

**Family Mediation in Canada:
Implications for Women's Equality**

**A Review of the Literature and Analysis of Data
from Four Publicly Funded Canadian Mediation Programs**

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in association with

National Association of
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Status of Women Canada is committed to ensuring that all research produced through the Policy Research Fund adheres to high methodological, ethical, and professional standards. The research must also make a unique, value-added contribution to current policy debates, and be useful to policy-makers, researchers, women's organizations, communities, and others interested in the policy process. Each paper is anonymously reviewed by specialists in the field, and comments are solicited on:

- the accuracy, completeness and timeliness of the information presented;
- the extent to which the analysis and recommendations are supported by the methodology used and the data collected;
- the original contribution that the report would make to existing work on this subject, and its usefulness to equality-seeking organizations, advocacy communities, government policy-makers, researchers and other target audiences.

Status of Women Canada thanks those who contributed to this peer review process.

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PREFACE

Status of Women Canada's Policy Research Fund was instituted in 1996 to support independent, nationally relevant policy research on gender equality issues. In order to determine the structure and priorities of the Policy Research Fund, Status of Women Canada held consultations from March to May 1996 with a range of national, regional and local women's organizations, researchers and research organizations, community, social services and professional groups, other levels of government, and individuals interested in women's equality. Consultation participants indicated their support for the Fund to address both long-term emerging policy issues as well as urgent issues, and recommended that a small, non-governmental external committee would play a key role in identifying priorities, selecting research proposals for funding, and exercising quality control over the final research papers.

As an interim measure during the fiscal year 1996-1997, consultation participants agreed that short-term research projects addressing immediate needs should be undertaken while the external committee was being established to develop longer-term priorities. In this context, policy research on issues surrounding the Canada Health and Social Transfer (CHST) and access to justice were identified as priorities.

On June 21, 1996, a call for research proposals on the impact of the CHST on women was issued. The proposals were assessed by Status of Women Canada and external reviewers. The research projects selected for funding in this area focus on women receiving social assistance, economic security for families with children, women with disabilities, the availability and affordability of child care services, women and health care, and women's human rights.

The call for research proposals on access to justice was issued on July 18, 1996. Also assessed by Status of Women Canada and external reviewers, the selected policy research projects in this area include a study of abused immigrant women, lesbians, women and civil legal aid, family mediation, and the implications for victims of sexual harassment as a result of the Supreme Court ruling in *Béliveau-St. Jacques*.

The objective of Status of Women Canada's Policy Research Fund is to enhance public debate on gender equality issues and contribute to the ability of individuals and organizations to participate more effectively in the policy-development process. We believe that good policy is based on good policy research. We thank all the authors for their contributions to this objective.

A complete listing of the research projects funded by Status of Women Canada on issues surrounding the Canada Health and Social Transfer and access to justice is provided at the end of this report.

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Equality Matters! Consulting

Equality Matters! Consulting is an association of independent legal consultants (Sandra A. Goundry, Yvonne Peters and Rosalind Currie) who each bring over 10 years of experience in the human rights and social justice fields in Canada. The team provides a wide range of legal consulting, policy development and research services, which often include an education and training component.

Together, this team's expertise lies in the research and analysis of public policy issues from an equality rights and human rights perspective. The team provides various services, including: policy development and analysis, research and report writing and project management.

National Association of Women and the Law (NAWL)

NAWL is a national non-profit organization dedicated to advancing the equality rights of women through legal research, law reform advocacy and education. NAWL's members and supporters include lawyers, academics, law students, human rights activists, local women's groups, social policy analysts and others who support NAWL's aims and objectives. NAWL is governed by a regionally representative Steering Committee, elected by the membership. NAWL has caucuses in a number of communities across Canada that are actively involved in organizing educational events, lobbying and information-sharing.

Since its inception in 1974, NAWL has significantly advanced the cause of gender equality in relevant areas of the law, including constitutional, family, criminal justice, equality, human rights, health, the profession, income security and employment. These gains, made through its research and advocacy work, have been based on extensive consultation with the wide and diverse community of Canadian women.

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EXECUTIVE SUMMARY

In the past decade, there has been a proliferation of family mediation programs, both public and private, throughout Canada. Today, virtually every province funds and operates some form of family mediation program. These programs are often directly connected to the courts, or are community-based with links to the courts and other social services. Family mediation is fast becoming an adjunct, or even an alternative, to court-based family justice services. It is widely promoted as a constructive, consensual and low-cost alternative to litigation.

This report offers a critical examination of this trend from a women's equality perspective. It focuses on the concerns of women and the extent to which they have been addressed by publicly funded family mediation programs in Canada. The examination assumes, as its starting point, that family mediation services must be provided in a way that enhances, not detracts from, women's equality rights.

Research for this report included a literature review to identify the concerns with family mediation raised by women's advocates and feminist academics. It also included interviews with key informants from four publicly funded family mediation services. Both the literature review and the interviews reveal that there are critical issues that need to be addressed in order to ensure that mediation does not replicate the inadequacies of the court-based justice system or, even worse, become a service that is inferior to other dispute resolution mechanisms. This report attempts to highlight these critical issues and suggest some workable solutions. The research, analysis and writing of the report were completed between December 15, 1996 and March 31, 1997.

Mediation programs are designed to assist two parties to a dispute involving family law issues to reach their own agreement. Mediators play the role of a neutral third party, and facilitate the negotiations between the parties. Although largely used to resolve custody and access issues, mediation programs are increasingly being used to assist couples to reach a settlement on all family-related issues, including division of property, and spousal and child support issues.

While mediation is only one of several available options for resolving family disputes, policy-makers appear to be turning to mediation, more than any other dispute resolution mechanism, in an attempt to solve the ever-increasing court backlogs and burgeoning costs associated with resolving family disputes.

A key criticism of mediation is that programs are introduced without sufficient evaluation, study or analysis of their effectiveness, especially as they affect the rights of women. Concerns have also been raised about parent education programs, especially the trend to make these programs mandatory for parties in a family law dispute. While consumer education on the available alternatives to resolving family matters is important, there are concerns that these programs place subtle and not-so-subtle pressure on individuals to choose mediation over other forms of dispute resolution.

Women's advocates have expressed specific concerns about the dangers of mediation for women. A particular concern is whether it is appropriate for women who are exiting violent or abusive relationships, or for women who have been controlled and dominated by their partners. These critics observe that mediation is designed for parties who enter into negotiations voluntarily and who share equal bargaining power. Women leaving relationships where there is an imbalance of power because of violence, abuse, or because they or their partners are experiencing problems related to alcoholism, drug abuse or their mental health, may not enter into mediation voluntarily nor with equal bargaining power.

Mediation has grown in popularity partly as a response to the many problems associated with the traditional family justice system. These problems are identified as:

- the adversarial nature of court proceedings, which leaves families feeling bitter and resentful;
- a lack of control by the parties over the legal proceedings and the outcomes;
- the high cost of legal services;
- dramatic cutbacks to legal aid, which mean legal representation for many is not available;
- failure of the law to take account of women's substantive inequality, which is reflected in problems such as violence and abuse, the undervaluation of women's paid and unpaid labour, and the systemic barriers to women's full participation in the market economy; and
- the particular problems experienced by women disadvantaged by race, disability, sexual orientation, poverty and other factors.

There is a real concern that rather than attempting to address these problems within the formal family justice system, policy-makers are focusing on mediation as an expedient and "quick-fix" solution.

The proponents of family mediation point to a number of factors that make mediation an attractive alternative dispute resolution method. These factors include that mediation:

- is non-adversarial and emphasizes joint problem-solving by the parties;
- results in agreements with higher compliance rates;
- is less costly and less time-consuming; and
- has higher rates of satisfaction among its users.

Many of these claims are not realized when examined and evaluated more closely. Critics argue that instead, many of the same problems inherent in the court system are simply being reproduced in a private, less visible forum — the mediation room.

Several common themes are evident in the information drawn from the literature review, from the interviews with policy-makers and service providers from the four publicly funded family mediation programs in Canada, and from the Advisory Committee to this research project. The common themes include:

- Policy-makers and service providers have not properly assessed the impact of family mediation programs on women's equality. Instead, mediation has been characterized as an attractive cost-saving policy option.
- Many subtle and not-so-subtle pressures that encourage and even compel parties to opt for family mediation over other mechanisms of dispute resolution are eroding the voluntariness of mediation. The recent introduction of mandatory family mediation legislation in Quebec is a cogent example of this erosion.
- Not enough is being done to ensure that publicly funded mediation programs include women who have suffered historical social, legal and political disadvantage. It appears that many women from these groups do not use mediation services due to access barriers within the family justice system.
- Mediators do not have the authority to ensure that parties make full disclosure of financial information.
- The failure of many publicly funded mediation programs to provide on-site legal assistance or ensure access to legal aid may result in parties making agreements without the benefit of legal assistance or advice. There is also concern that dramatic cutbacks in funding to legal aid across the country will only serve to exacerbate this situation.
- The lack of structures and processes to ensure mediator accountability, including certification standards, academic qualifications and training may result in inconsistent standards of practice and quality of service.
- Serious concerns still exist about the inability of mediation services to screen out, with a high degree of accuracy, those women who have experienced violence or abuse and for whom mediation could provoke a dangerous situation. Tools have been introduced to screen out inappropriate cases and, where cases have been accepted for mediation, to balance power where there is unequal power between the parties. However, the effectiveness of these tools is not yet fully understood and therefore must be evaluated.

Critics of family mediation worry that efficiency will be allowed to overshadow effectiveness. These critics believe that although women still encounter barriers within the family justice system, they have fought for and won legal recognition of many of their rights. Family mediation must therefore be approached cautiously and with a view to ensuring that women's equality rights are broadened and not diminished. While a number of important steps have been taken by policy-makers and service providers to address these concerns, more work needs to be done.

To this end, this report develops some key principles for an analytical framework and offers a number of specific recommendations. In particular, it recommends that further research, analysis, evaluation and policy development be undertaken in the following areas:

- (i) the impact of family mediation on women's equality interests, in particular on women exiting from violent or abusive relationships;
- (ii) the impact of funding cutbacks and deficit reduction strategies on family mediation programs, and their resultant ability to protect the rights of women; and
- (iii) the impact of cutbacks to legal aid on the rights of women using mediation services.

If governments are determined to go forward with these programs, they must reformulate and restructure family mediation services to be more responsive to women clients. Policy-makers need to allocate sufficient resources and attention to ensure that all facets of the family justice system, including mediation, will no longer detract from women's equality interests, but rather, enhance them by offering a service that truly respects them.

PART I — INTRODUCTION AND OVERVIEW

A. Introductory Comments

The proliferation of public and private family mediation services across North America over the last decade has served to place family mediation squarely on the public agenda. Family mediation has steadily gained in popularity among policy-makers, legislators, service providers, court administrators and family law consumers. One sign of this popularity is that an increasing number of jurisdictions have implemented (or are implementing) family mediation programs, which are publicly funded and often court-connected or community-based. A number of interrelated factors are responsible for the proliferation of mediation services, both public and private.

First, the appeal of mediation is seductive. The definition of the term “mediation” itself reveals much of what makes this concept attractive to policy-makers, service providers and potential family law consumers. Mediation is generally defined as an informal, voluntary process designed to help disputing parties with roughly equal bargaining power reach their own solution through agreement. The mediation process involves the participation of a neutral third party, the mediator, who has no decision-making power in the process. Measured against the adversarial legal processes which make up the formal court-based justice system, mediation is often perceived as more humane, consensual and constructive. Second, the *Report of the Canadian Bar Association Task Force on Systems of Civil Justice*¹ identified cost and delay as the two main barriers to accessing the civil justice system — an observation which applies equally to the formal family justice system. Family mediation, on the other hand, purports to maintain control of the process in the hands of the disputants and to eliminate costly legal fees. Third, a growing awareness of the numerous problems that plague the court-based family justice system serves as a strong disincentive to placing such heavy reliance on that system. In particular, problems of gender bias in the legal system have been widely publicized in recent years, fuelling the search for alternative ways of resolving family and other disputes.

This research report examines publicly funded family mediation services in Canada from a critical legal feminist perspective — a perspective that considers family mediation against the standard of women’s substantive equality. In its simplest form, the primary question in this analysis is whether family mediation promotes women’s equality, or in fact undermines it.

As already alluded to, a feature of contemporary Canadian public policy is the promotion of family mediation services as adjuncts, and even alternatives, to the court-based family justice

¹ Canadian Bar Association, *Report of the Canadian Bar Association Task Force on Systems of Civil Justice*, (August 1996) (hereinafter referred to as *Task Force Report*).

system. This trend has enormous implications for women's equality. This report contends that, so far, these implications are for the most part negative. The reasons for this conclusion are introduced briefly here, and discussed in detail in the balance of the report.

First, it must be remembered that mediation services operate within a social and economic context marked by women's substantive inequality. The term "substantive inequality" refers to the persistence of unequal living conditions, opportunities, and cultural status for women, even in areas of life where they have achieved formal legal equality.² Substantive inequality is reflected in problems such as the persistence of domestic and other forms of violence against women, the undervaluation of women's paid and unpaid labour, the systemic barriers to women's full participation in the market economy, and high rates of female and child poverty. The persistence of stereotypical assumptions and prejudices about women — especially women with physical and mental disabilities, lesbians, and racial and ethnic minority women — also works to inhibit the achievement of substantive equality. Policies and programs that are not designed carefully to address these issues are unlikely to serve women well. Instead, they are likely to reinforce and exacerbate substantive gender inequality.

Second, these aspects of gender inequality are directly relevant to women's experience of family breakdown. Past research has shown that for many of the reasons noted above, the costs of family breakdown are borne more heavily by women than men, and that the justice system has often exacerbated the gendered impact of divorce. Yet there is cause for concern that mediation services, as presently provided, simply reproduce the same problems in a more private, less visible forum.

There are serious gaps and contradictions between the theory of mediation and how it is actually delivered. In an environment of fiscal restraint, the temptation for governments to view mediation as a cost-saving measure severely undercuts any potential that it may have to improve the family justice system. If mediation is not truly voluntary, the parties have unequal power, legal advice is not accessible, or policy-makers and service providers employ assumptions that are gender-biased or insensitive to women's substantive inequality, the process will fail to address and may even exacerbate the problems women face in the family justice system. While some mediation proponents and service providers are aware of the potential disadvantages for women clients, resources and political will are required to address these shortcomings.

Consideration of this context is imperative to any examination of family mediation services from the perspective of women's equality. It is clear that any assessment of publicly funded family mediation services has to be undertaken within an analytical framework which takes into account women's substantive inequality as a primary principle of evaluation.

² See Status of Women Canada, *Setting the Stage for the Next Century: The Federal Plan for Gender Equality* (Ottawa: Status of Women Canada, 1995), at pp.10, 11.

This report has two main components: (1) a review of feminist literature to determine which aspects of family mediation have been identified as potentially problematic from a women's equality perspective, and (2) analysis of data from four publicly funded and often court-connected (or community-based) family mediation services.

B. Objectives of the Research Report

The main objective of this research report is to critically analyze the assumption that family mediation is a panacea or "quick-fix solution" for all the problems experienced by litigants with the court-based or formal family justice system. To this end, the review of feminist literature underlines the problems with and concerns about family mediation from a women's equality perspective. The purpose of analyzing the data from four publicly funded mediation services is to present information relevant to women's equality concerns for consideration and review by policy-makers, legislators, administrators and providers of mediation services, and women's advocates.

This data analysis is not designed to be evaluative. Its purpose instead is to illuminate the extent to which policy-makers and service providers are aware of the issues and, to identify what steps, if any, have been taken to address them. The extent of the gap between the feminist critique of family mediation and the day-to-day delivery of family mediation services is instructive in and of itself; it serves to highlight the need for additional, more comprehensive research and analysis of some of these issues.

The specific objectives of this research report are four-fold:

- (i) to provide an overview of both the range of alternative dispute resolution processes which are available and the extent to which such processes, particularly family mediation, have been incorporated into federal and provincial legislation and policy;
- (ii) to contribute to the development of a critical feminist analysis of family mediation by identifying the present and emerging concerns of women with respect to family mediation as an equality rights issue;
- (iii) to establish a base of current information about the relationship of women's equality concerns to the design and delivery of a number of publicly funded family mediation services across the country; and
- (iv) to make some preliminary recommendations to address the problems with family mediation services identified throughout the report. These recommendations will assist policy-makers, administrators, service providers and women's advocates in their various capacities to address some of the feminist criticisms of family mediation.

C. Scope of the Report

The report focuses on publicly funded and often court-connected family mediation services rather than private family mediation services or other forms of alternative dispute resolution (ADR) for a number of reasons:³

- (i) Family mediation is the form of ADR that has been most often the focus of critical commentary from feminist academic writers and women's advocates alike.
- (ii) Family mediation services are gaining in popularity; virtually every province offers some form of publicly funded family mediation (sometimes called conciliation) service. The data presented in Part VI, and the review of provincial and federal legislation related to family law in Part IV, both support this observation.
- (iii) A number of provinces have either recently completed a pilot project and are in the process of implementing mediation services as a permanent adjunct of the court system, or are considering the expansion of present mediation services and/or introducing pilot projects.
- (iv) Focusing on publicly funded services increases the potential to directly influence policy-makers, legislators, and administrators. The goal is to elevate consideration of women's equality issues to a status that ensures their consideration in the design and delivery of family mediation services.
- (v) Governments are bound by the *Canadian Charter of Rights and Freedoms* to respect women's equality rights. If family mediation practices are shown to disadvantage women, there may be a constitutional argument that all aspects of publicly funded mediation services must conform to the dictates of the *Charter* — particularly section 15, the equality rights section. That argument, whether made in court or through political action, can be applied directly to public, but not private, family mediation services.

Despite the growing number of publicly funded family mediation services, the fact remains that private family mediation is the fastest-growing segment of the mediation “boom” and is further removed from state regulation and public scrutiny. Consequently, women clients of private family mediation services may be at an even further disadvantage vis-a-vis their ex-partners than

³ Thomas A. Cromwell, “Dispute Resolution in the Twenty-First Century,” A Research Paper Prepared for the CBA Systems of Civil Justice Task Force (January 1996) at p. 96. Cromwell provides a complete response to the question of why it is not possible to simply examine ADR as a whole. He writes: “A.D.R. is not a single process or approach, but a range of them comprising processes and approaches which have little in common with each other except that they are grouped under the same ‘umbrella’ term. Therefore, generalizations about A.D.R. are often not very useful because of the difficulty of generalizing about such a broad and diverse continuum of approaches and process. The question ‘Is A.D.R. a good thing?’ is much too general. To assess the pros and cons of A.D.R. in a particular setting, it is necessary to be more specific about the type or types of A.D.R. being considered and the specific context into which the particular technique is to be introduced.”

those using public services. While beyond the scope of this research report, it will be important for policy-makers and legislators to consider the extent to which this report's analytical framework and recommendations also apply to private family mediation services. Until then, policy-makers and legislators have the immediate task of ensuring that publicly funded services are designed and delivered with women's equality as the primary barometer of their success or failure.

D. Structure of the Report

Part I has set out introductory comments, objectives, the scope and structure of the report.

Part II outlines the research methodology used to develop this report.

Part III provides an introduction to the concepts of alternative dispute resolution (ADR) and family mediation. It sketches an overview of the general relationship of ADR, and the specific relationship of family mediation to the family justice system.

Part IV describes the extent to which mediation services are legislatively acknowledged as an important ADR mechanism within the formal family justice system. This section assists in illustrating the relationship of publicly funded mediation services to the family court systems of the various provinces.

Part V tackles the task of demystifying the appeal of family mediation. It first acknowledges the problems documented in the formal family justice system, and then outlines some of the claims made on behalf of mediation by its proponents. The remainder of Part V reviews the main concerns and criticisms lodged against family mediation by feminist academics and women's advocates.

Part VI sets out a thematic description of four publicly funded family mediation programs located in British Columbia, Saskatchewan, Manitoba and Ontario. The themes used to organize the data coincide roughly with the concerns and criticisms highlighted in Part V.

Part VII summarizes the main observations and findings of the research report, laying the foundation for further research and policy analysis. A set of preliminary policy recommendations constitutes the final item in the report.

There are references throughout the report to the six attached **Appendices**.

PART II — METHODOLOGY

A. Introduction

The research methodology used to develop this report has three components: (1) a literature review; (2) an analysis of four publicly funded, court-connected (or community-based) mediation programs, including a program documentation review (see Appendix A for a more detailed description of the four mediation programs); and (3) a consultation with an Advisory Committee organized by NAWL. The Advisory Committee was comprised of practising family lawyers, community activists, women's support service staff, policy analysts and academics with expertise in family law, mediation and women's access to justice (see Appendix B for more details). The research, analysis, consultation and drafting of the report was completed between December 15, 1996 and March 31, 1997.

B. The Literature Review

The literature review focused on Canadian and U.S. materials, although related literature from Britain, Australia and New Zealand was also identified and reviewed (see Appendix C for more details). A number of CD-ROM databases were used, including: the Silvernet collection of databases, Legaltrac, Infotrac, WilsonDisc, Social Work Abstracts, and Women's Resources International. The Advisory Committee also played a role in identifying relevant material for this report.

C. Analysis of Data from the Four Publicly Funded Family Mediation Programs and Review of Program Documentation

Four publicly funded and court-connected (or community-based) family mediation services were selected as the research sites for the report. They are:

- (i) British Columbia — Burnaby/New Westminster Family Justice Centre
- (ii) Ontario — Ontario Court (General Division) Family Court — Mediation Services in Hamilton (formerly known as the Unified Family Court — Hamilton)
- (iii) Manitoba — Manitoba Family Conciliation Services
- (iv) Saskatchewan — Saskatchewan Mediation Services

These sites represent a *sample* of publicly funded family mediation services; they do not necessarily reflect all of the various ways in which family mediation is being delivered across Canada. The selection of sites was based on several factors: (1) whether the program

incorporated innovative or unique features;⁴ (2) whether screening protocols for abuse existed and had been implemented; (3) how the program came into existence; and (4) the geographic proximity of the program to researchers (particularly British Columbia and Manitoba).

This research was completed primarily through interviews, conducted by telephone or in person, with service providers and policy analysts from the four different sites/provinces.⁵ These key informants were selected on the basis of their availability, accessibility and expertise in dealing with mediation programs on a front-line basis or at the design level (see Appendix D). Supplemental information was gathered from informants from other jurisdictions, most notably Alberta, Quebec, New Brunswick and Nova Scotia.

Program documentation was also collected and reviewed, particularly in relation to the four selected sites. All of the key informants were asked to provide related program documentation that would assist in tracing the history of the program, its mandate, and any developments of note that may have occurred during its existence.

In order to standardize the interviews as much as possible, an Interview Guide was developed, based on concerns identified by women's advocates and feminist academics (Appendix E). An introductory letter and a copy of the Interview Guide were forwarded to each key informant prior to the interview. For each program site, at least one government policy analyst and one service provider was interviewed. In Manitoba and Saskatchewan, family mediation services are provided directly as a government-run service; thus, the key informant on both policy and service was the director of each of these programs. In both cases, however, other government officials and family law practitioners were contacted to obtain additional information regarding the effectiveness of the service and its future role in the resolution of family disputes. (These other government officials and family law practitioners are listed as "Additional Informants" in Appendix D.) The interviews ranged in length from one to three hours; the average interview took 1 1/2 hours. Supplementary information was gathered in follow-up phone calls.

Interviews with Quebec government officials were confined to the issue of the recent introduction of legislation that makes mediation mandatory. These limited interviews were conducted in an effort to learn as much as possible about this particular initiative, which is the first of its kind in Canada.

A number of representatives of women's groups were also interviewed. At least one women's group was contacted in each of the four provinces (British Columbia, Ontario, Saskatchewan and

⁴ An example of this would be the delivery of comprehensive mediation services: services which also include the mediation of financial and property matters were identified on this basis (Saskatchewan and Ontario), as was the community-based family justice centre model offered in British Columbia. Some mediation services, begun as pilot projects, were evaluated and then instituted as permanent programs (Ontario and British Columbia).

⁵ See Appendix D for contact information of those interviewed for each of the four family mediation program sites.

Manitoba) in which research was conducted. Quebec women's groups were also contacted for reaction to the new initiative in Quebec. Several general areas of concern that emerged from these discussions have been summarized in the report.

D. The Contribution of NAWL and the Advisory Committee

NAWL contributed to the research by assembling and coordinating ongoing feedback from an Advisory Committee to the researchers. The bibliography of mediation literature, the Interview Guide, the list of interview contacts and the final report were developed with input from NAWL and the Advisory Committee.

A one-day consultation was also held with the NAWL Advisory Committee. The consultation provided the researchers with:

- (i) guidance regarding how to interpret the research results;
- (ii) assistance in developing the equality analysis and framing the recommendations; and
- (iii) information on the delivery of family mediation services, based on both first-hand experience working with women mediation clients and in-depth academic research and analysis of the issues.

E. Limitations

The development of family mediation services in Canada and their impact on women's equality requires in-depth and comprehensive study. This report lays some of the groundwork for such a study by highlighting concerns with and criticisms of family mediation. It also ascertains how these concerns and criticisms are being addressed in specific publicly funded family mediation programs across Canada.

For these reasons, the following should be kept in mind: (1) the Interview Guide was designed to gather descriptive, not evaluative data; (2) interviews with direct clients of mediation services were beyond the scope of this project; (3) the sample of mediation services was limited to four programs; and (4) the Interview Guide was designed to obtain a good overall description of available services, while focusing specifically on particular issues. Its purpose was not to elicit detailed information with respect to each question.

Given the narrow focus of the methodology, the report represents a good starting point for further research on the effect of family mediation on women clients.

PART III — THE RANGE OF DISPUTE RESOLUTION METHODS IN FAMILY MATTERS: AN OVERVIEW

In this section, the main dispute resolution methods are concisely described in a manner that underlines both their variety and range. It includes a short discussion introducing some of the recurrent themes of the report, as well as some practical observations with respect to the interrelationship of the various dispute resolution processes.

A. What is Meant by ADR?

Although the focus of this report is on mediation, there are references to “ADR” throughout. Consequently, it is important to clarify what this confusing acronym means. It is often used to refer to any dispute resolution process other than a trial.⁶ ADR is, of course, an umbrella term that generally refers to “collaborative dispute resolution processes as distinct from adversarial processes involving litigation and adjudication.”⁷ The Canadian Bar Association’s Task Force on Systems of Civil Justice uses the term “ADR” to refer to:

a range of processes for resolving disputes. ‘Alternative’ refers to ways of resolving disputes other than a trial or hearing followed by (subject to an appeal) a binding decision imposed on the parties by a judge.⁸

The *Task Force Report* endorses the term “non-binding dispute resolution processes” to refer to all methods in which a third party helps the parties involved in a dispute achieve resolution.⁹

Court-annexed or court-connected ADR is generally described as:

...when one or more processes such as mediation, early neutral evaluation, mini-trials and arbitration are incorporated directly into the court process. In those cases where alternative processes may be more suitable to the resolution of a dispute, court-annexed ADR would permit the parties to pursue these processes voluntarily or, in the absence of the parties’

⁶ Christine E. Hart, “Role of ADR in the Civil Litigation Process — Emerging Issues” *Research Paper — Background Studies to the Systems of Civil Justice Task Force Report* (Canadian Bar Association; 1996), at p. 1.

⁷ Carolyn Stobo, *An Alternative Dispute Resolution Primer and Survey of Current Government Initiatives in Ontario*, Ontario Current Issue Paper, 165, Ontario Legislative Library, (September 1995), at p. 2.

⁸ *Task Force Report*, *supra* note 1 at p. 26.

⁹ *Ibid.*

agreement, they could be required to pursue them by a court order prior to taking any further steps in an action or proceeding.¹⁰

B. Defining the Concepts

A range of binding and non-binding dispute resolution methods are available to assist in the resolution of family disputes. Dispute resolution (DR) methods are often categorized as either adversarial or non-adversarial. This sometimes introduces a debate about the advantages and disadvantages of ADR compared to litigation or adjudication. The construction of the debate around this particular comparison is, at the very least, misleading. Lawyer-assisted negotiated agreements are the real comparator for mediated agreements, not litigated outcomes imposed by judges. This is true because the number of family law cases that actually go to trial is minuscule compared to the number that are settled “out of court” by the parties, with the assistance of lawyers. This point is an important one, because this particular comparison between mediation and litigation is used all of the time by proponents of mediation to buttress their case.

Moreover, the strict conceptualization of ADR as something completely separate from the formal family justice system is not accurate — at least in the public realm.¹¹ Although an extensive network of ADR services occupies the private realm, ADR methods are increasingly incorporated into the traditional, court-based adjudication system as complementary or supplementary processes. In any case, it is instructive to outline the range of available dispute resolution methods, as well as other tools that are enlisted to assist with dispute resolution, in order to situate mediation within that continuum.

RANGE OF DISPUTE RESOLUTION METHODS
<p>1. Litigation or Court Adjudication Litigation is what most people refer to as “going to court.” That is, it is the adversarial process or trial which takes place before a judge, with lawyers often representing the opposing sides or parties. Formal rules govern the entire procedure, including all aspects of the presentation of evidence by both parties. The judge bases his or her decision on this evidence and the relevant legal precedents. The judge’s decision is binding, subject only to the possibility of an appeal. Generally, the court process is recorded and open to the public.</p>

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¹⁰ Stobo, *supra* note 7 at p. 4.

¹¹ Some authors prefer to retain this “split,” assigning the various methods to one or the other categories, and taking care to identify those methods (e.g., negotiation) which can fall under either category. See Cromwell, *supra* note 3, at p. 96.

2. **Custody/Access Assessments**

Custody and access assessments are not dispute resolution mechanisms *per se*, but rather represent a modification to the judicial process that allows judges to enlist the assistance of a non-legal perspective on a more informal basis. Custody and access assessments refer to reports, prepared outside the courtroom, for the purpose of assisting the judge to determine custody and access issues. Generally, a social worker or family counsellor is retained on a case-by-case basis to make recommendations as to the type of parenting arrangement he or she determines are in the best interests of the child(ren). These reports, based on separate interviews with each of the parents, are generally given significant weight by the judge in making his or her decision.

<p>3. Negotiation Through Lawyers Lawyer-assisted negotiation refers to discussions between the parties' lawyers. The goal is to reach an agreement through the bargaining process. The agreement usually takes the form of a compromise, as parties instruct their lawyers on the trade-offs they are willing to make. Lawyer-assisted negotiation is the appropriate method of dispute resolution with which to compare mediation.</p>
<p>4. Self-help Mechanisms/ "Kitchen-table Negotiations" Self-help vehicles include a range of readily available brochures, courses, videos and "do-it-yourself" manuals designed to assist individuals in negotiating and drafting their own agreements, without the services of an outside party.¹² The term "kitchen-table negotiations" refers to those negotiations conducted by the parties themselves, without the intervention or assistance of a third party. Often, the parties will reach a settlement or agreement on all of the outstanding issues related to their relationship. These agreements may or may not be formalized. This form of dispute resolution attracts little attention, because it is practised solely within the private realm, apart from any public scrutiny.</p>
<p>5. Counselling/Therapy Counselling or therapy is an introspective process designed to assist clients in dealing with their personal and interpersonal emotional conflicts. Various theoretical orientations, particularly family systems theory, inform the practices of individual therapists/counsellors, who may practise one or more of a number of different types of counselling. These could include: individual, marital, reconciliation or separation counselling.¹³</p>
<p>6. Conciliation The terms conciliation and mediation are often used interchangeably, because the features which differentiated the two processes from each other have become blurred. Generally, conciliation refers to a process in which a neutral third party,</p>

¹² For an example of a "do-it-yourself" step-by-step guide for obtaining your own divorce, see Wayne Powell (B.A., LL.B.), *Divorce Guide for British Columbia* (British Columbia: International Self-Counsel Press Ltd., 1994) and the accompanying *Divorce Forms for British Columbia*, to be used in conjunction with the Guide.

¹³ Barbara Landau, Mario Bartoletti and Ruth Mesbur, *Family Mediation Handbook*, 2nd ed. (Toronto: Butterworths, 1997) at pp. 6-11. Family systems theory forms the basis for the preference for shared parenting. Landau *et al.* note at p. 10 that integrative work is being done to blend family therapy objectives with mediation. The awareness that there is really no such thing as a "single-parent family," in the sense that both parents from broken marriages continue to function in important ways in the lives of their children, has resulted in continued innovative approaches.

the conciliator, acts as an information conduit between two opposing parties. The conciliator attempts to: (1) establish more direct lines of communication; (2) help the parties identify any common ground they may have; and (3) smooth over outstanding issues in order that the parties can come to some agreement for the purpose of resolving family conflict. During conciliation, various other dispute resolution processes, for example, counselling, negotiation and mediation, may be resorted to on an “as-needed” basis.

7. **Arbitration**

Arbitration is usually a private process that is similar to litigation or court adjudication, except that: (1) the parties name a neutral third party, the arbitrator, or at least establish the process by which the arbitrator is chosen; and (2) the arbitrator is bound neither by the rules of court nor the law of evidence. The parties give the arbitrator the authority to make binding decisions on particular issues in dispute.

8. **Mediation**

Mediation is generally defined as an informal, voluntary process designed to help disputing parties, with roughly equal bargaining power, reach their own solution through agreement. The process involves the participation of a neutral third party, the mediator, who has no decision-making power. The mediator “encourages the parties to cooperate with each other and facilitates the negotiation by them of their own solutions.”¹⁴ The mediator also assists the parties to: (1) structure the negotiation; (2) maintain the channels of communication; (3) articulate their needs; (4) identify their issues; and, if requested, (5) make recommendations on disputed issues. Mediation can take place with or without the assistance of lawyers. When legal counsel are involved, open communication between the parties, as well as between their counsel, is encouraged.¹⁵

C. Discussion Points and Summary Observations

There are a number of points to highlight for further discussion. First, litigation or “going to court” is clearly not the only method of dispute resolution practised within the traditional court-based family justice system. It is simply the method that garners the most attention. In fact, lawyer-assisted negotiation is responsible for the vast majority of dispute resolution within this system. Further, even where negotiation does not produce a settlement, the resolution of the dispute does not necessarily depend on the commencement of a full-blown trial. Rather, increasingly, judges use their discretion to refer these disputes out of the courtroom; for example, by ordering custody and access assessments to help resolve the particular issue in dispute.

Second, lawyer-assisted negotiation is the appropriate comparator for mediated agreements. While lawyer-assisted agreements represent a form of private ordering, there are factors inherent in these types of agreements that mitigate against some of the more serious criticisms of private ordering in family law. For example, these agreements or settlements are bargained for in the “shadow of the law.” The context for any bargaining process where lawyers are involved includes: (1) a definable set of assumptions about what the outcome would be if the parties were

¹⁴ Alberta Law Reform Institute, *Dispute Resolution: A Directory of Methods, Projects and Resources*, Research Paper #19 (July 1990), at p. 9.

¹⁵ Hart, *supra* note 6, at p. 1.

to go to court; and (2) a two-way bargaining process during which the parties communicate and bargain through their lawyers.¹⁶ In short, there are extra-legal parameters within which most lawyer-negotiated settlements are structured.

What this means in practice is that both parties: (1) are likely to know their rights and responsibilities from the outset of the negotiation; and (2) do not have to do the actual bargaining themselves. Instead, the parties rely on lawyers who act on their instructions and are professionally bound to get the best possible deal for their client.

Third, the lines demarcating the various dispute resolution processes are not always clear-cut, particularly when the focus moves from a description of the concept to its implementation. For example, it is very difficult to maintain the distinction between mediation and conciliation — especially at the practical level.

Fourth, outside of and sometimes parallel to the publicly funded family justice system, there exists a wide range of non-binding dispute resolution services that are available on a private basis. The implications of integrating non-binding or non-adversarial processes within an adversarial system have yet to be comprehensively studied. Virtually every definition or description of mediation refers to the **voluntariness** of the parties' participation as essential to the integrity of the process. This is one aspect of integration that definitely requires more study and analysis.

Despite this essential requirement, there are jurisdictions (for example in the United States) that have legislated mandatory mediation for family law matters. In Canada, Quebec is considering doing the same. While mandatory family mediation has not yet been introduced in any Canadian jurisdiction, there remain serious concerns about the degree of involuntariness which may inhere with respect to publicly funded, ostensibly **voluntary** mediation services. At a minimum, it will be important to ascertain the extent to which voluntariness and other characteristics unique to mediation can or cannot be accommodated within an adversarial system.

The extent to which publicly funded family mediation services are designed and delivered based on a voluntary or an involuntary model is a key theme throughout this report. The conditions that are required to make mediation services truly voluntary are discussed at a later point. A related theme explores the relationship of mediation services to women's equality aspirations when delivery is based on one or the other of these models.

It is predictable that both staff and prospective clients of publicly funded mediation services experience a great deal of pressure because of the public policy decision to promote mediation as a form of alternative dispute resolution. This observation calls into question the degree to which these services are delivered on a truly voluntary basis. On a practical level, the pressure on

¹⁶ Anne Bottomley, "What is Happening to Family Law? A Feminist Critique of Conciliation" in Julia Brophy and Carol Smart, eds., *Women in Law: Explorations in Law, Family & Sexuality* (London: Routledge and Kegan Paul, 1985), at p. 179.

family court counsellors to divert contested family cases into mediation, and on mediators to produce agreements, reflect the ways in which nonvoluntary characteristics can be imported into mediation.

Similarly, a judge's or other court official's strong recommendation that the parties attempt to mediate their dispute is likely to hold considerable weight, especially with litigants who have little or no experience with the formal justice system.¹⁷ When these same litigants then decide to try mediation, the degree of voluntariness in that decision may be questionable. These concerns about the real voluntariness of mediation are revisited in Part V of the report.

¹⁷ One of the main concerns with mediation services reported by representatives from women's groups involved the observation that women are being pressured to participate in mediation. (From an interview with Greta Smith, Coordinator of the B.C. Yukon Society of Transition Houses in February 1997.)

PART IV — MEDIATION PRACTICES AS REFLECTED IN LEGISLATION

The extent to which mediation services are acknowledged as an important ADR mechanism within the formal family justice system is in part reflected in legislation. The first part of this section outlines the constitutional framework that structures the operations of the family justice system(s) administered by the provinces. The second part highlights some of the provisions in provincial and federal statutes that expressly refer to mediation. This sketch helps to illustrate the relationship of publicly funded mediation services to the family court system.

A. Constitutional Framework¹⁸

The *Constitution Act, 1867* makes no provision for the allocation of legislative power over family law to either the federal or provincial parliaments. This is probably because, in 1867, family law was not considered a distinct or discrete body of law. Consequently, the distribution of powers over family law is divided between the federal and provincial jurisdictions. While it might be expected that provincial legislatures would retain jurisdiction over the bulk of family law matters (as an item amenable to local control), the *Constitution* allocates the power to make laws in relation to “marriage and divorce” to the federal Parliament.¹⁹

On the other hand, the provinces have the power to make laws in relation to “the solemnization of marriage in the province.”²⁰ However, most provincial power is derived from its authority over “property and civil rights in the province.”²¹ This confers broad powers over property, contract and other private law relations, including, for example, matrimonial property, child and spousal support, adoption, custody and guardianship.

The practical implications of this division of powers are apparent upon review of the breadth of the federally enacted *Divorce Act*²² of 1968. Here, the federal Parliament expanded the ambit of the *Act*, and the scope of federal jurisdiction, to include corollary relief provisions relating to the custody and maintenance of children — a sphere of jurisdiction which until 1968 was subject to exclusive regulation by the provinces.

¹⁸ Berend Hovius, *Family Law Cases, Notes and Materials* (Toronto: Carswells, 1982), at pp. 11-15.

¹⁹ s. 91(26) Moreover, the federal power over criminal law intersects with family law to some extent through laws regarding young offenders, sexual assault and the neglect of children.

²⁰ s. 92 (12).

²¹ s. 92(13).

²² R.S.C. 1985, c. 3 (2nd Supp.), s. 8.

These additions to the federal *Divorce Act* created a situation whereby corollary relief with respect to custody and maintenance was the subject of overlapping federal and provincial jurisdictions. Consequently, for individuals attempting to obtain legal orders with respect to their separation(s) or divorce(s), there are potentially two different legislative regimes and two different courts which are relevant. The potential for confusion and delay is manifest. Indeed, different courts constituted under different legislation with respect to family law matters have adjudicated upon the same issues in the same case, and come to different results.

B. Federal Legislation

At the federal level, the *Divorce Act* enacts a no-fault divorce scheme in which the sole criterion for divorce is marriage breakdown. The only restriction on that criterion is that, to obtain a divorce, the parties have to be separated for a period of one year.

Section 9(2) of the *Divorce Act* requires that every lawyer “discuss with the spouse the advisability of negotiating the matters that may be the subject of a support order or a custody order and to inform the spouse of the mediation facilities known to him or her that might be able to assist the spouses in negotiating those matters.” Whether because of the relative scarcity of mediation services or the legal profession’s ambivalence toward mediated family law disputes, this provision, enacted in the 1980s, has not been used extensively.

C. Provincial Legislation

Each province has legislation governing separation and relationship breakdown as well as legislation covering various aspects of the administration of justice. Included in the latter are those statutes that authorize the establishment of the courts, and set out their jurisdiction and the rules by which they are governed. Mediation-related provisions are interspersed throughout these enactments. Some of those provisions are highlighted in the following pages.

1. British Columbia

Subsection 3(1) of the *Family Relations Act (F.R.A.)*²³ permits the court to appoint a family court counsellor. Section 3(2) of the *F.R.A.* sets out the two-fold role of the family court counsellor:

- (i) to offer the parties any advice or guidance that in his or her opinion will assist in resolving the dispute, and
- (ii) to offer the parties referrals to public or private family counselling services or agencies qualified to assist in resolving the dispute.

²³ R.S.B.C. 1979, c. 121.

The *F.R.A.* also provides for the confidentiality of the mediation process. Section 3(3) of the *Act* proscribes the disclosure of any evidence, information or communications made by either party in mediation, unless both parties agree otherwise. This same section prohibits any person from examining the mediator for the purpose of compelling him or her to disclose that evidence, information or communication. Section 3(4) goes on to prohibit, with a couple of exceptions, any person from disclosing information received by a family court counsellor in mediation without consent of the person who first provided the information.

2. Saskatchewan

Since 1994, the *Queen's Bench Act* has required parties to a family law action in Regina and Saskatoon to attend a mediation screening and orientation session upon commencing an action and before any further steps are taken.²⁴ After the mediation orientation and screening session, the parties may continue with mediation, or choose to proceed to court.²⁵

The mediator is obligated to file a certificate of completion or of non-attendance²⁶ with the court.²⁷ Where a certificate of non-attendance is filed, the court can, on application, make a variety of orders, including: (1) ordering the parties to attend the screening session; (2) ordering that further mediation occur on any terms the court considers appropriate; or (3) ordering that the pleadings be struck out.²⁸ The parties can apply for an order for interim relief.²⁹

Section 11 of the Saskatchewan *Children's Law Act*³⁰ provides that lawyers have a duty to inform clients about the advisability of negotiating matters, and about mediation services of which they are aware. The Saskatchewan statutes, like those in British Columbia, contain provisions to ensure that the information disclosed during mediation sessions remains confidential, except with the written consent of all parties and the mediator.³¹

Section 10(4) of the *Children's Law Act* addresses the apportionment of a mediator's fees between the parties. The section allows the court to order the amount of the mediator's fees and expenses that each party is required to pay. Subsection (5) allows the court to order one party to pay all of the mediator's fees and expenses, where payment would cause the other party serious financial hardship. Subsection (6) provides that either party may terminate mediation after one session where they are unable to resolve the matter. Upon termination, the parties may proceed to have the issue resolved by the court.

²⁴ R.S.S. 1978, c. Q-1, s. 54.1(1).

²⁵ s. 54.1(2).

²⁶ s. 54.1(3).

²⁷ s. 54.1(4).

²⁸ s. 54.1(5).

²⁹ s. 54.1(6).

³⁰ S.S. 1990, c. C-8.1.

³¹ s. 10(3).

3. *Manitoba*

Section 47(1) of the *Queen's Bench Act*³² authorizes a judge or master, at any stage in the proceeding, to refer any of the issues in dispute to mediation where he or she is of the opinion that an effort should be made to resolve an issue by other means than a formal trial. Section 47(2) directs the mediator to attempt to resolve the issue. A "mediator" is defined as a person appointed as a mediator by the Attorney General.

Closed mediation is addressed in section 48 of the *Act*, which provides that neither the mediator nor either of the parties can give evidence with respect to: (1) a written or oral statement made by a party during the mediation; or (2) knowledge or information acquired during the mediation by a mediator or either party.

4. *Ontario*

Section 31(1) of the *Children's Law Reform Act*³³ (*C.L.R.A.*) authorizes the court, upon application for custody of or access to a child(ren) and at the request of the parties, to appoint a person selected by the parties to mediate any matter specified in the order. Section 31(4) stipulates that before beginning the process of mediation, the parties must decide what form the mediator's report to the court will take. It can be: (a) a full report on the mediation, including anything that the mediator considers relevant to the matter in mediation, or (b) a report that sets out the agreement reached by the parties, or simply states that the parties did not reach agreement on the matter. Section 31(3) sets out the duty of the mediator "to confer with the parties and endeavour to obtain an agreement in respect of the matter."

If the parties choose to engage in closed mediation, any evidence submitted, or admission or communication made during the mediation process, is not admissible in any other proceeding, except with the consent of all parties.³⁴ Generally, the parties are required to sign a confidentiality agreement to this effect.

Ontario legislation also directs the court to order the parties to pay the mediator's fees and expenses.³⁵ The court is granted the discretion to apportion the payments between the parties.³⁶ The court may relieve a party from paying where it would cause serious financial hardship.³⁷

³² S.M. 1988-89, c.4 [also C.C.S.M., c. C280].

³³ R.S.O. 1990, c. C.12.

³⁴ s. 31(7).

³⁵ s. 31(8).

³⁶ s. 31(9).

³⁷ s. 31(10).

With respect to mediation, the *Family Law Act*³⁸ (*F.L.A.*) has similar provisions to those of the *C.L.R.A.* Section 3 of the *F.L.A.* provides that the court, subject to the parties' consent, may order mediation to resolve disputes related to property division and child and spousal support. Of note is the recent announcement by the Ontario government to implement mandatory mediation for all civil matters except those involving family law disputes. The implications of this initiative remain unclear. However, the fact that such an initiative has been adopted by the Harris government underlines the attractiveness of mediation to governments attempting to cut costs and privatize public services, including the administration of justice.

5. *Quebec*

In 1993, Quebec's *Code of Civil Procedure* was amended to allow the court to adjourn a contested family matter and refer the parties to mediation.³⁹ It appears that the parties' consent is necessary under this article, and that the court is directed to act "with a view to furthering either the reconciliation of the parties or their conciliation, in particular through mediation." The *Code* also provides that the Family Mediation Service of the Superior Court can designate a mediator or, at the parties' request, assign the parties to the mediator of their choice.

The hearing can be adjourned for a period not exceeding 90 days; at the end of the 90-day period, the hearing is continued unless the parties expressly agree to an extension for a period determined by the court. The parties must then begin the mediation process within 20 days after the referral order. The court can make orders safeguarding the rights of the parties and children during this period.⁴⁰

Other provisions require the report of the mediator be filed with the court. The report is to contain a record of the attendance of the parties and the matters on which agreement was reached, but no other information.⁴¹ Nothing stated verbally or transcribed during the mediation is admissible as evidence in court, unless the parties and mediator agree otherwise.⁴² The *Code* states that the parties are bound to pay the mediator's fees, through equal contributions unless otherwise ordered by the court.

The Quebec National Assembly is poised to take its legislative provisions with respect to mediation a step further. In May 1997, it is scheduled to introduce legislation which will make

³⁸ R.S.O. 1990, c. F.3.

³⁹ R.S.Q. 1977, c. C-25, art. 815.2.

⁴⁰ art. 815.2.

⁴¹ art. 815.2.2.

⁴² art. 815.3.

mediation mandatory.⁴³ The proposed Bill provides that parties to a custody, support or property dispute will not be permitted to apply to the court for a hearing until an attempt has been made to mediate the dispute. To ensure that mediation is attempted, any application to the court must be accompanied by a mediation report. The proposed Bill provides for exceptions where there is “valid cause.” Those exceptions include where: (1) there is a history of spousal or child abuse; (2) one of the parties is legally incapacitated; or (3) one of the parties resides outside of the province.⁴⁴

D. Interplay of Mediation Services with the Family Justice System

It is not possible to describe all of the ways in which publicly funded mediation services presently interact with the court-based family justice system. The key informants from the four programs believe that the judiciary is, for the most part, receptive to the provision of publicly funded mediation services. Indeed, these informants were of the opinion that to the extent that mediation services are available, they enjoy considerable support from judges. Increasingly, judges view mediation as a potential adjunct to the court system rather than a discrete alternative. According to these sources, judges want the option of referring a family law dispute out to mediation. Where judges have the statutory discretion to do so, they are taking full advantage of the opportunity.

Of course, the degree of interaction between judges and mediators varies across both jurisdictions and individual court rooms. However, some informants were of the opinion that judges would like to see the implementation of an “on-call” arrangement, whereby a judge, during the hearing of a case, could call on a mediator to assist the parties to work out the details of a specific

⁴³ Bill 65, An Act to institute, under the Code of Civil Procedure, pre-hearing mediation in family law cases and to amend other provisions of the Code.

⁴⁴ art. 814.3. See the analysis of this Bill presented in *Conseil du statut de la femme, Commentaires sur le projet de loi 65 instituant la médiation préalable en matière familiale* (February 1997).

issue.⁴⁵ In Ontario, discussions between mediators and judges have been held about the feasibility of this kind of “on-call” arrangement. However, there are difficulties inherent in the practice of “on-call” mediation. First, the screening process is most likely jeopardized in these arrangements due to lack of time. Second, the caseload of most court-connected mediators is sufficiently heavy to preclude availability for this kind of arrangement.

⁴⁵ From an interview with Maggie Hall, M.S.W., Court Mediator, Ontario Court (General Division) Family Court Mediation Services, Hamilton, Ontario on January 28, 1997. She discussed in particular the relationship between judges and mediators in Barrie and Kingston, Ontario, where this has been attempted.

PART V — DEMYSTIFYING THE APPEAL OF MEDIATION: A REVIEW OF THE LITERATURE

While proponents have effectively placed mediation on the public agenda, feminist academics, critical legal theorists and women's advocates have cautioned against uncritically accepting the claims made on behalf of mediation. Instead, they urge that mediation be subjected to more critical scrutiny, particularly in relation to its implications for women's substantive equality.

There are three principal components to this section: (1) a brief overview of some of the main problems that have been identified as access barriers to the family justice system; (2) a sketch of the claims made on behalf of mediation; and (3) an outline of some of the criticisms that have been levelled at mediation services at the practical level. The main objectives of this section are:

- (i) to highlight key policy issues that require closer scrutiny from policy-makers and service providers; and
- (ii) to identify several core principles that can be used to design an evaluation framework for the provision of mediation services.

This section will lay the foundation for the presentation in Part VI of the data analysis from the four publicly funded mediation programs, and for the development of preliminary recommendations in Part VII with respect to some of the key policy issues identified in relation to family mediation.

A. The Main Problems Identified in the Present Court-based Family Justice System

In the past decade, the court-based family justice system has been criticized on a number of fronts and from various perspectives. Documented in numerous reports, the pervasive problems of the family justice system range from inordinate delay and cost, to the need to reform the substantive law with respect to custody and access and eliminate gender bias.⁴⁶

⁴⁶ See e.g., Canadian Bar Association Task Force on Gender Equality in the Legal Profession, *Touchstones for Change: Equality, Diversity and Accountability* [Ottawa: Canadian Bar Association 1993] (hereinafter *CBA Task Force Report on Gender Equality*); Mona G. Brown *et al.* (eds.), *Fairness in Family Law*, A Study by the Manitoba Association of Women and the Law Inc. (September 1994); *Breaking Up is Hard to Do: Rethinking the Family Justice System in British Columbia* (November 4, 1991); The Law Society of British Columbia, *Gender Equality in the Justice System: A Report of the Law Society of British Columbia Gender Bias Committee* (1992); *Is Anyone Listening? Report of the British Columbia Task Force on Family Violence* (1992) (Mobina Jaffer, Chairperson).

It is necessary to understand the depth of the critique of the family justice system in order to assess whether or not mediation services, as presently provided, address these problems or simply reproduce them. Moreover, mediation is usually promoted as an alternative to the court system and the involvement of lawyers. However, mediation's status as an alternative dispute resolution mechanism is somewhat diminished if, in practice, it is simply the "lesser of two evils." In any event, the danger, perceived by some women's advocates, is that the availability of mediation services is being used as an excuse by governments to ignore the serious problems in the formal family justice system.

The shortcomings of the family justice system, from the perspective of women litigants, that most consistently appear in the literature and publicly funded reports include:

- (i) the adversarial nature of court proceedings, which contributes both to the escalation of hostilities between the parties and the propensity for disputes to become protracted;
- (ii) the lack of control over proceedings once the court machinery kicks into gear;
- (iii) the incomprehensible nature of the legal process and its jargon, the difficulty of dealing with fragmented services, and the prospect of appearing in more than one level of court on the same issue;
- (iv) the high cost of legal services for participants,⁴⁷ and inordinate delays between the time the action is commenced and the time it is finally adjudicated;⁴⁸
- (v) dramatic cutbacks to legal aid programs, which result in extremely restricted access to quality legal representation, especially in family law cases;
- (vi) the insensitivity of lawyers to the emotional trauma inherent in family law disputes;
- (vii) the failure of substantive law to take into consideration women's inequality, which often results in negative outcomes for women litigants and their children;⁴⁹

⁴⁷ *CBA Task Force Report on Gender Equality, supra* note 46, Vol. 2. See pp. 5-63 on the high costs and difficulties in retaining adequate legal representation. Other factors noted include judges' reluctance to order payment of legal fees by the spouse controlling the family assets, usually the man, and also the ineligibility of many working poor women for legal aid.

⁴⁸ *Task Force Report, supra* note 1.

⁴⁹ For example, in custody and access cases where there are allegations of wife abuse, the court often grants access to the batterer. This criticism is more accurately characterized as a call for reform of the substantive law of support, custody and access, such that the best interests of the child are interpreted to include the right to receive adequate and regular financial support, and the right to live in a household without spousal or child abuse.

- (viii) the inability of the family justice system to ensure that children receive adequate and regular child support; this is exacerbated in families in dire financial straits and by the feminization of poverty;
- (ix) the particular problems identified by women disadvantaged by race, disability, sexual orientation, poverty, language, culture and/or their experience of violence. Within this broad category, there are references regarding the need:
 - to attain a greater understanding of the cultural and language barriers experienced by newcomers in accessing the family justice system;
 - to require the removal of physical barriers, communication barriers, and attitudinal barriers which may influence the outcome of a case for litigants with disabilities;
 - to ensure access to justice system staff who understand the dynamics of family violence and its unique impact on family breakdown for women litigants who experience male violence; and
 - to recognize that pervasive heterosexism and homophobia throughout the family justice system effectively precludes access to lesbians and gay men wishing to utilize these services.⁵⁰
- (x) the pervasiveness of gender bias throughout the entire legal system;⁵¹ and
- (xi) the general inaccessibility of the justice system for poor people.⁵²

1. The Access to Justice Critique

Women’s advocates and feminist academics are not the only interests who have mounted critiques against the family justice system. Rather, there is a wide coalition of stakeholders who,

⁵⁰ This observation extends to the need for recognition of domestic violence and abuse of power within gay and lesbian relationships. See, for example *CBA Task Force Report on Gender Equality*, *supra* note 46, Vol. 2, pp. 5-59 – 5-63. re: the bias in custody determinations involving same-sex parents. See also: Wendy Gross, “Judging the Best Interests of the Child: Child Custody and the Homosexual Parent” (1986) 1 *CJWL* 505; Katherine Arnup, “Mothers Just Like Others: Lesbians, Divorce, and Child Custody in Canada” (1989) *CJWL* 18, and Susan B. Boyd, “Expanding the Family in Family Law: Recent Ontario Proposals on Same-Sex Relationships” (1994) 7 *CJWL* 545.

⁵¹ *CBA Task Force Report on Gender Equality*, *supra* note 46, Vol. 1. For example, the report notes that the credibility of both women litigants and women counsel is always at issue in the courtroom.

⁵² While legal aid constituted a partial response to this problem, recent cutbacks to family law legal aid are having a disproportionately adverse impact on women litigants. See National Council of Welfare, *Legal Aid and the Poor* (Ottawa: Ministry of Supply and Services, 1995).

under the rubric of “access to justice,” are examining the administration of the civil justice system with a view to initiating reform.

For example, the recent Canadian Bar Association Task Force on Systems of Civil Justice conducted such a study. The Task Force identified cost and delay as the two major barriers to access to justice in this country. The reference to cost is not restricted to the costs incurred by litigants; the cost to government is also factored into the equation.

In the *Task Force Consultation Document*,⁵³ other more specific barriers were identified, including:

- (i) physical barriers (e.g., availability of services during practical hours and physical access for persons with disabilities);
- (ii) geographic barriers;
- (iii) economic barriers (e.g., court costs, lawyers’ fees and indirect costs);
- (iv) barriers arising from delay;
- (v) barriers arising from complexity of the law, its vocabulary and institutions;
- (vi) procedural barriers;
- (vii) linguistic and other communication barriers;
- (viii) barriers arising from lack of information; and
- (ix) cultural barriers and barriers of bias (perceived and real).⁵⁴

In a research paper commissioned by the Task Force, Melina Buckley identifies women, low-income people, people with disabilities, and Aboriginal peoples as those facing particular barriers in relation to access to justice.⁵⁵ Given the multitude of criticisms levelled at the family justice system, it is not surprising that ADR has gained a foothold in the public policy agenda.

B. Claims Made on Behalf of Mediation

⁵³ *Task Force Consultation Document* at p. 47. See also Melina Buckley, “Overcoming Barriers: Towards Equal Access to Justice,” an issue paper prepared for the CBA Task Force on Systems of Civil Justice, at p. 4.

⁵⁴ *Task Force Consultation Document* at p. 47 citing Catherine Dagenais, “Les Perceptions de l’Administration de la Justice” *CIAL* (September 1994).

⁵⁵ Buckley, *supra* note 53, at p. 5.

Proponents of mediation have consistently made certain claims in promoting mediation as a viable alternative to the traditional adversarial justice system. Not surprisingly, many of these claims stand in direct opposition to the criticisms of the family justice system.

For example, the adversarial nature of the litigation system is charged with exacerbating the conflict inherent in separation and divorce. Mediation is promoted as a consensual process which minimizes conflict and promotes compromise and cooperation. Juxtaposed against each other in this way, mediation appears to be a more appropriate vehicle to resolve family law disputes.

The appeal of mediation has been described in various ways, but most commonly as reflecting:

the recent interest ... [in] finding an alternative to traditional litigation and the search for a more consensual approach to problem solving, more accessible and community-oriented forms of dispute resolution and less expensive, more efficient ways of resolving disputes, ... [for] a process that generates 'win/win' rather than 'win/lose' or zero sum results.⁵⁶

The claims made on behalf of mediation that have most consistently appeared in the literature include:

- (i) mediation is not adversarial, but rather is a problem-solving process based on compromise;⁵⁷
- (ii) mediation results in agreements with higher compliance rates;⁵⁸
- (iii) mediation reflects feminist principles and values;⁵⁹

⁵⁶ Stobo, *supra* note 7, at p. 4.

⁵⁷ Desmond Ellis, "Marital Conflict Mediation and Post-Separation Wife Abuse" (1990) 8 *Law and Inequality* 318, at p. 320 and Alberta Law Reform Institute, *Court-Connected Family Mediation Programs in Canada* (May 1994) (hereinafter referred to as "Alberta Law Reform Institute"), at p. 11. This claim is usually presented in two parts, something akin to: "while the adversary system represents conflict and removal of decision-making power from the parties, mediation/conciliation allows the parties to reach agreements based on a shared understanding and with the help of experts who know what is in the best interests of the children."

⁵⁸ *Ibid.*, at p. 321.

⁵⁹ *Ibid.*, at p. 321. In the mid-1980s, some feminist writers expressed enthusiasm for the potential of ADR, particularly since the legal system was seen as inhospitable to women, imbued with patriarchal values and failing to take account of women's interests and needs. ADR, on the other hand, was seen as having a greater potential to both respond to women's concerns and create less combative/adversarial methods of resolving disputes by focusing on cooperation, communication and compromise. See also Hilary Astor, "Mediation of Intra-Lesbian Disputes"

- (iv) mediation entails less time and cost;⁶⁰
- (v) mediation produces positive outcomes relating to the reconstruction of family relationships;⁶¹
- (vi) mediation has higher rates of satisfaction among participants;
- (vii) mediation constitutes a more humane approach to dispute resolution;
- (viii) mediation responds better to children's interests;⁶²
- (ix) mediation enhances personal autonomy;⁶³ and
- (x) mediation provides an additional resource with which to meet the unmet demand for resolution of the legal problems of the poor.⁶⁴

forthcoming in the *Melbourne University Law Review*, at p. 851 citing Menkel-Meadow and Rifkin.

⁶⁰ Ellis, *supra* note 57, at p. 322; see also Alberta Law Reform Institute, *supra* note 57, at p. 13, and Joshua Rosenberg, "In Defense of Mediation" (1991) *Arizona Law Review*, at pp. 472-473.

⁶¹ Alberta Law Reform Institute, *supra* note 57 at p. 12. Comparative empirical research on the extent to which outcomes are equitable for women and children is beginning to be done. See Carol Bohmer and Marilyn L. Ray, "Effects of Different Dispute Resolution Methods on Women and Children After Divorce" (1994) 28 *Family L.Q.* 223.

⁶² Alberta Law Reform Institute, *supra* note 57, at p. 13. This is in part a function of the observation that children's vulnerability to parental separation and divorce seems to be based in large part on the amount of conflict they are exposed to. See also Peter Jaffe, *et al.*, "Critical Issues in the Development of Custody and Access Dispute Resolution Services" (1987) 19:4 *Canadian Journal of Behavioral Science — Revue Canadienne des Sciences du Comportement* 405.

⁶³ Alberta Law Reform Institute, *supra* note 57, at p. 13.

⁶⁴ Larry R. Spain, "Alternative Dispute Resolution for the Poor: Is it an Alternative?" (1994) 70 *N. Dakota L. Rev* 269, at 271. See also *Legal Aid and the Poor*, *supra* note 52. Spain notes that ADR has the potential to increase access to justice for the poor by providing additional forums for the resolution of disputes — especially since legal aid has been cut. Spain warns that care must be taken to ensure that ADR is not offered as "the poor and other disadvantaged groups' substitute for their right to litigate and enforce, in appropriate cases, constitutional and statutory rights. We should, therefore, be cautious that alternative methods of dispute resolution do not 'create' a two-track justice system that dispenses informal 'justice' to poor people with 'small' claims and 'minor' disputes, who cannot afford legal services, and who are denied access to courts," at p.

According to Carrie Menkel-Meadow, these claims can be roughly divided into those concerned with the quality of justice and those concerned with efficiency.⁶⁵ Menkel-Meadow's analysis suggests that early mediation proponents were more likely concerned with the former. This conclusion is supported by numerous references, in the writings of proponents, to the growing number of litigants who did not believe that the courts could provide a fair and just resolution of their disputes. ADR (or mediation) provided a tailor-made opportunity to replace the formal procedural aspects of the traditional trial with a consensual, individualized alternative; it would allow participants to shape both the process and the outcome to their individual needs.

Others have focused more on the expense and delay inherent in litigation, and on ways to settle disputes more quickly. Efficiency arguments around cost and delay have dominated the more recent phases of ADR.⁶⁶

The claims made on behalf of mediation have not gone unchallenged. Feminist academics, critical legal theorists and women's advocates have subjected both the theory and the practice of mediation to scrutiny and have exposed many of those claims as false or exaggerated.

C. Critiques of Mediation

The critique of the use of ADR and mediation, particularly in family matters, encompasses a wide range of perspectives. It is, however, feminist perspectives that have been at the forefront. Some of the criticisms reflect a concern with the larger theoretical assumptions of ADR; others are more directly linked to concrete problems that affect, for the most part, women attempting to resolve family-related disputes.⁶⁷ The following criticisms appear most consistently in the literature, and are further supported by the observations of women's advocates. These points are not in any particular order and are obviously interrelated and overlapping. They include:

273, citing Jerold S. Auerbach, *Justice Without Law? Resolving Disputes Without Lawyers* 124 (1983), at p.144.

⁶⁵ Lucy Katz, "Compulsory ADR & Voluntarism: Two-Headed Monster or Two Sides of the Coin" (1993) *Journal of Dispute Resolution* 1, at p. 4, citing Menkel-Meadow. Courts were seen as poor mechanisms through which to dispense justice — they were viewed as overly formalistic, cumbersome, destructive of relationships, alienating, humiliating, slow and expensive.

⁶⁶ *Ibid.*, at p. 5.

⁶⁷ See Barbara Whittington, *Mediation Power & Gender: A Critical Review of Selected Readings* (Victoria: UVic Institute for Dispute Resolution, 1992).

- (i) the privatization, or the informal settlement, of family law disputes⁶⁸ which can lead to the neglect of broader social values;⁶⁹
- (ii) the inability of informal justice systems to protect individual rights and entitlements;⁷⁰
- (iii) the equation of mediation with a second-class justice or a lesser forum;⁷¹
- (iv) the concern that de-formalization may increase the risk of class-based and other forms of prejudice;⁷²
- (v) the weakening of legal precedent and the rule of law;⁷³
- (vi) the disregard for some of the positive facets of the formal justice system;
- (vii) the inability to redress power imbalances between the parties;
- (viii) the failure to effectively address the impact of mediation on women exiting abusive relationships, and the use of unsophisticated screening tools;
- (ix) the difficulties inherent in the provision of truly voluntary services;
- (x) the general lack of legal representation and/or difficulty getting legal aid for mediation clients;
- (xi) the bias toward joint custody or shared parenting reflected in most programs and adhered to by most mediators;
- (xii) the lack of accountability of individual mediators and mediation programs, as demonstrated by little or no record keeping, the absence of review mechanisms and the use of mediator neutrality as a shield;⁷⁴
- (xiii) the lack of mechanisms to ensure financial disclosure;

⁶⁸ Barbara Landau, “Qualifications of Family Mediators: Listening to the Feminist Critique” in C. Morris and A. Pirie (eds.) *Qualifications for Dispute Resolution: Perspectives on the Debate* (Victoria: University of Victoria Institute for Dispute Resolution, 1994) 27 at p. 29.

⁶⁹ Alberta Law Reform Institute, *supra* note 57, at p. 14.

⁷⁰ *Ibid.*, at p. 14.

⁷¹ Landau, *supra* note 68 at p. 30.

⁷² Richard Delgado, Dunn, Brown, Lee and Hubbert, “Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution” (1985) *Wis. L. Rev.* 1359, at p. 1360.

⁷³ Alberta Law Reform Institute, *supra* note 57, at p. 15.

⁷⁴ Alberta Law Reform Institute, *supra* note 57, at p. 16.

- (xiv) the lack of minimum educational requirements and standards for training; and
- (xv) the absence of meaningful integration of diversity issues and the particular needs of marginalized women (e.g., racial minority women, lesbians, women with disabilities and older women).

There is a great deal of academic commentary on most of the above points. In the next section, we outline some of the main observations that have been made with respect to several of the larger issues.

1. The Privatization of Family Law

When a family law consumer “chooses” mediation or is referred to mediation by a judge or other court official, the resolution of that dispute is effectively removed from the formal justice system. As a consequence, there is no recourse to the procedural and substantive safeguards which protect litigants as part of a public justice system.⁷⁵

For the individual mediation client, the implications are, of course, restricted to her particular case. However, on a collective level, one of the effects of “diverting” family law cases to mediation and other informal dispute resolution mechanisms is to remove family law disputes from the public realm. No public record detailing the nature of the dispute or the terms of the agreement is necessarily attached to a mediated case.⁷⁶ One of the consequences of this “privatization” of justice is that social inequities may be reproduced in these privately ordered agreements, and yet remain hidden from the public eye.

It is in this sense that the privatization of family justice is viewed as reinforcing the present inequitable social order on a collective level, and as perpetuating the existing power imbalance between the parties on an individual level.⁷⁷ As a result, the status quo is maintained and

⁷⁵ See Richard L. Abel, “The Contradictions of Informal Justice” in Richard L. Abel, ed. *The Politics of Informal Justice* (New York: Academic Press, 1982), at pp. 267-320. Also see Owen Fiss, “Against Settlement” (1984) 93 *Yale Law Journal* 1073, at pp. 1073-90; Lisa G. Lerman “Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women” (1984) 7 *Harvard Women’s Law Journal* pp. 57-113, as cited in Landau *supra* note 68, at p. 29.

⁷⁶ Another result is that legal precedent is weakened, as family law issues are handled on an individual case-by-case basis, without generating a public record. See Jocelynne Scutt, “The Privatization of Justice: Power Differentials, Inequality and the Palliative of Counseling and Mediation” (1988) 11 *Women’s Studies International Forum* 503, at pp. 514-515, citing Hofrichter.

⁷⁷ Delgado, *et al.*, *supra* note 72; Edwards “Alternative Dispute Resolution: Panacea or Anathema?” (1986) 99 *Harv. L. Rev.* 668; Fiss, *supra* note 75; Hazard and Scott, “The Public Nature of Private Adjudication” (1988) 6 *Yale L. & Policy Rev.* 42, as cited in Judith L. Maute,

women's inequality in relation to this "private" sphere of the family is no longer a public concern. This privatization of family matters has particularly negative ramifications for women who experience violence from their partners.⁷⁸ In this regard, Scutt observes:

The privatization of justice is detrimental to the interests of the disadvantaged, in that it shuts off from public view the very nature of the inequality from which the individual and the group suffers...⁷⁹

Further, by privatizing family law, the family unit is depoliticized, making social reform almost impossible.⁸⁰ As one author notes: "'[p]rivate justice' renders the personal apolitical."⁸¹ Scutt goes on to explain:

...it is instructive that from the late 1960s and in the 1970s and 1980s, when women have become, together with other disadvantaged groups, more inclined toward seeking to use the justice system to gain acknowledgment of, and redress for, the fundamental error of sex-based discrimination; more attuned to the basic inequality meted out through the criminal justice system; and more vocal about the right of women to share equally in property distribution and other appurtenances of marriage, considerable efforts are being made to temper women's demands and deflect them into a privatised system of mediation, conciliation or counseling.⁸²

2. *The Failure to Protect Individual Rights and Entitlements*

Inextricably interrelated with concerns about privatization are those expressed about the failure of mediation and other forms of ADR to protect women's rights and entitlements.⁸³ While there are obviously serious problems for women litigants attempting to negotiate within the formal family justice system, there have been some positive developments for women in the last 20 years. Briefly, there have been substantial reforms made to federal and provincial legislation. The objective is to accord women, upon relationship breakdown, with more equal entitlement to

"Mediator Accountability: Responding to Fairness Concerns" (1990) 2 *Journal of Dispute Resolution*, at p. 347.

⁷⁸ From an interview with Eileen Morrow, Lobby Coordinator, Ontario Association of Interval and Transition Houses, February 1997.

⁷⁹ Scutt, *supra* note 76, at p. 516.

⁸⁰ Alberta Law Reform Institute, *supra* note 57, at p. 16.

⁸¹ Scutt, *supra* note 76, at p. 516.

⁸² Scutt, *supra* note 76, at pp. 515-516.

⁸³ Bohmer and Ray, *supra* note 61, at pp. 224-225, citing others.

marital property.⁸⁴ More recently, there has been a concerted effort to make child support awards more consistent and appropriate through legislated guidelines.⁸⁵

A review of family law jurisprudence over the past 20 years also contains some developments that are beneficial to women. Of particular note is the Supreme Court of Canada's enunciation of common law principles that are more sensitive to gender inequality. These principles attempt to accord greater recognition to the value of women's contributions to the marriage/union and the cost of opportunities they forego in the marketplace.⁸⁶

In addition, mediated agreements, unlike lawyer-assisted negotiated agreements, are often made outside the framework of the parties' rights and responsibilities which exist according to the law. The critical point is that mediated agreements, especially if the parties enter into them without full information about their legal rights, may bear no relationship to what the parties would be entitled to if they went to court. There is currently no mechanism in place to ensure that those legal rights and entitlements are reflected in the agreements, or are even fully considered by the parties.

Moreover, the private nature of mediation means that the process is not open. This means that women may cede hard-won legal rights behind closed doors. In other words, the contents of the mediated agreements that women are securing may constitute a radical departure from what they are legally entitled to. Further, no one keeps a record of mediation proceedings similar to court transcripts; consequently, there is no public means to review and track what is happening to women in mediation.

3. *Second-class Justice or a Lesser Forum*⁸⁷

⁸⁴ For an overview of legislative provisions in this regard see Lindsay Ann Histrop, "Breaking Up the Business with the Marriage," *Report of Proceedings of the Forty-Eighth Tax Conference* (Toronto: Canadian Tax Foundation, 1997).

⁸⁵ Recently, child support guidelines were enacted under the *Divorce Act* R.S.C. 1985, c. 3(2d supp.) as amended. The guidelines themselves take the form of a regulation under the *Divorce Act*: JUS-96-166-02 (SOR/DORS). They came into force May 1, 1997.

⁸⁶ See e.g., *Moge v. Moge* [1992] 3 S.C.R. 813; 99 D.L.R. (4th) 456; *Pettkus v. Becker* [1980] 2 S.C.R. 834; 117 D.L.R. (3d) 257 and *Peter v. Beblow* [1993] 1 S.C.R. 980; [1993] 3 W.W.R. 337.

⁸⁷ Landau, *supra* note 68 at p. 30. There is a growing concern reflected in the literature that some parties in civil litigation are harmed and receive less justice the more ADR becomes incorporated into the judicial system. This concern is especially true for civil/human rights plaintiffs when settlement and case disposition are emphasized over justice.

Mediation trivializes family law issues by relegating them to a lesser forum, and diminishes the status of family law issues by placing them outside society's main dispute resolution system — the legal system.⁸⁸ Further, there is generally no mechanism similar to appellate review. While adding another level to the court system, appellate review serves as a safeguard against arbitrary and capricious decision-making.⁸⁹

4. The Integration of Diversity Issues and the Increased Risk of Class-based and Other Forms of Prejudice⁹⁰

Neither the critics nor the proponents of family mediation have accorded diversity issues the attention they deserve. The literature that does exist focuses for the most part on mediation generally, not family mediation. That literature indicates that mediation theory and practice is culturally biased; it reflects the dominant individualist values of Anglo-European culture. Therefore, it may be of limited relevance to members of other non-dominant cultures with more collectivist focuses (i.e., First Nations, Chinese, Japanese, East Asian and Latin American communities).⁹¹

The ways in which mediator bias, insensitivity or outright prejudice may affect the mediation of family disputes requires more research. There is research that suggests that members of cultural minorities may experience poor mediated outcomes unless a member of the minority culture sits on the panel of mediators. As well, there is a need to modify or even remove certain mediation methods or techniques in particular cultural contexts. For example, direct dispute resolution methods, which require face-to-face communications, may be inappropriate in some contexts, and may even serve to exclude whole segments of society (see footnote 91).

⁸⁸ Michael Benjamin and Howard Irving, "Toward a Feminist-Informed Model of Therapeutic Family Mediation" (1992) Vol. 10, No.2 *Mediation Quarterly*, at p. 133, citing others.

⁸⁹ Katz, *supra* note 65, at pp. 5-6.

⁹⁰ Delgado, *supra* note 72, at p. 1360.

⁹¹ See Michelle LeBaron Duryea, *Conflict and Culture: A Literature Review and Bibliography* (Victoria: University of Victoria Institute for Dispute Resolution, 1992). With respect to First Nations' experience in relation to ADR generally, see Patricia A. Monture, "Alternative Dispute Resolution: A Bridge to Aboriginal Experience?" pp. 131-140 in *Qualifications In Dispute Resolution: Perspectives in the Debate* (Victoria: University of Victoria Institute for Dispute Resolution 1994); Michael Jackson, "In Search of Pathways In Justice: Alternative Dispute Resolution in Aboriginal Communities" (1992) *University of B.C. Law Review Special Edition* 147.

There is also a notable absence of discussion in the literature on the accessibility of mediation services for gays and lesbians, with the exception of the work of Hilary Astor.⁹² Astor canvasses the advantages and disadvantages of mediation for lesbians, noting that their avoidance of the known homophobia of the justice system plays a large role in their decision to mediate. Further, there are privacy concerns that make mediation appealing to individual lesbians, but have implications for undercutting much-needed political and legal reforms. Astor applies the same type of critical analysis that is reflected in the bulk of the feminist literature; that is, she considers the parties' capacity to mediate, and the measures required to screen out lesbians exiting abusive relationships as unsuitable clients for mediation. Astor notes that while many of the issues are the same for lesbians as for their heterosexual counterparts, there is a qualitative difference. This difference has implications for the training of mediators and the provision of mediation services that are accessible and sensitized to lesbian issues.

Just as Astor warns that mediators are not necessarily less homophobic than court staff, Richard Delgado argues that the de-formalization that characterizes ADR generally may increase the risk of class-based and other forms of prejudice and bias. It is Delgado's view that the risk of bias or prejudice is heightened when issues related to sensitive or intimate areas, such as intra-family disputes, are resolved through informal dispute resolution mechanisms.⁹³ This is because the features of a formal adjudicative process — the rules and the procedures — that work to minimize the operation of bias and prejudice are absent in informal systems.⁹⁴

5. Retain the Positive and Remedy the Negative Facets of the Court-based Formal Family Justice System

Before mediation is unconditionally accepted as a panacea for the shortfalls of the court-based family justice system, it is worthwhile to consider some of the positive aspects of that formal system. For example, there have been some legal reforms that have contributed to the amelioration of women's unequal condition. Scutt notes:

The idea that the problems of the adversary system and traditional justice can be resolved by the establishment of alternative systems hides from view the fact that despite valid criticisms

⁹² Delgado, *supra* note 72, at p. 1360.

⁹³ Scutt, *supra* note 76, at pp. 514-515, citing Hofrichter and Auerbach. Auerbach construes the problem somewhat differently. Auerbach contends that the introduction of neighbourhood justice centres serves to dampen class conflict by: (i) creating a forum that offers an alternative to the neighbourhood or union meetings in which collective action might be taken; and (ii) discouraging social and minority groups from developing a litigation strategy that might be a more effective vehicle for change.

⁹⁴ Delgado, *supra* note 72, at p. 1403.

of the adversarial process, positive aspects exist which should not be removed from disadvantaged groups in particular...⁹⁵

There is more than one reference to the belief that the current appeal of mediation and other forms of ADR is simply a smoke screen created by governments, policy-makers and court administrators to divert the public's attention away from the shortfalls of the court-based justice system.

There are other questions worth raising:

- How many of the criticisms of the traditional court system also apply, maybe in a slightly different form, to the provision of mediation services?
- To what extent is substantive fairness reflected in agreements?
- To what extent are diversity issues meaningfully integrated into mediation services?
- To what extent are mediation clients likely to access a legal aid lawyer?⁹⁶

6. Issues Related to Abuse and Power Imbalances

Battered women's advocates have been at the forefront of the anti-mediation lobby. They remain adamant that mediation is dangerous for battered women and their children.⁹⁷ Indeed, a substantial amount of the feminist literature on mediation has been dedicated to raising concerns with respect to the disadvantaging effect that mediation has for a large number of women — especially those who have been abused by their ex-husbands. The nature of these concerns is wide-ranging, but clearly the bottom line is that the components of mediation that are critical to its effectiveness are wholly absent when considered in the context of abusive relationships.⁹⁸

⁹⁵ Scutt, *supra* note 76, at p. 516.

⁹⁶ The Honorable Rodney S. Webb, "Court-Annexed 'ADR' — A Dissent" (1994) 70 *N. Dakota L. Rev.* 229 at p. 233. Other writers suggest that different strategies may be more effective; for example, it may be more expedient to focus on introducing measures like case management and settlement conferences to tackle problems like delay and lack of control before advocating for the wholesale adoption of ADR.

⁹⁷ Georgina Taylor, Jan Barnsley and Penny Goldsmith, *Women and Children Last — Custody Disputes and the Family 'Justice' System* (Vancouver: Vancouver Custody & Access Support & Advocacy Association, 1996).

⁹⁸ There are mediators who think they can mediate in abuse cases. See e.g., Kathleen O'Connell Corcoran and James Melamed in "From Coercion to Empowerment: Spousal Abuse and Mediation" (1990) Vol. 17, no. 4 *Mediation Quarterly* 303. The authors frame the issue as whether there is present intimidation, control or coercion that jeopardizes the woman's safety.

First, there can be no equality of power — bargaining or otherwise — between batterers and their wives,⁹⁹ despite the use of screening protocols. Similarly, the spirit of cooperation that is required for successful mediation is simply a contradiction in terms when considered in the context of a batterer and his wife.¹⁰⁰ Nor can there be any pretext that battered women enter into mediation voluntarily.

The difficulty lies in incorporating these concerns into the practice of mediation. The literature on screening tools for abuse provides some evidence that at least segments of the mediation community are listening to its critics. The extent to which existing screening protocols — which vary in level of sophistication across jurisdictions — can effectively “screen out” inappropriate cases is unclear. A “culture of battering,” involving subtle modes of communication of the threat of abuse between the two parties, makes abuse virtually undetectable.¹⁰¹ Further, Pagelow notes that the “veil of secrecy” that shrouds the abusive relationship takes more than an initial interview to lift.¹⁰²

At the very least, screening protocols should include clear and comprehensive definitions of abuse — including physical, emotional and financial abuse. Umbrella questions such as, “Have you ever been abused by your husband?” will not facilitate the disclosure of abuse. Rather, the literature suggests that screening tools have to be much more sophisticated — making inquiries into power and control issues — to be of any assistance.

One strategy worthy of note is an approach to screening where the objective is to screen appropriate cases **into** mediation, rather than the usual focus on screening inappropriate cases out. Arguably, the difference with a “screening in” approach is only a matter of semantics. However, the potentially positive aspect of a “screening in” approach has to be measured by whether it ensures that the assumption that mediation is beneficial for the vast majority of separating couples is replaced by the assumption that it is in fact only appropriate for a select few.

The exclusive focus on abuse as the defining parameter for screening tools may be misplaced for at least two reasons. First, abuse is very difficult to detect and “screen out.” Second, there are

See also K. Fisher, N. Vidmar and P. Ellis, “The Culture of Battering and the Role of Mediation in Domestic Violence Cases” (1993) 46 *S.M.U. Law Review* 2117, for a critical discussion of how some mediators attempt to adapt the mediation process so that certain cases where abuse is present can be mediated.

⁹⁹ Hart, *supra* note 6, at p. 317, quoting Ellis who argues that there is no equivalent power for men and women in a patriarchy.

¹⁰⁰ *Ibid.*, at p. 38.

¹⁰¹ Fischer, *et al.*, *supra* note 98.

¹⁰² Mildred Daley Pagelow, “Justice for Victims of Spouse Abuse in Divorce and Child Custody Cases” (1993) 8 *Violence and Victims* 69, at pp. 70-71.

other factors which strongly weigh against the use of mediation (for example, drug/alcohol dependency or mental health issues) and tend to create a power imbalance (see Appendix A, p. 83).

Barbara Hart summarizes the issue as:

.... numerous research studies demonstrate[s] [that] mediation is [an] inappropriate and dangerous alternative to the legal process in the resolution of custody disputes between batterers and battered women. The process of mediation offers false promises to battered women — promises of cooperation, honest communication, safety, amicable postdivorce collaboration in parenting, improved communication and fairness.¹⁰³

(a) *Power Imbalances Between the Parties*

Also of concern in the literature is the extent to which power imbalances between the parties vitiate the fairness of the process and the agreement. This concern arises out of the requirement that, for mediation to work, the parties at the table are of relatively equal power. Gibbard and Hartmeister conclude: “If one party is at a disadvantage, whether it be emotionally, financially or otherwise, the mediation will not likely achieve its purposes.”¹⁰⁴

Yet, there are at least three sources of unequal bargaining power: (1) one party may have insufficient financial resources to pursue a contested divorce; (2) the emotional vulnerability of a partner may undercut the give-and-take process of mediation; and (3) one party may be more anxious to settle, for whatever reason. A further cause of imbalance is the failure of mediators to recognize gender-specific roles and socialization patterns. As Zoe Hilton explains:

Because of their “peacemaker” role, women are likely to be subject to the pressure which mediators are encouraged to apply to the more responsive, and therefore more vulnerable party.¹⁰⁵

For many mediators, power imbalances represent a challenge to their skills and expertise. What is imbalanced simply requires skilled intervention to balance — then mediation can proceed. Numerous power-balancing techniques have been developed in an attempt to right the imbalances.

However, just as the difficulties inherent in screening for abuse are underlined in the literature, so are the difficulties in “balancing power differentials.” For some authors, the claims made by

¹⁰³ Barbara Hart, “Gentle Jeopardy — The Further Endangerment of Battered Women and Children in Custody Mediation” (1990) 7 *Mediation Q.* 317, at p. 326.

¹⁰⁴ Frank Gibbard and Fred Hartmeister, “Mediation and Wyoming Domestic Relations Cases — Practical Considerations, Ethical Concerns and Proposed Standards of Practice” (1992) 27 *Land and Water L. Rev.* 435, at p. 457, quoting another author.

¹⁰⁵ Zoe Hilton, “Mediating Wife Assault: Battered Women and the ‘New Family’” (1991) 9 *C.J.F.L.* 29, at p. 36.

mediators with respect to their abilities to address power imbalances are nothing more than a rhetorical smoke screen:

It defies imagination to think of the skill required to empower a depressed wife with low self-esteem who believes in traditional sex role ideology, fears confronting her husband, and has no occupation outside the home. Nor can the mediator significantly improve the wife's psychological and emotional state.¹⁰⁶

7. *Bias Toward Joint Legal Custody or "Shared/Cooperative Parenting"*

References to the fact that joint legal custody is the preferred outcome for mediators abound in the literature.¹⁰⁷ Mediators perceive this arrangement as serving the best interests of the children and as most suited to maintaining continuity and stability in the children's lives through frequent contact with both parents.¹⁰⁸ Interestingly, joint legal custody is the custodial arrangement favoured by father's rights groups.¹⁰⁹

The *Report of the Attorney General's Advisory Committee on Mediation in Family Law* refers to the explicit bias in favour of joint legal custody arrangements demonstrated by mediators and mediation programs.¹¹⁰ An appendix to that same report, compiled by Donna Hackett of the Ontario Women's Directorate, lists the following summary comments as reflecting the main points made in the literature on the subject:

- (i) A philosophical preference for joint custody arrangements by a majority of mediators has been identified in Canada, the United States and Great Britain.
- (ii) Some mediators' notions of how families should be structured post-separation (i.e., almost a presumption of joint custody) are seen by women's groups as non-neutral. Studies demonstrate that joint custody is a successful arrangement only in very limited circumstances.

¹⁰⁶ Penelope E. Bryan, "Killing Us Softly: Divorce Mediation and the Politics of Power" (1992) Vol XL *Buffalo Law Review*, at p. 501.

¹⁰⁷ See Hart, *supra* note 6; Hilton, *supra* note 105, Bryan *Ibid.*; and Martha Fineman, "Dominant Discourse, Professional Language, and Legal Change in Child Custody Decision-Making" (1988) Vol. 101, No. 4 *Harvard L. Rev.* 727.

¹⁰⁸ Hart, *supra* note 103, at p. 317, citing Richardson (1988).

¹⁰⁹ Hilton, *supra* note 105, at p. 36. See also Taylor *et al.*, *supra* note 97.

¹¹⁰ Ontario, "A Summary of Women's Concerns About Mediation" (Appendix A to Chapter 4) *Report of the Attorney General's Advisory Committee on Mediation in Family Law* (February, 1989), at p. 46.

- (iii) Women's groups assert that joint legal custody increases the non-custodial parent's rights without a corresponding increase in responsibility for the children.
- (iv) Mediation focuses on the future. This approach has the unintended effect of undervaluing women's contributions to caregiving. Instead of placing sufficient value and emphasis on who has in fact reared the children, future promises of caregiving contributions made during mediation can be weighed too heavily. Continuity in care is generally in the best interests of children.¹¹¹

Mediator bias toward joint legal custody imposes enormous disadvantages on women. In addition to problems with joint legal custody in terms of its political implications,¹¹² it also further weakens the woman's financial position in divorce mediation. This is because women's sex role socialization makes them extremely susceptible to manipulation by a mediator. Consequently, in order to resist the mediator's bias toward joint legal custody, the women may give up more ground financially.¹¹³

8. *The Role of Coercion in Mandatory (and Voluntary) Mediation Programs*

In the literature, references to "compulsory ADR" include a wide range of dispute resolution mechanisms. It is defined as any process in which the parties experience a lack of free choice about their participation, other than a civil or criminal trial with full due process protections. In this broad formulation, compulsory ADR includes not only court-ordered mediation, but also judicial mediation, settlement conferences, non-mandatory summary jury trials and other techniques where there is pressure on litigants to forego trials at least temporarily and to use alternatives to bring about settlement.¹¹⁴

Mandatory or compulsory ADR appears to be fairly well entrenched within the justice system generally. For proponents of mediation, this exposes significant contradictions between the theory and the practice of mediation when there is any element of compulsion or coercion involved.

In relation to the provision of mediation services specifically, the contradiction is that every description of the concept of mediation states that voluntariness is integral to its success. Yet, there are charges that coercion is a predominant feature of most mediation programs. Reliance on coercive practices is particularly apparent in jurisdictions where mandatory mediation has

¹¹¹ *Ibid.*

¹¹² Joint legal custody allocates day-to-day care to the mother, but reinforces her ex-husband's control over important decisions related to the children.

¹¹³ Bryan, *supra* note 106, at p. 492.

¹¹⁴ Katz, *supra* note 65, at p. 2.

been implemented; it is implicated indirectly in the subtle and not-so-subtle forms of coercion experienced by family law consumers in relation to so-called voluntary programs.

Despite this apparent contradiction between the theory of mediation and its practice, there is a heated debate going on in Quebec and in many U.S. jurisdictions about whether to implement mandatory mediation. Proponents of mandatory mediation make the case that this form of mediation is the only effective form of delivery — otherwise the service simply will not be used.¹¹⁵

Similarly, experiences of coercion are also implicated in voluntary programs in jurisdictions with restrictive or limited availability of legal aid lawyers, or where public policy endorses mediation to the extent that court officials and others are strongly recommending it as an option. Further coercion is reflected in women's experience of mediation services — specifically the pressure to opt for mediation in the first place — and to stay at the table until an agreement is signed.¹¹⁶

For women separating from abusive partners, the coercion manifests itself in the lack of support and information available to empower women to resist the pressure to mediate. Finally, there is coercion evident in a system in which the only alternative to litigation or lawyer-assisted negotiation is perceived as simply the lesser of two evils; this creates a situation whereby women may choose to forego legal entitlements in order to resolve the disputes in the least costly and adversarial manner.¹¹⁷

9. Mediator Accountability — Standards, Credentials and Training

The demand is growing for the establishment of standards of practice and qualifications for mediators. According to various authors, there is substantial support for the setting of mediator standards by statute, including minimum qualifications of education, experience and specialized training. Family Mediation Canada has developed criteria for mediator qualifications, and in 1993, the Ontario Law Society of Upper Canada recommended that consideration should be given to issues of standards, credentials and certification of arbitrators and mediators.¹¹⁸

¹¹⁵ Rosenberg, *supra* note 60.

¹¹⁶ Taylor *et al.*, *supra* note 97.

¹¹⁷ Interview with Rozella Dyck, contact person, Coalition of Custodial Parents (Manitoba) in February 1997 and interview with Gloria Enns, Coalition Opposing Violence Against Women (Manitoba) in February 1997.

¹¹⁸ Catherine Morris, "Where Peace and Justice Meet: Will Standards for Dispute Resolution Get Us There?" in Morris and Pirie (eds.), *supra* note 68 at p. 14.

Within this discussion, the importance of ensuring adequate and appropriate mediator training and education has been paramount.¹¹⁹ While ensuring adequate and appropriate training for mediators will not address all of the concerns raised by feminist academics and women's advocates, it will mitigate some of the shortcomings of mediation as presently practised. Part of that training/education has to pertain to the goals and objectives of mediation.

Mediators have to be trained to recognize that “a good outcome cannot be reached if one party is in a disadvantaged power position.”¹²⁰ There are all sorts of issues and techniques in which mediators need to be trained. To the extent it is possible, any training has to include methods to equalize power imbalances, as well as training to recognize when it is not in fact possible to do.¹²¹ There is a need for training with respect to physical, mental, emotional and financial abuse, as well as substance abuse. Only with adequate and appropriate training will mediators be better prepared to provide a safe and productive mediation experience and, most importantly, to recognize when mediation is not possible.

Barbara Landau argues that when creating standards and designing training programs, it is necessary to take seriously the feminist critique of mediation. She recommends that the following principles inform the exercise:

- that the parties be fully informed as to their legal entitlements and obligations, and the range of alternative dispute resolution mechanisms;
- that entry into mediation be voluntary;

¹¹⁹ Maggie Vincent, “Mandatory Mediation of Custody Disputes: Criticism, Legislation and Support.” (Fall 1995) Vol. 20 *Vermont Law Review*, p. 255. The literature consistently underscores the importance of mediator training and experience to the success of the service. Jessica Pearson's research shows:

“The best predictors of successful mediation outcomes and client willingness to recommend mediation to others had to do with the skill and behavior of the mediator, particularly their perceived facility in promoting communication, empathy and self-insight.

The results argue for recruiting and producing talented mediators who are trained in the dynamics of domestic violence and know when to avoid or terminate mediation, as well as to pursue it.”

¹²⁰ Landau, *supra* note 68, at p. 39. The problem is that the requirement of neutrality, however ill-defined, remains in many sets of dispute resolution standards.

¹²¹ Vincent, *supra* note 119, at p. 285.

- that if mediation is chosen, all reasonable steps be taken to assure the parties' safety and ability to express their needs and concerns without intimidation or fear of reprisal; and,
- that agreements be reached voluntarily, be within the bounds of fairness, and reflect the best interests of children.

There are of course other gender-specific principles which probably should be added to Landau's list. However, these principles at least reflect the fact that some degree of attention is being paid to the concerns raised by feminist academics and women's advocates. There is also an urgent need

to address the cultural bias and insensitivity that likely permeate current mediation practices (see above). This bias and insensitivity can be addressed, in part, through specialized training.¹²²

Also apparent is the need for specialized training around mediator bias and insensitivity related to gays and lesbians using mediation services. Mediators, at the very least, require training in order to better equip them to distinguish between the ways in which family law disputes are the same for gay and lesbian couples, and the ways they are different.

10. Mediator Neutrality as a Proxy for the Abdication of Responsibility

Rifkin and Cobb talk about the "paradox of neutrality." Both authors note that mediation is often "sold" as a process that is different from formal dispute resolution processes (e.g., litigation or arbitration) because the parties are able to construct their own agreements. In this formulation, mediators are constrained from controlling or providing input into the substance of the agreement. As a result, the type of justice promised during a mediation can only be procedural — there is no mechanism to ensure that substantive justice is achieved when the parties are responsible for their own agreements.¹²³

The paradox comes from a strict requirement of neutrality, when the term "neutrality" connotes detachment from the process. However, in practice, mediators generally have to be proactive. In being proactive, they make normative statements and assessments, thereby influencing the value systems of the parties.¹²⁴ Rifkin and Cobb conclude that the answer to the dilemma of the paradox involves providing for compromise, allowing the parties to reach an agreement that suits them, and balancing the parties' strengths.

¹²² See Morris, *supra* note 68, at p. 17 for additional cites and discussion. Also Michelle LeBaron Duryea, *supra* note 91.

¹²³ Sara Cobb and Janet Rifkin, "Practice and Paradox: Deconstructing Neutrality in Mediation" (1991) 16 *Mediation Law and Social Inquiry* 35, at p. 47.

¹²⁴ *Ibid.*, at pp. 47-48.

11. The Lack of Mechanisms to Ensure Financial Disclosure

Full disclosure of financial information is necessary for a fair and equitable settlement or agreement. This statement holds true for all of the various dispute resolution processes. Without full disclosure, the non-informed or less-than-fully informed party is at a severe disadvantage in terms of framing a position.

Non-disclosure of assets has been identified as a barrier to access to justice for women litigants in the traditional court system.¹²⁵ Enforcing the full disclosure of assets has eluded the court system, even with the law supporting full disclosure. Based on this experience, it is predictable that mediation services will be hard pressed to ensure full disclosure of financial information, which is likely to work to the disadvantage of women clients.

12. Issues Related to Mediator Confidentiality

Issues related to confidentiality are in some ways related to the distinction between open and closed mediation. The restrictions on confidentiality apply to both the mediators and the parties. Confidentiality provisions guarantee that the mediator cannot reveal the substance of the mediation to anyone — including the court — by forwarding a report revealing details of the mediation that would not necessarily come out in the litigation process. Likewise, the parties are proscribed from using information shared during the course of the mediation to bolster their own position in another proceeding.

Without a guarantee of complete confidentiality, parties are unlikely to share information freely. Indeed, confidentiality is viewed as essential for mediation; otherwise parties have no incentive to make potentially harmful disclosures that could be used against them in a subsequent proceeding.

In the critical literature, there is a fair amount of consensus that complete confidentiality is required for the mediation process to work. The absence of complete confidentiality can contribute to the creation of an atmosphere of coercion during or after the mediation. One way of minimizing, or even eliminating, coercion from the process is to deny the mediator any ability to make a recommendation to the court if the parties do not reach a settlement.¹²⁶ Using mediators to “back up” the courts by reporting on the content of the mediation defeats one of the primary purposes of mediation — that is, the encouragement of the communication of needs in an honest and open manner. On the other hand, the privacy and confidentiality associated with mediation not only

¹²⁵ The Law Society of British Columbia, *supra* note 46, at pp. 5-71.

¹²⁶ Vincent, *supra* note 119, at p. 289 .

removes the process from public scrutiny, but also allows spousal abuse, child abuse and other criminal acts to be obscured by a veil of secrecy.¹²⁷

¹²⁷ Felicity Kaganas and Christine Piper, “Domestic Violence and Divorce Mediation.” (1994) 3 *Journal of Social Welfare & Family Law* 265, at p. 268.

D. Summary Comments

Family mediation continues to be touted as a cost-efficient, more humane dispute resolution mechanism. Policy-makers, judges and court administrators are increasingly demonstrating an avid interest in mediation's promise to bring down costs, reduce animosity, and alleviate the heavy volume of cases, among other things.

However, there are a number of factors which suggest that family mediation is not a panacea for the troubles that plague the family justice system. Nor is family mediation without serious problems of its own. A review of the literature and consultation with women's advocates and academics demonstrates that both the theory and practice of family mediation has drawn substantial criticism. To their credit, there are some proponents of mediation who are listening to these critiques; this is demonstrated by attempts to revise practices and implement changes to address these criticisms.

In summary:

- (i) The comparison between mediation and litigation is both inappropriate and misleading. This comparison creates unrealistic expectations about mediation services and ignores the reality that litigation is the dispute resolution mechanism of last resort. Lawyer-assisted negotiated agreements are a far more commonly used form of dispute resolution than is the formal court system.
- (ii) The concept of mediation is premised on the voluntariness of the process; that is, the parties to a mediation must voluntarily choose this dispute resolution mechanism over others. Yet, serious concerns have been raised that there is an element of compulsion that characterizes most family mediation services. In mandatory mediation programs (or mandatory referrals), the compulsion is direct and unambiguous. With respect to voluntary mediation programs, the compulsion is less direct, more subtle, but equally as coercive. The fact that such compulsion/coercion exists seriously undermines the integrity of the mediation process.
- (iii) Similarly, the concept of mediator neutrality requires substantial modification if mediators are to adequately address the concerns of feminist academics and women's advocates. Mediator neutrality — meaning impartiality or lack of bias or intervention — can only be appropriate where the essential elements of mediation (that is, voluntariness, roughly equal power and a spirit of cooperation) are all present. In practice, this utopian state of affairs is not likely to characterize the majority of situations. In any event, it is unclear whether neutrality as currently conceived is the standard to which mediators should aspire. At the very least, a standard of neutrality results in an abdication of responsibility for the substantive fairness of an agreement — wherein only process issues are scrutinized by the mediator.
- (iv) Diversity issues have not received the degree of attention and analysis they deserve in the literature on family mediation. There is some discussion of the need to be aware of issues related to cultural diversity, but this discussion primarily occurs in the

general literature on ADR. Similarly, gay and lesbian mediation-related issues have not been integrated in the feminist literature to the extent one might expect.

- (v) The problems that pervade the formal family justice system — gender bias, lack of meaningful integration of diversity issues, difficulty gaining access to quality legal representation, insufficient training of court staff, legal counsel and judges with respect to issues related to abuse and power imbalances — are all identified in the literature as posing significant problems for family mediation services, as well. The introduction of family mediation services has not eliminated these problems for women family law consumers, but has simply reproduced them in a forum that remains outside the purview of legal standards and public scrutiny.
- (vi) Critical commentary on the failure of family mediation services to adequately address issues of abuse and power imbalances continues to occupy centre stage in the literature. There is evidence that some proponents of mediation are attempting to address some of the concerns raised by feminist academics and women’s advocates. However, there remains a reluctance on the part of mediators to acknowledge that: (1) “abuse” — whether defined widely or narrowly — is extremely difficult to detect and “screen out”; and (2) power imbalances are more common than not and are not easily rectified by “quick-fix” power balancing techniques.

These critical themes contained in the literature are at least partially reflected in publicly funded family mediation services. On a positive note there has been an attempt by the mediation programs examined in this study to address at least some of the main criticisms that have been levelled at mediation as a dispute resolution mechanism. Accordingly, the information gathered during the interviews is presented for the purpose of showing some of the steps that have (or have not) been taken to remedy some of the identified problems, and to begin to build a base of information about publicly funded mediation programs across Canada. With this information, we can begin to develop recommendations to guide policy-makers, service providers, court administrators and others.

PART VI — ANALYSIS OF DATA FROM FOUR PUBLICLY FUNDED FAMILY MEDIATION PROGRAMS

A. Introduction

This section focuses on presenting the results of telephone and in-person interviews with service providers and policy-makers associated with four publicly funded, and often court-connected (or community-based) family mediation services. The four family mediation services highlighted are: Burnaby/New Westminster Family Justice Centre,¹²⁸ Saskatchewan Mediation,¹²⁹ Manitoba Family Conciliation,¹³⁰ and the Ontario Court (General Division) Family Court Mediation Service in Hamilton, Ontario (Hamilton Mediation Service).¹³¹ Where possible, the information in this section is supplemented with a very limited environmental scan of the practice(s) and experience(s) of other Canadian jurisdictions.

As demonstrated in Part V, there are a number of issues and concerns for women associated with the use of family mediation as a dispute resolution mechanism. Information obtained through the interviews reveals that many of the issues and concerns identified in the literature are also shared by service providers. Using the data from the four family mediation programs highlighted in this report, this section attempts to illustrate that the critique found in the literature is germane to current developments in publicly funded mediation services in Canada, particularly as it relates to the equality rights of women clients.

¹²⁸ Interviews with Wendy Galloway, Provincial Director of Family Services, Ministry of the Attorney General, Corrections Branch on January 24, 1997 and with Beverly Porter, Local Director, Family Justice Counsellor, Burnaby/New Westminster Family Justice Centre, Ministry of the Attorney General on January 28, 1997 (and a subsequent telephone call on February 13, 1997 to complete the interview).

¹²⁹ Interview with Ken Acton, Director of Mediation Services, Saskatchewan Mediation, Department of Justice on February 12, 1997.

¹³⁰ Interview with Sandra Dean, Director, Manitoba Family Conciliation on January 30, 1997.

¹³¹ Interviews with Lorraine Martin, B.A., M.S.W., Clinical Coordinator of Social Work, Office of the Children's Lawyer, Ministry of the Attorney General (formerly Manager, Mediation Services, Hamilton Unified Family Court during the Pilot Project and Past President of Family Mediation Canada) on January 24, 1997 and with Maggie Hall, M.S.W., Court Mediator, Ontario Court (General Division) Family Court Mediation Service, Hamilton, Ontario on January 28, 1997.

Information is provided about how four publicly funded family mediation programs are being delivered. Most importantly, this section serves to both highlight some of the key equality concerns of women raised in the literature, and to provide an analysis of the extent to which these concerns are being addressed by the programs surveyed. In this way, this section, taken together with the previous sections, lays the groundwork for the further research, evaluation, and policy development that is necessary in order to ensure that women's equality concerns with the current practice of family mediation in Canada are addressed.

Specifically, this section provides (1) background and descriptive information about the four mediation services; (2) a discussion and analysis of key issues related to women's equality concerns that the literature review highlighted and the case studies confirmed; and (3) summary comments.

The researchers cannot overemphasize that the information provided is to serve as a thumb-nail description of current developments in publicly funded family mediation services. It is in no way designed to provide an exhaustive account of all policies and practices currently in effect in the four programs examined. Nor should the information be construed as an evaluation of the merits of the various programs. Conclusions or observations based on information obtained from the four family mediation programs are at best preliminary, and require more in-depth study.

B. Background and General Description of Four Publicly Funded Family Mediation Programs

Here, background information and a summary description of four publicly funded, and often court-connected (or community-based), family mediation programs is presented. The interviews conducted with their representatives were designed to collect information about those features of the mediation services that are of particular concern to women (i.e., screening protocols, access to legal representation and the like). A detailed overview of the issues canvassed and the responses provided by representatives of each program can be found in Appendix A. The Interview Guide developed to assist the researchers to gather appropriate information is found in Appendix E.

Mediation services have been available both publicly and privately since the mid 1970s.¹³² In the past 10 years, however, public policy-makers have become intensely interested in the potential of mediation services to provide an alternative form of dispute resolution in family law cases. Publicly funded family mediation services of one form or another are now offered across the

¹³² i.e., Ontario and Saskatchewan. See Alberta Law Reform Institute, *supra* note 59.

country. Generally introduced as pilot projects,¹³³ many eventually evolve into permanently established services funded by provincial governments.

1. British Columbia

British Columbia is one of those jurisdictions where family mediation services have been available to clients seeking an alternative to the litigation process for many years. For over 20 years, family court counsellors (now called family justice counsellors) have provided mediation services throughout the province. In 1994, the provincial government announced a new initiative — the Community Family Justice Centre Project.¹³⁴ As part of this initiative, four Community Family Justice Centres were established as pilot projects in communities chosen to reflect British Columbia's geographic and demographic diversity: Burnaby/New Westminster, Kamloops, Kitimat and Nicola Valley.¹³⁵

Available program documentation describes these Family Justice Centres as “community-based” in the sense that each Centre was originally designed to reflect the unique needs and interests of the community it serves. While they have links with the family court system, the Centres are usually situated in a convenient location within the community and are not necessarily housed in the courthouse. Consequently, each Centre functions slightly differently, although they all share a common framework of principles. A community advisory panel was established for each Centre to ensure participation and input from individuals from the community.

These pilot projects ran for 12 to 18 months beginning in July 1994.¹³⁶ Toward the end of their mandate, an evaluation was conducted by an independent consulting firm to determine if the project had, in fact, improved the way in which family justice services were delivered.¹³⁷ The evaluation report cited extensive support for the Family Justice Centres, and concluded that they

¹³³ See for example, Dartmouth, Nova Scotia, which currently operates a pilot project to provide mediation with respect to access, custody, maintenance and occasionally property division.

¹³⁴ For more information see “The Family Justice Project — A Project to Develop Comprehensive Proposals for the Reform of the Family Justice Services in British Columbia” (March 1994) Ministry of the Attorney General.

¹³⁵ The latter was an Aboriginal community. This Centre is no longer in operation in B.C.

¹³⁶ Program documentation describes the initiative as informed by both the past experience of the family court counsellors with mediation and by a series of 13 reports produced by the B.C. government beginning in 1976. All of these reports studied and made recommendations with respect to how to improve the quality of services offered to B.C. families using the family justice system. The proposed reforms did not involve any changes to the existing legislation.

¹³⁷ Malates & Associates Ltd. “Family Justice Reform — Pilot Project Evaluation” (December 1995).

had resulted in better service to clients. Three of the four Family Justice Centres are now permanent (Burnaby/New Westminster, Kitimat and Kamloops) with other similar centres likely to be established.¹³⁸

2. *Ontario*¹³⁹

In 1988, the Attorney General of Ontario struck an Advisory Committee on Mediation in Family Law to examine the role and function of mediation in family law and develop a model for the delivery of future mediation services. The Advisory Committee concluded that mediation constituted “a positive development in family law and represented an alternative to the traditional, adversarial method of resolving marital disputes.”¹⁴⁰

The Advisory Committee recommended the implementation and evaluation of a comprehensive mediation model. In May 1990, the Attorney General announced that Hamilton had been selected as the project site for the implementation of the Advisory Committee’s recommended model, subject to a few modifications. In February 1991, the first comprehensive mediation service was available to the public. The comprehensive nature of the mediation services to be offered was a key component of the pilot project. This shift to comprehensive mediation marked a significant change in policy for the government. No longer were mediation services limited to custody and access disputes; rather, financial issues like support and maintenance, as well as property issues, were considered appropriate topics for mediation.

Four committees advised the Family Mediation Pilot Project: the Coordinating Committee, the Operations Committee, the Evaluation Committee and the Comparison Site Committee. Included in the membership of these committees were judges, lawyers, mediators, court administrators, and representatives from the Women’s Directorate, the Attorney General’s office and the Department of Psychology of the University of Guelph.

In 1994, Desmond Ellis and Associates completed a three-year evaluation of the pilot project. The terms of reference directed the examination of a number of issues, including:

- (i) the impact of wife assault/abuse on the process of mediation, and the impact of mediation on assault/abuse in comparison with the lawyer-negotiation process;
- (ii) the relative costs to the client and to the legal system of: (1) participation in the mediation process; or (2) involvement with lawyers who attempt to negotiate solutions;

¹³⁸ Galloway, *supra* note 128.

¹³⁹ The information for this section is taken from Desmond Ellis, “Family Mediation Project — Final Report” (July 1994) pp. 1-14.

¹⁴⁰ *Ibid.*, p.1

- (iii) legal education — an assessment of the degree to which mediation clients become informed consumers of mediation services and the court process;
- (iv) power imbalances — a description of how concerns about power imbalances between spouses and about mediator bias have been addressed;
- (v) settlements — a description of the seriousness of the issues in contention, the content of agreements, the time taken to reach them, their durability and rates of settlement through mediation and lawyer negotiations;
- (vi) a comparison of levels of user satisfaction expressed with mediation and lawyer negotiations; and
- (vii) a description of the qualifications, training and experience of mediators.¹⁴¹

The study makes three general conclusions:

- (i) Compared to lawyer negotiations and court processing of family law cases, court-based mediation is somewhat more costly to the public.
- (ii) In comparison to lawyer negotiations, the process of mediation is as satisfying to participants; it is more effective in enabling participants, especially women, to obtain the support outcomes they want; and less effective in enabling them to obtain the custody outcomes they want.
- (iii) Compared to lawyer negotiations, mediation makes a greater contribution toward preventing abuse of separated women by their ex-partners.

As a result of the generally positive findings of the report, the same service delivery model was expanded to four other sites: Toronto, Kingston, London and Simcoe. However, the fee structure has changed with the introduction of a sliding scale for fees in all of the sites except Toronto and Hamilton.

3. Saskatchewan

Mediation services in Saskatchewan developed largely in response to the foreclosure crisis in the agriculture industry of the mid 1980s. However, the intent from the beginning was not to focus exclusively on providing farm-related mediation, but to develop more broadly based dispute resolution services. According to Saskatchewan Mediation's program documentation, "this led very quickly to the development of family law fee-for-service mediation in 1990, mediation for

¹⁴¹ Ellis, *supra* note 139 pp. 2-3.

the Public and Private Rights Board and the beginnings of facilitation services for multi-party disputes.”¹⁴²

After 1990, the emphasis shifted; as the agricultural crisis began to abate, new roles started to emerge for mediation services. For example, government departments became interested in using these techniques for policy development, in areas such as the environmental field and in workplace disputes in government departments. At the same time, the general demand for the delivery of mediation services on a fee-for-service basis also expanded.

4. Manitoba

In 1984, the Department of Family Services introduced the Family Conciliation Program in Winnipeg in conjunction with the establishment of the Unified Family Court. The purpose of the program was to provide families with a non-adversarial option for the resolution of their differences. Part of its underlying rationale was the belief that social issues were as much an integral part of the separation and divorce process as legal issues. Family Conciliation attempts to provide a model of service that responds sensitively and effectively to help families, and children in particular, survive the transition of separation and divorce.

Family Conciliation is described as the social service arm of the Court of Queen’s Bench, Family Division. Its mission is to ensure the availability of quality dispute resolution services and counselling support for families affected by divorce, separation and guardianship matters. The services provided include court-ordered assessments, family mediation, parent education, support groups for children, some counselling and an extensive intake service which functions as an information and referral service.

C. Analysis Of Key Issues Related to Women’s Equality Concerns Emerging From the Data

Many of the issues discussed in the literature have been acknowledged as concerns by the service providers in the programs included in this research. In certain cases, some attempt to address these concerns has been made. However, in accordance with the critique offered by the literature, all

of the informants recognized that there are still a number of issues that require further research and development to ensure effective service for women clients. Using the critique in the literature as a starting point, the following provides an analysis of some of the key issues related to women’s equality concerns, and the extent to which they are being addressed by the four selected family mediation services. The discussion under each heading below serves to highlight the concern raised in the literature, and to provide information about how the programs surveyed have acknowledged the problem and attempted to address it. Comments are also provided about

¹⁴² Program documentation from Saskatchewan Justice, “The Role of Mediation Services” (July 15, 1996).

where further research, evaluation and policy development are necessary. While the literature canvasses many issues of concern, here only six key issues are highlighted.

1. Addressing Linguistic and Diversity Issues

The literature observes that neither the critics nor the proponents of family mediation have paid sufficient attention to diversity issues. Similar observations can be made about the four publicly funded family mediation services in this report. Obtaining reliable statistics and other data which would assist in the development of a client profile for the various mediation programs was difficult, and generally unavailable. However, according to estimates provided by the informants, the clientele of their services tend to be predominantly English-speaking, white, heterosexual couples from a range of income levels.¹⁴³ All informants agreed that the lack of both culturally sensitive services and services readily available in languages other than English has the potential to prevent some persons from accessing or benefiting from their services.

Of the four programs surveyed, three of them reported maintaining some capability of delivering services in French.¹⁴⁴ The Burnaby/New Westminster Family Justice Centre uses interpreters when required to provide service in other languages. Manitoba Family Conciliation and the Hamilton Family Court Mediation Service reported retaining sign language interpreters in the past. None of the programs offer mediation services in any of the Aboriginal languages, nor do they translate their printed informational materials into these languages.

Clearly, this is an area where more attention should be focused to ensure that services are made accessible to all women who wish to make use of them. Consideration should be given to how to break down barriers to these services for women with disabilities, racial and ethnic minority women, Aboriginal women, lesbians and non-English speaking women.

2. Disclosure of Financial Information (Assets)

To arrive at a fair and equitable agreement between parties, full disclosure of financial information, including assets and debts, is essential. Critics have identified non-disclosure of all financial information and assets as a barrier to access to justice for women in the traditional court system. According to the interviews, the issue of disclosure can often be a problem during mediation as well. Therefore, the non-disclosure of full and frank financial information can act as a barrier to women in achieving a fair and equitable agreement through the mediation process.

¹⁴³ This observation is about those clients who actually participate in mediation or conciliation, and not those who attend the parent education programs. The parent education programs may attract a more diverse group of clients, but it is difficult to tell since we did not ask this question specifically and these services keep incomplete statistics.

¹⁴⁴ Winnipeg, Burnaby/New Westminster, and Hamilton.

None of the four programs have been authorized to require parties to provide financial statements. Staff mediators do not have the authority to cross-examine parties on the financial statements they provide. The court-based system has these traditional safeguards to ensure that full financial disclosure has been made between the parties before any agreement about how to divide these assets is reached. However, some of the informants have devised mechanisms for helping to ensure that agreements are only reached with full information about the financial position of both parties.

For example, the family court counsellors staffing the Burnaby/New Westminster Family Justice Centre inform both parties that, in order for the mediation process to work, each party must completely disclose all information about his/her respective financial situation. Further, if the parties want to make their mediation agreement an order of the court, they are required to file their respective financial statements with the court. The mediator has no real authority, legislated or otherwise, to compel the production of financial information. However, British Columbia program representatives believe that, for the most part, the current method seems to result in the production of accurate financial statements.¹⁴⁵

The mediators with the Hamilton program will not mediate financial issues unless both parties are represented by counsel.¹⁴⁶ In this way, they can rely on lawyers to obtain a sworn financial statement from each of the parties, which can be shared with the parties and the mediator.

Public mediators in Saskatchewan and Manitoba are in a similar situation; they too have no authority to compel the production of financial information. Consequently, informants from both programs indicate that the resolution of financial issues is left to the lawyers.¹⁴⁷ Saskatchewan Mediation staff may invite lawyers to come to the mediation session. Some lawyers accept the invitation and attend; others do not, preferring instead to wait and see what kind of agreement is reached.

Although some of the informants have devised mechanisms for facilitating frank disclosure between the parties as to financial assets and debts, the bottom line is that in all cases, there are no procedural requirements in place governing mediation that compel this kind of disclosure. Therefore, the only way for mediators to ensure that financial disclosure has been made is to rely on the parties' lawyers to obtain the required information. Unfortunately, mediation clients are increasingly unrepresented by counsel due to financial constraints; therefore, this safeguard is not always available. While informants from some of the programs believe that the current practices are sufficient, it appears that the concerns raised in the literature are valid and that more procedural safeguards are required.

¹⁴⁵ Porter, *supra* note 128.

¹⁴⁶ Hall, *supra* note 131.

¹⁴⁷ Acton, *supra* note 129 and Dean, *supra* note 130.

3. Access To Legal Representation/Legal Aid

(a) Access to Legal Representation

One of the most significant concerns with mediation is the lack of access to legal representation for participating parties. Although all of the informants indicated that they strongly encourage all their clients to seek legal advice, specific mechanisms to ensure that clients have access to and the benefit of such advice do not exist in all four mediation services. As a rule, the mediators from the four programs are generally focused on trying to help the parties reach an agreement, and not necessarily on ensuring that their legal rights are met. Traditionally, the latter is the responsibility of the parties' lawyers, if they are involved.

Parties who use mediation to settle family disputes are generally encouraged to make agreements with which they can live. In some cases though, such mediated agreements may not always be in the parties' best interests from a legal standpoint. This observation underscores the importance of involving lawyers throughout the mediation process, from beginning to end, including a review of the final mediated agreement. The involvement of lawyers is necessary to ensure that neither of the parties bargain away rights and entitlements without fully understanding the consequences.

It is the lack of legal representation for women that is of particular concern to the critics of mediation. This concern is all the more real given funding cutbacks to legal aid. This has made it difficult, if not impossible, in some provinces for parties to secure legal representation while engaged in the mediation process. The availability of legal aid is addressed in more depth below.

All of the informants recognized that client access to legal representation/advice is a critical component of mediation services, particularly where financial matters like support payments and the division of property are at issue. While none of the four mediation programs provided clients with access to on-site legal services, some key informants indicated that they were able to secure legal representation for their clients in certain circumstances. Others indicated that they provided information about how clients could secure legal representation on their own.

For example, Hamilton Mediation Services will, on occasion, arrange for duty counsel¹⁴⁸ to give an unrepresented client legal advice on financial and property matters. In Saskatchewan, where comprehensive mediation is also practised, mediators are very reluctant to proceed with mediation on property matters if the parties do not have legal counsel. Unfortunately, legal aid is generally reluctant to take on cases involving property disputes. Nevertheless, on occasion, a legal aid lawyer may be provided to those clients who cannot afford to hire one privately. The Burnaby/New Westminster Family Justice Centre does not have lawyers on staff to provide legal

¹⁴⁸ A lawyer who is paid by the government and who is available at the courthouse to give summary advice to parties appearing before the court who do not have their own lawyer

advice to clients or mediators. Mediators regularly inform prospective clients of the options available for obtaining legal advice, including: (1) the province-wide lawyer referral service;¹⁴⁹ (2) the legal aid program; and (3) the hiring of their own lawyer.

These preliminary findings suggest that important related topics for further research and analysis include:

- (i) the extent to which mediation clients have direct access to legal services through the mediation program;
- (ii) the extent to which mediation clients exercise access to legal services; that is, what proportion of mediations actually have lawyers involved at some stage;
- (iii) in those cases where lawyers are involved, what proportion of lawyers are: (1) retained privately, (2) provided through legal aid, or (3) provided by the mediation services; and
- (iv) what is the policy of each of the legal aid programs across the country with respect to family mediation?

¹⁴⁹ For \$10.00 the client has access to a lawyer for 30 minutes.

(b) *Access to Legal Aid*

Based on the information gathered from the four family mediation programs,¹⁵⁰ it is difficult to make definitive statements about whether parties who engage in family mediation have access to lawyers through legal aid. However, some preliminary observations can be made:

- (i) Legal aid and mediation do not appear to be connected in the four family mediation programs. That is, it is not clear in all cases whether prospective mediation clients have access to legal aid while engaged in the process of mediation. The one exception appears to be Saskatchewan, where mediation clients can qualify for legal aid, except in relation to property issues.
- (ii) In British Columbia, staff at Family Justice Centres make referrals to legal aid for those clients who wish to retain counsel. However, it is not clear from our information what percentage of referrals result in retaining a lawyer, and whether a person in British Columbia engaged in the mediation process is also able to obtain a legal aid lawyer for advice on issues that arise during the mediation.
- (iii) In Ontario, severe budget cuts have resulted in the establishment of a priority system for the issuance of legal aid certificates. As a result, far fewer people are eligible for a drastically reduced number of available certificates.¹⁵¹ This appears to mean that only individuals involved in very dire family law matters, such as the protection of the safety of a spouse or child, or the protection of an established child/parent bond, are likely to receive a legal aid certificate. The impact of this new policy on clients using mediation services is not clear. However, it appears likely that very few clients using mediation services will be able to also qualify for legal aid to have a lawyer review their agreements or to provide them with legal advice during the course of mediation sessions.¹⁵²
- (iv) In Manitoba there appears to be no real connection between legal aid and mediation.

¹⁵⁰ See Interview Guide attached as Appendix E to this report for the questions asked of the informants on this topic.

¹⁵¹ See “Ontario Legal Aid Plan to Provide Fewer Legal Services for the Province’s Poor,” *Communique*, (The Law Society of Upper Canada, March 11, 1996) where Susan Elliott, head of the Law Society of Upper Canada, the body that administers legal aid in Ontario, says, “It is now unlikely that a person will be eligible for legal aid unless there is the possibility of incarceration, the safety of a spouse or child is at risk, or the client is seeking refugee status from a country with a well-established record of violence and oppression.”

¹⁵² Interviews with Hall and Martin, *supra* note 131, indicate that in Ontario more and more clients are unrepresented in the family courts and that family law duty counsel at the courthouse is being used more often to try to meet requirements that mediated settlements of property matters be reviewed by a lawyer.

In general, access to legal aid goes hand-in-hand with giving parties to mediation access to legal representation, especially for those clients who cannot afford to pay to consult with a lawyer. According to some of the key informants, the reduction of legal aid budgets has already begun to affect the ability of clients of mediation services to access legal representation during mediation. This is a serious concern, since parties may be making agreements with no understanding of their legal rights and entitlements, and with little protection against future ramifications of these mediated agreements. While mediation service providers are trying to assist parties to obtain legal advice in the best way they can, their methods are less than ideal.

The issues of legal representation and legal aid are linked and must be further explored to determine their impact on women who engage in family mediation. The concerns raised in the literature about the dangers of concluding a mediated agreement without the benefit of legal counsel are very real ones for the key informants of the four mediation programs. Clearly, this is an area for urgent policy action.

4. Abuse And Power Imbalances — Screening Tools and Protocols to Protect the Safety of a Client

A significant amount of the literature focused on the inappropriateness of mediation for women who are exiting from an abusive relationship. All of the informants strongly expressed the view that mediation is not an appropriate alternative for all parties, particularly where there is a power imbalance or history of abuse. They were also in agreement that one indicator of a power imbalance is if one party exercises absolute control over the financial and day-to-day decisions of the other party. This recognition has prompted strong support for the development and implementation of screening tools specifically designed to detect power imbalances and situations of abuse.

Each of the four mediation services has developed screening tools to identify situations involving abuse that are not suitable for mediation. These screening tools vary in sophistication and comprehensiveness. In addition, all four of the mediation services have offered some form of training for staff on the use of screening tools. The screening methods are varied; they generally include the completion of a written intake interview, conducted either by telephone and/or in person. Further, informants indicated that screening continues throughout the mediation process in each of the mediation services. In other words, screening not only takes place when clients are applying for mediation services, but also throughout the duration of the process. (Two examples of screening tools developed for use by publicly funded family mediation programs are included in Appendix F.)

Each of the programs has developed responses to assist or protect the more vulnerable party in situations where the screening tool detects abuse or a severe power imbalance. Often, the response is to screen these particular parties out of the traditional face-to-face mediation process. However, there are a number of alternative responses that are used by the four mediator programs canvassed in this report. (These responses are explained in more detail in Appendix A.)

Some programs have already or are currently in the process of reviewing and updating their screening protocols.¹⁵³ By including more detailed questions about the nature of the parties' relationship and so on, the program representatives hope to develop a more reliable screening tool. There is also an effort to provide mediators with effective training on how to recognize the signs of abuse. Such initiatives indicate there is a recognition of the need to develop and continually improve the effectiveness of screening policies and procedures and a full commitment to doing so in the four family mediation programs studied.

Overall, the informants from the four mediation programs seem to feel fairly confident that their screening techniques are working to both screen out ineligible parties for mediation, and monitor for situations that are initially accepted for mediation, but must be terminated due to the identification of abuse during the mediation process. Despite the awareness that not all family disputes are amenable to mediation, all of the informants agreed that one of their most difficult tasks is the development of a 100 per cent effective and reliable screening mechanism. While some programs, as mentioned above, have been undergoing refinements to their screening tools, a number of the informants admit that current screening mechanisms are not foolproof, and that inappropriate situations are not always screened out.

Finally, information was gathered about the various ways the four mediation programs have attempted to design and implement protective measures to assist clients who may be at risk from their partners, but who have not been formally screened out of the mediation process. All programs have devised certain techniques to balance power between the parties and to minimize the risk of physical and/or psychological harm to their clients. Staff mediators gave anecdotal accounts from their respective programs that indicate these power-balancing techniques work to assist their clients. However, it is not clear whether, from the clients' point of view, these interventions are truly effective, and not known what happens to them after they leave the mediation sessions. A greater understanding of the impact of all these measures on women, particularly those vulnerable to their partners due to power imbalances or abuse, is required. These techniques and measures require further study to determine if they are effective in protecting women clients.

It is clear that a great deal more research is needed to determine how to define a failsafe screening tool. It is equally important to determine the type of training needed to ensure that mediators are fully competent to use screening techniques and processes. Such training must include methods to assess the success of techniques used to balance power between parties and to ensure that parties remain safe throughout the mediation process. Finally, mediator training with respect to these important issues requires ongoing and careful scrutiny as to its relevance and usefulness. The failure to rigorously examine the use of screening mechanisms, of related training and its effects may result in mediation becoming yet another forum in which women are

¹⁵³ The screening procedures used by Manitoba Family Conciliation are currently being reviewed by a Masters student in social work. Ontario's screening tool was updated in 1995 by Desmond Ellis and Lorraine Martin.

re-victimized by the very process which is ostensibly designed to assist in their removal from an unhealthy and unsafe situation.

5. *Accountability Of Mediators — Certification, Academic Qualifications and Training*

None of the informants indicated the existence of a formal mechanism designed specifically to hold mediators accountable for their work. Rather, informants confirmed that complaints against staff mediators are dealt with using mechanisms developed in the course of the regular employee-employer relationship,¹⁵⁴ or through the general process for dealing with complaints about services provided by government.¹⁵⁵

Another issue related to the accountability of mediators is the development of adequate standards of practice and the establishment of appropriate qualifications and training. Critics of mediation suggest that although appropriate standards of practice and training will not necessarily address all of the criticisms of mediation, they will go a long way to rectifying some of its shortcomings.

All of the informants supported the notion that there has to be a way of ensuring that mediators are highly skilled, well-trained and educated on the effects of systemic inequality on women, racial minorities, people with disabilities and members of other disadvantaged groups. There is also a growing awareness that a mediator's competency to detect power imbalances and abuse must be better evaluated.

Based on the information obtained from the interviews, there are some general statements that can be made about the current academic credentials, certification processes and training requirements

of mediators. First, no national standard exists regarding minimum educational requirements governing the hiring of mediators. As a consequence, the academic credentials required of mediators vary across the country. Second, most programs appear to require, as a matter of policy, a university degree in the arts, social sciences, social work or equivalent (a law degree supplemented by a degree in social work was also identified as desirable). Third, all programs require some work-related experience in the helping professions (e.g., social work). Fourth, most programs require 40 to 80 hours of mediation-specific training in order to qualify to work as a mediator.

Most provinces do not have a certification process in place for mediators; this leaves mediation services largely unregulated in Canada. Quebec is an exception. In Quebec, there is a legislative requirement that only certified mediators can practise mediation. The certification process is

¹⁵⁴ Dean, *supra* note 130.

¹⁵⁵ Acton, *supra* note 129.

overseen by a provincial professional association of mediators.¹⁵⁶ In addition, Nova Scotia is in the process of developing a certification program for mediators practising in that province.¹⁵⁷

Family Mediation Canada (FMC) has recently developed a comprehensive set of mediator practice guidelines and a mediator certification process. FMC is currently seeking funding to implement these guidelines and certification processes. However, FMC is a purely voluntary association, and not all publicly funded programs offering mediation services are necessarily members.¹⁵⁸

Rather than relying solely on mediator certification to maintain quality control, a movement toward competency-based assessment is beginning. For example, the British Columbia government is currently developing a mediator competency assessment tool, believed to be the first of its kind in North America, specifically for assessing skills. The tool is designed both to set standards for mediators and assess their skills in accordance with these standards. As well, Family Mediation Canada is currently attempting to obtain funding to develop a mediator competency assessment tool.

It is clear from the interviews that mediators are not regulated by a professional body, nor are there formal mechanisms in place to assess their competency. Academic qualifications required to become a mediator vary, as does the amount of training. While some accountability is maintained through the employer-employee relationship, as most of those interviewed are public

¹⁵⁶ Interview with Pierre Tanguay, Counsel, *Direction générale des services de justice*, Government of Quebec, January 1997.

¹⁵⁷ Interview with Annette Strug, AMS Mediator Associates, Halifax, Nova Scotia, January 1997.

¹⁵⁸ Family Mediation Canada (FMC) is a national organization working with provincial mediation associations as part of a network of interdisciplinary associations of lawyers, social workers, human services and health care professionals, clergy, judges, etc. The national association is affiliated with 12 provincial/territorial associations in Canada, and has strong ties to members in the U.S. and Europe. (Information obtained from FMC's 1996 Membership Registration Form.)

According to FMC's 1985 Articles of Incorporation, their objectives include: (1) to provide for a Canadian forum for the exchange of ideas, experiences, research and opportunities relating to all aspects of family mediation through newsletters, conferences and seminars; (2) to develop and encourage a code of ethics and standards of practice; (3) to develop and encourage training and continuing education; (4) to encourage and conduct research into all areas of family dispute resolution; (5) to provide consultation to provincial mediation associations and other interested agencies, groups and individuals; and (6) to inform the Canadian public about the advantages of mediation. For more information see "Family Mediation Canada (FMC) Practice Guidelines and Family Mediator Certification Process" (February 1997 Draft).

servants, there is a concern about how to ensure that mediators are qualified to do their job, and are, in fact, doing it in a way which upholds women's equality concerns. This topic requires further study and discussion.

Our conclusions, based on information gathered from the interviews and the literature review, can be summarized in the following manner: the need to impose some form of regulation regarding mediator qualifications and standards of practice becomes crucial when considered in the context of the following points. Specifically, mediators must possess:

- (i) a sophisticated understanding of how issues of abuse and power imbalance can undermine the effectiveness of mediation;
- (ii) the requisite experience and skills in order to be able to recognize and act on issues of abuse and power imbalance; and
- (iii) a sincere recognition of the potential to cause serious harm to women if mistakes are made regarding the identification of abuse and power imbalance.

6. Voluntariness of Mediation — Parent Education Programs and Mandatory Mediation in Quebec

All of the informants stressed the importance of voluntariness as the centrepiece of successful mediation. That is, ideally, couples should freely choose mediation as a method of resolving their family law dispute, based on a careful assessment of all processes available to help them achieve the most satisfactory results. The literature stresses the danger of parties entering into mediation on

the basis of force or coercion, since any agreement will not be made truly freely, nor will it reflect what the parties need to resolve their dispute. Based on interviews with the informants, there are signs that subtle and not-so-subtle forms of coercion or pressure are creeping into the entire process of mediation. This pressure takes a variety of forms, such as judges "referring" couples

to mediation, and strong incentives to try mediation before filing court documents. Moreover, voluntariness is becoming a particular concern with the growing trend towards mandatory parent education in Canada, and the recent introduction of legislation in Quebec that requires couples to go to mediation before proceeding to court. These two phenomena will be examined in the following sections of the report.

(a) Parent Education Programs

Parent education programs provide information and education to parents who are separating or initiating divorce proceedings about: (1) how separation and divorce affects family members, primarily children; and (2) the alternative processes available to help parties resolve their family law disputes. These programs are being offered across the country.

To date, legislation mandating separating parents to attend parent education programs does not exist in Canada. However, this does not mean that attendance at such programs is always completely voluntary. For example, information gathered during the interviews suggests that

although participation is voluntary, parties are often urged by judges, mediators and counsellors to attend a parent education program prior to any kind of interaction with the court system.

For example, parent education sessions in Manitoba, British Columbia, Ontario, Saskatchewan and Newfoundland are at present voluntary, in the sense that they are not mandated by legislation. However, in these provinces, counsellors and/or mediators strongly recommend that both parents attend these sessions. In Manitoba, the parent education program is considered a vital component of the screening process; attendance is strongly encouraged. The encouragement usually takes the form of an intake counsellor advising parents that a policy exists that requires attendance, and that in any event, they should attend for the sake of their children.

Policy-makers in British Columbia, Saskatchewan and Manitoba are currently considering making attendance at parent education programs mandatory.¹⁵⁹ Policy-makers and service providers in both Dartmouth, Nova Scotia and Edmonton, Alberta consider parent education to be mandatory.¹⁶⁰

In Edmonton, and for a 50-mile radius around the city, all parties who file an application with the Court of Queen's Bench must attend a seminar entitled "Parenting After Separation." The application is processed only after the applicant produces a certificate of participation in the seminar.¹⁶¹ While there is no legislation in Alberta requiring parents to attend parent education programs, the mandatory enforcement of this practice has gone unchallenged. In the case of matters that are heard by Family Court, attendance in such programs becomes mandatory where the matter is adjourned for trial.

Recently, a pilot project in Dartmouth, Nova Scotia has made similar sessions mandatory by way of a practice direction from the bench. In Dartmouth, individuals who apply to the courts for adjudication or variation of matters related to custody, access, or support are required to attend a parent education session.¹⁶²

¹⁵⁹ A lobby to make parent education programs mandatory is currently under way in B.C., according to Bev Porter. In Saskatchewan, Ken Acton suggests that it would be preferable to make parent education mandatory, rather than attendance at a mediation orientation session, which is now the case. In Manitoba, the Civil Justice Task Force report released in September 1996 recommends that parent education be mandatory.

¹⁶⁰ Interview with Judge Jim Williams, Family Court of Nova Scotia in January 1997.

¹⁶¹ Mandatory participation in the seminar began as a pilot project in early 1996. The pilot concluded in early 1997 and it was decided that the seminar should continue free of charge. Preliminary plans are under way to extend the seminar to the rest of the province. (Interview with Ken Cunningham, Manager, Parenting After Separation Seminars, Alberta Department of Family and Social Services on January 20, 1997.)

¹⁶² Williams, *supra* note 160.

Both New Brunswick and Prince Edward Island are examples of provinces that do not fund parent education programs as part of their family justice systems.¹⁶³ However, New Brunswick is studying the feasibility of offering parent education programs in order to address some of the problems that have been identified with their family justice system.

The chief concerns with parent education programs are: (1) how information about mediation is presented, and whether it is promoted as the preferred method for resolving family disputes; and (2) how the existence of violence, abuse and power imbalances is acknowledged as contraindicated for mediation. If the available alternatives for resolving disputes are presented in a neutral fashion to participants, this concern is somewhat alleviated. Problems arise, however, where the goal is to promote mediation over and above other dispute resolution mechanisms. Without attending a parent education program, it is difficult to assess accurately how information about mediation services is actually provided. Clearly, there is a need to assess the messages and the subtle pressures that may exist.

It is also not clear the extent to which screening mechanisms, power-balancing techniques and other measures to protect spouses are explained during these sessions. This aspect of parent education programs is also important to assess.

(b) Mandatory Mediation in Quebec

Quebec is the first province to make mediation mandatory. The legislation provides that parties to a custody, support or property dispute will not be permitted to apply to the court for a hearing of the matter until an attempt has been made to mediate the dispute. To ensure that mediation is attempted, any application to the court must be accompanied by a mediation report. The proposed bill provides for exceptions where there is “valid cause”; for example, where: (1) there is a history of spousal or child abuse; (2) one of the parties is legally incapacitated; or (3) one of the parties resides outside of the province.¹⁶⁴

The literature has raised many serious concerns regarding mandatory mediation in family law disputes. It is not clear whether Quebec’s move will become a trend across Canada, but it is a significant development — one that undermines the voluntariness principle at the heart of the majority of mediation services in Canada. In general, the emphasis on making these programs mandatory prior to any contact with the justice system is a concern in and of itself. While there appear to be exceptions to the Quebec legislation’s mandatory requirement to seek mediation, it is not clear how narrowly these exceptions will be interpreted, since the legislation has only recently been introduced. One question, for example, is how the government or the courts will define “spousal or child abuse.”

¹⁶³ Interview with Barbara Bain, Supervisor, Family Court Services, P.E.I. on January 15, 1997, and Lynda Richard, Director of Program Support for Court Services, N.B., on January 22, 1997.

¹⁶⁴ art. 814.3.

The introduction of mandatory legislation in Quebec can be regarded as a sign that the trend toward mandatory mediation, prevalent in the United States, may be creeping into Canada, particularly when cost cutting is such a concern. Mandatory mediation requires careful and thorough assessment, especially as it has the potential to have an enormous effect on the equality of women.

D. Summary Comments and General Observations about the Four Publicly Funded Family Mediation Programs

A number of general observations and summary comments about the information gathered from the four family mediation programs are listed below.

- (i) The thematic focus of the information gathered through the interviews corresponds generally to a number of policy issues identified as problematic by academics and women's advocates. The preliminary data underscore the need for a great deal more comprehensive study and research of family mediation services in Canada, particularly as they affect the equality rights of women clients.
- (ii) Generally, informants were of the opinion that mediators trained in the helping professions are better suited to the resolution of custody and access disputes than lawyers. However, these same informants also recognized that client access to legal representation and advice was a critical component of mediation services, particularly where financial matters such as support payments and the division of property are at issue.
- (iii) Informants from all four programs indicated that staff mediators encouraged their clients to get legal advice, using whatever avenues were open to them. According to all of the informants, mechanisms that ensure clients of mediation have access to legal representation regarding all aspects of family breakdown do not currently exist. The relationship of publicly funded mediation services to legal aid programs across Canada is not clear from our information. Where informants indicated that legal aid was a possibility for clients of mediation services, no further details about the eligibility criteria of those programs, or the number of billable hours attached to a family legal aid certificate were provided. Given the drastic reductions in legal aid budgets across the country, it is most likely difficult to retain a family legal aid lawyer to provide advice on the mediation of an agreement.
- (iv) It is not clear from the data at which point(s) mediation clients seek legal advice — at the beginning of mediation, during the course of, or at the end, once an agreement is reached. The general impression arising from the interview process is that if legal advice is sought, it is usually sought once a tentative agreement has been reached.
- (v) Three of the four publicly funded family mediation programs have not implemented a record-keeping system with the capacity to gather and record data on many of the features that are highlighted in this report. Consequently, there is no mechanism in place to gather accurate statistical data for further analysis with respect to these

programs. Data are simply not available in the areas of: (1) client profiles; (2) the number of mediations that are terminated; (3) the substantive fairness of the agreements; (4) the number of clients screened out of mediation (and why); (5) re-litigation rates; (6) return rates; (7) the average length of time for sessions; and (8) the percentage of clients with legal representation. The only information available on these topics is that which can be gathered through inquiries of mediation program staff as to their respective experiences with their case loads.¹⁶⁵

- (vi) In the four selected jurisdictions, formal mechanisms designed specifically to hold mediators accountable did not appear to exist. Rather, informants confirmed that complaints are dealt with using mechanisms developed in the course of the normal employee-employer relationship¹⁶⁶ or through the general process for resolving complaints about services provided by government.¹⁶⁷ Similar observations can be made about the standards of practice for mediators. Although experience in the helping professions is a common feature, the specific training, related job experience and academic qualifications required to practice as a mediator vary from province to province.
- (vii) Both women and men tend to be represented on the staff of the four publicly funded mediation services, although mediators are predominantly women. However, at all four sites, the staff appears to be predominantly white and English-speaking. A similar observation can be made about the delivery of services and related educational materials. Only one of the services is mandated to provide services in both English and French.¹⁶⁸ The informants noted that occasionally services or materials are provided in other languages, but only rarely.
- (viii) All of the informants confirmed the importance of screening for those situations (for example, where there is a history of abuse) that may not be appropriate for mediation. As well, all of the informants advised that they had developed tools for screening for such situations. The types of screening instruments used and the sophistication of the instruments varied from province to province. All of the informants describe abuse as going beyond physical violence, to include psychological and emotional abuse and issues of power and control.

These informants stress that mediators are generally becoming increasingly aware of the problems associated with power imbalances and histories of abuse. The literature

¹⁶⁵ The exception appeared to be the Burnaby/New Westminster Family Justice Centre, which has developed a database system and is currently refining it to produce these kinds of statistics.

¹⁶⁶ Dean, *supra* note 130.

¹⁶⁷ Acton, *supra* note 129.

¹⁶⁸ Dean, *supra* note 130.

and women's advocates acknowledge that mediator awareness may be increasing with respect to these issues, but point out that these same mediators may still be overestimating their capacity to deal with and neutralize power imbalances.

On one hand, the fact that service providers are paying attention to the issues of screening and abuse is reassuring; it is a sign that they are listening to the criticisms of women clients and women's advocates. On the other hand, there are still indications that some inappropriate cases are not screened out, and subsequently referred to mediation.

- (ix) There are additional concerns related to the introduction and continuation of mediation services in a cost-cutting climate. For service providers and policy-makers associated with the Hamilton Mediation Service, the emphasis on cost cutting has resulted in drastic reductions in the amount of funding available for training mediators, and in the elimination of the legal consultants who acted as resource people for the mediators. What started out as a "Cadillac" pilot project has been scaled back considerably due to financial constraints. A more immediate concern relates to ongoing discussions as to whether or not the Hamilton Mediation Service will be completely privatized. Privatization would mean that what was initially provided as a free service would become fee-for-service. It is not known whether the fee-for-service model would include a sliding scale to allow prospective clients with limited financial resources access to this service.¹⁶⁹
- (x) There is a sense that comprehensive mediation (that is, mediation of all family-law related issues) will become the norm. This is true, despite the fact that, at present, the resolution of custody and access disputes constitutes the bulk of the caseload of public mediators. If this shift does occur, many of the concerns voiced with respect to cost and other aspects of service delivery will only be exacerbated.
- (xi) The informants describe mediation as a voluntary process and an alternative to other forms of dispute resolution such as litigation. With the exception of the recent bill in Quebec, the pressure to try mediation usually takes the form of strong encouragement or advice, or in some cases, a court order. The drive towards mediation raises questions about how to preserve its voluntary element, and how to ensure that mediation is truly regarded as one of a whole range of options available for resolving family disputes.

Information obtained from the interviews lays some of the groundwork for developing recommendations regarding the steps that need to be taken to address the problems and shortcomings identified in the current delivery of mediation services. It also reveals that a

¹⁶⁹ A sliding fee-for-service has been implemented at other sites in Ontario such as Kingston, London and Simcoe, according to Martin, *supra* note 131.

comprehensive survey(s) of women's advocates and mediation clients is missing from available data. Such information is vital to improving the overall effectiveness of mediation services.

PART VII — CONCLUSIONS AND RECOMMENDATIONS

This section of the report provides some general conclusions about family mediation as it relates to women. It also sets out some of the key principles that must underpin the development of effective family mediation services for women. Finally, it provides some general recommendations about the steps that must be taken to ensure that family mediation services uphold and respect the equality rights of women clients.

These conclusions and recommendations are based on the combined results and impressions obtained from the literature review in Part V, the analysis of the data from the four family mediation programs summarized in Part VI, and the consultations with the Advisory Committee to the research project (detailed in Appendix B).

A. Some General Conclusions About Family Mediation As It Relates to Women

As stated at the outset, the promotion of family mediation services as an adjunct to the court-based family justice system has enormous implications for women's equality. The review of the critical literature and consultation with the Advisory Committee suggests that these implications are, for the most part, negative.

The growing trend toward family mediation in Canada raises serious questions about the impact of such services on women's equality aspirations. Yet, because of inadequate record-keeping practices and the closed nature of most mediation services, it is difficult to document systematically how, or if, family mediation services have considered the equality interests of women in a meaningful way.

Feminist academics and women's advocates identify the following problems for women with respect to family mediation services: (1) the bargaining away of legal rights and entitlements; (2) the bias toward the promotion of "shared parenting" arrangements, which bear a strong resemblance to joint legal custody arrangements; (3) the failure to take responsibility for ensuring legal counsel throughout the mediation process; (4) the reliance on screening mechanisms that are less than "foolproof"; and (5) the systemic nature of accessibility barriers for many women from marginalized groups.

Highlighting those facets of family mediation services that require reform and reconceptualization — to ensure that they are delivered in a way that does not systematically disadvantage women — should in no way detract from the larger reform project of eliminating similar problems from the formal family justice system. In other words, by implementing family mediation services, policy-makers and service providers are not relieved of their corresponding responsibility to improve the family justice system for women.

If the concerns of women's advocates are left unaddressed, or are addressed only superficially, there is a real danger that the current rush to embrace mediation as a panacea will result only in the entrenchment of the same problems that currently plague the court-based family justice system. The seriousness of these criticisms suggest this large-scale implementation of family mediation is undesirable from the perspective of women's equality.

At the very least, if governments are determined to go forward with these programs, they must reformulate and restructure family mediation services to be more effective for, and more responsive to, women clients. The serious implications of marriage and relationship breakdown on women's social, economic and sometimes physical and emotional well-being underscores the need to ensure that the mandate of family mediation services is based on principles that support women and their children.

Issues related to abuse and power imbalances are at the crux of the critiques of family mediation. Despite widespread acknowledgment of the prevalence of wife abuse and the difficulties inherent in its detection, family mediation services remain confident that the screening tools that have been developed effectively identify cases that are inappropriate for mediation. The prevailing assumption that family mediation is beneficial to all family law consumers, with only a limited number of exceptions, has to be removed. In light of the profound criticisms and concerns identified by front-line workers and academics, the safer assumption is that mediation is appropriate for only a limited number of prospective clients.

At the same time, the mediation literature declares consistently that mediation requires two parties of roughly equal bargaining power in order to retain its integrity as a dispute resolution process. Yet, the systemic nature of women's inequality, and the number of ways that power imbalances can manifest themselves, mean that the majority of prospective clients exhibit one or more features of a relationship based on unequal power. Further, there are various manifestations of power imbalances (e.g., depression, low self-esteem and difficulty in articulating needs), many of which do not lend themselves to quick fixes or power-balancing "techniques." Women's equality aspirations may be further eroded by family mediation services that, on one hand, claim to be "neutral and bias-free," and on the other hand, ignore the serious social and economic inequalities experienced by women in general, and women litigants in the family justice system in particular.

Mediation is not a panacea for resolving the barriers encountered by women litigants in accessing the court-based justice system. The problems and their possible solutions have been extensively documented; it is now necessary that policy-makers allocate sufficient resources and attention to ensure the effective and efficient operation of the administration of the family justice system as a whole.

SUMMARY OF CONCLUDING OBSERVATIONS

Observation #1: Any assessment of family mediation services has to be undertaken within an analytical framework that adopts women's substantive inequality as a primary principle of evaluation. While ADR services are increasingly being used to complement the traditional court-based adversarial legal system, their effects on women family law consumers have not been assessed thoroughly. This lack of attention to the potential disadvantaging effect of family mediation services, particularly on women's equality, is a serious oversight on the part of policy-makers and service providers.

Observation #2: The importance of examining family mediation in the context of the whole family justice system cannot be overstated. Family mediation services cannot be viewed as a discrete microcosm, separate from the traditional adversary process.

Observation #3: In terms of the resolution of family disputes, there are features of ADR that are compelling in theory. However, the assumption cannot be that family mediation is beneficial to all but a small number of prospective women clients. Rather, the safer assumption is that family mediation may be beneficial for a small number of exceptional women clients, but that there are serious concerns which mitigate against using it for most — especially those for whom the process is not truly voluntary, and whose bargaining power is not equal to that of their ex-partners.

Observation #4: All of the indicators suggest that mediation is gaining rapid acceptance as a dispute mechanism in the family justice system. However, both the literature review and the interviews reveal that there are critical issues to be addressed to ensure that mediation is truly effective (see above and Part VI for more discussion). While it may be difficult to curtail the use of mediation, care and time is needed to ensure that mediation does not replicate the inadequacies of the family justice system — or even worse, become a service that is inferior to other dispute resolution mechanisms, including the court-based family justice system.

Observation #5: Whatever advantages proponents may attach to family mediation, they are effectively eliminated when these services are introduced in an environment of cutbacks and deficit reduction. When legal aid programs are slashed, training monies reduced and support systems all but eliminated, family mediation programs are likely to cause serious harm to women clients.

Observation #6: Some of the concerns related to mediation voiced by academics and women's advocates are in fact shared by service providers and policy-makers as well. For example, all of the informants emphasize the importance of legal representation as an essential component of any alternate dispute resolution mechanism. According to all of the informants, mechanisms that ensure that mediation clients have access to legal advice currently do not exist.

In addition, all informants recognize that certain situations are not appropriate for mediation and that effective screening protocols are necessary. What is not as clear is whether all

inappropriate cases are being screened out, what constitutes the most effective method for screening, and whether present screening processes can avoid endangering women leaving abusive relationships.

Observation #7: There is a need to be vigilant that family mediation programs are not designed simply as an “alternative” strategy to the formal family justice system, resulting in the circumvention of the multitude of calls for reform and overhaul of the court system. At the same time, family mediation services cannot in any way detract from the rights and entitlements women litigants have gained through the courts and legislative reform.

B. Key Principles for an Analytical Framework

Set out below are some of the key principles drawn from the research. They should form the foundation for the delivery of existing or future family mediation services.

- Ensure that family mediation services remain within the public purview; or, to restate, resist the privatization of the family justice system.
- Recognize the systemic substantive inequality of women and its implications for resolving family law disputes.
- Develop safeguards to protect the legal rights and entitlements of women.
- Acknowledge the need for a fully funded family justice system, including fully funded civil legal aid programs and fully funded women’s resource groups and services.
- Ensure that any family mediation services are fully funded, and implemented in a way that ensures they are a truly voluntary alternative to lawyer-assisted negotiation.
- Integrate diversity issues in a meaningful way, by taking into consideration the particular needs of marginalized groups of women.

For example:

- racial and cultural minority women,
 - lesbians,
 - women with disabilities,
 - poor women, and
 - older women.
- Object to the use of family mediation as a shield or excuse for failing to remedy the broader problems inherent in the formal family justice system.

- Eliminate all forms of subtle and not-so-subtle pressure to use family mediation services.

C. Specific Recommendations

1. Education, Information and Support

- (i) Prospective women clients should have ready access to information about:
 - their rights and entitlements; and
 - the advantages and disadvantages of available dispute resolution processes.
- (ii) Parent education programs should be assessed to determine their content and whether they are delivered in an objective and unbiased manner.

2. Voluntariness

- (i) Mandatory mediation and mandatory referrals should be prohibited by law.
- (ii) Measures should be implemented to ensure that prospective clients are not pressured to engage in or continue with mediation.
- (iii) If a client chooses to terminate mediation for any reason, there should be no repercussions.
- (iv) The trend toward mandatory parent education should be reviewed.
- (v) Parent education programs should be assessed to determine whether or not parents are pressured, subtly or otherwise, into choosing mediation to resolve their disputes.

3. Legal Representation and Legal Aid

- (i) Access to legal counsel must be a required component of family mediation services.
- (ii) Access to legal counsel should include the benefit of legal counsel prior to mediation, during mediation and after the mediated agreement has been finalized.
- (iii) Family mediation programs should facilitate the attendance of lawyers in the mediation sessions.
- (iv) Legal and accounting/financial professionals should be available to staff mediators for consultation.

- (v) Fully funded legal aid programs must be implemented across the country as both a necessary component of family mediation services and a starting point for refurbishing the formal family justice system.

4. Mediator Accountability — Standardization of Training and Certification

- (i) The criteria of mediator “neutrality” has to be significantly altered or removed from family mediation philosophy.
- (ii) Mediators must be made responsible for both the procedural and substantive fairness of agreements.
- (iii) Mediators should assume legal liability for negligence in cases of patently unfair agreements.
- (iv) An audit/review of agreements and mediations should be conducted on an annual basis to determine the fairness of agreements.
- (v) A permanent record-keeping system standardized across the country should be implemented. The record-keeping system should include information on:
 - the issues in dispute;
 - the length of time taken to conclude the mediation;
 - the number of meetings;
 - the cost to the parties;
 - the substance of the agreements;
 - the number of clients screened out of mediation, and why;
 - the number of unsuccessful attempts at mediation, and why;
 - the return rate to the mediation process;
 - the number of mediation clients who ultimately end up in court;
 - whether lawyers were involved, and if they were provided on legal aid; and
 - who uses mediation.

Consultation with equality-seeking groups is required to determine whether mechanisms for recording and tracking their participation in mediation programs are needed, and how to develop them.

- (vi) All family mediation services should include a formal complaint mechanism designed specifically to allow clients to register complaints regarding difficulties they may have encountered with program staff during the

mediation. The complaint mechanism should also contain an enforcement mechanism.

- (vii) Mediators should assume responsibility for the safety of women and children once abuse is disclosed.
- (viii) Consideration should be given to drafting exceptions to the confidentiality provisions of mediated agreements.
- (ix) Mediator training should be standardized across the country; higher standards should be set in terms of minimum hours for certification than presently exist in any of the jurisdictions.
- (x) The course content of mediation training programs should be reviewed in relation to the concerns outlined in this report and in consultation with women's advocates.
- (xi) Training programs should draw on the expertise of women's advocates. They should also include ongoing training with respect to cultural sensitivity, homophobia, racism, classism, disability-based discrimination and the systemic inequality of women.
- (xii) Competency assessment tools should include an assessment of skills related to the handling of screening protocols and the use of power-balancing techniques, and in dealing with diversity issues.

5. *Screening Mechanisms and Power-balancing*

- (i) All staff at family mediation services should be educated in the dynamics of abuse and the capacity of power imbalances to undermine bargaining power.
- (ii) Developing highly effective screening tools and techniques is by far one of the most important requirements of family mediation services. All family mediation services should use screening tools, and the tools should be standardized across the country.
- (iii) The standardization of screening tools should be designed for "screening in" clients for whom mediation might be helpful, not screening out. This follows from the recommendation that there be no mandatory referrals to mediation.
- (iv) Screening tools should be based on an understanding of abuse, violence and power issues. Not only physical violence and intimidation, but emotional, financial and psychological factors are potential indicators of the existence of abuse, violence and power imbalance in a relationship.
- (v) The difficulty in detecting or ensuring the disclosure of abuse, violence and power issues should be reflected in the design of screening tools. The tools should contain questions that are more likely to elicit information, not only

about the actual incidents of abuse, but also about the degree of intimidation and control that occurs in the relationship.

- (vi) To determine whether existing screening tools are fulfilling their objectives and to define the essential components of an effective screening tool, research is required to evaluate the effectiveness of the screening tools and procedures currently in use.
- (vii) Mediators must be trained to recognize abuse, violence and power imbalances, and to respond appropriately in such situations. Further, mediators must be trained to recognize the vast majority of such situations where the abuse, violence and power imbalances render meaningful mediation impossible.
- (viii) An assessment of the effectiveness of mediators' power-balancing techniques for women clients is required.

6. *Mandatory Full Disclosure of Financial Statements*

- (i) Legislation should authorize family mediation services to compel and enforce the full disclosure of financial statements.

7. *Diversity Issues*

- (i) Staff of family mediation services should reflect the diversity of the community in order to:
 - make available a pool of mediators so that clients can choose a mediator from their particular communities (e.g., racial minority group); and
 - provide a more effective community outreach program.
- (ii) Educational/information programs and printed materials should be provided in the various languages and alternate formats required by the members of the communities in which the family mediation services are offered.
- (iii) Marginalized communities should be funded to develop or maintain family mediation services appropriate to their cultures, and to include such services in the public record-keeping and evaluation process recommended above.
- (iv) Staff should be educated about the ways that mediation might best serve members of the gay and lesbian community, and should be proactive in ensuring that this community is aware of the availability of these services.

8. *Research, Evaluation and Monitoring*

- (i) More research is required on the effects of family mediation services on the equality of women clients. Such research should include a longitudinal study, of at least five years duration; it should compare client satisfaction, the substantive fairness of agreements, and the re-litigation and re-mediation rates compared among mediation, lawyer negotiation and litigation.
- (ii) The experience and expertise of women's advocates and feminist academics should inform the development of further research, evaluation and monitoring mechanisms.
- (iii) The evaluation of family mediation programs should be premised on the key principles for an analytical framework cited above.
- (iv) Research should be undertaken to identify other informal community-based mediation services/models, with a view to assessing their impact on women clients from the particular community, and to determining the extent to which the analysis and recommendations contained in the report might apply.
- (v) Research should be undertaken to consider: (1) the application of the analytical framework proposed by this report to private mediation services; and (2) the reforms and safeguards that may be needed regarding private mediation services to ensure that the equality rights of women clients are respected.
- (vi) Research is also required to examine the relationship between mediation services and the availability of legal aid for family matters across the country. Specifically, this research should examine whether clients of publicly funded mediation programs can access legal aid to retain a lawyer during mediation. Other related topics for further research and analysis include:
 - the extent to which mediation clients have direct access to legal services through the mediation program;
 - the extent to which mediation clients access legal services; that is, the percentage of mediations that actually have lawyers involved at some stage, and for which issues;
 - the percentage of cases where lawyers are: (1) retained privately, (2) provided through legal aid, or (3) provided by the mediation services; and
 - determining the policy of each of the legal aid programs across the country with respect to family mediation.
- (vii) The different ways mediator bias, insensitivity or prejudice affect the mediation of family disputes requires more research.

APPENDIX A

APPENDIX A — DESCRIPTION OF FOUR MEDIATION PROGRAMS

A. Introduction

This appendix provides detailed information about the four publicly funded family mediation programs: the Burnaby/New Westminster Family Justice Centre,¹ Saskatchewan Mediation,² Manitoba Family Conciliation³ and the Ontario Court (General Division) Family Court Mediation Service in Hamilton, Ontario (Hamilton Mediation Service).⁴ Information is provided about:

- (i) the range of services offered by each of the four programs;
- (ii) select features of each program;
- (iii) access to legal representation and legal aid for clients using the mediation services;
- (iv) how issues of abuse and power imbalances are dealt with by the programs;
- (v) the use of screening mechanisms and power-balancing techniques;
- (vi) safety protocols developed by these four programs;
- (vii) the accountability of mediators, as well as information concerning the certification, academic qualifications and the training of mediators; and
- (viii) diversity issues and parent education/information programs.

¹ Interviews with Wendy Galloway, Provincial Director of Family Services, Ministry of the Attorney General, Corrections Branch, on January 24, 1997 and with Beverly Porter, Local Director, Family Justice Counsellor, Burnaby/New Westminster Family Justice Centre, Ministry of the Attorney General on January 28, 1997 (and a subsequent telephone call on February 13 to complete the interview).

² Interview with Ken Action, Director of Mediation Services, Saskatchewan Mediation, Department of Justice on February 12, 1997.

³ Interview with Sandra Dean, Director, Manitoba Family Conciliation on January 30, 1997.

⁴ Interview with Lorraine Martin, B.A., M.S.W., Clinical Coordinator of Social Work, Office of the Children's Lawyer, Ministry of the Attorney General (formerly Manager, Mediation Services, Hamilton Unified Family Court during the Pilot Project and Past President of Family Mediation Canada) on January 24, 1997 and with Maggie Hall, M.S.W., Court Mediator, Ontario Court (General Division) Family Court Mediation Service, Hamilton, Ontario on January 28, 1997.

B. Range of Services Provided

Depending on their mandate and structure, family mediation services across Canada deal with a wide range of “family law” issues, from custody and access, to the division of property, to the determination and payment of spousal and child support. The range of issues addressed by a particular mediation program varies. Some programs provide comprehensive mediation; that is, they will mediate all issues arising out of relationship breakdown that would usually be negotiated through lawyers or adjudicated by a judge. Other programs restrict the scope of their services to a limited number of issues, like custody and access. In addition to mediation services, many court-connected programs also deliver or make referrals to counselling services and/or parent education programs.

Manitoba Family Conciliation provides a range of alternative or non-binding dispute resolution services, including: court-ordered assessments, family mediation, parent education, support groups for children, some counselling, and an extensive intake service, which functions as an information and referral service to the other services. Family mediation services are generally restricted to custody and access issues, although there is some discussion that mediation services will be expanded to include financial support and property issues.

The Government of Saskatchewan has promoted the adoption of alternative dispute resolution processes, particularly mediation, through the establishment of a section within the Department of Justice called Mediation Services. Saskatchewan Mediation Services has implemented a wide range of mediation services to address a variety of civil matters, including family issues.⁵ Comprehensive family mediation services are available throughout the province, in such areas as access, custody, property and support issues. In addition, the program assists in the delivery of voluntary parent education programs.

The Burnaby/New Westminster Family Justice Centre in British Columbia delivers a wide range of services, including: conciliation, mediation, parent education, information and referral services, counselling, and expert assessments in relation to custody and access disputes. The Centre also helps parties fill out forms and court documents, and offers supervised child access services. The Centre's staff work primarily with custody, access and child and spousal support issues; they do not mediate disputes related to the division of property. Information gathered during the intake interview helps staff assess which of the Centre's services might best assist the prospective client(s). In some cases, the parties are referred out to private individual counselling or financial advice services.

The Hamilton Family Court Mediation Service provides comprehensive mediation services for any and all issues usually dealt with in family court, such as custody, access and related matters, child and spousal support and property division.

⁵ It also provides some mediation services on behalf of social services as they relate to child protection.

C. Select Features of Family Mediation Services

1. *Language of Service*

Most mediation services are provided in English. Of the four programs surveyed, three reported having some capability of delivering services in French.⁶ The Burnaby/New Westminister Family Justice Centre uses interpreters when required to provide service in other languages. Manitoba Family Conciliation and the Hamilton Family Court Mediation Service have retained sign language interpreters in the past. None of the surveyed programs offer mediation services in any of the Aboriginal languages, nor do they translate their printed informational materials into these languages.

2. *Cost to Clients*

The Burnaby/New Westminister Family Justice Centre, Manitoba Family Conciliation and the Hamilton Family Court Mediation Service do not at present charge their clients a fee for any of their services.⁷ With respect to the Hamilton program, the no-fee policy may change to a fee-for-service in the very near future. Other mediation programs in Ontario operate on a fee-for-service model, although the intake session is generally conducted free of charge.

The policy of Saskatchewan Mediation with respect to fees for mediation services is based on a sliding scale of \$20 to \$50 an hour, based on one's ability to pay. Each party is assessed individually to determine the amount each should pay. This arrangement avoids negotiations over who will pay what amount. The bills of clients who are unable to pay any of the costs are generally picked up by legal aid.

3. *Open or Closed Mediation*

Generally, mediation programs use a closed format. Informants from the Hamilton program reported that clients are given the option of open mediation; to exercise that option, both parties must be in agreement and sign a "Consent For an Open Mediation Report."⁸

On occasion, Manitoba Family Conciliation offers open mediation, but only upon written consent of both parties. The Director of Manitoba Family Conciliation observed that "open mediation" is, in fact, a contradiction in terms since mediation by definition is a completely confidential

⁶ Winnipeg, Burnaby/New Westminister and Hamilton.

⁷ Burnaby/New Westminister charges a small fee to cover the costs of providing coffee during their parent education/information sessions.

⁸ Hall, *supra* note 4.

process.⁹ This comment is echoed by the Director of Saskatchewan Mediation, who remarked: “Providing information on the mediation sessions without the consent of the parties really changes the dynamics of the mediation.”¹⁰

In the Saskatchewan scheme, upon the consent of both parties, a summary of the mediation sessions is drafted by the mediator and forwarded to both parties. If the parties agree, the summary is then forwarded to their respective lawyers. When mediation reports are submitted to the court, the only information contained is one of two summary statements: “yes we mediated,” or “mediation is not appropriate.”

In British Columbia, when the court orders mediation or conciliation under the *Family Relations Act*, the mediator submits his or her report to the court for review. The report stipulates whether or not the parties met, and lists the issues that were agreed upon and those that remain outstanding. The report may further indicate whether the parties have agreed on a strategy for resolving any outstanding issues.

4. Termination of Mediation

All of the programs canvassed reported that either party can terminate mediation. Mediators can also terminate mediation when they believe that the integrity of the process is likely to be seriously undermined because of a power imbalance and/or history of abuse, which is a characteristic of the family dynamic.¹¹ Whether the mediation is terminated by one of the parties or the mediator, the mediator often takes responsibility for terminating the mediation. This practice is designed to minimize the risk of retaliation against one of the parties when there is an abusive ex-partner involved.¹²

Generally, mediation programs reported that statistics on the number of and reasons for terminations were simply unavailable. However, the key informants made comments based on their experience and observations while working with their respective programs. Informants from Ontario estimated that terminations were fairly balanced between male and female clients,¹³

⁹ Dean, *supra* note 3.

¹⁰ Acton, *supra* note 2.

¹¹ Note that mediation can be terminated for reasons other than abuse; an example is if the mediator determines that the mediation is “going nowhere” or is not working.

¹² While this practice may assist in some cases, it is in no way foolproof, as it does not address the dynamics operating within an abusive relationship (for example, whereby the abusive ex-partner will simply believe that his ex-partner has revealed something negative to the mediator). Interview with Eileen Morrow, Lobby Coordinator, Ontario Association of Interval and Transition Houses, Toronto in February 1997.

¹³ Hall, *supra* note 4.

while the informant from Manitoba Family Conciliation indicated that terminations were usually initiated by the custodial parent.¹⁴

Material from interviews with informants from Saskatchewan Mediation is inconclusive, though most staff sensed that in most cases, the mediator terminates the mediation.¹⁵ Informants from British Columbia stated that terminations were initiated by either party.¹⁶

5. Disclosure of Financial Assets

The practice of family court counsellors staffing the Burnaby/New Westminster Family Justice Centre is to inform both parties that, in order for the mediation process to work, each party must completely disclose all information about his/her respective financial situation. Further, if the parties want to make their mediation agreement an order of the court, they are required to file their respective financial statements with the court. The mediator has no real authority, legislated or otherwise, to compel the production of financial information. However, British Columbia informants believe that, for the most part, this approach seems to result in the production of accurate financial statements.¹⁷

Public mediators in Saskatchewan and Manitoba also have no authority to compel the production of financial information. Consequently, informants from both programs indicated that the resolution of financial issues is left to the lawyers.¹⁸ Saskatchewan Mediation staff may invite the lawyers to come to the mediation session. Some lawyers accept the invitation and attend the mediation sessions; others do not, preferring instead to wait and see what kind of agreement is reached. The Hamilton program relies on lawyers to obtain a sworn financial statement from each of the parties, which can be shared between the parties and with the mediator. The mediators in this program will not proceed to mediate financial issues unless both parties are represented by counsel.¹⁹

D. Access to Legal Representation/Legal Aid

1. Access to Legal Representation

¹⁴ Dean, *supra* note 3.

¹⁵ Acton, *supra* note 2.

¹⁶ Porter, *supra* note 1.

¹⁷ Porter, *supra* note 1.

¹⁸ Acton, *supra* note 2 and Dean, *supra* note 3.

¹⁹ Hall, *supra* note 4.

All four of the mediation services report that their clients are encouraged to seek the advice of a lawyer at some stage in the mediation process, and to have their mediated agreements reviewed by a lawyer before finalizing them. Again, the informants indicate that lawyers are welcome to participate in the mediation process. Where only one party is accompanied by his or her lawyer, the other party is strongly encouraged to retain a lawyer and bring him or her to the sessions.

Custody and access issues constitute the bulk of the case load of publicly funded mediators; the mediation of support issues also occurs, but to a lesser extent. The advantages of having a lawyer present for mediating these kinds of disputes was down-played by our contacts, who were of the opinion that the mediators themselves — usually educated in one of the helping professions

— are best suited to assist in the resolution of these disputes. The involvement of lawyers is questioned by the informants unless there are assurances that legal aid would fund representation on custody and access issues. From the information provided, it is not clear whether clients are consulting their lawyers at the beginning and then throughout the process of negotiating a parenting plan, or whether they are simply taking the final agreement to their respective lawyers for a quick review at the end of the process.

In the Hamilton service, where comprehensive mediation is practised, clients who wish to mediate financial and property issues must have legal representation, or mediation will not proceed. This requirement, however, imposes a burden on clients who cannot afford to retain a lawyer privately and cannot obtain legal aid due to government cutbacks. To address, in part, this gap in service delivery, other arrangements are being made to have these clients consult with family law duty counsel at the courthouse about financial and property issues.

Initially during the pilot project, Hamilton retained legal consultants to act as resource persons for mediators on financial and property issues. However, funding cuts have seriously constrained the program's capacity to provide these resources, thereby making it extremely difficult for those mediators who do comprehensive mediation to do their job properly.²⁰

According to the information obtained during the interviews, the surveyed mediation services do not provide clients with legal representation directly. As has been previously stated, one exception of note is the Hamilton mediation service; on occasion, it arranges for duty counsel to give an unrepresented client legal advice on financial and property matters. In Saskatchewan, where comprehensive mediation is also practised, mediators are very reluctant to proceed with mediating property matters where the parties do not have legal counsel. Legal aid, however, is generally reluctant to take on issues involving property disputes. A legal aid lawyer is provided to those clients who cannot afford to hire a lawyer privately. The Burnaby/New Westminster Family Justice Centre does not have lawyers on staff to provide legal advice to clients or mediators. Mediators inform prospective clients regularly of the options available for obtaining

²⁰ New Brunswick has implemented a similar model in which staff family solicitors provide some assistance to mediators. Interview with Lynda Richard, Director of Program Support for Court Services, Palais de Justice, New Brunswick January 22, 1997.

legal advice, including: (1) the province-wide lawyer referral service;²¹ (2) the legal aid program; and (3) retaining their own lawyer.

2. *Access to Legal Aid*

From the questions that were asked of informants and the answers received, it is difficult to make definitive statements about access to legal aid in the four programs.²² However, some general and preliminary observations can be made. For example, legal aid and mediation do not appear to be connected in the four provinces; that is, it is not clear whether prospective mediation clients have access to legal aid while engaged in mediation.

The one exception appears to be Saskatchewan, where mediation clients can qualify for legal aid except in relation to property issues. In British Columbia, staff at Family Justice Centres make referrals to legal aid for those clients who wish to retain counsel. However, it is not clear whether a mediation client in British Columbia could obtain legal aid for legal advice or to review an agreement reached in mediation, or whether legal aid referrals are made once mediation is ruled out as an option, or has been terminated by the parties or mediator.

In Ontario, severe budget cuts have resulted in the establishment of a priority system for the issuance of legal aid certificates. This means far fewer people are eligible for a drastically reduced number of available certificates.²³ It appears that only very dire family law matters, such as the protection of a spouse or child who is at risk, or the protection of an established child/parent bond, will merit a legal aid certificate. The impact of this new policy on clients using mediation services is not clear. It appears likely, however, that very few clients using mediation services will also be able to qualify for legal aid to have a lawyer review their agreements or to provide legal advice during the course of mediation sessions.²⁴ In Manitoba, there appears to be no real connection between legal aid and mediation.

²¹ For \$10.00, the client has access to a lawyer for 30 minutes.

²² See Interview Guide attached as Appendix E to this report for the questions asked of the informants on this topic.

²³ “Ontario Legal Aid Plan to Provide Fewer Legal Services for the Province’s Poor,” *Communique*, (The Law Society of Upper Canada, March 11, 1996) where Susan Elliott, head of the Law Society of Upper Canada, the body that administers legal aid in Ontario, says, “It is now unlikely that a person will be eligible for legal aid unless there is the possibility of incarceration, the safety of a spouse or child is at risk, or the client is seeking refugee status from a country with a well-established record of violence and oppression.”

²⁴ Interviews with Hall and Martin, *supra* note 4, indicate that in Ontario more and more clients are unrepresented in the family courts, and that family law duty counsel at the courthouse is being used more often to try and meet requirements that mediated settlements of property matters be reviewed by a lawyer.

E. Abuse and Power Imbalances

1. Screening Mechanisms

All of the key informants expressed the firm view that mediation is not appropriate for certain cases and situations. The examples cited most often of cases in which mediation is contraindicated were those where a power imbalance or a history of abuse is detectable. The informants' recognition of the limitations of mediation provided the basis for their strong support for the development and implementation of screening tools designed to detect power imbalances and abuse within the relationship. Indeed, all of the programs have developed screening tools of varying degrees of sophistication, and have attempted to provide some training for their staff on how to use them. Some programs have reviewed or are currently in the process of reviewing their screening protocols.²⁵

Not all cases deemed unsuitable for mediation go to court automatically. In British Columbia, many parties who are screened out of joint mediation are offered conciliation as an alternative non-binding dispute resolution process better suited to their particular situation. In conciliation, the parties never have to meet face-to-face to discuss the issues in dispute. Instead, the parties meet separately with a Family Justice Counsellor, who attempts to broker an agreement. In fact, according to one informant, conciliation services are provided on a much more frequent basis than face-to-face mediation in British Columbia.²⁶

2. Assessment of Prospective Clients

(a) British Columbia

The Ministry of the Attorney General developed a policy on abuse in relation to mediation, which became effective in April 1993, called "Screening for Abuse — Violence Against Women in Relationships." The policy requires Family Justice Counsellors to screen for violence and power imbalances in every new family case, both at intake for counselling and when undertaking a child custody and access evaluation. The Burnaby/New Westminster Family Justice Centre's intake policy is designed to ensure that a person seeking their services only has to tell his or her story once. In practice, this means that the counsellor who conducts the initial telephone interview is likely to act as mediator/conciliator should the parties decide to proceed with ADR to resolve their dispute.

²⁵ The screening procedures used by Manitoba Family Conciliation are currently being reviewed by a Masters student in social work. Ontario's screening tool was updated in 1995 by Desmond Ellis and Lorraine Martin.

²⁶ Galloway, *supra* note 1.

The screening tool is used to determine if a couple is suitable for joint mediation sessions.²⁷ The underlying assumption is that clients should be “screened in” to mediation rather than “screened out.” This means that the counsellors start from the premise that many, if not most, of their clients may not be suitable for joint mediation sessions requiring face-to-face contact between the parties. According to informants, if a power imbalance between the parties is detected, or if there has been past abuse in the relationship, then this couple will not likely proceed to joint mediation sessions.²⁸ Instead, conciliation is suggested as an option for resolving their disputes, or a referral to a lawyer is made to use the court process.

(b) Saskatchewan

In Saskatchewan, prospective clients are assessed by either an intake mediator or a program manager before they are assigned to a mediator. The advantage is that a second opinion is available to determine if mediation is appropriate. The disadvantage of this two-stage process is that the clients are faced with having to talk to two different staff members.

Intake workers are trained in mediation; they follow a rough script or guide to ask questions designed to identify abuse/power imbalances. Generally, the prospective client is urged to talk about the relationship he/she had with the former partner. The client is asked to describe how, when the relationship was on solid ground, disputes had been resolved, how they resolve them now, what happens when they argue, and so on.

Following this line of inquiry, the mediator turns the discussion to questions designed to determine whether the client is afraid of her partner now. This kind of information is elicited by asking questions as simple as: “How would you feel if your former partner was sitting in the room listening to this discussion?”²⁹

(c) Manitoba

The screening process in the Manitoba program consists of several layers, including: (1) parent education programs; (2) some telephone screening; (3) separate intake sessions with each party; and (4) screening into one of three categories upon assessment of suitability for mediation.

(i) The Parent Education Program

The parent education program currently delivered in Manitoba, “For the Sake of the Children,” is viewed in part as an introduction to Family Conciliation services. Established in September 1995 by the Minister of Family Services, the three-hour program is available to all parents going through a separation and/or divorce, regardless of whether the parents are using any other service(s) provided by Family

²⁷ See B.C.’s screening tool attached as Appendix F to this report.

²⁸ Galloway, and Porter, *supra* note 1.

²⁹ Acton, *supra* note 2.

Conciliation services or the courts. In these sessions, the coordinator of the program addresses issues of violence, and underlines the types of situations where cooperative parenting might not be advisable.³⁰ It is generally agreed that prospective clients attending these sessions learn more about the pros and cons of mediation versus litigation and, as a consequence, are more able to screen themselves as suitable or not suitable for mediation.

(ii) Telephone Screening

Telephone screening, while practised, is not the screening method of choice. The preference is to interview the prospective client(s) in person. Generally, though, the intake workers will gather preliminary information over the telephone.

(iii) In-person Intake Sessions

The intake worker or mediator is responsible for providing an overview of the mediation service provided by Manitoba Family Conciliation Services. This introductory information is usually communicated during the first in-person interview, which is conducted with each party separately. A fact sheet is used to gather more detailed information about any history of family violence or child abuse. Prospective clients are asked if, when, and for how long any abusive behaviour occurred. Based on this information, the intake worker assigns the client to one of three categories that define the client's suitability for mediation: (1) "absolutely no mediation under these circumstances;" (2) "yes likely;" and (3) "maybe."

Clients are generally assigned to the category of "absolutely no mediation" when the answers to the screening questions reveal any of the following:

- long-term violence;
- child abuse;
- allegations of child abuse;
- one of the parties fears being harmed;
- questions of safety;
- high levels of anger;
- stalking behaviour;
- current charges or convictions regarding spousal or child assault;
- incidents of threats or intimidation;
- the existence of restraining orders;

³⁰ Presented in this fashion, it appears that cooperative parenting is assumed to represent the norm for custodial arrangements.

- incidents of police being called for protection matters; and
- incidents of pet abuse.

Where clients are assigned to the “maybe” category, specific conditions are often imposed that must be met in order for mediation to proceed. Clients are assigned to the “maybe” category when there is information that suggests the client is not a suitable candidate for mediation; however, there are also countervailing factors that may be considered in making that assessment. Examples of countervailing factors include: (1) the violence was a one-time incident brought on by stress of the separation; (2) sufficient time has passed since the incident; (3) the woman feels secure and strong; and (4) assurances have been made that there have been no further incidents.³¹

³¹ Dean, *supra* note 3.

(d) *Ontario*

All referrals to the Hamilton Mediation Service are dealt with in the same way, regardless of whether the parties were initially referred by a judge, their own lawyer or themselves. Both parties receive a letter describing the mediation services available and informing them of the voluntary nature of the service. Parties are assured that they do not have to participate unless they want to — even if a judge has “referred” the parties to the mediation service.

When one party does not consent to proceed to mediation, the mediator informs the court that “no mutual consent (was) reached,” without naming which party refused to consent. If both parties consent to mediation, they are put on a waiting list for the intake/screening process where each party is interviewed separately by a mediator. While on the waiting list, the parties are encouraged to attend a family law information meeting (parent education program).

In Ontario, an “abuse-screening instrument” was developed for the Hamilton pilot project, and revised two years ago.³² This instrument helps to identify whether parties are suitable for mediation or not, and whether there is a need for additional interventions such as a restraining order.

The abuse-screening instrument is used during the intake/screening process. Prospective clients are asked a series of questions about the pattern of the couple’s decision-making, and about specific incidents of verbal and physical abuse.³³

Essentially, abuse is defined in terms of “fear and intimidation,” not violence *per se*. The mediators ask questions to determine whether or not the incidents and/or the ex-partner’s behaviour made the party feel fearful or intimidated. If one of the parties is fearful of or intimidated by the other party, the case will not be permitted to proceed to mediation. Other options for resolving the dispute will be explored and recommended.³⁴

2. *Definition of Abuse*

All four of the surveyed programs have adopted definitions of abuse that are not limited to incidents of physical violence but include behaviours that are directed at intimidation and control. For example, the director of Saskatchewan Mediation, in defining abuse, considers how the behaviour of the abuser has affected the bargaining capacity of the victim.³⁵ Consequently,

³² In 1995, Lorraine Martin and Desmond Ellis revised the original screening tool developed for the Hamilton Mediation Pilot Project. See Appendix E of this report for a copy.

³³ Examples include if things were smashed and/or if one of the parties was kicked, pushed, grabbed, shoved, hit, choked, threatened, thrown out of house, and so on.

³⁴ Martin and Hall, *supra* note 4.

³⁵ Dean, *supra* note 3.

the focus of the screening process is not so much on individual incidents, but an overall assessment of the ways in which the victim has responded to the behaviour.

3. *Training to Recognize Abuse*

All of the key informants indicated that staff mediators had some specific training to help them recognize the signs of abuse, and to screen out those cases. The information gathered during the course of the interviews did not, however, specify the amount or content of that training.

4. *Percentage of Cases Screened Out*

Certain key informants from the services emphasized that program staff had worked hard to educate the court and legal profession about the types of situations that are not suitable for mediation.³⁶ One of the informants speculated that the number of cases being screened out was actually going down because of the education of the bench and bar.³⁷

Although few programs kept detailed and complete records of the numbers of cases screened out or terminated and the reasons why, the key informants provided some estimates.³⁸ Staff at Saskatchewan Mediation suggested that 15 per cent of self-referrals and 40 per cent of cases coming through the mandatory orientation are screened out.³⁹ Sources at Manitoba Family Conciliation⁴⁰ estimate that about 20 per cent of cases are screened out, while at the Burnaby/New Westminster Family Justice Centre, approximately 40 to 50 per cent of clients are screened out of joint mediation sessions.⁴¹ Data gathered during the interviews suggest that the Hamilton Family

Court Mediation Service screens out approximately one-half or more of its cases due to abuse, power imbalances, or because the parties are not otherwise suitable for mediation (e.g., mental health problems).⁴² Where cases are screened out, most services try to make appropriate referrals to lawyers. In British Columbia, the parties may be offered conciliation.

5. *Protocols to Protect the Safety of a Client — Protective Measures*

³⁶ Dean, *supra* note 3 and Acton, *supra* note 2.

³⁷ Dean, *supra* note 3.

³⁸ The Hamilton Mediation Service has kept some statistics on their cases and the Burnaby/New Westminster Family Justice Centre has developed a database which is being refined to generate these kinds of specific statistics and data.

³⁹ Acton, *supra* note 2.

⁴⁰ Dean, *supra* note 3.

⁴¹ Porter, *supra* note 1.

⁴² Hall, *supra* note 4.

All of the programs have made some attempt to design and implement safety protocols to protect clients whose safety may be threatened. Some of the following strategies are employed to minimize the risk of physical and/or psychological harm to mediation clients:

- meeting separately with each client at the intake stage;
- providing for a cooling down period;
- terminating mediation where the situation becomes un-mediatable (often the mediator will take the responsibility for termination);
- setting different arrival and departure times for the parties;⁴³
- setting ground rules with respect to the type of contact the parties may have between mediation sessions;
- assisting the woman to develop a protection plan, which may involve referring her to other community services; and
- designating a pick-up/drop-off point for picking up and dropping off children.

F. Accountability of Mediators — Certification, Academic Qualifications and Training

British Columbia has developed a pamphlet for its clients that sets out the process for filing a complaint against a mediator. The complaints process begins with the local director of the Family Justice Centre, and continues up through the provincial government's "chain of command" to the Inspection, Investigation and Standards section, if necessary.

According to our key informant, most of the complaints directed at mediators have been of a minor nature, and are dealt with by the local director.⁴⁴ For example, clients have complained that counsellors take too long to return calls. Other types of complaints include one of the parties feeling that he or she was not listened to or that the mediator was biased or reached a conclusion too quickly. Most complaints are made in connection with the custody and access assessment reports, rather than about mediators per se. If clients encounter a problem with a mediator, they are more likely to terminate the mediation than lay a complaint.

Usually the local director resolves complaints by talking with the counsellor and alerting her or him to the problem. If the local director cannot resolve the complaint satisfactorily, then the complaint is taken up by the next person in the "chain of command." Complaints about

⁴³ In Saskatchewan, there is a debriefing session following a mediation session. The protocol is to first debrief the woman, so that she can leave while the mediator talks to the man.

⁴⁴ Porter, *supra* note 1 and interview with Katherine Platt, Acting Local Director, Burnaby/New Westminster Family Justice Centre on March 25, 1997.

mediators in the Saskatchewan program are usually handled by the director, who upon receiving a complaint will review the file with the mediator and the parties. Many of the complaints come from the legal community. Since Saskatchewan Mediation is a government agency, there is a “ready-made” appeal to the deputy minister if further action is required.

In Manitoba, specific problem cases are discussed among the supervisors as well as the mediators. There is no formal complaint process or accountability mechanism in place other than the usual employee/employer protocols.

In Ontario, staff mediators are accountable to their employer, the Ministry of the Attorney General.

1. Certification

According to the information gathered through the interviews, there are general statements that can be made about the academic credentials, certification processes and training requirements of court-connected mediators in the four programs. First, no national standard exists regarding minimum educational requirements for mediators. As a consequence, the academic credentials of mediators vary across the country.

Second, most programs appear to require, as a matter of policy, a university degree in the arts, social sciences, social work or equivalent (a law degree supplemented by a degree in social work was also identified as desirable). Third, all programs require some work-related experience in the helping professions (e.g., social work). Fourth, most programs require 40 to 80 hours of mediation-specific training in order to qualify to work as a mediator.

Family Mediation Canada (FMC) has recently developed a comprehensive set of mediator practice guidelines and a mediator certification process. FMC is currently seeking funding to implement them. However, FMC is a purely voluntary association, and not all publicly funded programs offering mediation services are necessarily members.⁴⁵ FMC is also currently attempting to obtain funding to develop a mediator competency assessment tool.

Most provinces do not have a certification process in place for mediators, leaving mediation services largely unregulated in Canada. Quebec is an exception. In Quebec, there is a legislative requirement that only certified mediators practise mediation. The certification process is overseen by a provincial professional association of mediators.⁴⁶ Nova Scotia is also in the

⁴⁵ Family Mediation Canada (FMC) is a national organization working with provincial mediation associations as part of a network of interdisciplinary associations of lawyers, social workers, human services and health care professionals, clergy, judges, etc. The national association is affiliated with 12 provincial/territorial associations in Canada and has strong ties to members in the U.S. and Europe. (Information obtained from FMC's 1996 Membership Registration Form.)

According to FMC's 1985 Articles of Incorporation, their objectives include: (1) to provide a Canadian forum for the exchange of ideas, experiences, research and opportunities relating to all aspects of family mediation through newsletters, conferences and seminars; (2) to develop and encourage a code of ethics and standards of practice; (3) to develop and encourage training and continuing education; (4) to encourage and conduct research into all areas of family dispute resolution; (5) to provide consultation to provincial mediation associations and other interested agencies, groups and individuals; and (6) to inform the Canadian public about the advantages of mediation. For more information, see *Family Mediation Canada (FMC) Practice Guidelines and Family Mediator Certification Process* (February 1997 Draft).

⁴⁶ Interview with Pierre Tanguay, Counsel, *Direction générale des services de justice*, Government of Quebec, January 1997.

process of developing a certification program for mediators practising in that province.⁴⁷ Rather than rely solely on straight certification to maintain quality control, the movement is toward competency assessments. Currently, staff mediators usually get feedback on their performance from their direct supervisor(s).

The British Columbia government is currently developing a mediator competency assessment tool — believed to be the first of its kind in North America — specifically for assessing the skills of mediators. The tool is designed to both set standards for mediators, and assess the skills of mediators in accordance with these standards. The British Columbia government is in the process of finalizing this competency assessment tool, with a view to implementing it in April 1997.⁴⁸ Key informants in Ontario reported that there is a great deal of interest in the British Columbia competency assessment tool. Further, these same informants indicated that the introduction of minimum standards for training and education requirements would be well received in Ontario.⁴⁹

2. *Minimum Academic Qualifications*

Ontario and Manitoba require that mediators working in publicly funded programs or court-connected programs have, as a minimum, a Bachelors or Masters of Social Work degree (B.S.W.\M.S.W.). In British Columbia, a Bachelor of Arts in the social sciences is sufficient. There are no specific education requirements for public mediators practising in Saskatchewan and Alberta; mediators in those provinces tend to have a variety of educational backgrounds. Contacts in Alberta report that in the past few years, mediation programs have pursued an unwritten policy of hiring individuals possessing degrees in both law and social work.⁵⁰ It is not known whether there is a minimum educational qualification, such as a university degree, required to be a mediator in these programs.

3. *Training*

Three of the four (Burnaby/New Westminster, Hamilton and Saskatchewan) publicly funded mediation programs selected for the survey reported having policies that stipulate minimum training requirements for staff mediators. However, the required number of hours of training varied considerably from program to program.

⁴⁷ Interview with Annette Strug, AMS Mediator Associates, Halifax, Nova Scotia in January 1997.

⁴⁸ Galloway, *supra* note 1.

⁴⁹ Hall, *supra* note 4.

⁵⁰ Interview with Diane Shearer, Supervisor, Mediation and Court Services, Government of Alberta on January 15, 1997.

British Columbia public mediators are required to complete 80 hours of training in mediation. This requirement is most often fulfilled by the successful completion of the Family Justice Counsellor Employment Readiness Training Course, offered by the Justice Institute of British Columbia. Course content includes training in the basics of family law and in family violence issues. In Saskatchewan, the Law Society has approved a minimum requirement of 40 hours of mediation training in order to work in the program. This minimum, however, is seen as somewhat artificial, as most mediators have 200 to 300 hours of training.

Mediators in the Hamilton Mediation Service are required to meet Family Mediation Canada's standards in terms of number of hours of training and background. Currently, FMC requires the completion of a 40-hour mediation course. While a university degree is encouraged and preferred, FMC has been flexible in allowing people without a university degree to attend and complete the course.⁵¹ According to contacts in Ontario, the mediators working presently in the Hamilton program are very experienced; all have 500 to 600 hours of training.⁵² This is due in part to their length of service and the intensity of training during the pilot project.

The Alberta Family Mediation Society recommends a minimum of 40 hours of mediation training. This requirement is met upon the successful completion of a 40-hour divorce and family mediation training course offered by the Legal Education Society of Alberta.⁵³ Manitoba does not seem to have a policy with respect to minimum training requirements. Instead, the focus is on work-related experience; that is, mediators are required to have several years of experience working with families, including experience in issues related to separation and divorce and in the dynamics of abuse.

(a) Ongoing Training Requirements

Requirements that mediators participate in ongoing training once they have been hired vary from province to province, and in part reflect funding allocations for mediation services. In British Columbia, family justice counsellors are required to attend 15 training days over three years. Generally, counsellors request that certain topics be covered in the ongoing training. These requests, by and large, determine the content of the training. The Burnaby/New Westminster Family Justice Centre has recently requested training on how to work with clients who have mental handicaps, particularly brain injuries. Family justice counsellors receive training from the Ministry of the Attorney General on gender issues, racism, abuse and cultural differences.

In Ontario, recent budget cuts have eliminated funding for ongoing training. Consequently, mediators have to find ways to stay current with developments in the law and the literature. The Hamilton mediation program is lobbying the Ontario government to allocate to court-connected

⁵¹ Interview with Paul Young, Executive Director, Family Mediation Canada on March 25, 1997. These minimum requirements are in the process of being changed by this association.

⁵² Hall, *supra* note 4.

⁵³ Shearer, *supra* note 50.

mediators the same number of training days as are currently allocated to Crown counsel. During the pilot project, staff mediators received fairly comprehensive training, including: one week of intensive training on the law, with monthly updates thereafter; training on abuse and violence issues; and training on issues related to financial affairs, property division issues and the tax implications associated with support payments.

Saskatchewan mediators have received training on a range of dispute resolution issues. Ongoing in-house training is provided on particular topics, for example, screening for domestic abuse, current family law issues including the division of property and pensions, racial harassment, and others. Saskatchewan Mediation Services has hired private consultants to deliver training and provide advice on the content of training programs.⁵⁴

(b) Training by Community Groups

In British Columbia and Saskatchewan, informants reported that public mediators receive training on abuse from staff and volunteers from transition houses.⁵⁵ Saskatchewan mediators have also received some training on how to deliver culturally sensitive and appropriate mediation to Aboriginal communities. Manitoba has invited a representative from the Aboriginal community to deliver some cross-cultural training to mediators in the province.

(c) Training on Abuse, Discrimination and Social Issues

All four programs reported some training on abuse, discrimination and other social issues. However, it is not possible to ascertain from the information provided the extent or content of that training, nor as to who provided the training. No specific mention was made of training in the area of anti-homophobia or anti-racism by informants in Manitoba and Saskatchewan; however, the Burnaby/New Westminster Family Justice Centre reported that family justice counsellors have had some training on racism and cross-cultural issues.⁵⁶

The lack of information about these aspects of training suggests that the topic should be investigated more thoroughly.

G. Diversity Issues

1. Client Profile

⁵⁴ For example, Daniel Hamoline, a training expert in the field of screening for abuse, has been retained in the past.

⁵⁵ Porter, *supra* note 1 and Acton, *supra* note 2.

⁵⁶ Porter, *supra* note 1.

Statistics and other data which would assist in the development of a client profile were difficult to come by from these services. Consequently, client profiles are drawn from observations of the key informants. According to the interviewees, the clientele of the four publicly funded mediation programs are predominantly English-speaking, white, heterosexual couples from a range of income levels.⁵⁷ However, it is the researchers' impression, based on the interviews, that most of these publicly funded mediation services serve mainly the working poor, including clients who qualify for legal aid. The exception may be the comprehensive mediation service offered in Hamilton. The staff mediator at that site indicated that the Hamilton program was the service of choice for those who want comprehensive mediation (generally those in higher income brackets who have assets and property to divide).⁵⁸ While Saskatchewan Mediation offers a comprehensive service, prospective clients who can afford it are encouraged to retain a private mediator.

Informants in British Columbia, Ontario and Saskatchewan reported that their respective programs had offered mediation services to lesbians and gay men in the past.⁵⁹ However, because of incomplete records of client profiles, it is difficult to ascertain if they are actually using these services. In any case, even the services that keep records do not ask their clients to reveal their sexual orientation.

Informants acknowledged that the vast majority of their clients were white; few come from other racial/ethnic backgrounds such as Aboriginal or Chinese.⁶⁰ Both Manitoba and Saskatchewan acknowledged that there is a need to attract more Aboriginal clients and to do more community outreach in this regard. At the same time, these same informants noted that their lack of use of mediation services is in part a reflection of the different ways that Aboriginal cultures deal with resolving family disputes.⁶¹

The mandate of Manitoba Family Conciliation is to provide services in both French and English. Services can also be offered in Ukrainian and Russian because of the language capabilities of the

⁵⁷ This observation is about those clients who actually participate in mediation or conciliation, and not those who attend the parent education programs. The parent education programs may attract a more diverse group of clients, but it is difficult to tell since this question was not specifically asked, and the statistics kept by these services are incomplete.

⁵⁸ Hall, *supra* note 4.

⁵⁹ Manitoba indicated that home assessments have been conducted for parties who are in lesbian or gay relationships. However, according to the director of Manitoba Family Conciliation, mediation services are not being used by lesbians or gay men (Dean, *supra* note 3).

⁶⁰ This may have been partly a result of the sites chosen for study (i.e., Burnaby and Hamilton) as opposed to other sites in Ontario and British Columbia with a more diverse population.

⁶¹ Dean, *supra* note 3 and Acton, *supra* note 2.

present staff. There were also reports from Manitoba, Ontario and British Columbia, though rare, of mediation services provided to deaf clients with the help of a sign language interpreter.

British Columbia, Saskatchewan and Manitoba reported doing community outreach primarily through public presentations about their services to community groups, including ethnic and racial minority groups.

2. Staff Profile

The staff of the publicly funded mediation programs are predominantly white women and men who speak English and sometimes French. Members of visible minority communities are poorly represented among the mediation services staff, except where they have been hired as secretaries and assistants. Staff representation of people with disabilities was not mentioned; Aboriginal people are not represented at all.⁶² In an attempt to attract and train Aboriginal mediators, Saskatchewan Mediation supports a mentorship program.

3. Future Profile

Two informants (Hamilton and Burnaby/New Westminster) expressed the opinion that the availability of public mediation services will be increasingly tied to income level. For example, recently in British Columbia, a provincial initiative has been implemented that sets guidelines for the types of clients and issues that should be handled by family justice counsellors (mediators). The initiative stipulates that 90 per cent of the case load should be devoted to mediation (and conciliation) services; and 10 per cent should be devoted to other issues such as custody and access assessments, intake work and the provision of information. The initiative also states that family justice counsellors and mediation services should focus on legal services (legal aid) clients.⁶³

There is some discussion in British Columbia that in the future, eligibility for legal aid will be contingent on the applicant first contacting a Family Justice Centre (or at least attending a parent education session).⁶⁴ Discussions like these fuel the speculation that court-connected mediation services, if they continue to be government-funded, will be restricted to poor people who cannot afford to retain either a lawyer or a mediator on a private basis.

⁶² An exception occurred during British Columbia's pilot project when one of the four Family Justice Centre was located in Nicola Valley — an area with several First Nations communities. At that time, a First Nations community was contracted with by the Ministry of the Attorney General to set up the Family Justice Centre services for this area. This Family Justice Centre is no longer in operation.

⁶³ Interview with Glen Robinson, Acting Local Director, Probation and Family Court Services, Ministry of the Attorney General, Kelowna, British Columbia on March 25, 1997.

⁶⁴ Porter, *supra* note 1.

In Ontario, the trend seems to be toward full-scale privatization of publicly funded mediation services. There are rumours that the Hamilton and Toronto mediation programs will be privatized; as a result, services will be offered on a sliding scale, fee-for-service basis.⁶⁵

In some provinces where there is an acknowledgement of the need to make services available to a more diverse clientele, consideration is being given to providing mediation services in a more culturally appropriate way. Policy-makers and service providers now consider factors such as the location of services, and methods of doing outreach into some of the Aboriginal and racial and ethnic minority communities, when reviewing these programs.⁶⁶

H. Parent Education/Orientation Sessions⁶⁷

1. General Introduction

All four provinces have implemented parent education/orientation programs over the past several years.⁶⁸ Parent education sessions are often promoted as the first step in the separation/divorce process, although individuals can attend these sessions throughout the process. Generally, these programs are designed to serve as educational sessions for individuals who are experiencing a divorce or separation and have children. The sessions are information-based and do not emphasize skill-building. They have two primary objectives:

- (i) to provide information to individuals about how separation and divorce affects family members, primarily children; and
- (ii) to provide information on what alternative methods of dispute resolution, that is, alternatives to court-based litigation, are available to assist in the resolution of family law issues.

⁶⁵ Hall, *supra* note 4.

⁶⁶ Acton, *supra* note 2.

⁶⁷ Also in the U.S. See Trecia Di Bias “Some Programs for Children” (1996) 34: 1 *Family & Conciliation Courts Review* 112.

⁶⁸ The names of these programs vary from province to province. In Ontario they are called “Family Law Information Meetings.” In British Columbia at the Burnaby/New Westminster Family Justice Centre, there are two types of sessions; one is called “Helping Parents Succeed After Separation,” while the other, a more intensive program, is called “Parent Education and Support Group.” In Manitoba, the program is called “For the Sake of the Children,” and in Saskatchewan these programs are referred to simply as parent information/education sessions. Other provinces have also implemented parent education programs, such as, Alberta and Nova Scotia. For a more complete inventory of parent education programs in Canada, see *Families in Transition: Children of Separation and Divorce: An Inventory of Canadian Parent Education Programs and Resources* (Family Mediation Canada and Health Canada: 1997).

Through these sessions, service providers attempt to have separating couples refocus on their children's needs and in so doing, minimize the negative effects of separation and divorce on children and young people.⁶⁹ Parent education programs often promote the idea of both parents sitting down to develop their own plan for the ongoing care and nurturing of their children.

One of the assumptions underlying these programs is that individuals need and want to be educated about alternatives to litigation. Once individuals know about the alternatives, service providers and policy-makers believe that clients often choose mediation to resolve outstanding family law issues over litigation-based strategies.⁷⁰ A further assumption reflected in the content of most parent education programs is that mediation is generally a preferable method of dispute resolution compared to litigation.⁷¹

Generally, the sessions are offered at a variety of times — in the evening, during the week, or on Saturdays, for example — to allow for different schedules. The length of the sessions vary from one and a half hours, to three, four and even six hours. The programs are structured toward group presentations; groups range in size from as few as nine or 10 participants to as many as 50 to 70. Ex-partners who register together are often assigned to different groups so that each may ask questions and participate in the discussions more comfortably. Generally, there is no screening for abuse prior to attendance.

A team of two or three presenters, which might include a mediator and a social worker or a mediator and a lawyer, is often used to deliver the sessions. In British Columbia, Family Court judges present information at these sessions. Funding for parent education programs is generally provided by the provincial government(s). There is no cost to the participants for attending these sessions, although sometimes there is a nominal charge for materials. According to the interviewees, parent education programs are popular with the participants; the feedback/evaluation forms are generally very positive.

2. *Mandatory vs. Voluntary Programs*

⁶⁹ One of the main objectives of these programs is explicitly or implicitly stated as trying to “enhance the possibility of settlement without resorting to court by focusing the attention of the parents on the needs of their children and the effects of open hostility on children.” Ministry of the Attorney General, Province of British Columbia, *The Family Justice Reform Project — A Project to Develop Comprehensive Proposals for the Reform of Family Justice Services in British Columbia* (March 1994).

⁷⁰ Porter, *supra* note 1.

⁷¹ It is difficult to say how “pro-mediation” these courses are, since the researchers were not able to attend the sessions. At a future date, it might be important to investigate these programs further to ascertain how these various options are being presented to the public. It is the researchers’ impression that these sessions are designed to turn people away from the court process and toward one of the alternatives to litigation, usually mediation or conciliation (B.C.).

To date, legislation mandating separating parents to attend parent education programs does not exist in Canada. However, this does not mean that attendance at such programs is always strictly voluntary. The same subtle and not-so-subtle pressures apparent in the delivery of mediation services are also present in parent education programs. For example, information provided suggests that although participation is voluntary, parties are often urged by judges, mediators and counsellors to attend a parent education program prior to any kind of interaction with the court system.

Parent education sessions in Manitoba, British Columbia, Ontario, Saskatchewan and Newfoundland are at present voluntary, in the sense that they are not mandated by legislation. However, in these provinces, counsellors/mediators recommend strongly that both parents attend these sessions. In Manitoba, the parent education program is considered a vital component of the screening process; attendance is strongly encouraged. The encouragement often takes the form of an intake counsellor advising the parent that a policy exists that requires attendance, and that in any event, they should attend for the sake of their children.

Policy-makers in British Columbia, Saskatchewan and Manitoba are currently considering making attendance at parent education programs mandatory.⁷² Policy-makers and service providers in both Dartmouth, Nova Scotia and Edmonton, Alberta consider parent education to be mandatory.⁷³ In Edmonton, and for a 50-mile radius around it, all parties who file an application with the Court of Queen's Bench must attend a seminar entitled "Parenting After Separation." The application is processed only after the applicant produces a certificate of participation in the seminar.⁷⁴ While there is no legislation in Alberta requiring parents to attend parent education programs, the mandatory enforcement of this practice has gone unchallenged. In the case of matters that are heard by Family Court, attendance in such programs becomes mandatory where the matter is adjourned for trial.

Recently, a pilot project in Dartmouth, Nova Scotia has made similar sessions mandatory by way of a practice direction from the bench. Individuals who apply to the courts for an adjudication or

⁷² For example, a lobby to make parent education programs mandatory is currently under way in B.C., according to Bev Porter. In Saskatchewan, Ken Acton suggests that it would be preferable to make parent education mandatory rather than attendance at a mediation orientation session, which is now the case. In Manitoba, the Civil Justice Task Force report released in September 1996 recommends that parent education be mandatory.

⁷³ Interview with Judge Jim Williams, Family Court of Nova Scotia in January 1997.

⁷⁴ Mandatory participation in the seminar began as a pilot project in early 1996. The pilot concluded in early 1997, and it was decided that the seminar should continue free of charge. Preliminary plans are under way to extend the seminar to the rest of the province. (Interview with Ken Cunningham, Manager, Parenting After Separation Seminars, Alberta Department of Family and Social Services on January 20, 1997.)

variation of matters related to custody, access, or support are required to attend a parent education session.⁷⁵

Both New Brunswick and Prince Edward Island do not fund parent education programs as part of their family justice systems.⁷⁶ However, New Brunswick is studying the feasibility of offering parent education programs in order to address some of the problems that have been identified with its family justice system.

3. *Content of Sessions*

The content of parent education programs is quite similar across the country. Most programs provide:

- (i) an overview of the legal issues related to custody, access and support;
- (ii) an explanation of legal terminology;
- (iii) an outline of the role of the courts in the resolution of family law disputes;
- (iv) a sketch of various available alternatives to litigation, such as mediation, conciliation, and counselling;
- (v) a discussion of the utility of parenting plans, and the need to understand the negative impact of separation and divorce on children; and
- (vi) a discussion of different strategies for helping children and adults through the process of separation/divorce.

In addition to the presentations, videos and printed materials are often provided to participants. Some programs distribute participants' manuals.⁷⁷ Material from Family Mediation Canada is often also included in the participants' handouts.

4. *Provision of Information in Other Languages/Formats*

There are very few examples of programs or services that offer parent education programs in languages other than English. One exception is Manitoba, which offers at least the program's printed material in French. The Burnaby/New Westminister Family Justice Centre has requested that its information materials be translated into several other languages (e.g., Punjabi, Spanish

⁷⁵ Williams, *supra* note 73.

⁷⁶ Interview with Barbara Bain, Supervisor, Family Court Services, P.E.I. on January 15, 1997 and Lynda Richard, *supra* note 20 on January 22, 1997.

⁷⁷ The Departments of Alberta Justice and Alberta Social Services, *Parenting After Separation: A Participants' Manual* (no date).

and Cantonese) but the funding has not been forthcoming. In Manitoba, information in alternate formats such as Braille or large print is provided on demand; this practice appears to be the exception, however, as no other province reported doing the same. Manitoba is currently developing a video on ADR; there is a possibility that the video will be close-captioned. British Columbia family justice counsellors are attempting to provide information sessions about the parent education workshops to various racial/ethnic communities (e.g., the Chinese community).

In conclusion, it appears clear that parent education programs are here to stay, and that they will be offered by more mediation services in the future. It is likely that more outreach will be made to other helping professionals, such as doctors and teachers, so that they can steer people to these sessions prior to beginning a court action. Some jurisdictions such as Alberta are considering offering separate parent education sessions to women who have been abused by their partners, in an effort to increase the level of comfort among this group of participants. Such sessions may also provide these women with information that addresses their particular experiences and circumstances.⁷⁸

⁷⁸ Cunningham, *supra* note 74 and interview with Virginia Philipson, Family Centre, Edmonton, Alberta in January 1997.

APPENDIX B

APPENDIX B — SUMMARY OF NAWL ADVISORY COMMITTEE MEETING

The National Association of Women and the Law (NAWL) struck an eight-member Advisory Committee to assist the project researchers in a variety of ways: (1) to review and provide advice on the Interview Guide used to gather information about the four publicly funded family mediation programs; (2) to provide guidance on how to interpret the research results and to frame the recommendations; and (3) to provide advice on the approach of the report, particularly its recommendations.

A one-day meeting was held in Toronto on March 15, 1997 with the members of the Advisory Committee and the project researchers. Lisa Philipps, a member of the NAWL Steering Committee and NAWL's coordinator of this project, acted as chair of the meeting.

The Advisory Committee was composed of academics who are experts in the field of family law and mediation, family law practitioners with a particular interest in and experience with family law mediation, and advocates for women's rights and racial minorities. The names and titles of Advisory Committee members are listed at the beginning of this report.

The Advisory Committee members were provided with a first draft of the project report to review prior to attending the meeting. They were asked to comment on the report and its treatment of family mediation in Canada. The majority of the meeting was spent discussing family mediation from a feminist and equality rights perspective, and assisting the project researchers to draft the final recommendations. The Advisory Committee provided invaluable support in this area. The Advisory Committee's thoughtful comments assisted the project researchers in writing the final draft of the report — particularly the comments on the report's approach and on the contents of the recommendations.

Several major themes and areas for reform emerged from the meeting with the Advisory Committee. These themes are summarized below in order to provide the essence of the Advisory Committee's perspective on the issue of family mediation and its implications for women's equality rights. Specific recommendations were also discussed, and these have been presented in point form.

A. General Observations

- (i) In general, the members of the Advisory Committee acknowledged that mediation has become a part of the family justice system in Canada. The Committee had many grave concerns about the implications for women's equality rights raised by current family mediation services in Canada. The members of the Advisory Committee were of the view that mediation was likely to continue; thus, it was important to call for immediate improvements. The specific improvements that are required are discussed in some detail below. In particular, members of the Advisory Committee were of the opinion that more research and evaluation of current family mediation practices and their impact on women's equality rights are urgently needed.

- (ii) Advisory Committee members were of the view that mediation must be seen as a single facet of the family justice system, and that the family justice system requires substantive changes to address and enhance women's equality rights. Further, mediation should not be viewed as a "quick-fix" for the problems of the family justice system.
- (iii) The movement toward mandatory mediation was particularly troublesome to the members of the Advisory Committee. The Committee recognized that the family justice system — and this includes judges — is exerting increasing pressure on parties to mediate. The Committee stated that women clients must come willingly to mediation; mediation must be voluntary. Further, mediation should never be a prerequisite for accessing other parts of the justice system, since this limits women's choices and puts some women in grave danger. From this perspective, referrals to mediation by a judge and mandatory parent education were seen as coercive measures. In addition, women must be allowed to terminate mediation under any circumstances and without repercussions.
- (iv) The Advisory Committee also stressed that women require information and advice in order to be empowered to enter into any part of the family justice system they choose. The goal is two-fold: (1) to help women access the range of options available to them to resolve their family law disputes — negotiation, mediation, or litigation; and (2) to assist women to understand the pros and cons of those options so that they can choose the best one for their particular situation.
- (v) The importance of women's access to legal counsel during mediation was stressed by the members of the Advisory Committee. The Committee believes that women should have access to legal counsel before they enter into mediation, at any point during the process, and at the end before signing the mediated agreement. However, the Committee also expressed concern about the erosion of the right to legal counsel in many parts of the country due to cutbacks in legal aid funding.
- (vi) The Advisory Committee was concerned that the perceived lower cost of mediation was driving the current trend of encouraging its use by parties to family law disputes. The Committee members expressed concern that mediation is couched in language that suggests it is a cheaper alternative to litigation. Committee members pointed to the fact that most cases are settled by lawyers through negotiation, and not through the litigation process. The five per cent of cases that currently go to trial will continue to do so despite the widespread acceptance of mediation. From this viewpoint, mediation is not likely to cut costs, especially if legal counsel is funded to ensure that parties have adequate legal advice about the mediation process, their options, and legal rights.

The issue of cutbacks to legal aid was of grave concern to Advisory Committee members. The Advisory Committee cautioned that such cutbacks may create a two-tiered legal system — where poor clients are shunted into mediation, with little or no legal representation, and rich clients continue to have a wide range of alternative avenues available to them for resolving disputes. The issue of cost cutting must be viewed in a more holistic fashion; all of its implications must be considered, especially those which impact on women's equality rights.

- (vii) Mediation is untested. The members of the Advisory Committee were concerned about the lack of information regarding what really happens within the confines of the mediation room. Since much of what occurs in mediation is confidential and behind closed doors, there is a need to talk to women clients to gain a better understanding of what actually occurs. Random audits by women's groups and groups representing women of colour were discussed as an option. Evaluating the substantive content of the agreements was seen to be important. Longitudinal studies of how mediated agreements fare over time were also found to be needed.
- (viii) One of the safeguards of the present family justice system is that there is a measure of public accountability. That accountability is due in part to the creation of a court system that is open, where decisions are recorded and made available for public scrutiny. The Advisory Committee expressed concern that public accountability in a private system such as mediation is virtually nonexistent. If the mediation sessions are closed and confidential, it is more difficult to track: (1) the impact of mediated agreements on the substantive equality of women; (2) the substance of these agreements; (3) how well these agreements serve women's interests over time; and (4) mediator biases against marginalized groups.
- (ix) Racial issues need to be better understood and addressed in mediation, and indeed throughout the entire family justice system. The assumption of racial neutrality needs to be challenged. There is a lack of information about cultural and racial minorities and their experience with mediation. It is harder to identify and address discrimination in a less open system such as mediation. The experience of African-Canadians with the family law justice system has been negative, due both to the power imbalance of black people within the system and the fact that they are labelled as "trouble makers."
- Concern was expressed by members of the Advisory Committee about this group with respect to accessing justice. For Aboriginal people and black women, "family law" often means fighting against child protection services and the other forms of state intervention in their families. The members of the Advisory Committee were of the opinion that a pool of mediators from different racial and ethnic backgrounds should be made available, so that couples can choose a mediator who understands their culture and community.
- (x) The overall systemic bias against women in society and within the family justice system needs to be the starting point in discussing the implications of mediation on women's equality rights. Once this standpoint is adopted, the concept of power imbalance and abuse can be better understood. Mediation must only be undertaken by parties who have equal bargaining power. Within a feminist framework, women as a group do not possess equal bargaining power compared to men. For example, women still earn less than men; therefore, men will generally hold some kind of economic power over women. Racial minorities, people with disabilities, and other disadvantaged people have less power, too. From this perspective, power imbalances are an issue for all women, not just those who come out of an abusive relationship.

- (xi) The Advisory Committee was concerned about the blurring of lines between therapy and legal issues in mediation. This is particularly a concern when mediation is done by social workers who are trained as therapists and counsellors. The distinction between mediation and counselling/therapy as a means of resolving family disputes must be maintained.
- (xii) The Advisory Committee discussed screening tools, and raised concerns about whether women would actually disclose incidents of abuse, or power and control issues. The Advisory Committee underlined the potential dangers to abused women of mediators finding abuse and screening the couple out of mediation. Members pointed out that when that occurs (i.e., the mediation is terminated), it becomes quite obvious that the woman disclosed the abusive relationship. This can put women in danger, especially if their partners want to settle issues by way of the mediation process. Other concerns with screening tools included the mediators' responsibilities and actions once indications of abuse were detected. The Advisory Committee had many queries: Is there is an obligation on the mediator to ensure the woman's safety? What are the tools screening for? Is it possible to screen for all the various levels of power imbalance and abuse? What disqualifies a woman from mediation? Do mediators screen for cultural and racial power imbalances?
- (xiii) The concepts of mediator neutrality and bias were seen as important to "unpack" and expose in relation to mediation. For example, concern was expressed about the bias and lack of neutrality inherent in the dominant idea that all children need to have maximum contact with both parents. This assumption is made as a starting point for mediation in custody and access disputes. This was seen as particularly problematic when there has been a history of violence and abuse in the family. Also, a white mediator may not understand his or her own prejudices and biases in terms of mixed race and other minority couples.

B. Specific Recommendations

In general, the Advisory Committee members were of the opinion that more structures, standards, training, procedural safeguards and funding were required to enhance women's access to justice and ensure their equality rights were met. The Committee also felt that more evaluation and monitoring were needed. Members made a number of suggestions and recommendations to provide better protection for women who engage in the mediation process.

- 1. There is a need for standardized training and a set of common credentials for mediators.**
 - need clinical supervision when training new mediators
 - contrast law school requirements for lawyers versus 40 to 80 hours of mediation training (plus a degree, usually) for mediators
 - some training must be done by front-line workers and members of equality-seeking groups

- need more training than is required presently.
- 2. There is a need to increase the power of mediators to enhance the safety and protection of women.**
 - clarify their role and distinguish them from counsellors, evaluators, assessors, lawyers, judges, and arbitrators
 - give them power to demand the mandatory disclosure of assets.
 - 3. There is need to ensure that more procedural protections are part of the mediation process.**
 - mandatory disclosure of assets/financial information
 - access to legal counsel.
 - 4. There is a need for regulations and a governing body for mediators.**
 - lawyers' governing body is important check on the legal profession
 - lawyer liability is a powerful safeguard for consumers of legal services.
 - 5. Fully funded services are essential.**
 - fully funded mediation services
 - fully funded legal aid services.

6. **There is a need to empower women to enter and access all parts of the family justice system.**
 - give women information about their legal rights and choices/options.
7. **It is important to build protocols for a “good” mediation program that serves the interests of women.**

For example, some of the elements of a “model” program would include:

 - legal representation at the beginning of the process
 - permission for lawyers to attend mediation sessions
 - a financial disclosure protocol
 - screening protocols
 - advocates (women and race) allowed in sessions
 - random audits by women’s groups.
8. **Compliance mechanisms and mediator accountability must be implemented.**
 - record keeping is also needed to track information about mediation (i.e., agreements that break down, etc.).
9. **There should be a choice of mediators.**
 - women from cultural groups should be allowed to choose a mediator from their own cultural/racial background
 - women should be allowed to choose mediators or change them.
10. **It is essential to protect women’s legal rights in the mediation process.**
 - provide legal counsel (this should not be the only solution due to lack of choice of legal aid lawyers)
 - provide women with a race advocate
 - provide more procedural safeguards
 - fully funded legal aid.
11. **The introduction of mediation on such a large scale and without the benefit of an equality rights analysis is problematic for many women. Mandatory mediation is definitely the wrong approach for women.**
 - not the right solution for all women
 - slows down the drive to mediation (more study and evaluation needed to rethink some aspects)

- provide protections/safeguards due to the fact that mediation is here
 - mandatory parent education is problematic
 - mandatory referral equals mandatory mediation
 - pressures to mediate from judges/lawyers is a concern.
- 12. Mediation must be recognized as an integral part of the family justice system.**
- not a separate entity
 - need some of the same procedural safeguards.
- 13. Lawyer-to-lawyer negotiation and mediation are the correct comparisons, not litigation (i.e., trial) and mediation.**
- 14. Mediation should not be embraced by the government just because of cost factors.**
- do not re-orient the entire family justice system to ADR.
- 15. Mandatory mediation is not/should not be a prerequisite to getting legal counsel.**
- 16. Women must be able to end mediation without repercussions.**
- judges must not be given information about who ended mediation and why.
- 17. It would be a good idea to introduce a checklist of minimum components to be discussed during the mediation process.**
- 18. The concepts of therapy and legal rights, which are blurred in the current way mediation is practised, should be disentangled.**
- there is also a need to keep the concept of mediation distinct from custody/access assessments.
- 19. The danger of a two-tiered legal system is being created with the current approach.**
- poor people will only have access to mediation with no legal counsel
 - the poor are disproportionately disadvantaged groups in society (cultural/racial minorities, people with disabilities).
- 20. The systemic power imbalances between men and women in Canadian society and between “whites” and racial minorities must be recognized.**
- need to ensure equality of bargaining power
 - it is not just women in abusive relationships who experience power imbalances
 - lack of attention paid to issues of cultural diversity/racial minorities.

- 21. There is a need for further research and evaluation of mediation in the family justice system.**
 - must address more than client satisfaction
 - must test relevant concerns of women (screening, power imbalances, etc.)
 - must evaluate the substance of agreements reached during mediation for substantive equality
 - need more reports/research in general on mediation, as has been done on the litigating system and courts/judges.
- 22. Consideration should be given to extending recommendations from this report to existing community mediation services/models.**
 - must acknowledge, recognize and validate existing models within certain cultural communities that are effective in mediating problems, and extend to them the analysis and recommendations.
- 23. The privacy of mediation services is often the only viable option for lesbians and other marginalized groups, due to systemic biases against them in the litigation system.**
 - mediation may be the option of choice for women in these groups to resolve their legal disputes.
- 24. The fact that Aboriginal people do not use mediation services is a concern.**
 - need to find out why
 - suggestions for the incorporation of healing circles and other forms of dispute resolution which are culturally appropriate require more investigation with respect to their effect on women.
- 25. Recommendations and principles in this report should also apply to the private mediation realm.**
- 26. Power imbalances are complex issues and must be understood in a wider social context.**
 - not an individual deficit problem but a larger systemic/societal and cultural issue
 - connected to mediation training
 - providing advocates for women in mediation sessions is not sufficient to balance power differences (only part of the solution)
 - immigrant status is a factor
 - language (other than English) is a factor
 - race of mediator versus race of clients

- adequacy and effectiveness of screening tools
- the civil justice system has safeguards built in that help to balance power (this is good for women).

27. More attention must be paid to diversity/inclusiveness/class issues with respect to mediation.

- must identify particular communities of marginalized women (i.e., lesbians, women with disabilities, poor women, rural women, Aboriginal women)
- homophobia of mediators is a concern
- homophobia of justice system is also a concern
- avoid imposition of legal rules which may be inappropriate
- privacy concerns
- power imbalance inherent in situations where one of the parties has a mental disability
- difficulty in checking biases of mediators.

28. Parent education is not an innovative trend.

- too entrenched
- too many programs across Canada.

APPENDIX C

APPENDIX C — FAMILY MEDIATION IN OTHER JURISDICTIONS

A. United States

According to the literature, approximately 22 states have some form of legislated, court-annexed divorce mediation.¹ These mediation programs are generally categorized under three separate headings: (1) voluntary programs administered through the court system; (2) programs where referral is at the discretion of the court; and (3) mandatory programs (i.e., California, Maine, North Carolina and Oregon).²

There have been recent changes made to these programs. These changes reflect in part a recognition of the concerns of women's groups that women are being treated poorly by the mediation process. Increasingly, for example, statutory provisions direct judges to consider abuse as a factor when determining whether mediation is appropriate in any particular case. These provisions are found in both voluntary and mandatory regimes. Statutory language which precludes mediation in cases where domestic violence is a factor is more and more common. Less explicit provisions refer more generally to mediation which would "pose an undue hardship or would threaten health or safety."³

However, the concerns of women's groups and others have apparently not diminished the general enthusiasm for mediation shown by state legislators and policy-makers. Recently, for example, the Oregon Task Force on Family Law endorsed an initiative which would see the expansion of mediation services state-wide, particularly for the resolution of custody and access disputes. The initiative does not make provision for any new funds to be allocated to this expansion of mediation services.

Instead, the initiative contemplates that existing court services, community dispute resolution centers, private mediation services and others will be able to absorb the added responsibility of service provision. Without knowing more detail, it is impossible to make an informed assessment of the Task Force's endorsement.

The Task Force did not limit its recommendations to broad service delivery and program expansion issues; it made a number of specific recommendations which are noteworthy in their own right. The Task Force recommended that mediation services:

¹ Maggie Vincent, "Mandatory Mediation of Custody Disputes: Criticism, Legislation and Support" (Fall 1995) Vol. 20 *Vermont Law Review* 255 at p. 271.

² Louise E. Graham, "Implementing Custody Mediation in Family Court: Some Comments in the Jefferson County Family Court Experience" (1993) 81 *Kentucky L.J.* 1107.

³ Vincent, *supra* note 1, at p. 271, citing Rogers and McEwen.

- (i) mandate full disclosure of assets and witnesses, with sanctions for failure to comply (i.e., have to pay costs);
- (ii) require that agreements address uninsured medical costs and the maintenance of insurance or other security for support and health insurance;
- (iii) codify claim preclusion on child support matters; and
- (iv) encourage the collection of data (i.e., ages of children, length of the marriage, etc.) from litigating families to guide policy efforts.

The consideration of abuse features prominently in legislative schemes.

1. Voluntary Programs

Michigan, Nevada and New Hampshire are examples of jurisdictions that provide voluntary mediation programs. Voluntary programs serve an educational purpose only; there is no automatic referral to mediation which attaches to attendance at these programs.

Concern for women in abusive situations remains apparent in the statutory schemes that legislate the establishment and use of the program. In Nevada, mediators are required by statute to take training on domestic violence issues. In New Hampshire, if the court suspects the parties are coming out of an abusive relationship, the court is required to order the termination of mediation. The only exception is if the abused party requests that the mediation continue, and the mediator is aware of the abuse.

2. Referrals at the Court's Discretion

Discretionary court referrals constitute the largest category of programs. The legislation enacting these programs contains various provisions in relation to the effect of abuse on the capacity to mediate. Some provisions direct the court to consider abuse before sending the parties to mediation. In other programs, both spousal and child abuse are to be considered “[i]f the court has reason to suspect that one of the parties or a child of a party have been physically, sexually, or emotionally abused by the other party.”⁴

3. Mandatory Programs

Four states have legislated mandatory programs: California, Maine, Oregon and North Carolina. All of these programs, with the exception of California's, provide for some kind of waiver if the parties are involved in an abusive relationship. California's mandatory scheme applies to all

⁴ Vincent, *supra* note 1, at p. 272.

contested custody and visitation matters. However, the legislation allows for separate mediation sessions when there has been abuse; support persons are also allowed to attend.⁵

B. Australia

A number of Australian jurisdictions have experimented with various combinations of counselling, conciliation and mediation in an attempt to provide an alternative to the traditional justice system.⁶ One of the more recent initiatives (June 1991) involves the passage of the *Courts (Mediation and Arbitration) Act*. This enabled the Family Court in Melbourne to establish a mediation service on a pilot basis in the Melbourne Registry.

The pilot program has since been made a permanent feature of the Melbourne Registry. The mediation services are available to parties who have not commenced legal proceedings in court, and to those who have commenced court proceedings but have chosen to resolve the matter through mediation.⁷

The suitability of the parties, and their dispute for mediation, is determined based on the following criteria: the willingness of both parties to mediate; their ability to enter into meaningful negotiation; and an assessment that there exists a reasonable balance of power between the parties. The Family Law Rules identify several criteria as indicators of a power imbalance. They include: (1) alcohol and drug abuse; (2) debilitating psychiatric disorders; (3) overwhelming emotions due to separation; (4) a history of broken agreements; (5) when mediation is used as a delaying tactic; (6) family violence; (7) the continuing dominance of one partner; and (8) child sexual abuse.⁸

These same Rules of Court require mediators to advise both parties to seek legal advice as to their rights, duties and obligations prior to mediation, at the conclusion of mediation, and if appropriate, at any time during the mediation. Mediators are also accorded the power to direct the parties to produce documents which they may require.⁹

⁵ Christy L. Hendricks, "The Trend Toward Mandatory Mediation in Custody and Visitation Disputes of Minor Children: An Overview" (1994) 32 *U. Louisville Journal of Family Law* 491.

⁶ Jocelyn Scutt, "The Privatization of Justice: Power Differentials, Inequality and the Palliative of Counselling and Mediation" (1988) 11 *Women's Studies International Forum* 503, at p. 510.

⁷ Tony Gee, *et al.*, "Mediation in the Family Court — An Overview of the Model" (1994) *Australian Journal of Family Law* 58.

⁸ *Ibid.*, at p. 60.

⁹ *Ibid.*, at p. 64.

C. New Zealand

New Zealand has been looking at reforms to its civil justice system as well. A recent statement from the federal Attorney General's Department indicates that the new-found interest in mediation is informed by the same types of concerns and objectives as elsewhere. The statement frames the objectives of civil justice reform as a "national strategy to create a simpler, cheaper and more accessible justice system."

Part of that strategy focuses on the use of mediation for the resolution of family law disputes. It reinforces the view that mediation is the appropriate dispute resolution process in family law disputes because of its emphasis on consensus and cooperation.¹⁰

D. Great Britain

Conciliation services are widely available in Great Britain, though they are focused largely on the resolution of custody disputes. Indeed, over the past 20 years, policy-makers and legislators in Great Britain have witnessed a growing movement to institutionalize "alternatives" to litigation, as ADR and the civil justice system are increasingly viewed as interdependent. This movement is proceeding on a smaller scale than in the U.S., but is entrenched firmly.¹¹

¹⁰ Rachel Field, "The Use of Litigation and Mediation for the Resolution of Custody and Access Disputes: A Survey of the Queensland Family Solicitors" (1996) 7 Vol. 1 *Australian Dispute Resolution Journal*.

¹¹ Sally Lloyd-Bostock, "Alternative Dispute Resolution and Civil Justice Reform: Is ADR Being Used to Paper Over Cracks?" (1996) 11 No. 2 *Ohio State Journal of Dispute Resolution* 397, at p. 398.

A number of reports and reviews have strongly recommended embracing ADR and integrating aspects of it into the civil justice system.¹² The *Heilbron Report*, for example, recommended establishing pilot programs to experiment with court-based mediation, together with other measures, to encourage the use of ADR.¹³ Moreover, Lord Wolf, in his Interim Report,¹⁴ made some recommendations for an enhanced role for ADR:

The new procedures ... will emphasize the importance of ADR through the courts' ability to take into account whether parties have unreasonably rejected the possibility of ADR or have behaved unreasonably in the course of ADR.¹⁵

¹² Report of the Independent Working Party *Civil Justice on Trial — The Case for Change* (Chair: Hilary Heibron Q.C., 1993).

¹³ Lloyd-Bostock, *supra* note 11, at p. 398.

¹⁴ Lord Wolf, M.R., *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (London: HMSO, July 1996).

¹⁵ *Ibid.*, at p. 11.

APPENDIX D

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APPENDIX E

APPENDIX E — INTERVIEW GUIDE: WOMEN AND MEDIATION PROJECT

To assist in gathering information about a sample of publicly funded family mediation services across Canada, we have designed the following Interview Guide which contains examples of the types of questions we will be asking during the interviews. We are sending the Guide to you prior to these interviews in order that you will have a better understanding of the general topic areas we are hoping to canvass and collect data on. We are NOT asking that you answer these questions in writing — unless that is your preferred method of response.

A. General Information

Name of Service:

Executive Director/Contact Person:

Address:

Telephone No.:

Fax No.:

Other Locations:

1. Description of service:
2. Hours of operation: evenings? weekends?
3. Length of time your service has been in operation:
4. What was the impetus for developing the mediation services your program/service provides?
5. What types of services are provided? (e.g., conciliation, arbitration, mediation, parent education, home assessments, information services, counselling, expert assessments re: custody and access claims, other)
6. What types of issues are dealt with (e.g., custody, access, child and spousal support, property division, financial arrangements, future dispute resolution mechanisms, mobility/relocation restrictions, other)?
7. In what languages are your services offered? English, French, other?

B. Administration of Program/Staffing

1. What is the mandate of your program/service? For example, are there mission statements, policy statements or other written statements that set out the particular

- philosophical approach taken by your program or service to family mediation services?
2. Has a policy manual or other written material been developed setting out the mandate, eligibility criteria, and/or administration procedures of the program? For example, is there written material on how the service is delivered, to whom, on what basis, i.e., the specifics of administration?
 3. How is the program administered? by the government? by a community board? professional advisory committee? private company?
 - If by government, which department?
 - Is there a mechanism for community input?
 4. Number of staff:
 - Full-time:
 - Part-time:
 5. Describe the composition of the staff. For example:
 - What positions do they hold?
 - What is the gender composition of the staff?
 - What is the percentage of women in managerial or senior positions?
 - Does the composition of the staff represent the cultural/ethnic make-up of your community?
 6. What is the average case load of each staff person, including mediators, counsellors, etc?
 7. What is the average length of time spent on a mediation case?
 - If not possible to estimate an average, is there an approximate range of time?
 - How many cases are resolved? How many cases carry on to litigation?
 8. Is there a waiting list for service?
 9. Is child care provided to enable clients to utilize the program?

C. Funding of Program

1. What is the funding source(s)? provincial government? private? fee-for-service? other?
2. What is the budget for your program/service?
3. Over the last few years, has your funding increased or decreased overall?
4. Are there costs to clients?
 - If yes, what are the costs?

- Does legal aid provide funding if clients cannot afford to pay?

D. Provision of Information on Mediation Services

1. How do clients become aware of your services? (e.g., referrals, advertisements, direction from the court)
2. Are potential clients provided with information on the benefits and drawbacks of mediation?
 - If yes, how is such information provided? (e.g., videos, in-person meetings, pamphlets or brochures, other)
3. Is information on other available options for resolving disputes provided to the parties?
4. Is this information available in different languages (including sign language) and in alternate formats for persons who cannot read conventional print (e.g., braille, cassette tape, large print)?

E. Screening Protocols

1. Are potential clients assessed to determine the appropriateness of mediation for their circumstances? (For example, is each party interviewed separately by the mediator to determine the power dynamics within the relationship?)
 - If yes, what percentage of potential clients are turned away on the basis that their situations are not suitable for mediation?
 - What options are suggested to them?
2. What is the program's policy with respect to screening for abuse and disclosures of abuse during mediation?
 - How is abuse defined? In particular does it include emotional, psychological, physical and financial abuse?
 - Are mediators trained to recognize the signs of abuse? If yes, describe the nature and extent of the training they receive.
 - Does the mediation continue in any cases if abuse is identified? If so, under what circumstances? What protections are put in place for the subjects of abuse?
 - What percentage of cases are screened out because of abuse? What happens to these cases?
 - Does the mediator consider the effects of past abuse when mediating a settlement or agreement?
3. What protocols are in place to protect the physical, emotional and/or psychological safety of a client where abuse is alleged and/or suspected? Please describe (e.g., Is there a process for cooling down an angry or hostile client? Are

separate meetings with each party viewed as appropriate or as compromising neutrality?).

4. What protocols are in place to protect the safety of a staff member? Please describe.

F. Nature of Services Provided

1. What are the goals of your mediation program?
2. On what basis are your services provided?
 - Are they provided by way of a practice direction, pilot project or legislation?
 - Are there other policies or legislation that affect the services offered?
 - Are the services mandatory or voluntary? How is mandatory defined? (e.g., is an attempt at mediation required before court services are available?)
 - At what point do mediators get involved?
3. What are the eligibility criteria?
4. Is the mediator given any information about the clients, such as the court file, prior to the mediation process? (e.g., history of abuse, existence of current or past restraining orders)
5. Do mediators have the legal authority to require the full disclosure of assets?
 - If no, how is full disclosure of assets obtained?
6. How are the mediation sessions structured?
 - In general, how long is each session and how often are they held?
 - How many sessions are required to resolve the dispute?
 - Are both clients present at every session and are they always in the same room?
 - Are clients permitted to bring a support person (family member or friend) into the mediation sessions?
 - Do mediators work separately or in pairs?
7. Is “open” or “closed” mediation practised? (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.)
 - If “closed,” are certain kinds of information exempt from the practice of confidentiality? (e.g., disclosure of violence or abuse)
8. Can either party terminate mediation, without penalty, either formally or through non-compliance?
9. Can mediators terminate mediation?

- If yes, when and under what circumstances?
10. How often is mediation terminated — by one party, both parties or by a mediator?
 11. Who tends to terminate mediation, women, men or mediators?
 12. Can the mediator(s) withdraw from situations where she/he determines that they cannot be resolved through mediation?
 13. Are timelines for resolving a matter determined at the outset of a case?
 14. Can the mediator(s) be compelled to testify in court on the mediation process?
 15. If both parties consent, can information or disclosures made during mediation be introduced as evidence in a court hearing? Is the consent of the parties required if the case proceeds to court? If not, are the parties forewarned that the information they disclose could be used in court?
 16. Are referrals made to other services? (e.g., counselling, women’s shelters, social services, legal assistance, financial services, etc.)
 17. What other services does the mediation program provide?
 18. Are there any mechanisms in place that allow clients to talk to someone other than the mediator about any concerns they may have about the mediation process?
 19. Is there an opportunity for older children to be involved in the mediation process?
 20. Do you provide mediation services to lesbians and gay men?
 21. Does your service adopt explicit or implicit policies or preferences about what defines a “good” outcome to mediation? (For example, do mediators assume that shared parenting/joint custody is usually best for children? Do mediators assume that maximum contact between children and their parents is best for children? If yes, in all circumstances?)
 22. How often is joint custody/shared parenting agreed to?
 23. How often are relocation restrictions agreed to? (i.e., either parent agrees not to move out of the jurisdiction without the prior approval of the other)
 - Who asks for them?
 - What form do they take? (i.e. how restrictive/how easily changed)
 24. Can a mediated agreement be appealed or varied?

G. Client Profile

1. Can you provide the following client information?
 - number of clients
 - sex of clients
 - age of clients
 - ethnic origin of clients
 - cases involving heterosexual vs. gay or lesbian relationships
 - income levels of clients
 - length of time married/common law
 - number of children
 - who usually gets custody?
 - how often joint custody is agreed to?
 - have clients have been through the legal system already?
 - the number of clients who have been denied legal aid? female? male?
 - particular problems for female clients
 - particular problems for male clients
 - particular problems for children
2. Are mediation services favoured by particular ethnic communities over others?
 - If yes, which ones and why?

H. Parent Education or Orientation Programs

1. Are parent education/orientation programs provided?
 - If yes, how are they conducted and what is their content generally?
 - If no, are referrals made to appropriate community resources?
 - Are they mandatory or voluntary?
 - What is the level of attendance?
 - Results?

I. Qualifications, Education and Training of Staff

1. What is the educational background of staff? What is the minimum/average level of education required of staff mediators?
2. What kind of training and experience in mediation do they have?
 - Is there an obligation to participate in ongoing education and training sessions once becoming a mediator in your program? If yes, what is the nature of that obligation?
 - Please describe the kinds of courses/training they are required to take and how often they are required to take them.
 - How often are continuing education courses held?

3. Have mediators received training or education about social conditions or discriminatory attitudes which may put one or both clients at a disadvantage? (e.g., poverty, racism, sexism, history of abuse, disability, homophobia, power dynamics, gender issues, cultural differences, etc.)
4. What qualifications or credentials are mediators required to have to work with your program? What type of experience is required?
5. Are there resources for ongoing training?
 - If so, what type and how often?
6. Are there resources for training specifically re: gender bias, cultural-sensitivity, aspects of disability, homophobia, violence against women in intimate relationships, etc.?
7. Are mediators trained specifically to detect and deal with situations where one party is more powerful or articulate than the other?

J. Accountability of Mediators

1. How is accountability maintained to clients?
2. Are mediators bound by a professional code of conduct or code of ethics?
3. Do consumers of mediation services have a choice about which mediator to use?
 - If yes, how are such choices made and on what information?
4. How are complaints about mediators or mediation practices handled?

K. Legal Representation

1. Does your program/service provide access to independent legal representation for clients involved in mediation services?
2. Are clients advised to retain counsel if they do not already have one?
 - If not, why not?
3. Are clients encouraged to have mediation settlements/agreements reviewed by outside experts? (e.g., legal counsel, accountants or financial advisors)
4. Are clients required or permitted to have legal counsel present during the mediation sessions? Is the presence of counsel encouraged or discouraged?
 - In what percentage of cases is only one party represented by counsel?

L. The Assessment of Results

1. Have any (i) program evaluations and/or (ii) client satisfaction surveys been conducted? If yes, please describe. For example:
 - What was the level of client satisfaction?
 - Were results broken down by gender?
 - Are the results of evaluations or surveys available to the public?
2. Does your program monitor compliance with mediated agreements?
3. If yes, what is the rate of compliance over time?
4. What kind of record-keeping is done? Computerized?
5. What type of information is kept? (e.g., is there a system to track alterations to agreements, the path of non-resolved agreements, or rates of post-litigation)
6. How is the “success” of the service currently being measured?
7. How many mediated agreements ultimately end up in court?
8. Can the effect of mediating an agreement versus obtaining a court order be measured?
9. Do you have recommendations on how to improve mediation services, particularly as they apply to women?

M. Availability of Service/Program Documents

1. Can we obtain the following service/program documents/information?
 - relevant statistics
 - relevant legislation and/or policies
 - protocols, procedures, guidelines, practices
 - screening tools, surveys or questionnaires
 - research reports or evaluations related to the service provided
 - information and other material provided to clients

Thank you very much for participating in the Women and Mediation Project.

APPENDIX F

APPENDIX F — SCREENING TOOLS

PART I — ONTARIO SCREENING TOOL

MINISTRY OF THE ATTORNEY GENERAL PROVINCE OF ONTARIO MEDIATION QUESTIONNAIRE PART ONE AND TWO 1995

Mediation Questionnaire Part One

Objective

All separated couples who choose to mediate conflicts arising out of their separation are required to complete this mediation assessment form. The information you provide will make an important contribution towards determining whether mediation is the most effective way of resolving your conflicts or solving your specific problems.

Instructions

- read each question carefully
- answer all questions

Background

Q1. Sex: Male: 1 Female: 2

Q2. Age: (a) How old are you? (answer on lines) _____ years

(b) How old is your partner? (answer on lines or check don't know)

_____ years _____ don't know

Q3. What is the highest level of education you have completed? (check one)

- Less than high school 1
- High school diploma 2
- Some post-secondary education 3
- College/technical degree 4
- University degree, undergraduate 5
- Other? (What?) 6

Q4. Into which of the following groups does your present personal gross household (per year) income fall?

- Less than \$15,000 1
- \$15,000-\$29,999 2
- \$30,000-\$59,999 3
- \$60,000 or more 4
- Do not know 5
- Refuse to answer 6

Q5. What is your present gross annual household income (count your own and partner's income if applicable and include income from all sources i.e. job, welfare, mother's allowance, worker's compensation, etc. Do not count child support payments received as income).

- Less than \$15,000 1
- \$15,000-\$29,999 2
- \$30,000-\$59,999 3
- \$60,000 or more 4
- Do not know 5
- Refuse to answer 6

Q6. Which of the following languages do you understand and speak best? (check one)

English 1

French 2

Other? (Which?) 3

Q7. (a) Which of the following best describes where you live at the moment?

Present Accommodation

A house or apartment owned with a mortgage 1

A house or apartment owned without a mortgage 2

A house or apartment rented privately 3

A house or apartment rented from Ontario Housing 4

The home of a friend or relative where you don't pay rent 5

The home of a friend or relative where you pay rent 6

Other (please specify) 7

(b) Are you currently living in the matrimonial home?

Yes 1

No 2

(c) At the time of your final separation who moved out of the family home?

Me 1

Partner 2

Both 3

Marital History

Q8. How old were you when you and your partner got married or began living together?

Me _____ years old

Partner _____ years old

Q9. When did you marry or start living with the person you separated from? (month - 01 to 12; year - last two digits)

Month _____ Year _____

Q10. Who made the decision to separate?

Me 1

Partner 2

Both 3

Q11. Couples who separate/divorce do so for a number of reasons. Are any of the following included among the major reasons for your separation? (check three)

A great deal of conflict 1

My physical abuse of partner 2

Partner's physical abuse of me 3

My emotional abuse of partner 4

*Partner's emotional abuse 5

My drug/alcohol problems 6

Partner's drug/alcohol problems 7

Very poor communication on my part 8

Very poor communication on partner's part 9

My sexual problems 10

Partner's sexual problems 11

**Being taken advantage of by partner 12

I took advantage of my partner 13

Partner's mental problems 14

My mental problems 15

My adultery 16

Partner's adultery 17

Other (what?) 18

* being put down, called names, humiliated

** taking and never giving, lying in order to get me to do things I did not want to do

Q12. (a) Are you and your partner living in separate residences at the present time?

No 1

Yes 2

(b) If no, when did you start living in separate residences? (Enter month and year)

Month _____ Year _____

Q13. Who did the children (child) live with when you separated?

Me 1

Partner 2

Both 3

Other (who?) 4

Q14. Who are the children (child) living with now?

Me 1

Partner 2

Both 3

Other (who?) 4

Q15. At the present time, with whom are you living? (check as many as apply)

My own child(ren), previous union 1

My own child(ren), present union 2

No 1

Yes 2

Q18. Has your partner ever been arrested or convicted for committing a violent crime?
(check one)

No 1

Yes 2

Q19. At the present time, does your former partner own a gun? (check one)

No 1

Yes 2

Don't know 8

Q20. If Yes, does he/she have a legal gun permit? (check one)

No 1

Yes 2

Don't know 8

Violence

Q21. Listed below are a number of hurtful acts or behaviours. Has your partner done any of them to you? Answer **yes** or **no** for each behaviour. If yes, then check when (before/after separating) and how often.

*2-3 x means two to three times; more than 3 x means more than three times.

	During last 6 months prior to separating				Since you separated			
	No	Yes	2-3 x	more than 3 x	No	Yes	2-3 x	more than 3 x
a. threatened to come after you if you tried to leave								
b. threatened to hurt or kill you								
c. showed anger by yelling, throwing things, breaking things, pounding walls or table								
d. put you down, called you names, swore at you, insulted you in public								
e. showed excessive jealousy by constantly questioning, accusing or threatening you								
f. pressured you to have sex								
g. threw, slapped, shook, pulled your hair, twisted your arm, pinned you to the wall or floor, used force to put you out of the house, smothered you								
h. choked or strangled you, punched you with his/her fist, kicked you, hit you with something								

i. threatened you with a gun, knife or other weapon								
j. stabbed or shot you, or used some other weapon, injured you physically								

**Mediation Questionnaire
Part Two**

Q22. Listed below are a number of reasons why one partner may say or do hurtful things to the other. For which of these reasons did your partner do the hurtful things you checked off? (check yes or no for each reason)

a. Control

No 1

Yes 2

- to get me to do what he/she wants me to do, or to stop me from doing what he/she does not want me to do

b. Conflict

No 1

Yes 2

- to win or end an argument or fight or to prevent me from arguing

c. Anger

No 1

Yes 2

d. Alcohol use/abuse

No 1

Yes 2

e. Self-defence

No 1

Yes 2

f. Retaliation (getting even)

No 1

Yes 2

g. For no reason (out of the blue)

No 1

Yes 2

h. Other reasons (what? write on lines)

Q23. Have any of the things said or done to you resulted in emotional or physical injury? (check yes or no)

a. emotional injury No 1

Yes 2

b. physical injury No 1

Yes 2

Q24. If yes, did you seek professional treatment?

a. mental health No 1

Yes 2

b. medical No 1

Yes 2

Q25. During the last six months prior to your separation, has your partner done any of the things noted below? Answer for each item listed and as best as you can remember, indicate how often.

	(5) Never	(4) Once	(3) 2-3 times	(2) more than 3 times
a. monitored your time and made you account for where you were				
b. prevented you from contacting family and friends				
c. restricted your use of the car or the telephone				
d. made major decisions without your input				
e. treated you like you were a servant				
f. made you account for all the money you spend				
g. made you ask for money to buy the basic necessities, such as food				

Q26. At the present time, if you become involved in a conflict or disagreement over an issue associated with your separation (e.g. custody, access, support), how well can you stand up for yourself and state your position, compared with your partner? (check one)

Better 1

Equally well 2

Less well 3

Q27. When you were involved in conflicts or disagreements while you were living together, how well did you stand up and state your position, compared with your partner? (check one)

Better 1

Equally well 2

Less well 3

Q28. Since you separated, has your partner done any of the following things to you?

	No	Yes 1	Yes 2-3 x	Yes 2-3 x often
a. caused problems for you with the car, house, credit cards				
b. said nasty things about you to the children				
c. telephoned you at all hours of the day and night/visited you at home when he/she was not invited				
d. spied on you/followed you around				
e. caused you to be fearful for your safety				
f. bothered you at work				
g. violated restraining orders or peace bonds				
h. provided verbal support and encouragement to you				
i. provided financial support whenever you needed it				
j. helped you move, cooked for you, fixed things around the house, drove you places, helped with the children, mowed the lawn, removed snow from driveways, helped with household pets, did some household chores, other?				
k. co-operated with you in matters relating to the children				

Q29. Is there anything you would like to say?

Thank you.

**MINISTRY OF THE ATTORNEY GENERAL
PROVINCE OF ONTARIO
DECISION GUIDE**

Violence

Question	Item	Male Partner	Female Partner
11 (2)	physical abuse as a major reason for separating	<input type="checkbox"/>	<input type="checkbox"/>
(5)	emotional abuse as a major reason for separating	<input type="checkbox"/>	<input type="checkbox"/>
16 (b)	alcohol consumption as a source of tension	<input type="checkbox"/>	<input type="checkbox"/>
(c)	consume 3 or more drinks per day	<input type="checkbox"/>	<input type="checkbox"/>
17	mental health problems	<input type="checkbox"/>	<input type="checkbox"/>
18	violent crime record	<input type="checkbox"/>	<input type="checkbox"/>
19	owns a gun	<input type="checkbox"/>	<input type="checkbox"/>
20	does not have a permit for gun	<input type="checkbox"/>	<input type="checkbox"/>
21 (b)	threatens to hurt/kill during last 6 months	<input type="checkbox"/>	<input type="checkbox"/>
	threatens to hurt/kill since separated	<input type="checkbox"/>	<input type="checkbox"/>
(g)	three, slapped etc. during last 6 months	<input type="checkbox"/>	<input type="checkbox"/>
(h)	choked, strangled etc. during last 6 months	<input type="checkbox"/>	<input type="checkbox"/>
(i)	threatened gun/knife during last 6 months	<input type="checkbox"/>	<input type="checkbox"/>
	threatened gun/knife since separation	<input type="checkbox"/>	<input type="checkbox"/>
(j)	shot, stabbed during last 6 months	<input type="checkbox"/>	<input type="checkbox"/>
	shot, stabbed since separation	<input type="checkbox"/>	<input type="checkbox"/>
22 (a)	violence as control	<input type="checkbox"/>	<input type="checkbox"/>
24 (a)	treatment - mental	<input type="checkbox"/>	<input type="checkbox"/>
(b)	treatment - physical	<input type="checkbox"/>	<input type="checkbox"/>

Decision Rules

1. exclude if shot/stabbed during past 6 months or since separated
2. exclude if partner has engaged in any type of violence since separation

3. caution: If no violence since separation, but any one or more types of violence during last six months, consumes 3 or more drinks per day, mental health problems, violence crime record, does not have permit for gun, caused injuries

requiring treatment and uses violence as control. The more frequently a partner has engaged in violence, the more caution should be exercised in reaching a decision to include.

Violence Imbalances

Question	Item	Male Partner	Female Partner
2.	markedly younger	<input type="checkbox"/>	<input type="checkbox"/>
3.	markedly higher education	<input type="checkbox"/>	<input type="checkbox"/>
14.	partner with whom the children are now living	<input type="checkbox"/>	<input type="checkbox"/>
7 (a)	partner with house/apartment owned	<input type="checkbox"/>	<input type="checkbox"/>
(c)	partner who stayed in matrimonial home	<input type="checkbox"/>	<input type="checkbox"/>
10.	partner who made the decision to separate	<input type="checkbox"/>	<input type="checkbox"/>
5.	partner with markedly higher income	<input type="checkbox"/>	<input type="checkbox"/>
15 (5)	partner with a new partner	<input type="checkbox"/>	<input type="checkbox"/>
21 (a)	partner with monitored time	<input type="checkbox"/>	<input type="checkbox"/>
(b)	partner who prevented contacts with others	<input type="checkbox"/>	<input type="checkbox"/>
(c)	partner with restricted use of car/telephone	<input type="checkbox"/>	<input type="checkbox"/>
(d)	partner who made major decisions	<input type="checkbox"/>	<input type="checkbox"/>
(e)	partner who made partner account for all money spent	<input type="checkbox"/>	<input type="checkbox"/>
(g)	partner who made partner ask for money	<input type="checkbox"/>	<input type="checkbox"/>
6.	partner who speaks English	<input type="checkbox"/>	<input type="checkbox"/>

Decision Rules

1. Power unbalances alone, even if marked, may not necessarily be used to exclude separating couples from mediation. They may suggest a departure from mediation neutrally however.

Perceived Persuasive Strength

Question	Item	Male Partner	Female Partner
26.	Partner who can stand up for self “better” or “equally well” at present	<input type="checkbox"/>	<input type="checkbox"/>
	Observation of couple interaction during first joint mediation session indicates that one partner can stand up for self “better” or “equally well”.	<input type="checkbox"/>	<input type="checkbox"/>

Decision Rule

1. **Exclude** if one partner clearly observed to stand up for self better than the other during first joint mediation session and also reports cannot stand up for self better or equally well at present.
2. **Caution** if information from self-report (Q.21) and observation of couple during first mediation are contradictory.

General Rule: Mediator’s judgment on the appropriateness of mediation is overriding

PART II — BRITISH COLUMBIA SCREENING TOOL

September 5, 1995
Branch Management Committee
Corrections Branch
Re: ADM 95:21

Screening for Abuse—Violence against Women in Relationships Policy

Effective immediately, the enclosed procedures for screening for violence are to be put into practice by all Family Court Counsellors and Family Justice Counsellors.

The Ministry of Attorney General Violence Against Women in Relationships Policy provides that Family Court Counsellors must screen for violence and power imbalance issues in every new family case. The attached procedures provide guidelines for this screening process. These procedures have been developed by the Family Program Advisory Group following wide consultation and research.

Many Family Court Counsellors and Family Justice Counsellors currently screen for abuse, violence and power imbalances. We now must ensure that this screening occurs with every new family case, both at intake for counselling and when undertaking a child custody and access evaluation.

Please ensure that this directive is provided to all managers and staff who have responsibility for family services and that a process is in place to each Region to assist Family Court Counsellors and Family Justice Counsellors to implement these procedures.

Thank you.

D.J. Demers
Assistant Deputy Minister

Enclosure

cc: Mr. Paul Pershick
Mr. Allan Anderson

SCREENING FOR VIOLENCE: PROCEDURES FOR FAMILY COURT AND FAMILY JUSTICE COUNSELLORS

The Violence Against Women in Relationships Policy

The Ministry of Attorney General introduced B.C.'s first integrated Violence Against Women in Relationships Policy in April 1993.

This policy makes it clear that violence within a relationship is a crime, and directs the criminal justice system to take the steps necessary to ensure the protection of women and children who may be at risk. It calls for the rigorous prosecution of offenses against women in relationships, and stresses the responsibility of police and Crown Counsel—not the victim—to lay and pursue criminal charges.

The policy also directs Family Court and Family Justice Counsellors to screen for the incidence of violence and power and control issues in every new family case.

Rationale

It is vital for Counsellors to identify the presence of domestic violence and power issues not only to help ensure the safety of family members, but also because domestic violence and power issues violate many of the basic assumptions we make in mediation.

We must know whether violence or power imbalances exist within a particular family before we can determine whether mediation is an appropriate alternative for that family. It is not appropriate—there can be no fair and equitable settlement—if one partner in the mediation is negotiating under duress or intimidation.

Because custody and access issues can exacerbate an already volatile situation, we must also know whether violence exists when we prepare child custody evaluations, to keep the children safe and to help the court determine the capacity of each parent to care for his or her children.

This Framework

This screening framework provides general guidelines only, designed to supplement the procedures contained in the *Family Services Manual of Operations*.

It begins with sample questions for Counsellors to use during first contact, and suggestions for what to do next depending on the answers to those questions. It then moves on to describe methods for determining violence during the intake interview and

mediation, along with screening procedures for custody and access reports. As you feel more comfortable and confident in determining violence and other control issues, you will no doubt develop your own screening questions and methods.

First Contact/Telephone Screen

Once you have determined the nature and subject of the call, ask the caller:

- *Have you ever had any concerns for your own safety or the safety of your children during the relationship? Has your spouse ever caused you to feel threatened or fearful?*
- *Do you believe there is an immediate risk of violence in your family, either to you or your children?*

If the caller says yes to either of those questions:

- Ask the caller if she or he would like a referral to the police, emergency medical services, regular medical services, or a specialized Victim Assistance Program.
- Make a note of the caller's safety concerns and make an appointment for the caller to come in for an intake interview, separate from the partner.
- Make the appointment as soon as possible with any caller who believes there is an immediate risk of violence.

If the caller says no:

- Ask the caller if she or he would like an intake interview separate from the partner, or whether they would like to come together to discuss the issues and options for resolution.

Intake Interview

The intake interview should be used to:

- define the role of the Counsellor;
- provide information on available services and options for resolution; and
- determine if violence or power issues are a factor in the relationship and for the family.

Even if you already know—from the first contact/telephone screen—that violence or fear of intimidation is a factor, you will still need to use this interview to determine the exact nature and extent of the abuse and what safety measures will be required.

Remember that abused people often do not recognize that they have been living in an abusive situation. Or, they do recognize it but blame themselves and deny and minimize the realities. They may need help in understanding the dynamics of violence, of control and abuse in a relationship.

Remember also that people express themselves in a variety of ways, not just through words. Throughout the intake interview and all subsequent meetings, watch for any non-verbal cues/body language that may indicate coercion, fear or intimidation.

Stage One

To determine the presence of violence or control issues, you will need to ask the client or clients a series of questions designed to review the general history and nature of the relationship. These questions might include:

- *How do you and your partner resolve disagreements? Deal with anger?*
- *How are decisions made in you relationship? Does one partner control all the major decisions—about finances or child guidance, for example? Or are the decisions shared between the two of you?*
- *How do you resolve conflict in the relationship or in making decisions?*
- *Have you ever been afraid of your partner? Are your children afraid of your partner? How does your partner discipline?*
- *Who wants to end the relationship? Why? Do you have freedom in your relationship? access to friends, family, free time?*
- *Is there a history of violence in your family—parents, brothers, sisters? In your partner's family? Do you ever alter your behaviour to protect yourself from your partner's anger?*
- *Do you or your partner use alcohol or drugs? To what extent?*

Stage Two

Based on the answers to these questions, you might feel it necessary—if you have been interviewing the partners together—to ask for separate intake interviews in order to investigate the relationship in more detail.

At this point, you might ask more specifically:

- *Has your partner ever threatened to hurt you, your children, a pet, belongings?*
- *Has your partner ever threatened to commit suicide?*
- *Does your partner control all money/property/the car or other resources?*
- *Is your partner jealous or possessive of you and your relationships with other people?*
- *Does your partner control your time with friends or family? Do you feel isolated by your partner?*
- *Has your partner ever thrown things/punched the wall or a door?*
- *Has your partner ever hit, kicked, punched, bitten or pushed you?*
- *Has your partner ever hurt anyone else—family member or otherwise?*
- *Has your partner ever forced you to have sex when you don't want to?*

If the client answers yes to any of these questions, and violence is obviously a dynamic in the relationship, you will need to discuss what services are available to help ensure the client's safety and the safety of her or his children. If requested, refer the client to the police, emergency medical services, regular medical services, or a specialized Victim Assistance Program.

Mediation

Successful mediation depends on balanced and cooperative decision making.

Mediation can only be effective as a tool for conflict resolution if:

- the mediator is aware of the nature and extent of violence or power imbalances in the relationship;
- the abuser or violent partner accepts responsibility for the violence; and
- the partner who has been the victim of the violence feels capable of making independent decisions, that she or he can make decisions without feeling coerced or intimidated.

Realizing that the victim of the violence may have been so intimidated over time that she cannot recognize her own preferences or be able to make an independent choice. Give lots of support!

In order for you to pursue mediation as an option, you must be satisfied that both partners:

- clearly understand what mediation is and what will be required of them during the mediation process;
- understand that there are other options, in addition to mediation, that they can consider;
- have expressed a clear commitment to proceed with mediation;
- have chosen to enter into mediation voluntarily, without overt or implied coercion by anyone;
- have the capacity to make decisions not influenced by the threat of intimidation, violence or abusive behaviour.

Joint Mediation Interview

Complete a joint mediation interview only if you are satisfied that violence is not a present factor in the relationship, and that both partners have chosen to enter mediation of their own free will.

During the mediation, continue to screen for abuse, power and control issues. (Mediating as a team—with one male and one female mediator—can be useful to address power imbalances.)

If at any time during the mediation process you suspect that violence or intimidation may be a present factor in the relationship—or that coercion was used to get one partner to agree to mediation, or to some specific aspect of an emerging agreement—stop the session and explain that you will need to complete interviews with each partner alone.

Begin your separate interviews with the at-risk or abused partner.

Interview with the At-Risk Partner

The focus of this interview should be on safety.

Explain that you are concerned about mediating in situations where domestic violence is present. Try to determine why this partner wants mediation, and explain that mediation is not the safest or fairest forum for an abused partner to reach an equitable settlement.

Explain that mediation is successful only when all of the issues are visible, and that violence or intimidation—if present in the relationship, negates the use of mediation.

Repeat the screening questions you asked during the intake interview to again try to determine the nature and extent of violence in the relationship and whether there is any immediate risk of violence to this partner or the children. Reassure the at-risk partner

that your discussions are confidential (within the limits of child abuse and criminal activity).

If you are not satisfied that this partner entered into mediation of her or his own free will, or that it remains as the best option for this family, explain that the mediation process cannot continue. Discuss safety plans for the future and make referrals to other agencies.

Make sure you are familiar with your Family Services Office/Family Justice Centre exit safety plan, and take whatever steps are necessary to ensure the at-risk partner's safety upon leaving the building.

Notify the police if you have any concerns about the immediate safety of the at-risk partner and/or the children.

Interview with the Abusive Partner

With the abusive partner, discuss what happened in the joint mediation interview and explain how the situation or tension that existed there made it necessary to hold separate interviews.

Acknowledge the tension the abusive partner probably feels right now. Perhaps state that, in your experience, so much tension usually means that mediation will not result in a fair outcome.

Explain that there are other options for addressing relationship issues that can be explored, and that the safety of all family members is your most central concern. Explain that mediation is successful only when all of the issues are visible, and that violence or power issues—if present in the relationship—negate the use of mediation.

If the abusive partner does acknowledge the violence/abuse, discuss the resources that are available to help, make and follow through with appropriate referrals.

If the abusive partner does not acknowledge the violence/abuse, but you are satisfied that it does exist, explain that the mediation process cannot continue and that you will have to move to another option.

Again, notify the police if you have any concerns about the immediate safety of the at-risk partner and/or the children.

Custody and Access Reports

Counsellors preparing custody and access reports should always hold separate interviews with parents to screen for violence and control issues.

Using the same kind of screening questions listed for the intake interview, try to determine any safety concerns or potential for violence.

If you do determine that violence or power issues are a factor within the family, your report will need to focus on the impact of the violence/abuse on the other parent, on the children, and on each parent's capacity to care for his or her children. Your report should also cover what steps, if any, are being taken by each parent to stop the violence and deal with its effect on the children. Remember that children who witness violence are impacted in the same way as if they had been the immediate victim.

Some principles¹ Counsellors may want to keep in mind while preparing child custody and access reports:

General

- All decisions about custody and access should be based on physically and emotionally protecting the child.
- Custody of children should not be used as a reward or compensation for the parent who is a victim of violence, nor should the denial of custody and restrictions on access be used as a punishment for the abusive parent.
- The needs of the children do not always coincide with the needs of the parent who has been physically abused. Parents need safety from threats, harassment, and/or physical violence in order to adequately provide and care for their children.

¹ Adapted from Section III of *High-Conflict and Violent Parents in Family Court: Findings on Children's Adjustment, and Proposed Guidelines for the Revolution of Custody and Visitation Disputes* by Janet R. Johnston (Center for the Family in Transition, Corta Madera, California, 1992).

- Domestic violence is not always perpetrated by the parents. The potential for violence in a wider circle—new spouses or boyfriends and extended family, for example—should be considered.

Custody

- Joint legal custody—which requires parents to work cooperatively in making decisions—is not appropriate where there is continued high conflict and potential for violence between parents.
- Where there is evidence of current use or threat of violence, sole legal custody should normally be given to the non-violent parent. In such cases, the non-custodial parent may be denied right of access to the child’s medical and educational records if such information would provide access to the other parent’s address and telephone number, which the custodial parent has the right—for safety reasons—to keep confidential.
- Where there is a history of domestic violence that is *not* current, there should be no presumption in favour of any particular legal custody arrangement:
 - legal custody decision-making rights and responsibilities may be explicitly divided between parents;
 - parents may have joint legal custody provided they are both able to make non-coerced, cooperative decisions for their children; or
 - one parent may be awarded sole legal custody.
- As a consequence of the violence, adult victims of repeated or severe abuse may have diminished parenting capacity when the violent relationship is ended. The parent who was the victim may need time and counselling to re-establish competence and stability as the custodial parent. Appropriate referrals should be made.

Access

- All arrangements for contact between a child and parent should be carefully structured to limit the child’s exposure to conflict between the parents and ensure the safety of everyone concerned.
- Supervised visitation is appropriate in any case where there is evidence of current or recent use or threat of violence.
- Access should be suspended in any case where there is a history of extreme violence or abusive behaviour, where the child is adamant in refusing to visit the abusive parent, or where the abusive parent has expressly threatened to harm or flee with the child or used the child to communicate threats to the other parent.

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