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**COURT-CONNECTED
FAMILY MEDIATION PROGRAMS
IN CANADA**

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ALBERTA LAW REFORM INSTITUTE



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The Institute's office is at 402 Law Centre, University of Alberta, Edmonton, Alberta, T6G 2H5. Its telephone number is (403) 492-5291; fax (403) 492-1790.

The members of the Institute's Board are B.R. Burrows, Q.C., C.W. Dalton; N.A. Flatters; A.D. Hunter, Q.C. (Chairman); W.H. Hurlburt, Q.C.; H.J.L. Irwin; Professor F.A. Laux; Professor J.C. Levy; P.J.M. Lown, Q.C. (Director); The Hon. Madam Justice B.L. Rawlins; A.C.L. Sims, Q.C.; and Neil Wittmann, Q.C.

The ALRI legal staff consists of P.J.M. Lown, Q.C. (Director); R.H. Bowes; C. Gauk; J. Henderson-Lypkie, M.A. Shone and E.T. Spink. W.H. Hurlburt, Q.C. is a consultant to the Institute.

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The Premier's Council in Support of Alberta Families was established in 1990 to advise the government of Alberta on how its policies, programs and services may affect family life. It was established in recognition of the fact that families are the foundation of our lives and the cornerstone of our society. Strengthening and supporting families is essential to the well-being of our province.

The Council seeks practical advice from all Albertans on how government can strengthen families; recommends ways to encourage partnerships among public, private, and volunteer organizations that serve families, helps create public awareness on matters of interest and concern to families and advises the Minister on how current and proposed government initiatives may impact families.

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PREFACE

The research for this paper was conducted by the ALRI with the cooperation of the Premier's Council in Support of Alberta Families (Premier's Council). The ALRI and the Premier's Council have a complementary interest in the subject of mediation. The ALRI, in its ongoing review of dispute resolution, is particularly interested in court-annexed activities and the use of mediation techniques in litigation generally. The Premier's Council has, of course, particular interest in the broader concept of mediation as it may impact on family issues.

The collection of information on family mediation has been a cooperative endeavour to meet the mutual objectives—the information base being crucial to the objectives of both entities. The research paper describes and compares features of selected court-connected family mediation programs in provinces across Canada. The Premier's Council plans to consult on the policy issues associated with the delivery of family mediation services. The descriptive research paper will serve as a useful base for the policy questions posed by the Premier's Council.

The precise accuracy of the program descriptions and related information set out in this document is difficult to ensure. Mediation services are continually undergoing change. As well, perceptions of the service vary among the persons reporting on it. The information contained in this document is generally accurate to April 1994.

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**COURT-CONNECTED
FAMILY MEDIATION PROGRAMS
IN CANADA**

CHAPTER 1 — INTRODUCTION

A. Background

Family law litigation can be said to be "unique insofar as it rarely involves judgements solely concerned with matters of fact but is almost invariably complicated by the intense and intimate emotions of the [parties] in conflict."¹

The use of the traditional litigation process to resolve family law issues in dispute has been much criticized. Where human relationships are strained, the adversarial approach may actually exacerbate rather than reduce conflict. The utilization of other processes, independently of litigation or in conjunction with it, may lead to a more satisfactory resolution of differences.²

This research paper constitutes a first step by the Alberta Law Reform Institute (ALRI) toward examination of the processes available to assist in the resolution of disputes in family law matters. The research paper will describe various court-connected family mediation programs offered in Canada.

The subject of mediation in family law matters relates to ALRI projects undertaken in the areas of family law and dispute resolution.

With respect to the family law project, to date the ALRI has concentrated on the substantive law governing family relationships, spousal and child support obligations, and child guardianship, custody and access. We issued Report No. 65 on the Domestic Relations Act (DRA): *Family Relationships: Obsolete Actions* in March 1993. The ALRI plans to issue

¹ Howard H. Irving and Michael Benjamin, "Outcome Effectiveness of Conciliation Counselling: An Empirical Study," (1983) 21 *Conciliation Court Review* 61.

² Some advantages and disadvantages of mediation as an alternative to court adjudication are outlined in chapter 3.

reports for discussion on other aspects of the Project in order to elicit comment on its tentative recommendations.

With respect to the improvement of dispute resolution processes, the ALRI has undertaken a range of projects, several of which have resulted in publications. In the introduction to Research Paper No. 19 on *Dispute Resolution: A Directory of Methods, Projects and Resources*, published in July 1990, the ALRI remarked that it is an ongoing concern of lawyers, judges, governments and citizens to ensure that disputes are resolved through effective means for the benefit of the parties and society in general. Interest in finding alternative forms of dispute resolution has increased as the efficacy of the traditional adversarial system to resolve disputes has come under increasing criticism. Solutions have been sought to control the growing number of cases coming before the courts and to manage limited court resources.

The concept of alternative dispute resolution—popularly referred to by the abbreviation "ADR"—encompasses a broad range of dispute resolution processes. Mediation is included among them. Also included are: negotiation, arbitration, adjudication, mini-trials (both judicial and private) and litigation pre-trial conferences.³ The court-connected family mediation programs described in this research paper represent one form of ADR.

B. Scope

The scope of this research paper is described by its title, *Court-connected Family Mediation Programs in Canada*.

The programs are "court-connected" in the sense that they are available to assist in the resolution of issues that have arisen or may arise in litigation over disputes in family matters. They may or may not be situated physically in or near the court. Most court-connected family mediation programs in Canada are publicly-funded by provincial governments. Services usually are delivered at no cost to the client although some mediation programs levy a fee-for-service charge.

³ For more information on the various forms of ADR, see ALRI Research Paper No. 19 on *Dispute Resolution: A Directory of Methods, Projects and Resources* (July 1990); see also *Dispute Resolution—Special Series, Discussion Paper No. 1 on Civil Litigation: The Judicial Mini-Trial* (August 1993).

The use of the word "family" restricts the scope of the research to processes employed in the resolution of issues in dispute in family law matters. The term "family law matters" is intended primarily to embrace disputes between individual family members (private law disputes) but not disputes involving the state (public law disputes).

Private law disputes arise between two (or more) individual disputants. An example is a dispute between spouses over child custody or access arrangements on marriage breakdown.

Public law disputes involve a conflict between one or more individuals and the government or a state agency acting in the interests of society at large. An example is a dispute between parents and child welfare workers employed by the government to protect children at risk of abuse or neglect in the home.

(1) Mediation Process

Mediation is a settlement process in which a neutral third party mediator assists two or more disputing parties to solve the problem themselves through communication and cooperation.⁴

There is no uniform pattern to the process of mediation. Several characteristics are common: mediation is usually conducted in private; the process is informal; and the mediator encourages the parties to reach their own agreement rather than accept a settlement imposed by a third party.

The use of the mediation process is not limited to the resolution of issues that arise in family law matters. Mediation is also used to settle disputes in a wide range of areas including business, labour and community. For centuries, private mediators have been helping to resolve private law disputes informally.

⁴ Mediation is described in greater detail in chapter 2.

(2) Mediation in Family Law

Because it is flexible, mediation has evolved for use as an adjunct to the legal process in family law.⁵ Mediation can be combined with counselling, therapy, education and information to meet a family's needs. The parties may secure the services of a private mediator or they may make use of court-connected mediation services designed to promote settlement through negotiation and mediation rather than litigation.

(3) Mediation Programs

The word "mediation" is not entirely accurate to identify the programs described in this research paper. Although mediation is the process employed principally in the services described, some of the programs use other techniques in order to reduce tension and resolve conflict. In addition to traditional mediation processes, increasingly, mediation services have utilized parent education and information service components. Some court-connected services also offer short-term counselling to the litigants and provide home assessments for the courts.

(4) Origin of Court-Connected Family Mediation

In Canada, mediation has been connected with the formal legal process for only two decades. The first court-connected family mediation service in Canada was launched in 1972 with establishment of the Edmonton Family Court Conciliation Project.⁶ Since then, mediation services offering various programs have been introduced in all ten Canadian provinces.

Court-connected family mediation programs have centred on private law disputes which result from divorce or spousal separation. Most of the

⁵ H. Jay Folberg has defined divorce mediation as "a nontherapeutic process by which the parties, together with a neutral third party(ies) attempt to systematically isolate points of agreement and disagreement, explore alternatives and consider compromises for the purpose of reaching a consensual settlement of issues relating to their divorce or separation": H. Jay Folberg, "Divorce Mediation—The Emerging American Model" in *Resolution of Family Conflict: Comparative Legal Perspectives*, ed. John Eekelaar and Sanford Katz (Toronto, Butterworths, 1985) 194.

⁶ This Project was initiated by Her Honour Judge Marjorie M. Bowker, now retired from the Provincial Court of Alberta (Family and Youth Division). The process leading to the establishment of the Alberta service is described in Appendix 1.

services have been dedicated to the child-related issues of custody, access and child support but some have expanded into other areas. Mediation services in New Brunswick, Ontario, Quebec and Saskatchewan now encompass at least some issues relating to property division between spouses, and financial arrangements.

Mediation services in Nova Scotia have expanded to include the resolution of disputes between parents or guardians and the state in child welfare matters where child welfare workers regard children to be at risk and in need of protection.⁷ British Columbia has experimented with the provision of a similar service in a one-year pilot project.

(5) Legislative Recognition

In several jurisdictions, the role of mediation in assisting to resolve family law matters is recognized in legislation. Federally, the Divorce Act 1985 provides that every lawyer who acts in a divorce case has the duty to inform the spouse of "mediation facilities known to him or her that might be able to assist the spouses in negotiating [the matters that may be the subject of a support order or a custody order]."⁸

In Ontario,⁹ Newfoundland¹⁰ and the Yukon,¹¹ legislation expressly authorizes the court to appoint a mediator to deal with any matter that the court specifies. In each of these jurisdictions, the order appointing the mediator must be made at the request of the parties who also select the mediator. Saskatchewan legislation is similar except that the order may be made on the application of either party and the court may choose the mediator provided that the person appointed has consented to be

⁷ Children and Family Services Act, S.N.S. 1990, c.5, ss.13(1),(2)(i) and 21.

⁸ R.S.C. 1985 (2nd Supp.), c.3, s.9(2).

⁹ Children's Law Reform Act, R.S.O. 1990, c.C.12, s.31; Family Law Act, R.S.O. 1990, c.F.3, s.3.

¹⁰ Children's Law Act, R.S.Nfld. 1990, c.C-13, s.37,41; Family Law Act, R.S.Nfld. 1990, c.F-2, s.4.

¹¹ Children's Act, R.S.Y. 1986, c.22, s.42.

named.¹² As under the Divorce Act, lawyers in Saskatchewan have a duty to inform clients about mediation facilities whose existence they know about.¹³ If enacted, an amendment introduced in the Saskatchewan Legislature in 1994 would go one step further by requiring the parties to a family proceeding to attend a mediation screening and orientation session after the proceeding is commenced and before any further step is taken.¹⁴ In 1993, Quebec amended the Code of Civil Procedure to permit the court to adjourn a contested family matter and refer the parties to mediation where the parties consent.¹⁵

Legislation in Nova Scotia encourages the use of mediation to help resolve issues in dispute in child protection matters. Where the parties appoint a mediator after proceedings have been commenced, the court may stay the proceedings for up to three months.¹⁶

Legislation in several jurisdictions protects the confidentiality of disclosures made during mediation by a court-appointed mediator from admission in evidence without the consent of the parties (Ontario,¹⁷ Newfoundland,¹⁸ the Yukon,¹⁹ Quebec²⁰ and Saskatchewan²¹). The

¹² Children's Law Act, S.S. 1990, c.C-8.1, s.10; Family Maintenance Act, S.S. 1990, c.F-6.1, s.13.

¹³ Children's Law Act, *ibid.*, s.11; Family Maintenance Act, *ibid.*, s.14.

¹⁴ An Act to amend The Queen's Bench Act to provide for Mediation, S.S. No. 40 of 1994, s.2. The bill imposes the same requirement on the parties to other contested civil actions after the close of pleadings.

¹⁵ Bill 14 (1993, c.1), 34th Leg. 2nd Sess., amending the Code of Civil Procedure, R.S.Q. 1977, c.C-25, arts.815,827.

¹⁶ Child and Family Services Act, *supra*, note 7.

¹⁷ Children's Law Reform Act, *supra*, note 9; Family Law Act, *supra*, note 9. The parties must decide in advance whether the mediator's report will be full (include everything relevant) or limited (set out only the agreements reached or fact of no agreement). If the report is limited, evidence obtained in the course of mediation is inadmissible.

¹⁸ Children's Law Act, *supra*, note 10; Family Law Act, *supra*, note 10 (modelled on the Ontario provisions).

¹⁹ Children's Act, *supra*, note 11 (modelled on the Ontario and Newfoundland provisions).

²⁰ Code of Civil Procedure, *supra*, note 15, arts. 815.2, 815.3.

confidentiality of the mediation process is also protected by common law rules that govern privileged communications, subject to waiver of the privilege by both spouses.

C. Contents of Research Paper

Chapter 1 introduces the objective and scope of this research paper. Chapter 2 is devoted to an examination of the mediation process, how it contrasts with other dispute resolution methods. It discusses some of the advantages and disadvantages of mediation as an alternative to litigation. Chapter 3 contains descriptions of family mediation programs that operate in connection with courts dealing with private family law matters. The descriptions in chapter 3 provide an introduction to the different services offered, the different approaches taken and the emerging trends in mediation service. The descriptions are of selected programs; they do not include every government-sponsored service in the country. Chapter 4 contains descriptions of child protection mediation programs introduced recently in British Columbia and Nova Scotia in order to facilitate the resolution of public family law issues. Chapter 5 offers a discussion of the effectiveness of selected mediation programs in operation in Canada, the United States and England and Wales based on empirical data.

²¹(...continued)

²¹ Children's Law Act, *supra*, note 12; Family Maintenance Act, *supra*, note 12.

CHAPTER 2 — MEDIATION

A. Definition

In Chapter 1, "mediation" is identified as an informal process designed to assist the disputing parties to reach their own solution through agreement. The process involves the participation of a mediator. The mediator is a neutral third party who encourages the parties to cooperate with each other and facilitates the negotiation by them of their own solutions.

B. Mediation and Other Dispute Resolution Processes

Mediation is also defined through its differences from other dispute resolution processes, for example: court adjudication, arbitration, therapy and conciliation.²²

Court adjudication. The authority of courts to resolve disputes, by adjudicating on matters in litigation, is established constitutionally. The litigation process is adversarial in nature. The judge's decision is binding, subject only to the possibility of appeal. Formal rules govern the procedure followed and the evidence received. Generally, court hearings are open and public.

Arbitration. The arbitration process is similar to adjudication by a judge but the parties name the arbitrator or, at least, establish the process by which the arbitrator, a neutral third party, is chosen. The parties authorize the arbitrator to make binding decisions on the disputed issues; however, the arbitrator is not bound by formal court rules.²³ In contrast, mediators do not make binding decisions. Instead, they facilitate the process of negotiation that leads to agreement by the parties. Both arbitration and mediation are usually conducted in private.

Therapy. Mediation is not designed to be a form of therapy or marriage counselling. Traditional therapy focuses on insights into personal

²² See e.g., ALRI Research Paper No. 19, *supra*, note 3.

²³ H. Jay Folberg, *supra*, note 5 at 194.

conflict or changing personality traits.²⁴ Mediation does not. Mediation is interactive rather than introspective, is goal oriented, and discourages dependence on the professional.²⁵

Conciliation. The terms mediation and conciliation are often used interchangeably. The features which once differentiated the two processes have become blurred. In family law, conciliation is intended to smooth difficulties in the relationship between spouses in order to enable them to reach agreement about issues in dispute, particularly child custody. Its purpose is not the reconciliation of the relationship between the spouses although, on occasion, reconciliation may be a by-product. Conciliation may involve the use of various dispute resolution techniques—short-term counselling, negotiation and mediation—to resolve family conflict.

C. **Some Features of Court-Connected Family Mediation Programs**

Because mediation is a flexible process, court-connected mediation programs differ in their features. Examples of some areas where differences occur follow.

Screening for Appropriateness. Mediation works best where the relationship between the parties is equal. It may be inappropriate where a power imbalance exists, e.g. in cases of domestic violence or other abuse. Screening mechanisms help determine whether mediation is appropriate. If it is not, the parties should be referred back to their lawyers or to other appropriate services.

Voluntary, Mandatory or Stand-down. Usually, mediation is undertaken voluntarily by the parties. However, in 22 of the 50 United States, mediation is a mandatory prerequisite to court proceedings involving family law issues. Stand-down mediation is variation on mandatory mediation. Stand-down mediation occurs when a judge adjourns the litigation proceedings and orders a couple directly into mediation to try to reach agreement.

²⁴ *Ibid.*

²⁵ *Ibid.*

Open or Closed. Mediation can be either "closed" or "open". Where the mediation is confidential or "closed", the parties cannot disclose communications made during mediation in a subsequent court dispute. Where the mediation is non-confidential or "open", the parties may inform the court about what transpired during mediation.

Single or Co-mediation. Co-mediation involves the use of two mediators whose skills complement each other and who work in cooperation as a team rather than as adversaries. For example, a mediation team may be composed of a lawyer and psychologist, or a man and a woman.

D. Advantages and Disadvantages of Mediation in Family Matters

Compared with litigation, mediation offers both potential advantages and disadvantages as a technique for resolving issues in family law. Some arguments for and against family mediation drawn from the literature are outlined below.

(1) Arguments for Mediation

Proponents of family mediation argue that the traditional adversarial litigation system is unable to adapt to the needs unique to family breakdown. They claim that mediation provides a more efficient and less destructive process than litigation. In their view, the adversarial system intensifies family conflict:

... the practical results of the adversarial system are to pit the marital couple against each other in mortal combat. This exacerbates the emotional trauma which already exists in most cases and renders attempts at constructive communication between the spouses even more difficult. Paradoxically, this serves to defeat the very purposes for which the Family Court System was created.²⁶

Proponents identify advantages in at least five areas: the positive reconstruction of family relationships; flexibility to resolve emotional and

²⁶ Irving and Benjamin, *supra*, note 1.

legal issues together; greater focus on the needs of children; greater efficiency in terms of cost and time; and the enhancement of personal autonomy.

(a) Produces positive outcomes

Mediation produces many positive outcomes relating to the reconstruction of family relationships:

- (1) mediation can help families learn to work together and develop skills to resolve future disputes—in this way, mediation reduces hostility between partners and creates positive family relationships;²⁷
- (2) mediation promotes cooperation and compromise—this helps to preserve family trust and dignity;
- (3) the spirit of cooperation created by mediation leads to greater compliance with the terms of the agreement;
- (4) mediation can be used to educate parents about each other's needs and the family's post-divorce needs; and
- (5) the reduction of the need for further litigation reduces stress in the long-term.²⁸

(b) Resolves legal and emotional issues

Because mediation is a flexible process, it can assist in resolving emotional as well as legal issues, should they arise. In contrast, the litigation process is focused on resolving only legal issues. Studies show that spouses who do not resolve their outstanding conflicts at the time they separate experience long-term negative consequences, as do their children.²⁹

²⁷ Fred A. Curtis and Beeke Bailey, "A Mediation-Counselling Approach to Marriage Crises Resolution", (1990) 8 *Mediation Quarterly* 138.

²⁸ *Ibid.*

²⁹ J. Burgoyne and D. Clark, "Starting Again? Problems and Expectations in Remarriage" (1981) *Marriage Guidance Journal*.

(c) Responds to children's interests

Mediation is effective in encouraging parents to design agreements that will meet the needs of their children. Children's needs may be under-represented in an adversarial proceeding between parents (i) to which the children are not party and (ii) in which issues that affect the interests of the children may or may not be raised. Under the existing law, matters affecting the interests of the child generally do not come before the courts unless the parents cannot agree or cannot adequately care for the child.³⁰

(d) Saves time and cost

There is some evidence that family mediation is less costly than litigation and provides a quicker resolution of disputed issues.³¹

(e) Enhances personal autonomy

By emphasizing agreement between the parties, mediation enhances personal autonomy and reduces state intervention.³² Mediation permits the parties to take control of their destiny, consider the facts they believe to be relevant, raise the issues they wish to resolve and design solutions that effectively meet their particular set of needs. They do so unrestricted by court rules or legal precedents which narrow options for a solution. Parties are more likely to comply with an agreement they have reached than one a judge has imposed. This is significant in light of the inability of the legal system to supervise court imposed agreements over access and support.

(2) Arguments Against Mediation

Critics of mediation caution against assuming that mediation is superior to the adversarial litigation process. They resist the

³⁰ Goldstein, Freud and Solnit, *Before the Best Interests of the Child* (New York: The Free Press, 1979). Goldstein, Freud, and Solnit argue that parents should be presumed to have the capacity and responsibility to determine what is best for their children and entire family. They advocate that parents should have the first opportunity to meet the needs of their children and maintain family ties without state intervention.

³¹ See *infra*, chapter 5.

³² Folberg, *supra*, note 5 at 196-97.

dejudicialization of the dispute resolution process and emphasize the potential detriment where the parties are unequal in bargaining power.

They argue that mediation: neglects broader social values; fails to protect individual rights; ignores power imbalances; reinforces the existing social order; weakens legal precedent; and provides no record for judicial review.

(a) Neglects broader social values

Private settlement neglects the broader social values that are involved in achieving justice.³³ Judges make decisions that explicate and interpret the social values embodied in authoritative text such as the Constitution and statutes and accord with these broader social values and notions of justice. Mediation provides a means by which to avoid confronting injustices in society.

(b) Fails to protect individual rights

Mediation does not guarantee the full protection of an individual's rights. The adversarial system is necessary to help lawyers secure all that the law promises to their clients and, as part of a public process, to eradicate injustice. It has been designed to do this. It is not needlessly combative.³⁴

(c) Ignores power imbalances

Mediation is a private ordering. It is based on the notion of two relatively equal parties and does not protect those at disadvantage because of individual or systemic imbalances in bargaining power. Poorer parties are at risk of being coerced into disadvantageous settlements, particularly if lawyers are excluded.³⁵ Women are also at a disadvantage because of the inequality of bargaining power they possess in society. There is a profound lack of understanding of the dynamics of gender-related power and its

³³ Owen Fiss, "Against Settlement," (1984) 93 Yale L.J. 1073.

³⁴ *Ibid.*, at 1089.

³⁵ *Ibid.*, at 1076.

impact on the mediation process.³⁶ Abused women are especially vulnerable. The mere presence of the abuser intimidates the woman and makes it difficult for her to articulate her needs and negotiate effectively. Mediation is not an appropriate tool for couples with a history of abuse, even if the mediator is highly trained.³⁷

(d) Reinforces the existing social order

Family mediation presents mediators as neutral third parties. It appears to provide individual redress for problems that are created systemically, mediation protects the state ideology.³⁸ Mediators work within paradigms that validate the existing social order and roles which it casts.³⁹ For example, focusing on the interests of the child blurs the woman's interests with her mothering role and propagates an ideology which keeps women economically, socially and psychologically vulnerable and unequal.

(e) Weakens legal precedent

Informal settlements divert cases from judicial consideration. This, in turn, takes away the opportunity to refine the law through the ongoing development of legal precedent.⁴⁰

³⁶ Martha Shaffer, "Divorce Mediation: A Feminist Perspective" (1988) 46 *University of Toronto Faculty of Law Review* 162.

³⁷ *Ibid.*

³⁸ Richard Abel, *The Politics of Informal Justice* (New York: Academic Press, 1982) at 307.

³⁹ A. Bottomly, "Resolving Family Disputes: A Critical View", in R. Abel, ed. *The Politics of Informal Justice* (New York, Academic Press, 1982) 267.

⁴⁰ Fiss, *supra*, note 33 at 1085.

(f) Provides no record for judicial review

Mediation assumes that judgment is the end of the process.⁴¹ In this, it trivializes the remedial dimensions of lawsuits. In some family law matters, judgment may be only one phase of a continuing struggle. If a party to a mediated agreement subsequently seeks modification, the judge must begin the difficult task of reconstructing the situation retrospectively without a formal record of findings of fact or law.

⁴¹ *Ibid.*

CHAPTER 3 — COURT-CONNECTED FAMILY MEDIATION PROGRAMS

This chapter contains brief descriptions of selected court-connected family mediation programs in operation in Canada. The descriptions include information about the location of the mediation service, the government department under which it operates, whether the mediation is open or closed, what issues are mediated, the structure of the mediation process involved, and other services that are available in conjunction with the mediation.

A. Alberta

Alberta Family and Social Services, a department of the provincial government, provides family mediation services through the Mediation and Court Services program. These services are available to all residents of Alberta. They focus mainly on the child-related matters of custody and access. The Custody Mediation program provides custody and access mediation to families with disputes in the superior courts. Provincial family court counsellors provide mediation services for clients of the Family & Youth Division of the Provincial Court of Alberta in Calgary and Edmonton; family maintenance workers provide services in rural Alberta. In addition, in Edmonton, the Family Conciliation Service: Edmonton Courts (Mediation Services) provides mediation and short-term counselling to some families with disputes in the Family & Youth Division of the Provincial Court.

(1) Custody Mediation Program

Since January 1, 1991, the Custody Mediation program has provided custody mediation services throughout the province in cases brought before the Court of Queen's Bench of Alberta or the Surrogate Court.⁴² The program is administered from two regional offices. The northern regional office is located in Edmonton; the southern regional office, in Calgary. Both offices are staffed with full-time mediators. In judicial districts outside

⁴² Alberta Family and Social Services (AFSS), "Description of the Custody Mediation Program" at 1.

Edmonton and Calgary, mediators are retained by the program to provide mediation services as required.⁴³

The program has two objectives:

- (1) to utilize closed mediation where appropriate to resolve custody or access issues; and
- (2) to provide expert opinion to the court on issues of custody and access where an open assessment is necessary.

The program is available to the parties to divorce, both prior to judgment and on application to vary the judgment, and in applications for the guardianship or custody of a minor child brought under Part 7 of the Domestic Relations Act.⁴⁴ To be eligible, both parties must agree to participate in mediation, reside within Alberta and have commenced or continued proceedings in the Court of Queen's Bench or Surrogate Court of Alberta.⁴⁵

The mediation program operates in several stages.

Orientation Seminar. An optional orientation seminar for divorcing parents is being offered currently on an experimental basis. It is designed to introduce prospective clients to the custody mediation program and services offered. In the seminar, the mediation process is explained and its benefits to families are outlined.⁴⁶ Educational material is provided on subjects ranging from the problems which arise in divorce and separation, the divorce process, the needs of the children, the reactions of children to parental separation, and parenting options for custody, access and visitation arrangements.⁴⁷ The session is useful for providing information, educating

⁴³ *Ibid.*, at 2.

⁴⁴ R.S.A. 1980, c. D-37.

⁴⁵ *Ibid.*

⁴⁶ Alberta, Mediation Services/Family Court Services, *Orientation Seminar for Separating and Divorcing Parents* (March, 1993).

⁴⁷ *Ibid.*

parents on the divorce process, and preparing clients for the mediation process.

Closed Mediation. As a first step, closed mediation is used to facilitate agreement between the parties on disputes over custody or access.⁴⁸ Closed mediation sessions are entered into for the purpose of reaching an out-of-court settlement and are conducted in confidence on a without prejudice basis. At this stage, mediation is provided free of charge by a staff member of Alberta Mediation and Court Services.

Open Assessment. Where closed mediation is unsuccessful or inappropriate,⁴⁹ the parties may enter into the second step, an open assessment. Both parties must agree to participate in the assessment. They must also agree upon the assessor who must be a certified psychologist or psychiatrist or a social worker (minimum M.S.W.). The assessor prepares a Custody Assessment Report based on relevant social, educational, medical, psychological and psychiatric information. In the report, the assessor makes recommendations regarding custody and the best interests of the child. This stage is not confidential. Consequently, the report is available as evidence and the assessor is available for cross-examination should the parties proceed to trial. Each party is responsible for 50 percent of the open assessment fees although a financial subsidy for a portion of the fees may be available to a party who has attended closed mediation. The subsidy is determined according to a sliding scale based on family size and income.⁵⁰

(2) Family Maintenance Workers and Court Counsellors

Family court counsellors provide support services to the Family & Youth Division of the Provincial Court in Edmonton and Calgary; family maintenance workers provide these services in rural Alberta. The court counsellors or family maintenance workers employ mediation, counselling and negotiation skills to assist clients to resolve family disputes over child

⁴⁸ AFSS "Program Description", *supra*, note 42 at 2-3.

⁴⁹ *Ibid.*, at 3.

⁵⁰ *Ibid.*, at 4.

custody or access without court action.⁵¹ They also employ these skills to resolve disputes over maintenance payments to a spouse or child of the marriage.

Where the clients do not reach agreement, the court counsellors or family maintenance workers assist them to apply to the family court for an order for custody, access or maintenance, or for a variation of an existing order, prior to divorce. They also assist persons who are divorced to register orders with the Maintenance Enforcement program if there has not been compliance with the maintenance order.⁵² Court counsellors or family maintenance workers also conduct home study assessments (at the direction of a family court judge).

(3) Family Conciliation Services: Edmonton Courts (Mediation Services)

As already mentioned, the Family Court Conciliation Service (the name used in 1972) was the first court-connected mediation service in Canada.⁵³ It operates in Edmonton only, in connection with the Family & Youth Division of the Provincial Court. Conciliation services are provided to help resolve custody, access and maintenance issues resulting from parental separation. The objective is to resolve the issues prior to taking court action. The process is closed, meaning that information shared during conciliation cannot be used as evidence in court.

The Family Court Conciliation Service remains similar to the original program with the conciliation of differences being attempted through a combination of counselling and mediation. A counsellor sees the clients within one week of referral or personal contact. The counsellor assesses the family situation and determines what process the family requires. The program provides short-term marital counselling of no more than twelve weeks and four to six sessions. Couples who require long-term counselling are referred to private professionals or community agencies. Possibilities

⁵¹ The qualifications, training, experience and skill level of family court counsellors and family maintenance workers in mediation, counselling and negotiation vary widely.

⁵² Alberta "Family Relations Program, Court Services Branch" brochure.

⁵³ See Appendix 1 for a history of the Family Court Conciliation Service.

such as reconciliation are explored and reconciliation counselling is available by referral. Where marriage breakdown is unavoidable, couples are urged to reach agreement on issues of custody, access and maintenance through mediation. (As Mediation Services expanded, Family Conciliation Services has decreased to approximately 5% of the services offered.)

Conciliation clients are referred to outside agencies for mediation and short-term counselling when they cannot be accommodated because of the mediation workload. Court counsellors now handle only a few cases.

B. British Columbia

In British Columbia, the Family Court Counsellor program provides support services to superior and Family Courts province-wide. In most of the province, the services are offered through Probation and Family Court Counselling offices. Two special conciliation offices exist in the British Columbia Supreme Court in Vancouver and New Westminster. All of these services are operated by the Ministry of the Attorney General, Corrections Branch.

Family court counsellors offer mediation, counselling and dispute resolution with respect to disputes over custody, access, maintenance or guardianship in a separation, divorce or custody proceeding. On court order, they also prepare custody and access reports. The services are free and participation is voluntary. Guidelines exist to ensure the safety of participants. Where violence is a factor, cases may be screened from the program.

The British Columbia pilot project on child protection mediation is described in chapter 4.

C. Saskatchewan

Saskatchewan offers comprehensive family mediation in one province-wide mediation program. Under this program, mediation services are provided in a wide range of areas including family law, business and family partnerships, environmental issues, community disputes, estate issues, and

farmland foreclosures.⁵⁴ The services are not specifically court-connected. The program operates under the Mediation Services Branch of the Saskatchewan Department of Justice which was established in 1988 in order to promote and expand the use of mediation. In 1993, twenty-four mediators operated under contract with the Saskatchewan Department of Justice.

The enactment, in 1990, of the Children's Law Act and the Family Maintenance Act⁵⁵ established family mediation as one program component. Under the Children's Law Act, at the request of either the applicant or respondent, the court may appoint a person to mediate the resolution of disputed custody and access issues.⁵⁶ Under the Family Maintenance Act, also at the request of either party, the court may appoint a person to mediate the resolution of maintenance issues.⁵⁷ Both statutes place a duty on lawyers to inform their clients of mediation facilities that are available to assist with negotiations.⁵⁸ However, referrals to the family mediation program are not limited to those from lawyers or the courts—clients are also referred by medical professionals, the general public and other government agencies.⁵⁹

Not every case is regarded as suitable for mediation. Cases are excluded where: domestic violence or abuse (physical, emotional, verbal or psychological) has occurred and either party does not feel able to negotiate freely; a power imbalance exists; or the safety of either party is at risk.

The program has a number of unique features. Because the mediation services are provided for a wide range of disputes, mediators are able to deal with a wide range of matters in dispute: comprehensive mediation services are provided to resolve disputes over custody, access, child and

⁵⁴ Ken Acton, *An Inventory of Dispute Resolution Activities in Saskatchewan*. (Saskatchewan Justice, Mediation Services, 1992).

⁵⁵ Alberta "Family Relations" brochure, *supra*, note 52.

⁵⁶ *Supra*, note 12.

⁵⁷ *Supra*, note 12.

⁵⁸ Children's Law Act, *supra*, note 12, s.11; Family Maintenance Act, *supra*, note 12, s.14.

⁵⁹ Acton, *supra*, note 54; Alberta "Family Relations" brochure, *supra*, note 52.

spousal support, and the division of marital assets and debts.⁶⁰ The mediation process is confidential.

Mediation is provided on a fee-for-service basis.⁶¹ The parties are encouraged to split the fees evenly. The provincial government provides some funding: for example, the participants are not charged for the mediator's travel costs. In addition, some support for families with limited financial means is available through legal aid.

The fees, as of November 1992, were:

- \$375.00 + GST for the first seven hours;
- \$45.00 + GST for each additional hour.

The mediation process, which is confidential and closed, is designed to include the lawyers for each of the parties as well as other appropriate experts. The mediation service ensures that the legal counsel for each party agrees to the possibility of mediation. Lawyers are assured that they will be informed of the progress made in mediation and that they will receive copies of any correspondence sent to their clients.⁶²

An initial assessment is completed to determine whether the situation is appropriate for mediation. During the initial contact, the mediation office discusses what mediation involves and the administrative procedures such as fee payment, and the assignment of the mediator.⁶³ The parties must sign a Mediation Agreement which sets out the respective parties' roles and responsibilities, and the mediator's role as an impartial third party. The agreement also states that the process is confidential.

After a mediator has been assigned, the mediator schedules an initial mediation session.⁶⁴ During the initial session the mediator encourages the

⁶⁰ *Ibid.*

⁶¹ Saskatchewan Justice, Mediation Services, "Administrative Procedure for Fee-For-Service Mediation" at 1.

⁶² *Ibid.*, at 1-2.

⁶³ *Ibid.*, at 1.

⁶⁴ *Ibid.*, at 2.

parties to discuss what they hope to achieve through mediation. Next the mediator works with the parties to define the issues in dispute, their goals in mediation, and possible solutions to resolve their disputes. The mediator conducts the mediation in the manner most likely resolve the dispute. Because mediation is viewed as a collaborative process, the mediator may include or refer the parties to appropriate experts (e.g., lawyers or accountants).⁶⁵

In summary, the Saskatchewan mediation program offers a different approach to the delivery of mediation services. Mediation services are not connected to a specific court, but combined into one service under the Ministry of Justice. The family mediation service component provides comprehensive mediation on a fee-for-service basis, and lawyers and other experts participate in the mediation process.

As noted in chapter 1, a legislative amendment to the Queen's Bench Act introduced in the Saskatchewan Legislature would require the parties to a family proceeding to attend a mediation screening and orientation session after the proceeding is commenced and before any further step is taken.⁶⁶ Enactment of the amendment is expected in the spring 1994 session.

D. Manitoba

(1) Manitoba Family Conciliation

In Manitoba, Family Conciliation services, which are available in separation, divorce or custody cases, are limited to the child related matters of custody and access.⁶⁷ The services are operated by the Manitoba Family Services Department in cooperation with the Court of Queen's Bench of Manitoba (Family Division). The services are delivered out of five population centres: Winnipeg, Brandon, Flin Flon, the Pas and Thompson. They are provided free of charge by trained professional counsellors with social work backgrounds. Parties are referred to the mediation services by

⁶⁵ *Ibid.*, at 1.

⁶⁶ An Act to amend The Queen's Bench Act to provide for Mediation, *supra*, note 14.

⁶⁷ Manitoba, "Family Conciliation" brochure.

judges of the Court of Queen's Bench (Family Division), lawyers, legal aid and social service agencies.

Family Conciliation has been innovative in implementing parent and children's education programs as well as guidelines for screening where domestic abuse is an issue.

An orientation seminar for parents provides a general introduction to the services offered by Family Conciliation, the function of mediation and counselling. Educational information about the divorce and separation process, parenting roles, children's needs, conflicts and communication problems as well as community resources are also provided.

During the intake process, all cases are screened for spousal abuse in accordance with the program's established guidelines.⁶⁸ Mediation is not recommended where threats of violence or actual violence has occurred within the last year or where the safety of one or both parents is at risk. Mediation may be considered where the parties acknowledge the abuse was wrong, have since learned non-violent means of communication, neither fears a recurrence of violence and they agree to and comply with safety plans. The same guidelines are used to screen for emotional, psychological or verbal abuse.

The mediation process is closed. Lawyers are not involved, but the parties are informed that they may consult their lawyer at any time during mediation. If the issues are resolved, the parents may draw up a written agreement with or without legal assistance. If an agreement is not reached, the parties return to the court process.

In addition to mediation, Family Conciliation provides short-term counselling and referrals for longer-term counselling to help couples and families in the process of marriage breakdown, separation or divorce. The short-term counselling does not include marriage counselling.

Where ordered by a judge, conciliation workers prepare home assessments to help determine the best interests of the children. If the

⁶⁸ Manitoba Family Conciliation, "Guidelines for Mediation and Spousal Abuse".

family has previously undertaken mediation, a worker other than the mediator is used to write the assessment.

Family Conciliation has developed short-term, goal-oriented workshops for children ages nine to twelve years who are experiencing parental separation or divorce.⁶⁹ The children participate in six sessions to discuss "on the surface" changes such as changes in living arrangements, school and family relationships and responsibilities, and "beneath the surface" changes such as intensity of emotions and feelings of fear, sadness and anger. The program includes exploration of the child's own resources for coping, as well as discussion about outside resources and strategies for managing situations in the separation. Illustration boards with movable homes and figures are used to help children share their experiences. By meeting other children who are going through similar experiences, children learn that they are not alone. They receive recognition and support for their role in the family and reassurance that they are not responsible for the family breakdown. The workshops assist the children to develop creative and workable solutions to their family situations and provide resource materials for the children to share with other family members.

Family Conciliation has also developed a group to support children ages eight to ten years whose parents are engaged in ongoing post-separation conflict. The group meets on a weekly basis for eight to ten sessions. In the group, the children explore their feelings about a variety of issues associated with the restructured family system and develop positive coping strategies.

In summary, Manitoba Family Conciliation provides a wide range of support services including information, education, counselling, and mediation to help both parents and children through the process of marriage breakdown and divorce.

(2) Manitoba Access Assistance Program

From 1989 to 1993, the Manitoba Access Assistance Program operated successfully to divert families with severe access compliance problems from the litigation process and held promise for saving court time.

⁶⁹ Margot Henning, "Children's Workshops: A new Concept in Direct Services for Children of Separation and Divorce" (July, 1987).

The Program was launched as a three-year pilot project funded jointly by the Manitoba Ministry of Justice, Manitoba Family Services, and the federal Department of Justice.⁷⁰ It provided long-term assistance and counselling to dysfunctional families in which access had been severely disrupted and mediation had failed or was inappropriate.

The goals of the project were to:

- assist children to have a positive continuing relationship with the access (non-custodial) parent;
- provide a safe, non-threatening environment for access to occur;
- reduce parental hostility;
- assist the custodial parent to expect reliable and consistent access;
- assist the access parent to maintain or re-establish a long-term relationship with the children.⁷¹

Referrals to the project came from judges, the courts, lawyers, access or custodial parents, and community agencies.⁷² Service was provided by an interdisciplinary team composed of a lawyer and counsellor as well as a consulting psychologist. The counsellor and consulting psychologist provided conciliation services; the lawyer provided legal information and pursued contempt charges against a party who failed to participate. Volunteers helped monitor supervised access visits.

The process had several stages.

⁷⁰ The project was initiated after a 1986 study by the Research and Planning Branch of the Manitoba Department of Justice revealed the need for an alternative program to resolve ongoing access disputes: Linda Cantelon, "Manitoba's Access Assistance Project", (1992) 30 *Family and Conciliation Courts Review* 102 at 103.

⁷¹ Manitoba, *Access Assistance Program: Evaluation Report* (Winnipeg: Prairie Research Associates Inc., 1993) at 7.

⁷² Cantelon, *supra*, note 70 at 104.

Intake. The intake stage included an initial screening to determine if the family met the necessary criteria.⁷³ For example,

- (1) a court order specifying access was required—"reasonable access" was not sufficient to show access violation;
- (2) access must have been absent or severely disrupted;
- (3) mediation must have been tried unsuccessfully or found to be inappropriate; and
- (4) both the parents and children had to reside in Manitoba.

An interdisciplinary intake review was conducted to assess whether the legal and therapeutic components could effectively help the family. Cases of alleged or proven child abuse were screened out because they required a different approach and expertise.

Pre-service meeting. A pre-service meeting was developed to explain the program and its expectations to parents.⁷⁴ Both parents and their lawyers were invited to attend. The meeting was chaired by the staff counsellor who emphasized the conciliation aspects of the program. The staff lawyer was present to emphasize the legal aspects. The parents were informed that gradual access was usually more successful and that the child's resistance to access may be due to the parent's inability to handle the separation.

Systematic assessment. The next stage was a systematic assessment which included interviews with the whole family and other relevant agencies to ascertain the family history, what would be needed to ensure the child's well-being, and the ways in which parents prevented members from reaching a reasonable access solution.⁷⁵ This was followed by a team consultation of program members to determine if access should be recommended. If access was recommended, the team would develop a strategy and put together a plan.

⁷³ *Ibid.*

⁷⁴ *Ibid.*, at 105-06.

⁷⁵ *Manitoba Evaluation Report, supra*, note 71 at 9.

Internal services and therapy. The plan for internal services and therapy could include in-house counselling of the parents, individual or child counselling, child group work, or supervised access.⁷⁶

Final settlement meeting. If the parents refused the proposal, the program lawyer called a final settlement meeting with both parents and their lawyers. If no settlement was reached at this meeting, the program lawyer could begin proceedings for a contempt order.⁷⁷

Children's program. This program allowed children to share with each other their experiences of ongoing parental conflict and separation.⁷⁸ Topics covered in the program included rebuilding self-esteem, changes in the family, dealing with feelings, being caught in the parental conflict, and other relevant issues.

E. Ontario: Hamilton Pilot Project

In Ontario, the Unified Family Court Amendment Act enacted in 1977 enabled mediation services to be established as part of the Unified Family Court.⁷⁹ Services have been established in Hamilton, Toronto, London and Kingston.

In February 1991, Ontario initiated a 3-year pilot project in the Hamilton Unified Family Court. The goal of the project was to provide a new and better model for mediation services. An extensive evaluation should yield valuable information on the effectiveness of comprehensive family mediation.⁸⁰ The mediation services offered in the pilot project have been continued pending the completion of the evaluation.

⁷⁶ *Ibid.*, at 10.

⁷⁷ Cantelon, *supra*, note 70 at 107.

⁷⁸ *Manitoba Evaluation Report*, *supra*, note 71 at 10-11.

⁷⁹ S.O. 1977, c.4, s.17(2).

⁸⁰ Professor Desmond Ellis of York University was retained to supervise the evaluation, which is nearly complete (April 1994). The outcomes for families who have used the Hamilton mediation services will be compared with outcomes for families who have litigated their cases in the nearby centre of St. Catharine's: Ontario "Media Backgrounder: Unified Family Court Pilot Project", at 2.

The Hamilton project is based on recommendations contained in the Report of the Attorney General's Advisory Committee on Mediation in Family Law issued in February 1989.⁸¹ The Committee's mandate was to (i) examine the role and function of mediation in Ontario, and (ii) devise a mediation project that could be evaluated in order to determine whether or not substantial funds should be invested in the mediation process. The Committee was composed of thirty representatives with interests and expertise in mediation and family law who were sensitive to concerns raised by the Bar as well as women's groups. The Committee considered a number of issues that included:⁸²

- What role should mediation, as opposed to litigation, play in resolving disputes?
- Should mediation be voluntary or mandatory?
- How can women's concerns about domestic violence, mediator bias and power imbalance be addressed?
- What is the role of independent legal advice in mediation services?

The Committee concluded that mediation is useful as a complement to the adversarial process. Mediation holds the potential to reduce family tension and conflict, the wasting of family assets in litigation and the judicial workload. The Committee recommended a mediation model the design of which emerged from extensive consultation.

Upon accepting the Committee's report, the Attorney General appointed a Court Reform Task Force to organize the various aspects of the Hamilton project.

The Hamilton pilot project ranks among the most progressive mediation services offered in Canada. It is court-based and staff report

⁸¹ The Attorney General of Ontario established the Advisory Committee on Mediation in Family Law in 1987. At that time, mediation services were in increased demand but Ontario lacked a specific plan to provide them.

⁸² *Ibid.*, at 5-6.

directly to Courts Administration.⁸³ The project offers comprehensive family mediation on issues relating to custody, access, spousal and child support and property division. There is no fee for the service.

The mediators, who are social workers, are assisted by members of the legal profession.⁸⁴ A legal training program was developed to assist the staff to mediate support and property matters and to identify potential legal issues that should be referred to independent counsel. In addition to the training program, lawyers from the Hamilton Law Association voluntarily assist the staff to identify situations in which the parties require independent legal advice. A tax lawyer is also available to provide information and advice on tax issues. Couple who wish to mediate financial issues must retain independent counsel as a safeguard to protect their interests.

The mediation process includes several innovative features.

Before entering mediation, couples are encouraged to attend the Family Law Information Meeting—an education seminar given at the Unified Family Court. The seminar, although not mandatory, is a preferred requirement for mediation clients.⁸⁵ The service has a separate and early intake phase. Individual intake meetings are conducted to determine if mediation is suitable. The parties also fill out intake questionnaires. The questionnaires provide key information which helps the staff to assess the appropriateness of mediation.⁸⁶ Staff hold weekly intake review meetings, bi-weekly case review meetings and legal consultation meetings.

The intake procedures enable staff to identify cases where a power imbalance exists between the parties, particularly at the intake phase. Couples are removed from the mediation process where there is a history of spousal abuse, and therefore a danger to a spouse's (usually the woman's) safety or ability to negotiate on an equal footing. A number of safeguards

⁸³ Lorraine Martin, "Comprehensive Mediation Project Launched in Ontario" (1991) 6 *Resolve* 1.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

are in place.⁸⁷ The project design accepts that domestic violence should be dealt with through prosecutions under the Criminal Code, and provincial offences in the Ontario Family Law Act and Children's Law Reform Act. Mediators receive special training to recognize where an imbalance of bargaining power exists and to assist couples in this situation. In addition, couples are encouraged to seek independent legal advice throughout the process. The adequacy of these safeguards will be assessed as part of the evaluation component of the project.

F. Quebec

In March 1993, the Quebec National Assembly took an innovative step when it enacted An Act to amend the Code of Civil Procedure regarding family mediation.⁸⁸ Under the amended provisions, where the parties consent, the court may adjourn the hearing of a contested family matter for a specified period and refer the parties to the Family Mediation Service of the Superior Court or the mediator of their choice. Ordinarily, the adjournment will not exceed 90 days. The judge presiding over a pre-trial conference may make a similar order.

The scope of the mediation is comprehensive. Matters which may be settled include child custody or access, spousal or child support, and property division.

Before making an order, the court is required to "take into account the particular circumstances of the case, and in particular the fact that the parties have already met a certified mediator, the balance of power in place, the interests of the parties, and, if any, of their children."⁸⁹ The court is also required to make "appropriate orders to safeguard the rights of the parties and children".

⁸⁷ Ontario "Media Backgrounder: Unified Family Court Pilot Project" at 2.

⁸⁸ *Supra*, note 15.

⁸⁹ *Ibid.*, art. 815.2.1.

The mediation process is closed. Nothing "said or written" during the mediation is admissible in evidence unless the parties and the mediator consent.⁹⁰

The Family Mediation Service is provided free of charge. Where they choose their own mediator, the parties are responsible to pay the mediator's fee in the proportion determined by the court.

The role of the parties' lawyers during mediation is not regulated. This preserves the flexibility that is desirable in the mediation process. If an issue arises, the parties can seek direction from the judge who ordered the referral.

The mediation must be conducted by a certified mediator. Regulations under the Act specify the requirements for certification.⁹¹ Mediators providing service to the Family Mediation Service of the Superior Court will be paid according to a tariff of fees established by regulation. The current tariff is \$95 for each mediation session, up to a maximum number of 6 sessions averaging 1 hour and 15 minutes in duration.⁹² Where no mediation session occurs, the mediator will receive \$25 for a report stating this fact.⁹³ Mediators providing private services will be able to charge at market price.

The Quebec government plans to promote the development of private family mediation services and to encourage persons to use these services voluntarily to resolve disputes as an alternative to taking legal action. The certification requirements establish the minimum professional qualifications required to act as a family mediator.

G. New Brunswick

New Brunswick offers mediation services in conjunction with the Family Division of the Court of Queen's Bench. The services are free to all

⁹⁰ *Ibid.*, art. 815.3.

⁹¹ *Regulation respecting family mediation*, Que. O.C. 1686-93 (December 1, 1993).

⁹² *Ibid.*, s.10.

⁹³ *Ibid.*, s.12.

families regardless of income level. The mediation includes custody, access, support and property issues for all couples in the program. Domestic violence cases are screened out in advance.

An on-site court solicitor reviews all mediated proposals. Where the solicitor finds the proposals to be conscionable the mediators can assist the couple to sign a legal agreement. The mediators first suggest to the couple that they should avail themselves of a private lawyers. Where the couple decide not to use the services of a private lawyer, the mediators have them sign an acknowledgment form releasing them from a possible "suit" should either party later change their mind about the fairness of the document they have signed.

All victims of spousal abuse are offered the services of the court solicitor. These services include support, custody, access and marital property applications as well as restraining orders. There is no cost for the court solicitor services. The court solicitor provides legal representation for all persons who wish to make support applications or have existing support orders enforced.

The legal aid program has been modified to include the court solicitor services.

H. Nova Scotia

Nova Scotia has introduced a program for child protection mediation that will be described in chapter 4.

I. Prince Edward Island

In Prince Edward Island, the Family Court Service which operates in conjunction with the Prince Edward Island Supreme Court, Family Division, based in Charlottetown, provides mediation services. The service is staffed by two social work professionals who also serve the areas outside Charlottetown from four regional offices on a demand basis. The four regional offices are at Souris, Summerside, Montague and O'Leary. The mediation services focus on issues related to children including custody, access, child support and communications. The mediation process is open. The workers provide two additional services: reports to the court in custody

and access disputes (which may involve home studies) and short-term counselling.

J. Newfoundland

In Newfoundland, public mediation services are provided by one court-based service which focuses on child-related issues. The Counselling and Mediation Division of the Unified Family Court in St. John's, Newfoundland provides the only public and free mediation service in Newfoundland. The Counselling and Mediation Division is staffed by three social work professionals. Two of the counsellors provide mediation services and the third staff member is the Senior Court Counsellor. The counsellors assist parents who have never been married as well as those going through divorce.⁹⁴ Parents are referred by family, friends, lawyers, the court, community resources and themselves.⁹⁵

Mediation is focused on custody, access and parenting issues.⁹⁶ The issues mediated include custody, where the children will live, the amount of access by the other parent, and how decisions pertaining to the child's health, education, welfare and day to day life are to be handled. Other issues affecting parenting—including parental dating, remarriage and blended families—may also be discussed.

The mediation process involves a number of stages.⁹⁷

Intake. During intake, the parents meet with a counsellor to assess their situation, explore options, and if desired, establish a plan of action.

Mediation. If mediation is chosen, the parents initially meet separately with the mediator. Parents also can expect two or more joint sessions with the mediator. Children and new partners may be involved when appropriate.

⁹⁴ Supreme Court of Newfoundland, St. John's Unified Family Court (Nfld.U.F.C.), "Services of Unified Family Court Counselling/ Mediation Division" brochure.

⁹⁵ *Ibid.*

⁹⁶ Nfld.U.F.C. "Mediation: Helping Parent Solve Child Custody/Access Disputes" brochure.

⁹⁷ *Ibid.*

Final agreement. When consensus is reached, a final agreement may be drafted by the mediator and sent to the parties if they desire. The parties are encouraged to have the agreement reviewed by their lawyers before signing.

The Counselling and Mediation Division provides a number of other services including short-term counselling for domestic violence, separation and divorce adjustment, and children's needs.⁹⁸ Families who require long-term counselling services are referred to other counselling services. Unified Family Court judges can order a home assessment when mediation, counselling or negotiation has failed or a judge is not satisfied that the parents have made the best arrangements for their children.⁹⁹ The Senior Court Counsellor is in charge of assigning a qualified professional. The home assessment is used by the court to determine the best parenting plan to meet the child's needs. Also, if supervised access is ordered by a judge, the Senior Court Counsellor appoints a worker who is responsible for providing supervised access and safe visitation.¹⁰⁰

⁹⁸ Nfld. U.F.C. "Services" brochure, *supra*, note 94.

⁹⁹ Nfld. U.F.C. "Mediation" brochure, *supra*, note 96.

¹⁰⁰ Nfld. U.F.C. "Services" brochure, *supra*, note 94.

CHAPTER 4 — CHILD PROTECTION MEDIATION

The most recent use of mediation in the area of family law is in child protection cases.

Child protection mediation is used to resolve public law disputes between families and the state, which bears the responsibility to protect society's broader interests by ensuring the safety and well-being of children. Ordinarily, the participants in the dispute will be the child's parent and a social worker who, as an agent of the state, believes a child is at risk in the home.

Child protection mediation protects the best interests of children through intervention plans, helps families to resolve conflict, and avoids costly legal battles for both families and government. It is different in form from the court-connected mediation that is available to spouses disputing issues upon separation or divorce.

Both Nova Scotia and British Columbia have developed programs for mediating child protection cases. British Columbia has developed a one-year pilot project in Victoria. Nova Scotia has implemented legislation and a province-wide program for developing child protection mediation services.

A. Nova Scotia: Child Protection Mediation

The Nova Scotia Department of Community Services has implemented the first permanent mediation program to resolve child protection matters. The use of mediation for this purpose is provided for by statute.¹⁰¹ The program is modelled after a child protection mediation program offered by the Centre for Dispute Resolution in Denver, Colorado. In this model, mediation is a tool used to complement the legal process in order to (1) determine whether a child is in need of protective services and (2) resolve related matters between the child, protection workers and the family. The Nova Scotia child protection mediation program has a statutory base.

¹⁰¹ Children and Family Services Act, *supra*, note 7.

The main purpose of the mediation is to secure agreement concerning the care and treatment of the child. The mediator:

- (1) helps the parents understand the case worker's role and assist the case worker in setting limits on parental behaviour;¹⁰²
- (2) encourages parental involvement in treatment and taking the steps necessary to get the child back into their home;
- (3) helps the case worker to respect and recognize the parental rights, as well as recognize (not compromise) the interests of the child.¹⁰³

Issues mediated can include parent/child conflict, supervision of teenagers, educational neglect, substance abuse, discipline, child placement, and parenting standards.¹⁰⁴

The goal of the mediation program is to assist in developing a therapeutic relationship between the child, protection worker and family. More specifically, the mediation service exists to:

- (1) provide agencies and families with a less intrusive option to the legal system for resolving conflicts, which will keep children in their own homes and avoid costly and time-consuming legal battles.
- (2) help develop a cooperative relationship between family members or between family and agency so that adequate intervention plans can be put in place as quickly as possible.
- (3) provide families with a model for resolving conflicts which they can adopt to create new approaches to complex family problems.¹⁰⁵

¹⁰² Bernard S. Mayer and Mary Golten, *The Child Protection Mediation Project Manual* (Boulder, Colorado: CDR Associates/Center for Dispute Resolution, 1987) at 3.

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*, at 7.

¹⁰⁵ Nova Scotia Department of Community Services, "Mediation Policy:Current Policy on Mediation Services" (May, 1993) at 1.

Eligibility to enter the program is based on several criteria:¹⁰⁶ the child must not be at immediate physical risk; the case must involve a legitimate child protection concern; all parties must agree to participate voluntarily; and the parents must have the capacity to participate in the process—examples of barriers to capacity include severe psychological or psychiatric impairment, severe behavioral problems, substance abuse, and cognitive impairment. The mediation program must also meet certain requirements: the case must be an open child protection case; the parties must be clear at the beginning whether the mediation is to be confidential or open; the method of reporting and to whom must be established; and, lastly, the parties must be informed of their right to independent legal representation.

Private mediators who have been specially trained by the Justice Institute of British Columbia conduct mediations on a demand basis. They are paid by the Department of Community Services. The procedure is as follows.¹⁰⁷ The request for mediation services is made by the child protection services worker in consultation with a supervisor. Where the case meets the established criteria, the agency retains a suitable mediator, after consulting the family. The Administrator of Family and Children's Services must approve of the mediator and rate to be charged.¹⁰⁸

B. British Columbia: Child Protection Pilot Project

British Columbia established a one-year pilot project, coordinated between the Ministry of the Attorney General and the Ministry of Social Services to test the use of mediation in protecting children and supporting families. The project, which ran from April 1992 to April 1993, was modelled on the program developed by the Center for Dispute Resolution in Colorado. Justice centres were opened in four locations: Burnaby, Kitimat,

¹⁰⁶ *Ibid.*, at 2-3.

¹⁰⁷ *Ibid.*, at 3-4.

¹⁰⁸ Section 45 of the Regulations to the Children and Family Services Act provides:

The cost of mediation services pursuant to section 13 or 21 of the Act may be paid for in whole or in part by the Administrator in accordance with rates established by the Administrator, provided that the services are rendered by a mediator who possesses the qualifications approved by the Administrator.

Kamloops and Merritt (an aboriginal centre). Mediators, who had to be certified, were contracted independently of the Ministry of Social Services. The service, which is provided free of charge,¹⁰⁹ has continued to operate during the evaluation of the project (still ongoing in April 1994).

As in Colorado, mediation was used as an adjunct, not an alternative, to the legal process. The objectives of the mediation were to:

- (1) provide speedy and effective intervention where necessary to protect children;
- (2) effect the least disruptive interventions possible into the lives of families; and
- (3) maintain the best possible long term working relationship between the family and social worker.¹¹⁰

A mediator was used to facilitate discussion between the social worker or social services and the family where child protection may be required and to work out a plan of action to ensure the child's safety and well-being. The referral criteria, adopted from the Colorado project, required that the child must not be in immediate danger, there must be a legitimate protection concern, parents must be competent to negotiate and participation must be voluntary.¹¹¹ The mediation process could include the family, an older child, counsel for the family, the social worker, counsel for the Superintendent, a mediator, and independent experts.¹¹² Issues that could be mediated included the form and nature of the Ministry of Social Service intervention, the nature of supervision, access and parenting training. The existence or non-existence of neglect or abuse as a fact could not be negotiated.¹¹³

¹⁰⁹ British Columbia, "Mediation and Child Protection: A service for Families and Social Workers" brochure.

¹¹⁰ British Columbia Ministry of Attorney General and Ministry of Social Services, "Concept Statement and Project Plan: Child Protection/Family Support Mediation Project" (January 1992) at 1.

¹¹¹ *Ibid.*, at 9.

¹¹² *Ibid.*, at 8.

¹¹³ *Ibid.*

CHAPTER 5 — MEDIATION PROGRAM EVALUATIONS

The effectiveness of mediation programs in Canada, the United States and Britain has been evaluated in a number of empirical studies. This chapter describes the results obtained in major studies conducted in each of these countries.

The studies are important in providing data to measure the effectiveness of mediation programs as well as a critique of mediation services. The evaluations show that mediation is not a panacea. The majority of participants are positive about the process, perceiving it to be more humane than the adversarial system. The majority of participants reach a full or partial agreement. However, when compared with litigation, there is no conclusive evidence that there is more compliance with mediated agreements, that post-divorce conflict is lessened, that it is less costly or that the process has any significant impact on children.

A. Canada

Two sets of Canadian studies will be discussed. The most recent studies—and the most extensive ever undertaken in Canada—involved the evaluation of mediation programs operating in four Canadian cities.¹¹⁴ They were conducted for the federal Department of Justice. Two earlier Ontario studies evaluated the Toronto Conciliation program.¹¹⁵

(1) Department of Justice Mediation Studies

In the Department of Justice studies, published in 1988, Professor James Richardson of the University of New Brunswick evaluated divorce mediation programs in four Canadian cities: Winnipeg, Saskatoon, Montreal and St. John's.¹¹⁶ He based his evaluation on data collected from 1773 court files and 905 divorced or separated men and women and from

¹¹⁴ James Richardson, *Divorce and Family Mediation Research Study: Winnipeg*, (Ottawa, Ministry of Supply and Services, 1988); *Divorce and Family Mediation Research Study: In Three Canadian Cities*, (Ottawa, 1988); *Court-based Divorce Mediation in Four Canadian Cities: An Overview of Research Results* (Ottawa, 1988).

¹¹⁵ Irving and Benjamin, *supra*, note 1.

¹¹⁶ Richardson, *supra*, note 114.

interviews with 324 of these persons who had used divorce mediation services.

(a) Mediation program descriptions

Professor Richardson found that the four mediation services had a number of similarities. Each was connected with a provincial family court. As social arms of the family courts the programs provided a number of services in addition to mediation. With the exception of Montreal, the services prepared custody reports and conducted investigations. All programs except St. John's were responsible to provincial ministries of social or community services. This appeared to allow some operational independence from the courts.

When the study took place, the Winnipeg Court Services program provided mediation services for custody and access disputes as well as intake and information services, short term counselling and court ordered assessments. It consisted of nine social workers plus a director. Judges consistently referred appropriate cases to mediation making it almost mandatory.

Both the St. John's and Saskatoon services—which has been created in the late 1970's as the social arm of their newly created unified family courts—offered a variety of services including mediation, short-term counselling and providing information.

Of the four programs studied, the Montreal service provided the most comprehensive service. It offered mediation of property division and maintenance issues, along with custody and access issues, because it was believed that all of these issues were deeply interwoven. Custody reports were prepared in a separate division because this function was seen to be too time consuming for the mediators. The service was staffed with seven mediators, one coordinator, one intake worker, and one consulting lawyer. In order to successfully provide this comprehensive mediation, the mediators were trained with a general knowledge of family law, tax law and family budgeting.

The mediation process in Montreal consisted of three stages. In the first stage, the willingness of the couple to enter mediation was assessed,

the rules of mediation explained and the issues to be mediated identified. In the second stage, parental goals were defined and all options possible to resolve the dispute were raised. This stage included the discussion of issues such as the needs of the children, custody, and living arrangements. In the third stage, a decision was reached and a memo of agreement was drafted. The staff attorney was consulted about the memo and answered any questions the couple might have. It was believed that, by attempting to resolve all of the major issues in a separation at one time, less conflict would result and the agreement would operate more successfully.

(b) Empirical findings

(i) Client satisfaction

Client satisfaction with the mediators was high. In 80-90% of cases, respondents felt that their mediator was fair, understood the situation, was approachable, gave them an opportunity to express concerns and feelings, and explained the choices available to their satisfaction.¹¹⁷ This response was similar to the response of litigation clients with their lawyers. Among respondents who did not attend mediation, 80% of men and 88% of women were satisfied with the service provided by their lawyer.¹¹⁸

(ii) Settlement success

A full or partial settlement was reached in 64% of the cases studied. Court records indicated that 49% of mediated cases reached complete settlement and another 15% reached partial settlement. Of the cases completely settled, 6% of couples reconciled. However, of the clients interviewed only 38% indicated a full settlement was reached and 20% indicated a partial settlement was achieved. The researchers speculated that some settlements may have unravelled after mediation and this may account for the difference in the statistics.¹¹⁹

¹¹⁷ Richardson, *Court-Based Divorce Mediation in Four Canadian Cities*, *ibid.*, at 27.

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*, at 28.

(iii) Economic results

Women on average achieved higher child support payments through mediation than in litigation. Child maintenance settlements were higher by an average of approximately \$100 per month which would have increased the income level of a woman and the children by \$1,200 - \$1,400 per year—a significant gain.¹²⁰

However, mediation did not prove to be less expensive than traditional litigation. In fact, the legal costs were higher overall for those who participated in mediation than for those who did not. The legal costs were on average \$385 higher for women and \$508 higher for men.¹²¹ The Montreal service presented an exception to this pattern, perhaps because a lawyer on staff could be consulted. There was an average saving in the Montreal service of \$133 for women and \$517 for men.¹²²

(iv) Compliance with maintenance agreements

The Montreal service demonstrated the most positive results in client compliance with maintenance agreements. There was 97% compliance in the mediated group compared to 66% compliance in the non-mediated group.¹²³ Winnipeg showed negative results: those in the mediated group defaulted more frequently, with 36% making irregular payments and 20% making no payments or paying less than the amount in the maintenance order. Saskatoon and St. John's showed no appreciable difference between the mediated and non-mediated groups.

(v) Joint custody

Taking all four programs, agreements for joint custody were four times higher for mediated cases than for non-mediated cases. In Montreal, joint custody was chosen in 47% of mediated cases but only 5% of non-mediated cases. The percentages for joint custody in mediated cases in

¹²⁰ *Ibid.*, at 32.

¹²¹ *Ibid.*, at 40.

¹²² *Ibid.*

¹²³ *Ibid.*, at 33.

Saskatoon and St. John's were much smaller—7.4% and 15% respectively—but still much higher than for non-mediated cases.¹²⁴ Concerns that women chose joint custody because of the fear that otherwise their ex-spouses would fight for sole custody appeared to be unfounded. Respondents indicated they believed joint custody was in the best interests of their child: 89% of men and 75% of women indicated that they would choose joint custody again.¹²⁵

(vi) Post-divorce impact

Unfortunately, mediation had little measurable impact on post-divorce relations and parenting. There was little difference in the level of hostility and conflict between the mediated and non-mediated groups. In fact, 14.5% of Winnipeg clients had already commenced court proceeding to alter the existing mediated agreement and 41% expected to litigate in the near future.¹²⁶ Again, Montreal presented the exception. There, men were more likely to share responsibility for the children and were more likely to have discussions with their ex-spouses. Client attitudes may account for the difference. Clients attending mediation in Montreal often expressed the goal of avoiding future conflict and hostility with their ex-spouses.

(c) Conclusion of mediation strengths

The two most positive aspects the study identified were the time savings to get a court order and the positive experience in utilizing mediation.

Mediation was shown to be the fastest route to a court order. On average, uncontested divorces took seven weeks less and contested cases took 23 weeks less.¹²⁷ According to clients, delays had the effect of prolonging the pain and anxiety of the marriage breakdown. The majority of clients felt that mediation was a more rational and humane process than the traditional advocacy process.

¹²⁴ *Ibid.*, at 35.

¹²⁵ *Ibid.*

¹²⁶ *Ibid.* at 33.

¹²⁷ *Ibid.*, at 42.

Professor Richardson concluded that while the results do not make a clear case for the superiority of mediation over the adversarial process, there were consistent and measurable benefits to mediation and the services provided. Clearly the Montreal program is the most effective. Several reasons why are cited in the report. In Montreal:

- (1) mediation did not have to compete with other services such as custody reports and investigations;
- (2) the more comprehensive program could deal with and resolve the four major issues in marital breakdown—custody, access, maintenance and property division at one time;
- (3) the program was the most structured and offered a consistent approach to design a workable arrangement for the couple.

The positive results from the Montreal service may reflect a greater acceptance of dispute resolution in Quebec. Whether or not this is the reason, the success of the Montreal program must be recognized.

(2) Toronto Conciliation Service Studies

Two smaller empirical studies of the Toronto Conciliation service were undertaken by Toronto professors Howard Irving and Michael Benjamin between 1977 and 1979. Although the process was labelled conciliation, it was essentially divorce mediation which is described as agreement-oriented counselling by a neutral third party in which families undergoing separation or divorce are helped to "identify and clarify issues between them and are assisted in making agreement on some or all of these issues."¹²⁸

The first study, undertaken in 1977, compared the mediation service which emphasized problem solving and agreements with the court intake service which focused on crisis counselling and referrals.¹²⁹ A second study, undertaken in 1978-1979, collected data from 193 couples who

¹²⁸ Irving and Benjamin, *supra*, note 1.

¹²⁹ Howard H. Irving and others, *A Comparative Analysis of Two Family Court Services: An Exploratory Study of Conciliation Counselling* (Toronto: Ministry of the Attorney General).

participated in the conciliation service.¹³⁰ This study dealt with the effectiveness of the service and benefit to clients, the durability of the agreements reached and lawyer evaluations of the service.¹³¹

The results of the second study are more relevant to this discussion. Of the couples studied, 70% reached an agreement and 12% reconciled,¹³² 54% reported they had completely accomplished what they wanted to, and 28% reported partial success on their most important problem.¹³³ The vast majority (69%) stated they had not been pressured into an agreement. The process was reported as a positive experience by 75% of the participants; 35% indicated improvements in communication, trust and understanding.¹³⁴

A one year follow-up evaluation revealed that 71% returned to court one or more times. Of these returns, 80% were of an "automatic" nature (e.g. court ratification of the agreement) and not due to agreement breakdown.¹³⁵ Of those who later modified their agreements, 74% did so without returning to court and 79% stated the changes were mutually acceptable.¹³⁶ In contrast, those couples who did not reach an agreement were twice as likely to return to court four or more times.¹³⁷ 53% reported improvement in their overall family situation.¹³⁸ The improvement in life satisfaction was also linked to attending three or more sessions.¹³⁹

¹³⁰ H.H. Irving (ed.), *Family Law: an Interdisciplinary Perspective* (Toronto: Carswell, 1981) at 47.

¹³¹ *Ibid.*; results also published in Irving and Benjamin, *supra*, note 1.

¹³² Irving, *supra*, note 130 at 54.

¹³³ *Ibid.*

¹³⁴ *Ibid.*, at 55.

¹³⁵ *Ibid.* at 68.

¹³⁶ *Ibid.* at 60.

¹³⁷ *Ibid.* at 59.

¹³⁸ *Ibid.* at 60.

¹³⁹ *Ibid.* at 58.

The lawyers surveyed believed the conciliation service played a positive role in the legal process.¹⁴⁰ The majority contacted recommended continuation of the service. In their view, conciliation helped to clarify and narrow the issues, facilitate dispute resolution, avoid unnecessary litigation, and reduce the emotional turmoil experienced by clients.

In terms of cost-effectiveness, Benjamin and Irving calculated in the first study that each mediated case saved the public \$155 through reduced use of the courts and better use of legal expertise.¹⁴¹

B. United States

This section reviews three major long-term studies involving numerous American cities.¹⁴²

These studies evaluated the outcomes of divorce mediation clients in comparison to the litigation process. The first study involved the custody and access mediation services provided by the Denver Custody Mediation Project between 1979-1981 (the "Denver study").¹⁴³ The second study—the Divorce Mediation Research Project—was based on data for custody and access mediation collected from Los Angeles, Connecticut and Minneapolis beginning in 1981 (the "multi-city study").¹⁴⁴ Data from Colorado was also used for the litigation process comparison in this study. The third study involved the assessment of the Delaware Child-Support Mediation program (the "Delaware study").¹⁴⁵

The research topics included profiles of people who use mediation, agreement rates, client satisfaction and reactions, compliance with mediated

¹⁴⁰ *Ibid.* at 61.

¹⁴¹ *Ibid.* at 63.

¹⁴² Jessica Pearson and Nancy Thoennes, "Divorce Mediation: Reflections on a Decade of Research" in *Mediation Research*, ed. Kenneth Kressel *et al.* (San Francisco: Jossey-Bass, 1989) at 9.

¹⁴³ *Ibid.*, at 10.

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*

agreements and subsequent litigation, relationships with former spouses, child adjustment patterns, and factors affecting mediation outcomes.

(1) Profiles

The studies showed that where mediation was voluntary, it was preferred by higher educated professionals: 72% of men and 55% of women had at least a college education.¹⁴⁶ Lawyer encouragement was reported as a factor by 72% of women and 69% of men who chose to mediate. Of those who rejected the opportunity to mediate, only 18% of women and 32% of men reported lawyer encouragement.¹⁴⁷

(2) Agreement Rates

The percentage of agreements reached varied with each program. The Delaware program mediated nearly 80% of the child support cases.¹⁴⁸ This success rate was tarnished by the fact that the support settlements were on average lower than those ordered by masters and judges for comparable families. In the other two studies, where mediation was voluntary, approximately 40% of cases reached full settlement and 20% reached partial settlement. Settlement rates in mandatory mediation cases were comparable at 60-70%. Couples in mediation more often agreed to joint custody or to more visitation for the access parent than those who litigated.

(3) Client Satisfaction and Reactions

Clients expressed high levels of satisfaction. In the first two studies involving custody and access, more than 3/4 of the clients were extremely satisfied with the mediation process and would recommend mediation to others. In comparison, only 30-40% of respondents were satisfied with the court process.¹⁴⁹

¹⁴⁶ *Ibid.*, at 13.

¹⁴⁷ *Ibid.*, at 14.

¹⁴⁸ *Ibid.*, at 18.

¹⁴⁹ *Ibid.*, at 19.

Mediation was seen to have a positive impact in a number of areas. According to 69% of respondents, mediation helped them to focus on the needs of the children; 70-90% stated that mediation gave them a chance to express their own point of view; 65% perceived that mediation was a better alternative than going to court and provided a better range of options; and 72% percent viewed mediation to be less rushed and less superficial than court.

Some negative feelings were also recorded: 20-40% of respondents in the multi-city study confused mediation with other processes such as reconciliation, arbitration, or counselling.¹⁵⁰ Most of the dissatisfaction expressed was associated with the one limited mediation program in Delaware: 94% of the Delaware clients indicated that mediation had been a rushed experience with inadequate time and 56% did not believe mediation was a better process than a court hearing.¹⁵¹ The response of mediation clients in other cities was clearly positive.

(4) Compliance

The studies showed a higher rate of compliance with the mediated settlements.¹⁵² In the Denver study, 80% of clients reported compliance with the mediated agreement, in comparison to 60% compliance with adjudicated settlements. In the multi-city study, only one-third of mediation clients reported irregular or absent child support payments while over one-half of adjudicated settlements reported non-compliance. Regarding access compliance, none of the mediation clients experienced infrequent visitation of their children whereas 30% of the access parents in the adversarial group saw their children only rarely. The findings give some support to the argument that parents who reach their own mutually acceptable solution through mediation are more likely to comply with the agreement.

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.*, at 21.

¹⁵² In spite of the higher rate of compliance, there was little difference in the rate of subsequent re-litigation.

(5) Post-Divorce Conflict and Re-Litigation

The studies showed contradictory findings with respect to the effect of mediated settlements on levels of spousal conflict and the need for subsequent litigation over the agreement. The Denver study showed lower rates of re-litigation, but the multi-city study showed similar rates of re-litigation between mediation and adversarial litigation groups. The authors concluded that although mediation may not be more effective in preventing re-litigation, neither did it produce higher rates of re-litigation. They also concluded that mediation had a limited effect in promoting cooperation between the divorcing parents and post-divorce conflict remained regardless of which process the parties used.

This contradictory pattern of high client satisfaction with the mediation process combined with a high level of post-divorce conflict was also reported in a study of New Jersey mediation clients.¹⁵³ The study, conducted between 1981-1985, involved 94 parents. The group who was most satisfied with the mediation process because they believed they had played an active role in the decision-making process reported higher levels of post-divorce conflict and emotional maladjustment with their former spouses. The authors argued that parents who were more cooperative during the divorce process were more likely to develop arrangements that accommodated each others needs. But these agreements usually required more frequent interactions and therefore more opportunities for confrontation.¹⁵⁴

(6) Child Adjustment Patterns

The studies revealed little difference in child adjustment patterns between families in mediation and litigation. While children of mediation clients had higher adjustment ratings in the studies, this difference was attributed to the family dynamics and the specific parent-child relationships of those in mediation rather than the mediation process. Mediation outcomes were affected by the skill and behaviour of the mediator, the

¹⁵³ Maria G. D'Errico and Amiram Elwork, "Are Self-Determined Divorce and Child-custody Agreements Really Better" (1991) 29(2) Family and Conciliation Courts Review at 104.

¹⁵⁴ *Ibid.*, at 111.

characteristics of the disputants and their willingness to communicate and cooperate and the seriousness of the dispute.

(7) Cost-Effectiveness

In terms of cost-effectiveness, in the Denver study mediation was found to be less expensive for divorcing couples than litigation using two lawyers.¹⁵⁵ Couples who successfully mediated spent an average of \$1,630 on lawyers fees. Couples who failed to reach an agreement in mediation spent an average of \$2,000 on legal fees. Couples who only used litigation spent an average of \$2,360. It should be noted that the mediation service in Denver was provided free of charge.

A more recent study in California found that couples who used the adversarial process has legal fees twice as large as those who used mediation.¹⁵⁶ The study compared samples of 225 people who used the adversarial process with 212 people who entered mediation voluntarily at the Northern California Mediation Centre (NMC). Fees for mediation at the NMC, a non-profit organization, ranged from \$40-120 per hour depending on the family's household income.¹⁵⁷ The average cost for couples who completed mediation and reached an agreement was \$2,224 and 50% of couples paid less than \$2,000. Their additional attorney fees were approximately \$1,500 each with an average total cost per couple of \$5,234.¹⁵⁸ In the adversarial group, the average cost of attorney fees was \$6,850 for men and \$5,376 for women. The cost per couple (\$12,226) was 134% higher than the cost for mediation.¹⁵⁹

The reasons for higher litigation costs were related to the elaborate and often duplicative procedures used by each side in the litigation process. In mediation, couples often used one mutually acceptable accountant or pension evaluator. The study also noted that higher income cases often used

¹⁵⁵ Jessica Pearson and Nancy Thoennes, "Mediating and Litigating Custody Disputes: A Longitudinal Evaluation" (1984) 17 Family Law Quarterly 479.

¹⁵⁶ Joan B. Kelly, "Is mediation Less Expensive? Comparison of Mediated and Adversarial Divorce Costs" (1990) 8 Mediation Quarterly 15.

¹⁵⁷ *Ibid.*, at 18.

¹⁵⁸ *Ibid.*, at 20.

¹⁵⁹ *Ibid.*

multiple court appearances for temporary and permanent support and property settlements.¹⁶⁰

(8) Conclusion

The Denver, multi-city and Delaware studies found that mediation was perceived as less damaging than adversarial litigation. Mediation produced high levels of client satisfaction, while the court process led to dissatisfaction for clients. The main attraction of mediation was that it gave parties a chance to express their views and was a more humane process. Mediation had little effect on re-litigation or post-divorce animosity. The U.S. studies also confirmed significant cost savings to couples who used mediation.

C. England and Wales

In 1989, the Conciliation Project Unit at the University of Newcastle upon Tyne released a comprehensive study on the effectiveness and costs of mediation services in England and Wales (the "Newcastle study").¹⁶¹ This recent study is the largest undertaken in England. It involved data from 1392 families who proceeded through the courts and mediation services over an 18-month period as well as information from judges, mediators, lawyers, probation officers and welfare officers.

The fact that the study was undertaken reflected the need to assess the growing number of mediation services. By 1985, there were over 40 independent mediation services in England and Wales and two-thirds of divorce courts had mediation services available.

In the study, the words mediation and conciliation are used interchangeably. To avoid confusion, this summary will refer only to mediation.

¹⁶⁰ *Ibid.*, at 24.

¹⁶¹ United Kingdom, *Report of the Conciliation Project Unit University of Newcastle upon Tyne on The Costs and Effectiveness of Conciliation in England and Wales* (1989). The results are summarized in chapter 20. See also Peter McCarthy and others, "Family Mediation in Britain: A Comparison of Service Types" (Summer 1991) 8 *Mediation Quarterly*.

The study divided mediation services into four comparative categories based on the degree of institutional control over the mediation process as well as the degree of control or influence exerted by authority figures. The categories were as follows:

- Category A: Court-based mediation with high judicial control;
- Category B: Court-based mediation with low judicial control, control by court welfare officers;
- Category C: Independent mediation with probation control;
- Category D: Independent mediation with no probation control.

(1) Cost Analysis

The primary objective of the Newcastle study was to determine the net impact of mediation on the cost of resolving disputed child issues as well as to test the widely held hypothesis that mediation was a less expensive process than litigation. The results showed that mediated settlements added significant cost to the overall resource cost. Court-based mediation added an average of £150 of which £25 - £30 was paid for by the parties.¹⁶² When the categories of A, B, and D were averaged (category C was too small to reach conclusions) mediation added approximately £250 to the overall cost of settling a dispute, with only about £40 paid by the parties.¹⁶³ The remainder of the expense was subsidized by the government and taxpayers.

(2) Effectiveness

In comparing the four types of mediation it is important to note the differences between the services. Court-based services were limited to custody and access issues (and therefore dealt with the fewest number of issues). In contrast, the independent services attempted to deal with all issues of the divorce in 19% of the cases. The independent services also provided a wider variety of services including counselling, advice and information about the divorce process and the welfare of children.

¹⁶² *Ibid.*, at 349.

¹⁶³ *Ibid.*

The researchers chose settlement rates as the primary method for quantitative analysis. Clients reported agreement on at least some issues in 71% of cases and 74% were satisfied with the arrangements.¹⁶⁴ Despite the narrower scope of issues dealt with, the court-based programs were much less successful in creating agreement. Court-based programs were especially weak in resolving custody matters. Their settlement rate was only about 30%. The independent services were much more successful, particularly in category C, where the settlement rate was over 90%.

There was no evidence that mediation improved the quality of the relationship between the parties. However, those who used the independent services (categories C & D) reported a significant improvement in their psychological well-being. Only 15% of the parties were dissatisfied with the mediation process and three-fourths stated that they would recommend mediation to others. Category D reported the most success in achieving the aims of mediation, especially regarding counselling and dealing with personal emotions and feelings. Most people who used mediation felt their mediators were helpful in encouraging agreement; mediators in categories C & D were regarded as the most helpful.

The study also revealed the independent services, which were based farther away from courts, closer to the community had better results than the court based services. The study linked the success of the independent services to ability to deal with all problems and issues surrounding divorce, in terms of information, comprehensive mediation, and counselling to deal with client emotions and well-being.

D. Conclusion

Mediation evaluations in Canada, the United States, England and Wales reveal a number of broad patterns. First, there were high levels of satisfaction with the mediation process ranging from 75% in the U.S. and Canada to 85% in Great Britain. Mediation assisted parties to reach a full or partial agreement in approximately 60-70% of cases in all three countries. Mediation resulted in significant time savings to obtain a final divorce decree in the Canadian study. As for benefits for families, the

¹⁶⁴ *Ibid.*, at 350.

studies showed that more couples agreed to joint custody or more access time for the non-custodial parent than couples who used litigation.

The studies showed mixed results in a number of areas. There were mixed results regarding party compliance with the mediated agreements. Although the Montreal service and American mediation services showed a higher rate of compliance with the mediated agreement, the other Canadian services showed no appreciable difference, and Winnipeg had a lower rate of compliance. The results on the cost-effectiveness of mediation were also mixed. The Toronto study showed a saving to the public; the Montreal service and two American studies showed that mediation clients saved money in legal costs. However, in the other Canadian services and the British services, mediation was found to be more expensive than using the legal system alone. While the Canadian study showed significant gains in the amount of support payments, the Delaware program resulted in lower child support payments than awarded in court. The studies also showed no evidence that the mediation process itself resulted in more well-adjusted children.

The programs that offered comprehensive mediation, a structured process, and related support services reported the highest success.

APPENDIX 1

Edmonton Family Court Conciliation Project

The first court-based program in Canada to utilize mediation and dispute resolution processes was established in Edmonton, Alberta. The Family Court Conciliation program began as a three year pilot project from 1972 - 1975, funded by the Department of Health & Welfare.¹⁶⁵ The project was initiated through the efforts of Judge Marjorie M. Bowker.¹⁶⁶ Between 1965 and 1969 Judge Bowker investigated numerous court based conciliation programs and procedures. She visited family courts in Japan, Korea and the United States, as well as the National Marriage Council in Britain. In 1969, Judge Bowker was invited to speak on family law in Canada at the American Conference of Conciliation Courts in Los Angeles where she came in contact with Mr. Franklin C. Bailey of the Conciliation Court of Los Angeles.¹⁶⁷ Subsequently, Judge Bowker became a board member of the National Board of the American Conference of Conciliation Courts, and her ongoing correspondence with Mr. Bailey provided many ideas which formed the basis of the Edmonton Family Court Conciliation Project.

The pilot project officially began on September 1, 1972.¹⁶⁸ It was administered by a board of directors under the Edmonton Family Court Conciliation society. This volunteer society was incorporated under the Societies Act of Alberta¹⁶⁹ in May 1972. The board members were individuals from legal and professional backgrounds and individuals who represented community interests. Judge Bowker was the Director, and Mr. Bailey was the consultant. The project consisted of a Chief Project Counsellor as well as four staff counsellors.

The purpose of the project was to reconcile all or some of the parties' differences, and to help persons whose marital problems had led to the point

¹⁶⁵ Final Report of Edmonton Family Court Conciliation Project, Vol. I, September 1975.

¹⁶⁶ *Ibid.*, at iii-12.

¹⁶⁷ *Ibid.*, at 10.

¹⁶⁸ *Ibid.*, at 3 for more detailed administration information.

¹⁶⁹ R.S.A. 1970, c. 347.

of seeking legal recourse.¹⁷⁰ The emphasis was on short-term services of crises oriented counselling.

The objectives were summarized as follows:

- 1) to reconcile couples and re-unite broken families;
- 2) to conciliate continuing differences where reconciliation was not possible or desirable;
- 3) to refer couples for long-term counselling where needed;
- 4) to offer post-divorce counselling where needed to assist parties to overcome feelings of bitterness, hostility, guilt and failure;
- 5) to diminish the social and economic damage of marital breakdown;
- 6) to offer an alternative to divorce;
- 7) to evaluate the value of court-administered conciliation services;
- 8) to evaluate the feasibility of duplicating the project services in other communities;
- 9) to explore whether such services belong in courts, and whether the Family Court in Alberta was the proper court for such purposes.¹⁷¹

Client referrals to the conciliation project came from lawyers, judges in the family and superior courts, and counsellors in the family court.¹⁷² In contested divorce cases, judges often sent couples into conciliation for a couple hours to try encourage an agreement. Several methods were used to publicize the service. One counsellor attended the superior law courts each Monday during the uncontested divorce hearings to raise awareness of the conciliation project. Conciliation project brochures were also sent out with divorce petitions.

The Conciliation counsellors had a number of responsibilities. Each day one counsellor was assigned to handle inquiries from the public. The counsellors handled intake to assess whether a case was appropriate for conciliation. If they decided a case was inappropriate for conciliation, for example, where there was an alcohol or psychological problem, they referred

¹⁷⁰ *Ibid.*, at 1-2.

¹⁷¹ John G. Paterson & James Hackler, "To Have or to Let Go: The Challenge of Conciliation. An Evaluation Report on the Edmonton Family Court Conciliation Project", 1974, at 9-10.

¹⁷² Final Report, at 32-47.

the person to the appropriate service. When a case was accepted by the service, it required an average of three to five sessions to reach a resolution.

After a number of sessions a decision would be reached either to reconcile through a written or verbal marriage agreement, reconcile for a trial period, or continue the separation or divorce. One interesting tool used by the counsellors where a couple wished to reconciliation was a written "marriage agreement". The agreement functioned primarily as an educational tool which focused on behavioral changes. It was particularly useful for couples who had not been involved in pre-marital counselling, couples confused about roles in the relationship, and those who had outdated notions of gender stereotypes. The agreement was useful for emphasizing behavioral changes which needed to occur in the marriage. Couples were also encouraged to design their own agreements.¹⁷³ If a decision was made to continue the separation or divorce an attempt was made to reach agreement on the relevant issues of custody and access and also provide counselling support for the couple.

In 1975, an evaluation report was completed on the project.¹⁷⁴ The feedback from lawyers who had referred clients to the project was very positive. Of the thirty-five lawyers contacted, thirty-two favoured continuing the program.¹⁷⁵ Only six percent felt that their clients did not benefit from the service.¹⁷⁶ Eighty-five percent favoured counsellor involvement before court action commenced.¹⁷⁷ Of the clients who used the service, only a few had negative comments. More importantly, the success of the program was evidenced by the fact that 42.5 percent of the couples reconciled either through a written or verbal marriage agreement. One year later, ninety percent of the reconciled marriages remained stable.¹⁷⁸

The Final Report recommended the program become permanent and continue under the pilot objectives.¹⁷⁹ The first recommendation was to

¹⁷³ *Ibid.*, at 91.

¹⁷⁴ *Ibid.*, at 48-108.

¹⁷⁵ *Ibid.*, at 63.

¹⁷⁶ *Ibid.*, at 64.

¹⁷⁷ *Ibid.*, at 63.

¹⁷⁸ *Ibid.*, at 83.

¹⁷⁹ *Ibid.*, at 136-41. A total of 18 recommendations were made. Only relevant recommendations are highlighted in this summary.

continue the project on a permanent basis under the Department of the Attorney General and expand to a province wide service. It was also recommended that the service continue to be identified with the family court system. All communications between counsellors and clients should remain confidential and privileged. The broader objective of conciliation should re-emphasized divorce and post-divorce counselling, and counselling parents and children in their continuing relationship. It was further recommended the conciliation program focus on short-term crisis counselling and those individuals who require long-term counselling should be referred out to appropriate agencies. The report also stated that a distinction should be made at the policy level between the function of a conciliation counsellor and a custody investigator and the same person should not perform both functions on a case. Finally, it was suggested the program retain a psychologist or psychiatrist as a consultant. When the project funding ended in 1975, the program continued under the Department of the Attorney General.

APPENDIX 2

Resource Persons

Alberta

Ken Balko, Manager
Mediation & Court Services Programs
Alberta Family and Social Services
Centre West
10035 - 108 Street
Edmonton, Alberta
T5J 3E1

Diane M. Shearer, Supervisor
Custody Mediation Program
Alberta Family & Social Services
Calgary Region
606 John J. Bowker Building
620 - 7th Avenue S.W.
Calgary, Alberta
T2P 0Y8

Kent Taylor, Coordinator
Custody Mediation Program
(Northern Region)
Family Court/Mediation Services
Alberta Family and Social Services
Room 401, Royal Lepage Building
4th Floor, 10130 - 103 Street
Edmonton, Alberta
T5J 3N9

British Columbia

Katherine Coulis
Acting Family Services Analyst
Corrections Branch
Ministry of the Attorney General
#406, 910 Government Street
Victoria, B.C.
V8V 1X4

Manitoba

Cynthia Spratt Goodmundson
Family Conciliation Counsellor
Manitoba Family Services
14th Floor, Woodsworth Building
405 Broadway
Winnipeg, Manitoba
R3C 3L6

New Brunswick

Ronald E. Bagnell
Family Court Mediator
The Court of Queen's Bench of New
Brunswick
Family Division
P.O. Box 6000
Fredericton, N.B.
E3B 5H1

Newfoundland

Cathy Foster and Emily Friel
Counselling & Mediation Division
Unified Family Court
Supreme Court of Newfoundland
21 King's Bridge Road
St. John's, Newfoundland
A1C 3K4

Nova Scotia

Harold L. Beals
Coordinator of Child Protection Services
Family and Children's Services
Department of Community Services
P.O. Box 696
Halifax, Nova Scotia
B3J 2T7

Ontario

Lorraine E. Martin
Coordinator of Social Services
Officer of the Official Guardian
Office of the Official Guardian
14th floor, 393 University Avenue
Toronto, Ontario
M5G 1W9

Formerly:
Manager, Mediation Services
Ministry of the Attorney General
Unified Family Court
55 Main Street West
Hamilton, Ontario
L8P 1H4

Prince Edward Island

Katheryn Jones, Supervisor
Family Court Services
Department of Justice and
Attorney General
Community and Correctional Services
Family Court Counsellors
42 Water Street
P.O. Box 2290
Charlottetown, P.E.I.
C1A 8C1

Saskatchewan

K.W. Acton, Director and
Arlene Nicol, Program Manager
Mediation Services
Saskatchewan Justice
#215, 3988 Albert Street
Regina, Saskatchewan
S4S 3R1

Quebec

Pierre Tanguay
Ministry of Justice
1200 route de l'Eglise
5th Floor
Sainte-Foy, Quebec
G1V 4M1

APPENDIX 3

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Newfoundland

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Yukon

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APPENDIX 4

Chart Comparing Family Mediation Programs in Canada

Program & Location	Government Dept Responsible	Issues Dealt With	Services Offered	Mediation Open or Closed	Cost to Clients	Eligibility Requirements	Legal Action Required	Status	Legislation or Policy Based
ALTA Custody Mediation Program . province-wide	Family and Social Services, Mediation and Court Services Program	Custody & Access	Mediation, Education, Negotiation and Assessment	Closed until Assessment stage Closed Mediation . provided in-house in Calgary & Edmonton . contracted out in rural regions Open Assessment . contracted out	Free until assessment, subsidy may be available (means tested)	. both parties must agree to enter the program (voluntary participation) . subsidy only of both parties reside in Alberta . screening for safety of either parent, severe psychological or impairment, substance abuse	. proceedings for divorce, custody or guardianship, or a variation of an order from those proceedings must be started in QB or Surrogate Court	Permanent	
Quebec Court Services Program . Court Counsellors, Calgary and Edmonton; . Family Maintenance Workers, rural Alberta	Family and Social Services, Mediation and Court Services Program	Custody, access and maintenance	. mediation, counselling and negotiation . home studies (at direction of Family Court judge) . assist clients to bring matter before Family Court . help prepare affidavits for custody and access and maintenance applications . schedule dates for A-G	Closed	Free			Permanent	

	Program & Location	Government Dept Responsible	Issues Dealt With	Services Offered	Mediation Open or Closed	Cost to Clients	Eligibility Requirements	Legal Action Required	Status	Legislation or Policy Based
ALTA (Cont)	<p>Family Conciliation Services</p> <p>Edmonton Courts (Mediation Services)</p> <ul style="list-style-type: none"> as Mediation Services has expanded, Family Conciliation Services has decreased to approximately 8% of the services offered 	Family and Social Services, Mediation and Court Services Program	Flexible, but agreements are especially encouraged for custody, access and maintenance	Conciliation through mediation and short-term counselling	Closed	Free			Permanent	
BC	<p>Family Court Counselor Program</p> <ul style="list-style-type: none"> available province-wide most services offered through probation and family court counselling offices two specialist conciliation offices in Vancouver specialist conciliation offices, one in Vancouver and the other in New Westminster 	Ministry of Attorney General, Corrections Branch	Custody, access, maintenance, guardianship	<ul style="list-style-type: none"> mediation, counselling and dispute resolution custody and access reports prepared by Family Court Counselors upon court order 		Free	<ul style="list-style-type: none"> voluntary participation ability to ensure safety (guidelines and screening where violence is a factor) 	<ul style="list-style-type: none"> separation, divorce or custody proceeding 		Family Relations Act, RSBC 1979, c.121, s.3
MAN	<p>Family Conciliation</p> <p>Winnipeg, Brandon, Flin Flin, the Pas, Thompson</p>	Manitoba Family Services Department	Custody and access	<ul style="list-style-type: none"> mediation, conciliation and education court-ordered assessments 	Closed	Free	<p>Cases not eligible include those which:</p> <ul style="list-style-type: none"> spousal abuse (physical, emotional, verbal or psychological) or threats of violence have occurred within the last year the safety of either spouse is at risk 	<ul style="list-style-type: none"> separation, divorce or custody proceeding 	Permanent	Court of Queen's Bench (Family Div.) Act, CCSM, c.C290, ss41-54; Queen's Bench Rules, 1996, ss825-829/2

Program & Location	Government Dept Responsible	Issues Dealt With	Services Offered	Mediation Open or Closed	Cost to Clients	Eligibility Requirements	Legal Action Required	Status	Legislation or Policy Based
MAN (Con't) Access Assistance Project · province-wide · based in Winnipeg	Manitoba Ministry of Justice/Manitoba Family Services/Federal Department of Justice (joint funding)	Access disputes	Assessment, counselling and legal enforcement		Free	<ul style="list-style-type: none"> · severe disruption of access · mediation was inappropriate or failed · parents and children reside in Manitoba · no child abuse 	<ul style="list-style-type: none"> · court order must specify access 	Pilot project, 1989-1993. This program has ended	Child Custody Enforcement Act, RSM 1987, c.360
NB Mediations Services · available full-time in all major centres and in the satellite courts	Court of Queen's Bench of New Brunswick (Family Division)	Custody, access, spousal and child support, property division	Mediation assessment, mediation	Open	Free, regardless of income level (costs borne by Dept of Justice)	<ul style="list-style-type: none"> · no evidence of spousal abuse · voluntary commitment by both parties to mediation 	None, although may be Court ordered	Permanent	Policy based
NFLD Counselling and Mediation Division, St. Johns?	Unified Family Court	Custody, access and parenting issues	Mediation, short-term counselling, home assessment and supervised access (if ordered)		Free		None (Note, parties need not be married)		Children's Law Act, MSNPLD 1990, c.C-13, ss37, 41; Family Law Act, MSNPLD 1990, c.F-2, s14
NS Child Protection Mediation · province-wide	Dept of Community Services, Family and Children's Services Division	Child protection issues arising between family and agency or between family members	Mediation	Closed or Open	Free	<ul style="list-style-type: none"> · open child protection case · physical safety of children assured · all parties · capacity to participate in process (barriers to participation: severe psychiatric or psychological impairment, severe behavioral problems, substance abuse or cognitive impairment) · attempts to negotiate have failed 	<ul style="list-style-type: none"> · Mediation can be initiated during court process or prior to any court involvement 	Permanent	Children and Family Services Act, SNS 1990, c.5, ss13, 21

	Program & Location	Government Dept Responsible	Issues Dealt With	Services Offered	Mediation Open or Closed	Cost to Clients	Eligibility Requirements	Legal Action Required	Status	Legislation or Policy Based
ONT	Unified Family Court Mediation Service Hamilton	Attorney General's Office	Custody, access, spousal and child support, property division	Mediation and education	Closed or Open	Free	no history of spousal abuse	None	Pilot Project, Feb 1991 to Feb 1994	Courts of Justice Act, RSO 1990, c.C.43, s.632
PEI	Family and Court Services province-wide	Department of Health and Social Services, Community and Correctional Services Division	Custody, access, child support and communication	Mediation, reports to courts on custody and access disputes, short-term counselling	Open	Free	Both parties must give informed consent to participate	Preliminary level advice advisable	Permanent	
QUE	Family Mediation Service of the Superior Court	Ministry of Justice, with cooperation of Health and Social Services	Custody, access, spousal and child support, property division	Mediation	Closed (not admissible in evidence unless parties and mediator consent)	Free	Court-ordered, with consent of parties	Contented case, already commenced	Permanent (still in development)	Code of Civil Procedure, RSQ 1977, c.C.25, art.815.2, 815.3 enacted in An Act to amend the Code of Civil Procedure regarding family mediation (1993, c.1)
SASK	Mediation Services head office in Regina mediators located province-wide	Department of Justice, Mediation Services Branch (not court connected)	In family law, custody, access, maintenance, financial and property division	Mediation	Closed unless the parties agree otherwise	\$375 for first 7 hours, \$45/hour for subsequent hours (subsidy may be available through Legal Aid)	Cases not eligible include those in which domestic violence or abuse (physical, emotional, verbal or psychological) has occurred and either party does not feel that he can negotiate on his/her own behalf a power imbalance exists the safety of either party is at risk	None	Permanent	Children's Law Act, SS 1990, c.C.8.1, s.10; Family Maintenance Act, SS 1990, c.F.61, s.13; An Act to amend The Queen's Bench Act to provide for Mediation, SS No. 40 of 1994, s.2