

A Short History of Family Mediation in British Columbia¹

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The Early Years²

While “mediation” has been in existence for thousands of years, family mediation began to take shape as a movement in British Columbia in the late 1970’s and early 1980’s. Dissatisfaction with the legal system’s ability to deal effectively with social and inter-personal conflict led to a search for alternatives. Family mediation began to be recognized as a unique area of practice that required specialized education and training. Many of our family mediation pioneers went to the US to get their training from institutions such as the Academy of Family Mediators. The Academy recognized the need for mediators to have a rich mix of skills and backgrounds including an understanding of family dynamics, law and the psychological impact of separation and divorce on children and parents. The Academy provided training supervised by a blend of lawyers and psychologists as well as well-organized conferences.

Continuing Legal Education Society of BC and the Justice Institute of BC began mediation training in the 1982 – 1984 period. In 1984, the Mediation Development Association of BC was formed as a private charitable Society. The purpose of MDABC was to organize the “development” of mediation by bringing together under one umbrella the many strands of mediation practice (family, education, commercial etc.). Its founders believed deeply in the need for mediators from all areas to work together as part of a strong and diverse organization based on shared ideas, principles and energy.

In 1984 the Law Society of BC created the first rules in Canada guiding the practice of family law mediation and the conduct of family law mediators (lawyers practicing family mediation).

Family Mediation Canada was formed in 1984 as a national family mediation organization with representatives from every province and territory. FMC held a national conference in Vancouver in 1988 that served to kick off a renewed surge of energy, enthusiasm and momentum for family mediation in BC.

By the late 1980’s mediation had grown but many mediation practitioners were concerned about the lack of uniform standards for education and practice to protect the public and the mediation discipline. In 1993, FMC initiated a national consultation led by Peggy English to assess the perceived need for national practice and educational standards for family mediators. The conclusion was a resounding “yes”. Peggy joined with Dr. Linda Neilson to conduct further consultations to identify and document the skills and knowledge necessary to provide competent, credible mediation services and produced a series of reports defining practice, certification and training standards.

In 1992, the provincial government published a seminal report “Breaking Up is Hard To Do: Rethinking the Family Justice System in British Columbia.” This report framed the need for, and signaled, a shift away from considering the adversarial family court process as the only way for family disputes to be

¹ Prepared by Kari D. Boyle, Executive Director of Mediate BC Society. Warmest thanks to Peggy English, Irene Robertson, M. Jerry McHale Q.C., Catherine Morris, Shelina Neallani and Darrin Hotte for their significant contributions to the preparation of this paper.

² Much of this section is drawn from the 1999 report of the FMC National Certification Implementation Pilot Project report.

resolved. The report was important in at least two other ways: it rethought the family justice system through the eyes of the family rather than professionals, and it made its recommendations based on widespread public consultation. As one of its recommendations, the report called for the implementation of Community Family Relations Centres – front doors to the family justice system - to offer dispute resolution services delivered by trained professionals.

The British Columbia *Family Relations Act* provided for Family Court Counsellors to assist parties with family law problems. This function was initially carried out by Probation Officers who had dual areas of responsibility. The report envisioned that these two functions would be separated and that Family Court Counsellors would specialize in offering services such as dispute resolution and early information/education. Four Family Justice Centres were subsequently piloted in the province; a positive project evaluation led to the creation of Family Justice Services Division (1996) and the specialization of Family Court Counsellors, or Family Justice Counsellors as they became known, reflecting the shift away from court-based dispute resolution to early more collaborative dispute resolutions processes.³

The synergy between the development of professional standards and training led by FMC and the government's interest in rethinking the family justice system significantly pushed the development of family mediation in BC forward. In 1994, the BC Ministry of Attorney General (MAG) conducted a project to establish and evaluate the skills of Family Justice Counsellors. The Ministry then contracted with the Justice Institute of BC to design a prototype to assess the competencies identified by FMC and, after a pilot project, appointed Carole McKnight to lead a talented project team to create the process and the skill-based assessment tool to assess family mediation skills in an interactive mediation process.

In 1997, FMC and the MAG partnered on a two-year pilot project to create, test and research a certification process for family mediators. The pilot was conducted in four sites: New Brunswick, BC, Saskatchewan and Ontario. As assessment of the certification process recommended that it be implemented nationally. This initiative brought together all the provinces and territories in an intense consultation and collaborative effort resulting in a seminal report in June of 1999 signed by representatives of FMC and the MAG. As a result, it is a condition of employment with Family Justice Services Division that all Family Justice Counsellors (FJCs) in BC are certified by FMC. As well, they are trained to bring the views of children into mediation. FJCs are publicly funded and offer services free to families of modest means in 24 Family Justice Centres and two Justice Access Centres.

As Catherine Morris notes⁴, the proponents of mediation in this early period included dedicated individuals from a broad range of backgrounds and disciplines who “had no singular vision for the dispute resolution movement” and that “differing philosophical approaches to mediation have created sharp divisions among mediators and dispute resolution educators in the US and Canada”. Despite these differences, many of which still exist, the development of mediation continued and expanded in the province.

³ Effective in 2013, the *Family Law Act* provides for Family Justice Counsellors to assist a person by offering information respecting a family law dispute and family dispute resolution.

⁴ Morris, Catherine. "Canada." In *Mediation in Asia-Pacific: A Practical Guide to Mediation and Its Impact on Legal Systems*, edited by Fan YANG and Guiguo WANG. New York: Wolters Kluwer Law & Business, and Hong Kong: CCH Hong Kong, 2013.

Linked Civil Mediation Initiatives

In 1989, the Canadian Bar Association (CBA) Task Force on ADR recommended development of dispute resolution education for law students, lawyers, judges and the general public. In its 1996 “Systems of Civil Justice Task Force Report, the CBA made 53 recommendations, the first of which was that every Canadian jurisdiction should make non-binding dispute resolution processes, like mediation, available as early as possible in the litigation process. In the same year, the BC MAG created the Dispute Resolution Office to expand the use of early, consensual dispute resolution processes.

Further to the groundbreaking developments in family mediation noted above, the BC government began to initiate similar discussions with respect to standards for mediators who would provide services in the private sector or through collaborations with government to resolve civil matters. BC introduced a Notice to Mediate process⁵, first for the resolution of motor vehicle matters, then for the resolution of disputes about condominium construction, and finally as a process which could be employed generally for Supreme Court civil matters. In order to ensure there would be a ready supply of mediators from which the public could choose, the government began to consult with a number of organizations which had sprung up in the 1980’s and 1990’s to champion the shift to collaborative dispute resolution.

This led to the creation of the B.C. Mediator Roster Society in 1998, which formed the Civil Roster and later the Family Roster, to provide the public with some level of quality assurance to accompany the introduction of the Notice to Mediate regulations. The Family Mediation Practicum Project (part of the D.R. Innovation Society) provided trained family mediators with experience mediating with a seasoned mentor and ran from 2004 – 2011. The Mediator Roster Society merged with the D.R. Innovation Society in 2010 to form Mediate BC Society. Mediate BC aims to be the “hub” for mediation in the province and to provide information and resources to the public as well as training and professional education for mediators.

Child Protection Mediation

The MAG, through its Child Protection Mediation Program, makes mediation available in cases where the state wishes to remove a child from a home based on suspected abuse or neglect. Historically, these cases all proceeded through litigation but the Ministry formally adopted a policy directing social workers to use litigation only after a collaborative process like mediation was attempted. Mediate BC supported this program through its Child Protection Mediation Practicum program that built capacity by providing mentored experiential training to child protection mediators who were either Aboriginal or from underserved or remote communities.

Provincial Court (Family) Rules

Complementing the shift to alternative dispute resolutions processes for family law matters, the Provincial Court developed a new set of family rules in 1998. The focus of the rules was judicial case management to promote early resolution. The family rules created a case conference in which Judges were empowered to mediate any or all of the issues in dispute and decide issues that did not require

⁵ The Notice to Mediate process enables any party to a wide range of actions in B.C. Supreme Court to make an informed assessment that mediation would be productive and then to require the other parties to attend a mediation session.

evidence (Rule 7). With the opportunity to refer parties to highly trained FJCs, the court rules also introduced a requirement that most parties to family law matters in designated Family Justice Registries meet with an FJC before a court date could be set to hear a disputed matter (Rule 5). The evaluation published in November 2002 found that Rule 5 was successful in diverting cases from courts, resulted in a reduction in court activity, provided additional benefits to the parties through the triage process and produced fewer court orders. Rule 5 remains in place in four registries of the court.

Parenting After Separation (PAS)

By 1996/97, consistent with the recommendations of the “Breaking Up Is Hard To Do” report, Family Justice Services was funding free, three-hour information “parenting after separation” (PAS) sessions. Parents learned about the impact of separation and divorce on adults and children; how to make new parenting arrangements consistent with the best interests of their children; what dispute resolution options were available to them; and about the family court system. In 1998, a pilot project tested mandatory referral to a PAS session in the Provincial Court in two locations. The success of the project resulted in the implementation of Rule 21 of the Provincial Court (Family) Rules. Today, before a disputed matter can be heard in 17 registries in BC, most parties must first attend a PAS session. In 2010, the Supreme Court Family Rules were implemented which allowed judges to refer parties to a PAS session. Parties are also able to attend a PAS session voluntarily.

Family Justice Reform Working Group

In 2002, the BC Justice Review Task Force formed the Family Justice Reform Working Group to “explore opportunities for fundamental reform of British Columbia’s family justice system, building on its strengths to better meet the needs of today’s separating and divorcing families.” The FJRWG published its report in May 2005 and proposed “a family justice system where mediation and other consensual processes are not considered ‘alternative dispute resolution’, but are the norm.” Recommendations included:

- Before asking a court to resolve a family dispute, people will be required to participate in at least one mediation session, to try to resolve their issues, and that first session will be free.
- If mediation is not appropriate, for reasons including family violence, another consensual dispute resolution process might be appropriate.
- Mediation, collaborative law, and other consensual processes will become the expected means of resolving family disputes. Lawyers will play an important role in helping clients choose the most appropriate dispute resolution process from the available options.

Notice to Mediate (Family)

In 2007, the Notice to Mediate (Family) regulation was enacted that required parties involved in B.C. Supreme Court family disputes to attend at least one mediation session if anyone involved in the dispute requested mediation. The process included pre-mediation meetings and appropriate screening for the mediation itself. On March 29, 2012, the Notice to Mediate (Family) pilot project expanded to all registries of the Supreme Court. Under the regulation, if the parties were unable to agree on a mediator, Mediate BC Society would appoint a mediator from Mediate BC’s Family Roster.

Technology-Assisted Mediation

With funding from the Law Foundation of BC, Mediate BC conducted a six year three-phase project which showed that family issues (such as parenting arrangements, child support, spousal support, or property and asset division) can be mediated safely, fairly and effectively using technology tools including teleconferencing and web conferencing.⁶ Phases 2 and 3 of the project were conducted in collaboration with Family Justice Services Division, Ministry of Justice. The participation of the Division's staff in Phase 3 was made possible through funding from the Department of Justice Canada.

New FLA

2006 marked the beginning of an extensive review the BC *Family Relations Act*. Fourteen initial discussion papers were released for wide public discussion, and ultimately a final discussion paper, *The White Paper on Family Relations Act Reform: A Proposal for a New Family Law Act* was released in 2010. The reforms set out in White Paper formed the basis of the new *Family Law Act* (FLA).

The FLA came into force in British Columbia on March 18, 2013. A major theme of the FLA is “an emphasis on and better support for out of court dispute resolution processes”. The new FLA is a fundamental shift from the previous legislation since it strongly encourages early dispute resolution and considers court a last resort.

The FLA creates positive duties on “Family Dispute Resolution Professionals”, which are defined under the FLA as family justice counselors, parenting coordinators, lawyers advising on family law disputes, family law mediators, and family law arbitrators. All have a duty to assess whether family violence is present, to discuss with clients the advisability of using various types of family dispute resolution processes to resolve their matter and to inform the parties of the methods and professionals available to assist them (FLA section 8). In addition to these positive duties, the FLA also requires lawyers to certify that the lawyer has complied with his or her duty at the time of filing a proceeding in court (FLA section 197(1)).

The FLA Regulation that comes into effect in January 2014 establishes standards that every family dispute resolution professional must meet. In order to conduct a family mediation a mediator must be either:

- A member in good standing of the Law Society of BC’s list of family law mediators;
- A member in good standing of the Mediate BC Society Family Roster;
- A member in good standing of, and a certified mediator with, Family Mediation Canada; or
- An individual who meets a long list of training and other requirements set out in the regulation

Family mediators, family arbitrators and parenting coordinators are required by the regulations to complete at least 14 hours of family violence training, including training on identifying, assessing and managing family violence and power dynamics. The Law Society of BC has upgraded its educational requirements for family law mediators effective January 2014.

Other highlights of the FLA include:

⁶ Technology-Assisted Family Mediation Project: <http://www.mediatebc.com/About-Mediation/Mediating-at-a-Distance.aspx>

- The FLA suspends the running of limitation periods while parties are engaged in “family dispute resolution with a family dispute resolution professional” (FLA section 198(5)). Limitation periods force parties to file in court to protect their legal rights, so eliminating this factor serves to encourage dispute resolution.
- The FLA mandates early financial disclosure, that is, “full and true”, sets out how information received during mediation can be used, and legislates provisions regarding confidentiality.
- The FLA puts a greater emphasis on written agreements, simplifies how those agreements can be made and strengthens the finality of the agreements and the degree to which parties can rely on them.
- The FLA also allows for the development and addition of mandatory family dispute resolution processes or prescribed procedures, such as the requirement to have mandatory meetings under Rule 5 (as described above), or to attend Parenting after Separation sessions, which are required for most parents prior to attending for their first family appearance in Provincial Court (FLA section 9).
- There are also provisions under the FLA that permit the court to order mediation in situations where, for example, there has been a denial of parenting time or contact (FLA section 61).

The above provisions are some examples of the fundamental legislative changes in family law in BC. It appears that the law finally reflects what the family law mediators have been advocating for since the early 70’s: a legal system that emphasizes early dispute resolution processes, including mediation, as more appropriate ways to resolve conflict for families and children in particular than the formal court system.

It is hoped that the legislation will truly transform the justice system for families. The FLA strives to inform people about their dispute resolution options and encourage them to use these options rather than going to court. The challenge is not only changing a litigation-oriented mindset, but also encouraging, supporting and funding these dispute resolution initiatives, including mediation.

Mediation for Disputes Regarding Child Support for Adult Children

Mediate BC recently completed an innovative project to assess the viability of a unique evaluative mediation approach in disputes about child support for adult children. Funded by the Law Foundation of BC and the Ministry of Justice, the project demonstrated mediation’s flexibility and ability to meet the needs of families even in the face of conflict, estrangement and many years since the separation.

Conclusion

BC hosts a rich and diverse community of family mediators from a wide variety of backgrounds mediating in the public and private spheres. Despite ongoing cultural resistance, it is hoped that recent legislative and other changes will strengthen the field and create new, affordable, accessible and healthy options for BC families to resolve their disputes.
