Mediation in Hong Kong:
The Way Forward
November 30, 2007

The Development of Mediation in British Columbia, Canada

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Introduction

Jurisdictions across the common law world are turning to mediation and other non-adjudicative dispute resolution processes for assistance in addressing problems of cost, delay and complexity in their justice systems. In the last 10 years there has been significant growth in both private and public sector interest in expanding the use of mediation in Canada. We have now had experience with mediation in a sufficiently large number and range of disputes to be able to draw some conclusions about its general effectiveness as a dispute resolution tool and about its potential to enhance access to justice.

Background

In the early 1980's mediation and "alternative dispute resolution" began to generate widespread interest amongst the Canadian public, bar and judiciary. The idea of mediation[1] initially made its way into the justice system through family law, but its potential for broader application to a greater range of civil and commercial disputes was quickly recognised.

Interest in mediation was spurred by the problems of cost, delay and complexity in the justice system. It is clear that from the court user's perspective the courts are unaffordable, overly complex, and take too long. There is growing concern across Canada that justice is inaccessible to all but the wealthiest and that the high cost of litigation means that the system favours the party with the greatest resources. These problems were serious in the 1980's, and are no less pressing today. As access to the justice system declines, so does public confidence in the administration of justice.

> *Access to justice is simply critical. Unfortunately, many Canadian men and women find themselves unable, mainly for financial reasons, to access the Canadian justice system. Some of them become their own lawyers, or try to.*[2]

[1] Mediation is a method of dispute resolution in which the parties try to resolve a dispute or reach a settlement with the assistance of a neutral mediator who facilitates the negotiation. It is a private, flexible and informal process where a mediator and disputing parties work together to find a solution that is acceptable to everyone. The parties, not the mediator, make the decisions about the terms of their agreement.
[2] Chief Justice of the Supreme Court of Canada, Beverley McLachlin, March 2007

In addition to concerns about expense and delay, an increasing number of academics and jurists were, by the early 1980's, expressing concern about other consequences of the adversarial approach to litigation, including its potential to amplify conflict and polarize parties, in particular in family law and in some commercial disputes where the parties must continue to work together after the lawsuit.

As growing numbers of litigants found that they could not afford counsel we began seeing increasing numbers of unrepresented or self represented litigants appearing before all levels of court. Not only is this a very challanging task for a lay person to take on, it also creates difficulties for judges, lawyers and court administrators, often slowing down the litigation process even more.

Thus, concerns on the part of both government and court-users (particularly the business sector) created both the political will and a consumer-driven demand to instigate change in the civil justice system.

By the mid 1980's several Canadian provinces were beginning to experiment with mediation. Early experiences with the process, usually in the family law area, were quite encouraging. In 1984 the Law Society of British Columbia became the first jurisdiction in Canada to create rules guiding the practice of family law mediation and the conduct of family law mediators. Around this same time the Continuing Legal Education Society of British Columbia and the Justice Institute of British Columbia began to offer high quality mediator training programs.

In 1996 the Canadian Bar Association published the *Systems of Civil Justice Task Force Report.* It made 53 recommendations, proposing a wide range of changes to the justice system, including simplification of procedural rules, increased judicial management of cases, better use of technology, and changes to legal education. Its first recommendation was that every Canadian jurisdiction should make non-binding dispute resolution processes, like mediation, available as early as possible in the litigation process. Further, the report recommended that participation in these processes be a pre-condition to using the court system. This Task Force Report became one of a series of many reports that strongly endorsed the increased use of mediation in the Canadian civil justice system.

The Report's strong endorsement of mediation was based on the fact, now clearly established, that mediation, if properly used, is effective (i.e., mediation settles a significant number of cases sooner, at reduced cost and in a manner acceptable to the parties and their counsel). Many other reports have now been published in various jurisdictions, and they all generally come to the same conclusion - early, consensual resolution of disputes holds the greatest promise for reducing costs and delays and enhancing access to justice in a manner that is consistent with the principles and values that underlie our common law justice systems.

In 1996 the BC Ministry of Attorney General created a dedicated resource, the Dispute Resolution Office ("DRO"), with a mandate to:

- expand the use of early, consensual dispute resolution processes - particularly mediation - in the civil justice system and in agencies, boards, commissions and tribunals across government;
- develop policy, legislation and regulations to support the growth of mediation;

- act as a liaison between the government and the bar, the bench and the public to promote understanding of and use of mediation.

The Dispute Resolution Office

The strategy adopted by the DRO to carry out its mandate was as follows:

a) explore the literature and the research, particularly with respect to mediation initiatives in other jurisdictions;
b) confirm a formal dispute resolution policy for the Ministry;
c) use legislation and regulation to expand the use of mediation;
d) use policy and program resources to expand the use of mediation;
e) help build a strong mediation infrastructure in the community;
f) take a collaborative approach to the design of programs and the creation of regulations.

a) The literature and the research

After reviewing a great deal of literature and consulting with other jurisdictions, the DRO was satisfied that the use of early, consensual dispute resolution processes can be linked to affordability and cost-saving, and to the following additional policy objectives:

- enhanced access to justice;
- greater process satisfaction for parties;
- enhanced post-dispute relationships;
- more durable outcomes (i.e. increased compliance);
- more complex remedies;
- better allocation of judicial resources (by removing the easily settled cases from the system); and
- faster or more streamlined case processing in the courts[3].

We also concluded from the research – and have since verified by our own experience – that:

- large scale (institutional) mediation programs, if properly established, will successfully resolve a significant number of cases quickly and economically, and in a manner satisfactory to the participants;

[3] It is noteworthy that the literature also warned us to take into account the possibility of unintended or undesirable consequences arising from the increased use of mediation. These might include:

- development of a two-tiered system of justice - second-class justice for those who mediate, litigation for those who can afford it;
- mediation could increase cost and delay by creating an additional procedural hoop for litigants to jump through;
- informal DR processes, lacking procedural safeguards, could be forums for the strong to exploit the weak;
- resolution based on idiosyncratic individual values, not legal principle, could dilute the power of the law; and
- mediation could result in loss of the court's voice and diminished evolution of law through precedent.

While it is wise to be cognizant of these concerns, the experience in British Columbia is that such consequences either do not arise or can be avoided.

- even though the process works very well, parties do not volunteer into mediation programs. Uptake rates in voluntary programs tend to be very low, even while success rates and levels of participant satisfaction are high; and
- if compelled (legislatively or by rules) to participate in mediation, neither settlement rates nor levels of participant satisfaction drop significantly.

These conclusions gave us some considerable confidence in vigorously asserting an expanded role for mediation in the civil justice system and in our willingness to mandate its use.

b) A formal dispute resolution policy

The Ministry had already articulated a basic dispute resolution policy early in the 1990's. It provides, in part, that:

> *The Ministry of Attorney General is committed to a justice and conflict resolution environment which includes a wide range of dispute resolution options. These options include both established adjudicative methods of dispute resolution as well as collaborative methods of dispute resolution such as conciliation, facilitation, negotiation, mediation and other consensus-based processes.*

Other policy values subsequently adopted by the DRO include:

- access to justice is taken to mean more than access to the courtroom. It includes access to any structured process that facilitates fair resolution of the dispute;
- as important as resolution is the goal of *early* resolution. It is well recognised that almost all civil cases commenced in the Canadian courts resolve short of trial.[4] The problem is that many of them resolve "on the court house steps" after the parties have already incurred significant process costs. Accordingly, the problem is not so much that cases need mediation to resolve, as they need mediation to resolve *earlier*. In this sense mediation can be thought of not so much as an alternative to trial, but as an alternative to expensive pre-trial procedures, and as an adjunct to negotiation;
- we must begin to think in terms of "managing cases to settlement", as opposed to the more traditional practice of "managing cases to trial". The historical approach to dispute resolution in civil justice systems has been to place all disputes on a procedural track aimed towards trial, while relying on the fact that most of them will resolve before actually reaching the hearing stage. In other words, even though we know that nearly all cases will settle without adjudication - in fact, we count on it - we still manage and administer them *as if* they will be adjudicated. Ministry policy supports programs and regulations that manage disputes by building on the fact that most cases resolve without trial, and designing systems and creating policy to support settlement at the earliest possible stage of case administration.

c) Using legislation and regulations to expand the use of mediation

[4] estimates range from 93 – 98% in the superior courts. What actually happens to those cases is another question. Some researchers suggest that not all resolve, and that many linger indefinitely or are abandoned.

Some of British Columbia's most concrete gains were made by using its legislative authority to mandate participation in mediation[5]. While there was initially opposition in the bar to the idea of compelling parties to mediate, this resistance diminished as understanding of the process grew and as the bar gained experience in mediation.

"Notice to Mediate" regulations: have been implemented in the British Columbia Supreme Court in the areas of personal injury, residential construction, general civil and family law litigation. The regulation provides that any party to a Supreme Court action may compel other parties to that action to participate in a single mediation session by serving them with a Notice to Mediate. This approach differs from that taken in some other Canadian jurisdictions where a "blanket" mandate has been created compelling all cases, or all cases within a defined category, to attend at mediation. The Notice to Mediate is described as "party-driven" in so far as one of the parties will have control over whether or not mediation should occur.

This party-driven model has the disadvantage that it does not generate a large number of mediations overnight. However, it does arguably allow for a slower and more careful growth in mediation. It gives lawyers and clients more time to learn about mediation and it avoids some of the quality control problems that could emerge if the sudden legislated demand for qualified mediators were to overstep the supply.

In any event, the experience in British Columbia with the Notice to Mediate has been quite positive. Its use has spread to virtually all areas of litigation in the Supreme Court. Research suggests that settlement rates in mediation are about 80% to 85% for all issues. Process satisfaction rates are very high - litigants and lawyers tend to have a high regard for the process. Research shows that even where a mediation does not resolve a case, lawyers feel that 65% of the time the mediation was still worthwhile insofar as it narrowed the issues and gave counsel a better understanding of the case. Although precise figures are not available, use of the Notice to Mediate has climbed from less than 1000 per year in 1988 when it was first introduced, to about 5000 per year now.[6] It is also clear that the collateral use of voluntary mediation in the Supreme Court has also grown significantly over that same period of time, although we have no way of tracking the frequency of use. Parties describe a high (82%) rate of participant satisfaction with the mediator at 4 or 5 on a 5 point scale. It is interesting to note that in the area of personal injury litigation, as complexity of a file increases so does use of mediation; i.e. mediation is used more for complex disputes.

Mandatory small claims mediation: A mixed fully mandatory and voluntary model is in place pursuant to small claims court rules. A fully mandatory mediation scheme exists for selected construction disputes in the Small Claims Division of the BC Provincial Court. The monetary jurisdiction of this court is $25,000. In four locations within the province construction disputes are steered into a mediation lasting two hours and conducted by a mediator on contract to the Ministry of Attorney General. All types of disputes are subject to voluntary mediation. Based on over 2000 cases (3500 respondents) studied, voluntary settlement rate is about 62% and mandatory settlement rate is about 54% depending on case-type. More than 90% of parties

[5] See Appendix "A" The Notice to Mediate" for a brief discussion of the relative merits of a Notice to Mediate approach and a fully mandatory approach to compelling participation in mediation.

[6] In 2006/07 there were about 14,000 personal injury actions, 14,600 general civil actions and 13,000 family law proceedings commenced in the British Columbia Supreme Court.

participating in these mandatory mediations say that they would choose to mediate in the future before going to court. A pilot project commencing in November of 2007 in our largest registry in Vancouver will mandate all small claims cases into mediation.

Mandatory mediation information sessions in family cases: Provincial Court rules in family law cases require parties in certain locations around the province to attend a 45 to 90 minute pre-court meeting with a Family Justice Counsellor to learn about mediation. If parties wish, they can be referred to mediation after the meeting. Research has shown that this process results in a significant number of people electing mediation.

Judicial Dispute Resolution: The DRO has worked with the provincial court judiciary to use court rules to create mediation-style judicial settlement conferences, including Family Case Conferences in family disputes, mandatory Case Conferences in child protection cases and mandatory Settlement Conferences in small claims cases. Provincial court judges receive mediation training to enhance their skills for these conferences. The Supreme Court has implemented a very successful Judicial Case Conference which is mandatory before any contested interlocutory family issue may proceed to hearing.

Apology Act: British Colombia recently implemented legislation which prevents any inference of liability from being drawn from the fact that an apology was made. It also provides that evidence of an apology made by or on behalf of a person in connection with any matter is not admissible in any court as evidence of the fault or liability. This was implemented in recognition of the power of apology in facilitating settlements in mediation and negotiation.

The use of mediation has also been specifically mandated or recommended in certain specialized statutes – the *Oil and Gas Act*, for example.

d) Using policy and program resources to expand the use of mediation;

In other instances, the province has expanded the use of mediation through the use of policy and program resources:

The Child Protection Mediation Program makes mediation available in cases where the state (represented by the Ministry for Child and Family Development) wishes to remove a child from a home where it believes the child is being abused or neglected. Historically, these cases have all proceeded through to the conclusion of a litigation process. After experimenting with mediation in this area for some years, the Ministry formally adopted a policy directing all of its social workers to use the court system only after mediation or family group conferencing (a related collaborative process) has been attempted. Families are free to reject mediation and proceed to court, but they are increasingly electing mediation. Fewer than 100 cases per year were mediated for several years. This number started to climb about five years ago and is expected to reach 925 this year. Settlement rates are about 70% all issues, more than 90% some issues.

Boards and tribunals: the Ministry of the Attorney General through the Dispute Resolution Office has assisted a number of tribunals in the design and implementation of dispute resolution systems devised to divert cases into mediation.

Treaties: by policy the province supports the creation of comprehensive dispute resolution models to be used in treaties between British Columbia, Canada and various first Nations[7]. These models require all parties to participate in mediation and other informal, collaborative dispute resolution processes before proceeding to court on an issue arising under a treaty.

e) Supporting the mediation infrastructure.

A very important aspect of the provincial strategy to expand the use of mediation falls under the heading of "supporting the mediation infrastructure". This involves identifying gaps where government resources could be applied strategically to make mediation more viable in the community. Our work in this area includes:

Education and information about mediation: even though it has been a viable feature of dispute resolution in British Columbia for more than 20 years, there is a huge gap in both public and professional understanding about mediation. We have tried to use some government resources to provide mediation information and education to the public as well as to the bar. Our success in this respect has been only modest.

Facilitating access to qualified mediators: because mediation is not a distinct profession, and because mediators are not regulated, we felt it incumbent upon government, to the extent that it compels participation in mediation, to ensure that there is easy public access to qualified mediators. Accordingly, the Ministry of Attorney General worked with the mediation community to create the *British Columbia Mediator Roster Society* ("the Roster"). The Roster is a central and accessible (web-based) list of trained and experienced mediators who subscribe to a code of mediation conduct. A board of directors defines qualifications for admission, governs an admissions process and responds to complaints.

The Roster was established in 1998 to support the use of mediation for civil, non-family cases in the B.C. Supreme Court. A Family Roster was established in June 2002, and linkages to a Child Protection Mediator Roster have now been made. Mediators on the Civil Roster and the Family Roster can also be used for disputes outside the court system. The Roster provides a way to organize and distribute reliable information about mediators, facilitate access to mediators, create a provincial standard for acceptable levels of mediator training and experience, and ensure that mediators on the Roster meet these standards.

Training and experience for mediators: If good mediator training had not already existed in British Columbia it would have been necessary to support its development. Such programs are absolutely essential to the development of quality mediation programs.

The gap that appeared in this area had to do not with training in mediation theory, but with the fact that mediators were finding very few opportunities to develop their skills in practice. It seems clear, from the literature and from our experience, that theoretical learning alone is often not sufficient to produce a good mediator; experience mediating is necessary. Accordingly, the DRO, worked with the mediation community and with the Office of the Chief Judge of the Provincial Court, to establish the *Dispute Resolution Practicum Society*. This society in turn developed the *Court*

[7] For example, see chapter (Dispute Resolution) in the Nisga'a treaty agreement

Mediation Program. In this program, students with training in mediation theory conduct 10 mediations of cases from the small claims court under the supervision of a senior mentor mediator. In addition to the guidance and feedback received from mentor mediators in the context of "hands on" sessions, the students also have the opportunity to share their experiences with one another. The Society has subsequently established programs designed to give practical experience to family law and child protection mediators. These programs have proven very effective in building the strength and depth of the mediator community.

f) Collaborative approach to the creation of programs and regulations

A final of our strategy to support the growth of mediation has to do not with *what* is done, but with *how* it is done. We have found that in developing regulations and designing and implementing mediation programs, the manner in which we engage with stakeholders has a very significant impact on the outcome. Generally, our approach is to identify everyone who is likely to be impacted by the initiative and then to include them as much as possible in discussions about what the program or regulation will look like and how it will work. We are as transparent as possible with our information and take a collaborative, interest-based approach to the design process. A summary of the principles that guide our design and implementation process is as follows:

- *Avoid the "DAD" (decide, announce, then defend) approach:* Do not have a small, powerful executive group unilaterally design the program or draft the regulation without significant involvement from all stakeholders. The result, in our experience, is that this approach creates unnecessary resistance.

- *In the design phase, actively involve those who will use the program:* This has the disadvantage that it makes the design process slower and more difficult because resistance and opposition must be met and dealt with up front. However, it has two advantages. First, a great deal of helpful information is acquired in the course of responding to the resistance. Second, the process ensures that once the product is designed, as many interests as possible have been satisfied, and the users of the system are much more likely to see the design as their own. This "buy in" facilitates a smoother implementation.

- *Employ an interest-based approach to program planning and legislation development:* This means working closely with stakeholders to identify their interests, and trying to accommodate as many interests as possible in a fully transparent design process.

- *Implement on a small scale to test new ideas and contain the scope of the initiative with manageable pilot projects:* This can also be framed as "make your mistakes on the small scale". Pilot sites are picked with great care to be representative and to provide a real test of the process.

- *Ensure early success*: At the front end of a new project strategize for early successes. Start with straightforward cases and the best mediators and work up to more challenging cases as the program acquires experience and confidence.

- *Evaluate pilots thoroughly:* It is critical to collect data, and to measure and formally evaluate all initiatives. A quality evaluation is invaluable. It helps you to know what works and does not work and guides further expansion. It also serves as an educational tool and as hard evidence to support funding and program expansion.

Conclusion

The use of mediation in the civil justice system in British Columbia and other Canadian jurisdictions has grown steadily over the last 20 years. As with anything new and relatively unfamiliar, initial take-up rates were low. The willingness of the Ministry of Attorney General to apply its resources and to use its legislative capacity to require the use of mediation in some circumstances played a significant role in increasing levels of uptake. Excellent mediator training programs offered by reputable teaching organizations, including two major universities in the province, also played a major role in promoting mediation. In the end, what has possibly given mediation the greatest credibility is when lawyers and clients actually experience the process. The best way to learn about mediation is to try it. While uptake rates in this jurisdiction have been decent, they should be higher - the full potential of mediation is certainly not yet realized. That said, there has been enough experience for lawyers and mediators to see that there are relatively few disputes that cannot be mediated, and that a mediation that is property planned and executed will result in full settlement in most cases.

APPENDIX A – Notice to Mediate Regulations

Mandating mediation is not only viable, it is a necessary. As noted earlier, it appears to be almost universally the rule that up-take rates for voluntary mediation programs are low, even when settlement and satisfaction rates are very high. Further, there is little difference between settlement rates involuntary and mandatory programs, and there's probably no difference in terms of participant satisfaction with the process, which tend to be very high for both mandatory and voluntary mediation.

Given the viability of mandatory mediation, is British Columbia's Notice to Mediate the best possible format?

At least two other Canadian provinces - Ontario and Saskatchewan - rely, to some extent on fully mandatory mediation in their superior courts. That is, unlike the system in British Columbia where mediation only occurs when one of the parties to an action chooses, these provinces enforce a blanket mandate requiring most cases to participate in a mediation session at some point in the litigation process.

The relative merits of these two different approaches have not been examined by researchers or academics. That said, a quick comparison of mediation under these two models suggests that under the fully mandatory model significantly more cases are mediated but the settlement rate is significantly lower (40% all issues and 17% some issues compared to about 85% all issues).

The fully mandatory model will obviously capture a much larger pool of cases than a party driven model. It may also settle the cases earlier, depending upon exactly how the mandate is structured and where it is placed in pre-trial procedures. Possibly, these differences boil down to a policy choice between a lower percentage of settlements, of much larger pool of cases, earlier in the litigation process, or a higher percentage of settlements, of a much smaller pool, later in the litigation process?

To further the analysis, consider some of the possible disadvantages of the BC model:

- late use of the Notice mutes its impact on the system;
- growth in mediation is slower;
- resolution is too late; settlement is still occurring on the court house steps;
- savings to litigants are too small;
- it fails to fully exploit the current pro-mediation environment;
- the impact on legal culture is reduced; n a fully mandatory system, everybody gets exposed and everybody gets educated.

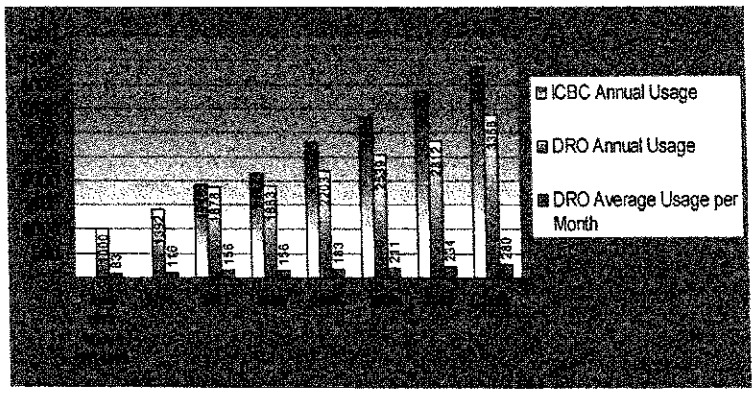
On the other hand, the BC Notice to Mediate model has a number of advantages:

- mediation growth is more stable, and in any event it increases use of mediation faster than a voluntary model;
- because it is a less radical change than the fully mandatory model, it is less likely to provoke opposition from the bench or bar. It gives more time for the legal culture to digest mediation;
- this approach is not as likely to result in overstepping the supply of skilled mediators; it is self-moderating;
- the BC approach is simpler and less expensive to implement and to administer than a fully mandatory system;

- cases need not be tracked in any way by the registry unless a problem (non-compliance, contested adjournment) arises;
- the mediated cases self-select, therefore there is a greater chance of settlement, a greater chance that the case is appropriate for mediation, and a smaller chance that neither lawyer will want to be there.

On balance, these advantages notwithstanding, the benefits of the Ontario approach should provoke some serious introspection in BC and, at the very least, some discussion about the prospect of a more fully mandatory model for BC.

Use – N2M (PI)



Use – N2M (General)