance of mediation, and just occasionally, an absence of "good faith" to negotiate. Another issue (perhaps related to this) is the somewhat uninformed approach of a small number of members of the Bar in regard to the role they might most effectively adopt in the mediation process. Each of these problems is resulting in some disappointment among clients, and some frustration among some members of the Bar.

None of these issues is unique to the Saskatchewan program – similar challenges are experienced in other mandatory mediation programs. However, the depth of experience with mediation in Saskatchewan – predating the Queen's Bench program to the earlier initiation of the farm debt mediation program – and the clarity and consistency of issues substantiated by this evaluation, present a unique opportunity to address these challenges.

In this spirit, the following fourteen Recommendations are made :

1. <u>The Mandatory Nature of Mediation</u>

   The program should remain mandatory for all non-family civil cases, aside from the present exemptions under section 5 of The Queen's Bench Act.

Over time, the use of mediation should become a significant and legitimate conflict resolution option to be utilized at the discretion of experienced counsel. The mandatory nature of the program should therefore be regularly reviewed in this light.

2. The Timing of Mediation

a. The initial referral to mediation

Referrals to mediation should continue to be made following the close of pleadings and before any further applications are made to the Court. It is recommended that clarification be made of the meaning of section 42(1) of The Queen's Bench Act in this regard.

b. Requiring the filing of a statement of documents before mediation

However, the precise timing of mediation raises other questions related to the exchange of information between the parties in order to facilitate constructive mediation. One of the principal reservations expressed by lawyers and clients alike regarding early mediation is the lack of information upon which to base substantive negotiations. This problem relates to frequently voiced concerns about a small minority of lawyers who sometimes attend mediation without good faith intent to undertake serious negotiations.

There are at present no formal requirements regarding the exchange of information between the parties before mediation. In one smaller center, and among some larger centre lawyers, conventions appear to be evolving to ensure that information and relevant documents are exchanged in advance of mediation. However this is a piecemeal solution to a widespread problem.

Other jurisdictions have tried various strategies to address a similar issue of lack of preparedness. Some have required the parties to file pre-mediation submissions (for example, Ontario), but these requirements sometimes raise confidentiality concerns and often result in only minimal compliance. Twenty-two states in the United States have enacted a good faith rule in mediation, with appropriate penalties (Lande, 2002) but these rules are highly controversial and did not find favour among our Saskatchewan respondents.

An alternative solution which is proposed here is the stage at which mediation takes place in the Queens' Bench program is adjusted slightly to facilitate the further exchange of information between the parties that would occur naturally as the litigation process proceeded. This could be achieved by requiring that before proceeding to mediation, all parties file their statement of documents with the Court (sometimes described as the affidavit of documents). (Note that this recommendation may need to be modified to fit the requirements of cases proceeding under the Simplified Rules).

If each party is in possession of the other's statement of documents before mediation, this may then be used as a basis for requesting particular documents before the parties meet at mediation, or simply as a tool for anticipating and preparing for that meeting. While the level of co-operation which transpires at this stage will be a matter for the parties themselves (possibly with assistance from the mediator in "enhanced package" cases; see also below at (8)(b)), this requirement will obviate the lack of information and hence preparedness to negotiate which is evidenced in a small number of cases.

To ensure that this requirement does not unnecessarily delay the conflict resolution process, an appropriate time period should be stipulated for the filing of a statement as to documents.

It is important that there are stipulated consequences for failing to comply with this requirement, or there is a risk that this will simply become a new ground for a non defaulting party to request an exemption from mediation. Two obvious options are later cost penalties (along the model of the Ontario mandatory mediation program; see Rule 24.1.13(d)) or a default judgment being entered against the defaulting party.

This requirement would need to be articulated as an amendment to the present Regulations. Future dialogue with the Bar, and with Courts Administration and the Registrar, will be very important to ensure a widely acceptable regulation.

c. "Loop-backs" to mediation

Finally, a number of judges and some lawyers expressed to us their interest in building further flexibility into the system to enable referral or at least a recommendation that a file return to mediation at a later stage in the litigation process. The model of pre-trial hearings which occur at a more mature stage in litigation than early mediation clearly satisfies many needs (including the input of an authoritative evaluator), and attracts the widespread support among the Bar. Nonetheless, we would encourage the development of a formalized mechanism to enable the referral of a small number of special cases, which appear to be especially suited to this type of intervention, back into mediation even at this later stage.

3. <u>Adjournments</u>

A formalized system for granting adjournments of mediation (for example until after the conclusion of discoveries) should be put in place. At present such a process is referred to under section 7(1)(b) of The Queen's Bench Regulations, but unlike the exemptions process, does not appear to be either widely used or broadly understood as being available.

Moreover applications are described in section 7 as being determined by the Court. This process needs to be as easily accessible as possible, while maintaining the integrity of the system. This means that it is preferable for postponements to be at the

discretion of the Director of the Dispute Resolution Office, rather than requiring an application to the court.

A paper application process, or adjournment at the unilateral request of one party, is not recommended. Experience in other programs suggests that this may lead to a default to adjournment in more cases than are strictly necessary. Instead, a system for application to the Director of the Dispute Resolution Office should specify criteria for adjournment including, but not limited to :

- a demonstrated need (i.e. grounded concerns about veracity in mediation) to conduct examinations under oath in order to verify key evidence; or
- an unavoidable delay in the ability to obtain and/or verify key pieces of evidence.

The relationship between mediation and pre-trial – two very different processes with different objectives – should be taken into account in granting adjournments. Generally there should be a limit on the length of the delay permitted in an adjournment, to ensure that mediation takes place in advance of pre-trial. However, parties should also be able to request a date for mediation shortly before pre-trial where, in the opinion of counsel, a facilitative process appears to be conducive to settlement at this stage.

4. Exemptions

The present system for granting exemptions (by both the Director of Dispute Resolution Office, and by the Court under section 7(1)(b) of The Queen's Bench Regulations) should continue. This evaluation has not produced any evidence upon which to expand or add to the case types listed under section 5 of The Queen's Bench Regulations as automatically exempted from mediation.

It may be useful at this stage in the history of the program to articulate and promulgate among members of the Bar the basis on which an exemption from mediation is likely to be granted. A review of case law to date under this provision suggests that exemptions are generally granted where:

- there is evidence that private mediation has taken place and this has not been successful; or
- there is no sustainable defence to the action and mediation would simply delay the outcome; or
- there is evidence of extensive efforts at negotiation between the parties which have been unsuccessful; or
- the location of the parties is such that mediation would involve extensive travel and expense; or
- all parties request the exemption from mediation.

It is recommended that this case law and the reasons given for granting exemptions be reviewed in light of the program objectives. The objectives of the mandatory mediation program have been recently clarified by Mr. Justice Klebuc in Welldone Plumbing v Total Comfort Systems (2002) SKQB 275 at Para 9. In light of this judgment, clarification of the scope of section 5 in granting exemptions would be timely and might avoid the potential for the expansion of the exemptions category beyond the intent of the legislation.

In addition, it is recommended that in a future list of criteria for exempting cases from mediation, an authentic fear of intimidation and/or emotional trauma be included. This recognizes one of the principal concerns about mandatory mediation (that under certain circumstances a face-to-face meeting will be a very negative experience for one or more parties). This does *not* mean that all individuals who have discomfort about a mediation meeting should always be exempted, but that evidence of a history of violence or intimidation between the parties may be relevant to granting an exemption from mediation.

It may also be important to explore the possible reasons for the lower rate of exemptions granted in Saskatoon compared with Regina (see the discussion above at Part II(4)(c).

5. Information for the parties

The Dispute Resolution Office produces explanatory literature for clients which offers a summary of what clients should expect in mediation and answers some potential user questions about the program. However, very few of our client respondents indicated that they had seen this information. Many, of course, had been satisfactorily briefed by their lawyers and were not disadvantaged in any way by having not seen this literature. However, as a general principle, it is important to try to get this explanatory information into the hands of the clients to whom it is targeted. This ensures at least a baseline of information which counsel can and should then supplement in discussions with his or her client.

It is recommended that The Dispute Resolution Office consider means of increasing the visibility of its informational materials and solicit the co-operation of the Bar in handing on such materials to their clients. One way to bring the Bar more fully into this endeavour as a partner might be for The Dispute Resolution Office to consult with the Bar over the future format and content of such informational materials.

6. Mediator style, training and qualifications

We heard clearly from program users that they desired mediators to be proactive in seeking settlement. This does not mean that there is support for replacing the facilitative model of mediation used in Saskatchewan with an evaluative approach – although there are some calls for greater choice and diversity (see also below at (8)(a)) – or for changing present expectations of the qualifications of mediators.

In response to many comments on the mediator's role, both positive and negative, it is recommended that :

a. The facilitative model of mediation be maintained. This means that non-lawyers as well as lawyers can continue to provide excellent service as mediators;
b. All current and new mediators should have an adequate working knowledge of civil procedure, and be provided with training to ensure same;
c. Future training for experienced mediators, and training for newly recruited mediators, should emphasis strategies for an proactive approach, including asking questions, using caucus where appropriate, and minuting outcomes (see also below at (7)). Training should also include work on managing relationships with counsel in order to maintain and build mediator confidence, and enhance a culture of "mediator management".

7. <u>The role of the mediator in finalizing settlement outcomes</u>

The present "hands-off" approach towards recording the outcomes of mediation has attracted considerable criticism, especially from clients (see the discussion above at Part II (2)(c) (iii)).

It is recommended that the practice be developed and encouraged among program mediators to minute in some detail the outcomes of mediation. Where possible, this task should be undertaken by counsel with the mediator playing a purely facilitative role. Mediators should encourage counsel to move to a finalizing of any agreed outcomes, whether in a handwritten memo or in formal minutes of settlement.

In other cases, it may be necessary for the mediator to ensure that any agreements reached – whether on substance or on process – be recorded in writing, and that the parties agree that these are correct as minuted.

If this recommendation is adopted training should be offered to the mediators to ensure that they are both comfortable and equipped to undertake this role.

This recommendation is in no way intended to suggest that mediators draft legally binding agreements in a manner which may constitute the unauthorized practice of law. The intention is to ensure that an accurate record is made of mediation outcomes which is approved – even verbally – by the parties, and to clarify the responsibilities of the mediator in this regard.

8. <u>Providing more choices to program users</u>

a. mediator selection

At present, mediators are internally assigned to cases. Informally, some counsel will request a particular mediator. The discretion of counsel to assess what type of

mediator is best suited to a particular case is a skill that should be encouraged, and is an important manifestation of choice in an otherwise mandatory system.

Therefore it is recommended that a process be instituted which gives greater degree of choice to all parties in selecting a mediator. There are a variety of ways in which this objective could be accomplished. One is to develop a database of mediators in which each mediator would provide a short description of her or his background, special expertise, experience and style. These descriptions would then be made available to parties, along with other accompanying explanatory information, at the time that a matter is referred to mediation.

In the event that a selection is not made within a given period of time, a mediator should be automatically assigned by the Dispute Resolution Office.

Mediator selection should be monitored internally to assess (a) levels of selection versus assignment (b) which mediators are selected.

b. An optional "enhanced package" of mediation services

There was considerable discussion throughout the evaluation of a possibly enhanced role for the mediator in certain cases which might benefit from pre-mediation assistance and/or post-mediation follow-up.

In a pre-mediation model, both lawyers and clients saw the potential for the mediator to play a constructive role in relation to information exchange, assessing the degree to which the parties were prepared to bargain in good faith, and ensuring that the persons with necessary authority were either present at the mediation or accessible at that time.

In a post-mediation model, both lawyers and particularly clients saw the mediator as playing a useful role as a quasi-case manager (facilitating a discussion over next steps) and in ensuring that outcomes contemplated or agreed to in mediation were formalized and executed in minutes of settlement.

It was also clear from these discussions that while many lawyers saw an enhanced role for the mediator in some cases, they were unwilling to support the extension of the mediator's role in all cases. This appears then to be another area in which counsel and client could be offered a choice of service to be exercised at their discretion.

An "enhanced mediation package" could contain the following components, either separately or together:

i. The assistance of the mediator for a specified number of hours before mediation in order to (for example) facilitate information exchange, assess the level of openness to settlement, and ensure that the appropriate persons are coming to mediation and are fully briefed on the process and its objectives.

ii. The assistance of the mediator for a specified number of hours following mediation in order to (for example) facilitate and follow up a dialogue over next steps, and generally keep the process moving.

It is recommended that an "enhanced package" should be offered to all parties on a pilot basis for a specified period of time (a minimum of six months), without additional costs. Information on an "enhanced package" of mediation services should be in The Dispute Resolution Office literature. Take-up and satisfaction levels should be monitored internally. At the end of the pilot period, it will be necessary to consider whether there should be user fees attached to accessing the "enhanced package" (see (9) below).

c. Formalizing opportunities for (i) longer (ii) further mediation sessions

At present, parties are sometimes offered and occasionally avail themselves of (i) mediation sessions scheduled for longer than the routine two hours and (ii) further follow-up mediation sessions.

It is recommended that these opportunities are now formalized and information provided to all parties.

It is recommended that (i) longer and (ii) further mediation sessions should be offered to all parties on a pilot basis (a minimum of six months) for a specified period of time, without additional costs. Information on the opportunity to book longer and subsequent mediation sessions should be included in The Dispute Resolution Office literature. Take-up and satisfaction levels should be monitored internally. At the end of the pilot period, it will be necessary to consider whether there should be user fees attached to taking advantage of these features (see (9) below).

9. User fees

At this point *some* of the costs of mediation are recouped via an additional filing fee. No further fee is payable at the time of mediation. It is recommended that the "basic" package of mediation services required under the legislation – a meeting with a mediator scheduled for two hours – continue to be financed in this fashion at no further cost to the parties.

However, if the provision of enhanced levels of service in some cases is utilized by the community, there may be a need following a pilot period to consider the introduction of modest user fees. User fees could be set by tariff and divided equally between the parties.

10. The role of counsel

We heard significant criticism of a small number of counsel by other program users. This criticism focuses on a lack of preparation and inadequate briefing of clients, and generally a negative or unconstructive attitude towards mediation. However, suggestions that new practice rules might be introduced to attempt to deal with these problems were met with little enthusiasm. Instead, and in order to ensure best practice in mediation representation, a strengthened commitment to meeting continuing education needs is proposed.

It is recommended that continuing legal education opportunities in this area be significantly expanded. Some excellent work has already been done in this area, but further expansion is warranted to support the continued development of mediation in Saskatchewan. It is important to build further on existing expertise to ensure that there is a sharing of experience between more and less experienced mediation advocates, as well as the encouragement of a continuing and challenging debate about how best to deliver conflict resolution services to clients. Appropriate objectives for continuing legal education here include development that is both individual (enhancing expertise in consensus-building negotiations and mediation) and systemic (building and enhancing a culture of consensus-based dispute resolution among advocates in Saskatchewan).

In order to meet these objectives, continuing legal education programs should include training for lawyers in Principled Negotiation, Mediation Representation and Advocacy, and Collaborative Law. Lawyers practising in all these areas share a commitment to using consensus-building processes to advance the interests of their clients, and together they can build an enviable program of continuing education.

Existing professional organizations within Saskatchewan offer ample opportunity for collaborative ventures in the area of continuing legal education, under the general auspices of the Saskatchewan Legal Education Society.

Experience elsewhere indicates that the strong leadership of the Bench is critical to building a local legal culture in which mediation is seen as an important opportunity for constructive negotiation in many cases. The involvement of members of the Saskatchewan judiciary in programs of continuing legal education may be one way to advance this objective (see also (13) below).

11. Retaining a presumption of face-to-face meetings

There is some complaint that attendance at mediation is excessively expensive for out-of-province. Some facility for mediation to be conducted using conference calls has been introduced, but The Dispute Resolution Office is reluctant to allow this to display face-to-face meeting in other than exceptional circumstances.

It is recommended that face-to-face meetings continue to be the norm and that conference calls are only permitted in exceptional circumstances.

12. Unrepresented (*pro se*) clients

Pro se clients presently experience high quality service and assistance from The Dispute Resolution Office. The only change recommended in relation to this group is that The Dispute Resolution Office literature be reviewed to ensure that it does not contain an assumption that each client is legally represented. It is also appropriate that The Dispute Resolution Office literature does not imply that clients must or should be legally represented in mediation. This is especially important in light of the increasingly number of *pro se* litigants seen in the civil justice system throughout Canada.

13. Enhanced liaison and co-ordination between The Dispute Resolution Office and the Court of Queen's Bench

There is relatively little contact between The Dispute Resolution Office and the Court Administration. While working relationships are good, some Court administrators confided that they knew very little about the operation of the mediation program. It may be useful to ensure that there is more liaison and sharing of information between these two programs. For example, it may be appropriate for the consideration of what further case data might be recorded and tracked (see (14) below) to be developed as a joint project between the two offices.

This "disconnect" between The Dispute Resolution Office and the Court also seems to extend to the judiciary. The judges interviewed for this evaluation expressed a feeling of "disconnect" with the mediation program - that the program operates in a way that is removed from its civil setting - and that they did not know as much as they might like about the program and its relationship to their own work. It is important to consider ways in which the judiciary – who are generally very supportive of the work of The Dispute Resolution Office and can offer important leadership to the Bar – can feel more "in touch" with the mediation program and perhaps, where appropriate, be identified as supporters of the program (see also above at (10)).

14. Enhanced case and program data systems

In monitoring the outcomes of mediated cases, it is recommended that The Dispute Resolution Office review the present classification system whereby mediators complete a report immediately following a mediation session. This system has generated considerable concern among members of the Bar and cannot be relied upon as fully accurate (see Part II(4)(a) (ii). Two changes are specifically recommended:

a. mediators record outcomes as "full settlement", "partial settlement" or "no settlement". This classification allows less room for subjectivity and has

the additional advantage of bringing Saskatchewan into line with most other jurisdictions with mandatory mediation reporting systems.

b. reports are made 10 days following the mediation session. This will enable a final follow-up to be made by the mediator or an administrator. In the effort that no further information is forthcoming, the mediator will file a report based on what happened at mediation.

It would be helpful for future monitoring and evaluation if additional information on civil cases could be collected by both The Dispute Resolution Office and the Court of Queen's Bench. It is recognized that this recommendation cannot be acted upon without the agreement of the Court of Queen's Bench, but such enhanced data collection would benefit future program evaluations within the wider ambit of the Court, as well as at The Dispute Resolution Office.

Especially relevant to program evaluation – in particular where an effort is to be made to compare cases in an experimental stream with a control group – would be an expanded and automated approach to the recording of events in the life of a file. The more events that can be formally recorded (for example, motions hearings, settlement conferences, completed examinations for discovery), the more detailed tracking of the progress of cases both inside and outside experimental "streams" or programs can be (routinely) conducted. This additional data would enable the tracking of timelines (in days) from filing to the occurrence of particular events up to and including discontinuation or "no further activity". The data collated manually for the 2001/2002 Status Check (see above at Part II(4)(ii)) demonstrates the present-day challenges of assembling such data, which may sometimes be critical to the evaluation of program efficiency.

Finally, it is recommended that The Dispute Resolution Office develop a simple consumer satisfaction survey – which should be no more than one page in length – which can be given to clients at the conclusion of their mediation session. If possible, clients should be encouraged to complete the survey before they leave. Surveys should offer the option of anonymity. A similar survey could also be developed for lawyers.

Julie Macfarlane, Kingsville, May 2003

Appendix A

Lawyers Discussion groups : May

The questions we have been asked to try to answer are

1. to evaluate how far the mediation program in the Queens' Bench meets the needs of the people of Saskatchewan (focusing on discussions with client users)
2. to assess the impact of the mandatory mediation program on civil litigation practice in Saskatchewan (focusing on discussions with members of the Bar)

What brought you to this meeting? What would you like to tell us about your experience of the mediation program?

Supplementary questions

1. what is your view of the style and knowledge of the mediators?
2. what if any issues do you have with confidentiality of mediation?
3. should this program be extended to the simplified rules procedures?
4. what are your views on the timing of mediation?
5. do you think there has been "culture change" around the idea of using mediation?
6. what are the implications for legal education and training?

Clients Discussion groups : May

The questions we have been asked to try to answer are

1. to evaluate how far the mediation program in the Queens' Bench meets the needs of the people of Saskatchewan (focusing on discussions with client users)
2. to assess the impact of the mandatory mediation program on civil litigation practice in Saskatchewan (focusing on discussions with members of the Bar)

What brought you to this meeting? What would you like to tell us about your experience of the mediation program? What was on your mind when you took up the invitation?

Appendix B

Lawyer Discussion groups : September

Opening question

What are your general perceptions of how the program is working – what impact has it had on your litigation files?

Is mandatory mediation changing the culture of disputing in the courts?

A. Impact

- In what ways has the culture of your local Bar been affected by the introduction of mandatory mediation in your jurisdiction? Have attitudes towards mediation amongst members of the local Bar changed?

- Secondary benefits – subsequent activity (oversight by mediators?)

- In relation to other procedures

    - ✓ Is mediation appropriate for matters proceeding through the simplified rules procedure? Why/why not?
    - ✓ Does participating in earlier mediation make any difference to cases that do not settle, and continue to pre-trial? (e.g. any less time spent on discoveries?)

B. Process Critique

- What timing would you like for mediation? And why?

- Some lawyers have suggested that mediation is not suitable for every case, and that they would like different processes for different cases – including but not limited to different timing for ADR. For example, some cases might require more than one session; discoveries to have taken place first; or a neutral evaluation to be provided. On the other hand, the existing system is simple and seems fair because it is applied to all civil cases without exception. What do you think? (optional : offer example of the residential schools cases)

- What is your view of the role taken by the mediators in this program?

- Have you ever participated in a mediation which you felt was a complete waste of everybody's time? Why was that? What could have been done differently to make it more productive?

- Why would you want conference calls? Some lawyers have told us that they would like greater flexibility over the substitution of conference calls for F2F meetings, perhaps to enable them to get the right people on the line. Others have told us that they support the emphasis on keeping mediation a F2F process. Is this an issue for you and what do you think?

- Some lawyers have told us that they are frustrated that sometimes opposing counsel will not provide necessary disclosures prior to mediation and is poorly prepared, perhaps appearing without authority to settle. Is this a problem for you and what if anything do you think could be done about it? (Optional : some jurisdictions tackle this problem with a "good faith" provision – there is something like this in the farm mediation program. Do you think that is needed here?)

- What is your view of the mediator(s) you have worked with? Are there sufficient experienced and effective mediators to meet your needs here in _____? Selecting your own mediator?

Optional question

- Some lawyers we have talked to have said they would like the mediators to take a more proactive, case management role where they would set sessions, hold pre-mediation discussions with the lawyers and generally oversee the case through mediation. Is there a need for such a role?

- How well prepared have you felt by your legal and professional education – and what more, if any, training would enable you to be more effective in mediation?

Check back to opening question

Check first go-round to ensure that all issues have been captured by discussion

All Things Considered Question

Do you think mandatory mediation is a good thing for civil litigation in Saskatchewan? What would you change?

Have we missed anything?

Client Discussion groups : September

Opening question

We would like to begin with your overall impressions of the mediation program, before getting to the specifics of your experiences

How far is the mediation program meeting the needs of the people of Saskatchewan?

A. Client satisfaction

- Some of you will have been to only one mediation, others more than one. In either case, what now is your view of mediation? How positive/ negative?
- What is your view of the mediator(s) you have worked with?
- How do you feel about your own role in the mediation process? (Was it a good experience? One that you would have preferred your lawyer handle without you? One that you would like to handle by yourself as far as possible?)
- What particular challenges do clients encounter in using mediation?

B. Program Structure and Process

- How well are clients being served by lawyers in the mediation process?
- How satisfied are you with the advance information provided to you by the court and/ or your lawyer, and how could this be improved?
- Some clients have told us that they would prefer mediation to be offered even earlier, perhaps before a lawsuit is begun – and others have said that it is pointless to mediate until just before trial. What do you think?
- Are there any other issues which you think are affecting the effectiveness of the mediation program for clients? For example

    - Is it important to select your own choice of mediator?
    - To be able to attend mediation without counsel present on either side?
    - Should there be some way of monitoring that disclosure has taken place and that lawyers are properly prepared for mediation?

Check back to opening question

Check first go-round to ensure that all issues have been captured by discussion

All Things Considered Question

Do you think mandatory mediation is a good thing for people who need to bring civil actions in Saskatchewan? What would you change?

Have we missed anything?

Appendix C

Interviews with Judges

1. General impression/ perspective of program
2. Relationship between mediation and pre-trials (purpose, objectives, duration, outcomes, skills)
3. What should be the role of the judge in settlement, from a philosophical perspective? How does this compare with the role of a mediator?
4. What matters should be exempted from mediation?
5. What leadership role might judges play in building the credibility of mediation?
6. Referrals by judges into mediation

    i. In the present process
    ii. Any suggested modifications?

Any other comments on the mediation program?

Appendix D

Follow-up interview questions

- ❖ Generally, what has been your experience with the mediation program?

- ❖ What effect, if any, have you seen the mediation process have on your future (business or personal) relationships (for example the likelihood of future litigation)/ the way you might handle a future conflict?

- ❖ Specifically for institutional clients, insurers etc

a. How is the present process perceived as useful and constructive by your corporation/ institution?
b. What are the objections that your corporation/ institution has to mediation?
c. What would make this a more useful process for your particular needs?
d. What is the impact on your internal complaints practices & system/ culture?

- ❖ Have you encountered any surprises in mediation? (ask for stories)

- ❖ Would you be interested in pre-mediation contact with the mediator (review purposes e.g. to clarify who will be coming with what authority, to facilitate exchange of information, ascertain that all parties coming prepared and in good faith etc)

- ❖ Would you be interested in any post-mediation follow-up by the mediator to ensure that next steps were completed?

- ❖ How creative are the agreements? How durable are the agreements?

- ❖ (For lawyers) Do you see secondary/ collateral benefits from mediation? Can you describe these/ give examples?

- ❖ Do you think that the present program would benefit from increased judicial oversight? For example, cost consequences for parties who come unprepared?

- ❖ What types of further training do you think would improve the effectiveness of lawyers in the program?

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