CANADA

The Impact of Mediation on the Culture of Disputing in Canada: Law Schools, Lawyers and Laws

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(1) *Introduction*

3.01 Experiments with mediation began to take place in Canada in the 1970s and 1980s in response to widespread concern about access to justice and negative social impacts of adversarial disputing. At that time, most lawyers, legal scholars and members of the public knew nothing about mediation. Now, four decades later, mediation is a mainstay within Canada's legal system. Most lawyers have received exposure to negotiation and mediation theory and practice in law schools or

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continuing legal education programs. Considerable legislation now contains mediation provisions. This chapter traces some of the major developments and critiques of the field of mediation since the 1970s as they pertain to lawyers, law schools and laws in Canada. The main focus is on British Columbia (BC), but comments are also made about Alberta, Ontario, Quebec and some federal initiatives. A fundamental question is posed: How has the dispute resolution movement affected Canada's culture of disputing?

(2) *Perceptions in the 1970s and 1980s: Overburdened courts and Excessive, Adversarial litigation*

3.02 Mediation attracted interest during the 1970s at a time when critics of Canada's justice system[2] were concerned about delays in [page 70] overburdened courts[3] and costs of litigation, especially for people who could not afford lawyers. Governments were concerned about the costs of running courts and legal aid programs.[4] Some critics saw Canada's custom of court-centred disputing as excessively adversarial, causing harms to litigants during lengthy and complex proceedings fraught with pre-trial discoveries and interlocutory motions. There was concern about the wellbeing of litigants in family law cases, especially children caught between parents who were sometimes embattled in the courts for years. The culture of adversarial lawyering was at the centre of these concerns;

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[2] Canada is a federal state. The Canadian legal system has federal jurisdiction and provincial jurisdictions, and each has exclusive jurisdiction to exercise its constitutionally mandated powers. The provinces have jurisdiction over the administration of justice and the licensing of lawyers. Canada's provinces are common law jurisdictions except Quebec, which is primarily a civil law jurisdiction.

[3] The fear of excessive litigation was based on concerns in the US, which some scholars found to be exaggerated when examining litigation rates that proved to be fairly stable during the 19th and 20th centuries. See Andrew J. Pirie, 'Manufacturing Mediation: The Professionalization of Informalism' in Catherine Morris and Andrew Pirie (eds), *Qualifications for Dispute Resolution: Perspectives on the Debate* (UVic Institute for Dispute Resolution 1994), who cites (among others) Marc Galanter, 'Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society' (1983) 31 UCLA Law Review 4, and Wayne McIntosh, '150 Years of Litigation and Dispute Settlement: A Court Tale' (1980-1981) 15 Law and Society Review 823.

[4] Canadian Bar Association, 'A Short History of Federal Funding for Legal Aid' <http://www.cba.org/cba/advocacy/legalaid/history.aspx> accessed 6 June 2013; Melina Buckley, 'Moving Forward on Legal Aid: Research on Needs and Innovative Approaches' 2010 <http://www.cba.org/cba/advocacy/PDF/CBA%20Legal%20Aid%20Renewal%20Paper.pdf> accessed 6 June 2013.

lawyers in charge[5] of the disputing process were often criticized as a profession for creating expense and delay along the 'litigation highway'.

3.03 The concerns were not unique to Canada. Scholars and jurists in the United States (US) had a strong influence on the Canadian search for 'faster, cheaper and better'[6] methods of disputing. The 1976 Pound Conference on Perspectives on Justice for the Future in the US[7] piqued Canadian interest, as did statements by US Supreme Court Chief Justice Warren Burger, who [page 71] suggested in 1982 that settling out of court was a 'better way' for lawyers to fulfil their role as 'healers of human conflict'.[8]

(3) *Benchmarks in the History of Mediation in Canada*

3.04 There was no single 'founder' of the field of mediation in Canada. It emerged as a central part of the interdisciplinary social movement towards alternative dispute resolution (ADR). While this chapter has its focus on the legal system, this is not the only lens through which to examine the mediation movement, and there can be no one, definitive history of this diverse movement in Canada.

3.05 *Pioneering Projects*. Early Canadian initiatives in mediation were in the area of family law disputes.[9] The first Canadian court-based family conciliation service was set up in Alberta in 1972. Ontario followed in 1973

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[5] Julie Macfarlane, *The New Lawyer: How Settlement Is Transforming the Practice of Law* (UBC Press 2007) 47-65.

[6] For an American discussion of this vaunted trilogy of benefits of ADR, see Christopher Honeyman, 'Two Out of Three' (1995) 11 Negotiation Journal 5.

[7] A. Leo Levin and Russell R. Wheeler (eds), *The Pound Conference: Perspectives on Justice for the Future* (West Publishing 1979).

[8] Warren E. Burger, 'Isn't There a Better Way' (1982) 68 ABA Journal 274.

[9] Mediation was not new in Canada in the 1970s. Canada's federal government passed the Conciliation Act, 1900 (63-64 Vict., c. 24) in response to labour unrest and union industrial action in the late 19th century. This Act formed the precedent for Canadian labour legislation, which imposes regulated systems of collective bargaining including mediation. Jay Atherton, 'The British Columbia Origins of the Federal Department of Labour' (1976-77) 32 BC Studies 93; F.R. Scott, 'Federal Jurisdiction over Labour Relations - a New Look' (1960) 3 McGill Law Journal 153. Voluntary labour conciliation has been incorporated into labour legislation in Canada since 1900. While labour mediators were a strong part of the mediation movement in the US, for the most part labour mediators in Canada tended to confine their activities to labour disputes, and they were not noticeably active among the proponents of mediation in the justice system in the 1970s and 1980s.

and BC in 1974.[10] At that time, public and private family mediators in Canada were primarily social workers and counsellors trained in [page 72] family therapy,[11] along with some lawyers. Interest in family mediation grew with the 1985 Divorce Act,[12] which instituted 'no fault' divorce in Canada. Mediators were influential in drafting Section 9 of the Divorce Act, which requires lawyers to certify that they have discussed negotiation with their clients and informed them of mediation services.[13]

3.06 Also during the early 1970s, community activists conducted mediation experiments.[14] By the late 1980s, local mediation centres for community conflict and small claims disputes were springing up across Canada,[15] often funded by governments seeking to save money by diverting cases from courts into mediation centres staffed primarily by volunteers.

3.07 *Getting Organized: Interdisciplinary Civil Society Organizations*. Mediation proponents began to form interdisciplinary national and provincial associations during the early 1980s.[16] Some mediation organizations had their primary focus on establishing mediation as [page 73] a profession with codes of ethics and qualifications standards.[17] While some wished to

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[10] Audrey Devlin and Judith Ryan, 'Family Mediation in Canada - Past, Present, and Future Developments' (1986) 11 Mediation Quarterly 93; B.C. Justice Review Task Force, *A New Justice System for Families and Children: Report of the Family Justice Reform Working Group to the Justice Review Task Force* (May 2005); Robert Tolsma, John Banmen and John Friseen, 'Role and Competencies of Family Court Counselors' (1984) 22 Family Court Review 35; John Waterhouse and Lorraine Waterhouse, 'Implementing Unified Family Courts:--The British Columbian Experience' (1983-1985) 4 Canadian Journal of Family Law 153.

[11] For an early discussion of the emerging practice of family mediation, see the first Canadian book on family mediation by therapist professor of social work, Howard H. Irving, *Divorce Mediation: A Rational Alternative to the Adversarial System* (Universe Books 1981). Also see Howard H. Irving and Michael Benjamin, *Therapeutic Family Mediation: Helping Families Resolve Conflict* (Sage 2002).

[12] Divorce Act, R.S.C., 1985, c. 3 (2nd Supp.); Hilary Linton, 'Family Mediation in Canada: A Brief History' (First International Congress on Mediation, Lisbon, 2010) <www.riverdalemediation.com/wp-content/uploads/2011/01/Family_Mediation_in_Canada.pdf> accessed 6 June 2013.

[13] Divorce Act, R.S.C., 1985, c. 3 (2nd Supp.), s 9.

[14] Dean E. Peachey, 'Victim/Offender Mediation: The Kitchener Experiment' in Martin Wright and Burt Galaway (eds), *Mediation in Criminal Justice* (Sage 1988).

[15] Catherine Morris (ed), *Resolving Community Disputes: An Annotated Bibliography About Community Justice Centres* (UVic Institute for Dispute Resolution 1994).

[16] The Conflict Resolution Network Canada (the Network) was founded in 1984. The Network, later renamed the Conflict Resolution Network Canada, was a highly respected organization that produced a number of publications and a quarterly magazine. It closed its doors in approximately 2008, primarily due to funding difficulties. Family Mediation Canada (FMC), a civil society organization, was founded in 1985 by a group of mediation proponents including social workers, judges and lawyers, with a grant from Canada's Department of Justice.

[17] For more information on the movement towards qualifications and codes of ethics, see Catherine

professionalize the field, others envisioned the expansion of broad-based,[18] grass-roots initiatives including community mediation and victim-offender mediation (now called 'restorative justice'). Mediation proponents in the legal profession convinced law schools and continuing legal education organizations to create mediation and negotiation courses, lobbied law societies to support mediation, talked to judges and persuaded government officials to make laws or policies supportive of mediation.

3.08 A pivotal moment in the Canadian evolution of dispute resolution occurred in 1986 when Canada, with consent of its provinces, acceded to the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Canada and the provinces passed new arbitration legislation based on the 1985 UNCITRAL Model Law on International Commercial Arbitration.[19] Most provinces also modernized their domestic arbitration legislation. At that time, the Canadian Commercial Arbitration Center (CCAC)[20] was founded in Quebec, and the BC government created the BC International Commercial Arbitration Centre (BCICAC). Realizing that it would take time to generate international commercial arbitration business, the BCICAC cultivated business in domestic commercial arbitration [page 74] and mediation. Canadian arbitration associations became interested in mediation.

3.09 The proponents of mediation included community activists, family therapists, lawyers, engineers, teachers, other professionals, academics, judges and government officials with interests broadly ranging from family and community mediation to commercial arbitration. This diverse set of actors had no singular vision for the dispute resolution movement.

Morris, 'The Trusted Mediator: Ethics and Interaction in Mediation' in Julie Macfarlane (ed), *Rethinking Disputes: The Mediation Alternative* (Emond Montgomery Publications Limited 1997); Catherine Morris and Andrew Pirie, 'Preface' in Catherine Morris and Andrew Pirie (eds), *Qualifications for Dispute Resolution: Perspectives on the Debate* (UVic Institute for Dispute Resolution 1994); Cheryl Picard, 'The Emergence of Mediation as a Profession' in Catherine Morris and Andrew Pirie (eds), *Qualifications for Dispute Resolution: Perspectives on the Debate* (UVic Institute for Dispute Resolution 1994).

[18] Eric B. Gilman and David L. Gustafson, *Of VORPs, VOMPs, CDRPs and KSAOs: A Case for Competency-Based Qualifications in Victim-Offender Mediation* (UVic Institute for Dispute Resolution 1994) 98; Pirie, 'Manufacturing Mediation: The Professionalization of Informalism' (n 2) 191.

[19] United Nations Commission on International Trade Law (UNCITRAL), UNCITRAL Model Law on International Commercial Arbitration 1985.

[20] See the website of the CCAC at www.ccac-adr.org/en/.

Some mediation proponents believed disputants should have more individual or corporate autonomy to choose from dispute resolution options along a continuum from unassisted negotiation to mediation to arbitration to the courts.[21] Others emphasized empowerment of communities or religious groups[22] to retrieve dispute resolution from the courts into the hands of local community dispute resolvers who shared their own values.[23] Still others believed mediation should become a mandatory part of the formal justice system or be encouraged through regulatory incentives so as to foster court efficiency and access to justice. Some proponents of mandatory mediation believed [page 75] in institutionalization of mediation because they saw it as better than adversarial disputing, particularly for family law disputants.[24]

3.10 By the mid-1980s, mediation proponents had persuaded courts and public officials across Canada to consider mediation as a possible way to increase court efficiency and improve access to justice.[25] The 1988 report of BC's Justice Reform Committee led by Ted Hughes, then BC's Deputy Attorney General, provides a snapshot of typical thinking in Canada's legal profession at the time. Hughes recommended that judges be encouraged to refer cases to mediation and that mediation be made available through

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[21] See Catherine Morris, 'Definitions in the Field of Conflict Transformation' (*Peacemakers Trust*, 2012) <www.peacemakers.ca/publications/ADRdefinitions.html> accessed 6 June 2013.

[22] For example, the Ismaili Muslim community founded a conciliation and arbitration service in 1984. Aga Khan, *National Conciliation and Arbitration Board for Canada: Submission to Ontario Arbitration Review September 10, 2004.* Conciliation Services Canada was founded by Mennonite Christians in 1990; see www.conciliationservices.ca/index.php?id=2. The Christian Legal Fellowship has a mediator referral service; see <www.christianlegalfellowship.org/?i=15718&mid=1000&id=392762> accessed 6 June 2013, which emphasizes the work of US author, Ken Sande, *The Peacemaker: A Biblical Guide to Resolving Personal Conflict* (3rd edn, Baker Books 2003). The Jewish *Beth Din* system of conciliation and arbitration has operated in Canada for many years. A controversy about faith-based arbitration emerged in Canada in 2006, resulting in a report to the Ontario government: Marion Boyd, *Religion-Based Alternative Dispute Resolution: A Challenge to Multiculturalism* (Institute for Research on Public Policy 2007).

[23] Robert A. Baruch Bush, 'Defining Quality in Dispute Resolution: Taxonomies and Anti-Taxonomies of Quality Arguments' (1989) 66 Denver University Law Review 335; Catherine Morris, 'Where Peace and Justice Meet: Will Qualifications for Dispute Resolution Get Us There?' in Catherine Morris and Andrew Pirie (eds), *Qualifications for Dispute Resolution: Perspectives on the Debate* (UVic Institute for Dispute Resolution 1994).

[24] For example, BC's Jerry McHale and Saskatchewan's Ken Acton, both government-based pioneers of mediation in Canada, take this approach. They are quoted in Janice Mucalov, 'Mediation, Like It or Not' (*The National*, February 2003) <www.cba.org/cba/national/janfeb03/PrintHtml.aspx?DocId=6371> accessed 6 June 2013.

[25] For example, see the Hughes report from BC and the Zuber report from Ontario: Edward N. Hughes, *Access to Justice, The Report of The Justice Reform Committee (*The Hughes Report*)* (BC Ministry of the Attorney General 1988); T.G. Zuber, *Report of the Ontario Courts Inquiry (*The Zuber Report*)* (Ontario Ministry of the Attorney General 1987).

BC's publicly funded legal aid program.[26] He also recommended development of 'professional standards' and certification for mediators.[27] Hughes stopped short of recommending mandatory mediation because of opposition expressed in submissions, insufficient evidence that mandatory mediation would reduce court delays and a lack of 'properly trained neutrals'.[28]

3.11 The Hughes Report also considered the roles of judges and lawyers. Traditionally, Canadian judges have limited their role to adjudication. Lawyers initiate the steps in litigation, harnessing court administrative procedures and interlocutory processes to gain leverage in negotiations. This 'litigotiation'[29] process was [page 76] noted to result in settlements in 85-95% of cases,[30] albeit often just before trial. Hughes urged a major shift, saying: '[t]he responsibility for the pace of litigation can no longer be left entirely in the hands of lawyers and their clients. The burdens on our court system today require that the judiciary assume an active role in seeing that a case, once set for trial, proceeds as expeditiously as possible'.[31] The Hughes Report prepared the ground in BC for more thinking about judicial case management, including judicial dispute resolution (JDR).

3.12 At the time, lawyers and judges seldom had any formal training in settlement skills. Hughes recommended that lawyers and the public be provided with more information about mediation[32] and suggested development of standards for training.[33]

3.13 *Education and Training: The Emergence of Philosophical Struggles*. In 1989, the Canadian Bar Association (CBA) Task Force Report on ADR[34]

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[26] Hughes (n 24) 207.
[27] ibid.
[28] ibid 187.
[29] Marc Galanter, 'Worlds of Deals: Using Negotiation to Teach About Legal Process' (1984) 34 Journal of Legal Education 268.
[30] This was the US estimate in the early 1990s by Marc Galanter and Mia Cahill, 'Most Cases Settle: Judicial Promotion and Regulation of Settlement' (1993-94) 46 Stanford Law Review 1339.
[31] See, eg, Hughes (n 24). Also see commentary on Zuber by Ian Greene, 'The Zuber Report and Court Management' (1988) 8 Windsor Yearbook of Access to Justice 150.
[32] Hughes (n 24) 190.
[33] ibid 195.
[34] Canadian Bar Association and Bonita Thompson, *Task Force on Alternative Dispute Resolution, Alternative Dispute Resolution: A Canadian Perspective* (Canadian Bar Association 1989). UVic legal scholar, Andrew Pirie, was a significant contributor to this report.

recommended development of dispute resolution education for law students, lawyers, judges and the general public. Continuing education courses in mediation became more available in several disciplines, including the legal profession. While it was common ground among the diverse proponents of mediation that more training was needed, different philosophical approaches began to emerge.

3.14 Canadian training in mediation was (and is) heavily influenced by the 1981 publication, *Getting to Yes*, by Harvard University's Roger [page 77] D. Fisher and William Ury. They proposed that 'win-win' agreements could be created by exploring and accommodating the interests of all parties.[35] This 'interest-based' approach is also called 'integrative' dispute resolution and is distinguished from 'distributive' or competitive approaches.[36] Fisher and Ury's thinking deeply penetrated Canadian mediation training during the 1980s. Trainers taught mediators to facilitate parties' creation of interest-based solutions. From a practical standpoint, however, many mediators, particularly commercial mediators, were animated less by the vision of 'facilitative', interest-based mediation and more by the idea of helping parties to hash or bash out settlements,[37] telling parties their predictions of how a judge might decide the case and sometimes suggesting solutions.[38] This method of mediation became known as 'evaluative' or 'predictive' mediation.[39] Many parties preferred to retain retired judges with substantive knowledge and professional gravitas who often had little or no training in interest-based, facilitative mediation. American critics of both evaluative and interest-based mediation cultivated methods that focussed less on solutions and more on transformation of relationships, but 'transformative mediation'[40] has not

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[35] Roger Fisher, William Ury and Bruce Patton, *Getting to Yes: Negotiating Agreement Without Giving In* (2nd edn, Penguin Books 1991).
[36] ibid 41. See Albie M. Davis, 'An Interview With Mary Parker Follett' (1989) 5 Negotiation Journal 223.
[37] James J. Alfini, 'Trashing, Bashing, and Hashing it Out: Is This the End of 'Good Mediation'?' (1991) 19 Florida State University Law Review 47.
[38] For a concise explanation of these mediation styles, see Zena Zumeta, 'Styles of Mediation: Facilitative, Evaluative, and Transformative Mediation' (*Mediate.com*, September 2000) <www.mediate.com/articles/zumeta.cfm> accessed 6 June 2013.
[39] The 'facilitative' and 'evaluative' terminology is attributed to Leonard L. Riskin, 'Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed' (1996) 1 Harvard Negotiation Law Review 8.
[40] Robert A. Baruch Bush and Joseph Folger, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* (Jossey-Bass Publishers 1994); Joseph P. Folger and Robert A. Baruch Bush (eds), *Designing Mediation: Approaches to Training and Practice within a Transformative Framework* (The

deeply penetrated mediation training for lawyers in Canada, although it is taught in programs aimed at community and workplace conflict management.

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3.15 Differing philosophical approaches to mediation have created sharp divisions among mediators and dispute resolution educators in the US and Canada.[41] The dominant inspiration of many Canadian founders of dispute resolution organizations during the 1980s was a vision of shifting the culture to non-adversarial methods of dispute resolution. These 'true believers'[42] have emphasized consensual conflict resolution methods, especially 'interest-based', 'facilitative' or 'transformative' mediation. To some true believers, evaluative mediation falls outside the very definition of mediation and is considered a form of non-binding adjudication.[43] Adjudicative approaches, including arbitration, generally fall outside the scope of true believers' interests.

3.16 During the 1980s, ideological and turf struggles emerged between Canadian mediation organizations and arbitration organizations as they tried to develop qualifications standards. Arbitrators were seldom true believers in mediation; many took mediation training to position themselves for what they described as a 'growth industry'. Some mediation proponents feared a competitive take-over[44] by arbitrators who might undermine facilitative, interest-based mediation and move the field towards adversarial, adjudicative approaches.

3.17 By the mid-1990s, however, most mediators had accepted a variegated dispute resolution terrain that included arbitration. In [page 79] 1996, the

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Institute for the Study of Conflict Transformation 2001).

[41] For further definitions of mediation, see Morris, 'Definitions in the Field of Conflict Transformation' (n 20).

[42] Julie Macfarlane, 'Culture Change - A Tale of Two Cities and Mandatory Court-Connected Mediation' (2002) 2 Journal of Dispute Resolution 241.

[43] Jane Kidner, 'The Limits of Mediator 'Labels': False Debate Between 'Facilitative' versus 'Evaluative' Mediator Styles' (2011) 30 Windsor Review of Legal and Social Issues 167.

[44] In 1992, ADR Canada, at that time known as the Arbitration and Mediation Institute of Canada (AMIC), trademarked the designation 'Chartered Mediator' (C.Med) without consultation with mediation organizations in Canada. AMIC was then viewed primarily as an arbitrators' association. It had provincial affiliates in most provinces. Catherine Morris, *'Chartered Mediator' Designation Trademarked by Arbitration and Mediation Institute of Canada* (Interaction Newsletter, The Network: Interaction for Conflict Resolution, Summer 1992). See the C.Med criteria: <www.adrcanada.ca/resources/cmed.cfm> accessed 6 June 2013.

CBA released another Task Force Report which suggested a 'multi-option civil justice system' where trials would 'remain a key component' but would become a last resort in a system that would emphasise early settlement, court control of case management and multiple tracks for dispute resolution.[45] Thus, mediation would be one of several options for dispute processing. However, the overall emphasis was settlement. The CBA Task Force report seemed ambivalent about adversarial justice. It called for 'a fundamental reorientation away from the traditional adversarial approach and toward dispute resolution',[46] but then seemed to back away from this radical idea by acknowledging that 'the adversarial approach is central to the civil justice system, and should remain a key feature in the future'.[47]

3.18 *Law Schools: Teaching and Research*. A prominent feature of the field of dispute resolution in Canada is its strong links between theory, practice and policy. From the beginning, legal scholars were instrumental in the mediation movement and often became practitioners and policy makers (and vice versa).[48] For example, scholars at the University of Windsor Law School in Ontario were among those who launched the Windsor-Essex Mediation Centre, one of the pioneering community mediation centres in Canada in the early 1980s.[49] Academics from the University of Victoria (UVic) Faculty of Law were among the community leaders involved in development of the Victoria Dispute Resolution Centre (DRC) in 1986.[50] The DRC was originally conceived to be a practicum opportunity [page 80] for UVic law students taking a course in dispute resolution. UVic legal scholars championed an interdisciplinary approach as they founded the UVic Institute for Dispute Resolution (UVic IDR) in 1989.[51] Canadian law schools continue to be involved in

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[45] Canadian Bar Association, *Report of the Canadian Bar Association Task Force on Systems of Civil Justice* (Canadian Bar Association 1996).
[46] ibid 6.
[47] ibid.
[48] It is important to state that legal scholars did not – and do not – hold exclusive domain over dispute resolution scholarship. However, the focus of this chapter is on legal education and scholarship.
[49] Canadian Bar Foundation, *Windsor-Essex Mediation Centre: History and Pilot Project Evaluation* (Canadian Bar Foundation 1984).
[50] Norm Dolan, *The Victoria Dispute Resolution Centre: An Evaluation* (Ministry of the Attorney General and the Dispute Resolution Centre 1989).
[51] UVic IDR developed the interdisciplinary Masters program in Dispute Resolution (MADR) in 1998. The MADR is now housed in the UVic Faculty of Human and Social Development. Some MADR

operating mediation clinics and conducting public education, such as the University of BC Faculty of Law's student-run CoRe Conflict Resolution Clinic in Vancouver and the Osgoode Mediation Centre at Osgoode Hall Law School in Toronto.

3.19 By the late 1990s, most Canadian law schools offered at least one course in dispute resolution. Courses in negotiation, mediation and arbitration are now standard and are often taught by practitioners. Some law schools have a significant number of elective courses in dispute resolution.[52] Only a few law programs provide mandatory education in dispute resolution,[53] although a number of LLB or JD programs integrate dispute resolution as components of mandatory courses.[54] Some Canadian law students [page 81] are involved in mediation and negotiation mooting.[55] The University of Ottawa provides a 'Dispute Resolution and Professional Responsibility' designation for students who complete a particular set of courses.[56] There are graduate law programs in dispute resolution at Osgoode Hall Law School at York University in Toronto (since 1995) and Université de Sherbrooke in Quebec (since 1999).[57]

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courses remain cross-listed as law courses. The UVic IDR ceased to operate as a separate entity in 2010.

[52] Eg, the Faculty of Law at University of Ottawa, Osgoode Hall Law School at York University in Toronto, the Faculty of Law at University of Toronto, the Faculty of Law at University of Calgary in Alberta, and the Faculty of Law at University of Victoria in BC. The new Faculty of Law at Thompson Rivers University in BC plans to integrate conflict resolution principles and skills training throughout all three years of the law school curriculum.

[53] The University of Calgary has several mandatory courses entitled 'Dispute Resolution'; one of these courses has its focus on interviewing and counselling, another on negotiation and mediation, and a third on adjudication. The Faculty of Law at the University of Ottawa has a mandatory course in Dispute Resolution and Professional Responsibility that includes ethics, professional responsibility, legal problem-solving, transaction facilitation and dispute resolution through negotiation, mediation and arbitration.

[54] Eg, Faculties of Law at Windsor University and University of Victoria.

[55] Canadian law students increasingly participate in dispute resolution moots, including the International Competition for Mediation Advocacy (ICMA), the American Bar Association Student Division's Negotiation Competition and the International Law School Mediation Tournament (Chicago Mediation Competition) of the International Academy of Dispute Resolution. The Kawaskimhon National Aboriginal Moot focuses on negotiation of issues regarding indigenous peoples in Canada.

[56] Students who take this option may qualify for the roster of the Ontario Mandatory Mediation program. See information about this designation: <www.commonlaw.uottawa.ca/en/programs/dispute-resolution-and-professionalism/dispute-resolution-and-professionalism-option.html> accessed 6 June 2013.

[57] This list omits interdisciplinary dispute resolution graduate and undergraduate university programs outside law schools, of which there are several in Canada.

3.20 In general, mediation courses at Canadian law schools are optional. Dispute resolution education has not shifted the hegemonic norm of adversarial disputing conveyed throughout most other Canadian law courses.

3.21 While the number of Canadian scholars[58] of mediation continues to grow, scholarship and research on the impact of mediation on the legal system or legal culture seems sparse. Research continues to [page 82] show that mediation is promising,[59] and that it 'has given evidence of its power to settle complex, highly emotional disputes and reach agreements that are generally durable'.[60] However, North American scholars have noted a 'continued dearth of solid information about which ADR measures work and what side effects they produce' and have called for 'more and better research data to examine how design variables affect disposition time, trial rates, and substantive outcomes'.[61] In Canada, too, there are questions about what works, particularly given the variety of approaches to dispute system design. There are also

[58] A recent confidential survey by the author identified a non-exhaustive list of approximately 40 academics in Canada who focus on dispute resolution. Names are on file with the author. Quite a number of Canadian law school instructors and authors are not full-time, permanent faculty members and ADR courses are often taught by sessional lecturers or adjunct professors.
[59] In 2006, M. Jerry McHale, Assistant Deputy Minister of Justice Services, British Columbia pointed out high settlement rates of mandatory mediation, citing a 1999 report of the BC Dispute Resolution Office that indicated that its evaluation of the Notice to Mediate in motor vehicle actions showed that 71% of all mediated claims settled completely following mediation. See this evaluation report at Focus Consultants, *An Evaluation of the Notice to Mediate Regulation the under the Insurance (Motor Vehicle) Act Prepared for the Ministry of Attorney General Dispute Resolution Office* (Dispute Resolution Office, BC Ministry of Attorney General 1999). A report by the University of British Columbia (UBC) in 2002 found even higher settlement rates in the range of 80-90%. John Hogarth and Kari Boyle, *Is Mediation a Cost-Effective Alternative in Motor Vehicle Personal Injury Claims? Statistical Analyses and Observations* (UBC Program on Dispute Resolution, University of British Columbia 2002). For comparison, see the Ontario Ministry of the Attorney General's 1995 evaluation of Ontario's pilot mediation program, which revealed an overall settlement rate of 40% of cases that were referred to voluntary mediation: *Ontario Civil Justice Review: Supplemental and Final Report* (Ontario Ministry of the Attorney General 1996), citing Julie Macfarlane, *Court-Based Mediation for Civil Cases: An Evaluation of the Ontario Court (General Division) ADR Centre* (Windsor: Faculty of Law, University of Windsor, November 1995). A 2001 evaluation of the Ontario Mandatory Mediation program in Ottawa and Toronto showed 44% were fully settled with additional partial settlements. For details, see the report: Robert G. Hann and others, *Evaluation of the Ontario Mandatory Mediation Program (Rule 24.1): Final Report—The First 23 Months* (Queen's Printer 2001) <www.attorneygeneral.jus.gov.on.ca/english/courts/manmed/eval_man_med_final.pdf> accessed 6 June 2013.
[60] Joan B. Kelly, 'Family Mediation Research: Is There Empirical Support for the Field?' (2004) Conflict Resolution Quarterly 3.
[61] Lisa Blomgren Bingham and others, 'Dispute Resolution and the Vanishing Trial: Comparing Federal Government Litigation and ADR Outcomes' (2009) 24 Ohio State Journal on Dispute Resolution 225.

differences in research questions and methods. It is difficult to know how to interpret or what accounts for widely varying settlement rates ranging from a high of 80% in Alberta's JDR cases to a low of 35% [page 73] in BC's Small Claims Court settlement conferences. A significant challenge in answering this question is the problem of comparing apples to apples.[62]

3.22 It is often asked whether 'evaluative' or 'facilitative' mediation is more effective. A preliminary question to be asked is 'effective for what?' The usual answers include settlement rates, costs, party satisfaction and perceptions of fairness.[63] These answers reflect the policy goals that guide program evaluation.

3.23 Evaluative and facilitative categories are rarely mutually exclusive. Canadian scholar, Jane Kidner, points out that in practice, mediators may vary their style depending on the needs of the parties in their particular situation, weighing factors including:

> the relationship between the parties; the balance of power between the parties; the nature of the dispute; the duration and time frame of the dispute at the point of the mediation intervention; the sincerity of the parties and existence or lack of good faith; and the context and framework within which the dispute is taking place.[64]

3.24 Canadian scholars have made important contributions to discussions of these interconnected issues, but there seems to be little empirical research on the impact of mediator styles on processes or outcomes and what approaches of mediators best foster 'participation, dignity and trust', which are seen as important in participants' assessment of the fairness of a process.[65] Canadian researcher, Julie Macfarlane, points out

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[62] To see some of the methodological challenges, see a meta-analysis done for the Department of Justice in 2007. Austin Lawrence, Jennifer Nugent and Cara Scarfone, 'The Effectiveness of Using Mediation in Selected Civil Law Disputes: A Meta-Analysis' <www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr07_3/index.html> accessed 21 May 2013.

[63] See, eg, ibid 6.

[64] Kidner (n 42) 167.

[65] Ellen A. Waldman, 'The Evaluative Facilitative Debate in Mediation: Applying the Lens of

that mediated outcomes 'should not violate principles of equality, anti-discrimination, or oppression'; she proposes that in some cases, a [page 84] 'norm advocating' approach needs to be considered to ensure fairness to parties.[66] Quebec scholars Louise Otis and Eric Reiter noted in 2006 that little research has been done on the 'normative impact' of mediation.[67] Macfarlane noted in 2008 that 'With rapid yet uncoordinated development across courts and jurisdictions, the need for research on process and style variations is increasingly urgent'.[68] Much more scholarly attention is needed if the potential, limitations and impact of mediation is to be fully investigated, particularly in light of continuing concerns in Canada about access to and quality of justice.

(4) *Resistance and Critique*

3.25 Mediation has long been critiqued as being potentially disadvantageous to underpowered people and insensitive to cultural differences. Critiques have come from outside the field and from within. Canadian legal scholars have made significant contributions to critical discussions of mediation since the 1980s.

[page 85]

3.26 *Feminist Critiques*. During the 1980s, feminist critics began to express concern that underpowered people may experience unfairness in mediation because of coercion, bargaining disadvantages or lack of resources for advocacy. They have argued that overemphasis on

Therapeutic Jurisprudence' (1998) 82 Marquette Law Review 155, 161.

[66] Julie Macfarlane, *The New Lawyer: How Settlement Is Transforming the Practice of Law* (n 4) 171-172. The 'norm advocating' approach is drawn from work of Ellen A. Waldman, 'Identifying the Role of Social Norms in Mediation: A Multiple Model Approach' (1997) 48 Hastings Law Journal 703. Waldman's helpful typology places mediation models into three categories: 'norm-generating', 'norm-educating', and 'norm-advocating.' Norm-generating models are used in contexts where parties may wish to create their own norms: for example, neighbour conflicts that present few public policy issues. Norm-educating models might be used in divorce mediation where parties receive independent legal advice as to their rights, but parties may choose solutions based on their interests or personal ethics, using the law as just one possible standard for a fair settlement. Norm-advocating models promote particular legal, ethical or norms and may be suited for cases involving important public policy issues such as environmental or human rights concerns.

[67] Louise Otis and Eric Reiter, 'Mediation by Judges: A New Phenomenon in the Transformation of Justice' (2006) 6 Pepperdine Dispute Resolution Law Journal 352. Louise Otis is a retired Justice of the Quebec Court of Appeal. She designed the first system of judicial mediation in Quebec.

[68] Macfarlane, *The New Lawyer: How Settlement Is Transforming the Practice of Law* (n 4) 233. There has been some discussion in Quebec that suggests integrative approaches foster values of participatory justice. See Otis and Reiter (n 66) 363; Jean-François Roberge, 'The Future of Judicial Dispute Resolution: Towards a Participatory Justice Facilitator Judge' in Tania Sourdin and Archie Zariski (eds), *The Multi-Tasking Judge: Comparative Judicial Dispute Resolution* (Thomson Reuters forthcoming 2013).

settlement trivializes the importance of judicial authority to shift the balance of power and the basis of settlement. There has been concern that mediation programs pacify complainants at the expense of justice, privatize matters of public importance and thwart development of case law on women's human rights.[69] Domestic abuse has been a significant concern;[70] mediation proponents and scholars have responded by promoting qualifications standards, screening tools,[71] safety measures and independent legal advice.[72] For many years, these influential critiques effectively hindered the development of mandatory mediation in the area of family law. The critiques have also ensured that present-day mandatory mediation schemes provide exemptions in cases where there is evidence of family abuse. Canadian empirical research has found that in contemporary family mediation processes, women are no less safe than they are in processes within the regular justice system[73] where the 'settlement mission'[74] of public officials in family justice programs may add pressure to settle without the safeguards that are now required in most mandatory and voluntary mediation programs.

3.27 *Indigenous Peoples in Canada:*[75] *Resistance to Colonial Ideologies***.** Since the early 1990s, indigenous political leaders and scholars have pointed out that

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[69] Martha J. Bailey, 'Unpacking the 'Rational Alternative': A Critical Review of Family Mediation Movement Claims' (1989) 8 Canadian Journal of Family Law 61; Ruth Phegan, 'The Family Mediation System: An Art of Distributions' (1995) 40 McGill Law Journal 365; Martha Shaffer, 'Divorce Mediation: A Feminist Perspective' (1988) 46 University of Toronto Faculty of Law Review 162.

[70] Renu Mandhane, 'The Trend Towards Mandatory Mediation: A Critical Feminist Legal Perspective' (Ontario Women's Justice Network, August 1999) <http://owjn.org/owjn_2009/legal-information/aboriginal-law/161> accessed 6 June 2013.

[71] See, eg, Desmond Ellis and Noreen Stuckless, 'Domestic Violence, DOVE, and Divorce Mediation' (2006) 44 Family Court Review 658.

[72] Mediate BC, 'Mediate BC Society Standards of Conduct' 2011 <www.mediatebc.com/PDFs/1-28-Standards-of-Conduct/Standards_Conduct.aspx> accessed 6 June 2013; Colleen Getz, *Safety Screening in Family Mediation: A Discussion Paper* (Mediate BC, January 2008) <www.mediatebc.com/PDFs/1-23-Resources-(For-Mediators)/Screening_Family_Paper.aspx> accessed 6 June 2013; Barbara Landau, 'Qualifications of Family Mediators: Listening to the Feminist Critique' in Catherine Morris and Andrew Pirie (eds), *Qualifications for Dispute Resolution: Perspectives on the Debate* (UVic Institute for Dispute Resolution 1994); Noel Semple, 'Mandatory Family Mediation and the Settlement Mission: A Feminist Critique' (2012) 24 Canadian Journal of Women and the Law 207.

[73] Ellis and Stuckless (n 70) 658; Semple (n 71) 225-239.

[74] Semple (n 71) 234-239.

[75] Canada's population is approximately 34 million, of which the majority is of immigrant ancestry from Britain or Europe. Canada was colonized by Britain and France. Indigenous peoples comprise approximately 4% of the population, and visible minorities of immigrant ancestry comprise approximately 16% of the population. Indigenous peoples are the original nations in Canada, and they are not appropriately placed in the same category as immigrant cultural minority groups. While the

theories and practices of dispute resolution taught and practiced in Canada, including interest-based negotiation, are unsuited to conflicts involving indigenous peoples in Canada who do not share the Western values underlying dominant ADR processes in Canada.[76] Western-based negotiation and dispute resolution methods, including Canada's courts, have been imposed on indigenous peoples through colonization. Hegemonic Western and colonial assumptions have made it a struggle for indigenous peoples to be heard by Canadian governments or persons from the dominant culture; this has made it difficult for indigenous peoples or individuals to participate on an equal footing in Canadian courts or other dispute resolution processes. Recently, indigenous legal scholars in Canada have been providing insights on how indigenous wisdom, indigenous law and legal pluralism could help address conflicts involving indigenous peoples, including land rights and environmental issues.[77]

3.28 *Canada's Cultural Minorities*. Starting in the early 1990s, Canadian researcher, Michelle LeBaron, documented concerns about a lack of cultural sensitivity of Canadian mediation methods that assume values of individual autonomy and equality.[78] Not all of Canada's immigrant cultures share these Western values.[79] Conversely, some immigrant groups, particularly feminist groups, have expressed concern about importing into Canada some traditional dispute resolution methods that fail to meet the needs of underpowered persons, including women in

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term 'indigenous' is commonly used internationally, the term 'Aboriginal' is more common in Canada. In this chapter, these terms are used synonymously.

[76] Catherine Bell and David Kahane (eds), *Intercultural Dispute Resolution in Aboriginal Contexts* (UBC Press 2004); Michael Coyle, 'Defending the Weak and Fighting Unfairness: Can Mediators Respond to the Challenge?' (1998) 36 Osgoode Hall Law Journal 625; Wenona Victor, *Alternative Dispute Resolution (ADR) in Aboriginal Contexts: A Critical Review* (Canadian Human Rights Commission 2007); Jack Woodward, *Why the 'Interest-based' Model is Not Suitable for Negotiations about Aboriginal Rights* (UVic Institute for Dispute Resolution 1996).

[77] See, eg, Elmer Ghostkeeper, *Weche Teachings: Aboriginal Wisdom and Dispute Resolution* (UBC Press 2004); Val Napolean, *Who Gets to Say What Happened? Reconciliation Issues for the Gitxsan* (UBC Press 2004); also see the Aboriginal Litigation Practice Guidelines, Federal Court, 16 October 2012, discussed later.

[78] Michelle LeBaron Duryea, 'The Quest for Qualifications: A Quick Trip Without a Good Map' in Catherine Morris and Andrew Pirie (eds), *Qualifications for Dispute Resolution: Perspectives on the Debate* (UVic Institute for Dispute Resolution 1994); Michelle LeBaron Duryea and Bruce Grundison, *Conflict and Culture: Research in Five Communities in Vancouver, British Columbia* (UVic Institution for Dispute Resolution 1993).

[79] LeBaron Duryea and Grundison (n 77), see, eg. 203-214; Brishkai Lund, Catherine Morris and Michelle LeBaron, *Conflict and Culture: Report of the Multiculturalism and Dispute Resolution Project* (UVic Institution for Dispute Resolution 1994) 32-33.

male-dominated settings. Some traditional methods may also fail to measure up to Canadian and international human rights standards.[80] LeBaron reported that many immigrant families and communities want culturally sensitive processes that 'respect the values of disputants without importing features of processes they cannot now accept'.[81] More recently, LeBaron has explored the concept of 'cultural fluency', including understanding of one's own cultural frames of reference, to improve mediation across cultures.[82]

3.29 *Canada's Legal Culture: Resistance by Judges and Lawyers*. Consideration of some cultural frames and lenses common in Canada's legal profession may help explain resistance to mediation and JDR by some Canadian jurists. Proposals in the 1980s for mediation and judicial case management were frontal assaults on the 'adjudicative norm'[83] and the normative role of the lawyer as 'zealous advocate' within Anglo-Canadian legal culture. This section uses BC examples to illustrate.

3.30 By the mid-1980s, then Chief Justice of BC, Allan McEachern, had become deeply concerned about mediation, saying that 'the court is sometimes the only protection the weak and the timid have against stubborn and unreasonable adversaries. We must all be careful not to let that important responsibility be transferred to other disciplines whose only remedy (often ineffectual) is reasonable persuasion'.[84] This view suggests that disputes are inherently adversarial, that pressure for settlement might result in capitulation by weaker parties, and that the only bulwark against such injustices is the power of lawyers and courts. McEachern's concern about coercion to settle on unfair terms is similar to themes that run through other critiques of mediation.

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[80] Boyd (n 21), see, eg, 46; LeBaron Duryea and Grundison (n 77), see, eg. xxii; Lund, Morris and LeBaron (n 78) 29-33.
[81] Lund, Morris and LeBaron (n 78) 33.
[82] Michelle LeBaron, *Bridging Troubled Waters: Conflict Resolution From the Heart* (Jossey-Bass 2002). While Prof. LeBaron's research in the 1990s had its primary focus on immigrant communities, she has also considered culture and conflict relating to indigenous peoples; see, eg, Michelle LeBaron, 'Shapeshifters and Synergy: Toward a Culturally Fluent Approach to Representative Negotiation' in Colleen Hancycz, Trevor C.W. Farrow and Frederick H. Zemans (eds), *The Theory and Practice of Representative Negotiation* (Emond Montgomery Publications Limited 2008).
[83] Otis and Reiter (n 66) 358.
[84] Quoted in Hughes (n24) 180. This critique echoes concerns famously articulated by American scholar, Owen Fiss, 'Against Settlement' (1964) 93 Yale Law Journal 1073.

3.31 Faced with lawyers' interest in practising family mediation, leaders of the Law Society of BC (LSBC) feared that mediation might weaken the role of the legal profession in protecting clients' rights. In 1984, the LSBC ruled that BC lawyers wishing to practice family mediation were required to take mediation training and were precluded from acting as family mediators until they had practiced law for three years. Lawyer mediators also were required to ensure that parties obtained independent legal advice before concluding settlement agreements. Interdisciplinary mediation organizations' codes of ethics in the 1980s also began to emphasize qualifications and independent legal advice [85] in light of formidable concerns of feminist critics and the legal profession.

3.32 Critics of this rule lambasted the requirement of three years of law practice, saying it was a move to ensure that lawyer-mediators would be thoroughly indoctrinated in adversarial practices. Canadian scholar, Andrew Pirie, saw the LSBC regulation, including the requirement of independent legal advice, as contrary to mediation values of 'mutuality, community,... individual responsibility and trust'; [86] he warned that mediation was being co-opted into adversarial ways of thinking.[87]

3.33 When judicial mediation was proposed in the 1980s as part of case management initiatives, it met with opposition. Since then, JDR has made considerable inroads and is now widely practiced in several provinces, including Alberta, Quebec and BC's Small Claims Court. However, there continues to be resistance, notably now in Ontario.[88] This is not just a matter of resistance to change. In the Anglo-Canadian common law tradition, the judge is to remain disengaged from litigants, separated by

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[85] Most early codes of ethics are no longer easily accessible. For citations and excerpts, see Morris, 'The Trusted Mediator: Ethics and Interaction in Mediation' (n 16) 301-347, particularly 317-335.

[86] Andrew J. Pirie, 'The Lawyer as Mediator: Professional Responsibility Problems or Profession Problems?' (1985) 63 Canadian Bar Review 378, 404.

[87] Recently, nearly three decades later, the LSBC has abolished the 'three year' rule but retains requirements of independent legal advice. Law Society of BC Family Law Task Force, 'Qualifications for Lawyers Acting as Arbitrators, Mediators and/or Parenting Coordinators in Family Law Matters' (*Law Society of BC*, 7 September, 2012) <www.lawsociety.bc.ca/docs/publications/reports/FamilyLawTF_2012.pdf> accessed 6 June 2013. See Recommendation 2.2. These recommendations were adopted by the LSBC on 26 September 2012.

[88] Warren K. Winkler, 'Some Reflections On Judicial Mediation: Reality Or Fantasy? ' [2010] Advocates' Journal 3.

the metaphoric blindfold of Justitia, the Greco-Roman goddess of justice,[89] who symbolizes judicial independence, impartiality, neutrality, transparency and incorruptibility. The symbol of Justitia is deeply embedded in Canadian legal culture. Formal, public hearings 'conducted on the record, in a courtroom, with all parties present, the rules of evidence adhered to, and under the overall aegis of the *Rules of Civil Procedure*' prevent 'the dreaded descent into the arena' of the parties' dispute.[90] Judges protect their neutrality by avoiding private contact with parties outside the courtroom. Judicial mediation brings judges perilously close to the private 'arena' with no protective blindfold. Judicial case management is a doubly dangerous descent; not only does it put judges into the 'arena', but it also interferes with the Anglo-Canadian idea that lawyers, not judges, are in charge of case management. Thus, many Canadian judges have seen judicial case management and mediation as 'antithetical to judging'.[91]

3.34 Given considerable experience over the past two decades, Canadian judges are now likely to see case management and JDR as compatible with their role. Judges ensure their impartiality by insisting that judicial mediators are never involved in adjudicating the same case. It is important to note that Canadian judges uniformly, zealously and rightly guard their independence from the executive branch of government or other forms of corruption. However, some have raised concerns about a 'darker side' of JDR summarized by retired Alberta Provincial Court Judge Hugh Landerkin and Andrew Pirie:

> Will JDR be mostly about achieving economic efficiencies, essentially ignoring qualitative justice goals? Is JDR, like ADR, second class justice for those who cannot afford or otherwise access the full attributes of the formal justice system? Will JDR perpetuate systemic inequalities by encouraging a further privatisation of justice and a de-emphasis on legal rights? Will judges and the judicial function be compromised as a law of JDR develops around confidentiality, negligence, judicial

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[89] Judith Resnick, 'Managerial Judges' (1982) 96 Harvard Law Review 374.
[90] Winkler (n 87) 3-4.
[91] ibid 3.

immunity, fiduciary duties and the like? Can JDR accommodate the cultural dimensions of disputing? Will JDR and its ADR influences be co-opted by judges as vehicles for defusing dissent, pressuring parties to settle and fostering pacification at the expense of justice?[92]

3.35 *The Emergence of the 'New Lawyer'*. The work of mediation practitioners, advocates and scholars since the 1970s, and particularly over the past two decades, has successfully moved mediation from the margins to the mainstream. Canadian scholar, Julie Macfarlane, has documented a changing culture of the legal profession,[93] noting that several traditional beliefs held by Canadian lawyers are now 'continuously under challenge'.[94] She uses the term 'the new lawyer' to describe lawyers whose repertoire extends beyond court-centred litigotiation and includes negotiation, mediation and 'collaborative law practice'. Yet, Macfarlane notes the persistence of three stable beliefs of lawyers:

> 1. A default to rights-based strategies and processes (and an assumption that these are always the most appropriate and effective);
> 2. An image of justice as process rather than outcomes – while outcomes may be capricious and hard to predict, it is the stable knowable procedural steps of the justice system that afford 'justice'; and,
> 3. That the lawyer is 'in charge' in the lawyer-client relationship, by virtue of her superior legal knowledge which is the bedrock of the rights-based strategies she will pursue.[95]

Macfarlane says these three beliefs 'are holding back the development of a modified professional identity for lawyers which is more fully responsive

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[92] Hugh F. Landerkin and Andrew Pirie, 'What's the Issue? Judicial Dispute Resolution in Canada' (2004) 22 Alternative Dispute Resolution and the Courts: Law in Context 25, 58.
[93] Julie Macfarlane, *Culture Change? Commercial Litigators and the Ontario Mandatory Mediation Program* (Law Commission of Canada 2001); Macfarlane, *The New Lawyer: How Settlement Is Transforming the Practice of Law* (n 4); Julie Macfarlane, 'The Evolution of the New Lawyer: How Lawyers are Reshaping the Practice of Law' (2008) 62 Journal of Dispute Resolution 61.
[94] Macfarlane, 'The Evolution of the New Lawyer: How Lawyers are Reshaping the Practice of Law' (n 92) 64.
[95] ibid 64.

to significant changes in the disputing environment – changes driven by courts, policy-makers and the consumers of legal services'.[96]

(5) *Law Reform Efforts and Their Impact on the Culture of Disputing*

3.36 Canadian law reform initiatives involving mediation have resulted in significant changes to the legal system since the 1980s. In Canada's federal system, most relevant laws about dispute resolution are made by the 10 provinces and three territories. This section discusses some legal reforms in BC, Alberta, Ontario and Quebec as well as some federal reforms and considers their impact on the culture of disputing.

3.37 *BC: Mandatory Judicial Settlement Conferences and Quasi-mandatory Mediation*. In 1991, the BC Small Claims Court introduced mandatory judicial settlement conferences. In 1992, independent evaluators reported that the 20- to 30-minute judge-led processes yielded settlements in 40.3% of disputed cases.[97] This was a dramatic improvement; prior to introduction of settlement conferences parties reached settlements in only 4.9% of disputed cases.[98] In 2012, a brief study by the BC government reported a settlement rate of 35%.[99] While all judges of the Provincial Court undertake interest-based mediation training,[100] mediation styles actually practiced by judges in settlement conferences do not appear to be documented.

3.38 In addition, beginning in 2007, BC regulations have gradually introduced mandatory mediation in selected cases in five Small Claims Court registries. This Court Mediation Program (CMP) is operated by a government-organized non-governmental organization, Mediate BC.[101]

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[96] ibid 65. Also see Nicholas Bala, 'Reforming Family Dispute Resolution in Ontario: Systemic Changes and Cultural Shifts' in Michael Trebilcock, Anthony Duggan and Lorne Sossin (eds), *Middle Income Access to Justice* (University of Toronto Press 2012).

[97] Peter Adams and others, *Evaluation of the Small Claims Program, Vol. 1* (Province of British Columbia, Ministry of Attorney General 1992) 32.

[98] ibid.

[99] Province of British Columbia, *Modernizing British Columbia's Justice System* (Minister of Justice and Attorney General February 2012)

[100] Professor Andrew Pirie, University of Victoria, quoted in Jacqueline Iny, 'Judicial Mediation: Transformation or Transgression?' (INSTEEL Consulting Corporation, 22 December 2011) 14 <www.insteel.ca/INSTEEL/Home_files/INY_%20Judicial%20Mediation_INSTEEL.pdf> accessed 6 June 2013.

[101] Small Claims Rules, B.C. Reg. 261/93 [includes amendments up to B.C. Reg. 271/2010, 24 September 2010] <www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/261_93_07#ScheduleC> accessed

The CMP mediates about 1,400 mandatory cases per year with a settlement rate of 50% or more.[102] The CMP provides a two-hour mediation session by mediators who are required to use an interest-based approach to mediation.[103] Mediators are not required to be lawyers. Without further research, no conclusions can be drawn about the relative effectiveness of the judicial settlement program and the CMP or about the impact of different time-frames, qualifications of mediators, type of mediator training or mediation styles.

3.39 BC's Supreme Court Rules also provide for judicial settlement conferences upon a joint request of parties or by order of a judge.[104] The BC Supreme Court Family Rules provide for a mandatory Judicial Case Conference (JCC) to identify issues that may be settled. JCCs may include mediation.[105] However, judicial mediation does not appear to be widely practiced in the BC Supreme Court. No information was found concerning the extent or style of judicial mediation conducted by judges of the Supreme Court of BC.

3.40 To encourage more and earlier settlements in cases filed in the Supreme Court of BC, in 1998 the BC government introduced a 'quasi-mandatory'[106] mechanism, the Notice to Mediate regulation,[107] by which a party in a motor vehicle accident law suit can compel the other party to enter into mediation. In 2001, the Notice to Mediate regulation was extended to all lawsuits within the Supreme Court of BC, except family law cases, judicial reviews of administrative tribunal decisions, and

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6 June 2013.

[102] Kari Boyle, *Letter to the Ministry of Justice of BC* (Mediate BC, 22 June 2012) <www.mediatebc.com/PDFs/1-52-Reports-and-Publications/Mediate-BC-Society---Response-to-Green-Paper-page-.aspx> accessed 21 May 2013; Sarah Vander Veen and Angela Mallard, *Three Years of Court-Connected Small Claims Mediations: The Importance of System, Program, Case, and Mediator Characteristics to the Court Mediation Program's Outcomes* (Mediate BC, 7 August 2012) <www.mediatebc.com/PDFs/1-52-Reports-and-Publications/Lessons-Learned-FINAL-VERSION_07-Aug-2012.aspx> accessed 21 May 2013.

[103] Vander Veen and Mallard (n 101) 4.

[104] Supreme Court Civil Rules, BC Reg 168/2009, r 9-2.

[105] Supreme Court Family Rules, BC Reg 169/2009, r 7-1.

[106] M. Jerry McHale, 'Mediation in Civil and Family Cases in British Columbia' (*BarTalk*, June 2008) <www.cba.org/bc/bartalk_06_10/06_08/PrintHtml.aspx?DocId=31893> accessed 6 June 2013.

[107] Notice to Mediate (General) Regulation, BC Reg 4/200 Notice to Mediate Regulation, B.C. Reg. 127/98; Notice to Mediate (General) Regulation, BC Reg 4/200; Notice to Mediate (Residential Construction) Regulation, B.C. Reg. 152/99; and the Education Mediation Regulation, B.C. Reg. 250/2000.

cases involving claims of physical or sexual abuse. By 2005, the Notice to Mediate had been extended to all claims in the BC Small Claims Court.[108] By March 2012, the Notice to Mediate applied to all family law cases in the BC Supreme Court with exemptions in cases of domestic violence or where the appointed mediator considers that mediation will be inappropriate or unproductive.[109]

3.41 Recently, the BC government took a unique and dramatic step to try to address problems of access to justice and to develop a culture of settlement. A new Civil Resolution Tribunal Act (CRT Act)[110] was proclaimed in May 2012 and is to come into force when the BC Cabinet passes the required regulation, probably in 2014. The CRT Act creates a mechanism that will allow disputants to sidestep the Small Claims Court altogether in favour of a voluntary administrative tribunal that will include a case management system and a range of processes including party-to-party negotiation, 'facilitated dispute resolution', 'neutral case evaluation' and adjudication. It is anticipated that all these processes will utilize online dispute resolution (ODR) to the extent feasible. By mutual agreement, parties will be able to withdraw from consensual processes at any time up to the time of adjudication. Development of ODR practices in the CRT will likely be mindful of UNCITRAL ODR procedural rules currently in draft form,[111] and the European Commission's Regulation on Consumer ODR recently adopted by the European Parliament.[112] The monetary jurisdiction of the Civil Resolution Tribunal (CRT) is expected to be the current Small Claims limit of $25,000.

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[108] When a party files a Notice to Mediate in the Small Claim Court, the CMP mediates.

[109] Notice to Mediate (Family) Regulation, B.C. Reg. 296/2007 [includes as amendments up to B.C. Reg. 66/2012, 30 March 2012] <www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/296_2007> accessed 21 May 2013.

[110] Civil Resolution Tribunal Tribunal Act, SBC 2012, c 25

[111] See the work of the UNCITRAL Working Group III. <www.uncitral.org/uncitral/commission/working_groups/3Online_Dispute_Resolution.html> accessed 6 June 2013. BC government official and lawyer, Darin Thompson, has been the Canadian delegate to Working Group III.

[112] Proposed Regulation of the European Parliament and of the Council on online dispute resolution for consumer disputes (Regulation on consumer ODR), P7_TA(2013)0065, adopted by the European Parliament 12 March 2013.

3.42 The CRT Act bypasses definitional debates about 'mediation', 'conciliation,' and 'arbitration' by avoiding these terms, replacing them with the terms 'facilitated dispute resolution', and (for the adjudicative phase) 'decision[s] of the tribunal.' The CRT Act aims to shift the culture of disputing by making consensual dispute resolution the central focus, moving the focal point away from courts and adjudication.

3.43 It is not known how well the CRT's voluntary scheme will be used by the public. Voluntary mediation programs have generally not been well-used.[113]

3.44 The CRT Act was drafted with unrepresented disputants in mind. In the absence of special circumstances specified by the Act, parties will be required to represent themselves in the CRT.[114] The CBA has expressed concern about this requirement,[115] but its overarching concern is that that the CRT creates a 'potentially costly parallel system to the courts' but does not address the main problems which 'are due to the fact that the court system has been starved of government resources for far too long, and diverting resources to a civil claims tribunal may exacerbate that problem'.[116]

3.45 No qualifications for mediators or adjudicators are set out in the CRT Act other than that the process of appointment must be 'merit-based'. The qualifications of tribunal members are to be established by regulation. This means the government will decide the qualifications of the CRT's dispute resolution staff and decision-makers.

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[113] Mucalov (n 23), citing Jerry McHale, then Assistant Deputy Minister (Justice Services) of BC.

[114] Section 20, Civil Resolution Tribunal Tribunal Act, SBC 2012, c 25.

[115] BC Branch of the Canadian Bar Association, 'Government Consultation and Collaboration Falls Short When it Comes to Improving Justice' (Canadian Bar Association, 8 May 2012) <www.cba.org/bc/Public_Media/news_2012/news_05_08_12.aspx> accessed 6 June 2013. It is doubtful that Canada's courts would strike down a requirement that people not be represented by lawyers in a voluntary tribunal. The Court of Quebec, Small Claims Division, which hears civil cases involving $7,000 or less, has required self-representation since 1980. The Supreme Court of Canada has affirmed the competence of the National Assembly of Quebec to exclude representation by counsel before the Small Claims Division of the Quebec Provincial Court in the case of *Nissan Automobile Co. (Canada) Ltd. et al. v. Pelletier et al.* [1981] 1 SCR 67. This issue remains contentious in Quebec. The monetary limit is proposed to be raised to $10,000 upon coming into force, and to $15,000 three years after coming into effect. See Quebec's Draft Bill to enact the new Code of Civil Procedure, 39th Legislature, Second Session, 2011, Articles 799(4) and 539.

[116] BC Branch of the Canadian Bar Association (n 114).

3.46 The early development of mediation in Canada by social workers and community activists has precluded lawyers from exclusively capturing the field of mediation. However, as early as the Hughes Report in 1988 there have been questions and controversies about mediator qualifications.[117] With the exception of family law mediation, the private practice of mediation is not currently regulated in BC, at least not directly. Disputants may use any mediator they like, and anyone may practice mediation. However, in 1998, the BC government found a way to address judges' and consumers' questions about mediator qualifications by creating rosters through Mediate BC. BC's Notice to Mediate regulations provide that in the event of an inability of parties to appoint a mediator, a 'roster organization' may appoint a mediator. The 'roster organization' is Mediate BC, which has established qualifications for admission to its rosters.[118] Mediate BC also has Standards of Conduct to which roster mediators must adhere.[119] Thus, through Mediate BC and the Notice to Mediate regulations, the BC government has indirectly regulated qualifications and standards of conduct for mediators. This scheme has effectively addressed the key concern that persons cannot rightly be compelled into mediation without ensuring that mediation is conducted by persons with accepted qualifications. Family law mediators are the first to be directly regulated in BC. Regulations of the new *Family Law Act*, in force as of 18 March 2013, provide that all family law mediators must meet particular training standards.[120] This has led the LSBC to upgrade its educational requirements for family law mediators effective January 2014.[121]

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[117] The qualifications debate of the early 1990s is set out in Catherine Morris and Andrew Pirie (eds), *Qualifications for Dispute Resolution: Perspectives on the Debate* (UVic Institute for Dispute Resolution 1994).

[118] Mediate BC, 'Why Choose a Mediate BC Roster Mediator?' (Mediate BC) <www.mediatebc.com/About-Mediation/Why-Choose-a-Mediate-BC-Roster-Mediator-.aspx> accessed 6 June 2013. For more information about child protection mediation in BC, see M. Jerry McHale, Irene Robertson and Andrea Clarke, 'Building a Child Protection Mediation Program in British Columbia' (2009) 47 Family Court Review 86.

[119] 'Mediate BC Society Standards of Conduct' (n 71).

[120] Section 4 of the Family Law Act Regulation, BC Reg 837/12 <www.ag.gov.bc.ca/legislation/family-law/pdf/FLARegsSectionNotes.pdf> accessed 6 June 2013.

[121] Lawyer mediators in family law cases have since 1984 been required to have 40 hours of training, but effective January 2014 will be required to have at least 80 hours of training in family law mediation plus training in how to screen for family violence. See Recommendation 2.2, Family Law Task Force (n 86).

3.47 Currently, mediation-arbitration (med-arb) is not widely practiced in BC, but it is legally possible. The BC Arbitration Act is silent on settlement, but Section 22 of the Act provides that the default rules are the rules of the BCICAC,[122] which allow mediation. Arbitration and med-arb in family law cases may well increase in BC under the new Family Law Act, which includes amendments to the Arbitration Act that specify procedural safeguards for family arbitration. This is creating incentives for continuing legal education in family arbitration. Regulations under the new Family Law Act have established experience and training requirements for family arbitrators.[123] There are no qualifications standards for arbitrators working in any other areas of law.

3.48 No research was located that assesses the impact of mediation on the culture of disputing in BC. However, in 2004, 30 BC family law lawyers were interviewed about characteristics they preferred in family law mediators. Most of the lawyers said they preferred mediators with substantive knowledge and litigation experience in family law. The majority preferred efficient and solution-focused mediation. Most interviewees did not demonstrate familiarity with the terms 'evaluative' or 'facilitative' mediation, but at least one third of the lawyers preferred mediators who were willing to provide opinions or to be 'directive'.[124] In 2011, a survey of mediators on Mediate BC Rosters indicated divided opinion on whether judicial mediators should use evaluative, facilitative or other approaches.[125]

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[122] British Columbia International Commercial Arbitration Centre, Domestic Commercial Arbitration Rules of Procedure (As amended June 1, 1998) (British Columbia International Commercial Arbitration Centre 1998) <http://bcicac.com/arbitration/rules-of-procedure/domestic-commercial-arbitration-rules-of-procedure/> accessed 6 June 2013.

[123] Section 5 of the Family Law Act Regulation, BC Reg 837/12 <www.ag.gov.bc.ca/legislation/family-law/pdf/FLARegsSectionNotes.pdf> accessed 6 June 2013. The LSBC has also ruled that lawyers conducting family law arbitration must have 10 years of current experience in law practice or be experienced as a judge and must also take 40 hours of training in arbitration, including training in family dynamics, plus a further 20 hours of training in screening for family violence. See Recommendation 1, Family Law Task Force (n 86).

[124] Catherine Morris, *Creation Of A Credible And Accessible Family Mediator Roster In British Columbia: Barriers And Policy Options For Effective Family Dispute Resolution* (BC Mediator Roster Society, 15 October 2004).

[125] Mediate BC, *Survey on "Judicial Mediation" Summary of Survey Results* (December 12, 2011) <http://library.constantcontact.com/download/get/file/1102335284681-290/Summary+of+Survey+Results+Dec+12+11+Final.pdf> accessed 21 May 2013.

3.49 *Alberta: Judicial Dispute Resolution*. Private mediation, including med-arb, is widely available in Alberta. Alberta's Arbitration Act provides that with party consent, arbitrators may engage in mediation and resume arbitration without disqualification.[126] The Province of Alberta advertises some government-based services in civil mediation, family mediation and child protection.[127]

3.50 However, the main focal point of mediation in Alberta is JDR, in which Alberta courts have been engaged for nearly two decades. In the Provincial Court of Alberta, which addresses small claims, parties may request mediation, and contested cases may be selected for mandatory JDR. The Alberta Court of Queen's Bench (ACQB) is said to be 'further ahead in formalized dispute resolution practices than any other superior trial court in the country'.[128]

3.51 On 1 November 2010, the ACQB Rules of Court were amended to make dispute resolution mandatory before a trial date may be set.[129] The Rules require parties to participate in good faith in their choice of private mediation or arbitration, court-annexed dispute resolution, JDR or another dispute resolution program or process designated by the Court. Upon application, the Court may waive the requirement. While the mandatory dispute resolution program allows parties to choose a range of processes, many litigants have reportedly insisted on waiting for JDR,[130] which has proven to be so popular that disputants 'wait longer for a mediation date than a trial... there is pressure for judges to free themselves for JDR'.[131]

3.52 On 12 February 2013, the Court became concerned about sufficiency of judicial resources and decided to suspend enforcement of mandatory

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[126] Arbitration Act, RSA 2000, c A-43, s 35.

[127] For more information see the website of the Ministry of Justice and Solicitor General, Province of Alberta: <http://justice.alberta.ca/programs_services/mediation/Pages/mediation_services.aspx> accessed 6 June 2013.

[128] Justice John A. Agrios and Janice A. Agrios, *A Handbook on Judicial Dispute Resolution for Canadian Lawyers* (Canadian Bar Association, 2004) <www.cba.org/alberta/PDF/JDR%20Handbook.pdf> accessed 21 May 2013.

[129] Alberta Rules of Court, Alta Reg 124/2010, rr 2.1, 8.4, 8,5, 4.16.

[130] Cummings Andrews Mackay LLP, 'Court Suspends Mandatory ADR' 13 Februry 2013 <www.camllp.com/2013/02/13/court-suspends-mandatory-adr/> accessed 6 June 2013.

[131] Iny (n 99) 12.

dispute resolution 'until such time as the judicial complement of the Court and other resources permit reinstatement'.[132] However, lack of enforcement of the Rules may not substantially reduce the popularity of JDR, which continues to be offered by the judiciary on a voluntary basis. According to Associate Chief Justice John D. Rooke, dispute resolution is no longer merely an 'alternative' in Alberta; rather settlement 'in the shadow of the law,[133] based on rights or interests as the parties choose, has become an 'integral, normative, and institutional part of the resolution of disputes litigated in the Court.'[134] Justice Rooke's 2009 evaluation of JDR in the ACQB indicates that the goal of the JDR is settlement and that evaluative mediation is predominant, although there is some regional variation.[135] Facilitative mediation is 'more predominant in Calgary and mini-trials more predominant in Edmonton', but settlement rates for all approaches are similar (at least 80%).[136]

3.53 The role of the judge remains central in Alberta; many parties prefer JDR to private mediators because JDR provides them with a 'day in court'.[137] In Alberta, the adjudicative norm has been replaced by the 'multi-tasking judge'[138] whose core function is no longer adjudication but the resolution of disputes using a range of processes from mediation to adjudication.

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[132] Court of Queen's Bench of Alberta, *Notice to the Profession: Mandatory Dispute Resolution Requirement Before Entry for Trial* (Court of Queen's Bench of Alberta, 12 February 2013) <www.albertacourts.ab.ca/LinkClick.aspx?fileticket=yusOKnMC2Ow%3D&tabid=69&mid=704> accessed 21 May 2013.

[133] John D. Rooke, 'The Multi-Door Courthouse is Open in Alberta: Judicial Dispute Resolution is Institutionalized in the Court of Queen's Bench' in Tania Sourdin and Archie Zariski (eds), *The Multi-Tasking Judge: Comparative Judicial Dispute Resolution* (Thomson Reuters Australia 2013), referencing the well-known expression 'bargaining in the shadow of the law' used in Robert H. Mnookin and Lewis Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88 Yale Law Journal 950.

[134] Rooke (n 132) 160.

[135] John D. Rooke, 'Improving Excellence: Evaluation of the Judicial Dispute Resolution Program in the Court of Queen's Bench of Alberta' (Edmonton: Court of Queen's Bench of Alberta, 2009) 806-807 <www.cfcj-fcjc.org/sites/default/files/docs/hosted/22338-improving_excellence.pdf> accessed 6 June 2013.

[136] ibid ix.

[137] Rooke, 'The Multi-Door Courthouse is Open in Alberta: Judicial Dispute Resolution is Institutionalized in the Court of Queen's Bench' (n 132) 178.

[138] Tania Sourdin and Archie Zariski (eds), *The Multi-Tasking Judge: Comparative Judicial Dispute Resolution* (Thomson Reuters Australia 2013).

3.54 *Ontario: Mandatory Mediation Initiatives*. The government of Ontario initiated mediation experiments in 1994 after an extensive Civil Justice Review that sought to address concerns about access to justice. Major recommendations of the Review included a comprehensive case management program and introduction of mandatory mediation.[139] In 1994, a pilot project in Toronto initiated early referrals of non-family civil cases to a voluntary three-hour mediation session. A 1995 evaluation of this pilot concluded that 'referral to mediation provided a cheaper, faster and more satisfactory result for a significant number of those cases referred'; 40% of cases referred to mediation had settled within 90 days.[140] A second pilot project in 1997 made the three-hour mediation session mandatory for non-family civil cases involved in Ontario's case management system in Ottawa. Of the cases mediated in the Ottawa pilot, '44% fully settled; 17% partially settled; and, 5% settled within 60 days of having attended a mediation'.[141] In 1999, the Ontario Mandatory Mediation Program (OMMP) was put in place in Toronto and Ottawa after passage of Rule 24.1. The new Rule had been negotiated by the Civil Rules Committee, composed of members of the judiciary, bar and officials of the Ministry of the Attorney General. The OMMP had been championed by then Attorney General Charles Harnick, Regional Justice Robert Chadwick, and Assistant Deputy Attorney General Leslie H. Macleod,[142] who was then a recent graduate of Osgoode Hall Law School's LLM in ADR Program. The OMMP's continuation beyond a two-year period was subject to assessment of the 'costs, speed, outcome and satisfaction' with the program.[143] After positive evaluation according to these criteria in 2001,[144] the OMMP was made permanent and extended in 2002 to a third large court registry, Windsor.[145]

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[139] Leslie H. Macleod, Elana Fleischmann and Anne DeMelo, 'The Future of Alternative Dispute Resolution in Ontario: Mechanics of the Mandatory Mediation Program' (1998) 20 Advocates' Quarterly 389.
[140] ibid 393, citing Macfarlane, *Court-Based Mediation for Civil Cases: An Evaluation of the Ontario Court (General Division) ADR Centre* (n 58).
[141] Macleod, Fleischmann and DeMelo (n 138) 393.
[142] Julie Macfarlane, 'Introduction to the Special Topic of Alternative Dispute Resolution' (2006) 21 Windsor Review of Legal & Social Issues 1.
[143] Macleod, Fleischmann and DeMelo (n 138) 399.
[144] Hann and others (n 58).
[145] Rule 24.1, Mandatory Mediation, and Rule 75.1, Estates, Trusts and Substitute Decisions, in Courts of Justice Act R.R.O. 1990, Regulation 194 Rules of Civil Procedure, as amended by O. Reg. 55/12 <www.e-laws.gov.on.ca/html/regs/english/elaws_regs_900194_e.htm#sched24.1.01> accessed 6 June 2013.

3.55 Family litigants seeking spousal support, parenting orders or division of property are required to attend a two-hour Mandatory Information Program (MIP) session[146] which provides scripted information about effects of separation and divorce on parties and children, court processes, and alternatives to litigation such as mediation. The MIP had been in force in some parts of the province for some years but was extended to all parts of Ontario in 2011. No information was found on the impact of the MIP on public uptake of mediation.

3.56 Anecdotal reports suggest that mediation may not be widely practiced in Ontario outside the mandatory mediation program. Few people work as mediators on a full-time basis.[147] As in other provinces in Canada, voluntary mediation programs for non-mandatory issues such as community and small claims disputes are not widely utilized and have struggled to remain alive.

3.57 The 1995 and 2001 evaluations of the OMMP demonstrate that the program has fostered increased settlement at earlier stages of litigation. The OMMP has also led to the development of a large roster of trained mediators. There is also evidence from the OMMP that exposure to mediation engenders positive attitudes towards mediation. Julie Macfarlane has drawn connections between experience with mediation, including the OMMP, and increased willingness of lawyers to move away from the norm of 'lawyer in charge' towards fostering client engagement in dispute resolution processes and participatory development of case outcomes.[148]

3.58 However, as Macfarlane has pointed out, the adversarial culture with the lawyer in charge is persistent; a cultural shift towards integrative approaches to mediation and a power shift towards client participation

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[146] Rule 8.1, Family Law Rules, Courts of Justice Act, R.R.O 1990, Regulation 114/99 Family Law Rules, as amended by O. Reg. 389/12 <www.e-laws.gov.on.ca/html/regs/english/elaws_regs_990114_e.htm#s8p1s1> accessed 6 june 2013.

[147] Catherine Morris, Telephone interview with a senior Ontario mediation practitioner, 11 January 2013). All interviews for this chapter were conducted on the understanding of anonymity.

[148] Macfarlane, *Culture Change? Commercial Litigators and the Ontario Mandatory Mediation Program* (n 92) 34 and following; Macfarlane, *The New Lawyer: How Settlement Is Transforming the Practice of Law* (n 4) 42.

(and autonomy) seem slow and uneven. Canadian scholar Colleen Hanycz says that a significant number of OMMP mediations '[u]ndeniably... include coercive practises by mediators who regularly provide assertive legal advice'.[149] If coercion vitiates consent, it is cause for concern. Others consider that mediation under the OMMP has improved over time as mediators have become more experienced. While the OMMP has shifted the culture of disputing towards settlement using private sector mediators, it does not appear to have fulfilled the visions of true believers in integrative dispute resolution. Hanycz points to the purposes of the OMMP, saying:

> [I]t was to be an answer to the costly, time-consuming and inefficient backlogs of traditional adjudication in this province, and at no time did anyone talk about achieving those objectives of mediation gathered loosely under the categories of "relational" and "transformative." This was to be about improved judicial efficiency, plain and simple. While debate has continued surrounding other objectives of this program — some noting its role in enabling better access to justice for disputants who are ill equipped for the costs and delay of traditional litigation — the guiding principles of the sponsoring institution... have, in my view, served to create and nourish within the program's mediators a strong orientation to settlement, regardless of the case or context.[150]

3.59 In 2011, Ontario Chief Justice W.K. Winkler expressed interest in developing judicial mediation.[151] This resulted in considerable controversy even though JDR has been practiced in Ontario since judicial pre-trial conferences were instituted in the 1980s. JDR processes are ad hoc and may range from 'fireside chats' to 'mini-trials'.[152] JDR in Ontario is not governed by the Rules of Civil Procedure or practice guidelines. In 2011, the Ontario Bar Association (OBA) formed a Judicial Mediation Taskforce, which has centred on theoretical discussion of the

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[149] Colleen M. Hanycz, 'Through the Looking Glass: Mediator Conceptions of Philosophy, Process and Power' (2005) 42 Alberta Law Review 819.
[150] ibid.
[151] Winkler (n 87).
[152] Iny (n 98).

appropriate role of judges, as well as concerns about uneven quality and inconsistent availability of JDR throughout the Province. Some concern has been expressed about coercion by some judges during JDR hearings. As of June 2013, the OBA Judicial Mediation Taskforce report has not yet been released.

3.60 In 2005, the Uniform Law Conference of Canada recommended an International Commercial Mediation Act based on the UNCITRAL model law;[153] however, Ontario,[154] along with Nova Scotia,[155] are the only two provinces with commercial mediation legislation based on the model law. A key feature of Ontario's Commercial Mediation Act 2010 is that it makes it possible to enforce a mediated agreement without having to commence a lawsuit. Section 13(2) of the Act allows a party to a mediated agreement to apply to the court for a judgment in the terms of the agreement.[156] No information was found to indicate whether the 2010 Act is encouraging mediation at the earliest pre-litigation stages of commercial disputes.

3.61 *Quebec: An Integrative Approach to Dispute Resolution*. Since the mid-1990s, mediation has been accepted as an important way to improve access to justice in the Province of Quebec, Canada's only civil law jurisdiction.[157] Voluntary judicial mediation is widely practiced. In 1994, Quebec instituted a mandatory information session on family mediation for parents into its 2003 Code of Civil Procedure.[158] The mandatory information session is two and a half hours with five additional hours of voluntary mediation at no cost to participants.

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[153] Civil Law Section, Uniform Law Conference Of Canada, *Uniform Act On International Commercial Mediation: Report Of The Working Group* (2005) <http://66.51.165.111/en/poam2/International_Commercial_Mediation_Rep_En.pdf> accessed 21 May 2013.
[154] Commercial Mediation Act 2010, S.O. 2010, c 16.
[155] Commercial Mediation Act, SNS 2005, c 36.
[156] The Ontario Act departs slightly from the Model Law in terms of confidentiality of the mediation. See a critique by Rick Weiler, 'Good Intentions Gone Bad – Ontario Commercial Mediation Act, 2010' (Kluwer Mediation Blog, 22 January 2012) <http://kluwermediationblog.com/2012/01/22/good-intentions-gone-bad-ontario-commercial-mediation-act-2010/> accessed 21 May 2013.
[157] Otis and Reiter (n 66) 352.
[158] Code of Civil Procedure, RSQ, c C-25.

3.62 Quebec is now revising its Code of Civil Procedure again. The draft Code [159] continues the mandatory parental mediation information sessions (Articles 414-416). It also enshrines in its Preliminary Provisions [160] principles of respect for the individual and party participation in prevention and resolution of disputes (participatory justice), along with proportionality, administrative efficiency, cost efficiency, promptness and simplicity, and 'the exercise of the parties' rights in a spirit of co-operation'. The draft Code requires that parties 'consider the private modes of prevention and resolution before referring their dispute to the courts', specifically mentioning negotiation, mediation and arbitration.[161] Actual participation in dispute resolution processes remains voluntary.[162] If parties agree to mediate, the draft Code allows parties to choose any approach to mediation, including evaluative mediation. However, in the absence of agreement to the contrary, the draft Code has a default rule[163] prescribing an integrative, interest-based approach. Voluntary judicial Settlement Conferences continue under the draft Code, which specifies an integrative, facilitative style of judicial mediation for the Conferences.[164]

3.63 The draft Code's clear policy preference for integrative, facilitative approaches to dispute resolution appears to be unique in Canada. Quebec lawyers are reportedly demonstrating openness to the integrative approach to mediation.[165] The signs of a cultural shift in Quebec are attributed to three factors. The first is the presence of the LLM program at the Université de Sherbrooke, where faculty members have championed integrative approaches to mediation.[166] The second

[159] Draft Bill to enact the new Code of Civil Procedure, 39th Legislature, Second Session, 2011.
[160] The Preliminary Provisions are a mandatory guide to the interpretation of all the Articles of the draft Code.
[161] Draft Bill to enact the new Code of Civil Procedure, 39th Legislature, Second Session, 2011, art 1.
[162] ibid art 2. One commentator suggests that the Code might well go farther by making mediation mandatory as in other provinces. See Scott Horne, 'The Privatization of Justice in Quebec's Draft Bill to Enact the New Code of Civil Procedure: A Critical Evaluation' (2013) 18 Appeal 55. However, a hallmark of the Quebec approach includes an emphasis on voluntariness.
[163] Draft Bill to enact the new Code of Civil Procedure, 39th Legislature, Second Session, 2011, at Book VII, arts 607-653; see particularly arts 607 and 610.
[164] ibid art 161-165, especially art 162.
[165] Catherine Morris, Telephone interviews with three Quebec mediation scholars and practitioners, 24 January and 5 February 2013).
[166] The current director is Jean-François Roberge. Leadership in establishing the integrative approach in Quebec was also provided by previous directors Louise Lalonde and Louis Marquis. See Louise

factor is that graduates of the LLM program in dispute resolution have been leaders in the field of mediation in Quebec and have been instrumental in influencing the incorporation of integrative approaches to dispute resolution into public policy initiatives including the draft Code of Civil Procedure. The third factor is the involvement of influential mediation practitioners as educators in the Université de Sherbrooke, in professional development education and as advocates for policy reform. Of key importance has been the leadership of judicial champions of mediation, such as retired Justice Louise Otis.

3.64 *National Initiatives*. In 2011, the Hon. Beverley McLachlin, Chief Justice of the Supreme Court of Canada (SCC), appointed SCC Justice, the Hon. Thomas A. Cromwell, as chair of a national Action Committee on Access to Justice in Civil and Family Matters (Action Committee). This initiative, composed of judges, provincial justice system officials, lawyers and legal scholars from across Canada, is grounded in the idea that access to justice depends in large part on prevention and early resolution of disputes. [167] The work of the Action Committee demonstrates the extent to which settlement has replaced – or at least decentred – court adjudication within the Canadian civil justice system. For example, the most recently released report of the Action Committee's Family Justice Working Group has its main focus on the 'still untapped potential of non-adversarial values and consensual dispute resolution processes to enhance access to the family justice system'. [168] While the Working Group recognizes the need for coordination and increased resources for family justice, including legal aid, its April 2013 report considers the main problem to be 'the culture of the legal system and its incomplete embrace of non-adversarial or consensual dispute resolution processes and values.[169] It recommends

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Lalonde, 'La Médiation, Une Approche 'Internormative' Des Différends?' (2002-03) 33 La Revue de droit de l'Université de Sherbrooke (RDUS) 99, which is based on research conducted by Université de Sherbrooke scholars, Georges A. Legault, Louise Lalonde and Louis Marquis.

[167] Alison MacPhail, *Report of the Access to Legal Services Working Group of the Action Committee on Access to Justice in Civil and Family Matters* (Action Committee on Access to Justice in Civil and Family Matters, 2012) 1.

[168] Family Justice Working Group of the Action Committee on Access to Justice in Civil and Family Matters, *Meaningful Change for Family Justice: Beyond Wise Words. Final Report of the Family Justice Working Group of the Action Committee on Access to Justice in Civil and Family Matters* (Action Committee on Access to Justice in Civil and Family Matters, April 2013) 2.

[169] ibid 4.

affordable *non-judicial* mandatory mediation of family matters with exemptions in certain cases including urgency or family violence.[170] While the impact of the Action Committee remains to be seen, the imprimatur of the SCC may become a powerful energizer for those advocating mandatory non-judicial mediation programs, including in family cases, throughout Canada's provinces.

3.65 *Federal Initiatives*. Canada's constitutional division of powers provides for federal jurisdiction in matters such as international trade and commerce, federal taxation, banking, intellectual property, Aboriginal matters, national defence, immigration, navigation, fisheries, divorce,[171] criminal law, the federal civil service and interprovincial matters. Most other matters are within provincial legislative jurisdiction.

3.66 The federal Commercial Arbitration Act[172] incorporates into Canadian law a Commercial Arbitration Code based on the 1985 UNCITRAL Model Law. However, this Code applies only 'to matters where at least one of the parties to the arbitration is Her Majesty in right of Canada, a departmental corporation or a Crown corporation or in relation to maritime or admiralty matters.' All other commercial arbitration matters are governed by provincial laws. Section 30(1) of the Act provides that settlements during arbitral proceedings may, upon request of the parties, be recorded as an arbitral award. While the Act is silent on mediation, parties are free to agree on arbitral procedure, and, in the absence of agreement, arbitral tribunals may decide their rules of procedure. Subject to the constraints of the Code, including independence and impartiality, this would include mediation.

3.67 In many federal tribunals and agencies, mediation has become well-established. For example, federal statutes provide for ADR in many tribunals including Canada's Public Service Labour Relations Board, the

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[170] ibid 6 (Recommendation 9). Emphasis added.

[171] Only the granting of divorces is within federal legislative jurisdiction. All other family law matters are within provincial jurisdiction.

[172] An Act relating to commercial arbitration R.S., 1985, c. 17 (2nd Supp.)[1986, c. 22, assented to 17th June, 1986]. Also note the federal United Nations Foreign Arbitral Awards Convention Act R.S., 1985, c. 16 (2nd Supp.) <http://laws-lois.justice.gc.ca/eng/acts/U-2.4/FullText.html> 6 June 2013. This federal statute gives the force of law to the Convention on recognition of foreign arbitral awards.

Canadian Transportation Agency, the Canadian International Trade Tribunal and the Commission for Public Complaints against the Royal Canadian Mounted Police.[173] The Canadian Human Rights Tribunal, which handles human rights complaints in matters of federal jurisdiction only, has a voluntary mediation program that in 2011 claimed a 94% satisfaction rate.[174] In 2012, of the 38 complaints the Tribunal closed, 24 (63%) were settled through mediation.[175] The Tribunal utilizes 'evaluative mediation', which is described as an evaluation of the 'relative strengths and weaknesses of the positions advanced by the parties' and a possible 'non-binding opinion as to the probable outcome of the inquiry'.[176]

3.68 In addition, each federal government department is required by law to have an informal conflict management system for addressing workplace disputes; these systems generally emphasise mediation.[177] Since 1992, the federal Department of Justice provides dispute resolution advisory and training services for federal government departments, agencies, tribunals and federally constituted courts to assist them with integration of dispute resolution in to government policies and operations.

3.69 In 1998, Canada's Federal Court introduced dispute resolution into its Rules of Court.[178] The Rules mandate parties' settlement discussions

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[173] See Trevor C.W. Farrow and Ada Ho, 'Canadian Federal and Provincial Administrative Legislation Containing ADR Processes' (Canadian Forum on Civil Justice, September 2007, last updated 28 April 2009) <www.cfcj-fcjc.org/sites/default/files/docs/2007/Admin_Legislation_Chart_%28Sept_22%2C_2007%29.pdf> accessed 6 June 2013; Trevor C.W. Farrow and Ada Ho, 'Administrative Tribunals Using ADR' (Canadian Forum on Civil Justice, last updated 28 April 2009) <www.cfcj-fcjc.org/sites/default/files/docs/2007/Administrative_Tribunal_Legislation_%28May_17%2C_2007%29.pdf> accessed 6 June 2013.

[174] Fifty-five percent (55%) were 'very satisfied' and 39% were 'satisfied'. See the website of the Canadian Human Rights Commission at <www.chrt-tcdp.gc.ca/NS/sr-rs-eng.asp> accessed 6 June 2013. It should also be noted that mediation is now commonplace in provincial human rights tribunals in Canada. Discussion of mediation in human rights issues is beyond the scope of this chapter. For one discussion of some key issues, see Margaret Thornton, 'Equivocations of Conciliation: The Resolution of Discrimination Complaints in Australia' (1989) 52 Modern Law Review 733.

[175] Canadian Human Rights Tribunal, 'Annual Report 2012 (Canadian Human Rights Tribunal, 2013) <http://chrt-tcdp.gc.ca/NS/pdf/CHRT_AR12_EN_WEB.pdf> accessed 6 June 2013.

[176] Canadian Human Rights Tribunal, 'Evaluative Mediation Procedures' (Canadian Human Rights Tribunal, 10 December 2010) <http://chrt-tcdp.gc.ca/NS/about-apropos/emp-pme-eng.asp> accessed 6 June 2013.

[177] Public Service Labour Relations Act, S.C. 2003, c 22, s 2, s 207.

[178] Federal Courts Rules, SOR/98-106, Rule 257; Susan Haslip, 'Making a Federal Case Out of Dispute

within 60 days of the close of pleadings (Rule 257). The rules also provide for judicial dispute resolution processes, including mediation, neutral evaluation or a mini-trial with a non-binding opinion. Unless a court orders dispute resolution (Rule 386), it is not mandatory. In 2001, it was estimated that approximately 80% of cases were mediated under the Rules by separate case management judges or 'prothonotaries'.[179] The jurisdiction of the Federal Court is limited to matters specified in Canada's Constitution or federal statutes. The Court handles matters involving the Federal Crown, review of federal government decisions including immigration and refugee matters, oceans and fisheries and Aboriginal matters. The Court also handles intellectual property issues and maritime and admiralty disputes.

3.70 In October 2012, a Subcommittee of the Federal Court's Rules Committee released a major report on possible changes to the Federal Courts Rules[180] after a year of extensive consultations throughout Canada. The Subcommittee noted that in 1998 there was an assumption that the purpose of the Rules was 'to secure the just, most expeditious and least expensive *determination* of every proceeding on its merits' but that now 'words like "disposition" or "resolution" might better reflect the current reality'.[181] The 'case management and mediation provisions of the rules have proven to be effective in achieving settlement' to the point that in some subject areas 'trials are increasingly rare'.[182] The Subcommittee expressed support for simplifying procedures for easier access to dispute resolution options, but did not support mandatory pre-trial resolution procedures.[183] The report noted the need to address issues created by increased numbers of self-represented litigants.[184]

Resolution' (1999-2000) 22 Advocates Quarterly 231.

[179] Allyson Whyte, 'Canada: ADR in the Federal Court of Canada' (Mondaq, 12 December 2001) <www.mondaq.com/canada/x/14490/ADR+in+the+Federal+Court+of+Canada> accessed 21 May 2013.

[180] Subcommittee on Global Review of the Federal Courts Rules, *Report of the Subcommittee* (Federal Court Rules Committee, 16 October 2012) <www.fca-caf.gc.ca/bulletins/notices/subcommittee_report_FINAL_e.pdf> accessed 21 May 2013.

[181] ibid 10. Italics in original.

[182] ibid 10.

[183] ibid 10-11.

[184] ibid 17, 34-39.

3.71 Also in October 2012, the Federal Court-Aboriginal Law Bar Liaison Committee issued Aboriginal Litigation Practice Guidelines[185] developed in consultation with indigenous lawyers. The Guidelines created procedural methods for increasing dialogue among parties, reducing adversarial proceedings and adapting court processes to the cultural and language needs of Aboriginal peoples. For example, the Guidelines suggest hearing expert evidence in the form of oral histories provided through testimonies of Aboriginal Elders in ways that incorporate specific Aboriginal ceremonies, protocols and truth-telling customs.[186] Also included in the Practice Guidelines are directions to consider use of the Court's dispute resolution Rules and ensure attention to requests by parties for assignment of judges or prothonotaries with 'specific mediation and/or cross-cultural experience'.[187] The work of the liaison committee is obviously intended to address some aspects of the disrespect for indigenous cultures and legal systems that Canadian courts have demonstrated historically.[188]

3.72 *Off-ramps from the Litigation Highway: The 'Vanishing Trial' and Self-represented Litigants*. ADR is increasingly used by disputants to pre-empt the costs and risks of litigation, particularly commercial disputants.[189] Canadian corporations increasingly include ADR provisions in standard form contracts. So-called 'stepped ADR'[190] provisions require attempts at dispute resolution by negotiation, then mediation and finally arbitration.[191] Such ADR clauses are viewed as a significant factor in the

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[185] Federal Court Aboriginal Law Bar Liaison Committee, 'Aboriginal Litigation Practice Guidelines' (Federal Court, 16 October 2012) 6 <http://cas-ncr-nter03.cas-satj.gc.ca/fct-cf/pdf/PracticeGuidelines%20Phase%20I%20and%20II%2016-10-2012%20ENG%20final.pdf> accessed 21 May 2013.

[186] ibid 17.

[187] ibid 6.

[188] See, eg, John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (University of Toronto Press 2002). It is beyond the scope of this chapter to discuss the continuing concerns of indigenous peoples in Canada about the inability of Canadian courts and tribunals to address historic and contemporary land and human rights issues.

[189] Right Honourable Beverley McLachlin, 'Judging the "Vanishing Trial" in the Construction Industry' (2011) 2 Faulkner Law Review 315.

[190] John G. Davies, 'Dispute Boards Their Use in Canada' (Continuing Legal Education, Canadian Bar Association, 22 October 2010) <www.cba.org/cba/cle/PDF/constr10_davies_paper.pdf> accessed 6 June 2013.

[191] Canada's telecommunications corporation, Telus, has a stepped dispute resolution clause including mediation and arbitration in its standard form contract. After Telus applied for a stay of a class action lawsuit against Telus, the plaintiff successfully challenged the arbitration clause in the Supreme Court

phenomenon of the 'vanishing trial'[192] in the US and Canada.[193] According to a 2006 report of the Civil Justice Reform Working Group to the BC's Civil Justice Review Task Force, the number of trials decreased by half[194] between 1996 and 2002.

3.73 It is not only trials that are vanishing. Fewer Canadians are even attempting to use courts to resolve disputes. The BC Working Group reported:

> The number of Supreme Court general civil filings in the province has been dropping over many years. Supreme Court new civil filings fell from 68,574 in 1999/2000 to 60,905 in 2004/05, a decrease of more than 11%. Members of the public are clearly choosing other means to resolve their legal problems.[195]

3.74 The report does not specify what these 'other means' may be. It is not known how many grievances and disputes of ordinary citizens are left completely unaddressed. A significant reason for failing to take action is reduced access to legal aid[196] due to funding cuts.

3.75 Lack of affordable legal representation is a key reason for dramatically increased self-representation in courts.[197] The Canadian legal system has not yet found ways to cope with the reality that in Ontario, Alberta and BC, the number of self-represented litigants 'now reaches to 80% and is consistently 60-65% at the time of filing.[198] The legal system with its

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of Canada. In *Seidel v. TELUS Communications Inc.*, 2011 Supreme Court Reports (SCR) 15, the arbitration clause was held not to trump BC's Business Practices and Consumer Protection Act, which provides that any waiver of protections under that Act is void. The SCC found that consumer protection legislation must be interpreted in favour of consumers.

[192] Bingham and others, citing Marc Galanter, 'A World Without Trials?' (2006) 7 Journal of Dispute Resolution 13.

[193] Donalee Moulton, 'Vanishing Trials: Out-of-court Settlements on the Rise' (*The Lawyer's Weekly*, 17 October 2008) <www.lawyersweekly.ca/index.php?section=article&articleid=784> accessed 6 June 2013.

[194] Civil Justice Reform Working Group, *Effective and Affordable Civil Justice: Report of the Civil Justice Reform Working Group to the Justice Review Task Force* (BC Justice Review Task Force 2006).

[195] ibid 71.

[196] Buckley (n 3) 2.

[197] Julie Macfarlane, *The National Self Represented Litigants Project: Identifying and Meeting the Needs of Self Represented Litigants. Final Report* (National Self Represented Litigants Project, May 2013).

[198] ibid 15.

labyrinthine processes and complex forms is not designed for self-representation. Unrepresented litigants face extreme difficulties.[199]

3.76 Judges and lawyers also experience challenges when faced with self-represented litigants. As the Chief Justice of the Supreme Court of Canada says:

> An unrepresented litigant may not know how to present his or her case. Putting the facts and the law before the court may be an insurmountable hurdle. The trial judge may try to assist, but this raises the possibility that the judge may be seen as "helping", or partial to, one of the parties. The proceedings adjourn or stretch out, adding to the public cost of running the court... Different, sometimes desperate, responses to the phenomenon of the self-represented litigant have emerged. Self-help clinics are set up. Legal services may be "unbundled", allowing people to hire lawyers for some of the work and do the rest themselves. The Associate Chief Justice of the British Columbia Provincial Court is quoted as saying this is "absurd", not unlike allowing a medical patient to administer their own anaesthetic.
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> It is not only the unrepresented litigants who are prejudiced. Lawyers on the other side may find the difficulty of their task greatly increased, driving up the costs to their clients. Judges are stressed and burned out, putting further pressures on the justice system. And so it goes.[200]

3.77 Self-represented litigants find it challenging when the opposing lawyer proposes mediation. According to BC lawyer Michael Parrish, 'One of the most difficult aspects of dealing with unrepresented litigants is that they are frequently unable to see the flaws or weaknesses in their claim

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[199] ibid 9-12.

[200] Right Honourable Beverley McLachlin, 'The Challenges We Face' (Remarks delivered to the Empire Club of Canada, Toronto, Ontario, 8 March 2007).

or defence, and view all communications by opposing counsel with suspicion'.[201]

3.78 The huge proportion of self-represented disputants frustrated by an unaffordable and inhospitable legal system, and mistrustful of an adversarial legal profession, portends a serious breakdown of the legal system. A focus on self-help aids and access to settlement processes is not enough. Courts, the legal profession and governments must remember their primary responsibility to uphold the rule of law and to ensure that everyone is equally afforded access to remedies – including adequate representation – in accordance with international human rights law and standards.

(6) *Conclusion*

3.79 Mediation has undoubtedly made a huge impact on Canada's justice system over the past four decades. Yet Canada's adversarial legal culture has reciprocally influenced ideologies and practices of mediation. Mediation proponents have successfully made mediation mainstream, but the early visions of 'true believers' remain unfulfilled as values of cost-saving and efficiency have become dominant along with evaluative forms of mediation. Mediation now has a significant place in arbitration and court practices, and the 'settlement mission'[202] is well established in Canada. However, the dominance of evaluative mediation means that dispute resolution in Canada remains largely adjudicative in its ethos.

3.80 Integrative approaches to dispute resolution have not attained sufficient critical mass to make the justice system or lawyers non-adversarial. In general, Canadian civil society organizations and governments have not been sufficiently unified to take clear policy stands that consistently favour integrative approaches to dispute resolution. Education in integrative approaches to negotiation and mediation has not penetrated most Canadian legal education sufficiently to upset the adversarial, adjudicative norm. This means that cultural transformation has been uneven. Where there have been notable shifts in the culture of disputing

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[201] Michael D. Parrish, 'When David Becomes Goliath: Litigating Against Self-Represented Litigants' (Presentation for Continuing Legal Education Society of BC, 2 April 2009).
[202] Semple (n 71).

towards integrative approaches, such as in Quebec, they are due to combined efforts of civil society advocacy, concentrated educational efforts, and unified policy leadership from mediation practitioner organizations, scholars, judges and officials.

3.81 The hopes of those who envisioned mediation as a 'peace virus'[203] for constructive transformation of society have not been entirely frustrated. Mediation education and policies have significantly influenced the development of the phenomenon of the 'new lawyer'[204] who understands that effective advocacy requires effective negotiation, which is neither uncivil nor necessarily adversarial, and that clients now expect more participation in the design of remedies to address their disputes. Neither lawyers nor court adjudication are quite so clearly at the centre as they were in the 1970s.

3.82 Persistent tensions between mediation proponents and critics have forced mediation organizations and governments to take justice seriously, particularly where there is need for protection of fundamental human rights and wellbeing of vulnerable parties in individual mediation processes. Yet promotion of more – and more just – mediation processes is not the full answer. The field of dispute resolution in Canada has yet to engage seriously in understanding the severe, systemic problem of insufficient public access to effective advocacy and remedies.[205]

3.83 Education supported by scholarship and research is key to cultural transformation. Significant shifts of emphasis and resources for dispute resolution education, scholarship and independent research on the practical and normative impacts of reforms are critical if Canada is to realize the power of mediation to address the roots of conflict and injustice, and to create a social climate of wellbeing and true justice for individuals and communities in all sectors of Canadian society.

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[203] This term seems to have been coined by Daniel R. Crary, 'Community Benefits from Mediation: A Test of the "Peace Virus" Hypothesis' (1992) 9 Conflict Resolution Quarterly 241.
[204] Macfarlane, *The New Lawyer: How Settlement Is Transforming the Practice of Law* (n 4).
[205] Exceptions include Bala (n 95), see note 95 and Macfarlane (n 196).