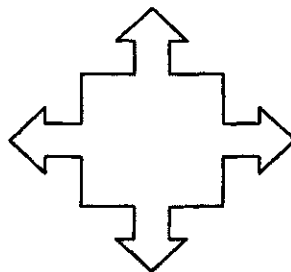


DEVELOPING FRAMEWORKS  
FOR THE EVALUATION OF  
MANDATORY MEDIATION:  
CONSIDERING  
SYSTEMIC TRANSFORMATION  
IN SASKATCHEWAN

MICHAELA KEET

2005

Developing Frameworks for the Evaluation  
of Mandatory Mediation:  
Considering Systemic Transformation  
in Saskatchewan



A Thesis Submitted to  
the College of Graduate Studies and Research  
in Partial Fulfillment of the Requirements  
for the Degree of Master of Laws  
in the College of Law  
University of Saskatchewan, Saskatoon

by  
Michaela Keet

Copyright Michaela Keet, February, 2005. All rights reserved

## PERMISSION TO USE

In presenting this thesis in partial fulfillment of the requirements for a Postgraduate degree from the University of Saskatchewan, I agree that the Libraries of this University may make it freely available for inspection. I further agree that permission for copying of this thesis in any manner, in whole or in part, for scholarly purposes may be granted by the professor or professors who supervised my thesis work or, in their absence, by the Dean of the College of Law. It is understood that any copying or publication or use of this thesis or parts thereof for financial gain shall not be allowed without my permission. It is also understood that due recognition shall be given to me and to the University of Saskatchewan in any scholarly use which may be made of any material in my thesis.

Requests for permission to copy or to make other use of materials in this thesis in whole or part should be addressed to:

Dean, College of Law  
University of Saskatchewan  
15 Campus Drive  
Saskatoon, Saskatchewan  
S7N 5A6

## ABSTRACT

In 1994, the Saskatchewan government implemented a mandatory mediation program, requiring litigants (for the first time) to mediate civil files. Many governments and civil courts have since adopted similar programs across Canada, moving mediation from the periphery to the center of civil process. The magnitude of this shift has not yet been fully captured in the accompanying research.

Conventional evaluation research has used a narrow focus, driven by concerns for efficiencies. I will argue that conventional research provides an inadequate framework for continued study in this area, and will illustrate this through an analysis of the distinct character of the Saskatchewan program. The Saskatchewan objectives are tied, not to the increase of efficiencies, but to “systemic transformation” - an end result which depends on change in the culture of litigation and change in lawyers’ professional roles and identities.

Qualitative research methods provide the program evaluator with a widened lens, and the Saskatchewan Evaluation (2003) makes some significant gains in this direction. I will describe the study’s qualitative approach, and will organize the study’s results in terms of quantitative and qualitative data. Although the study gathered rich information on lawyers’ and clients’ experiences, it left many questions unanswered.

Using a grounded theory method, I will reanalyze the study data. A deeper analysis reveals common stories of clients and lawyers - glimpses into what is happening beneath the surface of the program’s operation. I will conclude that the mandatory mediation program in Saskatchewan has inspired significant change, but has fallen short of systemic transformation. Both clients and lawyers view mediation as having unrealized potential. While clients see their lawyers as largely determining the process’ success, only half of lawyers are attentive to the impact of their role.

Changes in professional identity, a necessary ingredient in systemic transformation, are only beginning to occur. Using the concepts of story, ritual and metaphor to explain the cultural variables that influence lawyers, I will begin the construction of a broader analytical framework. I conclude that not only is more and different research needed, but that systemic transformation depends on a renewed commitment to dialogue and relationship between program managers, mediators, and legal professionals.

“... more life will be found  
where two ecosystems meet  
than at the heart of either of the two systems.”

*Michele Landsberg*

*“...the action most worth watching is not at the center of things  
but where edges meet ...  
shorelines, weather fronts, international borders.  
There are interesting frictions and incongruities in these places,  
and often, if you stand at the point of tangency,  
you can see both sides better  
than if you were in the middle of either one.  
This is especially true, I think, when the apposition is cultural.”*

Anne Fadiman,  
The Spirit Catches You and You Fall Down

## ACKNOWLEDGEMENTS

I would not have embarked on this project, nor would have succeeded, without the guidance and support of many people. I have had the extreme good fortune of working with a wonderful group at the College of Law, and in particular, under the mentorship of my supervisor, Dan Ish, and the other members of my committee, Marj Benson and Russ Buglass. I have benefited in innumerable ways by their patience, wisdom, and skill for intellectual inquiry.

I would also like to acknowledge the important influences of Julie Macfarlane and Michelle LeBaron. I have learned volumes in the short time that I spent with Julie Macfarlane. I deeply appreciate the opportunities that she has presented me, and her genuine and open commitment to sharing her knowledge and experience. Michelle LeBaron's approach to the field of conflict resolution – her capacity to integrate the intellectual and the personal – has renewed my commitment to my work.

I thank them all.

## DEDICATION

*I dedicate this work to family. To my parents, Jean and David, my lifelong teachers.  
To my partner, Kim, who has always brought balance, love and laughter to my life.  
And to my children, Jace, Lauren and Damon, who meet each day with acceptance and  
joy. From all of them, I have learned that more life will indeed be found where  
ecosystems, and lives, intersect.*

## TABLE OF CONTENTS

|  |      |    |
|--|------|----|
| PERMISSION TO USE  | Page | i  |
| ABSTRACT   |      | ii |
| ACKNOWLEDGEMENTS   |      | iv |
| DEDICATION   |      | v  |
| I. INTRODUCTION  |      | 1  |
| II. SETTING THE STAGE: CONVENTIONAL RESEARCH AND UNANSWERED QUESTIONS FOR SASKATCHEWAN |      |    |
| A. The Mandatory Mediation Program in Saskatchewan                                     |      | 11 |
| B. Current Evaluative Research   |      | 13 |
| i) Ontario   |      | 14 |
| ii) Other Canadian Experiences   |      | 15 |
| iii) American Research   |      | 18 |
| C. The Distinct Character of the Saskatchewan Program                                  |      | 20 |
| i) The Influence of History  |      | 20 |
| ii) Departmental Objectives  |      | 24 |
| a. Access to Justice Issues: Cost and Delay  |      | 25 |
| b. Broadening the Parameters of the Dispute  |      | 26 |
| c. Returning Control to the Parties  |      | 27 |
| d. Paying Respect to Relationships   |      | 28 |
| iii) Reshaping Civil Justice   |      | 28 |
| III. DRAWING ON THEORY   |      |    |
| A. Tension as Agent of Change  |      | 33 |
| B. Range of Outcomes at the Systemic Level   |      | 36 |
| C. Professional Role and Identity  |      | 42 |
| IV. INFORMATION GATHERING: A QUESTION OF WHICH LENS                                    |      |    |
| A. The Evaluation Lens: Narrow Focus on Efficiencies                                   |      | 45 |
| B. Widening the Lens   |      | 48 |
| i) Understanding the Qualitative Experience of Clients                                 |      | 49 |
| ii) Understanding Lawyers and the Legal System   |      | 50 |
| C. Qualitative Research Tools  |      | 54 |



|       |   |     |
|-------|---|-----|
| V.    | SASKATCHEWAN EVALUATION:<br>A NEW LAYER OF INFORMATION  |     |
|       | A. Saskatchewan Evaluation as Qualitative Work  | 60  |
|       | i) Focus Groups   | 60  |
|       | ii) Analysis Techniques   | 62  |
|       | B. A Review of the Report's Findings  | 65  |
|       | i) Qualitative Data   | 65  |
|       | ii) Quantitative Data   | 68  |
|       | C. Unanswered Questions   | 72  |
| VI.   | BACK TO THE DATA: GOING DEEPER  |     |
|       | A. Methodological Theory: Multiple Rounds   | 75  |
|       | B. Circling Back to the Data  | 78  |
|       | i) Clients  | 78  |
|       | ii) Lawyers   | 81  |
| VII.  | ANALYZING THE DEEPER LAYER:<br>DIMENSIONS OF A CULTURAL FRAMEWORK   |     |
|       | A. Cultural Dimensions of Litigation  | 89  |
|       | i) Culture and the Person: the Scope of Imagination   | 92  |
|       | ii) Cultural Roles: the Search for Identity   | 94  |
|       | B. Conceptual Tools for Understanding the Cultural Dimensions<br>of Mandatory Mediation                       | 96  |
|       | i) Story: Unravelling Perceptions of the Past   | 96  |
|       | ii) Ritual: Ingrained Patterns  | 98  |
|       | iii) Metaphor: Lessons about Control  | 103 |
|       | C. Developing New Professional Roles  | 106 |
| VIII. | MOVING FORWARD  |     |
|       | A. Rejection, Convergence or Transformation?<br>Conclusions About Saskatchewan's Progress                     | 109 |
|       | B. Further Research   | 113 |
|       | C. Dialogue and Collaboration   | 114 |
|       | BIBLIOGRAPHY  | 118 |
|       | APPENDICES  |     |
|       | A: Saskatchewan Evaluation Report   |     |
|       | B: Annotated Bibliography: Evaluation of Court-Connected and<br>Related ADR Programs (Reports and Literature) |     |

## CHAPTER I

### INTRODUCTION

One of the most significant developments in the area of civil process reform has been the recent adoption of mandatory and court-connected mediation programs across Canada. Saskatchewan and Ontario led the way in 1994 with the first general court-connected mediation programs. Now, at least half of the remaining provinces have developed or are discussing the introduction of such programs. A decade into this new era of civil process, government administrators, researchers, and legal practitioners are asking these key questions: are we accomplishing what we set out to? What *did* we set out to accomplish?

Ten years ago, the introduction of Saskatchewan legislation met with an outburst of rhetoric on all sides. Program administrators and their political leaders described the program as an attempt to redress the failures of the civil justice system, with the potential to save clients from significant costs and delays. Lawyers treated the program as an affront to their integrity as advocates. Private sector mediators publicly warned of the dangers of forcing people into an inherently voluntary process, and privately complained of a government department engaged in empire building.

The passage of ten years, however, has brought dramatic change in the shape and size of resistance to mandatory mediation, a change noticeable in both the process and the outcome of the program's recent evaluation.<sup>1</sup> Representatives of the government, bar, bench, and professional association of mediators came together to work as an advisory committee for the evaluation.<sup>2</sup> Lawyers and judges committed themselves fully to conversations about the pros and cons of their experiences with mandatory mediation. It is as if the script in this debate has been replaced. The issue is no longer whether the program should exist but how it can be improved.

The Evaluation Report, completed last year, moves quickly into an exploration of amendments to the program. It identifies areas of continuing concern and presents recommendations in response. The report describes and analyzes the experiences of clients, lawyers and mediators, in a solution-oriented way. It positions us to move forward. And yet, I will argue, the single act of making adjustments to the program will not sustain meaningful change. Like the doctor prescribing medication without the benefit of a full diagnosis, it may alleviate presenting problems while the underlying imbalance persists. A full analysis must return to the beginning, journeying through the program's historical goals, and back through the data that has been collected, at a level that reveals what has been occurring underneath.

---

<sup>1</sup> Julie Macfarlane with Michaela Keet, *Learning from Experience: An Evaluation of the Saskatchewan Queen's Bench Mediation Program*, Final Report (Regina: Saskatchewan Justice, 2003) hereinafter referred to as the Evaluation Report. I have received permission from the Dispute Resolution Office to use the Evaluation data for the present analysis. Any information which identifies participants' names has been removed. All references to the data in this thesis relate to documents on file with the author.

<sup>2</sup> Terms of Advisory Committee, unpublished, fall 2002.

Existing literature on the impact of court-connected mediation programs offers little precedent for a deeper inquiry. Evaluators have concentrated on surface questions about the operation of mediation programs: are people satisfied? Is court-connected mediation speeding up settlements and reducing costs? Conventional evaluations accept, without questioning, the underlying tensions surrounding the insertion of mediation into an inherently adversarial system. Their studies give little more than a nod to the complex dynamic resulting from the clash of mediation and litigation cultures.

I have had the privilege of viewing the Saskatchewan program from a number of perspectives: as a civil litigator in the years before mandatory mediation, in the office of the Minister of Justice at the time the legislation was developed and introduced, as a mediator in the program during the first two years of its operation in Saskatoon, and, finally, as a researcher during the program's evaluation. These experiences have led me to respect the dynamics of litigation, and the challenges of moving between adversarial and collaborative settings. They have shaped the question that I have chosen to explore in this thesis: the extent to which mandatory mediation in Saskatchewan has contributed to cultural and systemic transformation. Although the analysis in this thesis was built on information obtained objectively (information available to any researcher wishing to pursue this question), it has been inevitably influenced by the observations I have gathered over ten years of connection to the program. My primary objectives are to identify deficiencies in the conventional framework for evaluating court-connected programs, to present the Saskatchewan program as an illustration of the importance of

broadening our focus, and to begin the task of constructing an evaluation framework that accounts for cultural change.

Chapter II reviews conventional research and its limitations. Although mediation programs have been operating for over a decade, agencies have only begun to research the question of their impact. Most of that research has focused on quantitative characteristics: settlement rates, impact on court dockets, and comparative costs of the processes for clients. In Saskatchewan, access to justice (efficiency) concerns that have tended to drive programs in other parts of Canada have played a backseat role. A concern for the quality of people's encounters with the civil justice system instead figures more prominently in the original objectives for the Saskatchewan program. In Chapter II, I identify three objectives in addition to increasing access to justice: broadening the parameters of the dispute, returning control to the parties, and paying respect to relationships. Early explanations of the program reveal broad expectations of change, in how the civil justice system works for litigants and how lawyers relate to consensus-based problem solving processes.

The Saskatchewan program is ideally situated for a more comprehensive analysis. The Evaluation Report describes as displaying "a level of sophistication in the use of mediation that is unusual in evaluation studies and indicates the depth of experience in Saskatchewan with mediation processes".<sup>3</sup> Given the maturity of the Saskatchewan program and its ambitious goals, it is worth investing some time to discover whether systemic and cultural goals have been achieved (and, if not, why not) before moving

---

<sup>3</sup> *Supra*, note 1, at 17.

forward with program amendments. I will conclude in Chapter II that a failure to take up this inquiry may mean a loss in the potential to fully realize the program's goals.

If past research fails to supply an evaluation framework that focuses on cultural and systemic factors, then a new one must be constructed. In Chapter III, I will examine the possibilities for change using a broader theoretical perspective. Although evaluators might superficially characterize tension as evidence of failure, I will argue that tension can be viewed as an essential force in the production of institutional change. Using this as a starting point, I will draw upon Julie Macfarlane's description of the range of systemic responses that result from the introduction of a new system into an old one: assimilation, convergence, divergence, and transformation.<sup>4</sup> I will present the last of these options as the one that best frames an assessment of the Saskatchewan program, and will conclude that cultural change, changes in lawyers' professional roles and identity, must inevitably accompany transformative systemic change.

In order to discover whether transformation is in fact occurring, researchers will need to expand their focus -- to widen the lens. In Chapter IV, I will gather pieces in the evaluation literature that illustrate a concern for the culture of litigation. Very recent trends in the evaluation of court-connected mediation programs have begun to encompass a qualitative approach, and the Saskatchewan Evaluation illustrates this shift in direction. Chapter V sets out the methodology used in the evaluation, and summarizes the report's conclusions, along with the themes that emerged from

---

<sup>4</sup> J. Macfarlane, "Culture Change? A Tale of Two Cities and Mandatory Court-Connected Mediation" (2002) 2 *Journal of Dispute Resolution* 241.

discussions with lawyers and clients in particular. The study answers many, but not all, outstanding questions about the impact of mandatory mediation. It reveals that systemic and cultural change has *not* occurred, yet may be within reach.

In Chapter VI, I will reexamine the data used in the Saskatchewan Evaluation, looking for evidence of deeper shifts. This Chapter describes the grounded theory method that was used to re-examine the Evaluation data. A re-analysis of focus group discussions reveals a split in consciousness among lawyers, and a common story told by their clients. Both clients and lawyers view mediation as having unrealized potential. While clients see their lawyers as largely determining the process' success, only half of lawyers are attentive to the impact of their role. In particular, lawyers differed in the extent to which they acknowledged an attitudinal shift towards mediation, and the importance of open information exchange and client involvement. The entrenchment of mandatory mediation has produced surface changes across the board – most lawyers acknowledge the important role of mediation and collaborative approaches in the resolution of civil disputes. The deeper and more troubling difference lies in the degree to which lawyers acknowledge the role of the legal profession's influence.

Chapter VII explores some dimensions of legal culture that account for the above results. I will begin constructing a cultural framework for program evaluation by drawing on the recent work of Michelle LeBaron, *Bridging Troubled Waters*.<sup>5</sup> In particular, I will introduce the concepts of story, ritual, and metaphor to explain the

---

<sup>5</sup> Michelle LeBaron, *Bridging Troubled Waters: Conflict Resolution from the Heart* (San Francisco: Jossey Bass, 2002).

cultural variables that quietly influence lawyers' behavior. All three concepts fit into an alternative framework for analyzing the impact of mandatory mediation in Saskatchewan. They make more room for the Saskatchewan program's original goals, and for those potentially motivating the development of other programs across the country.

Both the Saskatchewan Evaluation and this subsequent analysis leave us with as many questions as answers. The deeper analysis contained in this thesis, however, does support the conclusion that cultural and systemic transformation will require more than the functional amendments that the Report now recommends. Clients implicitly attribute fault in their own failed mediation sessions to their lawyers. A residue of litigation culture – assumptions, attitudes, behaviors – still clings to the approaches of many lawyers appearing in mediations. In the last chapter, I will argue that, even more than amendments, the program needs dialogue: meaningful partnerships between the government and the bar; open forums for discussion about how lawyers and mediation can interact; continued debate in the realm of legal education about the underlying questions of lawyers' roles.

I undertook this work as an exploration that does not lead to all the answers, but does take us further than we have been. I do not profess to offer the best definition of the problem nor the best solution. That would be inconsistent with a collaborative perspective. My goal is to reveal mandatory mediation's impact at many different levels: systemic, professional, and personal. This work is intended to be an open



invitation for conversation – directed at lawyers, judges, mediators, program administrators and policy developers – an invitation to move forward *in partnership* with the challenging task of civil process reform.

## CHAPTER II

### SETTING THE STAGE: CONVENTIONAL RESEARCH AND UNANSWERED QUESTIONS FOR SASKATCHEWAN

Court-connected mediation is now a common phrase, a model of dispute resolution that litigants and lawyers encounter regularly in different venues across the country. Ten years ago, however, governments had only begun to imagine the integration of mediation into the court structure. Only Saskatchewan and Ontario were proceeding with the adoption of mandatory mediation into the process of general civil litigation. Since then, the idea of mandatory and court-connected mediation has taken root, such that most provinces have implemented or are exploring the introduction of such programs,<sup>6</sup> and Canadian research in this field has begun to develop.

The evaluation of the Ontario program in 1995 laid the groundwork for the documentation of Canada's experience with mandatory mediation. A few smaller studies have followed suit. Supplemented by the richer body of program evaluation research in the United States, this research has begun to reveal some conclusions about the impact of such programs, and in particular, about their efficiency-related characteristics. The central questions for most research to date have been narrow: do

---

<sup>6</sup> For a discussion of current programs in Canada, see Michaela Keet & Teresa Salamone, "From Litigation to Mediation: Using Advocacy Skills for Success in Mandatory or Court-Connected Mediation" (2001) 64(1) Saskatchewan Law Review 57.

civil mandatory mediation programs produce settlements earlier or with less cost for clients, and how satisfied are program users?

In 2001, the Saskatchewan government commissioned an evaluation of its own mandatory mediation program. Had the evaluation process followed the lead of earlier studies, it would have centered on efficiency claims. However, as the oldest Canadian program, and, some might say, one of the more ambitious, it offered an excellent window into court-connected mediation – a chance to look deeper into our experience with this new kind of justice reform, to assess its character and its impact beyond the superficial. Saskatchewan’s mandatory mediation program is unique: in its scope, in its objectives and, potentially, in its effect – a clear reason to broaden the scope of the evaluation.

In this Chapter, I will first describe the mechanics of the Saskatchewan mandatory mediation program. I will then introduce the range of program evaluation research and broad conclusions about what it tells us. In order for program evaluation to be effective, it must be framed by the program’s original objectives. I will argue that current research does not respond to the Saskatchewan program’s particular objectives. The premises driving current research - that mediation will increase efficiencies – would not test for the goals the Saskatchewan program declared for itself. The Saskatchewan program was driven instead by concerns about the qualitative experience for clients, a hope for broad systemic change in the experience of litigation (not just its time frame), and therefore calls for a different approach. I will conclude that there is a

gap between the parameters of current research and the original objectives of the Saskatchewan program.

### **A. The Mandatory Mediation Program in Saskatchewan**

Saskatchewan's mandatory mediation program is designed to be widely inclusive, accessible, early, and litigant-focused.<sup>7</sup> The program was first introduced in 1994 in the form of a pilot project in Regina and Swift Current. Since then, it has been expanded to include a total of four judicial centres, now applying to eighty percent of all cases in the non-family side of the Court of Queen's Bench. As soon as a case enters the system, the parties must attend a mediation session: the requirement to attend is invoked "after the close of pleadings"<sup>8</sup> and is subject to few exceptions. Litigants themselves must attend and can choose whether to be accompanied by counsel.<sup>9</sup> In most cases, counsel attend. Mediators are assigned by the Department of Justice from full-time and contract mediators, who may or may not be lawyers. The first session may last up to three hours (two individual caucuses and one joint meeting), leaving parties the option to continue at that time, or later, by agreement with the mediator. The cost of subsequent sessions will be carried by the parties, but the initial session is free.

---

<sup>7</sup> *The Queen's Bench Act, 1998*, S.S. 1998, c.Q-1.01, s.42 [hereinafter *Act*].

<sup>8</sup> *Act, ibid.*, s. 42(1). The parties are not generally allowed to participate by conference call, although a written request may be made to exempt a party from attendance. Out-of-province parties are eligible for an exemption, but otherwise, the provision has been narrowly construed: *The Queen's Bench Regulations*, R.R.S. 1999, c.1-1.01, O.C. 433/99, s. 7.

<sup>9</sup> Section 42(1) states that "the parties shall attend"; *Act, ibid.*

As is the case with standard steps in the litigation process, the program operates with enforcement mechanisms. The mediator will file a Certificate of Completion at the end of the mediation.<sup>10</sup> A party may request a Certificate of Non-Attendance if another party fails to attend.<sup>11</sup> The mediation session must be completed “before taking any further step in the action or matter”,<sup>12</sup> and is avoided at the peril of the non-complying party. In response to the Certificate of Non-Attendance, the court may either order the party to attend mediation, order another mediation with specific terms, or under certain conditions, strike the pleadings of the party that failed to attend.<sup>13</sup>

The prescription to get the parties to an early mediation session is relatively strict; what is less predictable is what happens once they arrive. When the program was first introduced, educational objectives set the parameters for most sessions. Mediators concentrated on informing the parties and their counsel about the option to mediate, and helping them explore its feasibility in their particular case.<sup>14</sup> Mediators therefore spent more time providing descriptive overviews of mediation and its potential benefits. After a short time in operation (and perhaps once a critical mass of lawyers had heard

---

<sup>10</sup> *Act, supra*, note 8 at s. 42(4).

<sup>11</sup> *Ibid*, s.42(3).

<sup>12</sup> *Ibid*, s.42(1)

<sup>13</sup> *Ibid*, s.42(5).

<sup>14</sup> The documentation at the time all pointed to the first model. At all turns, the program was described upon its introduction as mandating “orientation”, and not mandating mediation itself; Press Release, Government of Saskatchewan “Mediation Pilot Projects Under Way” (1 December 1994); Speech presented by R.W. Mitchell, Minister of Justice for the Government of Saskatchewan, to the Alberta Arbitration & Mediation Society, Annual General Meeting, Calgary, Alberta [unpublished], November 18, 1994 at 9; Press Release, Government of Saskatchewan “Use of Mediation to be Increased in Civil and Family Law Disputes” (17 March 1994). Even the early Strategic Plan refers to the implementation of “mandatory mediation sessions for mediation orientation in civil cases”; Department of Justice, *Saskatchewan Justice Strategic Plan*, 1993 [unpublished] at 14.

the presentations), the sessions evolved.<sup>15</sup> Mediators began more quickly to wade into the cases themselves, with the quiet and sometimes reluctant cooperation of clients and lawyers. Over time, working sessions became the norm. There continues to be no requirement that the parties negotiate or participate in the sessions in good faith. Yet lawyers, mediators and parties alike tend to be motivated by the desire to use their time effectively, to move the case forward, exploring settlement wherever possible.

Saskatchewan's program design illustrates only one of many models. Some court-connected programs involve mandatory mediation (Saskatchewan, Ontario), and some are opt-in programs, requiring the consent of both parties (Quebec) or simply one party (British Columbia). Some programs apply generally to all non-family civil matters in superior courts (Saskatchewan, Ontario, Quebec), and others apply more narrowly to certain types of actions (British Columbia: motor vehicle and residential construction claims). Many programs operate within small claims courts. All are designed to promote the use of mediation early in the litigation process, for the most part, immediately after initiating legal documents have been filed.

## **B. Current Evaluative Research**

Because Canadian institutions have had relatively little time to live with court-connected mediation programs, research about their impact and effectiveness is only in its infancy. Enough has been done, however, to offer a sketch of the Canadian

---

<sup>15</sup> Two years into the pilot project, lingering confusion over these operational goals is captured in an early evaluation; Prairie Research Associates Inc., *Initial Mediation Session Evaluation Report* (March 1996) [unpublished] at 18.

experience, and to signal the types of concerns that are driving the evaluation of those programs.

### **i) Ontario**

The Ontario program has been the subject of one of the more informative evaluations, and has continued to influence decisions about court-connected mediation in other provinces. In September, 1994, the Attorney General established the Alternative Dispute Resolution Centre in Toronto as a pilot project.<sup>16</sup> The Centre accepted cases randomly, with four out of every ten files being referred after the close of pleadings. At that point, a dispute resolution officer would contact the parties, and in most cases, arrange for a mediation session. A year after its implementation, Julie Macfarlane completed an evaluation of the pilot project. The Toronto evaluation report is useful because it offers a glimpse of the impact of an early Canadian program, and perhaps more importantly, reveals assumptions about the program's objectives.

The report focuses primarily on settlement rates and patterns. Out of the roughly one thousand cases that had been referred to the centre (and were the subject of the evaluation), 33% opted out, 15% settled before the intervention of the center, 29% settled fully or in part at the session and 23% did not settle. Viewed another way,

---

<sup>16</sup> Ontario's experience with the pilot project (and another pilot project operating out of Ottawa) led to the implementation of a province-wide program of mandatory mediation, in January, 1999; for a description of the Ontario Mandatory Mediation program see online: Ontario, Ministry of the Attorney General, *Notice - Ontario Mandatory Mediation Program* (1999) <http://www.attorneygeneral.jus.gov.on.ca/html/MANMED/notice.htm>; online: Ontario, Ministry of the Attorney General, *Fact Sheet: Ontario Mandatory Mediation Program: Rules 24.1 and 75.1* <http://www.attorneygeneral.jus.gov.on.ca/html/MANMED/fctsheets.htm>.

roughly half of the parties that actually attended a session settled at least in part at that time.<sup>17</sup> Settlement patterns are compared with those in the normal litigation process: while mediated cases may have settled regardless of this process, they were settling in roughly half (or less) the amount of time.<sup>18</sup> The report also contains some analysis of the types of cases that settle,<sup>19</sup> and considers barriers to settlement, including factors such as hostility between clients or lawyers, and complexity of the issues.<sup>20</sup>

Levels of client and lawyer satisfaction were also explored. Both sets of participants were generally very positive about their experience,<sup>21</sup> with lawyers appearing primarily motivated by concerns about the speed and cost involved in achieving a resolution through litigation.<sup>22</sup> The majority of lawyers described their settlement through the ADR centre as having been reached at lower cost to the client.<sup>23</sup>

## ii) Other Canadian Experiences

Other Canadian studies explore the same range of issues and report similar types of results. Current research tentatively supports the following conclusions: that cases in

---

<sup>17</sup> J. Macfarlane, *Court-Based Mediation of Civil Cases: An Evaluation of the Ontario Court (General Division) ADR Centre* (Toronto: Queen's Printer, 1995).

<sup>18</sup> The mean time for settlement in cases that were referred to the ADR Centre was 124 to 129 days. The mean time for breach of contract/negligence cases which settled without referral to the center was 288 days, and for wrongful dismissal cases, 404 days. Even files which proceeded through Case Management settled later on average: 272 – 298 days; Macfarlane, *ibid*, at 10 – 11.

<sup>19</sup> Settlement rates were comparable across a number of variables, including case type, although wrongful dismissal cases appeared to settle at a higher rate; Macfarlane, *ibid*, at 15-17, 23.

<sup>20</sup> *Ibid*, at 54-60.

<sup>21</sup> *Ibid*, at 26-27; 48.

<sup>22</sup> *Ibid*, at 26.

<sup>23</sup> Over 70% of lawyers responded that the settlement through the ADR center was achieved at a lower cost to the client, with over 70% of those lawyers saying that the costs were lowered by anywhere from \$1,000 to \$10,000; *ibid*, at 13-14.



mediation are settling at significant rates; that the disposition time is being reduced; that lawyers estimate reductions in client costs; and that lawyers and clients are relatively satisfied with the process. The following are some examples of the research supporting these claims.

An evaluation of Quebec's pilot project illustrates that while settlement rates are similar between "mediated" and "non-mediated" cases, mediation offers a significant advantage regarding the length of time taken to reach settlement.<sup>24</sup> For those litigants not offered mediation, the average time between statement of claim and a judgment, or out of court settlement, was 19.5 months and 15.5 months respectively. Those who opted for mediation, on average, obtained an agreement in 8.6 months.<sup>25</sup> Participants were also quite satisfied with their experience, with sixty-two percent indicating an interest in retaining the services of a mediator if another case brought them before the Superior Court and another twenty-five percent interested in using mediation before the start of a court action. Only three percent answered that they would not seek mediation in the future.<sup>26</sup>

---

<sup>24</sup> The Quebec program is based on voluntary participation in mediation; Quebec, Groupe de Travail Sur la Mise en Oeuvre du Project Pilote, *Evaluation des Resultats du Projet Pilote de Conciliation en Matiere Civile a La Cour Superieure de Montreal* (August 1998) at 4 [unpublished]. Evaluators for Quebec's pilot project used a sample of litigants who received an invitation to mediate, and a sample of litigants who did not. Of those who were offered mediation, 19.9% settled in mediation; 39.5% settled out of court; 24.2% were ended by a legal action; and 16.4% had their actions struck or withdrawn. If we consider only those cases actually mediated, the evaluation shows 71% of those cases settling during the session. The results were similar for those litigants not provided mediation: 61.2% settled out of court, 23.8% went to court, and 15% either withdrew or were struck: *ibid.*

<sup>25</sup> *Ibid.* at 6.

<sup>26</sup> *Ibid.*, at 10.

In the Alberta Small Claims Court Pilot Project, sixty-eight percent of cases were settled in mediation.<sup>27</sup> Evaluators also estimated a drop in the time taken to reach a resolution, from nineteen to ten weeks.<sup>28</sup> The litigants and their lawyers perceived the process to be generally fair and useful. Cost savings for the client did not appear to be as much of a factor (with only 37% of lawyers believing that the process saved their client costs),<sup>29</sup> a conclusion that is not surprising given that small claims courts are considered more efficient and accessible. British Columbia's program for motor vehicle personal injury claims reveals similar settlement rates, with seventy percent (or higher) of cases consistently settling in mediation.<sup>30</sup>

It is worth noting that any information analysts have gathered about cost savings for clients, so far, is based on their lawyers' estimates. No jurisdiction has yet managed to assess comparative cost implications for the system, nor reliable data on comparative client costs. Claims on both sides of the debate - that court-connected mediation programs save money in the administration of justice, or, on the other hand, cost more than they are worth - continue to be unproven.

---

<sup>27</sup> Between January 1998 and December 1998; Strategic Planning & Operations Coordination Court Services, *Edmonton Provincial Court Civil Mediation Pilot Project: Evaluation Report* (Edmonton: Alberta Justice, 1999) at 5.

<sup>28</sup> *Ibid*, at 4.

<sup>29</sup> *Ibid*, at 9.

<sup>30</sup> B. Daisley, "Government and Courts Promote ADR in B.C." *The Lawyer's Weekly* (24 September 1999) 9. For the period between March and April 1999, 108 of 152 cases resolved all issues in motor vehicle mediation (71%) and in 114 of those at least some issues were resolved (75%): Focus Consultants, *An Evaluation of the Notice to Mediate Regulation under the Insurance (Motor Vehicle) Act* (British Columbia, June 1999) [unpublished] at p. iii. Higher settlement rates are likely attributable to the fact that the process is party-driven, an opt-in model.

### iii) American Research

The above themes carry through to the American literature as well. One of the original studies of a small claims mediation program (now twenty years old) showed that two-thirds of the cases settled in mediation, and that clients are more likely to be satisfied with the process and results than with litigation.<sup>31</sup> That figure has been confirmed in a recent review of the literature, with the author estimating that between one-third and two-thirds of cases in these programs tend to settle.<sup>32</sup> Evaluators of North Carolina's program,<sup>33</sup> in a typical study, concluded that the overall time to reach a resolution was reduced by about seven weeks in mediated cases, the probability of trial was not affected (those cases that settled are those that would have settled anyway), clients' legal costs were reduced (but the amount of time clients put into the resolution of their case was increased), and clients were generally satisfied with the process.<sup>34</sup>

Beyond that, however, it is difficult to draw conclusions that are applicable to the Canadian experience. American programs are older, more numerous, and more diverse in their design and approach. Generalizations are difficult to make, with frequent contradictions among studies. For example, evaluators have reached different

---

<sup>31</sup> C.A.McEwen & R.J.Maiman, "Small Claims Mediation in Maine: An Empirical Assessment" (1981) 33 *Maine Law Review* 237.

<sup>32</sup> R.L.Wissler, *Court-Connected Mediation in General Civil Cases: What We Know From Empirical Research* (2002) 17 *Ohio St. J. on Dis. Res.* 641 at 659.

<sup>33</sup> North Carolina's program is court-connected, but the requirement to mediate is not invoked unless a judge refers the matter to a mediation session; S.H.Clarke, E.D.Ellen & K.McCormick, *Court-Ordered Civil Case Mediation in North Carolina: Court Efficiency and Litigant Satisfaction* (North Carolina: Institute of Government, The University of North Carolina, 1995).

<sup>34</sup> *Ibid.*, at 6-8.

conclusions about whether the settlement rate in mediation is higher than the settlement rate in non-mediated cases.<sup>35</sup> Studies also differ on the question of whether mediated cases were resolved more quickly than other cases.

In Chapter IV, I will return to the current research to analyze its limitations in greater detail. Recent studies have begun to deviate from the focus on quantitative measures of success, exploring qualitative dimensions of the mandatory mediation experience for clients and for lawyers and possibilities for systemic change. For example, a study by Julie Macfarlane in 2001-2002 examines lawyers' responses to mandatory mediation at an ideological level. Questions which move our attention to the culture of litigation also broaden the scope of the inquiry. They invite us to learn deeper lessons from the experience of mandatory mediation. To date, however, the focus on settlement rates and patterns, disposition time and cost has dominated the literature. In summary, conventional research offers a growing body of statistics on settlement rates and related measures of mediation's impact – measures which do not account for the distinct character of the Saskatchewan program.

By reconstructing the objectives for the Saskatchewan program, I will demonstrate the limitations of such a narrow focus. In some cases, documents initiating a new program will articulate program goals, so that the evaluation must only measure the extent to which those goals have been met. In Saskatchewan, neither the Evaluation report nor the governing legislation contains a full explanation of program objectives.<sup>36</sup> The

---

<sup>35</sup> *Ibid*, at. 660.

<sup>36</sup> Saskatchewan Report, *supra*, note 1, at p. 8.

failure to pay proper attention to program goals has created a deficiency in the literature surrounding the evaluation of mandatory mediation.<sup>37</sup> For this reason, I have included a comprehensive investigation of goals for the Saskatchewan program, and will conclude that these goals required a deviation from the historical concern for efficiencies.

## **B. The Distinct Character of the Saskatchewan Program**

An across-the-board mandatory mediation scheme had never been done before in Canada. The idea of forcing people into a process whose success had, until that point, been attributed to its voluntary nature was ambitious and controversial. What factors influenced such a decision? The Saskatchewan Department of Justice's early experience with mediation is an important piece of the current program's foundation. Drawing on legislative and government documents, I will offer a brief description of this history and contextual factors influencing the government's eventual approach

### **i) The Influence of History**

The story of Saskatchewan's civil mediation program begins almost twenty years ago. Mandatory mediation was first entrenched in a Saskatchewan legislative scheme as a

---

<sup>37</sup> Program evaluations should start with an articulation of program objectives. Those objectives must frequently be reconstructed, with reference to historical documents and/or to the political backdrop against which the program was born; Rossi, P.H., H.E. Freeman & M.W. Lipsey (eds), *Evaluation: A Systematic Approach*, 6<sup>th</sup> Ed. (London: Sage Publications, 1999) at 39. K. Lawson describes the evaluator as "archeologist"; Lawson, K.L., & H. D. Hadjistavropoulos, "The Pitfalls and the Potential of Early Evaluation Efforts: Lessons Learned from the Health Services Sector" 17(3) *The Canadian Journal of Program Evaluation* 39.

response to the agricultural crisis in the mid-80's.<sup>38</sup> Administrators and policy makers hoped to mitigate the impact of the farm crisis by inserting mandatory mediation into foreclosure litigation. Before proceeding with a foreclosure action, lenders were required to attend a mediation session with the landowners. The program was a creative solution that increased the potential for lenders to receive money while farmers retained their land. In situations where farmers could not ultimately keep their land, the process allowed them to negotiate the transition in a way that was more humane and respectful, and to emerge with their dignity intact.

The farm program has been considered extremely successful, achieving settlement rates in the range of seventy to eighty percent.<sup>39</sup> The volume of mediations generated by the farm program also enabled the Mediation Services Branch (now Dispute Resolution Office) to develop a genuine expertise in mandatory mediation, and a rapport with lawyers, individuals and institutional clients.<sup>40</sup> Meanwhile, the Branch was gaining

---

<sup>38</sup> *The Farm Land Security Act*, S.S. 1984-85-86, c.F-8.01 introduced a formal mediation process to resolve disputes between farmers and lenders in 1985. Mediation has been called "the most significant component of Saskatchewan's legislative attempt to deal with farm debt" and it is indeed Saskatchewan's success with the farm program that supported other progressive mandatory mediation programs; Donald H. Layh, "Legislative Options to Manage the Farm Debt Crisis", in Donald E. Buckingham and Ken Norman (eds) *Law Agriculture and the Farm Crisis* (Purich Publishing: Saskatoon, 1992), p.96. The idea of facilitating settlements in agricultural disputes had existed long before 1995. *The Provincial Mediation Board Act*, S.S. 1943, c. 15, which evolved out of *The Debt Adjustment Act*, S.S. 1934-35, c.88, established a board with the mandate to "endeavour to bring about an amicable arrangement for payment of the debtor's indebtedness" (s.5(1)). However, the board's role included broader tasks, such as advising the debtor or creditor, and inquiring into the validity of claims (s.5(1)). It was in 1988 that mediation – by an independent trained mediator – was entrenched as a formal step in farm debt collection actions. *The Saskatchewan Farm Security Act*, S.S. 1988-89, c.S-17.1 separated the functions of the board and mediators, made mediation a mandatory step, and delegated the responsibility for providing mediation to the Mediation Services branch of Saskatchewan Justice (now called the Dispute Resolution Office); Marjorie L. Benson, *Agricultural Law in Canada 1867-1995: With particular reference to Saskatchewan* (Calgary: Canadian Institute of Resources Law, 1996).

<sup>39</sup> Mediation Services, Saskatchewan Justice, "Monthly Statistical Reports as of March 31, 1994" [unpublished].

<sup>40</sup> Over the first five years of the program, almost 3000 farmland foreclosure actions were mediated; Mediation Services, *ibid.*

experience with mediations in other areas as well, many of those also involving issues surrounding land use (for example, expropriations and surface rights disputes).<sup>41</sup> In fee-for-service matters, which are voluntary mediations of all types, the branch was achieving a significant rate of full or partial resolutions: over fifty percent.<sup>42</sup> The Branch's cumulative experience, along with other examples of successful settlement-oriented processes in the province, led the province to consider change on a larger scale.<sup>43</sup>

In that sense, the Saskatchewan model of mandatory mediation was a part of the province's unique heritage. Saskatchewan had the very early opportunity to build a base of experience with mandatory mediation which brought with it a confidence and comfort with the process, at least from the government's perspective.<sup>44</sup> The "made in Saskatchewan" approach is clear in the following statement by Ron Hewitt, who was at the time an Assistant Deputy Minister in the Department of Justice:

Saskatchewan intends to remain on the leading edge of innovation in the area of dispute resolution, as it has traditionally been in the areas of health care, public insurance and public administration.<sup>45</sup>

---

<sup>41</sup> Mediation Services, Saskatchewan Justice, "Mediation Services: Program Summary" [unpublished].

<sup>42</sup> *Supra*, note 39.

<sup>43</sup> Other programs provided inspiration as well: the provision of mediation services (on a voluntary basis) as part of the Unified Family Court which operated in Saskatoon from the mid-70's to the mid-80's; the success of the mandatory pre-trial conference system instituted by the judiciary in the Court of Queen's Bench in 1986, achieving settlement rates as high as 66%; R. Hewitt, "Saskatchewan ADR Ignored" in Canadian Bar Association, *The National* (October 1997) at 5.

<sup>44</sup> There are other pieces of history which will have contributed as well: the provision of mediation services (on a voluntary basis) as part of the Unified Family Court which operated in Saskatoon from the mid-70s to the mid-80s; the success of the mandatory pre-trial conference system instituted by the judiciary in our Court of Queen's Bench in 1986, with settlement rates as high as 66%; R. Hewitt, *ibid* at 5.

<sup>45</sup> *Ibid* at 5. The Leader-Post described the mediation program as potentially "another successful social policy experiment" in our province; Editorial, "Mediation could prove to be a valuable legal option" *The Regina Leader Post* (23 March 1994) A7.

Incentive came not only from the Department's own internal history, but also from external sources. The Department's growing experience with mediation was accompanied by shifts in the national climate. For example, in 1992, a federal government agency was created, whose sole mandate was to develop and implement a philosophy of "cooperative conflict resolution" in the federal service.<sup>46</sup> The language used in the promotion of that agency spoke clearly of the importance of government leadership in promoting collaborative approaches, and how much potential there was for that in the Canadian context. The idea of government leadership in the promotion of alternative dispute resolution was also gaining some support in Saskatchewan at the time, even in the private sector. The Arbitration and Mediation Institute of Saskatchewan presented a paper to the Minister of Justice in early 1994 inviting the government to get involved.<sup>47</sup> Although the scheme presented in that paper was different than that which the Department chose to implement, the idea of government leadership was the same.

Other external factors also played their part. The unregulated state of the mediation profession was starting to cause some discomfort for practitioners and for the government.<sup>48</sup> Ontario was proceeding with its own court-connected dispute resolution program at roughly the same time. Public opinion, as revealed through the press, and

---

<sup>46</sup> J. Stanford "Canadian Centre moves to "change the culture" of public service" in MIT – Harvard Public Disputes Program, *Consensus* (July 1993).

<sup>47</sup> Arbitration and Mediation Institute of Saskatchewan Inc. "Concepts for Using Alternative Methods to Resolve Disputes in Matters under Provincial Jurisdiction", 1994 [unpublished].

<sup>48</sup> Some of the Department's literature identifies this as an issue. A document generated by Mediation Services in June, 1994 reveals a consumer-oriented, quality-control philosophy, speaking to the responsibility of government to address some of these basic concerns in the delivery of services at a time when the profession was still quite immature; Mediation Services, Saskatchewan Justice "The Role of Justice in Mediation Services" (June, 1994) [unpublished].



the perspective of some pockets of practicing lawyers, signified a shifting consciousness, a readiness to accept the shortcomings of litigation and consider alternatives.<sup>49</sup> All of these factors combined to motivate the Department to proceed with its ambitious goals.

## ii) Departmental Objectives

Buoyed by their early successes in farm files and a receptive external environment, the Department began to formulate broader goals. These goals took shape through the Department's strategic planning process in the early 90s, a process that culminated in the development of six core strategies for the Department, one of which addressed the dispute resolution area.<sup>50</sup> The development of the civil mandatory mediation program appears to have come directly out of that process, or was at least clearly supported by it.

The "core strategy on dispute resolution" described the Department's objective as follows:

To promote the most constructive and accessible ways of resolving disputes that are consistent with the needs of the parties and consistent with the public interest.<sup>51</sup>

---

<sup>49</sup> An article in the *Globe and Mail*, June 21, 1994 relates one of the big success stories, and describes the trend in some large law firms towards the establishment of "dispute settlement groups"; G. Baroudi "Moving the corporate battles from courthouse to boardroom" *Globe and Mail* (21 June 1994).

<sup>50</sup> *Strategic Plan*, *supra* note 14 at 9.

<sup>51</sup> *Ibid*, at 9: that same document goes on to identify "strategic action items", descriptions of actions or changes required in order to achieve this and other objectives. The provision of mandatory mediation sessions in civil cases is listed, along with "enhance the effectiveness and accessibility of the existing court process" and "promote other appropriate dispute resolution mechanisms in government programs and legislation". *Ibid*, at 15.

Departmental literature describes this objective as including several goals: resolving disputes more quickly and with less expense, broadening the parameters of the dispute, returning control to the parties, and paying respect to relationships. The last three are hallmarks of an interest-based approach to mediation, the model eventually adopted in Saskatchewan.<sup>52</sup>

#### **a) Access to Justice Issues: Cost and Delay**

The Strategic Plan document speaks to accessibility, and explanatory notes describe accessibility as the importance of allowing people to achieve resolution “without unreasonable barriers because of financial resources or personal incapacities”.<sup>53</sup> This theme is repeated in the second reading speech presented by the Minister of Justice during the legislation’s introduction into the Legislative Assembly, where several references are made to the high cost and delay involved in litigation.<sup>54</sup> Some

---

<sup>52</sup> Although the literature surrounding the Saskatchewan program does not address the facilitative-evaluative spectrum of mediation models, the program objectives are best met through a facilitative, interest-based approach, and that is the approach consistently applied by Saskatchewan program mediators. A combination of features, including the use of staff mediators, the absence of a fee, and the de-formalized nature of the process, have likely preserved the interest-based nature of the process – unlike what has occurred in some other jurisdictions. Some argue that the focus on settlement rates has driven the practice of mediation inside programs (Frank Sander, “The Obsession With Settlement Rates” (1995) 11 *Negotiation Journal* 329) and that a settlement-oriented approach encourages an evaluative and often coercive style of mediation (James Alfini, “Trashing, Bashing and Hashing It Out: Is This the End of ‘Good’ Mediation?” (1991) 19 *Florida State Law Review* 47).

<sup>53</sup> Mediation Services, Saskatchewan Justice, “Saskatchewan Justice: Core Strategy on Dispute Resolution” [unpublished] at 1.

<sup>54</sup> Hon. R. W. Mitchell, Minister of Justice for the Government of Saskatchewan, Bill No. 40, Second Reading Speech, 1994, <http://www.legassembly.sk.ca/hansard/22L45/40318>, 14-17.

subsequent press interviews and newspaper reports also emphasize these factors, highlighting the legislation's goals as saving consumers time and money.<sup>55</sup>

These were, however, lesser concerns. The problems of cost and delay have not been as acute in Saskatchewan as in some jurisdictions. Language about efficiency issues was used at the legislation's introduction, but was overshadowed by the following objectives that focus on parameters, control, and relationships. The concern for the quality of people's encounters with the civil justice system had two elements, each integrally connected: a concern for both the nature of the conversation (substance) and the manner in which that conversation occurs (process).

#### **b) Broadening the Parameters of the Dispute**

Concern for the substantive element appears in the call for an interest-based approach. The second reading speech indicates that many types of litigation (for example, wrongful dismissal, personal injury, estate matters) have heavy emotional overtones and involve a 'tremendous personal stake in the outcome' for litigants; and points out that the litigation system simply does not take these factors into account.<sup>56</sup> The Strategic Plan described the importance of exploring a wider range of factors that may be motivating or emerging from the dispute, so "that both sides to a dispute can be satisfied

---

<sup>55</sup> D. Roberts, "Saskatchewan moves to mediation" *The Globe and Mail* (18 March 1994) A10; Editorial, *Regina Leader Post*, *supra* note 45; K. Nelson "Minister explains proposed bill" *The Nipawin Journal* (23 March 1994) A3.

<sup>56</sup> *Supra*, note 54.

that their interests are being considered and addressed”.<sup>57</sup> The message came from an interest-based perspective, the idea that a much wider range of things matter to people, and there should be scope to discuss those things.

### c) Returning Control to the Parties

Also of central concern was the question of who controls the process – the need for an accompanying shift at a procedural level. At the time the Core Strategy was developed, the Department, specifically the Mediation Services Branch, stated that:

Behind this Core Strategy lies a recognition of a growing expectation by people throughout the world for greater input into the resolution of their own disputes and greater control over solutions that affect them. No longer are people completely satisfied with decisions that are imposed on them by a third party. People are seeking solutions that they have created themselves, that they are committed to ...<sup>58</sup>

The second reading speech uses the same type of language: “[mediation] leaves consumers in control of, and participating directly in, the decisions that are made”.<sup>59</sup>

The Mission Statement of Mediation Services describes the importance of offering people the “option and the tools to settle differences *with dignity and control* in a non-threatening environment” (emphasis added), reinforced by references throughout the Mission Statement to the branch’s mandate in educating people so that they can use the

---

<sup>57</sup> *Supra*, note 14 at 1.

<sup>58</sup> *Supra*, note 53 at 1

<sup>59</sup> *Supra* note 54.

tools themselves.<sup>60</sup> The mission of the policy makers was clearly to return the litigation process, or at least some dimension of it, to the litigants.

#### **d) Paying Respect to Relationships**

The final goal apparent in the literature surrounding the legislation's introduction is the message that relationships matter. The Strategic Plan raises the importance of recognizing continuing relationships in all settings – family, community, business – and the importance of encouraging resolutions that respect these relationships.<sup>61</sup> The second reading speech contains a reminder that the adversarial process inevitably pits people against each other in their quest for a solution. Although “relationship” is a substantive factor that may “broaden the parameters of the dispute”, it is a theme that pervades the Department's own explanations for the legislation and deserves to be highlighted.

#### **iii) Reshaping Civil Justice**

The latter three objectives – broadening the parameters, returning control to parties, and paying respect to relationships – are qualitatively different from the first (an efficiency concern). Each of these three goals can be viewed in different ways, depending upon how it is characterized:

- Does the call for “broader parameters” mean simply that parties ought to be able to speak about formally irrelevant matters during a mediation session, or

---

<sup>60</sup> Mediation Services, Saskatchewan Justice “Mission Statement” [unpublished] at 1.

<sup>61</sup> *Supra* note 14 at 1.

does it mean that the broader interests of the parties ought to be taken into account from the beginning of their involvement with the civil justice system?

- Does a “return of control to the parties” mean simply making sure that they have enough “airtime” during mediation, or does it contemplate leaving them with a greater feeling of ownership of their dispute as it moves through to a resolution, from beginning to end?
- Does the reminder that “relationships matter” mean that people should be civil to one another as they sit across a mediation table, or does it mean somehow preserving the values of respect and dignity in our connections with each other as human beings, from beginning to end of civil process?

More specifically, each can be understood in narrow or broad terms: as embedded within a discrete process – a narrow, one-time attempt to offer litigants an alternative process; or, as evidence of a wide value base which has the potential to shift civil process towards fundamental systemic change.

I will describe the Saskatchewan civil mediation program as better situated within the broader set of goals. The program was introduced on the justification that the litigation system is failing people.<sup>62</sup> Mandatory mediation was presented as an effort to improve the experience of civil justice for Saskatchewan litigants. The following quote from one of the Minister of Justice’s later speeches offers a picture of this goal:

I am confident that we can *transform our system of justice* to what it was originally designed to be – a system for conflict resolution. A system that is

---

<sup>62</sup> Indeed, the second reading speech begins with exactly that point, quoting from *The Financial Post*:  
In the best of all possible worlds, justice would be done efficiently, inexpensively and with minimal emotional pain to those involved. But until legal reforms take place ... you’re entering a less than perfect world that will require caution, stamina and bravery to survive.  
The Minister of Justice goes on to refer to “the justice system’s failure to serve the needs of our citizens”. Although he subsequently qualifies that statement, the same tone, that this legislation is required in order to shore up the failure of the litigation system, remains; *supra*, note 54.

accessible to our people. A system that is sensitive to the needs of our people in this very diverse and complex world. (emphasis added)<sup>63</sup>

On another occasion, the Department described its objectives as follows:

...to shift the justice system away from its current adversarial model, towards a collaborative model that responds in a more direct and sensitive way to the needs of society.<sup>64</sup>

...  
Programs being delivered by Mediation Services within the Department of Justice mark a significant shift away from an adversarial system to a more collaborative one, and therefore, have a significant impact on the justice system and the way society resolves disputes.<sup>65</sup>

The integration of mediation into the Saskatchewan system of civil justice was not about clearing more cases off the dockets to relieve pressure on the courts. Nor was it simply about requiring that litigants and their lawyers pause, take a brief step off the litigation track, and try an “alternative”. It was not about *diverting* litigants. Rather, it was about *fundamentally changing the experience* of the civil justice system for those people.

A reconstruction of the government’s objectives for fundamental systemic change provides an important axis upon which an assessment of the program must turn. It is only once we understand the program’s transformative objectives that we can move to a meaningful assessment of the program’s effect. The current literature on mediation’s efficiency gains does not provide the framework needed to support a full evaluation of the Saskatchewan program. A new framework needs to be constructed, one that

---

<sup>63</sup> R. W. Mitchell, Speech, *ibid* at 10.

<sup>64</sup> Mediation Services, Department of Justice “Staff Mediator – Job Description – July, 1994” [unpublished] at 10.

<sup>65</sup> *Ibid* at 9.

encompasses systemic transformation. As will be shown, such a framework will include cultural factors in the form of lawyers' professional roles and identity as an integral part of systemic change. In the next Chapter, I will develop such a theoretical structure and then will locate the Saskatchewan program within that framework.



## CHAPTER III

### DRAWING ON THEORY

The insertion of mediation into litigation has produced tension at many levels, especially in Saskatchewan.<sup>66</sup> Consistent with the program goals, the Saskatchewan program employs the interest-based model.<sup>67</sup> In a system that is otherwise centered on judicial authority, interest-based mediation offers a third party who is not evaluative, not judicial, but merely a facilitator. Against a legal tradition that favours negotiation by telephone and correspondence, it brings the lawyers – *and* their clients – into the same room. The process invites settlement discussion at a time much earlier than lawyers would normally begin. Mediators ask for openness at a time when information is being closely guarded, and look for balance when participants are more comfortable with the language of blame. They view the dispute as symptomatic and the task before them as the reconciliation of broader, underlying interests. Litigation, on the other hand, narrows and structures the dispute as a normative conflict, one that must be resolved through a comparison and measurement of legal rights and obligations. The core

---

<sup>66</sup> Julie Macfarlane identifies some as “purely mechanical” and others as conceptual; *supra*, note 4, p. 301. In her exploration of the basic differences, she refers to the early discussion of Vilhelm Aubert, *Competition and Dissensus: Two Types of Conflict and Conflict Resolution* (1963) 7 J. of Confl. Res. 26, and to recent discussions in Julie Macfarlane, *The Mediation Alternative, Rethinking Disputes: The Mediation Alternative* (Toronto: Emond Montgomery, 1997) at 8-18, and Julie Macfarlane, *Conflict Analysis, Dispute Resolution Reading and Case Studies* (Toronto: Emond Montgomery, 1999) at 45-57.

<sup>67</sup> The present analysis may not be transferable to programs that value evaluative approaches instead of interest-based ones.

assumptions of interest-based mediation and rights-based litigation differ fundamentally.

The resulting tensions are palpable to lawyers and mediators, and they are also essential for the process of change. As I begin this chapter, I reject the notion that tension is a by-product of failure, arguing instead that change will occur precisely through the application of pressure and its resulting discomfort. I will draw upon Julie Macfarlane's recent analysis of mandatory mediation's impact on commercial lawyers in Ontario, wherein she offered a spectrum for understanding outcomes when a new process is merged with an old system. Macfarlane's spectrum includes "systemic transformation" – a concept that, as I argued in the previous chapter, best mirrors Saskatchewan program objectives. I will conclude that systemic transformation requires cultural shifts at the personal level, in lawyers' professional roles and identity.

#### **A. Tension as an Agent of Change**

Thirty years ago, a leading writer in the area of sociology of law, Richard Abel, presented a general theory of institutional change that applies directly to this analysis. Abel describes how dispute processes and institutions interact with their social and cultural environment in a way that presumes not harmony but tension. Values originating in culture and social structure – some unconscious, some planned – will produce pressure on dispute processes. Those pressures, along with contradictions that may be internal to the institution, will produce changes. The changes, in turn, exert

return pressure on surrounding culture and dispute processes. Abel envisions a cyclical process of change driven forward by tension:

It is inevitable that there will always be contradictions among these factors [originating in culture and social structure], between each and the resultant dispute institution, and within the dispute institution. These contradictions cannot but lead to continuous pressure for change in both dispute institution and society.<sup>68</sup>

One of the ways the tension has manifest itself in Saskatchewan is in views about what constitutes a dispute. A rule-centered approach tends to lead to narrower definitions of “dispute”; for example, Lempert’s assertion that a dispute only becomes such when there are competing legal (or “normative”) claims.<sup>69</sup> Thinking as traditional litigators, many lawyers would support this view: there is no dispute unless a potential plaintiff can frame and support a legal claim, and a defendant can advance a legal defense. This feeds into the view that anything outside of those parameters is not “up for discussion”.

On the other hand, mediation program administrators would say that the dispute is not restricted to its legal form. Its essential character is much broader than any normative claims that have been produced, incorporating potentially any interest that might be influencing either party to the dispute or the relationship between them. Inside the litigation system, a broad definition of “dispute” causes discomfort. Kidder explains:

---

<sup>68</sup> Richard Abel, “A Comparative Theory of Dispute Resolution Institutions in Society” (1973) 8 *Law & Society Review* 217 at 300.

<sup>69</sup> R.O. Lempert, “Grievances and Legitimacy: The Beginnings and the End of Dispute Settlement” 15:3-4 *Law & Society Review* 707.

If we stretch the term *dispute* to include all dyadic bargaining ... every instance of human interaction would be a candidate for dispute processing analysis. Disputing would be indistinguishable from all human interaction.<sup>70</sup>

This is certainly one of the threads of the tension that the Saskatchewan program has created. Saskatchewan government mediators would agree with Kidder, and they would not share the worry about any resulting confusion - a worry more apt to belong to litigators.

Abel's theory that tensions produce change echoes, if not deliberately, Hegel's dialectic.<sup>71</sup> For Hegel, all history is the product of the union of opposites, and all progress depends on the friction between "what is" and "what is evolving". His view of antithesis as the beginning of growth and change, and essential to it, applies directly to the present analysis, explaining the relationship between mediation and litigation as the constantly evolving product of inherent – and healthy – tension. As long as the tension is rooted in positions that are not mutually exclusive, and have the potential to produce some common ground, transformative growth is still possible.

---

<sup>70</sup> R.L. Kidder, "The End of the Road? Problems in the Analysis of Disputes" 15:3-4 *Law & Society Review* 717 at 722.

<sup>71</sup> For a summary of how Hegel used this concept, see M.D.A. Freeman, *Lloyd's Introduction to Jurisprudence*, 7<sup>th</sup> ed. (London: Sweet & Maxwell, 2001) at 954.

## B. Range of Outcomes at the Systemic Level

Julie Macfarlane explains court-connected mandatory mediation as the integration of a marginal culture into an established culture.<sup>72</sup> She argues that the nature of mediation and litigation are so different, bringing the two together will necessitate some kind of change in one, or the other, or both. Beneath her analysis is the assumption that tension is inevitable, and so is change – that the two sets of processes will *not* hang together in a static environment. Macfarlane organizes possible systemic responses along a continuum: divergence, assimilation, convergence, or transformation. Distinctions between each are defined by the degree of mediation’s influence on litigation (and vice versa), and the character of responding change in each system.

Macfarlane’s overall framework helps focus the issues in the present analysis.

According to Macfarlane, the most common outcome for a marginal systemic culture, upon meeting a dominant one, will be assimilation. Applied to mandatory mediation, the possibility is that “adjudication will simply swallow, subvert, or assimilate the different goals of the mediation process, and turn it into a traditional exercise in positional bargaining”.<sup>73</sup> She uses the following examples of behavior and comments coming from Ontario lawyers as evidence of assimilation: views that reinforce stereotypes (comments that suggest mediation is “touchy-feely” or unrealistic); generalized preference for evaluative mediators; instrumental use of mediation as an early and cheap discovery process; not taking mediation seriously at all or preparing in

---

<sup>72</sup> *Supra*, note 4, at 309-310.

<sup>73</sup> *Ibid.*, at 310.

a way that will make the session meaningless; falling back on traditional litigation patterns (a presumptive preference to delay until after discoveries); an emphasis on legal rights and lawyers' preference for being in control of the process.

Divergence, on the other hand, is described as the result when pre-existing approaches and understandings held by lawyers are simply reinforced and become further entrenched.<sup>74</sup> As an illustration of divergence, Macfarlane describes the polarization that occurred between lawyers who are "True Believers" (who have taken up the "faith" in mediation), and lawyers who are "Oppositionists" (where resistance to mediation is the deepest).<sup>75</sup>

For mediation proponents, convergence and transformation are more positive outcomes than either assimilation or divergence. Convergence is described as an outcome with "mutual influence".<sup>76</sup> The character of the old system shifts in some way, as does the character of the new, in response to each other – but falling short of the creation of a "new substitute paradigm" or transformation. Convergence contemplates that each has taken on some of the "ideas, values, and practices" of the other.<sup>77</sup> Macfarlane sees evidence of convergent changes in the adjustment of mediation to a place in the shadow of the law, for example, through the formalization of disclosure rules surrounding mediation or the strategic use of evaluative mediators.<sup>78</sup> She argues that convergent

---

<sup>74</sup> *Ibid.*, at 312.

<sup>75</sup> *Ibid.*, at 254-259

<sup>76</sup> *Ibid.*, at 310.

<sup>77</sup> *Ibid.*.

<sup>78</sup> Julie Macfarlane refers to use of evaluative mediation as an indicator of assimilation, and then again later as an indicator of convergence. Presumably the difference is in the level of dependence the lawyer has on the rule-oriented and adjudicative character of that process. Thus where mediation needs to look

changes in litigation are occurring when settlement discussions become normalized inside mediation, the common range of settlement options widens to include emotion-based solutions such as apologies, and lawyers begin viewing the advocacy skills they must employ inside mediation and litigation differently.

Transformation describes change at a different level – change in the “internal norms” of each process, which changes the character of each. The result, a new emerging paradigm, would be “an authentic and comprehensive integration of the values and practices of mediation and traditional litigation”.<sup>79</sup> Macfarlane concludes that the evidence does not show the emergence of such a new paradigm in Ontario, although it does show dimensions of the other three categories. The effect, she argues, is that “existing paradigms are under pressure both structurally ... and conceptually ...”.<sup>80</sup>

The label “transformation” has attracted considerable debate in the conflict resolution field. Folger and Bush propose that the real test of mediation is whether it has succeeded in “transforming” the parties, such that they are better able to articulate their interests (“empowerment”) and acknowledge the interests of the other party (“recognition”).<sup>81</sup> Their suggestion that moral transformation is more important than

---

evaluative in order for lawyers to be comfortable, it may reflect assimilation. Where it is viewed as one approach, perhaps more appropriately a “last resort” where interest-based discussions may not be appropriate, then it may indicate convergence.

<sup>79</sup> *Supra*, note 4, at 312.

<sup>80</sup> *Ibid.*, at 313.

<sup>81</sup> R.A. Baruch Bush and J.P. Folger, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* (San Francisco: Jossey-Bass, 1994).

the resolution of particular disputes has been criticized by many writers.<sup>82</sup> Others prominent writers have moved the transformation debate from a focus on the personal to a focus on communities. John Paul Lederach, for example, considers the potential for conflict to be transformative at a social and political level, arguing that conflict resolution processes can and should seek transformational change in social structures.<sup>83</sup> Although there is much richness in the debate about transformational goals of conflict resolution, I have introduced the concept of transformation in a narrower way. As used by Julie Macfarlane in the above framework, “transformation” reflects fundamental change at the systemic level, without assuming that mediation itself is functioning in a peace-oriented or morally transformative way. I am exploring the proposition that an adversarial civil justice *system* can be transformed through the introduction of an interest-based approach, without examining the particular goals of mediators or processes inside that system. Even in the present analysis, the debate can only be temporarily avoided – it represents one of the deeper and more interesting current issues facing theorists and practitioners.

I have therefore chosen to use Macfarlane’s range – from assimilation to transformation – to categorize the possible systemic responses in Saskatchewan. I have argued that the language and goals surrounding the legislation’s introduction are arguably most consistent with the transformation ideal. The goal of changing the litigation experience

---

<sup>82</sup> Carrie Menkel-Meadow, “The Many Ways of Mediation” (1995) 11 *Negotiation Journal* 217; M. Williams, “Can’t I Get No Satisfaction? Thoughts on *The Promise of Mediation*” (1997) 15 *Mediation Quarterly* 143.

<sup>83</sup> John Paul Lederach, “Transforming Violent Intercommunal Conflict” in Kumar Rupesinghe, *Conflict Transformation* (New York: St. Martin’s Press, 1995); see also John Paul Lederach, *Preparing for Peace: Conflict Transformation Across Cultures* (Syracuse, NY: Syracuse University Press, 1995).



for clients, to make it more responsive to their substantive and procedural needs, suggests larger scale and cultural change. How can researchers identify whether “systemic transformation” has occurred?

Noticeably absent from Macfarlane’s analysis is a description of what transformation would look like. By identifying examples of convergent changes, however, Macfarlane’s analysis provides a starting point. Drawing on the anthropological work of Clifford Geertz, Macfarlane begins with the assertion that significant change can be found in an accumulation of small “functional adjustments” that lawyers may make:<sup>84</sup>

- Changes in the way that lawyers manage files (planning for settlement discussions earlier, front-end loading the work on files, gathering information earlier in the litigation, and changing billing practices);
- Changes in client roles and relationships (for example, how clients participate in mediation sessions);
- Changes in settlement strategies and behaviors;
- General changes in lawyers’ attitudes towards the use of mediation.

Implicit in this analysis is a conclusion about critical mass. Examined on its own, each functional adjustment identified by Macfarlane appears more mechanical than ideological. Examined together, I suggest, these kinds of changes could support a conclusion that transformation has occurred. In her definition of a transformational outcome, Macfarlane ties the emergence of a new paradigm to the existence of “widely

---

<sup>84</sup> *Supra*, note 4, at 288-289.

accepted norms and practice values".<sup>85</sup> In other words, the evidentiary difference between convergence and transformation is not necessarily one of quality, but quantity -- a critical mass of mechanical changes that reveal an ideological shift.

For the purpose of this analysis, I will abandon the distinction between divergent and assimilative outcomes. The distinction between divergence and assimilation turns more on lawyers' subjective experience of the program, with the end result for their clients and the program being hard to distinguish. Lawyer behavior may differ; for example, where divergence has occurred, lawyers may fight any future opportunities for mediation in other settings, whereas assimilation suggests that those lawyers may still participate (while co-opting the process into a litigation model). The impact upon clients may differ. The impact at the systemic level, however, is similar: Both assimilative and divergent outcomes will frustrate goals for systemic transformation. The program, along with its potential for positive impact, dissolves. The old litigation paradigm is further entrenched.<sup>86</sup> Since divergence and assimilation both involve a rejection of the principles and activities of the mediation program, I will merge those two categories into "rejection" for the purpose of analyzing the Saskatchewan program.

With this slight revision, Macfarlane's analysis brings into focus the general possibilities for the integration of mediation into the dominant system of litigation: rejection, convergence, or transformation. The Saskatchewan program will have

---

<sup>85</sup> *Ibid.*, at 312.

<sup>86</sup> Although one might argue that a divergent effect at its most extreme would be the neutralizing of mediation as offering anything different at all -- the complete dismantling of its original values and objectives.

achieved a transformative outcome if the program values are integrated into the litigation process, resulting in significant changes in civil process *outside* of the mediation itself. Such changes, I will argue, would have to be cultural in nature, located in the attitude and approaches of the lawyers and tied to the program goals set out in Chapter II.<sup>87</sup> One might look for evidence, for example, that lawyers are comfortable broadening the parameters of the dispute, returning control to the parties, and paying respect to relationships. At the center of my analysis is the matter of lawyers' roles and identities.<sup>88</sup>

### **C. Professional Role and Identity**

The premise that systemic transformation requires shifts at the level of role and identity is supported by the study of two social scientists, May and Buck. These two researchers investigated changes in the field of social work in Southern England, and parallels can be drawn to the degree of change being experienced by lawyers in Saskatchewan.<sup>89</sup> The Social Services Department had undergone some significant policy changes in the 1990s. They moved from actual service delivery (where Department social workers provided counseling and support services) to an enabling role (using voluntary and

---

<sup>87</sup> A comprehensive analysis would need to take into account the experiences of clients, mediators, judges and others, in addition to those of lawyers. Changes in legal culture, or lawyers' roles and identities, are only one dimension and one measure of systemic transformation.

As I will conclude in the last chapter, more (and different) research is needed.

<sup>88</sup> Macfarlane also argued that in determining whether mediation is making any "real difference" to the broader disputing culture of the profession, one must look to shifts in role and identity, and refers to Clifford Geertz in support of this point: "Geertz argues that changes in actual practices [sometimes practices which appear to be superficial adjustments] become especially noteworthy where they appear to have an impact on notions of role and identity"; J. Macfarlane, *supra*, note 4, at 289, referring to Clifford Geertz, "Thick Description: Toward an Interpretive Theory of Culture" in C. Geertz, *The Interpretation of Cultures; Selected Essays* 3 (Basic Books 1973).

<sup>89</sup> T. May & M. Buck, "Power, Professionalism and Organisational Transformation" (1998) 3(2) Sociological Research Online, <http://www.socresonline.org.uk/socresonline/3/2/5.html>.

private sectors for service delivery as well as public). The change was described as one in the “overall ethos”, with social workers moving from being providers to being designers, organizers, and purchasers.<sup>90</sup> Social workers were now to think of themselves as care managers.<sup>91</sup> Supporting this turn was a shift in philosophical approach as well. Organizational policy now stated explicitly that social services were to meet individual needs, rather than working to fit individual needs into existing structures. The change incorporated a new “culture of the consumer”.<sup>92</sup>

May and Buck go on to examine social workers’ perceptions of their changing roles and identity, and how those materialized in their daily practices. New practices for social workers were met with resistance and tension. Through their actions, social workers still showed an allegiance to their old professional identity – an allegiance that contradicted their new role on some levels. This produced “unintended consequences” with the result being “new sets of practices and rationales that were never envisaged” by organizational planners.<sup>93</sup> In the end, the authors conclude that “because of unintended consequences and resultant conflicts, to be a professional social worker is never fixed,

---

<sup>90</sup> *Ibid*, at paragraph 3.8, p.3; The example is also parallel in this way: change was implemented in Southern England in a fashion that was ‘top-down’ – it was implemented from above, with employees having to reorder themselves to fit the new regime. The application of power to produce change is identified as a significant factor in the response it generates. The authors offer the following quote from Foucault:

What makes power hold good, what makes it accepted, is simply the fact that it doesn’t only weigh on us as a force that says no, but that it traverses and produces things, it induces pleasure, forms knowledge, produces discourse. Foucault, M. (1980) *Power/Knowledge, Selected Interviews and Other Writings 1972-1977* Edited by C. Brighton Gordon: Harvester Press, p.119.

In a similar way, mandatory mediation was introduced through the use of legislative power.

<sup>91</sup> *Ibid*, at paragraph 5.4 – 5.10, p. 7-8.

<sup>92</sup> *Ibid*, at paragraph 3.17 – 3.18, p. 5.

<sup>93</sup> *Ibid*, at paragraph 7.1-7.3, p. 15.

but always in the process of *becoming*".<sup>94</sup> Ultimately, they envision the potential for the development of new forms of identity for social workers.

May and Buck's study illustrates how organizational or systemic change can produce a role tension for professionals working inside that system. Tension can be materialized in ways that are unanticipated, and can ultimately produce transformation in professional identity. The adoption of mandatory mediation has similarly produced a tension in lawyers' traditional professional identity. A deeper analysis of the Saskatchewan Evaluation data shows that tension is generating an internal discourse, a process of "becoming", that will, I submit, result in cultural change that involves new roles for lawyers.

---

<sup>94</sup> *Ibid*, at paragraph 6.14, p. 15.

## **CHAPTER IV**

### **INFORMATION GATHERING: A QUESTION OF WHICH LENS**

Although the literature contains a significant amount of evaluation research in Canada and the United States, it provides only a limited, efficiency-oriented view of the mediation experience, and certainly does not reflect the full range of possibilities and outcomes. In order to capture a transformative outcome, the lens will have to be widened. Ultimately, this means a shift in research methodology – towards an emphasis on qualitative research. A focus on statistics and efficiencies leaves little room for the dialogue the profession needs about cultural change. In this Chapter, I will analyze the limitations of existing research, and will introduce ways to widen the lens.

#### **A. The Evaluation Lens**

The earlier discussion shows that current research only begins to tell the story about the effectiveness of mandatory and court-connected mediation programs. It speaks volumes about what program designers, researchers, legal practitioners, and policy makers think is important when it comes to civil process change. Canadian evaluation has turned on settlement rates and patterns, and cost implications. Our assessment lens

has been focused on the process as a discrete intervention, and has included broader systemic and contextual issues only to the extent that those relate to efficiencies.<sup>95</sup> Most of the American research has used the same narrow focus.<sup>96</sup> There are some examples of a broader approach - attempts to assess the wider dimensions of people's experience with the justice system. To date, however, those examples are largely confined to non-mandatory mediation programs in other settings: voluntary mediation programs used by regulatory agencies,<sup>97</sup> mediation in matters involving divorce and family breakdown<sup>98</sup> or victim-offender mediation.<sup>99</sup>

---

<sup>95</sup> The process of evaluating social programs can be viewed as inherently political; C. Weiss, "Where Politics and Evaluation Research Meet" (1993) 14(1) *Evaluation Practice* 94. Program evaluation textbooks describe the first stage of the process as involving an assignment of value - objectives must first be articulated before they can become criteria against which the program's performance is measured; Rossi, *supra* note 37 at 1.

<sup>96</sup> The evaluation of the North Carolina program was narrow in scope, confined to determining whether it "[made] the operation of the superior courts more efficient, less costly, and more satisfying to the litigants"; Clarke, Ellen & McCormick, *supra*, note 33 at 1. One might argue that the values driving the program reveal themselves in the language of the evaluation: "In the typical case, mediated conferences did not focus, and probably could not have focused, on the underlying interests of the parties, on their relationship, or on the underlying causes of the dispute"; *ibid*, at 3. Examples of other conventional evaluations include: Daniel, J., *Assessment of the Mediation Program of the U.S. District Court for the District of Columbia*, (Washington, DC: Administrative Conference of the United States, 1995); Katalik, James S. et al., *An Evaluation of Mediation and Early Neutral Evaluation Under the Civil Justice Reform Act*, (Rand Institute for Civil Justice, 1996); Schildt, K., *Major Civil Case Mediation Pilot Program: 17<sup>th</sup> Judicial Circuit of Illinois, Preliminary Report*, (DeKalb, Illinois: Northern Illinois University, College of Law, 1994); Taaffe, L., S. Morokuma & E.E. Gordon, *Participant Satisfaction Survey of Court-Connected ADR Programs*, (State Justice Institute, Georgia Office of Dispute Resolution, 2000); Vidmar, N., "An Assessment of Mediation in a Small Claims Court" (1985) 41(2) *Journal of Social Issues* 127; Yates, S.M. & J.E. Shack, *An Evaluation of the Lanham Act Mediation Program: U.S. District Court for the Northern District of Illinois* (Chicago: Center for Analysis of Alternative Dispute Resolution Systems, 2000) available online at [www.caadrs.org](http://www.caadrs.org). An example of a broader approach to evaluation is Wissler, R.L., "Mediation and Adjudication in the Small Claims Court: The Effects of Process and Case Characteristics" (1995) 29(2) *Law & Society Review* 323.

<sup>97</sup> *Evaluation of the Occupational Safety and Health Review Commission Settlement Part Program* (Indiana Conflict Resolution Institute, 2000); Cavenagh, T.D., "A Quantitative Analysis of the Use and Avoidance of Mediation by the Cook County, Illinois, Legal Community" (1997) 14(4) *Mediation Quarterly* 353 (evaluating lawyers' use of voluntary mediation); Raines, S. & R. O'Leary, "Evaluating the Use of Alternative Dispute Resolution Techniques and Processes in U.S. Environmental Protection Agency Enforcement Cases: Views of Agency Attorneys" (2000) 18 *Pace Environmental Law Review* 118.

<sup>98</sup> Studies in the area of family mediation tend to focus on the longer term impact of mediation on the relationships between parents, and parents and children, levels of conflict, acceptance of the termination of the marriage, levels of anger and depression, communication patterns. Some examples of evaluations of family mediation services include: Bahr, S.J., C.B. Chappell & A.C. Marcos, "An Evaluation of a

The access to justice (efficiencies) theme has clearly set the parameters for how analysts think about court-connected mediation, and whether it is working. The language used to describe many program policies reveals this assumption. For example, administrators described the primary objective of the Toronto project as offering:

... enhanced, more timely and cost-effective access to justice for both defendants and plaintiffs. It is designed to provide additional court services and significantly improved access to justice.<sup>100</sup>

Even where program objectives have included broader considerations, efficiency concerns have eventually dominated. In Edmonton, where administrators had originally included concerns for the qualitative experience of litigants, it was efficiency that governed the review.<sup>101</sup>

---

Trail Mediation Program" (1987) 18 *Mediation Quarterly* 37; Bautz, B.J. & R.M. Hill, "Divorce Mediation in New Hampshire: A Voluntary Concept" (1989) 7(1) *Mediation Quarterly* 33; Bohmer, C. & M.L. Ray, "Effects of Different Dispute Resolution Methods on Women and Children After Divorce" (1994) 28 *Family Law Quarterly* 223; Emery, R.E. & J.A. Jackson, "The Charlottesville Mediation Project: Mediated and Litigated Child Custody Disputes" (1989) 24 *Mediation Quarterly* 3; Jones, T.S. & A. Bodtker, "Satisfaction with Custody Mediation: Results from the York County Custody Mediation Program" (1998) 16(2) *Mediation Quarterly* 185; Kelly, J.B. & M.A. Duryee, "Women's and Men's Views of Mediation in Voluntary and Mandatory Mediation Settlements" (1992) 30(1) *Family and Conciliation Courts Review* 34; Pearson, J. & N. Thoennes, "Mediating and Litigating Custody Disputes: A Longitudinal Evaluation" (1984) 17(4) *Family Law Quarterly* 497.

<sup>99</sup> Studies of victim-offender mediation programs also tend to examine the longer term impact upon participants, including the likelihood of the offender to reoffend: Nugent, W.R. & J. B. Paddock, "The Effect of Victim-Offender Mediation on Severity of Reoffense" (1995) 12(4) *Mediation Quarterly* 353; Roy, S. "Two Types of Juvenile Restitution Programs in Two Midwestern Counties: A Comparative Study" (1993) 57(4) *Federal Probation* 48.

<sup>100</sup> Practice Direction (1994) 16 O.R. (3d) 481.

<sup>101</sup> Although there is some discussion about other objectives in the Toronto report, the efficiency ones received the primary focus during evaluation; see Macfarlane, *supra*, note 18 at 1. The goals of the Edmonton small claims pilot project seemed more diverse (including promoting consensual and participatory processes, offering a high quality alternative to trial, *as well as* delivering an accessible, efficient, cost effective, user friendly service and reducing the volume of matters adjudicated in the court system), but the evaluation focused primarily on the efficiency concerns, with its first objective being "to determine what are the savings to be achieved by using mediation" and secondly "to determine the satisfaction of the parties, lawyers/agents and mediators with the mediation process"; *Edmonton Pilot Project, supra*, note 27 at 3.



Even theorists and academic writers have accepted this assumption, depicting court-connected programs as the lesser cousin of mediation. Writing in 1997, Carrie Menkel-Meadow separates two strands of alternative dispute resolution, one focused on the qualitative (focused on producing better processes and better solutions) and the other on quantitative issues (efficiency, cost-reducing, docket clearing).<sup>102</sup> She places court-connected mediation programs in the latter category.

## **B. Widening the Lens**

Other analysts have observed limitations in the evaluation and study of court-connected mediation programs.<sup>103</sup> Some writers have stressed the importance of founding the research upon the program's particular objectives,<sup>104</sup> and have noted attempts to include the larger qualitative systemic goals.<sup>105</sup> Early studies included some

---

<sup>102</sup> Carrie Menkel-Meadow, "Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities" 38 *South Texas Law Review* 407 at 408.

<sup>103</sup> In his early study, McEwen raised some deeper questions, which we have not necessarily answered in the last 20 years: "Too often mediation programs have been touted as successful based solely on their rate of settlement. The data introduced in this article do go considerably farther but do not direct broad and significant issues of social justice. . . . . As the movement to develop alternatives to court expands, we must continue to restrain our enthusiasm and to distinguish ideology and hope from sober analysis of the consequences of these alternatives for people with grievances and for the larger society of which they are a part"; *supra*, note 33 at 268.

<sup>104</sup> Bussin makes this point about congruency between the evaluation scope and program objectives. Yet, when she goes on to list some specific criteria for ADR systems evaluation, they still treat the mediation session as a one-time event: settlement rates, efficiency (speed, cost, peak performance), user satisfaction, fairness and justice (interpreted in the legal context), neutrality, and other issues such as case types and compliance rates; N. Bussin, "Evaluating ADR Programs: The Ends Determine the Means" (2000) 22 *Advocates Quarterly* 460.

<sup>105</sup> For example, Wissler sets out three general categories of criteria: quality of the procedure, quality of the outcomes, and efficiency of the procedure. This last category she describes as including cost and time issues, from the perspective of the parties and the court - efficiency goals. "Quality of the procedure" includes perceptions of fairness, opportunity for parties to participate, thoroughness of the process, mediator neutrality and respectful treatment of the parties, absence of coercion. These touch upon some of the deeper values, but are still mainly confined to superficial 'satisfaction levels' and again, treatment

consideration for the qualitative experience of program participants, but continued to treat mediation as an isolated process. As discussed below, researchers have only begun to explore the qualitative experience of clients and lawyers.

### **i) Understanding the Qualitative Experience of Clients**

Both the Toronto and Edmonton studies posed questions to clients and lawyers about the impact of the process in broader, experiential terms. Evaluators looked at some dimensions of the client's role in mediation: clients' expectations, the scope of issues they were allowed to discuss, and their views about their own and their lawyers' roles. The Toronto report offers the following results (noted as "surprising"):<sup>106</sup>

- Less than half of clients expected that the mediation process would be easier to understand than a trial, or that it would be more private.<sup>107</sup>
- Less than half of clients expected that they would be allowed a greater role in mediation than in trial, or that they would have a greater opportunity to explain their side of the case.<sup>108</sup>
- Fewer clients indicated that they understood everything that was going on during mediation than those whose case was argued before a judge.<sup>109</sup>
- A higher number of clients in the litigation control group said that they felt 'very much' like a participant in their case.<sup>110</sup>

---

of the process as a discrete, isolated event. The last category, which she calls "quality of the outcomes" (a label which I think is a little misleading), potentially includes systemic issues: perceptions of fairness of the agreement, extent to which dispute is resolved comprehensively and finally, impact on disputants (relationship, handling of future disputes, their evaluation of the courts), and impact on third parties and the community; *supra*, note 32.

<sup>106</sup> *Supra*, note 17 at 45

<sup>107</sup> *Ibid*, at 44; 41.4% and 41.8% respectively.

<sup>108</sup> *Ibid*, 38.4% and 45.9% respectively.

<sup>109</sup> *Ibid*, at 40.

<sup>110</sup> 72.7% for litigation, and 63.2% for mediation; *ibid*, at 45

- More clients indicated that their lawyers were ‘in control’ of the process in mediation than in litigation control group.<sup>111</sup>

The Edmonton study revealed that more lawyers than clients in small claims mediations felt that the process allowed them to discuss important issues that did not involve money,<sup>112</sup> and few clients felt that a continued relationship with the other party was important.<sup>113</sup>

From this limited information, it is possible to draw the following conclusions.

Although clients are generally positive about the mediation process, they do not see it as offering them an expanded role, and do not necessarily expect it to be qualitatively different than the litigation experience. This supports, I will argue, a conclusion that lawyers hold significant influence over their clients, and particularly their clients’ perceptions about the possibilities and parameters of the mediation process.

## **ii) Understanding Lawyers and the Legal System**

As court-connected mediation programs have begun to mature, the research focus has begun to shift. Researchers are asking more questions about the systemic and long-term impact of mediation programs for players in the justice system. After reviewing much of the American literature, Wissler concluded in 2002 that:

---

<sup>111</sup> 57.9% for mediation and 47.1% in litigation; *ibid.*

<sup>112</sup> 46% of clients agreed and 78% of lawyers agreed; *supra*, note 27, at 9.

<sup>113</sup> 21% of clients agreed that a continued relationship was important; but 45% agreed that mediation is likely to help maintain or improve the relationship; *ibid.*

Studies are needed to look at the broader impacts of mediation beyond the instant case - on parties' general evaluations of the court system, on their (and their organizations') handling of future disputes, on the lawyers' practice of law, and on the community.<sup>114</sup>

Researchers can access this type of information by studying the behavior and perspectives of lawyers. In 1997, for example, Bobbi McAdoo examined how lawyers in Minnesota had been integrating different dispute resolution processes into their practices, how their views about mediation had evolved, and how their discovery practices had adjusted.<sup>115</sup>

A similarly broad analysis came out of the second wave of evaluation information from Ontario. Five years after the first Toronto report, Julie Macfarlane conducted a second study that led her to discuss the ranges of outcomes at the systemic level (from divergence to transformation). In this project, she focused on the ideologies of practicing lawyers as a "barometer" of systemic change.<sup>116</sup> Based on in-depth interviews with commercial lawyers in Toronto and Ottawa, she grouped lawyers into five categories, according to their levels of acceptance or resistance to mediation sessions, and how they conceptualized their roles and responsibilities within those sessions.

---

<sup>114</sup> *Supra*, note 32 at 667; Wissler, for example, suggests that more research is needed to examine how court-connected mediation might affect the use of discovery, settlement discussions, and pre-trial conferences in the usual course of litigation. She does indicate that a few studies show no impact on the numbers of motions filed, or amount of discovery.

<sup>115</sup> The Minnesota program is based on a different model. A practice rule was developed, requiring lawyers to consider ADR in every civil case, to discuss it with their client and opposing counsel, and to report to the court as to their conclusions, including informing the court of their selection of process, the third party, and timing.; B. McAdoo, *A Report to the Minnesota Supreme Court: The Impact of Rule 114 on Civil Litigation Practice in Minnesota* (Minnesota: Supreme Court Office of Continuing Education, 1997) Given that the effectiveness of the rule, and the use of ADR processes, turned largely on lawyer discretion, it was a logical step for her to examine lawyers' reasoning and attitudes.

<sup>116</sup> *Supra*, note 4.

The study showed how the culture of commercial litigation has adjusted, with lawyers making changes to their practices.<sup>117</sup> Examples include the way that lawyers manage files, perceive their relationship with clients, strategize for settlement, and view mediation in general. Many lawyers indicated that mandatory mediation had encouraged them to develop the case and prepare for settlement earlier, before the examinations for discovery stage.<sup>118</sup> The study showed lawyers letting go of old assumptions that they will “run the file”, with their commercial clients reasserting some control over the resolution of their dispute.<sup>119</sup> Although lawyers’ views about mediation obviously influenced the degree of change in their settlement behaviors and strategies, the study did show growth in their capacity to understand their clients’ interests (moving beyond legal positions to emotion, relationship, and reputation – the wide range of concerns that are not necessarily deemed relevant to an analysis of legal rights).<sup>120</sup> Over time, many had changed their views about the usefulness of mediation. The program contributed significantly to this evolution.<sup>121</sup> The author ultimately concluded “some lawyers *are* changing the ways in which they operate both functionally ... and conceptually.”<sup>122</sup>

A good example of the emerging interest in systemic civil process change is that research conducted by Roger Hartley, assessing a program in Mountain County,

---

<sup>117</sup> *Ibid.*

<sup>118</sup> *Ibid.*, at 290-291

<sup>119</sup> *Ibid.*, at 294-295; Some lawyers spoke of this as a philosophical shift, a recognition that clients can contribute in significant ways to the understanding and resolution of their dispute.

<sup>120</sup> *Ibid.*, at 298. The author also discusses the evidence of some changes in lawyers’ relationships with each other as a result of their interactions in the mediation program.

<sup>121</sup> Lawyers from one of the two centers studies did show a significant trend away from levels of resistance displayed in the mediation program’s earlier history. *Ibid.*, at. 300-301

<sup>122</sup> *Ibid.*, at 320.

Georgia. Hartley describes his research as an attempt to determine how the “web” of civil justice institutions (including the rules, norms and processes embedded within), and the behavior of “system actors” (lawyers and judges) have been affected by the insertion of mediation.<sup>123</sup> Hartley uses a theoretical framework that enables a focus on macro issues, designed to capture the impact of mediation processes upon the surrounding system, not just on individual cases or participants.<sup>124</sup>

Hartley’s research provides some of the traditional evidence of increased efficiencies in the system: decreased case processing time, increased settlement rates and decreased numbers of trials, some client costs savings, and increased client satisfaction.<sup>125</sup> He concludes that the degree of efficiency gains do not meet the original expectations in this area,<sup>126</sup> but that the program *did* alter the civil justice process, with changes in some of the norms and behaviors “that seemed to “free” court actors [lawyers and judges] in some way”.<sup>127</sup> Not only did mediation stimulate lawyers to begin work earlier on their files, but some lawyers reported improved communication with their colleagues. Judges began to think of process options more broadly. Clients began to ask for mediation, some electing to use it before the pleadings were filed. Some cases were being resolved outside the court system, and without the traditional intervention of lawyers. The study left questions about whether efficiency goals had been met but did, according to its author, prove “alterations in the behavior of court actors” and in “the

---

<sup>123</sup> R.E.Hartley, *Alternative Dispute Resolution in Civil Justice Systems* (New York: LFB Scholarly Publishing LLC, 2002), at x.

<sup>124</sup> *Ibid*, Chapter 2.

<sup>125</sup> *Ibid*, at 23

<sup>126</sup> *Ibid*, at 203; he describes original motivations at p.21.

<sup>127</sup> *Ibid*, at 194

culture of civil justice”.<sup>128</sup> This study raises the interesting prospect that efficiency goals and cultural or systemic change can be achieved exclusive of each other. To summarize, widening our evaluative lens requires us to consider the qualitative experience of the players involved (including but not limited to clients and lawyers). It is only through qualitative research tools, I argue, that evaluators will access this layer of information.

### **C. Qualitative Research Tools**

Recent studies have therefore shed some light on the relationship between court-connected mediation and the environment of civil justice. In Saskatchewan, it is particularly important to build on this foundation. If program planners stay focused on efficiencies, they will ultimately define their task in an equally narrow way: how to design, or improve, programs to maximize settlement at the earliest possible stage or with the lowest possible cost to litigants and to the system. Only a wider research lens will identify lessons learned from the integration of mediation, and how to weave those lessons into broader and more diverse improvements for civil justice. I will outline the differences between quantitative and qualitative methods, as offering very different perspectives on a situation. After examining some views on how to determine the suitability of a qualitative approach, I will argue that qualitative tools are key (alongside quantitative ones) to an assessment of mandatory mediation in Saskatchewan.<sup>129</sup>

---

<sup>128</sup> *Ibid*, at 197

<sup>129</sup> What is also needed is a shift from quantitative to qualitative research methods for gathering information. Rather than organize and count, what we arguably need is to enter into the “subjectivity of [people’s] experiences”; Camic, in Camic, P.M., J.E. Rhodes & L. Yardley, *Qualitative Research in*

Whole disciplines have evolved in the social sciences built on the challenge that, when it comes to empirical research, we only get the answers to the questions that we ask. The tools used by researchers can either constrain, or open up, their focus. The choice between quantitative and qualitative research design depends on the researcher's objective. A qualitative approach explores the subjectivity of the human experience, through the open generation of information instead of the testing of a previously established hypothesis. Qualitative research does not try to claim the distance, or objectivity, that traditional quantitative research does. Instead, it focuses directly on the interaction between researcher and participants, allowing the researcher to enter into the setting and participants' experience. In their explanation of the difference, Camic, Rhodes, and Yardley invite the reader to visualize the contrast between "the process of producing a map of a place" and "the process of producing a video of that place":

A map is extremely useful; it conveys with economy and precision the location of a place and its relationship to other places in terms of proximity and direction. However, *even the most detailed map is unable to convey an understanding of what it is like to be at that place.* In contrast, a video conveys in vivid detail the constantly changing perspective of the observer. Although this perspective is selective and could not easily be used for navigation, it is able to communicate something of the subjective experience of being there. [emphasis added] <sup>130</sup>

Some writers have attempted to generate a more concrete list of the differences between the two models. Usually, proponents of each method will tie their arguments to value-

---

*Psychology* (Washington: American Psychological Association, 2003) p.ix; to work toward an 'enlargement of human understanding'; E.W. Eisner, "Art and Science of Qualitative Research" in Camic, *ibid* at 26. At the same time, it is important to acknowledge that mediation programs are not the only ones striving to meet 'efficiency' standards; over the last three decades, social programs in North America have increasingly been viewed through an economic lens; Rossi, *supra*, note 37 at 15-19.

<sup>130</sup> Camic, *ibid* at 10.



based assumptions: Qualitative and quantitative researchers tend to define their own model by its strengths over the other.<sup>131</sup> Some see the difference as philosophical: Quantitative researchers value breadth of knowledge, and qualitative researchers favor depth; or quantitative researchers adhere to a scientific model, and qualitative researchers adopt a critical framework which connects peoples' perceptions to their social and political environments.<sup>132</sup> The Camic text, a recognized resource on accomplishing the shift to qualitative, suggests the distinction includes more than "whether to count or not to count". Instead, they suggest, "the true difference is what to count and measure and *what one discovers when doing so*" [emphasis added].<sup>133</sup>

---

<sup>131</sup> Favoring qualitative research, McBride and Schostak note the following differences:

1. quantitative researchers seek to know numbers or percentages of people, where the qualitative researcher pays much more attention to individual cases, and the human understandings featured in those cases – the "why";
2. qualitative research looks at the context in which people are being evaluated/studied – the impact of environment, an inclusion of the 'natural setting'; where quantitative research seeks the objectivity of a laboratory-based approach;
3. quantitative research tends to describe behaviour, where qualitative looks for the meaning behind it;
4. quantitative researchers tend to begin with an initial hypothesis, and sees his study as an exercise in testing and explaining that hypothesis. Qualitative researchers are concerned more with understanding the views or experiences of people – building theory from the ground of the experience of those being studied.
5. quantitative researchers see their challenge as overcoming the subjective – suppressing personal views or points of reference for the researcher; striving for detachment; qualitative researchers tend to draw attention to those very things; R. McBride & J. Schostak, "Qualitative Versus Quantitative Research" <http://www.uea.ac.uk/care/elu/Issues/Research/Res1Ch2.html>; accessed November, 2003

<sup>132</sup> L. Sharpe & J. Frechtling, "Part I: Introduction to Mixed Method Evaluations -- Introducing this Handbook" in J. Frechtling & L. Sharp (eds), *User-Friendly Handbook for Mixed Method Evaluations*; (Directorate for Education and Human Resources, Division of Research, Evaluation and Communication, National Science Foundation, United States, August 1997, a copy can be found at: <http://www.stanford.edu/~davidf/empowermentevaluation.html#mixed-method>

<sup>133</sup> P.M. Camic, J.E. Rhodes & L. Yardley, "Naming the Stars: Integrating Qualitative Methods Into Psychological Research" in Camic, *supra*, note 129 at 4

A qualitative approach is particularly useful for the assessment of “complex and dynamic” programs, especially where participants’ perceptions are key.<sup>134</sup> Qualitative methods may also be required for programs implemented incrementally, adapting over time to local conditions and needs.<sup>135</sup> Although the Saskatchewan mediation program lacks structural complexity, its interaction with the civil litigation system has been complex and dynamic - justification for an open-ended discovery-oriented method.

For the most part, quantitative and qualitative approaches are considered “complementary, and not competing” and, despite the benefits of qualitative research, program evaluators will still require some statistical information.<sup>136</sup> However, past allegiance to the quantitative paradigm has constrained the questions posed about programs such as Saskatchewan’s. Recent research trends, inside and outside

---

<sup>134</sup> J. Kalafat & R.J. Illback, “A Qualitative Evaluation of School-Based Family Resource and Youth Service Centers” (1998) 26(4) *American Journal of Community Psychology* 573 at 580; M.Q. Patton, *Qualitative Evaluation and Research Methods* (Newbury Park, CA: Sage, 1990).

<sup>135</sup> Kalafat and Illback, *ibid.*

<sup>136</sup> Kalafat and Illback, *ibid.*, at 578; Rossi, *supra*, note 37 at 151, describes the merging of approaches as the conventional response. Sharpe and Frechtling make the argument that evaluations should presumptively combine qualitative and quantitative methods – that “when investigating human behavior and attitudes, it is most fruitful to use a variety of data collection methods”, and that “by using different sources and methods at various points in the evaluation process, the evaluation team can build on the strength of each type of data collection and minimize the weaknesses of any single approach”, *supra*, note 132 at 6. They describe “triangulation” as one way of implementing a mixed method approach; *ibid.* See also V.C. Rabinowitz & S. Weseen “Power, Politics and The Qualitative/Quantitative Debates in Psychology” in (2001) D. L. Tolman and B. M. Miller (eds), *From Subjects to Subjectivities: A Handbook of Interpretive and Participatory Methods – Qualitative Studies in Psychology*. (New York, New York University Press, 2001); A. Tashakkori & C. Teddlie *Mixed Methodology: Combining Qualitative and Quantitative Approaches*, 2<sup>nd</sup> ed. (CA: Sage, 1998). For the opposite perspective, see J. Maracek “Dancing Through Minefields: Toward a Qualitative Stance in Psychology” in Camic, *supra*, note 125 at 49. J.E. McGrath & B.A. Johnson also argue that “all paradigms for obtaining empirical information about the behaviour of human systems pose serious epistemological and evidential problems – and that different paradigms pose different, though equally serious, problems” and they advance this warning in support of their argument that multiple methodologies are needed; “Methodology Makes Meaning: How Both Qualitative and Quantitative Paradigms Shape Evidence and Its Interpretation” in Camic, *supra*, note 129 at 32.

Saskatchewan, show a ripened opportunity to broaden the focus. In the next Chapter, I will explore the extent to which the Saskatchewan Evaluation reaches this potential.

## CHAPTER V

### SASKATCHEWAN EVALUATION: A NEW LAYER OF INFORMATION

Compared to the work that had yet been done in Canada<sup>137</sup> and in Saskatchewan<sup>138</sup> on the evaluation of court-connected mediation programs, the study completed in 2002-2003 was heavily qualitative. Compared to its Canadian predecessors, this study broadened its focus, so as to release new and more illuminating stories about the evolution and impact of mandatory mediation.

The Saskatchewan study confirms that lawyers have a powerful influence in the process, and on each other, their clients, the mediator, and the outcome. It supports the claim that mediation usually moves files forward in some significant way, and that clients engage with the process more comfortably than they do with litigation. The report shows mediation having slowly gained legitimacy in this province. And yet, I will argue, this study only reveals part of the story.

In this chapter, I will discuss the extent to which the study accomplishes a shift to qualitative, and will then summarize its results, identifying themes that emerged.

---

<sup>137</sup> See previous discussion at Chapter II.A.

<sup>138</sup> Initial Mediation Session Evaluation Report, *Supra*, note 15.

Finally, I will describe aspects of the mandatory mediation experience that require further consideration.

## **A. Saskatchewan Evaluation as Qualitative Work**

### **i) Focus Groups**

The Saskatchewan study's commitment to a qualitative approach is apparent from the first pages of the report. It begins with an articulation of the benefits of qualitative research, especially given the evaluation's mission of assessing "users' expectations and needs ... and the systemic "cultural" impact of this major innovation".<sup>139</sup> The commitment is reinforced by the use of focus groups as the primary data collection vehicle, a deviation from the standard reliance on surveys.

Within the qualitative discipline, focus groups are considered to be one of the best vehicles where the researcher's concern is for the *collective* social experience. In contrast to other qualitative tools (for example, interviews and observation), it has been said repeatedly that focus groups are an effective way to get underneath: "for exploring peoples' knowledge and experiences and ... to examine not only what people think but how they think and why they think that way."<sup>140</sup> Focus groups can ease the discussion

---

<sup>139</sup> Report, *supra*, note 1, at 8.

<sup>140</sup> J. Kitzinger, "Introducing Focus Groups" (1995) 311(7000) *British Medical Journal* 299(4) at 300; R. Kreuger, *Focus Groups: A Practical Guide for Applied Research* (London: Sage, 1988). Other references and examples include: F.D. Butterfoss, et al., "Use of Focus Group Data for Strategic Planning by a Community-Based Immunization Coalition" (1997) 20(3) *Family & Community Health* 49; L. M. Loriz, & P.H. Foster, "Focus Groups: Powerful Adjuncts for Program Evaluation" (2001) 36(3) *Nursing Forum* 31; J.A. Smith, D.L. Scammon & S.L. Beck, "Using Patient Focus Groups for New Patient Services" (1995) 21(1) *Joint Commission Journal on Quality Improvement* 22; K. E. H. Race, D. F. Hotch & T. Packer "Rehabilitation Program Evaluation: Use of Focus Groups to Empower Clients"

of a difficult topic: break the ice for participants, provide a 'safety in numbers' dynamic, and allow mutual support to arise in the group as participants express feelings that are common to others. Kitzinger, a leading author on the use of focus groups, describes this option as particularly sensitive to cultural variables.<sup>141</sup>

In the Saskatchewan evaluation, an initial round of focus groups was conducted in May, 2002, using open-ended questions and a focus group guide that was designed to invite discussion of a wide range of issues.<sup>142</sup> Using patterns that emerged from those groups, a further round of focus groups was conducted in the fall of 2003. The focus group guideline was refined to centre discussion on issues that had been raised consistently in the earlier round, yet to remain open-ended. A total of 115 persons participated in focus groups, including 73 lawyers and 37 clients.<sup>143</sup> Following this, a number of judges, lawyer and clients were interviewed, either in-person or by telephone.

The focus groups produced a rich set of information. Qualitative research is distinguished as much by the techniques that are used to analyze information as they are by the tools used to gather it.

---

(1994) 18(6) Evaluation Review 730; R. B. Straw & M. W. Smith "Potential Uses of Focus Groups in Federal Policy and Program Evaluation Studies" (1995) 5(4) Qualitative Health Research 421; T. Packer, K.E.H. Race & D. F. Hotch, "Focus Groups: A Tool for Consumer-Based Program Evaluation in Rehabilitation Agency Settings" (1994) 60(3) The Journal of Rehabilitation 30. Many of these same articles also explore the pitfalls of focus groups; see also D. L. Morgan "Why Things (Sometimes) Go Wrong in Focus Groups" (1995) 5(4) Qualitative Health Research 516.

<sup>141</sup> Kitzinger indicates that "focus groups are more suitable for examining how knowledge, and more importantly, ideas, develop and operate within a given cultural context"; *ibid*, at 312.

<sup>142</sup> Homogeneous focus groups were used (separating groups of lawyers, clients, and mediators); Kitzinger addresses the benefits of homogeneity; *ibid*. Focus groups are often seen as particularly appropriate for grounded theory analysis; K. Henwood & N. Pidgeon, "Grounded Theory in Psychological Research" in Camic, *supra*, note 129 at 141.

<sup>143</sup> Report, *supra*, note 1 at 12.

## ii) Analysis Techniques

The Report indicates that the focus group data was initially coded and organized with the use of the NUD\*IST<sup>144</sup> computer program.<sup>145</sup> Although the document does not contain any discussion about the theory behind this analytical tool, it is a central piece in the Report's methodology. NUD\*IST, along with related programs, operates with a central "code-and-retrieve" function.<sup>146</sup> Once codes<sup>147</sup> are identified by the researcher, the program attaches those codes to strips of data, and collects them in one location. It can handle complex multi- and cross-coding functions. It indexes components of documents and can search for words and phrases. Proponents claim that the program supports the development of theory by enabling and organizing the retrieval of indexed segments. The process in which the computer engages is not unlike what the researcher would do manually, following a grounded theory strategy. In fact, programs such as NUD\*IST are originally based on a grounded theory approach.<sup>148</sup>

"Grounded theory" is a process that involves similar, but more extended, stages: coding and comparing data, searching for conceptual similarities and differences, articulating emerging concepts and their links to existing theory, coding in a more focused way,

---

<sup>144</sup> NUD\*IST stands for Non-numerical, Unstructured, Data: Indexing, Searching and Theorising; Buston article below; K. Buston, "NUD\*IST in Action: Its Use and Its Usefulness in a Study of Chronic Illness in Young People" (1997) 2(3) Sociological Research Online <http://www.socresonline.org.uk/socresonline/2/3/6.html>, at 3.

<sup>145</sup> Report, *supra*, note 1.

<sup>146</sup> Buston, *supra*, note 144.

<sup>147</sup> Labels, topics or issues.

<sup>148</sup> A. Coffey, B. Holbrook & P. Atkinson, "Qualitative Data Analysis: Technologies and Representations" (1996) 1(1) Sociological Research Online <http://www.socresonline.org.uk/socresonline/1/1/4.html>

continuing to compare and apply theoretical possibilities until theoretical saturation<sup>149</sup> is achieved, and moving on to regroup or reclassify categories to build conceptual models and, ultimately, theory.<sup>150</sup> Although the stages are discrete, their implementation is not. The process involves a “flip-flop” between data and conceptualization – a returning to earlier stages and a gradual moving forward. The process of theory building is essentially one of *emergence*, and is not linear.<sup>151</sup>

Since the 1980s, grounded theory has dominated qualitative research, often described as “the method of qualitative inquiry”.<sup>152</sup> The theory gained popularity as awareness grew of the need to explain and regulate how the qualitative researcher is engaged in the “creative and interpretive” process of analyzing data and generating theory.<sup>153</sup> The target, “activities and interactions involved in the interpretive and symbolic production of meaningful social and cultural worlds”, was often complex.<sup>154</sup> The potential for common ground in the use of the grounded theory method became obvious to sociologists and social psychologists, and the theory has since been generalized for use in multi-disciplines.<sup>155</sup>

---

<sup>149</sup> No new relevant insights are being reached.

<sup>150</sup> Henwood & Pidgeon, *supra*, note 142 at 136; Another good description of the grounded theory method and its application is contained in N.R. Pandit, “The Creation of Theory: A Recent Application of the Grounded Theory Method” 2(4) *The Qualitative Report*, December, 1996 <http://www.nova.edu/ssss/OR/OR2-4/pandit.html>

<sup>151</sup> Henwood, *ibid*, at 137

<sup>152</sup> *Ibid*, at 131.

<sup>153</sup> *Ibid*, at 134-135.

<sup>154</sup> *Ibid*, at 133. It is in fact this multi-disciplinary character, the mobility of this method, that is particularly attractive for the present analysis.

<sup>155</sup> The founding theorists are usually identified as B.G. Glaser & A.L. Strauss (1967) *The Discovery of Grounded Theory: Strategies for Qualitative Research* (New York: Aldine, 1967).



The grounded theory method is not without limitations, and the use of computer programs in particular has attracted significant concern. Critics often point out that the relationship of grounded theory to computer programs such as NUD\*IST is overemphasized. Such programs are built on the approach, but are relegated to the task of organizing the data, while the application of theory must come from the researcher herself.<sup>156</sup> Coffey warns that grounded theory involves much more than the actions produced by these programs: "Analytical procedures which appear rooted in standardized, often mechanistic procedures are no substitute for genuinely 'grounded' engagement with the data throughout the whole of the research process."<sup>157</sup> Coffey concludes that good research requires a match between purpose and method, and access to a plurality of approaches.

How was NUD\*IST used in the Saskatchewan Evaluation? The Report indicates that existing literature was used to frame a general list of issues to be explored.<sup>158</sup> Second, the data was reviewed to determine themes, and a set of open codes was developed for use in the coding process.<sup>159</sup> Data was sifted (using NUD\*IST), organized and cross-referenced, using those codes.<sup>160</sup> That data base was then analyzed again, so that

---

<sup>156</sup> K. MacMillan & S. McLachlan criticize the 'theory-building' claims made in relations to software such as NUD\*IST: "Theory-Building with NudIst: Using Computer Assisted Qualitative Analysis in a Media Case Study" (1999) 4(2) Sociological Research Online [http://www.socresonline.org.uk/socresonline/4/2/macmillan\\_mclachlan.html](http://www.socresonline.org.uk/socresonline/4/2/macmillan_mclachlan.html). Buston, *supra*, note 144 contains a detailed description of how the software works and its benefits when put to limited application. See also the discussion in : Burgess, R.G. (ed) *Computing and Qualitative Research: Studies in Qualitative Methodology* 5 (Greenwich CT: JAI Press, 1995).

<sup>157</sup> Coffey, *supra*, note 148 at 8.

<sup>158</sup> Report Appendices, *supra*, note 1. This is generally seen to be an appropriate starting point for a grounded theory approach (Henwood, *supra*, note 138 at 138), but debate does continue on the issue of how data is originally gathered: see the reference to Glaser, *Basics of Grounded Theory Analysis: Emergence vs. Forcing*, referred to at: <http://www.groundedtheory.org/soc6.html>

<sup>159</sup> Report, *ibid*, at 11

<sup>160</sup> Report, *ibid*, at 10

summaries of experiences could be extracted and important core categories identified. Conceptual and theoretical analysis, the linking of concepts and theories to the data, occurred throughout.

The evaluation data, organized through the use of NUD\*IST, contained enough detail and clear themes to support the analysis and the conclusions reflected in the Report. In this form, however, it did not offer enough detail for the second part of my analysis, summarized in Chapters VI and VII. I returned to the raw focus group and interview notes, and used a grounded theory method to conduct this part of the research – a task which was facilitated by my involvement as an interviewer in the original project.

## **B. A Review of the Report's Findings**

### **i) Qualitative Data**

The Report begins with a description of the positive dimensions of the mandatory mediation experience. Lawyers and clients affirmed the value of meeting face-to-face. Lawyers' examples include the chance to evaluate clients on both sides, to defuse emotions, or offer an apology. Clients spoke of being able to humanize the dispute: to see the other party as a person, and have each tell their perspective directly to the other; to defuse emotions; and to exchange information. In a small number of situations, mediation provided an opportunity for an organizational litigant to change the way it does business in the future. A few clients and some lawyers saw mediation as uniquely

allowing clients a direct role in the process of problem-solving. Some lawyers saw mediation as moving the case forward regardless of whether it settled. Finally, comments reinforced that the potential for success in mediation is difficult to predict, and continues to surprise some lawyers.

Concerns and criticisms about mandatory mediation attract more attention in the report, a characteristic of focus group processes. Acknowledging the widespread acceptance of the Saskatchewan program, the study goes on to categorize the following areas of concern:

a. Timing of Mediation in the Litigation Process:

Mandatory mediation sessions are currently held at the close of pleadings, before the official exchange of documents and examinations for discovery. There was no general sense that the sessions were too early. Yet, lawyers predominantly held the view that there ought to be more flexibility in timing. Where appropriate, many lawyers would like the opportunity to push mediation back to a point after discoveries.

b. Mandatory Nature of Mediation:

Mandatory mediation in Saskatchewan operates as an opt-out program. In order to be released from the statutory requirement to attend, a litigant needs the approval of the Director of the Dispute Resolution Office or an order from the court. There was

allowing clients a direct role in the process of problem-solving. Some lawyers saw mediation as moving the case forward regardless of whether it settled. Finally, comments reinforced that the potential for success in mediation is difficult to predict, and continues to surprise some lawyers.

Concerns and criticisms about mandatory mediation attract more attention in the report, a characteristic of focus group processes. Acknowledging the widespread acceptance of the Saskatchewan program, the study goes on to categorize the following areas of concern:

a. Timing of Mediation in the Litigation Process:

Mandatory mediation sessions are currently held at the close of pleadings, before the official exchange of documents and examinations for discovery. There was no general sense that the sessions were too early. Yet, lawyers predominantly held the view that there ought to be more flexibility in timing. Where appropriate, many lawyers would like the opportunity to push mediation back to a point after discoveries.

b. Mandatory Nature of Mediation:

Mandatory mediation in Saskatchewan operates as an opt-out program. In order to be released from the statutory requirement to attend, a litigant needs the approval of the Director of the Dispute Resolution Office or an order from the court. There was

general support for the mandatory nature of the program.<sup>161</sup> Yet, lawyers commonly endorsed the view that more flexibility was required here as well: more access to exemptions where appropriate.<sup>162</sup>

c. Mediator's Role:

Lawyers and clients had many positive comments to make about the mediators in the program, who are generally well-respected. Both lawyers and clients, however, had a clear preference for mediators to "take a more proactive role in working for settlement in the session". Mediators' current 'hands-off' approach to drafting settlement documents produced frustration for some of the clients, who complained of things falling apart after the session.<sup>163</sup> In cases where settlement is not possible at the mediation stage, many lawyers would have preferred that mediators assist with litigation-management: planning the exchange of information and subsequent procedural steps.

d. Lawyer's Role:

Many clients were satisfied with the role played by their lawyer. However, there was also a significant amount of negativity expressed by some clients and some lawyers about the failure to prepare clients, failure to prepare the file, a pessimistic outlook on mediation, and the tendency to muzzle clients. Many lawyers saw these

---

<sup>161</sup> With a small number of lawyers holding the opposite view: that the program should be opt-in, leaving the full discretion with the lawyer to determine if mediation would be effective and appropriate.

<sup>162</sup> Some examples included: medical malpractice, cases involving out-of-province litigants, frivolous claims/defences, cases involving institutional clients who never settle as a matter of policy, and cases involving vulnerable plaintiffs where the defendant is not likely to consider settling.

<sup>163</sup> *Supra*, note 1 at 25. Some lawyers had suggestions for achieving closure and documenting agreements.

issues as being tied to the presence or absence of good faith on the part of other lawyers. Lawyers and clients alike seemed to agree that a lawyer's attitude toward mediation would largely determine the success of the session.<sup>164</sup> Most lawyers identified a cultural change within the Bar – in the rising degree of openness and receptivity to mediation, and some described their own conversions.<sup>165</sup> There was also widespread agreement that legal education in Saskatchewan has made significant strides ensuring that graduates understand interest-based negotiation and mediation, and that more remains to be done.

e. Procedural Housekeeping:

The Report went on to identify some particular smaller areas of concern about the process. Some lawyers wanted more flexibility to use conference calls, and yet others disagreed, suggesting that the loss of the human face would inhibit the process.<sup>166</sup> Some lawyers and clients would favour more follow up and repeated sessions. Most clients did not receive the background literature for mediation that is prepared by Saskatchewan Justice (and sent to the lawyers to distribute to their clients).

**ii) Quantitative Data**

While the report values qualitative information primarily and builds much of the analysis around this, it also collects quantitative data often considered essential in this

---

<sup>164</sup> *Supra*, note 1 at 27.

<sup>165</sup> *Ibid*, at 30.

<sup>166</sup> *Supra*, note 1 at 29.

type of evaluation process. Program administrators still wished to verify that the program was performing acceptably against an efficiency standard. I have summarized four areas of quantitative data below:

a. Settlement Rates:

Using categories and records maintained by mediators (1999-2002), 13-16% of cases settled inside the mediation session<sup>167</sup>, and another 13-19% were rated as “agreement likely”. When compared with other data gathered in Canada and in the United States, these settlement rates are described as “in the ballpark”.<sup>168</sup>

An audit conducted during the study shows that while the “agreement reached” category records were fairly reliable, the “agreement likely” labels were only accurate half of the time - pointing to the need for modification in the way that information is gathered internally, and the need for future research.

b. Shortening the Time to Resolution:

Court records were consulted to determine the percentage of files which had been discontinued or otherwise showed no evidence of court activity within the six to eighteen month period following the mediation session. The implication is that, at this early stage in the litigation, a lack of activity suggests a likely resolution of the file. The data did suggest that a high number of cases that had been mediated showed “no further activity”, with the report cautioning readers

---

<sup>167</sup> Organized by judicial center, year, and category of outcome

<sup>168</sup> *Supra*, note 1 at 37.

not to read too much into this result.<sup>169</sup> Mediated files were possibly getting to the pre-trial conference stage more quickly than non-mediated files, suggesting that mediation may reduce the time to settlement even where it does not produce settlement at the session itself.<sup>170</sup> This conclusion is also supported by other research in the field.

c. Links With Type of Case:

No reliable links could be made between outcome and case type, except for the “moderately suggestive” pattern that contracts cases settle at higher rates than wrongful dismissal or personal injury.<sup>171</sup> There is no statistically supportable evidence confirming the suspicion of many lawyers that medical malpractice cases are not suitable for mediation. Simplified Rules cases (involving claims under \$50,000) *may* be settling at higher rates.<sup>172</sup>

d. Exemptions:

Most exemptions (ranging from 3.4% to 12.4% of overall cases) are granted by the Department itself rather than the court (.4% - 2.4% of overall cases).<sup>173</sup>

Regina cases are exempted slightly more often than Saskatoon cases, which is attributed to the location of the central administration of the program in Regina, a fact that might affect accessibility.<sup>174</sup>

---

<sup>169</sup> Notices of Discontinuance are not considered a reliable indicator for whether the file has been resolved, nor is the absence of court activity.

<sup>170</sup> *Supra*, note 1 at 50.

<sup>171</sup> *Ibid.*, at 46.

<sup>172</sup> *Ibid.*, at 47.

<sup>173</sup> *Ibid.*, at 52.

<sup>174</sup> *Ibid.*



The above qualitative and quantitative conclusions identify what is working and what is not working with the program. They offer insights into the impact of mandatory mediation, and describe potential that has yet to be actualized. The Report concludes with concrete suggestions for change, with the primary ones being:

- Mandatory exchange of a statement as to documents in advance of the mediation session;
- A formal system of adjournments for mediation, along with a specific list of criteria;
- Mediator training that emphasizes a proactive approach and possible roles for the mediator in drafting agreements;
- More choice for program users in the assignment of a mediator and access to longer and 'enhanced' mediation services;
- Expansion of legal education for lawyers.

The Saskatchewan Evaluation contains a solid review of Saskatchewan's experience with the program: its strengths and weaknesses, and adjustments that can be made. But does it indicate whether systemic and cultural transformation have occurred? In the discussion to follow, I will argue that the Report does not answer these questions and that more investigation is required.

### C. Unanswered Questions

A growing consensus about the benefits of early mediation seems a coup for program designers and administrators. Lawyers originally resisted mandatory mediation on the grounds that it was simply 'too early',<sup>175</sup> and their relative abandonment of this position at the point of this evaluation was a surprise to researchers.<sup>176</sup> On the whole, lawyers are no longer pushing for mediation to be fixed at a later point in litigation. On its most optimistic interpretation, this could mean that lawyers are embracing the alternative goals of mediation. On the other hand, lawyers do continue to articulate a strong preference for more flexibility in the timing of sessions – that the discretion over timing be delegated to lawyers themselves. The preference for an after-discoveries process may, in fact, be continuing to feed their opinions. Some might see the option to delay a session as a piece of a larger litigation strategy.<sup>177</sup>

Since the program's introduction, there has been a strong suspicion among lawyers that certain categories of claims were simply not suited to mediation, and that there ought to be a list of automatic exemptions. As with the matter of timing, lawyers are now simply asking for more flexibility. Here again, the concerns or goals behind these requests are not evident. Does the call for flexibility mean that lawyers are gaining enough comfort with mediation to feel that they can authentically judge when its benefits might come to

---

<sup>175</sup> Keet & Salamone, *supra*, note 7; Report, *supra*, note 1.

<sup>176</sup> Report, *supra*, note 1 at 17.

<sup>177</sup> The study did not fully canvass why many lawyers prefer to delay sessions. It does conclude that a significant number of lawyers now feel it is appropriate to go to mediation as early as possible, although they had been originally skeptical of it; *ibid* at 18.

fruition, that they are finding their place within new approaches to conflict? Or does it mean that lawyers are still holding onto internal resistances to mediation, concluding that it will help only when limited conditions exist? While there may have been a softening of positions on the question of timing and exemptions, it is quite possible that old paradigms continue to encase lawyers' views.

A new piece of information that emerged from this study was the comfort that lawyers display with a facilitative, non-evaluative model of mediation. In Saskatchewan, lawyers used to pre-trial conferences might be expected to prefer the rights-based character of an evaluative approach, expecting the mediator to measure the strength of each side and to manipulate the process accordingly. In fact, Saskatchewan lawyers expressed a clear preference for the separation of these functions in the litigation process.<sup>178</sup> Most said that evaluation was appropriate for a pre-trial judge, but not for a mediator at the post-pleadings stage. This might suggest significant movement forward in the profession's acceptance of the unique role of interest-based processes. But does it?

The strong preference among lawyers and clients for mediator proactivity is more troubling. A significant number of lawyers and clients expressed a desire for mediators to: stand up to counsel, hold counsel to account in the exchange of information, not let counsel dictate the tone of the meeting, require counsel to justify their positions, work harder to keep the parties at the table, and push for follow-up sessions where agreement

---

<sup>178</sup> This was not a unanimous view; *supra*, note 1 at 22.

is not forthcoming.<sup>179</sup> This again suggests a victory for the program – an openness to the potential of mediation and a quest to remove barriers to success. Beneath the surface, however, these requests all relate to one factor: the attitudes and behaviors of lawyers themselves.

For those interested in transformative change, the results of the study are encouraging. Several lawyers described a “systemic change” in their own practices over time, linked with a “huge change” in the attitudes of lawyers toward mediation.<sup>180</sup> A decade’s experience with mandatory mediation has unquestionably produced significant change. However, negative experiences and old patterns are still entrenched. What degree of change has in fact occurred? Has the program’s full potential been realized? Is that original goal of systemic transformation within reach? Using the Camic analogy,<sup>181</sup> the study reveals that there has been movement from Point A to Point B on the map, but does not reveal what the view is like for lawyers sitting at either point. In the next chapter, I will return to the original evaluation data, searching for more information to help illuminate the answers to these questions.

---

<sup>179</sup> *Ibid* at 23.

<sup>180</sup> *Ibid* at 30.

<sup>181</sup> See footnote 130 and accompanying text.

## **CHAPTER VI**

### **BACK TO THE DATA: GOING DEEPER**

The study fulfilled its mandate: an overall assessment of the program. Questions posed were necessarily broad. The focus on systemic and cultural shift that propels my own inquiry is not one that was intended to be answered in the evaluation. Yet, I will show in this chapter that the original study data has the potential to reveal more, a deeper layer of the experience of lawyers and clients. I will begin by describing the circular methods employed in a grounded theory analysis, and will revisit the data to investigate additional layers of information.

#### **A. Methodological Theory: Multiple Rounds**

One of the distinguishing characteristics between quantitative and qualitative analysis is temporal. Quantitative evaluation is divided into discrete stages. The researcher develops methodology and instruments, collects the data, processes it, and then analyzes it. Qualitative research, on the other hand, involves overlapping functions, often utilizing “a loop-like pattern of multiple rounds of revisiting the data as additional questions emerge, new connections are unearthed, and more complex formulations

develop along with a deepening understanding of the material”.<sup>182</sup> Using this approach, a grounded theory analyst may want to circle back to the data two or three (or more) times in his search for theory.<sup>183</sup>

If the Saskatchewan evaluation data is to produce deeper insights, it will need to be reviewed with a different approach than that used in the preparation of the Report. The study was based partly on the computer [NUD\*IST] analysis of focus group records. Recent literature questions the analytical techniques for dealing with this type of data.<sup>184</sup> Cattaral and Maclaren divide analytical techniques for focus groups into two strategies: cut-and-paste (where excerpts dealing with similar themes are all gathered under different headings) and annotating-the-scripts (where the researcher reads the transcripts, writing interpretive thoughts in the margins). The methods differ in how they treat the transcript – as a whole, or as a set of discrete responses.<sup>185</sup>

The method used in the production of the Evaluation Report has its limitations. The “cut-and-paste” method that computer programs employ tends to ignore developing research on small group dynamics.<sup>186</sup> Programs such as NUD\*IST and other companions implement a cut-and-paste approach. Whether done electronically or manually, this approach will mean a loss of process dimensions of the data, resulting in

---

<sup>182</sup> S. Berkowitz, “Chapter 4: Analyzing Qualitative Data” in Frechtling and Sharp, *supra*, note 128 at 1.

<sup>183</sup> Each time, the analyst is thinking critically, as theory emerges – in a way that, they describe, “stimulates theoretical sensitivity and creativity”; Henwood, *supra*, note 142 at 151.

<sup>184</sup> M. Catterall & P. Maclaran “Focus Group Data and Qualitative Analysis Programs: Coding the Moving Picture as Well as the Snapshots” (1997) 2(1) Sociological Research Online <http://www.socresonline.org.uk/socresonline/2/1/6.html>.

<sup>185</sup> *Ibid*, at 3.

<sup>186</sup> Social scientists using focus groups have long acknowledged that group dynamics have an impact (both negative and positive), but have made few adjustments to analytical techniques; Buston, *supra*, note 144.

a “snapshot” result rather than one that captures “the whole moving picture of the unfolding script or story”.<sup>187</sup> Several events in the “unfolding story” are apt to be missed: the sequence of group talk that might explain what is said at different stages in the discussion (forming, storming, norming, performing, and mourning); that some participants contradict themselves as the discussion progresses, or change their views; or that they may give experiences a different interpretation or context later on.<sup>188</sup> Other dimensions that may be missed include the extent to which beliefs and language are shared, ideas or points that cause people to reinterpret their experiences or opinions, and the tone and degree of introspection or emotional engagement.<sup>189</sup> Some scientists argue that computer assisted analysis risks blurring the lines between qualitative and quantitative characteristics.<sup>190</sup>

The Saskatchewan study concentrated on aggregate responses to particular issues, and aggregate descriptions of peoples’ experiences. A computer-assisted cut-and-paste method was entirely suited to this goal. Confronting the questions of cultural change and systemic transformation, however, means looking at the data through a different lens. Rather than re-examining blocks of coded information, I have chosen to review the original records of focus group discussions. A whole reading of the documents will divulge more textured stories – an analysis that takes into account the images, contradictions, and focal points of each client and lawyer’s story.

---

<sup>187</sup> *Ibid*, at 6.

<sup>188</sup> *Ibid*, at 6.

<sup>189</sup> *Ibid* at 6.

<sup>190</sup> *Ibid*.

## B. Circling Back to the Data

Qualitative researchers are encouraged to consider “what interesting stories emerge” from the data, and “how can these stories help to illuminate the broader study question(s)?”<sup>191</sup> Once each story was reassembled,<sup>192</sup> several plots emerged:

### a. Clients

Clients’ stories did include contradictions and wanderings. Overall, however, the following distinctions began to emerge in their accounts. Some clients focused on the benefits of mediation, their comments appreciation for the positive influence that the process had or could have. Other accounts carried a tone of disappointment: a description of the experience as negative, or the failure of something to occur which the speaker identified as important. Some clients attached the failure of the process to the role played by certain individuals. For example, lawyers acted in a way that inhibited the process, or failed to contribute where they might have, or the mediator had not

---

<sup>191</sup> Frechtling & Sharp, *supra*, note 132, Chapter 4 at 2.

<sup>192</sup> All of the focus group and interview data were re-read, first to establish the direction of the discussion, and the facilitator’s notes about dynamics and degree of consensus or disagreement (if any). The data was then reassembled, manually, and a new data file created for each participant’s story: the essential points made by each participant were extracted and put together in a short (usually one paragraph) ‘story’. Since the facilitators’ notes contained a significant amount of paraphrasing and summarizing, this step involved condensing and distilling the statements one more time. Each story was labeled (eg. Client 1, or Lawyer 1).

The key information that story-paragraphs included were words or phrases that captured the participant’s basic perceptions of the process: what the experience was like (what it achieved and did not achieve), who they felt was responsible for the experience being that way. Comments that focused on particular recommendations (solutions) were not included, unless they were linked to an experience or disappointment of some kind.

The newly created data files were reviewed again, with different themes highlighted and organized as above. Note that many qualitative theorists advocate against the use of numbers or percentages in communicating the data. I share that general perspective, but have chosen to use numerical values in order to relay the relative weight attached to each story.



fulfilled the role expected of him. Some clients simply spoke of these failures as a lack of good faith in the process, or a lack of openness either before or during the session. Another group attached their disappointments to something structural, rather than to the failures of particular individuals.

Clients' stories can be grouped into four themes: stories of success, or unrealized potential; stories that were neutral or negative.

**a. The Success Story**

The success story contained primarily positive elements, describing mediation as a wholly positive experience with a potential that was fully realized for the client. For example:

Client #5 described mediation as a very positive experience, that opened up the discussion to issues that would not have been allowed into a legal process. Both sides were able to give their stories honestly without fear of repercussions. The client said that "it helped me to offload where I couldn't before" and "I felt I had something to say and to contribute to the process". The client felt prepared by his/her lawyer, and had gone into the mediation expecting to get a better understanding of the issues and perspectives. Although no settlement was reached in the session, he/she felt that the objectives were met. Settlement occurred two or three months later.

Client #40 is an institutional client who sees mediation as being useful most of the time. He/she describes it as an opportunity to meet with the other party, "to learn first hand what happened and how it affected them", and to "make our [the corporation's] philosophies and policies known", to present a caring side. This client clearly assumes a more

central role in the process, saying “Fine, have my lawyer rein me in if I get going too much, but it really should be between the parties and not their lawyers”. He/she also describes the program as having changed the way he/she approaches conflict, and having made the organization more comfortable with alternative approaches in general.

Only a small minority of clients told stories of success (9%).

**b. The Unrealized Potential Story**

The most common story focused on the process’s unrealized potential, with a refrain that sounded like “mediation helped or could have helped, BUT ...”. The vast majority (69%) of clients described positive elements of the process (that either occurred for them, or that they would anticipate occurring in other cases) but ultimately felt the process’s potential had not been realized in their case.<sup>193</sup> Of those, the majority (74%) went on to attribute the failure of the process at least in part to the action or inaction of either lawyer: lawyers behaved as if it were still about winning and losing; the presence of lawyers escalated the conflict; the client felt (or was told specifically) that the process was for lawyers and not the disputants themselves; one or both lawyers clamped down on the process or on their clients.

Additional problems or concerns described by clients fell into the other categories described above. Not enough effort or good faith was invested in the process. There was not enough follow up, nor enough openness between both sides. The mediator was not proactive enough. Most of the stories where clients attributed disappointment to the action or inaction of the lawyers also contained reference to one or more of these other problems. The minority (26%) attributed the process’ failure to one of these things *without* also complaining of the

---

<sup>193</sup> The level of criticism in a focus group may be higher than would be conveyed through individual interviews; Kitzinger, *supra*, note 140 at 2.

lawyer's role. Only two clients who said that they wished the mediator had been more proactive did not go on to also articulate frustration with the lawyers.

**c. The Neutral Story**

In a small number of cases (7%), the client conveyed a neutral story. She focused neither on the positive nor negative value of the process, and simply described her experience in neutral terms.<sup>194</sup>

**d. The Negative Story**

A small number (16%) of clients described their experience in mediation as predominantly negative and did not appear to view the process as offering any benefits.

**ii) Lawyers**

Lawyers' stories differed slightly from those of the clients. Most contained positive comments, referring to the benefits of mediation, generally or in specific cases.

Negative comments, reflecting problems encountered in sessions or with the program, also appeared in most narratives. Yet, it is here that their stories diverged. Some

lawyers attributed failures to the behavior of (usually other) lawyers – an explanation which can be seen as “internal” to lawyers and the lawyering process. Others defined

the problems by reference to structural deficiencies, which they conceived as the failure

---

<sup>194</sup> Since the data took the form of facilitators' notes, there were some gaps. A few clients did not speak at length in the focus group discussions, and the “neutrality” of their statements might have been a result of the absence of detail.

of something “external” to the lawyers: general concerns about the perceived lack of flexibility, early timing, or absence of mediator proactivity.

Lawyers’ stories cannot as easily be organized into “successes” and “failures”. The vast majority of lawyers saw the process as working partially, in most cases, or as having some potential (somewhere along this continuum). Only 13% of the lawyers did not begin their story or end it with some acknowledgement of the unique benefits of the process. Where stories polarized turned on where lawyers laid the blame for the program’s deficits. The absence of wholly positive views of mediation can be explained by lawyers’ repeated use of the program. It is unlikely for them to experience only continual success with the mediation process. As advocates and mature users of the program, lawyers, no matter what their story, will move on more quickly to identify what might be getting in the way.<sup>195</sup> Lawyers generally agree with the “unrealized potential” view that clients convey. What emerges, however, is a clear break in the consciousness about where the responsibility for this lies, with the data revealing the following three categories:

**a. The Internal Responsibility Story**

Roughly half of lawyers openly attributed at least some degree of responsibility for the failure of the process’s potential to lawyers themselves: their confining attitudes, their lack of preparation, and their discomfort with the free exchange of information - all, I would argue, cultural variables.

---

<sup>195</sup> It is possible that the stories described above have some alignment with the five ‘ideal types’ identified by J. Macfarlane (Pragmatist, True Believer, Instrumentalist, Dismissor, Oppositionist); *supra*, note 4. No direct correlations can be made, however, because the themes that emerged in this study were less a factor of individual philosophies and more a description of the nature of that person’s experiences with mandatory mediation.

**b. The External Responsibility Story**

The other half defined the barriers as wholly external or structural. They viewed these factors as falling outside of lawyers' control, as functions of faulty system design, such as timing. Some simply diverted responsibility to the mediators (not being proactive enough), or to the Department of Justice itself (being too paternalistic and inflexible).

**c. The Completely Negative Story**

A few lawyers who fell outside of the above two categories viewed mediation as inappropriate and unsuccessful generally. One example is the lawyer who, banging his fist against the table, said "God damn it, we don't want to settle". This lawyer went on to describe the mediation program as paternalistic, one that assumes lawyers are either mercenaries or are incompetent, and the process as hampered by the lack of information exchange leading up to it. When asked why more of this has not occurred before mediation, this lawyer responded, "we have other things to do; it's not a priority for us or our clients".<sup>196</sup> Only a very small proportion (13%) of lawyers fell into this category.

The extent to which lawyers either accepted or deflected responsibility also corresponded with their views on whether there had been a shift in attitudes about mediation.<sup>197</sup> Lawyers who attributed the problems with mediation to external sources were also less likely to acknowledge this shift.<sup>198</sup> The only lawyers to deny that there had been a cultural shift at all, either personally or within the legal community, also fell into this category.<sup>199</sup> In contrast, the majority of lawyers who accepted internal

---

<sup>196</sup> Lawyer 45.

<sup>197</sup> Roughly 40% of all lawyers indicated that they had experienced a shift in their own attitudes and/or had noticed a shift in the attitudes of the profession about mediation.

<sup>198</sup> Only 24%.

<sup>199</sup> Two lawyers.

responsibility also went on to describe a cultural shift.<sup>200</sup> What has emerged from this data is a picture of two very different levels of consciousness among lawyers: one group that is engaged with the changing roles and responsibilities of lawyers, and another that completely resists this type of change.

One of the Department's own benchmarks for change was the participation of clients in the process. Mediation was integrated in an effort to make civil process more client-centered. Many lawyers did indeed speak of the client-focused benefits of the process: returning control and speaking time to the clients; focusing on clients' unique needs; and providing information directly to them in response to those needs. A large number of lawyers spoke of the client-focused characteristics of mediation, attributing some degree of value to them.<sup>201</sup> The vast majority of lawyers who spoke about client interests also identified the responsibility for mediation's success, at least in part, as falling upon lawyers themselves. Very few of those lawyers fell into the category who were inclined to deflect responsibility to external factors.<sup>202</sup> If they did not see the legal community as contributing to mediation's failures, they were also much less likely to include client-centeredness in their approach. These lawyers were instead more apt to use lawyer-centered language, or to speak about legalities, timing and the peculiarities of the litigation process.<sup>203</sup>

---

<sup>200</sup> 57%

<sup>201</sup> 37%

<sup>202</sup> 15%

<sup>203</sup> Examples include comments that the litigation process better supports settlement discussion after examinations for discovery, or that there should be more case management.

The focus group discussion guideline invited lawyers to comment on whether there had been a shift in attitudes since the program's introduction, and in this sense, to reflect back over the program's history.<sup>204</sup> Many lawyers, however, went beyond reflections about attitudinal shift, and focused on the political history of the program's introduction. Almost one-quarter of lawyers spoke about this particular history at some point in telling their story, attempting, perhaps, to explain or rationalize the high levels of early resistance to the program.<sup>205</sup> The point came up in several focus groups that the government's choice to proceed with no-fault insurance legislation,<sup>206</sup> alongside mandatory mediation, left lawyers feeling under siege. Some commented that they viewed the Department of Justice, Mediation Services Branch as engaged in "turf protection", simply not trusting lawyers to use their discretion to advise clients.<sup>207</sup> Some noted that there had been little opportunity for lawyers to have input into the development of the mediation program and little explanation as to why it was being introduced.<sup>208</sup> This focus on the program's troubled beginnings, at a point ten years later when most lawyers support it, was an unexpected outcome.

In summary, the stories of clients and lawyers show a shared perspective about the program: a caution that "we are not there yet", but a continued trust in its potential. Clients are more apt to link the blame for the process's unrealized potential to the role played by lawyers. Two types of consciousness have emerged for lawyers, each with

---

<sup>204</sup> Report, Appendix B, *supra*, note 1.

<sup>205</sup> 24% ; Included in this figure are lawyers who noted the hostility or frustration over the legislation's introduction, or negative comments about the Department of Justice, and not lawyers who simply described the cultural shift from skepticism to acceptance of the program.

<sup>206</sup> Removing the right to sue in motor vehicle accident cases in most instances.

<sup>207</sup> Lawyer 28

<sup>208</sup> Lawyer 29

equal support.<sup>209</sup> The first group of lawyers is apt to agree with their clients: the client-centered lawyer, who accepts some degree of internal responsibility for the process, and attributes significance to a shift in lawyers' attitudes. This group accepts that as lawyers have become more open to the process, so the program gains potential for success. The second group of lawyers is much more lawyer-centered, attributing continued failure to other dimensions of the process, and less likely to be conscious of any cultural shift amongst lawyers or to concede the program's impact on clients or the profession.

The fact that fully one-half of lawyers fell into the first of these two categories can be claimed as a sign of the program's success. This degree of shift should not be underrated. It does show significant – and, arguably, sustainable – progress in the direction originally envisioned by program designers. The remaining challenge is presented by the second group.

What accounts for the resistance displayed in this group? The two groups of lawyers shared a need to identify concerns about the program and the process, and a need to speak about past grievances. They differed in the extent to which they acknowledged a cultural shift in the attitudes of lawyers, and the importance of open discussion and client participation. In Chapter VII, I will identify dimensions of the Saskatchewan legal culture that are potential barriers to systemic transformation.

---

<sup>209</sup>However, this is only one interpretation of the data. See later discussion at Chapter VIII.B regarding the need for further research.



## **CHAPTER VII**

### **ANALYZING THE DEEPER LAYER: DIMENSIONS OF A CULTURAL FRAMEWORK**

The previous account of the clear divergence in lawyers' consciousness invites a deeper analysis, centered on the cultural dimensions of lawyering. Why do ten years of the program's operation and a clear support for its benefits still yield such a divergence in lawyers' perspectives? There exists virtual consensus among lawyers and clients that the program needs to be adjusted. Program planners and evaluators tend to search for answers in the program's mechanics, changing time frames or documentary requirements. While potentially effective, such alterations will not address the ideological tension that continues to affect the legal community.

On each revolution in the grounded theory model of analyzing qualitative data, researchers are encouraged to link patterns back to theory. Each revolution brings the researcher to a different layer of concepts and possibilities. Earlier evaluation studies have been stopping at considerations of efficiency. The Saskatchewan evaluation goes another layer, deeper into the strengths and weaknesses of the program. The additional layer of information that I have introduced leads even further into the notion of legal and litigation culture.

In this Chapter, I will explore the parameters of legal culture, using the analytical framework offered in a recent book of Michelle LeBaron's, Bridging Troubled Waters.<sup>210</sup> Although LeBaron does not deal specifically with lawyers or the legal system, her analytical framework is transferable. She describes the impact of cultural gap in very broad and symbolic terms, and explains its origins inside relationships and personal perceptions of identity. LeBaron introduces the connection between relationships and identity in the following way:

... conflicts are part of relational systems. The ways we construct our identities and relate to each other are informed by our ways of making meaning. It is also true that through composing identities and relating, we make meaning: we come to know ourselves through relationships and the stories we co-create. Only by making the invisible visible, by naming and exploring meanings related to conflicts, can we address issues connected to who we believe we are and how we see the world.<sup>211</sup>

For the first few years in Saskatchewan, lawyers and program administrators were busy constructing and defending arguments about why the program should continue as it is, or be abolished. We have more recently been busy analysing the lingering points of tension, and proposing material changes to address those. LeBaron's work invites us to move beyond traditional ways of understanding this conflict, and to open up our scope to include the histories, culture, rituals and identities that surround the various perspectives.

---

<sup>210</sup> *Supra*, note 6.

<sup>211</sup> *Ibid* at 138-9.

Conflict produced by the introduction of mandatory court-connected mediation is certainly a result of the clash between opposing frames of reference. Mediation, with its client-centered and interest-based focus, inevitably causes tension for lawyers, who have been well-equipped for rights-based advocacy.<sup>212</sup> Understanding the resistance of lawyers does mean understanding this basic conceptual tension. What is needed, I will argue, is an analysis that moves beyond that, from the conceptual to the *personal*.

In this Chapter, I will examine the challenges of mandatory mediation using LeBaron's approach – a lens which views culture in terms of the impact on the person, and how people make meaning of their interactions with the world around them. The discussion will start with the cultural dimensions of litigation, specifically, an exploration of lawyers' traditional, litigation-oriented professional identities. I will draw upon LeBaron's symbolic dimensions of culture, and in particular, will offer three conceptual tools – story, ritual and metaphor – to help reveal the barriers to systemic change in the context of mandatory mediation. All three concepts fit into an alternative framework for analyzing the impact of mandatory mediation in Saskatchewan, a framework which arguably better suits the program's original goals for systemic transformation.

### **A. The Cultural Dimensions of Litigation**

Court-connected mediation was transplanted into litigation with the deliberate intention of introducing a different set of values. It is no surprise that it has produced a clash of

---

<sup>212</sup> J. Macfarlane, *supra*, note 4 at 248. Many lawyers recognized this as well: one Regina lawyer described coming to the realization that “mediation is quite different than litigation and trying to plug mediation into litigation is like trying to plug a square peg into a round hole”; May 28/02 lawyer focus group.

cultures.<sup>213</sup> Mediation sessions reveal this clash at many levels – with mediators, lawyers and clients often displaying different vocabularies, ways of communicating, and ideas about disputes. Although the cultural dimensions of this conflict in Saskatchewan are palpable, they have continued to elude program administrators and lawyers alike.

Like the “water fish swim in”, culture is relatively invisible. Michelle LeBaron describes it as the intrinsic logic and values that operate within a particular context.<sup>214</sup> Avruch and Black describe culture and its influence as a “perception-shaping lens” or “a grammar for the production and structuring of meaningful action”.<sup>215</sup> Because our cultural messages determine normality, intercultural conflict is especially challenging: “it is precisely one’s sense of normality that may be put at risk”.<sup>216</sup>

Perhaps realizing what was at stake, administrators and mediators have attempted to acknowledge cultural difference from the inception of the program. In hindsight, however, it seems clear they were only scratching the surface. All have succumbed to the common impulse to underestimate the impact of culture, to treat it as simply

---

<sup>213</sup> One Regina lawyer said that “Lawyers do not feel that mediators’ roles are transparent, and mediators feel that lawyers are biased”; May 28/02 focus group. There were many examples, especially in the beginning, of the moralizing that was engaged in by lawyers and mediators; Kevin Avruch and Peter Black suggest that these kinds of statements are usually evidence of cultural clash; “Conflict Resolution in Intercultural Settings: Problems and Prospects” in D.J. Sandole and H. van der Merwe (eds) *Conflict Resolution Theory and Practice: Integration and Application* (New York: St. Martin’s Press) at 135.

<sup>214</sup> In her new book, Michelle LeBaron defines culture as “a range of currencies ... as pattern, form and symbol”; *Bridging Cultural Conflicts. A New Approach for a Changing World* (San Francisco: Jossey Bass, 2003) at 1 (unpublished version).

<sup>215</sup> *Supra*, note 213 at 136.

<sup>216</sup> *Ibid.*

“differential etiquette”.<sup>217</sup> Saskatchewan mediators have often acknowledged the importance of respecting the lawyer’s role in the session: allowing the lawyer some discretion to determine whether and how his client participates. They have contemplated contacting lawyers ahead of time to clarify expectations about information that might be exchanged between counsel. Although valuable steps, these are really only changes in communication, in the surface protocols.

When we think of culture, we tend to focus our attention on the activities and norms of the collective. LeBaron, instead, invites us to consider culture in terms of the impact on the person – the way we engage with each other and our world at a personal level. How is a litigator’s sense of normality put at risk in mandatory mediation?<sup>218</sup> This type of inquiry requires that we suspend judgment about why lawyers resist and accept that there is an intrinsic logic to – *meaning* behind - that resistance. Our sense of normality is governed in many ways by the limits of our imagination,<sup>219</sup> and this is a useful place to begin.

---

<sup>217</sup> *Ibid.*

<sup>218</sup> Avruch and Black warn of the difficulty of doing a cultural analysis of one’s own culture; *ibid.* The challenge of doing this is important to acknowledge, along with the risk of reducing the complexities surrounding culture. The same authors point out that we often speak of cultural characteristics as applying uniformly to members of a group, impervious to change. All lawyers do not make meaning in the same way, nor do they subscribe to the same cultural values; indeed, lawyers have been recognized as having a history of responding to external pressures, adapting to change with some success; J. Macfarlane, *supra* note 4 at 247.

<sup>219</sup> LeBaron states that: “One of the first steps in accessing imagination is to uncover our assumptions of what is normal and natural. These assumptions tend to be carved into our ideas and perceptions in ways long before rendered invisible”; *supra* note 5 at 22.

## i) Culture and the Person: The Scope of Imagination

...imagination is the gateway through which meanings derived from past experience find their way into the present.<sup>220</sup>

Mediation itself is not a new concept to Saskatchewan lawyers. Over the years, lawyers have opened to the idea of family mediation,<sup>221</sup> and conciliation in union-management disputes.<sup>222</sup> In both examples, lawyers tend to refer their clients for mediation on their own, providing background legal information and advice, but not attending with their clients. They have a general sense of what mediation is about in those circumstances, and the benefits that can be achieved. The idea of mediation in those settings is not outside the scope of their imaginations.

In the setting of general civil litigation, a decade ago, lawyers' imaginations were still limited by old patterns and experiences. They had developed strong preferences for the overall pace, timing and nature of the negotiation process. They disclosed information only as triggered by the court process; conducted negotiations lawyer-to-lawyer (over the phone or by letter); and simply pushed the matter through to a pre-trial conference if

---

<sup>220</sup> LeBaron, *ibid*, referring to John Dewey, *Art as Experience* (New York: Minton, 1934).

<sup>221</sup> In the mid-70's, the Unified Family Division of Queen's Bench was established in Saskatoon - a specialized family court which offered a variety of multi-disciplinary services, including mediation; since then, the Saskatoon family bar has become accustomed to the use of mediation in their files. Although the mediation service through UFC was discontinued many years ago, the pattern continued, with lawyers referring their clients to private mediators.

<sup>222</sup> For many years, the Labour Relations and Mediation Branch of Saskatchewan Labour has offered mediation at no charge in certain kinds of labour disputes, particularly those involving a breakdown in collective bargaining. Mediation in that setting is referred to as "conciliation", and has traditionally followed an evaluative model which relies extensively on caucusing, facilitated by mediators with substantive expertise.

settlement discussions were stalling out.<sup>223</sup> The pattern etched into their memories did not leave any room for early, interest-based mediation.

This was not the first time that Saskatchewan lawyers have had to adjust their imaginations in response to significant changes in civil process. The introduction of pre-trial conferences by the Queen's Bench Court prompted a surprisingly similar response almost twenty years ago.<sup>224</sup> At that time, the concept of a mandatory, settlement-oriented process, facilitated by a third-party neutral, was quite new.<sup>225</sup>

Judges and administrators estimate that it took seven or eight years for lawyers to become comfortable with the changed expectations and climate that accompanied pre-trial conferences. Lawyers first had to see the process, and begin to imagine what it might offer them and their clients. Gradually, this expanded imagination allowed new memories to be formed and new patterns to unfold.

The same could be expected with mandatory mediation. At one level, it is about overcoming the cellular memories of litigators, case-by-case and lawyer-by-lawyer. Many lawyers do speak of their experience with mandatory mediation in these terms.<sup>226</sup> They describe their initial outright resistance to the program, and a very gradual acceptance of the process, as they began to experience some "successes". They talk of

---

<sup>223</sup> For a discussion of the influence of local legal culture see J. Macfarlane, *supra* note 4, at 250.

<sup>224</sup> Interviews with court personnel, Saskatchewan Evaluation data.

<sup>225</sup> Clients were not present and caucuses were not held in the early stage of the program; even so, the process pushed lawyers well beyond their remembered patterns. Gradually, pre-trials evolved to include client participation and to permit discussions in caucus.

<sup>226</sup> Focus group discussion notes; a Saskatoon lawyer says that in the first couple years after the program was introduced, lawyers had a "bad attitude"; that they need to be convinced that it worked, to see it happen first, and now they can see that it does have potential; May 28/02 lawyer focus group. Another Saskatoon lawyer spoke of the impact of surprises; Sept. 16/02 lawyer focus group.

the surprises – entering the session fully expecting it to fail, and then being utterly surprised at a positive outcome. These individual experiences pull at the corners of their imagination, stretching it bit by bit.

The Saskatchewan program has appeared to inch forward on the understanding that change in lawyers' attitudes would be slow and gradual. Is it enough to accept this as a call for patience, taking comfort in the evidence that a shift in attitudes is coming? *Why* have lawyers' imaginations seemed so confined? *What* is it that confines lawyers to their ways of doing things? I will argue in this Chapter that it is not the patterns themselves that create such allegiance; rather, it is the meaning that lawyers find within these patterns - meanings that clarify their roles.

## **ii) Cultural Roles: The Search for Identity**

From our earliest days, we internalize cultural messages about identity ....<sup>227</sup>

Within old patterns, the meaning of the lawyer's role is clear. From the beginning, the lawyer sits at the center of the dispute: framing the issues, authoring documents, being the sole spokesperson and negotiator. In mediation, she is asked to sit back, to let the client frame issues of concern, to set the law aside and to use wide latitude in sharing information. On the surface, she travels the pendulum swing from a central, "out in front" role, to an invisible, background role that has little definition or meaning to her. Not only might she have trouble imagining how mediation, with its collaborative frame,

---

<sup>227</sup> LeBaron, *supra* note 5 at.33.



fits inside the adversarial litigation process, but she also cannot imagine the shape of her own role at a personal level. For someone who normally carries the burden of producing predictable results for her client, this is an uncomfortable position.

We might wrongly assume that lawyers derive meaning, fully, from the process dimensions of their job. While the adversarial process certainly shapes their identity, I do not believe that it contains the seeds of it. Lawyers have imagined their role *in relation to*<sup>228</sup> the legal system as they were taught it, but their meaning comes usually from a deeper source. University of Saskatchewan students spend their first week of law school in an orientation program. On the morning of the first day, they gather in small groups to discuss what hopes have brought them to this place. Some, of course, talk about stable, professional careers, and comfortable incomes. The vast majority of those students, however, describe who they want to be: their hopes of making a difference, helping people, changing the conditions of peoples' lives. They enter law school with a need to make meaning of their work. Over the next three years, they are given a certain framework within which they can apply those energies - a framework centered, of course, on a rights-based analysis, the operational pillars of the litigation system, and very deep and often quiet messages about adversarialism being the only axis upon which legal work turns.

LeBaron uses a number of concepts as windows into the ways that people make meaning, using them as tools to help peel back layers of personal and professional identity. Three of these concepts seem particularly fitting in this analysis of litigation

---

<sup>228</sup>LeBaron argues that people tend to define themselves in relation to others, *supra* note 5 at 140.

culture: story, ritual and metaphor.<sup>229</sup> In the following discussion, I will explore the way that story, ritual and metaphor enter the mandatory mediation picture.

## **B. Conceptual Tools for Understanding the Cultural Dimensions of Mandatory Mediation**

### **i) Story: Unravelling Perceptions of the Past**

The world, the human world, is bound together not by protons and electrons, but by stories. Nothing has meaning in itself: all the objects in the world would be shards of bare mute blankness, spinning wildly out of orbit, if we didn't bind them together with stories.<sup>230</sup>

Focus group data shows that, in conversation after conversation, lawyers drew in the story of no-fault automobile accident insurance. The story always had the same plot, that mandatory mediation was introduced in the same legislative session that car accident victims lost their right to sue. It always led to the same conclusion, that lawyers were under siege by the provincial government. The linking of mandatory mediation and no-fault insurance was not new; it was in the battle cry of lawyers back in 1994. Although the logic fails - each piece of legislation originated in completely different government departments, and was inspired by completely unrelated objectives (and it seems an obvious matter of historical coincidence) - some lawyers are still unable to move beyond it.

---

<sup>229</sup> Although LeBaron offers these as tools to use in an interactive setting, these concepts are here being used as windows into the conflict generated by mandatory mediation.

<sup>230</sup> Brian Morton, *Starting Out in the Evening*, quoted in Diane Schoemperlen, *Our Lady of the Lost and Found* (Toronto: Harper Collins Publishers Ltd, 2001) at 143.

LeBaron issues the reminder that culture is a “complex series of shared, interrelated activities with origins buried in the past”.<sup>231</sup> One could reach further back than 1994 to build the relevant history of lawyers, for certain. But the experience of 1994 clearly imprinted itself onto lawyers in this province. No-fault insurance removed a substantial block of litigation work away from civil lawyers. In fact, very few lawyers would not have felt its impact, with many having relied on motor vehicle accident claims for one-quarter to one-half of their work. The impact of no-fault insurance was expected to be immediate and far-reaching. When mandatory mediation was introduced in the same legislative session, there was a strong sense that the government’s mission was to take work away from lawyers. Mandatory mediation might have generated that fear alone; in Ontario, one lawyer described trying cases as “a very important way [of resolving disputes] which the system tried mightily to take away from us ...”.<sup>232</sup> The image is one of a tug-of-war, with much more being at stake in Saskatchewan.<sup>233</sup> Lawyers’ fear centered partly on economic concerns (loss of work), but was arguably even broader than that – the fear of “the ground shifting beneath their feet”.

The government’s failure to consult with lawyers in the program’s design contributed to this alienation. The first opportunity for lawyers to address the program was after its introduction in the legislative session.<sup>234</sup> Lawyers resisted at every turn.<sup>235</sup> As

---

<sup>231</sup> LeBaron credits Edward T. Hall with this assertion; *Beyond Culture* (Garden City, NY: Doubleday, 1976) at 14.

<sup>232</sup> Macfarlane, *supra* note 4 at 282.

<sup>233</sup> Note that lawyers are still fighting against no-fault insurance, and partly due to their persistent and vocal opposition, the scheme was changed in 2002/03 to an “opt-out” no fault plan.

<sup>234</sup> Since Saskatchewan’s experience in 1994 – although perhaps not because of it – other provinces (Alberta, British Columbia) have engaged in consultation processes with the Bar in the early stages of developing court-connected dispute resolution programs.

professionals who might consider themselves not only stakeholders in but gatekeepers of the civil justice system, their initial response is anything but surprising.

The fears have since subsided; but the resentment and tone of defensiveness continue to linger. Interestingly, the two groups of lawyers identified earlier did not differ in their need to discuss the early history of the program. The focus on historical tensions in lawyers' stories exposes an important dimension of their experience with mandatory mediation, and may move program administrators toward a clearer understanding of the legal community's resistance. Its consistency across the stories told by the two groups of lawyers – and its presence even in the comments of lawyers who are now fully supportive of the program – suggests a need for acknowledgment that had (at the time of the evaluation process) not yet been met.<sup>236</sup>

## **ii) Ritual: Ingrained Patterns**

The focus group data also shows that a common complaint about mandatory mediation is its awkward fit with systemic patterns of disclosure and information sharing.

Lawyers often described it as a matter of timing. Settlement should be incremental, evolving over time “as trust and disclosure developed”, or after the lawyer has had an

---

<sup>235</sup> An example of this is the Canadian Bar Association resolution advocating for the repeal of the legislation; Regina Bar Association, “The Mediation Resolution, 1995”, prepared for the 1995 meeting of the Canadian Bar Association, Saskatchewan Branch [unpublished].

<sup>236</sup> Louise Diamond offers history as one of the “tests” that must be navigated “if transformation is to be complete”; *Beyond Win/Win: The Heroic Journey of Conflict Transformation* (Washington, DC: The Institute for Multitrack Diplomacy, 1996), at 11. She goes on to suggest that history offers us the opportunity to discover the human need that has been violated underneath; and that until this has been acknowledged, participants may be unable to make the “shift”; *ibid*, at 15.

opportunity to “digest” information.<sup>237</sup> When pressed about this, lawyers refer to barriers which they present as almost technical in nature: documentary discovery and oral examinations have not yet occurred (and the mediation session is not under oath); they do not know enough about the facts connected to their or the other case; they may not know enough about the law. It is simply, and technically, too early. Patterns around the sharing of information have arguably taken the form of rituals. Understanding this as a matter of ritual may help explain its hold on lawyers.<sup>238</sup>

LeBaron describes a ritual as “a time when senses are heightened, moments are distinct and marked, and participants feel connected to each other and to the meaning of what they are doing”.<sup>239</sup> She introduces ritual as a tool to move the parties forward and through a particular conflict. Ritual may involve deeply symbolic action, capturing underlying hopes and meaning, and preparing people emotionally to welcome transition. I will use the concept of ritual in a slightly narrower way. Lawyers in litigation mode often appear to be participating in a carefully choreographed dance. However, their actions are more than movement; they communicate meaning. If ritual is a concentration on patterned behavior,<sup>240</sup> and an acknowledgment of shared community and purpose,<sup>241</sup> then lawyer’s approaches to information disclosure are surely ritualistic.

---

<sup>237</sup> Macfarlane, *supra* note 4 at 280

<sup>238</sup> A Saskatoon mediator put it this way: that timing alone is not a problem, but if lawyers THINK that timing is a problem, then it is; Mediator Interview, Sept. 16/02

<sup>239</sup> *Supra* note 6 at 253.

<sup>240</sup> *Ibid*, at 262

<sup>241</sup> *Ibid*, at 252.

Let me offer an illustration of the ritual.<sup>242</sup> A client comes into a lawyer's office with a story that supports a legal claim. The lawyer crafts a demand letter to the offending party, providing a very brief summary of the nature of the claim. The pleadings which follow contain more information about the facts that support basic legal allegations. The small degree of information initially offered is expanded a bit more. At the examinations for discovery stage, the information is extended further, mainly at the hands of the opposing lawyer.<sup>243</sup> The lawyer will keep a close rein on this, stopping the flow of any information that he is legally entitled to hold back.<sup>244</sup> It is likely at this point that the information net has been cast as wide as it will be in the litigation. The job of each lawyer is to pick out which pieces of that information are supportive (and will therefore be woven into the case) or damaging (and attempts will be made to move them out).<sup>245</sup> At the pre-trial conference stage, that information is culled and refined.<sup>246</sup> Lawyers perfect the process of ascertaining and presenting facts that legitimately support the action as they move towards trial.

---

<sup>242</sup> Within this context, lawyers are likely high-context communicators – the ritual of information disclosure contains a type of script within it; and much of what is said or not said has a high content of unspoken meaning. Mediators who understand that much of the communication is high-context, will see the openings as they arise; mediators who do not are apt to interpret the signals as outright resistance.

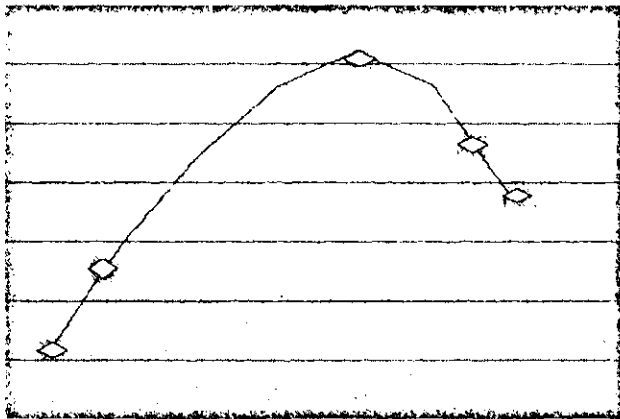
<sup>243</sup> Although there is a positive obligation to present relevant documents, the focus at this stage tends to be on the oral examinations, and the undertakings that can be extracted through that process.

<sup>244</sup> For example, those exchanges or documents that are covered by the doctrine of privilege.

<sup>245</sup> By attempting to protect the information (claiming privilege, for example), by minimizing its relevance, or by offering other facts that counter or contradict.

<sup>246</sup> Lawyers often use the feedback and observations of judges in pre-trial to help them further refine their arguments and evidence.

Consider the following illustration:



*Amount of Information  
Exposed during the  
Stages of Litigation*

*Demand Letter   Pleadings   Exams for Discovery   Pre-trial Conference   Trial*

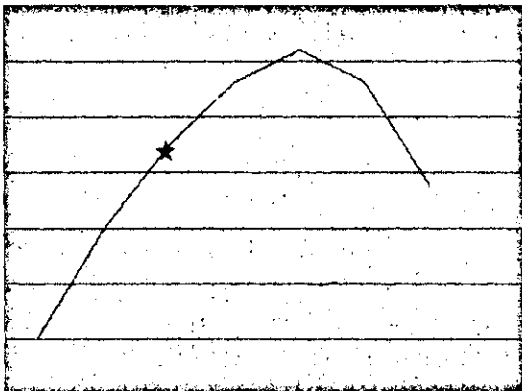
Information is released in a controlled fashion, like the fisherman letting out his line, bit by bit, and then reeling it back in. The force behind the information disclosure also involves some push and pull – with the lawyer having a limited obligation to offer information (operating within a culture that discourages him from offering more than legally required) and the opposing lawyer being left to pull out information, using his adversarial skills to do so.<sup>247</sup>

The mediation program interrupts this ritual in three significant ways. It reverses the onus on information disclosure, expands the information available, and interferes with the timing.<sup>248</sup> First, lawyers (and their clients) are asked to offer information, rather

<sup>247</sup> Through tools such as questioning during examinations for discovery, pursuing certain documents and using court applications to support that where necessary.

<sup>248</sup> Macfarlane's study illustrates a second time line that has been affected by early mandatory mediation programs – the 'workload' or 'case development' time line that lawyers traditionally follow; *supra* note 4 at 280. Many of the lawyers she interviewed spoke of the fact that the work they now have to do before mediation, in the past, did not have to be done until the examinations for discovery or pre-trial conference

than waiting to have it extracted as the litigation progresses. Second, they are expected to offer information that simply might never become part of the litigation process. Ordinarily, for example, two prior business partners might never be asked to talk about the personal misunderstanding that led to their mutual feelings of betrayal,<sup>249</sup> not because it is privileged, but simply because it would have been screened out as irrelevant through litigation. Third, and perhaps most importantly, lawyers are expected to be at their most open at a time much earlier than their normal ritual demands:



*The Timing of Mediation,  
In Relation to the Normal  
Flow of Information Disclosure  
In Litigation*

Through their involvement with mandatory mediation, lawyers are not simply being asked to let go of technical patterns. They are being asked to abandon, or alter, embedded rituals – to leave room for the development of new practices, especially surrounding the exchange of information.

---

stage, indicating that now the litigation process is “front-end loaded” in terms of the work involved. This time line has some relationship with the information-disclosure time line, but does not coincide exactly. Litigation tends to involve a steadily increasing commitment of time as one moves through each step of the process, building slowly to the time invested in trial – a somewhat different pattern than that sketched out above. Still, however, it is a ritual that has been interrupted by the program.

<sup>249</sup> See Keet & Salamone, *supra*, note 7 at 72.



The problem of open information exchange in mediation is easily diminished, its solutions quickly identified as mandating the exchange of documents or submissions. The perspectives across both groups of lawyers reveals, however, the complexity of the problem. The issue of information exchange was one of the most consistent concerns raised about mandatory mediation. Very few lawyers spoke about having successfully overcome this tension. Most either identified open information exchange as a goal that lawyers fail to attain in the process, or denied that it is a laudable goal at all. Viewing the constraints on information exchange as a deeply ingrained pattern – a ritual of civil litigation – helps to explain its hold.

### **iii) Metaphor: Lessons About Control**

Attached to this ritual is an image: lawyer as gladiator, as the general hired to do battle,<sup>250</sup> as the manager of war.<sup>251</sup> These images invite the lawyer to take over, and to fight on behalf of the client:

[The client has] put their case in your hands and says, this is your field, you just basically do what you think is right and get me the results I expect ...  
[Clients] run their lives, they want you to run the litigation...<sup>252</sup>

The image relies on visions of control.<sup>253</sup> Lawyers expect to control how the complaint is constructed and framed (the legal rights and obligations that are attached to it), how it

---

<sup>250</sup> Macfarlane, *supra* note 4 at 272

<sup>251</sup> *Ibid* at 306; most metaphors offered by lawyers involve images of war; another lawyer referred to himself as a “gunslinger”; *ibid* at 295.

<sup>252</sup> *Ibid* at 277

<sup>253</sup> A Saskatoon lawyer put it in exactly those terms: “it’s about losing control over the process”; May 28/02 lawyer focus group. Another Regina lawyer described her dismay at how mandatory mediation

is described (by being the spokesperson throughout) and explored (by controlling the framework of questions that can be used during examinations for discoveries, and preparing their clients for questioning). Lawyers let go of control at the trial stage, by handing the judge the responsibility to determine outcome. Even then, the judge will generally use the framework that the lawyers have carefully constructed during the course of litigation.

The metaphor of manager of war serves lawyers well.<sup>254</sup> It helps them determine at a very subconscious level how to navigate, how to respond to the twists and turns of any litigation process. As they come into mediation with this guiding image, they are effectively asked to abandon it, to take on a different and undefined one (one that perhaps lies outside the scope of their imagination and experience).

Lawyers' general reactions to mandatory mediation are directed in part by their degree of comfort with the shift in control. In her study of commercial lawyers in Ontario, Macfarlane discusses five categories of reactions. Macfarlane's "True Believer" is the only one of five types who displays comfort, happily seeing her role as "significantly changed".<sup>255</sup> While the "Pragmatist" also supports mediation, this lawyer still assumes a dominant role, "engineering" the mediation process in the same way he would

---

was introduced (with little consultation with the bar) and asked, rhetorically, "why didn't they [Department of Justice] just ask us if we wanted some help?"; Sept. 10/02 lawyer focus group.

<sup>254</sup> P. Aubusson, "Using Metaphor to Make Sense and Build Theory in Qualitative Analysis", 7(4) *The Qualitative Report* December, 2002, <http://www.nova.edu/ssw/QR/QR7-4/aubusson.html> addresses the idea of exploring metaphor as the primary vehicle for analyzing qualitative data. Aubusson uses this approach in a parallel example, studying high school teachers as they experience a shift in teaching roles and techniques, from a teacher-centered role focused on the transmission of information to an interactive teaching approach that depends more on the relationship between teacher and students.

<sup>255</sup> Macfarlane, *supra* note 4 at 256; see previous discussion at footnotes 75-76 and 14-120, and accompanying text.

engineer other elements of the civil process.<sup>256</sup> The remaining three types show variations on this theme. The “Instrumentalist” sees the opportunity to control mediation as a tool to inflict disadvantage on the other side: “You can tie everyone up and keep them further away from getting their dispute resolved ....”<sup>257</sup> The “Dismitter” resists the intrusion of mediation: “[L]ook, we’re big people and we can settle the darn thing, what do we need a third party and why do our clients have to be there”<sup>258</sup>, and the “Oppositionist” worries about what happens when people “get so caught up in the process of settling that they forget the greater context”.<sup>259</sup>

Mediation does challenge the traditional “lawyer-driven” model of decision making.<sup>260</sup> Perhaps, however, it is about more than a fear of losing control to the client. For some, it is a fear of losing control to the *system*. Lamenting the “end of an era” when lawyers could determine their own pace on a file, one Ottawa lawyer explained:

At a human level, it was nice to be able to put some things aside from time to time. You can’t do that anymore. So I feel like there’s somebody out there, the thought’s almost paranoid, who is calling the shots.<sup>261</sup>

The Collaborative Law movement illustrates similar concerns, taken to a different conclusion. The procedural framework of Collaborative Law is much the same as mediation: working through a dispute using a structured, interest-based approach.

---

<sup>256</sup> *Ibid* at 255

<sup>257</sup> *Ibid* at 257

<sup>258</sup> *Ibid*.

<sup>259</sup> *Ibid* at 258

<sup>260</sup> *Ibid* at 250. Lawyers often express fears about their clients saying too much in mediation sessions; that type of fear is an example of the tension between different assumptions about the role of clients in the process.

<sup>261</sup> *Ibid* at 280

What is strikingly different is the image surrounding the lawyer's role. In mediation, lawyers at best believe themselves to be taking a back seat. Collaborative Law places the lawyer, once again, front and center. Like the "True Believers", Collaborative Lawyers have accepted the new model, and have quickly found new meaning – a new metaphor – to guide their work. They have abandoned the war analogies, but have retained the managerial dimensions of their role. Control has been preserved.

The differences between the two groups of lawyers do show an evolution here. The first group displays some comfort with letting go of traditional forms of control, for example, through the blessing given to client participation in the process. In the stories presented by lawyers in this group, new guiding images and professional identities are beginning to be revealed.

### **C. Developing New Professional Roles**

To transform conflict is to release the energy bound in the intellectual, emotional, physical, and spiritual patterns of thought and action that have built up over time, and to reshape that energy into new and more positive patterns of relationship.<sup>262</sup>

Both groups identified in the previous chapter, those who accept internal responsibility and those who externalize it, reveal lawyers getting hung up in the process of systemic change. I have argued that lawyers' current perceptions of mandatory mediation are still bound, in differing degrees, to old professional identities. In order for the mandatory mediation program to create sustainable systemic change, rooted in a shift in

---

<sup>262</sup> Diamond, *supra* note 236 at 3.

the culture of litigation, lawyers will need to release the energy bound in stories of the past. They will need, at times, to depart from comfortable rituals around the release of information and the guidance of adversarial images of their role. These dimensions of the culture of litigation need not be abandoned, but they do need to be enlarged, leaving room for the expansion of new professional identities. The responsibility for supporting these changes does not fall on the shoulders of the legal community alone – it is shared with program administrators and others engaged in the operation of the mandatory mediation program. In Chapter VIII, I will assess the extent to which the program has supported systemic change, and will identify action needed for the program to actualize its full potential for transformative systemic change.

## CHAPTER VIII

### MOVING FORWARD

The qualitative focus of the Saskatchewan evaluation leaves room for the right kind of analysis. It raises questions about the extent to which the mandatory mediation process broadens the parameters of the dispute, returns control to the parties and pays respect to relationships.<sup>263</sup> It turns our attention to the matter of culture – both in terms of the norms of the litigation system and the extent to which those drive perceptions of professional identity for lawyers. The study allows some early conclusions to be drawn about the program's success, and suggests that the program has made significant progress in reaching its objectives and challenging cultural norms. Much more work remains to be done, however, at two levels. More research is needed on the qualitative impact of court-connected mediation programs, litigation and legal culture. More importantly, continued dialogue is needed between legal and other professionals about the operation of court-connected mediation programs and the issues which surround them, one that assists in the construction of new relationships, rituals and guiding images.

---

<sup>263</sup> See the Department of Justice's objectives as described in Chapter II.

## **A. Rejection, Convergence or Transformation? Conclusions About Saskatchewan's Progress**

Viewed as the integration of a marginal culture into a dominant one, the introduction of mediation into litigation can result in one (or more) of the following outcomes: rejection, convergence, and transformation.<sup>264</sup> Although the Evaluation Report does not articulate it in these terms, I will argue that the data, and even the recommendations themselves, show a mix of convergence and transformation occurring in Saskatchewan.

Despite early signals that the mandatory mediation program would be rejected, the data contains very little evidence of this having happened. Evidence of rejection might include signals that the mediation program has been assimilated into the litigation culture, in a way that undermines its objectives. As noted, examples taken from Julie Macfarlane's work<sup>265</sup> include the generalized use of evaluative mediators; instrumental use of mediation as an early and cheap discovery process; a failure to prepare in a way that renders the session meaningless; falling back on traditional litigation patterns, such as the presumptive preference to delay until after discoveries; or a focus on the rights paradigm and lawyer-control. Rejection might also be shown through evidence that the program has merely reinforced lawyers' previously-held biases against mediation. The data shows that a small minority of lawyers have rejected mediation, in either of the above ways. Only thirteen percent of lawyers<sup>266</sup> described mediation as completely unsuccessful or inappropriate. Although very few lawyers were wholly positive about

---

<sup>264</sup> Refer to earlier discussion beginning at p.36.

<sup>265</sup> *Ibid.*

<sup>266</sup> Refer to earlier discussion beginning at p.36.

the experience of mandatory mediation, the vast majority (87%) began or ended their comments with some acknowledgement of the unique potential for mediation – in a way that endorsed its client-centered principles and goals.

The dominance of critical perspectives on mediation, I will argue, is evidence of convergence rather than rejection. Convergence occurs when the litigation structure is seen to be taking on some of the “ideas, values and practices” of mediation, and vice versa.<sup>267</sup> Viewed in isolation, the predominance of lawyers’ critical comments might be seen as assimilative. Viewed in context of lawyers’ whole stories, with endorsements of mediation throughout, they instead support the conclusion that the program is closer to a convergent stage. For example, some lawyers spoke about the value of the mediation as an early discovery tool. Alone, this comment might be taken as a rejection of mediation, a return to traditional litigation strategies. However, most comments of this nature were accompanied by other acknowledgments of the alternative objectives of mediation. A lawyer who talked about the use of the process as a forum for discovery would also talk about his growing comfort with letting his client contribute to the process in a meaningful way: a convergence of litigation strategy with an endorsement of the client-centered value of mediation; a revelation of the influence of old rituals, with evidence of the development of a new one.

---

<sup>267</sup> Refer to footnote 76 and accompanying discussion. Even the recommendations for the report itself show the influence of convergence-type aspirations. The recommendation that the Statement as to Documents be exchanged in advance is clearly a convergent one, using an accepted litigation mechanism to achieve early information exchange; *supra*, note 1, recommendation #2, page 55.



The data contains some indications that the program's original objectives for a transformative result may be around the corner. The concept of systemic transformation, identified by the emergence of a new paradigm, is difficult to translate in concrete or quantifiable terms.<sup>268</sup> If transformation occurs when internal norms of each process – mediation and litigation – are integrated or merged, resulting in a new normative order, how does one know when that objective has been reached? The data suggests two indications that might be included in this kind of assessment: the degree to which clients feel that mediation changed the litigation process in significantly positive ways, and the degree of shift in lawyers' openness to client-centeredness and interest-based processes.

Although the number of clients who felt that mediation's potential was fully realized was small (9%), their comments reveal some significant successes for the program. Some clients, regardless of whether they settled in the session, saw mediation as fully positive in the following ways. The process gave them an important role and opportunity to contribute, and/or helped them to more fully express themselves or understand the other party's perspective in ways that they had been unable to achieve in the litigation process to date. Some institutional clients highlighted the process's ability to humanize the dispute and to help teach alternative approaches to conflict in the future. Although a small number of clients described these kinds of results, the fact that any did at all suggests a small move towards a transformative outcome for the program.

---

<sup>268</sup> See earlier discussion beginning at p.36.

The broad endorsement of mediation that came from lawyers also suggests a transformative result. Although lawyers tended not to focus on mediation's successes, and rather wanted to talk about what might be getting in the way of more widespread success, the fact that 87% of them spoke about the process's unique benefits does suggest a fundamental underlying and transformative shift. For example, 37% spoke (unprompted) about the benefits of the client-focused nature of the process.

The difference between convergence and transformation is not a difference in kind but a difference in degree.<sup>269</sup> What stands between them (assuming that transformation is a laudable goal)<sup>270</sup> is the professional identity and perspective of lawyers. At the moment, lawyers are equally divided in the degree to which they acknowledge lawyers and the legal profession as playing an active role in the shaping of the civil litigation process and the success of mediation.<sup>271</sup> One group of lawyers displays commitment to a client-centered approach, accepts some degree of internal responsibility for the success of mediation (meaning internal to the legal profession), and values the growing openness towards mediation. The second group includes lawyers who are more lawyer-centered in approach, less likely to admit a cultural shift among lawyers in terms of their views toward mediation, and more likely to place responsibility for the failure of the process on external factors. The split reveals a role tension - an internal discourse or process of "becoming"<sup>272</sup> - that may open up new roles for litigators.<sup>273</sup> It is the extent

---

<sup>269</sup> This assigns "transformation" a narrower definition than that which would be assigned by some writers. See earlier discussion at footnotes 81-83 and accompanying text.

<sup>270</sup> The argument can be made that the goal of system transformation contains value judgments about the superiority of consensus-based, or interest-based, models; I would like to acknowledge critical perspectives on mandatory mediation, but have not attempted to include them in this thesis.

<sup>271</sup> See earlier discussion beginning at p.81.

<sup>272</sup> See earlier discussion at p.42.

to which the profession continues to evolve in this direction which will determine whether the program's original transformative goals are fully met.

## **B. Further Research**

The Saskatchewan evaluation is one of the first studies to examine the impact of court-connected mediation using a wider lens. The focus on qualitative methods allowed data to be generated that fit more closely with the program's objectives, encompassing more than efficiency-related concerns. It was, however, only a first step. Important questions about clients' experiences with civil litigation, lawyers' perceptions of their role, and the risks and benefits of mediation have been left unanswered.

Even the conclusions reached in this analysis require further study. Tests for validity are conventionally understood to "encompass a much broader concern for whether the conclusions being drawn from the data are credible, defensible, warranted, and able to withstand alternative explanations" than the more mathematical tests using when assessing the strength of quantitative data.<sup>273</sup> A common test used in the evaluation of qualitative focus group data is whether the data is "saturated" – the point at which no

---

<sup>273</sup> Role tension is lessening with recent shifts in legal education; Macfarlane, *supra*, note 4 at 307. ADR has become entrenched in legal education in Saskatchewan. Law students receive education about conflict resolution theories and approaches from their first week of law school. A full program of dispute resolution has been integrated into all the core courses of the first year curriculum, and there are several upper year electives available as well. The association responsible for continuing legal education has also begun offering courses in negotiation and mediation advocacy to practicing lawyers. In addition, Collaborative Law training has swept across the province in the last two years

<sup>274</sup> Lechtling & Sharp, *supra*, note 132, Chapter 4 at 8

new information is being discovered.<sup>275</sup> In the evaluation of the Saskatchewan mediation program, the data from focus groups had reached the saturation point in relation to the narrower questions designed for the study. However, the same cannot be said for the analysis I have presented. The study data supports tentative conclusions about lawyers' attitudes and values, but has not reached the saturation point in the context of these broader issues. Underlying questions about legal culture warrant further study.<sup>276</sup>

### **C. Dialogue and Collaboration**

Language of systemic transformation and cultural change surrounded the program from the beginning. However, the evaluation process contained an important reminder that cultural change, in the operation of civil litigation and in lawyers' internal views of professional role, cannot be imposed from the outside. Significant shifts have occurred over the last ten years, but for systemic change to reach the dimensions envisioned in the program's early objectives, the system's agents – lawyers – will need to be fully engaged. The evaluation process acknowledges this in three ways: in its advisory structure, in its commitment to open conversation, and in the dialogue following its release.

---

<sup>275</sup> Appropriate tests or measures of validity in qualitative research will vary according to the nature of the research; G. Winter, "A Comparative Discussion of the Notion of 'Validity' in Qualitative and Quantitative Research" 4(3 & 4) *The Qualitative Report*, March, 2000, <http://www.nova.edu/ssw/OR/OR4-3/winter.html>.

<sup>276</sup> As warned by M.A. Carey, unless the focus group facilitator has asked or probed for the same question/issue across all groups, it is inappropriate to engage in comparisons. "Comment: Concerns in Analysis of Focus Group Data" 5(4) *Qualitative Health Research* 487 at 488.

The evaluation process included the establishment of an advisory committee, a structural recognition of the central role played by lawyers and other professionals in civil process reform. Representatives from the Queen's Bench judiciary, Law Society, Canadian Bar Association, Mediation Saskatchewan organization, Department of Justice and court administrative staff all participated on the committee. Although the committee's role was narrow, its existence symbolized an important commitment to future partnership.

The evaluation's methodology left room for lawyers themselves to identify the issues they wished to discuss. Although focus group facilitators guided participants through a list of particular questions,<sup>277</sup> lawyers were invited to speak about what was on their minds. Ten years after the program's introduction, almost one-quarter of the lawyers interviewed still wanted to talk about their frustrations over the program's introduction, identifying feelings of hostility or suspicion about the Department of Justice's motivations, and disappointment over the unilateral nature of the program's design and implementation.<sup>278</sup> Lawyers did not raise these comments as arguments against the program's continued operation; in fact, the majority of those same lawyers now appreciate the option to mediate. Instead, the focus group discussions themselves served to acknowledge past conflict, potentially enabling lawyers, mediators and program administrators to reorganize their relationships with one another and move forward.

---

<sup>277</sup> Evaluation Report, *supra*, note 1, Appendix B.

<sup>278</sup> See previous discussion at p.81.

Finally, the evaluation process became a catalyst for dialogue in the legal profession. In October, 2003, the Continuing Legal Education branch of the Saskatchewan Legal Education Society hosted a seminar on Mandatory Mediation.<sup>279</sup> The seminar brought together mediators, program administrators, and practicing lawyers for a discussion about mandatory mediation. Inspired by the release of the Evaluation Report, organizers designed the seminar to brief lawyers about the Report's conclusions and clients' perspectives on mediation in particular, and to promote dialogue. Members of a panel also discussed lawyers' and mediators' views about what works well in mediation and their expectations of each other. For the first time, lawyers, mediators and program administrators came together to exchange not positions but hopes, concerns and objectives. This is the kind of conversation that can lead to the development of new patterns (rituals) and guiding images to accompany lawyers' changing professional identities.<sup>280</sup>

A commitment to partnership raises interesting possibilities for the structure of legislative or policy reform in this area. A good example is the Civil Justice Reform Working Group, established this year by the British Columbia Attorney General and comprised of members of the judiciary, government, court services, and legal profession. A Green Paper entitled "The Foundations of Civil Justice Reform"<sup>281</sup> describes its mandate as addressing the question of "is there a better way for the B.C.

---

<sup>279</sup> October 2, 2003, Saskatoon and October 3, 2003, Regina; the writer was a presenter on the panel.

<sup>280</sup> LeBaron might call this finding a joint way to story the future; see *supra* note 5 at 141. Benjamin Broome might call it the emergence of a third culture; "Managing Differences in Conflict Resolution: The Role of Relational Empathy" in D.J. Sandole & H. Van Der Merwe (eds), *Conflict Resolution Theory and Practice: Integration and Application* (New York: St. Martin's Press, 1993) 97 at 104.

<sup>281</sup> Dated September, 21, 2004, Office of the Attorney General for British Columbia.

civil justice system to resolve disputes?”. Although the Green Paper places significant emphasis on efficiencies, it does go on to identify legal culture as a factor. It calls for procedural change that goes “beyond legal process to legal culture”<sup>282</sup> and results in changes in “the values, thinking and behaviours of people within the system”, particularly lawyers.<sup>283</sup> Perhaps most promising is the use of a collaborative model for examining these fundamental questions.

There are risks with consensus-based approaches to policy development, including the likelihood that controversial changes – as the Saskatchewan program was viewed ten years ago – will not be implemented. At this stage in the life of the mandatory mediation program, however, a consultative approach is crucial to completing program objectives. At some level, all of the players involved in mandatory mediation (lawyers, mediators, program administrators *and* clients) are locked in the same struggle - the struggle for a meaningful role. In order to move forward, all will need to explore new and different meanings, through relationship with each other.<sup>284</sup> A genuine relationship among lawyers, program administrators, mediators, judges and clients will support transformation in the system of civil process.

---

<sup>282</sup> *Ibid*, p. 13

<sup>283</sup> *Ibid*, p.12

<sup>284</sup> LeBaron suggests that the path through conflict, especially that which is shaped by intracultural differences, is through the building of relationship; *supra* note 5 at.5; Some of the mediators interviewed were intuitively speaking in these terms. A Regina mediator wished that she knew how to build trust with lawyers, and indicated she wanted to be a “partner” with lawyers, and expressed frustration over being cast in the role of “adversary”, concluding metaphorically that “you can’t get married if you’ve only been dating two months”; May 28/02 mediator focus group. A Regina lawyer put it in the same terms, asking what mediators can do to improve their relationships with lawyers, and vice-versa: that each needs to understand the other better; May 28/02 lawyer focus group.

## BIBLIOGRAPHY

### LEGISLATION

*The Debt Adjustment Act*, S.S. 1934-35, c.88.

*The Farm Land Security Act*, S.S. 1984-85-86, c.F-8.01.

*The Provincial Mediation Board Act*, S.S. 1943, c.15.

*The Queen's Bench Act, 1998*, S.S. 1998, c.Q-1.01.

*The Queen's Bench Regulations*, R.R.S. 1999, c.1.1.01, O.C. 433/99.

*The Saskatchewan Farm Security Act*, S.S. 1988-89, c.S-17.1.

### ACADEMIC ARTICLES

Abel, Richard, "A Comparative Theory of Dispute Resolution Institutions in Society" (1973) 8 *Law & Society Review* 217.

Alfini, James, "Trashing, Bashing and Hashing It Out: Is This the End of 'Good' Mediation?" (1991) 19 *Florida State Law Review* 47.

Aubert, Vilhelm, "Competition and Dissensus: Two Types of Conflict and Conflict Resolution" (1963) 7 *J. of Confl. Res.* 26.

Aubusson, P., "Using Metaphor to Make Sense and Build Theory in Qualitative Analysis" 7(4) *The Qualitative Report*, December 2002, <http://www.nova.edu/ssw/QR/QR7-4/aubusson.html>.

Bahr, S.J., C.B. Chappell & A.C. Marcos, "An Evaluation of a Trail Mediation Program" (1987) 18 *Mediation Quarterly* 37.

Bautz, B.J. & R.M. Hill, "Divorce Mediation in New Hampshire: A Voluntary Concept" (1989) 7(1) *Mediation Quarterly* 33.

Bohmer, C. & M.L. Ray, "Effects of Different Dispute Resolution Methods on Women and Children After Divorce" (1994) 28 *Family Law Quarterly* 223.

Bussin, Naomi, "Evaluating ADR Programs: The Ends Determine the Means" (2000) 22 *Advocates Quarterly* 460.



Buston, K., "NUD\*IST in Action: Its Use and Its Usefulness in a Study of Chronic Illness in Young People" (1997) 2(3) Sociological Research Online <http://www.socresonline.org.uk/socresonline.2.3.6.html>.

Butterfoss, F.D., et al, "Use of Focus Group Data for Strategic Planning by a Community-Based Immunization Coalition" (1997) 20(3) Family & Community Health 49.

Carey, M.A., "Comment: Concerns in Analysis of Focus Group Data" 5(4) Qualitative Health Research 487.

Catterall, M. & P. Maclaren, "Focus Group Data and Qualitative Analysis Programs: Coding the Moving Picture as well as the Snapshots" (1997) 2(1) Sociological Research Online <http://www.socresonline.org.uk/socresonline/2/1/6.html>.

Cavenagh, T.D., "A Quantitative Analysis of the Use and Avoidance of Mediation by the Cook County, Illinois, Legal Community" (1997) 14s(4) Mediation Quarterly 353.

Coffey, A., B. Holbrook & P. Atkinson, "Qualitative Data Analysis: Technologies and Representations" (1996) 1(1) Sociological Research Online <http://www.socresonline.org.uk/socresonline/1/1/4.html>.

Emery, R.E. & J.A. Jackson, "The Charlottesville Mediation Project: Mediated and Litigated Child Custody Disputes" (1989) 24 Mediation Quarterly 3.

Jones, T.S. & A. Bodtker, "Satisfaction with Custody Mediation: Results from the York County Custody Mediation Program" (1998) 16(2) Mediation Quarterly 185.

Kalafat, J. & R.J. Illback, "A Qualitative Evaluation of School-Based Family Resources and Youth Service Centers" (1998) 26(4) American Journal of Community Psychology 573.

Keet, Michaela & Teresa Salamone, "From Litigation to Mediation: Using Advocacy Skills for Success in Mandatory or Court-Connected Mediation" (2001) 64(1) Saskatchewan Law Review 57.

Kelly, J.B. & M.A. Duryee, "Women's and Men's Views of Mediation in Voluntary and Mandatory Mediation Settings" (1992) 30(1) Family and Conciliation Courts Review 34.

Kidder, R.L., "The End of the Road? Problems in the Analysis of Disputes" 15:3-4 Law & Society Review 717.

Kitzinger, J. "Introducing Focus Groups" (1995) 311(7000) British Medical Journal 299(4).

- Lawson, K.L. & H.D. Hadjistavropoulos, "The Pitfalls and the Potential of Early Evaluation Efforts: Lessons Learned from the Health Services Sector" 17(3) *The Canadian Journal of Program Evaluation* 39-56.
- Lederach, John Paul, "Transforming Violent Intercommunal Conflict" in Kumar Rupersinghe, *Conflict Transformation* (New York: St. Martin's Press, 1995).
- Lempert, R.O., "Grievances and Legitimacy: The Beginnings and the End of Dispute Settlement" 15:3-4 *Law & Society Review* 707.
- Loriz, L.M. & P.H. Foster, "Focus Groups: Powerful Adjuncts for Program Evaluation" (2001) 36(3) *Nursing Forum* 31.
- Macfarlane, Julie, "Culture Change? A Tale of Two Cities and Mandatory Court-Connected Mediation" (2002) 2 *Journal of Dispute Resolution* 241.
- MacMillan, K. & S. McLachlan, "Theory-Building with NudIst: Using Computer Assisted Qualitative Analysis in a Media Case Study" (1999) 4(2) *Sociological Research Online*  
[http://www.socresonline.org.uk/socresonline/4/2/macmillan\\_mclachlan.html](http://www.socresonline.org.uk/socresonline/4/2/macmillan_mclachlan.html).
- May, T. & M. Buck, (1998) "Power, Professionalism and Organisational Transformation" 3(2) *Sociological Research Online*,  
<http://www.socresonline.org.uk/socresonline/3/2/5.html>.
- McEwen, Craig & R.J. Maiman, "Small Claims Mediation in Maine: An Empirical Assessment" (1981) 33 *Maine Law Review* 237.
- Menkel-Meadow, Carrie, "Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities" 38 *Southern Texas Law Review* 407.
- Menkel-Meadow, Carrie, "The Many Ways of Mediation" (1995) 11 *Negotiation Journal* 217.
- Morgan, D.L., "Why Things (Sometimes) Go Wrong in Focus Groups" (1995) 5(4) *Qualitative Health Research* 516.
- Nugent, W.R. & J.B. Paddock, "The Effect of Victim-Offender Mediation on Severity of Reoffense" (1995) 12(4) *Mediation Quarterly* 353.
- Packer, T., K.E.H. Race & D.F. Hotch, "Focus Groups: A Tool for Consumer-Based Program Evaluation in Rehabilitation Agency Settings" (1994) 60(3) *The Journal of Rehabilitation* 30.

Pandit, N.R., "The Creation of Theory: A Recent Application of the Grounded Theory Method" 2(4) *The Qualitative Report*, December, 1996  
<http://www.nova.edu/sss/QR/QR2-4/pandit.html>.

Pearson, J. & N. Thoennes, "Mediating and Litigating Custody Disputes: A Longitudinal Evaluation" (1984) 17(4) *Family Law Quarterly* 497.

Race, K.E.H., D.F. Hotch & T. Packer, "Rehabilitation Program Evaluation: Use of Focus Groups to Empower Clients" (1994) 18(6) *Evaluation Review* 730.

Raines, S. & R. O'Leary, "Evaluating the Use of Alternative Dispute Resolution Techniques and Processes in U.S. Environmental Protection Agency Enforcement Cases: Views of Agency Attorneys" (2000) 18 *Pace Environmental Law Review* 118.

Roy, S., "Two Types of Juvenile Restitution Programs in Two Midwestern Countries: A Comparative Study" (1993) 57(4) *Federal Probation* 48.

Sander, Frank, "The Obsession With Settlement Rates" (1995) 11 *Negotiation Journal* 329.

Smith, J.A., D.L. Scammon & S.L. Beck, "Using Patient Focus Groups for New Patient Services" (1995) 21(1) *Joint Commission Journal on Quality Improvement* 22.

Straw, R.B. & M.W. Smith, "Potential Uses of Focus Groups in Federal Policy and Program Evaluation Studies" (1995) 5(4) *Qualitative Health Research* 421.

Weiss, C., "Where Politics and Evaluation Research Meet" (1993) 14(1) *Evaluation Practice* 94.

Williams, M., "Can't I Get No Satisfaction? Thoughts on *The Promise of Mediation*" (1997) 15 *Mediation Quarterly* 143.

Winter, G., "A Comparative Discussion of the Notion of 'Validity' in Qualitative and Quantitative Research" 4(3&4) *The Qualitative Report*, March, 2000,  
<http://www.nova.edu.sss.QR/QR4-3/winter.html>.

Wissler, R.L., "Court-Connected Mediation in General Civil Cases: What We Know From Empirical Research" (2002) 17 *Ohio St. J. on Dis. Res.* 641.

Wissler, R.L., "Mediation and Adjudication in the Small Claims Court\_ The Effects of Process and Case Characteristics" (1995) 29(2) *Law & Society Review* 323.

## BOOKS

- Baruch Bush, R. A. & J. P. Folger, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* (San Francisco: Jossey-Bass, 1994).
- Benson, Marjorie L. *Agricultural Law in Canada 1867-1995: With particular reference to Saskatchewan* (Calgary: Canadian Institute of Resources Law, 1996).
- Burgess, R.G. (ed) *Computing and Qualitative Research: Studies in Qualitative Methodology 5* (Greenwich CT: JAI Press, 1995).
- Camic, P.M, J.E. Rhodes & L. Yardley, *Qualitative Research in Psychology* (Washington: American Psychological Association, 2003).
- Diamond, Louise, *Beyond Win/Win: The Heroic Journey of Conflict Transformation* (Washington, D.C.: The Institute for Multitrack Diplomacy, 1996).
- Freeman, M.D.A., *Lloyd's Introduction to Jurisprudence*, 7<sup>th</sup> ed. (London: Sweet & Maxwell, 2001).
- Geertz, Clifford, *The Interpretation of Cultures; Selected Essays 3* (Basic Books, 1973).
- Glaser, B.G. & A.S. Strauss, *The Discovery of Grounded Theory: Strategies for Qualitative Research* (New York: Aldine, 1967).
- Hartley, R.E., *Alternative Dispute Resolution in Civil Justice Systems* (New York: LFB Scholarly Publishing LLC, 2002).
- Kreuger, R., *Focus Groups: A Practical Guide for Applied Research* (London: Sage, 1988).
- Layh, Donald H., "Legislative Options to Manage the Farm Debt Crisis" in Donald E. Buckingham and Ken Norman (eds) *Law Agriculture and the Farm Crisis* (Purich Publishing: Saskatoon, 1992).
- LeBaron, Michelle, *Bridging Troubled Waters: Conflict Resolution From the Heart* (San Francisco: Jossey Bass, 2002).
- LeBaron, Michelle, *Bridging Cultural Conflicts: A New Approach for a Changing World* (San Francisco: Jossey Bass, 2003).
- Lederach, John Paul, *Preparing for Peace: Conflict Transformation Across Culture* (Syracuse, N.Y.: Syracuse University Press, 1995).
- Macfarlane, Julie, *Rethinking Disputes: The Mediation Alternative* (Toronto: Emond Montgomery, 1997).

Macfarlane, Julie. *Conflict Analysis, Dispute Resolution Reading and Case Studies* (Toronto: Emond Montgomery, 1999).

Patton, M.Q., *Qualitative Evaluation and Research Methods* (Newbury Park, CA: Sage, 1990).

Rossi, P.H., H.E. Freeman & M.W. Lipsey (eds), *Evaluation: A Systemic Approach*, 6<sup>th</sup> Ed. (London: Sage Publications, 1999).

Sandole, D.J. & H. Van Der Merwe (eds), *Conflict Resolution Theory and Practice: Integration and Application* (New York: St. Martin's Press, 1993).

Sharpe, L. & J. Frechtling (eds) *User-Friendly Handbook for Mixed Method Evaluations* (Directorate for Education and Human Resources, Division of Research, Evaluation and Communication, National Science Foundation, United States, 1997); available at <http://www.stanford.edu/~davidf/empowermentevaluation.html#mixed-method>.

Tashakkori, A. & C. Teddlie, *Mixed Methodology: Combining Qualitative and Quantitative Approaches*, 2<sup>nd</sup> ed. (CA: Sage, 1998).

Tolman, D.L. & B.M. Miller (eds), *From Subjects to Subjectivities: A Handbook of Interpretive and Participatory Methods – Qualitative Studies in Psychology* (New York: New York University Press, 2001).

Vidmar, N., "An Assessment of Mediation in a Small Claims Court" (1985) 41(2) *Journal of Social Issues* 127.

## REPORTS

Clarke, S.H., E.D. Ellen & K. McCormick, *Court-Ordered Civil Case Mediation in North Carolina: Court Efficiency and Litigant Satisfaction* (North Carolina: Institute of Government, The University of North Carolina, 1995).

Daniel, J., *Assessment of the Mediation Program of the U.S. District Court for the District of Columbia* (Washington, D.C.: Administrative Conference of the United States, 1995).

Focus Consultants, *An Evaluation of the Notice to Mediate Regulation under the Insurance (Motor Vehicle) Act* (British Columbia, June, 1999) [unpublished].

Indiana Conflict Resolution Institute, *Evaluation of the Occupational Health Review Commission Settlement Part Program* (2000) [unpublished].

Katalik, James S. et al, *An Evaluation of Mediation and Early Neutral Evaluation Under the Civil Justice Reform Act* (Rand Institute for Civil Justice, 1996).

Macfarlane, Julie, *Court-Based Mediation of Civil Cases: An Evaluation of the Ontario Court (General Division) ADR Centre* (Toronto: Queen's Printer, 1995).

Macfarlane, Julie with M. Keet, *Learning From Experience: An Evaluation of the Saskatchewan Queen's Bench Mediation Program*, Final Report (Regina: Saskatchewan Justice, 2003)

McAdoo, Bobbi, *A Report to the Minnesota Supreme Court: The Impact of Rule 114 on Civil Litigation Practice in Minnesota* (Minnesota: Supreme Court Office of Continuing Education, 1997).

Prairie Research Associates Inc., *Initial Mediation Session Evaluation Report*, submitted to Saskatchewan Justice (March, 1996) [unpublished].

Quebec, Groupe de Travail Sur la Mise en Oeuvre du Project Pilote, *Evaluation des Resultats du Projet Pilote de Conciliation en Matiere Civile a La Cour Superieure de Montreal* (August, 1998) [unpublished].

Schildt, K., *Major Civil Case Mediation Pilot Program: 17<sup>th</sup> Judicial Circuit of Illinois, Preliminary Report* (Dekab, Illinois: Northern Illinois University, College of Law, 1994).

Strategic Planning & Operations Coordination Court Services, *Edmonton Provincial Court Civil Mediation Pilot Project: Evaluation Report* (Edmonton: Alberta Justice, 1999)

Taaffe, L., S. Morokuma & E.E. Gordon, *Participant Satisfaction Survey of Court-Connected ADR Programs* (State Justice Institute, Georgia Office of Dispute Resolution, 2000).

Yates, S.M. & J.E. Shack, *An Evaluation of the Lanham Act Mediation Program: U.S. District Court for the Northern District of Illinois* (Chicago, Illinois: Center for Analysis of Alternative Dispute Resolution Systems, November, 2000) available online at [www.caadrs.org](http://www.caadrs.org).

#### OTHER MATERIAL

Arbitration and Mediation Institute of Saskatchewan Inc. "Concepts for Using Alternative Methods to Resolve Disputes in Matters under Provincial Jurisdiction", 1994 [unpublished].

Baroudi, G. "Moving the corporate battles from courthouse to boardroom" *Globe and Mail* (21 June 1994).

Daisley, B., "Government and Courts Promote ADR in B.C." *The Lawyer's Weekly* (24 September 1999).

Department of Justice, *Saskatchewan Justice Strategic Plan*, 1993 [unpublished].

Editorial, "Mediation could prove to be a valuable legal option" *The Regina Leader Post* (23 March 1994).

Government of Saskatchewan, Press Release, "Mediation Pilot Projects Under Way" (1 December 1994).

Government of Saskatchewan, Press Release, "Use of Mediation to be Increased in Civil and Family Law Disputes" (17 March 1994).

Hewitt, R. "Saskatchewan ADR Ignored", Canadian Bar Association, *The National* (October, 1997).

Mediation Services, Saskatchewan Justice, "Monthly Statistical Reports as of March 31, 1994" [unpublished].

Mediation Services, Saskatchewan Justice, "Mediation Services: Program Summary" [unpublished].

Mediation Services, Saskatchewan Justice, "The Role of Justice in Mediation Services" (June, 1994) [unpublished].

Mediation Services, Saskatchewan Justice, "Saskatchewan Justice: Core Strategy on Dispute Resolution" [unpublished].

Mediation Services, Saskatchewan Justice, "Mission Statement" [unpublished].

Mediation Services, Saskatchewan Justice, "Staff Mediator – Job Description – July, 1994" [unpublished].

McBride, R. and J. Schostak, "Qualitative Versus Quantitative Research"  
<http://www.uea.ac.uk/care/elu/Issues/Research/Res1Ch2.html>.

Mitchell, R.W., Minister of Justice for the Government of Saskatchewan, Speech presented to the Alberta Arbitration & Mediation Society, Annual General Meeting, Calgary, Alberta (November 18, 1994) [unpublished].

Mitchell, R.W., Minister of Justice for the Government of Saskatchewan, Bill No. 40, Second Reading Speech, <http://www.legassembly.sk.ca/hansard/22L45/40318> (1994).

Nelson, K. "Minister explains proposed bill" *The Nipawin Journal* (23 March 1994).

Ontario, Ministry of the Attorney General, *Notice – Ontario Mandatory Mediation Program* (1999) <http://www.attorneygeneral.jus.gov.on.ca/html/MANMED/notice.htm>.

Ontario, Ministry of the Attorney General, *Fact Sheet: Ontario Mandatory Mediation Program: Rules 24.1 and 75.1*  
<http://www.attorneygeneral.jus.gov.on.ca/html/MANMED/fctsheetsheet.htm>.

Practice Direction (1994) 16 O.R. (3d) 481.

Roberts, D. "Saskatchewan moves to mediation" *The Globe and Mail* (18 March 1994)

Stanford, J. "Canadian Centre moves to "change the culture" of public service" in MIT – Harvard Public Disputes Program, *Consensus* (July, 1993).

Schoemperlen, Diane, *Our Lady of the Lost and Found* (Toronto: Harper Collins Publishers Ltd., 2001).



**APPENDIX A:**  
**Evaluation Report**

**Learning from Experience :  
An Evaluation of the Saskatchewan  
Queen's Bench Mandatory Mediation  
Program**

**Final Report  
May 2003**

**Dr. Julie Macfarlane**

**with Professor Michaela Keet**

*Submitted to Saskatchewan Justice Dispute Resolution Office*

### *Acknowledgements and credits*

Primary acknowledgement must go to Professor Michaela Keet of the College of Law at the University of Saskatchewan. Professor Keet worked with me as a partner at all stages of the evaluation project, from the development of the evaluation methodology, through the conduct of interviews and discussion groups, to our final reflection on what the data told us. Professor Keet also provided many helpful comments on both the Interim Report and the Final Report. In a more mundane but nonetheless critical role, Michaela was also the official driver and navigator for this project as we traversed the province of Saskatchewan soliciting input from program users. Her insight, analysis, knowledge of the field and intuitive sense of diplomacy have been invaluable throughout this project and I cannot thank her enough.

The excellent work of Jennifer Mathers (Windsor Law, 2003) in coding the electronic data should also be acknowledged.

Sincere thanks are due to the members of the Evaluation Advisory Committee for their commitment to this project, and for their willingness to educate me on the history and context of mediation in Saskatchewan. I was extremely fortunate to work with Mr. Justice Maher of the Prince Albert Court of Queen's Bench, Marty Popescul of Sanderson Balicki Popescul, Robert Leurer of MacPherson Leslie & Tyerman (and President of the Saskatchewan Branch of the Canadian Bar Association), Paul Hildebrand, President, Mediation Saskatchewan, Rod Crook Executive Director, Courts & Civil Justice, Saskatchewan Justice, Linda Bogard, Director, Court Operations Saskatchewan Justice, Dennis Berezowsky, Local Registrar, Saskatoon Court of Queen's Bench and John Jacques, Assistant Director, Dispute Resolution Office. This group worked with me to refine the evaluation methodology, facilitate access to lawyers and clients for data collection purposes, and later assist me in the interpretation of data and the consideration of program design options. Although the conclusion and recommendations of this Final Report are entirely my own, their wise counsel was highly influential and very supportive.

A number of people in the Saskatchewan Dispute Resolution Office were also critical to the successful completion of this work. Ken Acton had the foresight to plan for this evaluation and along with John Jacques, provided support and encouragement throughout. Melissa Wallace, Manager of Programs and Operations, played the most significant role at The Dispute Resolution Office. Melissa responded to our countless requests for information, facilitated access to lawyers and clients, and performed numerous other tasks in relation to the smooth conduct of the evaluation. She deserves credit for this labour without which this study would not have achieved its goal of ensuring a comprehensive review of the Queens' Bench mediation program at all sites. Thanks are also due to Bonnie in the Regina Dispute Resolution Office Office and to Leslie in the Saskatoon Dispute Resolution Office.

As always, the individuals who participated in discussion groups and interviews, submitted written comments, and encouraged their colleagues to do likewise, are owed a debt of gratitude. Thank you for your willingness to contribute to this evaluation, and I hope you will see your many and diverse views reflected herein.

All errors and omissions that remain are my responsibility alone.

Julie Macfarlane, Kingsville, April 2003

## TABLE OF CONTENTS

### Executive Summary

### Part I : Methodology

1. Evaluation Goals
2. A Qualitative Orientation
3. Qualitative Data Collection
4. Qualitative Data Coding and Analysis
5. Sample size

Table One Evaluation respondents

Pie Chart One Evaluation respondents

6. Quantitative Data Collection

### Part II : Data Analysis

#### **1. General Benefits of Mediation**

- a. A structured face-to-face meeting
- b. As a means of achieving systemic change
- c. Mediation produces surprises
- d. Access to justice
- e. collateral benefits

#### **2. General Criticisms of Mediation**

- a. The Timing of Mediation
- b. The Mandatory Nature of Mediation/ the Exemption System
- c. The Mediator's Role
  - i. Evaluation by the mediator
  - ii. Mediator proactivity
  - iii. The mediator's role in finalizing settlements
  - iv. Beyond facilitation
- d. Compliance
- e. The Role of Counsel

#### **3. Other Observations**

- a. The use of conference calls
- b. Access to extended mediation sessions and subsequent sessions
- c. Information for the parties

- d. "Culture change"
- e. Implications for legal education

#### 4. Quantitative Data Analysis

- a. What are the outcomes of mediation?

Table Set Two      Reported outcomes in all case categories : by year  
1999-2002

Pie Chart 2 (A)    Reported outcomes 1999/2000

Pie Chart 2 (B)    Reported outcomes, 2000/2001

Pie Chart 2 (C)    Reported outcomes, 2001/2002

Table Set Three    All programs, comparison of reported case  
outcomes in all case categories, 1999-2002 : by  
reported outcome

- i.      How typical is Saskatchewan's rate of settlement?

- ii.     How accurate are reported outcomes?

*The 2001/2002 Audit*

*The 2001/2002 Status Checks*

Table Set Four      Status Checks 2001/2002

- iii.    Are outcomes significantly affected by case type?

- I.      Contracts, Personal Injury and Wrongful Dismissal  
cases

Table Set Five      Case type data 1999-2002 : by reported outcome

- II.     Malpractice cases

- III.    Simplified Rules cases

Table Set Six      Settlement by case type 1999/2000, Saskatoon  
Simplified Rules cases

- iv.    Repeat players

- b.      Does mediation reduce time to settlement?

- c.      Is the system of exempting certain cases from mediation  
working efficiently without undermining the mandatory  
nature of mediation?

Table Seven      Exemptions from mediation

### Part III : Recommendations for Program Modification

1. The Mandatory Nature of Mediation
2. The Timing of Mediation
  - a. *The initial referral to mediation*
  - b. *Requiring the filing of a statement of documents before mediation*
  - c. *"Loop-backs" to mediation*
3. Adjournments
4. Exemptions
5. Information for the parties
6. Mediator style, training and qualifications
7. The role of the mediator in finalizing settlement outcomes
8. Providing more choices to program users
  - a. *mediator selection*
  - b. *An optional "enhanced package" of mediation services*
  - d. *Formalizing opportunities for (i) longer (ii) further mediation sessions*
9. User fees
10. The role of counsel
11. Retaining a presumption of face-to-face meetings
12. Unrepresented (*pro se*) clients
13. Enhanced liaison and co-ordination between the Dispute Resolution Office and the Court of Queen's Bench
14. Enhanced case and program data systems

|              |  |
|--------------|--|
| Appendix A   | Lawyers Discussion groups : May<br>Client Discussion groups : September      |
| Appendix B   | Lawyer Discussion groups : September<br>Client Discussion groups : September |
| Appendix C   | Interviews with Judges   |
| Appendix D   | Follow-up interview questions  |
| Bibliography |  |

## Executive Summary

The evaluation data, both qualitative and quantitative, which has been collected and analyzed for this study illuminates the operation of the Saskatchewan Queen's Bench mediation program and gives voice to the experiences of program users. It provides a detailed picture of the relationship between lawyers, their clients, the mediators and the structure and design of the present program.

The Saskatchewan Queen's Bench mediation program is perceived by almost all the individuals we consulted as appropriate, and its objectives – the faster and more satisfactory reaching of settlement in some civil matters – fully achievable. It became rapidly apparent that the question that respondents were most interested in discussing with us was not whether the program should be maintained, but how it might be improved in order to better achieve those objectives.

The consensus that emerges is that the program is reaching its goals in many individual cases, but not in others. While there is widespread support for both its universal nature and the present timing of mediation, many respondents called for greater *flexibility* in relation to both aspects of program design. In addition, there is an interest in rethinking the role of the mediator to clarify and perhaps sharpen this point of intervention with greater proactivity, and perhaps some type of enlarged role before and after mediation in *certain cases*.

There are also a few clear problems with the design of the present program. One is that some cases proceed to mediation with insufficient preparation, perhaps with little or no exchange of materials in advance of mediation, and just occasionally, an absence of "good faith" to negotiate. Another issue (perhaps related to this) is the somewhat uninformed approach of a small number of members of the Bar in regard to the role they might most effectively adopt in the mediation process. Each of these problems is resulting in some disappointment among clients, and some frustration among some members of the Bar.

None of these issues is unique to the Saskatchewan program – similar challenges are experienced in other mandatory mediation programs. However, the depth of experience with mediation in Saskatchewan – predating the Queen's Bench program to the earlier initiation of the farm debt mediation program – and the clarity and consistency of issues substantiated by this evaluation, present a unique opportunity to address these challenges.

Fourteen Recommendations are made. These include :

- Mediation should remain mandatory for all civil non-family cases, but attention should be given to enhancing access to adjournments and exemptions where an appropriate case can be made
- Mediation should continue to take place early in the litigation process, but with the additional requirement that parties first file their statement of documents in the hope of enhancing the exchange of relevant information before mediation.

- Mediation and pre-trial offer parties two distinctive conflict resolution processes, meeting different party needs at different stages in the life of a file. However, there should be provision for judicial referral of some special cases back to mediation at a later stage in the litigation process.
- A range of additional consumer choices – including the selection of a mediator and access to “enhanced services” including second sessions or longer initial sessions – should be made available to program users (the latter on a pilot basis)
- Mediator training should emphasize a proactive approach to the facilitation of settlement (including a role for the mediator in finalizing settlements), within the acknowledged constraints of non-evaluative model.
- An education and leadership strategy (including the leadership of the Bench) should be devised to further enhance a culture of effective conflict resolution within the Saskatchewan legal community
- The Dispute Resolution Office and the Court of Queen’s Bench should consider the development of enhanced data recording systems to support future program evaluations.



## **PART I : METHODOLOGY**

### **1. Evaluation Goals**

The first step in the evaluation process was to frame the primary questions the client (Saskatchewan Justice) wished to have answered. These questions were as follows:

- a. To evaluate how far the mediation program in the Queens' Bench meets the needs of the people of Saskatchewan (focusing on discussions with client users);
- b. To assess the impact of the mandatory mediation program on civil litigation practice in Saskatchewan (focusing on discussions with members of the Bar);
- c. To determine the efficiency of the Queen's Bench program (from available program statistics).

### **2. A Qualitative Orientation**

In order to evaluate the success of the Queen's Bench mediation program in meeting users' expectations and needs, and to assess the systemic "cultural" impact of this major innovation, qualitative methods such as discussion groups and interviews are particularly appropriate (Krueger, 1994). Qualitative data is essential in order to understand the unique internal dynamics of a program and in order to fully differentiate the views and attitudes of different user groups. These methods can focus intensely on the detail of cases and process in order to identify and establish significant patterns (Huberman & Miles, 1993, Palton, 1991). The purpose is to discover as much as possible about individual experiences with the mandatory mediation program.

### **3. Qualitative Data Collection**

*May 2002*

Our first step was to conduct an initial round of discussion groups with lawyers and clients, and interviews with mediators, at two sites (Saskatoon and Regina), in order to address questions (1) and (2) above. In these sessions participants were presented with the three primary evaluation questions and asked for their responses. While the May discussion groups were informed by what we already know from earlier research on mandatory mediation elsewhere in Canada and the United States, open-ended questions were used and all comments and reactions encouraged in order to discover the particular issues and concerns that are key to answering these questions in Saskatchewan (see Appendix A).

These initial discussion groups included only a small number of lawyers and clients, but immediately produced some clear patterns in response. Client users were very positive about the potential of mediation and generally welcomed the initiative, but many focused on criticisms about the way the process was handled by their lawyers and the role played by lawyers generally in the process, which was seen by these clients as less than constructive. Concern was also expressed by some clients about what they saw as lack of

follow-through after mediation by either the mediator or their counsel; for example, where they believed that an agreement or the basis of an agreement had been reached in mediation, but was never executed or implemented.

Most of the lawyers who participated in the May discussion groups were positive about the program but many had reservations which related to (a) the history of the introduction of the program (seen by many lawyers as implemented without adequate consultation) and (b) a number of program design issues. These latter included :

- the timing of mediation in the litigation process
- the role played by the mediator in mediation
- the role played by (other) counsel in mediation, including preparation, information exchange and bargaining in “good faith”
- the mandatory nature of mediation for all Queen’s Bench cases and the exemption system

These themes formed the basis of our next round of discussion groups in September 2002.

#### *September 2002*

Our second step was to refocus the questions we were asking of lawyers, clients and mediators to reflect the program design issues that had been consistently described to us during the May visit. In September we returned to conduct a further round of lawyer and client discussion groups, this time including Prince Albert. We also conducted a lawyer discussion group at North Battleford, which afforded us the opportunity to speak with lawyers at a site without formal mandatory mediation.

A conscientious effort was made to ensure that lawyer and client discussion groups were as complete as possible, including lawyers from all areas of civil litigation practice, representing both individuals and corporations, and both institutional and personal litigants (for a complete breakdown, see data sources at (1) above)). This time we saw a total of 31 clients and 62 lawyers.

The September discussion group questions are included at Appendix B. These are more closely structured than the May group questions and as a consequence, the data we collected more specific to program design issues. However, there was still ample opportunity provided for participants to raise other issues and take the discussion in whatever direction they felt was important.

In addition we completed our interviews with mediators, making a total of 13 mediator interviews. The mediator interview questions are included at Appendix C.

#### *October – December 2002*

The third and final step in qualitative data collection was to identify individuals with whom we had not yet met, and whose views appeared to us to be important to the overall credibility and completeness of the evaluation. The Chief Justice provided us with a list of five named judges who were interviewed by Professor Keet (see questions at Appendix C). A further 8 interviews were conducted with lawyers and institutional clients (see questions at Appendix D).

#### 4. Qualitative Data Coding and Analysis

Contemporaneous notes were taken of all discussion groups and interviews. Each meeting was also audiotaped to enable checks to be made between the written record and the recording. A file was created for each (electronic) meeting record and identified by location (Saskatoon/Regina/Prince Albert); participant role (lawyer/ client/ judge/mediator); date (May/September 2002); and where necessary numbered. The anonymity of all respondents has been maintained. File names appear through the data analysis presented below at Part II where it is appropriate to identify a source or sources for comments. Where a direct quotation is used, the text unit of the electronic file is also given for reference purposes.

All electronic records of interviews and discussion groups were entered into a data analysis program (NUDIST) which enables the coding of data to identify themes and patterns. The remainder of this Final Report is drawn from an analysis of this data and a review of the coding nodes.

NUDIST works by attaching codes or categories to sentences and/or paragraphs in the electronic text (records of interviews of discussion groups). Settling on codes or categories emerges from an initial analysis of the data, as particular themes and patterns recur. Thus the codes that are ultimately used to organize and structure the data arise from the data itself, and are not preset or externally imposed. The development of the appropriate number and type of codes emerges gradually, slowly evolving changing into a fixed set of codes or categories that appear to take account of all the issues raised by the data (see list below). At this point the entire database can be coded using these categories.

Once the electronic data has been coded in full, the resulting database can then be manipulated and sorted in a variety of ways, for example, to disclose all comments made under a particular code or category, comments made by lawyers or by clients or both, at one or more centers. This enables an accurate collation of the frequency of these comments, how internally consistent or diverse they are, etc.

All electronic records of discussion groups and interviews were coded using the following categories :

## Demographics

- centre
- role (lawyer/client/judge)
- gender

## General expectations of the mediation program

### Evaluative Comments

- positive
- negative

### Timing of mediation

- should come later in the process
- should come earlier in the process
- is OK where it is

### The mediator's role

- comments regarding evaluative/ facilitative style of mediator
- pre-mediation role of mediators
- role of mediators in drafting settlement outcomes
- post-mediation role of mediators
- overall level of intervention by mediator

### Compliance

- positive experiences
- negative experiences
- reasons given for experiences

### Collateral benefits of mediation

### Culture change among the Bar

### Implications for legal education

### Suggestions for program modification

- regarding compliance
- regarding the use of conference calls
- regarding the role played by the mediator
- regarding ensuring "good faith" by all parties
- regarding case management as a feature of the mediation process
- regarding voluntariness and allowing exemptions from mediation
- the relationship between mediation and pre-trial

### Cost considerations

The coded database is stored by the author for the future use of Saskatchewan Justice.

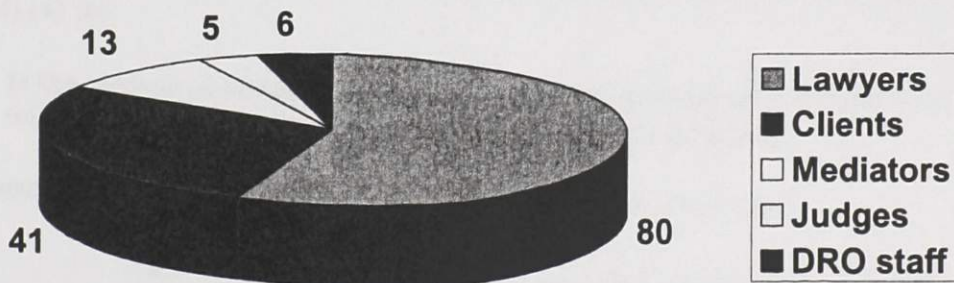
5. Sample size

Each of the individuals we consulted spoke with us for at least 45 minutes, and some for more than one hour. Detailed notes were taken and discussions were also audiotaped. The final numbers for consultation (via participation in discussion groups, interviews, and email communications) in each user group are as follows:

Table One Evaluation respondents

|           | May Discussion group | September Discussion group | Interviews | Email | Total |
|-----------|----------------------|----------------------------|------------|-------|-------|
| Lawyers   | 11                   | 62                         | 4          | 3     | 80    |
| Clients   | 6                    | 31                         | 4          | 0     | 41    |
| Mediators | 0                    | 0                          | 13         | 0     | 13    |
| Judges    | 0                    | 0                          | 5          | 0     | 5     |
| DRO staff | 5                    | 0                          | 1          | 0     | 6     |
| Total     | 22                   | 93                         | 27         | 3     | 145   |

Pie Chart 1 Evaluation respondents



## 6. Quantitative Data Collection and Analysis

In generating and analyzing quantitative data in relation to the program, three questions were central :

### **a. What are the outcomes of mediation?**

This question includes consideration of the following sub-questions:

- i. do case outcomes differ significantly between different centres?
- ii. have there been any noticeable changes over the past three years in levels of outcome?
- iii. how reliable are the outcomes reported (1-5) by the Dispute Resolution Office?
- iv. are case outcomes significantly affected in any way by case type (insofar as data is differentiated), including simplified rules cases?
- v. what if any impact do the major "repeat players" have on settlement outcomes?
- vi. generally, is the rate of settlement reported for this program comparable with similar programs elsewhere?

These questions are answered by the data presented below at Part II (4) (a).

### **b. Does mediation reduce time to settlement?**

This question was difficult to answer in light of the data presently captured by the Dispute Resolution Office and Court Services. It was further complicated by the absence of a random control group in centers where mandatory mediation applied (foreclosing the possibility of comparing the length of time to settlement for cases inside and outside a mediation stream). Insofar as this was possible, this question is considered further below at Part II (4) (b).

### **c. Is the system of exempting certain cases from mediation working efficiently without undermining the mandatory nature of mediation?**

This question includes consideration of the following sub-questions:

- i. do exemption levels differ significantly between different centres?
- ii. have there been any noticeable changes over the past three years in level numbers of exemptions granted?

These questions are answered by the data presented below at Part II (4) (c).

## PART II : DATA ANALYSIS

The following four sections present the findings of the evaluation. Sections 1-3 present the results of our extensive discussions (in discussion groups and via personal interviews) with lawyers, counsel, mediators, administrators and judges. These findings are supported by our analysis of the records of all these meetings, analyzed in the NUDIST database. Where appropriate, quotations are used and remarks referenced to data sources. The anonymity of respondents has been preserved by indicating only the discussion group or a numbered interview (see the explanation above at Part I(4)).

Section 4 below presents an analysis of the statistics provided by the Dispute Resolution Office. It further examines possible relationships between settlement and case types. Section 4 also includes the results of an audit of reported outcomes.

### 1. Overview of Benefits of Mediation

The majority of the analysis and conclusions presented in this Report will focus on program enhancement and concerns over issues of program design, it seems appropriate to begin by summarizing the many comments we received from respondents about the more generalized benefits of the mediation program. This is important not only to accurately reflect the balance of positive as well as negative comments we heard – and also because these comments begin to fill in a picture of how mediation is understood as working well by users – both lawyers and clients – of the Queen’s Bench program.

#### a. **The value of an opportunity for a structured face-to-face meeting**

Benefits consistently mentioned by lawyers include the potential to meet the other side and evaluate their credibility (direct communication rather than filtered via their counsel); to evaluate the credibility of one’s own client in a “live” encounter with the other side; to gather new and important information quickly and informally (for example, *lawyerfollow-upinterview.3*) and as a consequence to be able to assess the risk of proceeding with litigation more realistically (for example, *saskatoonlawyersmay.1*).

Several counsel talked about the usefulness of mediation to address and defuse intense emotionality in litigation; for example,

“In some cases, where money is not the ultimate issue, where there are relationship issues, then mediation can be better suited to these cases.”

(*reginalawyerssept.1 at 192-194*)

Similarly, mediation can also provide “an non-embarrassing forum in which to offer an apology” (*saskatoonlawyerssept.3 at 53*)

Benefits consistently mentioned by clients include the impact of seeing the other side as a “real person”, and hearing from them directly (“put a face to the voice and meet the

people we were dealing with" (*clientfollow-upinterview.1*)); being able to tell one's story directly to the other side and feel listened to (for example, *paclientssept.1*); an opportunity to provide an explanation (for example, city or corporate policy. See *reginaclientsmay.1*) to the other side; an opportunity to "vent" and "offload" (for example, see *reginaclientsept.2*); and as a consequence, an opportunity to possibly restore business relationships. Some institutional clients also described mediation as a useful way to access and exchange information informally (for example, see *reginaclientsmay.1*, *reginaclientssept.1*)

These benefits were well summarized by one client who expressed his opinion as follows:

"It all started over hurt feelings. But then the lawyers got involved and it escalated. This was the first time we could sit down, face to face, and talk about it. That in itself was worth it".

(*reginaclientsept.2 at 64-68*)

The next three categories of benefits flowing from mediation were described by smaller numbers of respondents than (i) above, but are worth noting for the sake of completeness.

#### **b. Systemic change outcomes**

A small number of lawyers and clients talked about the benefit of mediation negotiations leading to outcomes which could result in changes in the way an organization does business in the future (to avoid future conflicts). This is because of the nature of the discussions in mediation, which may consider outcomes beyond legal remedies. For example, one lawyer described a case involving a client terminally ill with breast cancer:

"We got them (the hospital) to completely redo the protocols regarding how they interact with patients – this was a huge symbolic success for her, even though little money changed hands".

(*reginalawyerssept.1 at 114-118*)

#### **c. The element of surprise**

Some lawyers also mentioned that it was sometimes difficult to anticipate whether a mediation meeting would be useful or not. These lawyers acknowledged that even in circumstances that did not look promising, they were sometimes surprised. It was suggested that this was a reason to always give mediation a try, even if the parties were not initially feeling optimistic about its value (see for example, see *lawyerspasept.2*, *saskatoonlawyersmay.1*)



#### **d. Access to justice**

A few lawyers (for example see *saskatoonlawyersmay.1*) and some clients (for example see *reginaclientsept.2*), understood mediation as a means to engage clients directly in the process of decision-making over their dispute, enabling them to contribute to the outcome in a hands-on way. As one client put it, “it (mediation) is a lot less intimidating” (*reginaclientssept.4 at 128*). Another put it this way:

“I felt I had something to say and to contribute to the process”  
(*reginaclientsept.2 at 40-41*)

In these comments, this is described as a generalized access to justice value, rather than at the level of individual engagement.

#### **e. Collateral benefits**

Finally, there may be of course be some collateral benefits even for those cases that do not settle in mediation (see for example, *clientinterview.3*, *lawyerinterview.1*). In many ways, early mediation can function as a reality-check for all parties. As one lawyer described this,

“Even if no settlement is reached, mediation can substantially move things forward and put things into a different perspective, seeing the shades of gray that were apparent to the solicitors.”  
(*palawyersept.2 at units 34-36*)

Other secondary effects of mediation (Cooley, 1996) cited by respondents included the speeding up an exchange of information, the opportunity to vent and to off-load, to meet first-hand with the other side, and to gauge their credibility.

These results are consistent with work conducted elsewhere on the general benefits of mediation as these are described by lawyers and by clients. For similar findings, see for example Bobbi McAdoo’s study of the Minnesota Bar’s response to court-connected mediation (McAdoo, 1997), and Roselle Wissler’s study of litigant assessments of the mediation process in Ohio (Wissler, 2002).

## **2. General Criticisms of Mediation**

It is noteworthy that program users in Saskatchewan generally placed less emphasis than has been noted in other studies on two historically contentious aspects of court-connected mediation – the mandatory nature of mediation and the timing of mediation. While both of these critiques were raised by some respondents, and therefore reported on below, generally there appears to be widespread acceptance in Saskatchewan of these core features of the present program. This may be a consequence of the length of time that the program has now endured in Saskatchewan, suggesting that it has now reached a period

of “post-legitimacy” (Tolbert and Zucker, 1983) where its essential components are not widely challenged. Similar results have been noted in the Ontario program, especially in Ottawa, where mediation has been mandatory for all civil cases for almost as long as in Saskatchewan (see Macfarlane (1995), Hann et al (2001) and Macfarlane (2002)).

What did emerge as a clear concern among both lawyers and clients was how to ensure that mediators in the Queen’s Bench program play the most effective role possible. There was much discussion of mediator proactivity, and the role of the mediator before, during and after mediation. There was also considerable discussion of how to ensure that counsel played the most effective and constructive role in preparing for and participating in mediation. These discussions reflect a level of sophistication in the use of mediation that is unusual in evaluation studies and indicates the depth of experience in Saskatchewan with mediation processes. The concerns and critiques explored in this dialogue have many implications for future program enhancement and these are discussed further below under “Recommendations” at Part III.

a. The Timing of Mediation in the Litigation Process

The issue of the timing of mediation – which must presently be completed before any additional applications are made to the Court – was expected to figure strongly in our discussions with members of the Bar. However, this level of concern did not materialize. A small number of lawyers told us that they would prefer mediation to occur later in the litigation process – after discoveries was the most common suggestion – but very few wished mediation to be *fixed* at a later point in the litigation process. There were just five lawyers who felt that early mediation was never or almost never appropriate.

A far more common suggestion was that there should be greater flexibility in timing and the potential to take a case out of mediation and complete discoveries – or at least some document exchange – before returning to mediation. A number of lawyers spoke about cases in which mediation came too early to be really useful, and where an option to postpone mediation until after discoveries would have been beneficial (for example, see *reginalawyerssept.2* at 63-64, *reginalawyerssept.4* at 39-41). In particular, residential schools cases (see *saskatoonlawyersmay.1* at 44-47), medical malpractice cases (see *reginalawyersmay.1* at 60-61 and *palawyersept.2* at 48-51) insurance cases where liability is denied (see *reginalawyerssept.1* at 45, *lawyeremail communication.2*) were described as cases in which it was often better to conduct discoveries before mediation (although this was by no means a unanimous view – see the debate at *palawyerssept.1*, *reginalawyersept.1*)

The problem articulated by a number of lawyers is not that the timing of mediation is “wrong”, but that all cases are necessarily treated the same way (for example, *lawyerfollow-upinterview.2*). Some suggested that there should be more flexibility in allowing adjournments of mediation until after discoveries are completed – at present the only option available to counsel is to apply for an exemption from mediation (although informally, we understand that adjournments are sometimes given by the Director of The Dispute Resolution Office). Many respondents pointed to the benefits of a presumption

of early mediation – it forces a face-to-face meeting early in the process (see above at 1(a)); it prevents the parties from becoming overly entrenched in their positions (see *reginaclientssept.2*); it overcomes the resistance sometimes observed by clients of their lawyers to “put numbers on the table” (see *reginaclientssept.1 at 104*); and that it avoided the tendency to put off negotiation until later in the process when this might not actually be necessary (some lawyers cited the model of collaborative law in this context; see for example, *reginalawyerssept.1 at 123-124*). Similarly, in interviews with members of the judiciary, most expressed the view that while some cases might benefit from flexibility in the timing of the mediation session, they considered it to be important that the focus should remain on early post-pleadings sessions. In this way mediation can continue to be a very distinctive process from pre-trials, and the two processes remain complementary and not in competition. The relationship between pre-trials and mediation is discussed further below at Part II (2)(c)(i).

The key word here that reoccurs throughout the discussion group and interview transcripts is “flexibility”. It was also apparent that some members of the Bar were not aware of the range of options that the present provisions offer in terms of the timing of mediation, assuming that it had to be done as soon as possible after the close of pleadings.

A significant number of lawyers said that while originally skeptical, they now felt that it was appropriate in some cases to go to mediation as early as possible. As one put it, “I am no longer offended by the earlier process.” (see *lawyerfollow-upinterview.1 at 38*). Certainly lawyers have a historical bias towards leaving serious negotiations until after discoveries (Barkai & Kassenbaum, 1989) and this assumption is challenged by early mediation (see Macfarlane 2002). Several lawyers stated that they had been surprised with the success of early mediation in some less complex cases and saw this as an important way of reducing costs to the client (for example see *palawyersept.2, saskatoonlawyersmay.1*).

There was a general acknowledgement that in appraising the timing of mediation it was important to ask “do you have all the information you need?” (see *palawyerssept.2 at 100*). The question was how to ensure that sufficient information was on the table to ensure that the mediation was productive. There appears to be a widespread view (see for example *lawyerfollow-upinterview.1*) that no discoveries can take place before mediation. In fact, The Queen’s Bench Act only stipulates that no further steps can be taken following the close of pleadings before mediation. It is presently unclear whether this clause means that discoveries (as long as these do not require recourse to the court) are possible before mediation, or whether no discoveries can be commenced before mediation. The Bar appears generally to adopt the latter interpretation. It would be helpful to clarify this interpretation (see also “Recommendations” below at Part III).

A related issue is how information might be exchanged prior to discovery which nonetheless has a significant impact on the usefulness of a mediation session at this stage. The present program does not impose any explicit requirements of documentary or other exchange between the parties before coming to mediation. In other cities with mediation

programs, counsel have had developed an informal practice of exchanging statements or affidavits of documents before mediation, and ensuring that information is furnished to the other side on their request (for example, in Toronto and Ottawa; see Macfarlane 2002). Indeed some Saskatchewan counsel told us that they routinely asked the other side for documents in advance of mediation (for example, this seemed to be established practice in Prince Albert; see both Prince Albert lawyer discussion groups). The mediation program would greatly benefit from formalizing this practice as a requirement before mediation; see also "Recommendations" below at Part III.

Finally, a couple of institutional clients (for example, see *reginaclientssept.3*) expressed an interest in a program that offered mediation *before* litigation was commenced. Several lawyers told us that they now attempted mediation before litigation was commenced in appropriate files, and agreed that they would not have even thought of doing this before the introduction of mandatory mediation.

b. The Mandatory Nature of Mediation / the Exemption System

In keeping with the theme of "flexibility" regarding the timing of mediation, many lawyers expressed a desire for a system that gave counsel the discretion to make arguments that a case was not suitable for mediation and to withdraw with minimal bureaucracy. A number of lawyers described cases in which they believed that an exemption from mandatory mediation would be appropriate. These included medical malpractice cases (see also below at 4(a)(iii)); out-of-province cases (this comment was often linked to a request for greater flexibility around allowing parties to participate by conference call, see also below at 3(a)); cases that were raising frivolous claims or defences; cases involving institutional parties who historically never settled at mediation (for example the Department of Justice and the residential schools cases; see *palawyerssept.1 at 128-129*); and cases where it was painful for a client to retell his or her story where the other side was not likely to be seriously contemplating settlement (for example sexual abuse cases and in particular, residential schools cases). However, it was noteworthy that there were very different views expressed to us on this later point. Some lawyers working on residential schools cases considered the mediation process to be therapeutic and healing (for example *reginalawyersmay.1 at 73-75*); while others decried it as painful and traumatic (for example *reginalawyerssept.1 at 68*).

Certainly some clients have been upset by the mediation process, and found their expectations unmet. One client (the plaintiff in an abuse case) told us that she hated going through the process of telling her story again, and that the anticipation of having to meet with her alleged abuser face-to-face produced enormous anxiety for her (see *reginaclientssept.4 at 101-104*). This client told us that the other side clearly had no intention of settling in mediation. There was also a general feeling that where the parties were not in good faith that a mandatory mediation could be simply an opportunity for game-playing; one lawyer on medical malpractice suits commented that he had sometimes seen defendants coached to offer platitudes in mediation which "only a moron would think are coming from the heart". (*palawyersept.2 at 49-50*)

However, these specific proposals for exempting certain cases did not indicate a lack of support for the universal nature of the program as it presently stands. There were a number of lawyers who were clear that they understood and accepted the need for the program to be mandatory in the first instance, given the potential for lawyers not to use the process otherwise. Many saw the current impact of the program as linked to its “opt-out” mechanism. These lawyers said that they understood why it was important to maintain the program as an “opt-out” scheme, because otherwise lawyers who express themselves as broadly supportive of mediation might fail to use it in their own cases. One institutional client made the point that mediation needed to be mandatory in order to achieve lawyer “buy-in” (*reginaclientsmay.1 at 93*).

Support for the mandatory nature of mediation was expressed by several lawyers as a systemic change that had occurred over time in their own practices. One lawyer commented that the issue of the mandatory nature of mediation no longer seemed to be an issue among members of the Bar, unlike the earlier days of its introduction (*lawyerinterview.2 at 40*). This lawyer commented that he had seen “a huge change in attitudes over time”. Another lawyer described systemic changes in his own practice. He provided the example of a pre-litigation mediation on a wrongful dismissal matter that he had participated in the day before. He noted that this mediation – which was successful in resolving the claim and what he described as a very good result for both sides – likely would not have taken place before the days of mandatory mediation. Moreover, “(T)his is something that never would have happened that way without a mediator.” (*lawyerinterview.1 at 55*)

Although there was widespread acceptance of the case for retaining mandatory mediation for all civil cases, there were also some misgivings expressed by a smaller number of lawyers. These reservations centred on certain case types that some lawyers felt were unsuited to mediation (for example, medical malpractice) and on the principle that lawyers should be allowed to make the determination for themselves and their clients as to whether mediation was appropriate. For example, in Prince Albert two lawyers felt that their small and collegial Bar made it inappropriate to impose mediation, and argued that Prince Albert lawyers would make use of mediation in any case. (see *palawyerssept.1 at 23*). A more pragmatic argument was made by one lawyer in Regina who pointed out there where the parties were unwilling to use mediation it was unlikely to work anyway. (*reginalawyers1, at 31*). However even this critic appeared to be less concerned about the mandatory nature of mediation if a degree of flexibility were permitted in choosing the timing of the session.

Many of the mediators also expressed some preference for a narrower focus of cases. They felt that sometimes their intervention was doomed to failure from the start where one or more of the parties were convinced that mediation would not work. Some suggested that they would welcome a broader role for the mediator (for example in facilitating document exchange and in follow-up, see below at (c)) in cases where there was a common recognition that mediation represented a real opportunity for full or partial resolution.

c. The Mediator's Role

First, it is important and fair to report that we heard many positive comments about the mediators, especially from clients who particularly appreciated the time and patience taken to ensure their comfort with the process. Many clients commented that their mediators appeared genuinely concerned for their well being, and they were appreciative of this.

There were a cluster of more critical comments about the role played by the mediators which were consistent among lawyers and clients, and between centres. A few of these relate to the facilitative, non-evaluative role played by the mediators in the Saskatchewan program. A larger cluster of remarks from both lawyers and clients suggest that program users want the mediators to take a more proactive role in working for settlement in the session. Clients also spoke of wanting the mediator to take more steps and perhaps have greater powers to move what is agreed in a session into formal compliance. Finally, some clients and lawyers see the potential for the mediator to assist in setting a future timetable for a case not resolved or partially resolved in mediation, instead of simply releasing the parties at the end of the mandatory session.

*i. Evaluation by the mediator*

The Queen's Bench mediation program adopts an explicitly facilitative, non-evaluative approach to resolution. This is reflected in the fact that most of the present mediators are not legally trained. They do not give an opinion on the legal merits of the case. As one mediator expressed this to us,

"I see my role in these files as being to facilitate, to assist people in their communications, to poke, prod, give gentle nudges, to try to move people forward."  
(*pamediators*)

The lawyers we spoke with appreciated that most of the present cadre of mediators were not qualified to provide a legal evaluation, and although some questioned this these were a small group (see below under mediator qualifications). Most lawyers appear to accept the mediation as a purely facilitative process, thus distinguishing it clearly from the later pre-trial. A number of lawyers commented that in relation to the present pre-trial process, it made more sense to make mediation a distinctive and earlier process. There was no suggestion that the mediator should act as a judge; in fact, there were many examples of lawyers distinguishing the role of a judge from the role of a mediator. The judicial function was seen as quite different from that of a mediator. For example ,

"Some clients won't settle unless a judge tells them that they're liable."  
(*clientfollow-upinterview.2 at 33*)

"The pre-trial judge provides evaluation – it is sometimes important for the client to hear what judge says about their case."  
(*lawyerfollow-upinterview.2 at 32*).

In interviews with members of the judiciary, a majority (although not unanimous) view emerged that once the action proceeds closer to the pre-trial conference stage, the benefits of that more evaluative process tend to overtake those that might come from a later mediation session (although this was not a universal sentiment). Judges interviewed were consistently supportive of early mediation but saw this as a quite distinctive process that generally should occur well in advance of pre-trial (see also "Recommendations", below).

There were some lawyers, however, who stated that they would prefer a more evaluative approach in mediation (for example, four of the five lawyers in *saskatoonlawyersmay.1*). Others said that they could see some types of cases in which an evaluation would be more useful than a purely facilitative approach. While these comments came from a minority, taken with other suggestions about mediator role they suggest that more might be done to provide counsel with choices over mediators (style, expertise, etc). This is discussed further below under "Recommendations" at Part III.

## ii. Mediator proactivity

We were struck by how often we heard comments that the mediator could have been more interventionist during the mediation session (and sometimes, though less often, after the session as well; see below). These comments focused on the level of energy, tenacity and the expectations that the mediators placed on the parties, and particularly on counsel.

These comments came from both lawyers and clients. From clients, they sometimes related to how evaluative a role they expected the mediator to take and some disappointment on that score (see, for example, *reginaclientssept.2*). However, clients remarks about mediator proactivity was not restricted to providing a legal evaluation; see the “wish list” below. From lawyers, generally these comments were separate from and unrelated to any desire for an evaluative mediation (see discussion above).

Instead, the reservations we heard suggested a preference for a more directive style or strategy for the mediator. This “wish list” includes:

- standing up to counsel where they are either unwilling to stay in the session or to bargain in good faith (for example, see *saskatoonclientssept.3*)
- holding counsel to account where they have not exchanged adequate information in advance to make the session constructive and worthwhile for everyone
- not letting counsel – or one counsel – dictate the tone of the meeting
- requiring counsel to answer questions and to explain / justify their positions (for example, see *reginaclientssept.1*)
- working harder to keep parties at the table (for example, see *reginalawyerssept.2*)
- being more specific and clear about the possibility of follow-up sessions where agreement appears close (for example, see *saskatoonclientssept.1*)

There were a number of comments about the general level of energy and tenacity evidenced by the mediator or experienced by the parties. For example, “There wasn’t enough energy in that person to keep the ball rolling” (*saskatoonclientsmay.1*); and “(T)hey (the mediators should be prepared to get their hands dirty” (*reginalawyerssept.2*).

In summary, there was a clear sense that many lawyers and clients wished for mediators who while not necessarily providing direction regarding the possible legal outcomes in the case, would work hard at steering the parties towards constructive and substantive negotiations, and would take charge where the lawyers appeared to be recalcitrant.

From the mediators themselves we heard a range of views about how proactive they felt they should be in mediation. A number felt that it was important to give primary responsibility to the parties themselves for resolving the matter, and this reflected how proactive they felt they should be in the mediation session. Some of the more experienced mediators however said that they felt comfortable being a little more “pushy”, and



working hard to keep the parties at the table. It may be that these mediators are the preferred choice of some lawyers who have had extensive experience at Dispute Resolution Office.

These comments - which were noticeably widespread and consistent between lawyers and clients - give rise to specific Recommendations regarding the role of the mediator and appropriate training (see below at Part III).

### *iii. The mediator's role in finalizing settlements*

One of the points of tension around the level of intervention of the mediator is their role in the drafting of any settlement outcomes or interim agreements. Some of the mediators we spoke with said that they were willing to help draft a summary of matters discussed and agreed in mediation. However others said that they were not comfortable with any role in drafting outcomes or documents that might later be used towards settlement outcomes, and that they saw this as the responsibility of the parties themselves (for example, see *reginamediators.4*). Part of this caution appears to come from a program philosophy about handing off responsibility to the parties to use the results of mediation as they see fit; and part may stem from the difficulties of non-lawyer mediators becoming involved in drafting documents with possible legal effect.

Whatever the strength of these and other arguments that support minimal mediator involvement in the drafting of settlement agreements, we can report that the "hands-off" practice presently adopted among the majority of the mediators attracts considerable client criticism, which may threaten the credibility of the program among some client groups. Some clients simply cannot understand why the apparent agreements made in mediation could not be written down - by someone, anyone - in order to speed the process up after mediation. Typical of this frustration was one clients' comment that he would like the mediator "to light a fire under the other side" (*saskatoonclientssept.3 at 76*). "One-shot" or first-time litigants are usually not clear whose job this is - their lawyer's or the mediator's.

Some repeat clients told us that they have developed the practice of minuting the outcomes of mediation, although this is often not an agreed and shared document (for example, *reginaclientssept.1*). Some lawyers said that they have developed the practice of writing out a memo summarizing the results of mediation and asking the other side to review and sign this in mediation (see for example, *lawyerfollow-upinterview.2*, *lawyerfollow-upinterview.3*). Some reported that the mediator was very helpful in facilitating this process, and there was a general sense that the assistance of the mediator in this regard would be welcomed, not resented. One lawyer told us that he thought that mediators were generally "...much too cautious about involving themselves in developing agreements." (*lawyerfollow-upinterview.1 at 52-53*). Many clients repeated that they thought that a constructive enhancement to the program would be for the mediator to routinely assist directly in minuting the outcomes of mediation (for example, *reginaclientssept.1*)

These comments are related to further comments on compliance, discussed below at (d).

*iv. Beyond facilitation*

There was considerable discussion over the role that might be played by the mediator beyond the facilitation of the mediation session itself. This might include work before mediation and follow-up after the session had taken place. In relation to the early stages of a litigation file this might include, for example, assisting the parties in agreeing a schedule of productions and exchanges ahead of the mediation; relationship-building between the parties before the mediation (which might simply mean agreeing on information exchange (see *saskatoonlawyersmay.1*); and perhaps fractionating some smaller issues that could be agreed upon and disposed of. Once mediation had taken place, this role might involve the mediator in following up on next steps and setting a timetable for future events (*saskatoonclientssept.1*).

There was also some discussion among program users of opportunities to reconvene in a second mediation session, or to book a longer first session for a complex case. Many of those who attended discussion groups were unaware that this opportunity was available. There appeared among some clients to be a measure of regret that the mediator did not stay involved in the case to ensure that a second meeting took place (for example *clientfollow-upinterview.1*).

In the September discussion groups, we conceptualized these ideas as a "case manager" role for the mediator. Clients were generally enthusiastic about this suggestion, feeling that mediation often left too many "loose ends" (see also discussion below on compliance). However among lawyers, the suggestion of a "case manager" role for the mediators was greeted with much less enthusiasm. Comments included concern for adding another level of bureaucracy to the litigation process; a sense that mediators had less authority and credibility than judges in setting case management schedules; and a concern that mediators would need greater knowledge of legal procedures than some presently possessed in order to carry out this task properly (see for example, *reginalawyerssept.1*, *reginalawyerssept.4*). The mediators themselves did not welcome the idea either, and several suggested that they saw their role quite differently to this, and that case management was "treating the symptoms not the causes of the conflict" (*mediator.8 at 140*).

It may be that part of this reaction can be explained by the assumption that a role which we were describing as a "case manager" was perceived by lawyers to be as the same or similar to a judicial case management role. This was not our intent and clearly the role of the judge as case manager is quite distinct. When this was clarified, a number of lawyers stated that if the mediator were to be charged with the responsibility of engaging the parties in a general discussion over their next steps, and a greater degree of proactivity over ensuring that information was exchanged ahead of time, this additional aspect of the mediator's role could be very useful indeed. A number of mediators also described themselves as already informally playing this role (for example, *mediator.5*, *mediator.7*). The possible enhancement of the mediator's role in these ways was also raised with

judges in our discussions with them. Those members of the judiciary with whom we spoke were very supportive of this idea.

d. Compliance

There were many complaints from personal litigants about would-be agreements that they saw as falling apart from lack of follow-through after mediation. Many of these clients were angry about what they saw as a process “without teeth” (for example, see *reginaclientssept.1*). One client described this as “a disconnect between undertakings in the session and what actually happened”. (*reginaclientssept.1 at 33*) Another client said that his experience of non-compliance with an agreement he believed had been made in mediation made him feel like he had been “screwed” by the mediation process (*reginaclientssept.4 at 51*).

Many lawyers and institutional clients also recognized this difficulty, but their comments were more practical. Several suggested that there should be written undertakings made at or immediately following mediation which in the event of non-compliance could then be raised in future proceedings. One lawyer said that his approach to the outcomes of mediation was exactly the same as pre-trial – he took a list of possible undertakings with him to the session, which could be amended as necessary, and if the negotiation was successful would ask the other side to sign off on these, there and then (see *lawyerfollow-upinterview.3*).

More attention to recording the outcomes of mediation would both enhance the legitimacy of the process, and reduce the damage that these client experiences may do to the credibility of mediation. This issue is closely related to the mediator’s role in finalizing settlement, discussed above at (c)(iii). It is further addressed below under “Recommendations.”

e. The Role of Counsel

Many clients appear to be highly satisfied with the role played by their lawyers in the mediation process. We were told by many clients that their lawyers did an excellent job of preparing them, representing them in the mediation session, and counseling them on settlement options. Several clients noted that the commitment of their lawyer to use the mediation process constructively changed the whole experience for them. For example,

“In the first few mediations, our lawyer told me to speak only when I was asked a question, and the mediation was mostly an exchange between the lawyers. Then the city solicitor changed. He told me that mediation was really for the clients to talk, not the lawyers – that we can use it to do the PR thing and if it’s a legitimate case say sorry -- and that he would take care of the legal issues. Now my feeling about mediation has totally changed.”

(*saskatoonseptclients.3 at 20-22*)

However, we also heard a significant amount of negativity expressed by *some* clients about the role played by *their* lawyers in the mediation process. These comments highlighted in particular a failure to prepare the client for mediation; a failure to prepare the file for mediation for example by exchanging or obtaining information from the other side; a pessimistic outlook on mediation (“it’s going to be a waste of time”); and the tendency of some lawyers to “muzzle” their clients (i.e. to instruct them not to talk in the mediation session) (for example, see *clientfollow-upinterview.3*).

It is important to note that these negative comments about the behavior of some counsel came from both clients and lawyers. In fact, these comments were largely the same from lawyers and clients, although it would be fair to say that clients were often more forthright in their criticisms. It is also fair to note that in some cases lawyers may take the view that mediation is not going to be helpful for moving this case along, and therefore choose not to spend time preparing for the session. However, if this is the case it is incumbent on these lawyers to explain this to their clients, some of whom do not appear to fully understand the reasons for their lawyer’s attitude towards mediation.

Lawyers themselves were often critical of the approach taken by their colleagues who either failed to prepare or treated the mediation as simply an opportunity for informal examinations; one lawyer suggested that “(T)here should be some way to ‘de-lawyerize’ the process’.” (*saskatoonlawyersmay.1 at 34*). Another candidly acknowledged “Lawyers sometimes have a vested interest in complicating things, and delaying the resolution of cases” (*lawyer email communication.1*).

There was widespread acceptance among both lawyers and clients that counsel’s attitude towards mediation would largely determine how the mediation would go, and how useful and constructive it would be – or not. We heard a number of tales of lawyers who had not prepared their clients in any way for what to expect in mediation (see for example *paclientsept.2*). This appeared to be a consequence of the lawyer’s assumption that there was no point in preparing for mediation since the process would not work for this case. These clients suggested that their lawyers’ “default position” was not to prepare or take mediation seriously, instead of a default (more appropriate and courteous in a bilateral matter) of treating mediation as a serious settlement opportunity, in all but special circumstances. One large institutional client described the contrast between his experience with a lawyer who was not interested in mediation, compared with a new lawyer for his organization who regarded mediation as important and useful; as a result, he “had a completely different feeling about mediation now” (*saskatoonseptclients.3 at 14*). The negative attitude of some lawyers also stands in contrast with those lawyers who told us that experience had taught them that the results of mediation not infrequently surprised them, and that they had learned that it was sometimes hard to anticipate in advance whether it would be useful in this case, or not (in other words, it was almost always worth trying) (see above at Part II(1)(c)).

A couple of our client discussion groups were largely preoccupied with negative comments about lawyers in the process, while the clients were positive about the program itself (for example, see the discussion in *saskatoonclientsmay.1*). Several clients in this

group expressed the view that in hindsight they believed that they would have been better off coming to mediation without their lawyer. Some reasoned that attending without counsel – but with access to counsel for advice if a settlement emerges – would be a better option than attending with a lawyer who was neither prepared nor committed to making mediation work (see also *paclientssept.2*). This would at least avoid their paying the lawyers fee for attending at mediation.

Negative comments from lawyers about their colleagues were often framed in terms of an absence of “good faith” in entering the mediation process willing to disclose relevant information and genuinely searching for a solution. A number of lawyers expressed high levels of frustration to us about the likelihood that they prepare conscientiously for mediation, bring their client, only to be confronted by a lawyer on the other side who was not willing to bargain openly or in good faith.

We asked lawyers for their reaction to the possibility of a “good faith” rule for the program. Other jurisdictions in North America, including the farm debt mediation program in Saskatchewan, have a rule that enables the mediator to impose sanctions if s/he believes that one or other party has not come in good faith, adequately prepared and ready to bargain seriously (see generally Lande, 2002). However this idea was not well received, with many lawyers telling us that they were adverse to more “rules” (for example see *palawyerssept.1, reginalawyerssept.4*).

Instead most lawyers expressed a strong preference for strategy of further lawyer education, combined with strong leadership from the Bench, to overcome this problem. A focus on continuing legal education and the support of the Bench for court-connected mediation may also prove to be the most effective and the most easily accepted means of addressing the problem of a minority group of lawyers coming to mediation without having adequately prepared either themselves, or their clients (Kovach, 1997). Studies elsewhere have highlighted the importance of establishing a culture of legitimacy for mediation, ensuring that lawyers take the process seriously and that a norm of good faith and adequate preparation takes hold within the community (exemplified by the Ottawa experience, which was backed by strong advocates from the Bench and in the Court; see Macfarlane 2002).

The judges interviewed for this evaluation did indicate their clear support for the mediation program, and this may need to be utilized more effectively than at present. It was also notable that judges made the comment in interviews that they encountered similar dynamics – some lawyers' resistance to a settlement oriented process, the failure of some counsel to adequately prepare for the process - in pre-trial conferences (although perhaps to a lesser degree).

A possible education and leadership strategy is outlined further below under “Recommendations”.

### 3. Other Observations

Several other important themes emerged from our discussions with lawyers and clients which are reported here.

#### **a. The use of conference calls**

We heard complaints from five lawyers who wanted greater flexibility in substituting attendance at mediation with conference calls for out-of-province clients. However, in the course of these discussions we also heard from other lawyers that conference calls would in their opinion reduce the usefulness of mediation; “you need to have a human face on it in order to facilitate resolution” (*saskatoonlawyersmay.1 at 97*). Several lawyers told us that they resented the request of the other side (often large insurers) to meet by conference call instead of sending a representative to mediation, and that they were happy for the Dispute Resolution Office to generally insist on attendance and participation.

We have concluded that while some lawyers are frustrated over the reluctance to allow conference calls, that the present approach is treating each request on its merits and encouraging face-to-face meeting is broadly supported by all but a small number of counsel.

#### **b. Access to extended mediation sessions and subsequent sessions**

We heard from a minority of lawyers that they were aware that they could request both a longer session (regular mediation sessions are scheduled for two hours); and further follow-up sessions to finalize agreements or take negotiations another step forward. Many other lawyers in these discussion groups expressed surprise at this – this does not appear to be widely known. Some of these lawyers said that they would sometimes want to avail themselves of a second session, and/or anticipate the need for a longer first session.

Among clients, there were some comments about a follow-up session being discussed at the end of their mediation session, but not materializing. These clients were usually unclear over who should take this initiative, although a few wished that the mediator would. The mediators themselves seemed to assume that a second session was not widely desired (for example see *mediatorsregina 2*). Other mediators told us that they would like a stronger and clearer role in relation to encouraging parties to return for a second session where real progress was being made (see *saskatoonmediatorsmay.45678*).

If these services are to be made available informally, it seems appropriate now to formalize their availability to all program users. See also “Recommendations”, below at Part III.

#### **c. Information for the parties**

The Dispute Resolution Office produces explanatory literature for clients which offers a summary of what clients should expect in mediation, and answers some potential user

questions about the program. However, very few of our client respondents indicated that they had seen this information. For *some* (see below), this serves only to exacerbate a feeling of strangeness and lack of preparation in advance of mediation. One client stated that he would have appreciated more information about the procedural dimensions of mediation – precisely the type of information that the Dispute Resolution Office materials do present (*reginaclientsept.2 at 45-46*). Another told us that he was concerned about how confidentiality applied to what was discussed in mediation – a question which went unanswered in this case. Another client said that her lawyer told her to expect something along the lines of a hearing for discovery (*reginaclientsmay.1 at 90*).

Many clients, of course, had been satisfactorily briefed by their lawyers and were not disadvantaged in any way by having not seen the literature provided by the Dispute Resolution Office. However, as a general principle, it is important to try to get this explanatory information into the hands of the clients to whom it is targeted. This ensures at least a baseline of information which counsel can, and should, then supplement in discussions with his or her client. See also “Recommendations”, below at Part III.

#### d. “Culture change”

Most of the lawyers we spoke to, including those who were more negative about mediation, acknowledged a significant shift in the attitude of the Saskatchewan Bar towards mediation in the last 8 years. In addition to identifying a cultural change within the Bar itself – described by one respondent as originally “dragged into this kicking and screaming” (*lawyerfollow-upinterview.2*) - in the degree of openness and receptivity towards mediation (including mandatory mediation), a number of lawyers gave us personal accounts of what was sometimes described as their “conversion” (for example, *lawyerfollow-upinterview.1*, *lawyerfollow-upinterview.3*, *palawyersept.2*, *lawyeremail.1*, *reginalawyerssept.1* among many). These lawyers all described their initial reactions to the introduction of mandatory mediation as highly skeptical and/or critical. However they told us that they had become gradually convinced of its real worth in at least a significant number of cases. Even those who were more personally cautious – broadly supportive but entirely convinced - described a significant shift of attitudes among members of the Bar. As one lawyer put it, “mediation is no longer a dirty word” (*reginalawyerssept.2 at 56*).

Some of those counsel who described themselves as having embraced the principles of interests-based mediation were relatively new practitioners, who had been exposed to some ADR education in law school (see below). Many others however were more senior practitioners who explained a shift in their strategy and attitudes towards settlement as the results of pragmatism and experience. As one experienced lawyer put it,

“(W)hen you practice long enough, you’ll understand there are some brilliant legal arguments that are not worth making”.  
(*saskatoonlawyersmay.1 at 189-190*)

Mediators also told us that they had seen signs of real change in the attitude of the Bar. Several spoke of individual lawyers whose commitment to mediations they oversaw had changed radically over the past few years. This change was attributed by the mediators to

a range of possible causes, including enhanced law school education on mediation, and the recent growth of collaborative family lawyering and associated trainings within the province.

**e. Implications for legal education**

There was widespread agreement on two issues : that legal education in the province has made significant strides towards ensuring that new law school graduates had a better grasp of the essentials of interests-based bargaining and mediation; and that there remained much to be done still in this area to adequately equip lawyers to be as effective as possible in these processes

Many of the lawyers with whom we spoke suggested that an educational strategy was preferable to a rule-based approach to addressing challenges with program structure and design (Kovach, 1997). See also “Recommendations”, below at Part III.

**4. Quantitative Data Analysis**

Efficiency questions inevitably preoccupy program planners and evaluators. Whereas the Saskatchewan Queen’s Bench program was not introduced primarily to enhance case processing efficiency – unlike Ontario and British Columbia where the civil justice system has faced a significant backlog of cases and delays in resolution – it is important that the program can be shown to be performing to an acceptable standard of efficiency.

Program efficiency is generally measured by examining the cost and time involved in resolving the dispute, both from the parties perspective (legal costs, delays, other commercial and personal costs) and more generally from the perspective of the justice system itself (court staff time, processing costs, judge time and so on). While there may be some collateral benefits for those cases that do not settle in mediation (see above at Part II(1)(e)), the first question to be answered is how many cases are actually resolving in mediation, or as a result of mediation.

**a. What are the outcomes of mediation?**

Dispute Resolution Office mediators currently record one of five outcomes for mediation immediately after the session has ended.

|            |                                   |
|------------|-----------------------------------|
| Category 1 | Agreement reached in mediation    |
| Category 2 | Agreement likely                  |
| Category 3 | Further negotiations pending      |
| Category 4 | Proceed to court                  |
| Category 5 | No interaction (proceed to court) |

The following tables set out case outcomes as reported by mediators for the three years 1999/2000, 2000/2001, and 2001/2002.

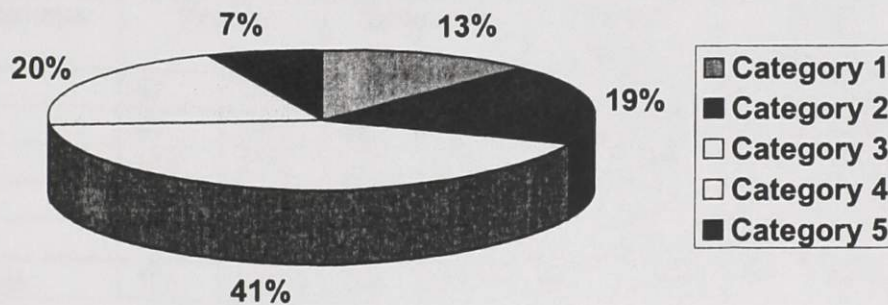


**Table Set Two** Reported outcomes in all case categories : by year 1999-2002

**Table 2(A) Recorded outcomes 1999/2000**

| Outcome | Regina |      | Saskatoon |      | Prince Albert |      | Swift Current |      | Totals |      |
|---------|--------|------|-----------|------|---------------|------|---------------|------|--------|------|
|         |        |      |           |      |               |      |               |      |        |      |
| 1       | 38     | 12%  | 52        | 14%  | 6             | 15%  | 6             | 24%  | 102    | 13%  |
| 2       | 57     | 18%  | 71        | 19%  | 10            | 24%  | 5             | 20%  | 143    | 19%  |
| 3       | 142    | 44%  | 137       | 37%  | 22            | 52%  | 8             | 32%  | 309    | 41%  |
| 4       | 72     | 22%  | 75        | 20%  | 1             | 2%   | 6             | 24%  | 154    | 20%  |
| 5       | 14     | 4%   | 38        | 10%  | 3             | 7%   | 0             | 0%   | 55     | 7%   |
| Totals  | 323    | 100% | 373       | 100% | 42            | 100% | 25            | 100% | 763    | 100% |

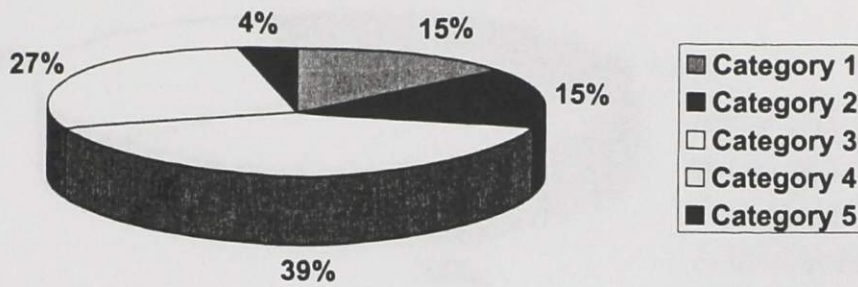
**Pie Chart 2(A) Reported outcomes 1999/2000**



**Table 2(B) Reported outcomes 2000/2001**

| Outcome | Regina |      | Saskatoon |      | Prince Albert |      | Swift Current |      | Totals |      |
|---------|--------|------|-----------|------|---------------|------|---------------|------|--------|------|
|         |        |      |           |      |               |      |               |      |        |      |
| 1       | 48     | 13%  | 53        | 14%  | 14            | 22%  | 6             | 33%  | 121    | 15%  |
| 2       | 55     | 15%  | 48        | 13%  | 17            | 26%  | 1             | 6%   | 121    | 15%  |
| 3       | 148    | 40%  | 140       | 38%  | 23            | 35%  | 8             | 44%  | 319    | 39%  |
| 4       | 102    | 28%  | 109       | 29%  | 11            | 17%  | 3             | 17%  | 225    | 27%  |
| 5       | 17     | 4%   | 23        | 6%   | 0             | 0%   | 0             | 0%   | 40     | 4%   |
| Totals  | 370    | 100% | 373       | 100% | 65            | 100% | 18            | 100% | 826    | 100% |

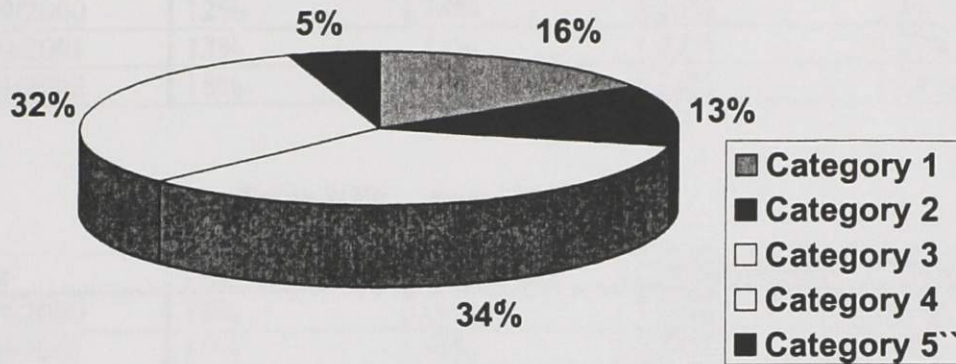
**Pie Chart 2(B) Reported outcomes 2000/2001**



**Table 2(C) Reported outcomes 2001/2002**

| Outcome | Regina |            | Saskatoon |            | Prince Albert |            | Swift Current |            | Totals |            |
|---------|--------|------------|-----------|------------|---------------|------------|---------------|------------|--------|------------|
|         | Count  | Percentage | Count     | Percentage | Count         | Percentage | Count         | Percentage | Count  | Percentage |
| 1       | 62     | 18%        | 50        | 13%        | 15            | 18%        | 4             | 23%        | 131    | 16%        |
| 2       | 48     | 14%        | 44        | 11%        | 11            | 13%        | 2             | 11%        | 105    | 13%        |
| 3       | 118    | 35%        | 138       | 35%        | 21            | 25%        | 7             | 39%        | 284    | 34%        |
| 4       | 90     | 27%        | 138       | 35%        | 36            | 42%        | 5             | 28%        | 269    | 32%        |
| 5       | 18     | 5%         | 24        | 6%         | 2             | 2%         | 0             | 0%         | 44     | 5%         |
| Totals  | 336    | 100%       | 394       | 100%       | 85            | 100%       | 18            | 100%       | 833    | 100%       |

**Pie Chart 2(C) Reported outcomes 2001/2002**



Over the past three years, the rate at which agreements have been reached in mediation (category 1) across all four centres has remained fairly consistent. This was 13% in 1999/2000; 15% in 2000/2001; and 16% in 2001/2002. In Regina and Saskatoon there are some slight but insignificant differences in settlement rates and reported outcomes from year-to-year. Where variations do appear from year-to-year between the smaller centres – for example, Swift Current reports a 33% agreement rate in 2000/2001, but only 24% in 1999/2000 and 23% in 2001/2002 – these figures should not be taken as conclusive of any significant trend because of the very small volume of cases involved. (The two smaller centres represent a very small fraction of the overall caseload. In 1999/2000 the major centres of Regina and Saskatoon accounted for 91% of the total number of mediations conducted in the province; in 2000/2001 90%; and in 2001/2002 88%.)

These figures also show a similar consistency in outcomes reached between the four centres. The percentile of settled cases recorded appears as slightly higher at the smaller center of Swift Current – and to a lesser extent at Prince Albert. However, a small group of successful or unsuccessful cases may affect percentiles in centres with a small volume of cases.

**Table Set Three:** All programs, comparison of reported case outcomes in all case categories, 1999-2002 : by reported outcome

**Table 3(A): Agreement Reached**

| Year      | Regina | Saskatoon | Prince Albert | Swift Current |
|-----------|--------|-----------|---------------|---------------|
| 1999/2000 | 12%    | 14%       | 15%           | 24%           |
| 2000/2001 | 13%    | 14%       | 22%           | 33%           |
| 2001/2002 | 18%    | 13%       | 18%           | 23%           |

**Table 3(B): Agreement Likely**

| Year      | Regina | Saskatoon | Prince Albert | Swift Current |
|-----------|--------|-----------|---------------|---------------|
| 1999/2000 | 18%    | 19%       | 24%           | 20%           |
| 2000/2001 | 15%    | 13%       | 26%           | 6%            |
| 2001/2002 | 14%    | 11%       | 13%           | 11%           |

**Table 3(C): Further Negotiations**

| Year      | Regina | Saskatoon | Prince Albert | Swift Current |
|-----------|--------|-----------|---------------|---------------|
| 1999/2000 | 44%    | 37%       | 52%           | 32%           |
| 2000/2001 | 40%    | 38%       | 35%           | 44%           |
| 2001/2002 | 35%    | 35%       | 25%           | 39%           |

**Table 3(D): Proceed to Court**

| Year      | Regina | Saskatoon | Prince Albert | Swift Current |
|-----------|--------|-----------|---------------|---------------|
| 1999/2000 | 22%    | 20%       | 7%            | 0             |
| 2000/2001 | 28%    | 29%       | 17%           | 17%           |
| 2001/2002 | 27%    | 35%       | 42%           | 28%           |

**Table 3(E): Total Bust**

| Year      | Regina | Saskatoon | Prince Albert | Swift Current |
|-----------|--------|-----------|---------------|---------------|
| 1999/2000 | 4%     | 10%       | 7%            | 0             |
| 2000/2001 | 4%     | 6%        | 0             | 0             |
| 2001/2002 | 6%     | 6%        | 2%            | 0             |

i. *How typical is Saskatchewan's rate of settlement?*

In comparing Saskatchewan's settlement rate in mandatory mediation with other programs, it is contentious whether the point of comparison should be with the total Category 1 cases (16% for the year 2001/2002), or with all cases reported as *either* settled or "likely to settle" (Category 2) (29% for the year 2001/2002). It is also arguable that some of the Category 3 ("further negotiations") cases may also proceed to settle shortly after and as a result of mediation (see also below).

If cases reporting Category 1 outcomes ("full settlement") are assumed to be the sum total of settled cases in the Saskatchewan program, this rate of settlement appears to be somewhat lower than other, similar programs report. For example, the most recent evaluation (Hann & Associates 2001) of the Ontario mandatory mediation program (Rule 24.1 Ontario Rules of Civil Procedure RRO 1990, reg 194) reported a full settlement rate in Toronto of 38% and an additional partial settlement rate of 21% ; and in Ottawa 41% of cases settled in full and 13% partially settled. However, the 10 day time lag in filing a report (in the evaluation, mediators were asked to respond to whether the case had settled within 7 days of mediation) *may* mean that this data captures some equivalents to Saskatchewan's category 2 ("likely to settle") cases. If Category 2 cases are added in to Saskatchewan's settlement rate, (making it 29% in 2001/2002; see above), the figures become more comparable between the two programs, although the settlement rate remains still considerably higher in Ontario.

The significance of Ontario as a comparator is that its program is in many respects very similar to the Saskatchewan program. It is an opt-out program (i.e. exemptions have to be requested) and it occurs early in the litigation process (generally before discoveries). However, there are some differences between the two programs which may account for the difference in settlement rates, including the potential for selection of a mediator from a large pool and the different method of reporting outcomes (below). In addition, Ontario requires the parties to exchange statements before mediation outlining the issues in dispute, although it would appear that in practice this appears to add little to levels of preparedness (recognized as a problem in some Ontario cases (Macfarlane, 2002), just as in some cases in Saskatchewan; see the discussion above at Part II (2)(e).

Looking beyond Ontario for possible program comparators, a number of additional variables intrude. For example, many US programs are voluntary (characterized as "opt-in" not "opt-out" as in Ontario and Saskatchewan), and this may account for their often higher rates of settlement. For example, the Illinois Judicial Circuit reports a settlement rate in five circuit courts (statistics variously collected from 1993 to 2003) as high as 60% ([www.caadr.org/statistic/reports](http://www.caadr.org/statistic/reports)). Clarke et al (1995) report a settlement rate of 44% in North Carolina. Both of these programs are opt-in programs.

However, there are apparently exceptions to this trend also. Other evaluations of voluntary programs report much lower rates of settlement. The RAND Report of 1997 which examined settlement in 20 judicial districts in the United States found a settlement rate in (voluntary) court-referred mediations of just 21% (Kakalik et al 1997) (note

however that this study has been widely criticized as based on a very small sample of mediated cases).

Arrangements for lawyers fees in the US (for example whether undertaken on a contingency basis) may also affect settlement levels. Such comparisons may also be affected by differences in reporting practices; for example in Ontario, unlike Saskatchewan where the mediator's report is made immediately after the conclusion of the mediation session, the mediator has up to 10 days to file a report after the conclusion of the mediation, He or she may have been able to follow-up with the parties during that time to ascertain progress towards proposed outcomes. Ontario, along with a number of other US jurisdictions, also reports both "full settlement" and "partial settlement" (of some but not all issues).

Typically, family mediation programs reveal higher rates of settlement than civil non-family programs (Pearson, 1982). In a recent study of voluntary court-connected mediation in Georgia which included both family and other civil cases, family cases settled at a higher rate (35%). Settlement rates in contract and in tort cases (each 21%) were far more comparable to the Saskatchewan figures (Hartley, 2002).

In conclusion, it is important to recognize that so many variables exist among court-connected mediation programs that direct comparison may be unrealistic. Nonetheless, it would be safe to say that typically settlement rates in civil non-family court-connected programs range from one third to two thirds (Wissler, 2002). This would place the Saskatchewan settlement rate "in the ballpark" if Category 1 and 2 cases added together are assumed to represent the overall rate of settlement. This proportion of settled cases might be further swelled if some Category 3 cases could be shown to settle as a result of mediation.

However, because of the manner in which data on outcomes is presently collected in Saskatchewan, this assumption bears further examination. In common with many other programs, mediators are given the responsibility of reporting actual or anticipated outcomes. This raises concerns about the accuracy of this data. It must be emphasized that there is no suggestion here (and we heard none from any parties) that mediators were deliberately misrepresenting outcomes. Instead, the reporting of anticipated results represents a data management challenge

*ii. How accurate are reported outcomes?*

#### *The 2001/2002 Audit*

The decision to implement a random audit of case outcomes in Categories 1 and 2 was made on the advice of the Evaluation Advisory Committee at an early stage of the evaluation. At present, the outcomes of mediation are recorded by the mediators themselves, without independent verification by the parties. Concerns about reporting of outcomes have focused in particular on the prediction that an agreement would likely

follow mediation (Category 2), and this was the focus of this limited audit. Further studies might usefully track outcomes in other categories (see discussion below).

In the absence of any formal requirement (either in Saskatchewan or in any other Canadian province) to file notice of settlement and withdrawal, the only way to ascertain the accuracy of both Category 1 and Category 2 record was to conduct a small random audit of actual outcomes. This task was taken on by the Dispute Resolution Office, and the returns – which are analyzed below - forwarded to the Evaluator.

### *Category 1 cases*

The Dispute Resolution Office sent out surveys to counsel on all cases that had recorded either Category 1 outcomes (agreement reached in mediation) during the year 2001/2002 in Regina, Saskatoon and Prince Albert (a total of 126 cases). Counsel was asked to respond to the following two questions:

2. If there was a settlement reached in mediation, did this get translated into formal Minutes of Settlement or a Settlement Agreement? If not, what happened?
3. To the best of your knowledge, was the agreement reached in mediation complied with by the parties?

### *Results*

70 surveys were returned (an excellent return rate of 55.5%). Of these 70 returns, 2 stated that they could provide no further information. Of the remaining 68, 59 (87%) stated that formal minutes were executed at or shortly after mediation. The 9 cases which did not use formal signed minutes of settlement reported nonetheless that the parties had agreed on an outcome between themselves and in none of these cases were there any reported compliance problems. In two cases, minutes had been drawn up but one party (the defendant in each case) had refused to sign these. Unsurprisingly, in each of these two cases there had been compliance issues. Two other cases – for a total of four – reported compliance problems. One case reported that compliance was partially complete but ongoing. Compliance was complete therefore in 97% of cases.

### *Analysis*

These results appear to substantiate the accuracy of the Category 1 record. They also indicate that in most cases, the parties are executing settlement agreements – but also that where this formality is dispensed with, there is rarely a problem. Compliance appears to be high. There is no reason to believe that compliance with settlement agreements arising out of mediation is any different from compliance where settlement agreements are made outside mediation.

### *Category 2 cases*

The Dispute Resolution Office sent out surveys to counsel on all cases that had recorded either Category 2 outcomes (agreement likely following mediation) during the year 2001/2002 in Regina, Saskatoon and Prince Albert (a total of 106 cases). Counsel was asked to respond to the following three questions:

1. Was there ultimately a settlement in this case?
2. To what extent was the settlement a result of/ influenced by the discussions that took place in mediation?
3. Approximately how long after mediation and at what stage of the case did settlement take place?

### *Results*

35 surveys were returned (a respectable return rate of 33%). Of these 35 returns, 3 stated that they could provide no further information. Of the remaining 32, 14 (44%) stated that no agreement had in fact been reached in this case. A few of these commented that mediation had been less than helpful. For example,

“Mediation was ineffective. Matters appeared more inflamed following the session.”

“The mediation process was meaningless.”

A further 14 (44%) stated that agreement had been reached which was significantly or “somewhat” (three of 14) enabled by the discussions in mediation. Several respondents pointed to the role of mediation in enabling critical documentary and other information exchange. Some of these responses explained the impact that mediation had on moving the settlement discussions along in the following terms:

“The mediation was really helpful in understanding the issues”

“The mediation really helped the parties appreciate that it is the process they would like to use to settle their case”

“The case had been stalled for 9 years. It was resolved as a direct result of the mediation.”

“Hard to say...the mediation was in this instance helpful in bringing all parties together in a non-confrontational atmosphere which I expect promoted settlement.”

“To what extent...? 100%”

In contrast, four respondents (including one counsel on a case otherwise reported by the other side as being settled as a result of mediation) stated that while agreement was



reached it was *not* as a result of mediation. One counsel stated that "it was (as a result of the) co-operation of counsel.". A second stated his view that "(S)ettlement was not in my opinion influenced by the discussions that took place at the mediation to any significant extent." The third stated "I do not know whether (my client) is of the view that the mediation process helped or not. I have not discussed it with him." The fourth described the mediation as "rancorous".

Of the 18 cases which did settle, 15 provided information on the timing of settlement. Eleven of these cases settled within weeks or a few months of mediation, and before any other legal steps were taken (e.g. discoveries). A smaller group (4 cases) were not finalized until 12 months or later. This longer time period did not seem to clearly relate to the usefulness of mediation but rather to the practicalities of finalizing documentation, exchanging necessary information etc.

### *Analysis*

These results suggest that the prediction that an agreement is "likely" following mediation is only accurate about half the time. While Category 2 cases are not presented as having been settled by Dispute Resolution Office, there is certainly a sense created that these cases will probably – although not certainly - settle shortly after mediation. A figure of 50% may be too low to justify this designation.

There are a number of very strong and moderately strong statements in this part of the survey about the positive influence of mediation on settlement discussions. The volume of these comments clearly outweighs negative comments about mediation (examples above).

Nonetheless there is a need to ensure that the Category 2 rating is attributed only when there is adequate information to substantiate this reporting status. This may mean that reports should not be completed immediately other than in situations where there is a clear outcome i.e. an agreement reached and documented in some fashion in mediation, or a "total bust" where parties declare the negotiations to be over. In other cases a follow-up two or four weeks later for the purposes of record keeping may be more appropriate and may achieve greater degree of accuracy.

Having considered these results, modifications to the present system of reporting outcomes are described under "Recommendations" at Part III.

It should also be noted that a future study could usefully examine the outcomes of Category 3 cases (negotiations continuing). It seems likely that further settlements may arise in that group which can be attributed to mediation. The best way to ascertain this would be to undertake an audit similar to that undertaken here in relation to Category 1 & 2 cases.

### *The 2001/2002 Status Check*

Another means of checking on reported outcomes is to access what information exists in the court record on each case in each reporting category. A year end Status Check was carried out for the year 2001/2002 in Saskatoon and Prince Albert, and for each month of this same period in Regina. Each case was checked to ascertain (i) whether a notice of discontinuation had been filed (ii) whether there had been any other or further court activity on the file during this period, which would be a minimum of 6 and a maximum of 16 months after mediation.

Since there is no formal requirement of the filing of a notice of discontinuation in Saskatchewan (in common with other Canadian provinces), this data is at best an incomplete picture of those cases that have settled and withdrawn from litigation. We also know that in North American civil justice systems most (in the region of 95%; see Galanter & Cahill, 1994; Trubek, Sarat, Felstiner, Kritzer & Grossman, 1983) cases settle before trial. Therefore data showing discontinuation and/or no further activity on the file is most useful where it can show patterns which contrast with a control group (e.g. that discontinuation occurred significantly earlier in the mediation stream than in the litigation stream). Such a control group was not available here since all cases in these three centers are referred to mandatory mediation.

Nonetheless, the Status Check reveals a striking number of cases which have been recorded as showing "no further activity" following mediation. No further activity *implies* that the matter had resolved, and without further recourse to the court via motions activity or discoveries. It is important not to overstate the significance of this data – it is impossible to conclusively assert that cases in which there was "no further activity" or which filed a notice of discontinuation *settled as a result of mediation*. In order to demonstrate this causal connection it would be necessary to communicate directly with the parties, as in the audit process above. However, these figures are suggestive of the impact of mediation. This is *especially* so where there was no further activity, and/or discontinuation took place within a few months of the date of mediation.

#### Table Set Four:      Status Checks, 2001/2002

#### **Table 4(A): Prince Albert, Status 6-16 months following mediation**

The results of a Status Check on a total of 79 files during the period April 1, 2001, to March 31, 2002 showed almost 60% of Category 3 cases (22 files) and 45% of Category 4 files recorded no further activity following mediation.

#### *Code 1 – Agreement Reached – 13 Files*

|   |                           |       |
|---|---------------------------|-------|
| 3 | Nothing Further           | 23.0% |
| 6 | Discontinuance/Settlement | 46.2% |
| 4 | Other Court Action        | 30.8% |

*Code 2 – Agreement Likely – 11 Files*

|   |                           |       |
|---|---------------------------|-------|
| 7 | Nothing Further           | 63.6% |
| 1 | Discontinuance/Settlement | 9.1%  |
| 3 | Other Court Action        | 7.3%  |

*Code 3 – Further Negotiation – 22 Files*

|    |                           |       |
|----|---------------------------|-------|
| 13 | Nothing Further           | 59.1% |
| 2  | Discontinuance/Settlement | 9.1%  |
| 7  | Other Court Action        | 31.8% |

*Code 4 – Proceed to Court – 31 Files*

|    |                           |       |
|----|---------------------------|-------|
| 14 | Nothing Further           | 45.2% |
| 4  | Discontinuance/Settlement | 12.9% |
| 13 | Other Court Action        | 41.9% |

Both the Category 5 files (“total bust”) continued to court action.

**Table 4(B): Saskatoon, Status 6-16 months following mediation**

In Saskatoon, with a much larger number of files (393), quite similar patterns are apparent in the large numbers of Category 3 & 4 cases which record no further activity on the file following mediation.

*Code 1 – Agreement Reached – 50 Files*

|    |                           |       |
|----|---------------------------|-------|
| 18 | Nothing Further           | 36.0% |
| 27 | Discontinuance/Settlement | 54.0% |
| 5  | Other Court Action        | 10.0% |

*Code 2 – Agreement Likely – 39 Files*

|    |                           |       |
|----|---------------------------|-------|
| 25 | Nothing Further           | 64.1% |
| 9  | Discontinuance/Settlement | 23.1% |
| 5  | Other Court Action        | 12.8% |

*Code 3 – Further Negotiation – 142 Files*

|    |                           |       |
|----|---------------------------|-------|
| 72 | Nothing Further           | 50.7% |
| 20 | Discontinuance/Settlement | 14.1% |
| 50 | Other Court Action        | 35.2% |

*Code 4 – Proceed to Court – 138 Files*

|    |                           |       |
|----|---------------------------|-------|
| 73 | Nothing Further           | 52.9% |
| 12 | Discontinuance/Settlement | 8.7%  |
| 53 | Other Court Action        | 38.4% |

*Code 5 – No Interaction – 24 Files*

|    |                           |       |
|----|---------------------------|-------|
| 7  | Nothing Further           | 29.2% |
| 6  | Discontinuance/Settlement | 25.0% |
| 11 | Other Court Action        | 45.8% |

**Table 4(C): Regina, Status 6-18 months following mediation**

Finally, the Regina cases (316 files over this period) were subject to the same status checks over a period ranging from 6 – 18 months following mediation. The Regina cases show slightly lower, but still significant numbers of files recording no further activity following mediation.

*Code 1 – Agreement Reached – 57 Files*

|    |                           |       |
|----|---------------------------|-------|
| 16 | Nothing Further           | 28.1% |
| 33 | Discontinuance/Settlement | 57.9% |
| 8  | Other Court Action        | 14.0% |

*Code 2 – Agreement Likely – 38 Files*

|    |                           |       |
|----|---------------------------|-------|
| 15 | Nothing Further           | 39.5% |
| 13 | Discontinuance/Settlement | 34.2% |
| 10 | Other Court Action        | 26.3% |

*Code 3 – Further Negotiation – 113 Files*

|    |                           |       |
|----|---------------------------|-------|
| 49 | Nothing Further           | 43.4% |
| 20 | Discontinuance/Settlement | 17.7% |
| 44 | Other Court Action        | 38.9% |

*Code 4 – Proceed to Court – 91 Files*

|    |                           |       |
|----|---------------------------|-------|
| 34 | Nothing Further           | 37.4% |
| 11 | Discontinuance/Settlement | 12.1% |
| 46 | Other Court Action        | 50.5% |

*Code 5 – No Interaction – 17 Files*

|   |                           |       |
|---|---------------------------|-------|
| 5 | Nothing Further           | 29.4% |
| 5 | Discontinuance/Settlement | 29.4% |
| 7 | Other Court Action        | 41.2% |

iii. *Are outcomes significantly affected by case type?*

Efforts elsewhere to establish statistically significant relationships between case type and the likelihood of settlement to case type have largely proved to be fruitless (see for example, Wissler, 2002). In Canada, there is some work that supports the thesis that wrongful dismissal cases have a slightly higher chance of settlement in mediation (Macfarlane, 1995, Hann et al, 2001). However, research also indicates that case type settlement patterns may also vary between different cities and different legal cultures (Hann et al, 2001, Macfarlane, 2002; see also further the discussion below under “Malpractice”). While program planners would welcome the opportunity to introduce screening based on case type, experience suggests that case type is not a major predictor of outcome in mediation. Other factors such as the experience of the mediator (Brazil, 1999) and the predisposition of the parties (especially the distance between their initial positions; Wissler 2002) appear to be much more significant.

I. *Contracts, Personal Injury and Wrongful Dismissal cases*

Nonetheless, it is important to examine the Saskatchewan data from the perspective of case type analysis in order to ascertain whether any patterns emerge. In common with other civil jurisdictions, Saskatchewan differentiates between case types by using a small number of very broad categories. In Saskatchewan these classifications are Contracts; Personal Injury; Wrongful Dismissal; Malpractice; and “Other”. At the same time as these case types appear very broad, a further problem for data analysis is the very small number of cases in some of these categories (especially Malpractice) – along with the difficulty of drawing any conclusions from the category defined as “Other” (including estates and probate, residential schools cases, property disputes and a myriad of other matters). For these reasons, the Malpractice and the “Other” categories have not been included in the analysis below.

We tried to establish whether these distinctions made any significant difference to the rate at which cases resolved in mediation. The tables below record outcomes in the case categories of contracts, personal injury and wrongful dismissal.

Some caution is advised in the interpretation of these results. The only case type which produces significant numbers of cases on which to base a reliable analysis is the Contracts group. In Regina and Saskatoon between 190-230 Contracts files are mediated each year. Even in these two larger centers, the number of Personal Injury files mediated annually is less than 45, with Wrongful Dismissals lower again – around 30 files per year in each site. Numbers are much lower again in Prince Albert. As a result of these very small numbers, minor fluctuations in settlement levels should not be taken as significant. With this small volume of cases in each case type, it would take only a small group of cases – for example eight suits filed for personal injury against a manufacturer – which

either all settled or all failed to settle to significantly affect the overall settlement rate for that case type.

Second, these case type records were extracted and collated manually. While every care was taken to ensure that all records were pulled and that manual counting was accurate, without a computerized record it is not possible to state definitively that all records were included in the manual count. Note that where "0" is entered, this means that no cases in this category were found with the stipulated outcome from the data available (rather than 0%).

Table Set Five Case type data 1999-2002 : by reported outcome

**Table 5(A) : Agreement reached**

|                    | Regina |       |       | Saskatoon |       |       | Prince Albert |       |       |
|--------------------|--------|-------|-------|-----------|-------|-------|---------------|-------|-------|
|                    | 99/00  | 00/01 | 01/02 | 99/00     | 00/01 | 01/02 | 99/00         | 00/01 | 01/02 |
| Contract           | 17%    | 20%   | 25%   | 18%       | 21%   | 17%   | 27%           | 20%   | 27%   |
| Personal injury    | 11%    | 10%   | 10%   | 2%        | 7%    | 9%    | 20%           | 17%   | 10%   |
| Wrongful dismissal | 10%    | 0     | 0     | 16%       | 17%   | 21%   | 33%           | 20%   | 11%   |

**Table 5(B) : Agreement reached plus Agreement Likely**

|                    | Regina |       |       | Saskatoon |       |       | Prince Albert |       |       |
|--------------------|--------|-------|-------|-----------|-------|-------|---------------|-------|-------|
|                    | 99/00  | 00/01 | 01/02 | 99/00     | 00/01 | 01/02 | 99/00         | 00/01 | 01/02 |
| Contract           | 25%    | 34%   | 41%   | 35%       | 29%   | 31%   | 38%           | 25%   | 34%   |
| Personal injury    | 24%    | 30%   | 22.5% | 18%       | 17%   | 25%   | 40%           | 33%   | 20%   |
| Wrongful dismissal | 27%    | 24%   | 0     | 24%       | 28%   | 31%   | 50%           | 40%   | 22%   |

**Table 5(C) : Proceed to Court plus Total Bust**

|                    | Regina |       |       | Saskatoon |       |       | Prince Albert |       |       |
|--------------------|--------|-------|-------|-----------|-------|-------|---------------|-------|-------|
|                    | 99/00  | 00/01 | 01/02 | 99/00     | 00/01 | 01/02 | 99/00         | 00/01 | 01/02 |
| Contract           | 25%    | 27%   | 28%   | 27%       | 31%   | 40%   | 8%            | 45%   | 20%   |
| Personal injury    | 28%    | 24%   | 45%   | 37%       | 33%   | 25%   | 60%           | 33%   | 20%   |
| Wrongful dismissal | 28%    | 0     | 0     | 34%       | 38%   | 38%   | 33%           | 40%   | 44%   |

One apparent pattern in this data is that the rate of resolution is higher for Contracts cases than for the other two case types. This remains the case in Table 5(B) (cases settled plus those in which agreement is likely). This *may* mean that generally Contracts cases have been more susceptible to settlement in the Saskatchewan program, but this data is at most moderately suggestive of this conclusion (see discussion above).

Note that the large percentage of unresolved matters in Personal Injury in Prince Albert in 1999/2000 represents just three files.

## *II. Malpractice cases*

It was suggested to us several times by lawyers in discussion groups that medical malpractice cases might be inherently unsuitable for mediation. In the 2001 Ontario evaluation (Hann et al 2001), medical malpractice suits were found to settle at a lower rate than other case types in Toronto (but not in Ottawa, interestingly). Figures for malpractice cases in Saskatchewan have not been included in the analysis above because it is too small to provide a basis for drawing sustainable conclusions. However, the malpractice data for Regina - which carries the largest number of malpractice files - was reviewed. In 1999/2000, 9 malpractice files were mediated in Regina. One was settled, four were deemed "likely to settle" and 9 were recorded as continuing in further negotiations. In 2000/2001, 15 malpractice files were mediated. One was settled, 7 deemed "likely to settle" and five were recorded as continuing in further negotiations. Finally, in 2001/2002, 25 malpractice files were mediated in Regina. One was settled, five were deemed "likely to settle" and 17 were recorded as continuing in further negotiations.

These results may suggest that the rate of settlement is indeed somewhat lower in Malpractice suits than in Contracts cases or even Personal Injuries. However no

statistically supportable conclusion to that effect can be drawn from such a small volume of data. Moreover, these reported outcomes do not account for the other, collateral benefits of mediation – for example, the exchange of information – mentioned by numerous lawyers in the discussion groups and in responding to the audit (see above). Arguably, this may make mediation useful in malpractice suits even where no formal settlement is yet attainable.

### III. *Simplified Rules cases*

Another hypothesis often debated is that mediation is more suited to cases involving smaller rather than larger sums of contests monies. One respondent writes in an email :

“Despite my initial reservations, I must admit that I am a big proponent of mandatory mediation, especially in disputes involving the Simplified Procedure Rules (under \$50,000). Given that we have no discoveries for these types of cases, mediation is our first and only pretrial opportunity to assess credibility and to ask a few questions.”  
(*lawyeremail.1*)

The debate over whether mediation is more likely to succeed in cases where smaller amounts of money is involved has not been settled conclusively elsewhere. In Ontario, Simplified Rules cases are excluded from the mandatory mediation program under Rule 24.1, but in British Columbia and many US states, small claims matters (generally under \$10,000) were the first to be mandated into mediation. In Saskatchewan, cases proceeding under the Simplified Rules in the Queen’s Bench are included in referral to mediation. Are cases that proceed under the Simplified Rules Procedure (for cases under \$50,000) settling at any significantly different rate than other cases?

Again this analysis could only be accomplished by manual count and thus some caution must be taken with the results. Because of the difficulty of manual counting, only one center (Saskatoon) was examined. The figures for Saskatoon are set out below. These tables show that the total number of Simplified Rules cases in Contracts and Wrongful Dismissal cases is around 45-50%; and somewhat lower in Personal Injury cases. The tables go on to show that the representation of Simplified Rules cases among the cases settled or deemed likely to settle in each case type runs at a slightly higher percentage.

This analysis suggests that Simplified Rules cases *may* be settling at a slightly higher level than those cases proceeding outside the Simplified Rules; however it does not suggest that *only or mostly* Simplified Rules cases are settling in mediation.



Table Set Six

Settlement by case type 1999-2002, Saskatoon : percentage simplified rules cases

**Table 6(A) : 1999/2000 Saskatoon Simplified Rules cases**

| 1999/2000          | Total # cases | Percentage simplified rules cases | Total # cases settled/ "agreement likely" in mediation | Percentage simplified rules cases |
|--------------------|---------------|-----------------------------------|--|-----------------------------------|
| Contracts          | 182           | 41%                               | 64   | 56%                               |
| Personal injury    | 56            | 16%                               | 10   | 20%                               |
| Wrongful dismissal | 38            | 47%                               | 9  | 89%                               |
| Totals             | 276           | 37%                               | 83   | 55%                               |

**Table 6(B) : 2000/2001 Saskatoon Simplified Rules cases**

| 2000/2001          | Total # cases | Percentage simplified rules cases | Total # cases settled/ "agreement likely" in mediation | Percentage simplified rules cases |
|--------------------|---------------|-----------------------------------|--|-----------------------------------|
| Contracts          | 154           | 51%                               | 45   | 67%                               |
| Personal injury    | 42            | 24%                               | 7  | 0%                                |
| Wrongful dismissal | 35            | 54%                               | 10   | 50%                               |
| Totals             | 231           | 47%                               | 62   | 56%                               |

**Table 6(C) : 2001/2002 Saskatoon Simplified Rules cases**

| 2001/2002          | Total # cases | Percentage simplified rules cases | Total # cases settled/ "agreement likely" in mediation | Percentage simplified rules cases |
|--------------------|---------------|-----------------------------------|--|-----------------------------------|
| Contracts          | 231           | 41%                               | 71   | 59%                               |
| Personal injury    | 44            | 16%                               | 11   | 27%                               |
| Wrongful dismissal | 9             | 47%                               | 9  | 56%                               |
| Totals             | 284           | 41%                               | 119  | 42%                               |

*iv. Repeat players*

In order to check that the activities of the major repeat players in mediation were not skewing the outcome results, the most frequent participants in mediation were analyzed separately for the year 2000/2001.

This analysis reveals that three of the top four repeat players in the Queen's Bench mediation program show significantly lower than average outcomes reported in Categories 1 and 2. These top three players record between 9 and 9.5% of their files falling into Categories 1 and 2, compared with a rate of 28% for the same period for all cases in Regina, and 27% in Saskatoon. The fourth of the top four players (#2 in terms of numbers of files) records outcomes much closer to the overall norm.

This analysis suggests that it is important to ensure that major players who regularly participate in mediation are fully apprised of how they might use the process to their advantage and that their full "buy-in" is secured. This may mean listening to any particular concerns these parties have about the process (several representatives participated in our discussion groups) and considering how the process may be better fitted to their needs.

**b. Does mediation reduce time to settlement?**

This question was difficult to answer satisfactorily in the absence of a substantive control group with which to compare timelines. The task is further complicated (as it is elsewhere in Canada and the US) by the lack of required information or information recorded by court databases on the timing of withdrawal from a lawsuit, and the reasons for withdrawal (settlement, party fatigue or lack of resources, moving away, death).

However, some inference may be drawn from timelines to pre-trial for mediated and non-mediated (exempted) cases. In Regina in 2000/2001, 655 files were opened by The Dispute Resolution Office and of these, 13.4% were noted as having a pre-trial date scheduled within this year (presumably in these cases mediation was unsuccessful). For these cases, the average (not median) time from the claim to the pre-date of trial was 633 days. In a quasi-control group of 1974 cases which were filed in Regina in 2000/2001 (cases exempted from mediation either under the statute or by The Dispute Resolution Office or a judge), 0.3% recorded a pre-trial date scheduled during this period. Of these (6) cases, the average time between claim and pre-trial date was 895 days.

This data suggests that in this very small sample, timelines between claim and pre-trial were significantly lower for cases that failed to settle in mediation than for those that did not mediate at all. This is consistent with other studies (see below and Macfarlane, 2002) which suggest that preparing for and participating in mediation focuses counsel earlier than usual on considering settlement options, exchanging information, and generally moves the case along.

Other program evaluations have clearly established that early mediation generally results in a shorter timeline to settlement. Since settlement occurs in between 95-98% of all civil filings, the only real question for program planners and policymakers is how to ensure that settlement occurs sooner, rather than later, in the litigation process (Macfarlane, 2001). An Ontario study by the author in 1995 found that of a sample of 1460 cases filed in the Ontario General Division between January 1991 and August 1995, 6.4% proceeded to trial (Macfarlane, 1995) Similar rates of settlement before trial have been found in US studies; for example, in 1991 just 4% of all cases filed in the US Federal District Court were ended "at or during trial" (Galanter & Cahill, 1994; Trubek, Sarat, Felstiner, Kritzer & Grossman, 1983).

Evidence that mandatory mediation shortens the timeline to settlement (or case disposition) is available from a number of both US and Canadian sources, for example the 2001 Ontario evaluation (Hann et al, 2001), the 1995 Ontario evaluation (Macfarlane, 1995), the high-quality (and widely relied upon) evaluation of North Carolina's mediation programs (Clarke, et al 1994). However, some dissenting notes have also been struck, most significantly by the RAND Report of 1997 (Kakalik et al, 1997) which found no reduction in case processing times for mediated cases and reported that in one court, mediated cases took longer to process to settlement (a conclusion reached by another study of workers compensation mediations in Ohio; Hanson, 1997) (note the critiques of the RAND study, above).

Finally, it is important to recognize when reviewing data on timelines to settlement that the other settlement events offered in that court may have a significant impact on disposition times (for example, whether or not pre-trials or settlement conferences are also offered; whether or not case management is also in place).

**c. Is the system of exempting certain cases from mediation working efficiently without undermining the mandatory nature of mediation?**

While section 5 of The Queen’s Bench Act automatically exempts certain cases from mediation (for example, farm foreclosures under The Saskatchewan Farm Security Act, and the Land Contracts Actions Act), matters commenced other than by statement of claim, applications for judicial review), further exemptions may be applied for and granted by both The Dispute Resolution Office and the courts.

The cumulative statistics show the numbers of exemptions granted from the program by both the court and The Dispute Resolution Office, in the regional centers. These statistics show some variation between the granting of exemptions in Regina and Saskatoon, and indicate a slight reduction in the overall numbers of exemptions granted from March 31 2000 and March 31 2001 (but note that these are cumulative figures).

Comparison with yearly statistics for the year ending March 31 1996 and the year ending March 31 1997 (when the project was limited to Regina and Swift Current) show the rate of exemptions granted by the court in each of those years running at 3.3% in each case. There is therefore no evidence that the granting of exemptions has varied significantly from year-to-year.

Table Seven Exemptions

| Cumulative year ending | Regina        |      |              |       | Saskatoon     |      |              |      | All programs  |      |              |     |
|------------------------|---------------|------|--------------|-------|---------------|------|--------------|------|---------------|------|--------------|-----|
|                        | Court-ordered |      | Med. Service |       | Court-ordered |      | Med. Service |      | Court-ordered |      | Med. Service |     |
| March 31 2000          | 148           | 3%   | 607          | 12.4% | 8             | 0.4% | 80           | 4.4% | 160           | 2.3% | 697          | 10% |
| March 31 2002          | 167           | 2.4% | 665          | 9.7%  | 25            | 0.8% | 127          | 3.4% | 200           | 1.7% | 808          | 7%  |

Some lawyers in discussion groups remarked that since the process for securing an exemption was itself time-consuming, it was often preferable to simply proceed with the mediation (this may however lead to some lack of preparedness; see above at Part II (2)(e)). This may also reflect some regional disparity. The higher rate of exemptions granted in Regina may reflect the fact that this is where the Director and Assistant Director and the majority of the administrative team for the mediation program are

located. Access to the Director for permission to be exempted may simply be easier and more widely utilized in Regina than in Saskatoon. This hypothesis could be verified by examining the total number of applications for exemptions in each center, and their rate of success; the only figures available at this time are those relating to successful applications for exemptions.

### **PART III : RECOMMENDATIONS FOR PROGRAM MODIFICATION**

The evaluation data, both qualitative and quantitative, which has been collected and analyzed for this study illuminates the operation of the Saskatchewan Queen's Bench mediation program and gives voice to the experiences of program users. It provides a detailed picture of the relationship between lawyers, their clients, the mediators and the structure and design of the present program.

The Saskatchewan Queen's Bench mediation program is perceived by almost all the individuals we consulted as appropriate, and its objectives – the faster and more satisfactory reaching of settlement in some civil matters – fully achievable. It became rapidly apparent that the question that respondents were most interested in discussing with us was not whether the program should be maintained, but how it might be improved in order to better achieve those objectives.

The consensus that emerges is that the program is reaching its goals in many individual cases, but not in others. While there is widespread support for both its universal nature and the present timing of mediation, many respondents called for greater *flexibility* in relation to both aspects of program design. In addition, there is an interest in rethinking the role of the mediator to clarify and perhaps sharpen this point of intervention with greater proactivity, and perhaps some type of enlarged role before and after mediation in *certain cases*.

There are also a few clear problems with the design of the present program. One is that some cases proceed to mediation with insufficient preparation, perhaps with little or no exchange of materials in advance of mediation, and just occasionally, an absence of "good faith" to negotiate. Another issue (perhaps related to this) is the somewhat uninformed approach of a small number of members of the Bar in regard to the role they might most effectively adopt in the mediation process. Each of these problems is resulting in some disappointment among clients, and some frustration among some members of the Bar.

None of these issues is unique to the Saskatchewan program – similar challenges are experienced in other mandatory mediation programs. However, the depth of experience with mediation in Saskatchewan – predating the Queen's Bench program to the earlier initiation of the farm debt mediation program – and the clarity and consistency of issues substantiated by this evaluation, present a unique opportunity to address these challenges.

In this spirit, the following fourteen Recommendations are made :

1. The Mandatory Nature of Mediation

The program should remain mandatory for all non-family civil cases, aside from the present exemptions under section 5 of The Queen's Bench Act.

Over time, the use of mediation should become a significant and legitimate conflict resolution option to be utilized at the discretion of experienced counsel. The mandatory nature of the program should therefore be regularly reviewed in this light.

## 2. The Timing of Mediation

### a. *The initial referral to mediation*

Referrals to mediation should continue to be made following the close of pleadings and before any further applications are made to the Court. It is recommended that clarification be made of the meaning of section 42(1) of The Queen's Bench Act in this regard.

### b. *Requiring the filing of a statement of documents before mediation*

However, the precise timing of mediation raises other questions related to the exchange of information between the parties in order to facilitate constructive mediation. One of the principal reservations expressed by lawyers and clients alike regarding early mediation is the lack of information upon which to base substantive negotiations. This problem relates to frequently voiced concerns about a small minority of lawyers who sometimes attend mediation without good faith intent to undertake serious negotiations.

There are at present no formal requirements regarding the exchange of information between the parties before mediation. In one smaller center, and among some larger centre lawyers, conventions appear to be evolving to ensure that information and relevant documents are exchanged in advance of mediation. However this is a piecemeal solution to a widespread problem.

Other jurisdictions have tried various strategies to address a similar issue of lack of preparedness. Some have required the parties to file pre-mediation submissions (for example, Ontario), but these requirements sometimes raise confidentiality concerns and often result in only minimal compliance. Twenty-two states in the United States have enacted a good faith rule in mediation, with appropriate penalties (Lande, 2002) but these rules are highly controversial and did not find favour among our Saskatchewan respondents.

An alternative solution which is proposed here is the stage at which mediation takes place in the Queens' Bench program is adjusted slightly to facilitate the further exchange of information between the parties that would occur naturally as the litigation process proceeded. This could be achieved by requiring that before proceeding to mediation, all parties file their statement of documents with the Court (sometimes described as the affidavit of documents). (Note that this recommendation may need to be modified to fit the requirements of cases proceeding under the Simplified Rules).

If each party is in possession of the other's statement of documents before mediation, this may then be used as a basis for requesting particular documents before the parties meet at mediation, or simply as a tool for anticipating and preparing for that meeting. While the level of co-operation which transpires at this stage will be a matter for the parties themselves (possibly with assistance from the mediator in "enhanced package" cases; see also below at (8)(b)), this requirement will obviate the lack of information and hence preparedness to negotiate which is evidenced in a small number of cases.

To ensure that this requirement does not unnecessarily delay the conflict resolution process, an appropriate time period should be stipulated for the filing of a statement as to documents.

It is important that there are stipulated consequences for failing to comply with this requirement, or there is a risk that this will simply become a new ground for a non defaulting party to request an exemption from mediation. Two obvious options are later cost penalties (along the model of the Ontario mandatory mediation program; see Rule 24.1.13(d)) or a default judgment being entered against the defaulting party.

This requirement would need to be articulated as an amendment to the present Regulations. Future dialogue with the Bar, and with Courts Administration and the Registrar, will be very important to ensure a widely acceptable regulation.

### *c. "Loop-backs" to mediation*

Finally, a number of judges and some lawyers expressed to us their interest in building further flexibility into the system to enable referral or at least a recommendation that a file return to mediation at a later stage in the litigation process. The model of pre-trial hearings which occur at a more mature stage in litigation than early mediation clearly satisfies many needs (including the input of an authoritative evaluator), and attracts the widespread support among the Bar. Nonetheless, we would encourage the development of a formalized mechanism to enable the referral of a small number of special cases, which appear to be especially suited to this type of intervention, back into mediation even at this later stage.

### 3. Adjournments

A formalized system for granting adjournments of mediation (for example until after the conclusion of discoveries) should be put in place. At present such a process is referred to under section 7(1)(b) of The Queen's Bench Regulations, but unlike the exemptions process, does not appear to be either widely used or broadly understood as being available.

Moreover applications are described in section 7 as being determined by the Court. This process needs to be as easily accessible as possible, while maintaining the integrity of the system. This means that it is preferable for postponements to be at the



discretion of the Director of the Dispute Resolution Office, rather than requiring an application to the court.

A paper application process, or adjournment at the unilateral request of one party, is not recommended. Experience in other programs suggests that this may lead to a default to adjournment in more cases than are strictly necessary. Instead, a system for application to the Director of the Dispute Resolution Office should specify criteria for adjournment including, but not limited to :

- a demonstrated need (i.e. grounded concerns about veracity in mediation) to conduct examinations under oath in order to verify key evidence; or
- an unavoidable delay in the ability to obtain and/or verify key pieces of evidence.

The relationship between mediation and pre-trial – two very different processes with different objectives – should be taken into account in granting adjournments. Generally there should be a limit on the length of the delay permitted in an adjournment, to ensure that mediation takes place in advance of pre-trial. However, parties should also be able to request a date for mediation shortly before pre-trial where, in the opinion of counsel, a facilitative process appears to be conducive to settlement at this stage.

#### 4. Exemptions

The present system for granting exemptions (by both the Director of Dispute Resolution Office, and by the Court under section 7(1)(b) of The Queen's Bench Regulations) should continue. This evaluation has not produced any evidence upon which to expand or add to the case types listed under section 5 of The Queen's Bench Regulations as automatically exempted from mediation.

It may be useful at this stage in the history of the program to articulate and promulgate among members of the Bar the basis on which an exemption from mediation is likely to be granted. A review of case law to date under this provision suggests that exemptions are generally granted where:

- there is evidence that private mediation has taken place and this has not been successful; or
- there is no sustainable defence to the action and mediation would simply delay the outcome; or
- there is evidence of extensive efforts at negotiation between the parties which have been unsuccessful; or
- the location of the parties is such that mediation would involve extensive travel and expense; or
- all parties request the exemption from mediation.

It is recommended that this case law and the reasons given for granting exemptions be reviewed in light of the program objectives. The objectives of the mandatory mediation program have been recently clarified by Mr. Justice Klebuc in Welldone Plumbing v Total Comfort Systems (2002) SKQB 275 at Para 9. In light of this judgment, clarification of the scope of section 5 in granting exemptions would be timely and might avoid the potential for the expansion of the exemptions category beyond the intent of the legislation.

In addition, it is recommended that in a future list of criteria for exempting cases from mediation, an authentic fear of intimidation and/or emotional trauma be included. This recognizes one of the principal concerns about mandatory mediation (that under certain circumstances a face-to-face meeting will be a very negative experience for one or more parties). This does *not* mean that all individuals who have discomfort about a mediation meeting should always be exempted, but that evidence of a history of violence or intimidation between the parties may be relevant to granting an exemption from mediation.

It may also be important to explore the possible reasons for the lower rate of exemptions granted in Saskatoon compared with Regina (see the discussion above at Part II(4)(c)).

#### 5. Information for the parties

The Dispute Resolution Office produces explanatory literature for clients which offers a summary of what clients should expect in mediation and answers some potential user questions about the program. However, very few of our client respondents indicated that they had seen this information. Many, of course, had been satisfactorily briefed by their lawyers and were not disadvantaged in any way by having not seen this literature. However, as a general principle, it is important to try to get this explanatory information into the hands of the clients to whom it is targeted. This ensures at least a baseline of information which counsel can and should then supplement in discussions with his or her client.

It is recommended that The Dispute Resolution Office consider means of increasing the visibility of its informational materials and solicit the co-operation of the Bar in handing on such materials to their clients. One way to bring the Bar more fully into this endeavour as a partner might be for The Dispute Resolution Office to consult with the Bar over the future format and content of such informational materials.

#### 6. Mediator style, training and qualifications

We heard clearly from program users that they desired mediators to be proactive in seeking settlement. This does not mean that there is support for replacing the facilitative model of mediation used in Saskatchewan with an evaluative approach – although there are some calls for greater choice and diversity (see also below at (8)(a)) – or for changing present expectations of the qualifications of mediators.

In response to many comments on the mediator's role, both positive and negative, it is recommended that :

- a. The facilitative model of mediation be maintained. This means that non-lawyers as well as lawyers can continue to provide excellent service as mediators;
- b. All current and new mediators should have an adequate working knowledge of civil procedure, and be provided with training to ensure same;
- c. Future training for experienced mediators, and training for newly recruited mediators, should emphasize strategies for an proactive approach, including asking questions, using caucus where appropriate, and minuting outcomes (see also below at (7)). Training should also include work on managing relationships with counsel in order to maintain and build mediator confidence, and enhance a culture of "mediator management".

7. The role of the mediator in finalizing settlement outcomes

The present "hands-off" approach towards recording the outcomes of mediation has attracted considerable criticism, especially from clients (see the discussion above at Part II (2)(c) (iii)).

It is recommended that the practice be developed and encouraged among program mediators to minute in some detail the outcomes of mediation. Where possible, this task should be undertaken by counsel with the mediator playing a purely facilitative role. Mediators should encourage counsel to move to a finalizing of any agreed outcomes, whether in a handwritten memo or in formal minutes of settlement.

In other cases, it may be necessary for the mediator to ensure that any agreements reached – whether on substance or on process – be recorded in writing, and that the parties agree that these are correct as minuted.

If this recommendation is adopted training should be offered to the mediators to ensure that they are both comfortable and equipped to undertake this role.

This recommendation is in no way intended to suggest that mediators draft legally binding agreements in a manner which may constitute the unauthorized practice of law. The intention is to ensure that an accurate record is made of mediation outcomes which is approved – even verbally – by the parties, and to clarify the responsibilities of the mediator in this regard.

8. Providing more choices to program users

a. *mediator selection*

At present, mediators are internally assigned to cases. Informally, some counsel will request a particular mediator. The discretion of counsel to assess what type of

mediator is best suited to a particular case is a skill that should be encouraged, and is an important manifestation of choice in an otherwise mandatory system.

Therefore it is recommended that a process be instituted which gives greater degree of choice to all parties in selecting a mediator. There are a variety of ways in which this objective could be accomplished. One is to develop a database of mediators in which each mediator would provide a short description of her or his background, special expertise, experience and style. These descriptions would then be made available to parties, along with other accompanying explanatory information, at the time that a matter is referred to mediation.

In the event that a selection is not made within a given period of time, a mediator should be automatically assigned by the Dispute Resolution Office.

Mediator selection should be monitored internally to assess (a) levels of selection versus assignment (b) which mediators are selected.

*b. An optional "enhanced package" of mediation services*

There was considerable discussion throughout the evaluation of a possibly enhanced role for the mediator in certain cases which might benefit from pre-mediation assistance and/or post-mediation follow-up.

In a pre-mediation model, both lawyers and clients saw the potential for the mediator to play a constructive role in relation to information exchange, assessing the degree to which the parties were prepared to bargain in good faith, and ensuring that the persons with necessary authority were either present at the mediation or accessible at that time.

In a post-mediation model, both lawyers and particularly clients saw the mediator as playing a useful role as a quasi-case manager (facilitating a discussion over next steps) and in ensuring that outcomes contemplated or agreed to in mediation were formalized and executed in minutes of settlement.

It was also clear from these discussions that while many lawyers saw an enhanced role for the mediator in some cases, they were unwilling to support the extension of the mediator's role in all cases. This appears then to be another area in which counsel and client could be offered a choice of service to be exercised at their discretion.

An "enhanced mediation package" could contain the following components, either separately or together:

- i. The assistance of the mediator for a specified number of hours before mediation in order to (for example) facilitate information exchange, assess the level of openness to settlement, and ensure that the appropriate persons are coming to mediation and are fully briefed on the process and its objectives.

- ii. The assistance of the mediator for a specified number of hours following mediation in order to (for example) facilitate and follow up a dialogue over next steps, and generally keep the process moving.

It is recommended that an “enhanced package” should be offered to all parties on a pilot basis for a specified period of time (a minimum of six months), without additional costs. Information on an “enhanced package” of mediation services should be in The Dispute Resolution Office literature. Take-up and satisfaction levels should be monitored internally. At the end of the pilot period, it will be necessary to consider whether there should be user fees attached to accessing the “enhanced package” (see (9) below).

*c. Formalizing opportunities for (i) longer (ii) further mediation sessions*

At present, parties are sometimes offered and occasionally avail themselves of (i) mediation sessions scheduled for longer than the routine two hours and (ii) further follow-up mediation sessions.

It is recommended that these opportunities are now formalized and information provided to all parties.

It is recommended that (i) longer and (ii) further mediation sessions should be offered to all parties on a pilot basis (a minimum of six months) for a specified period of time, without additional costs. Information on the opportunity to book longer and subsequent mediation sessions should be included in The Dispute Resolution Office literature. Take-up and satisfaction levels should be monitored internally. At the end of the pilot period, it will be necessary to consider whether there should be user fees attached to taking advantage of these features (see (9) below).

9. User fees

At this point *some* of the costs of mediation are recouped via an additional filing fee. No further fee is payable at the time of mediation. It is recommended that the “basic” package of mediation services required under the legislation – a meeting with a mediator scheduled for two hours – continue to be financed in this fashion at no further cost to the parties.

However, if the provision of enhanced levels of service in some cases is utilized by the community, there may be a need following a pilot period to consider the introduction of modest user fees. User fees could be set by tariff and divided equally between the parties.

10. The role of counsel

We heard significant criticism of a small number of counsel by other program users. This criticism focuses on a lack of preparation and inadequate briefing of clients, and generally a negative or unconstructive attitude towards mediation. However, suggestions that new practice rules might be introduced to attempt to deal with these problems were met with little enthusiasm. Instead, and in order to ensure best practice in mediation representation, a strengthened commitment to meeting continuing education needs is proposed.

It is recommended that continuing legal education opportunities in this area be significantly expanded. Some excellent work has already been done in this area, but further expansion is warranted to support the continued development of mediation in Saskatchewan. It is important to build further on existing expertise to ensure that there is a sharing of experience between more and less experienced mediation advocates, as well as the encouragement of a continuing and challenging debate about how best to deliver conflict resolution services to clients. Appropriate objectives for continuing legal education here include development that is both individual (enhancing expertise in consensus-building negotiations and mediation) and systemic (building and enhancing a culture of consensus-based dispute resolution among advocates in Saskatchewan).

In order to meet these objectives, continuing legal education programs should include training for lawyers in Principled Negotiation, Mediation Representation and Advocacy, and Collaborative Law. Lawyers practising in all these areas share a commitment to using consensus-building processes to advance the interests of their clients, and together they can build an enviable program of continuing education.

Existing professional organizations within Saskatchewan offer ample opportunity for collaborative ventures in the area of continuing legal education, under the general auspices of the Saskatchewan Legal Education Society.

Experience elsewhere indicates that the strong leadership of the Bench is critical to building a local legal culture in which mediation is seen as an important opportunity for constructive negotiation in many cases. The involvement of members of the Saskatchewan judiciary in programs of continuing legal education may be one way to advance this objective (see also (13) below).

11. Retaining a presumption of face-to-face meetings

There is some complaint that attendance at mediation is excessively expensive for out-of-province. Some facility for mediation to be conducted using conference calls has been introduced, but The Dispute Resolution Office is reluctant to allow this to displace face-to-face meeting in other than exceptional circumstances.

It is recommended that face-to-face meetings continue to be the norm and that conference calls are only permitted in exceptional circumstances.

12. Unrepresented (*pro se*) clients

*Pro se* clients presently experience high quality service and assistance from The Dispute Resolution Office. The only change recommended in relation to this group is that The Dispute Resolution Office literature be reviewed to ensure that it does not contain an assumption that each client is legally represented. It is also appropriate that The Dispute Resolution Office literature does not imply that clients must or should be legally represented in mediation. This is especially important in light of the increasingly number of *pro se* litigants seen in the civil justice system throughout Canada.

13. Enhanced liaison and co-ordination between The Dispute Resolution Office and the Court of Queen's Bench

There is relatively little contact between The Dispute Resolution Office and the Court Administration. While working relationships are good, some Court administrators confided that they knew very little about the operation of the mediation program. It may be useful to ensure that there is more liaison and sharing of information between these two programs. For example, it may be appropriate for the consideration of what further case data might be recorded and tracked (see (14) below) to be developed as a joint project between the two offices.

This "disconnect" between The Dispute Resolution Office and the Court also seems to extend to the judiciary. The judges interviewed for this evaluation expressed a feeling of "disconnect" with the mediation program - that the program operates in a way that is removed from its civil setting - and that they did not know as much as they might like about the program and its relationship to their own work. It is important to consider ways in which the judiciary - who are generally very supportive of the work of The Dispute Resolution Office and can offer important leadership to the Bar - can feel more "in touch" with the mediation program and perhaps, where appropriate, be identified as supporters of the program (see also above at (10)).

14. Enhanced case and program data systems

In monitoring the outcomes of mediated cases, it is recommended that The Dispute Resolution Office review the present classification system whereby mediators complete a report immediately following a mediation session. This system has generated considerable concern among members of the Bar and cannot be relied upon as fully accurate (see Part II(4)(a) (ii)). Two changes are specifically recommended:

- a. mediators record outcomes as "full settlement", "partial settlement" or "no settlement". This classification allows less room for subjectivity and has

the additional advantage of bringing Saskatchewan into line with most other jurisdictions with mandatory mediation reporting systems.

- b. reports are made 10 days following the mediation session. This will enable a final follow-up to be made by the mediator or an administrator. In the effort that no further information is forthcoming, the mediator will file a report based on what happened at mediation.

It would be helpful for future monitoring and evaluation if additional information on civil cases could be collected by both The Dispute Resolution Office and the Court of Queen's Bench. It is recognized that this recommendation cannot be acted upon without the agreement of the Court of Queen's Bench, but such enhanced data collection would benefit future program evaluations within the wider ambit of the Court, as well as at The Dispute Resolution Office.

Especially relevant to program evaluation – in particular where an effort is to be made to compare cases in an experimental stream with a control group – would be an expanded and automated approach to the recording of events in the life of a file. The more events that can be formally recorded (for example, motions hearings, settlement conferences, completed examinations for discovery), the more detailed tracking of the progress of cases both inside and outside experimental “streams” or programs can be (routinely) conducted. This additional data would enable the tracking of timelines (in days) from filing to the occurrence of particular events up to and including discontinuation or “no further activity”. The data collated manually for the 2001/2002 Status Check (see above at Part II(4)(ii)) demonstrates the present-day challenges of assembling such data, which may sometimes be critical to the evaluation of program efficiency.

Finally, it is recommended that The Dispute Resolution Office develop a simple consumer satisfaction survey – which should be no more than one page in length – which can be given to clients at the conclusion of their mediation session. If possible, clients should be encouraged to complete the survey before they leave. Surveys should offer the option of anonymity. A similar survey could also be developed for lawyers.

Julie Macfarlane, Kingsville, May 2003



## Appendix A

### *Lawyers Discussion groups : May*

*The questions we have been asked to try to answer are*

1. to evaluate how far the mediation program in the Queens' Bench meets the needs of the people of Saskatchewan (focusing on discussions with client users)
2. to assess the impact of the mandatory mediation program on civil litigation practice in Saskatchewan (focusing on discussions with members of the Bar)

What brought you to this meeting? What would you like to tell us about your experience of the mediation program?

### *Supplementary questions*

1. what is your view of the style and knowledge of the mediators?
2. what if any issues do you have with confidentiality of mediation?
3. should this program be extended to the simplified rules procedures?
4. what are your views on the timing of mediation?
5. do you think there has been "culture change" around the idea of using mediation?
6. what are the implications for legal education and training?

### *Clients Discussion groups : May*

*The questions we have been asked to try to answer are*

1. to evaluate how far the mediation program in the Queens' Bench meets the needs of the people of Saskatchewan (focusing on discussions with client users)
2. to assess the impact of the mandatory mediation program on civil litigation practice in Saskatchewan (focusing on discussions with members of the Bar)

What brought you to this meeting? What would you like to tell us about your experience of the mediation program? What was on your mind when you took up the invitation?

## Appendix B

### *Lawyer Discussion groups : September*

#### Opening question

What are your general perceptions of how the program is working – what impact has it had on your litigation files?

Is mandatory mediation changing the culture of disputing in the courts?

#### A. Impact

- In what ways has the culture of your local Bar been affected by the introduction of mandatory mediation in your jurisdiction? Have attitudes towards mediation amongst members of the local Bar changed?
- Secondary benefits – subsequent activity (oversight by mediators?)
- In relation to other procedures
  - ✓ Is mediation appropriate for matters proceeding through the simplified rules procedure? Why/why not?
  - ✓ Does participating in earlier mediation make any difference to cases that do not settle, and continue to pre-trial? (e.g. any less time spent on discoveries?)

#### B. Process Critique

- What timing would you like for mediation? And why?
- Some lawyers have suggested that mediation is not suitable for every case, and that they would like different processes for different cases – including but not limited to different timing for ADR. For example, some cases might require more than one session; discoveries to have taken place first; or a neutral evaluation to be provided. On the other hand, the existing system is simple and seems fair because it is applied to all civil cases without exception. What do you think? (optional : offer example of the residential schools cases)
- What is your view of the role taken by the mediators in this program?
- Have you ever participated in a mediation which you felt was a complete waste of everybody's time? Why was that? What could have been done differently to make it more productive?

- Why would you want conference calls? Some lawyers have told us that they would like greater flexibility over the substitution of conference calls for F2F meetings, perhaps to enable them to get the right people on the line. Others have told us that they support the emphasis on keeping mediation a F2F process. Is this an issue for you and what do you think?
- Some lawyers have told us that they are frustrated that sometimes opposing counsel will not provide necessary disclosures prior to mediation and is poorly prepared, perhaps appearing without authority to settle. Is this a problem for you and what if anything do you think could be done about it? (Optional : some jurisdictions tackle this problem with a “good faith” provision – there is something like this in the farm mediation program. Do you think that is needed here?)
- What is your view of the mediator(s) you have worked with? Are there sufficient experienced and effective mediators to meet your needs here in \_\_\_\_\_? Selecting your own mediator?

#### Optional question

- Some lawyers we have talked to have said they would like the mediators to take a more proactive, case management role where they would set sessions, hold pre-mediation discussions with the lawyers and generally oversee the case through mediation. Is there a need for such a role?
- How well prepared have you felt by your legal and professional education – and what more, if any, training would enable you to be more effective in mediation?

Check back to opening question

Check first go-round to ensure that all issues have been captured by discussion

#### All Things Considered Question

Do you think mandatory mediation is a good thing for civil litigation in Saskatchewan?  
What would you change?

Have we missed anything?

*Client Discussion groups : September*

Opening question

We would like to begin with your overall impressions of the mediation program, before getting to the specifics of your experiences

How far is the mediation program meeting the needs of the people of Saskatchewan?

A. Client satisfaction

- ❖ Some of you will have been to only one mediation, others more than one. In either case, what now is your view of mediation? How positive/ negative?
- ❖ What is your view of the mediator(s) you have worked with?
- ❖ How do you feel about your own role in the mediation process? (Was it a good experience? One that you would have preferred your lawyer handle without you? One that you would like to handle by yourself as far as possible?)
- ❖ What particular challenges do clients encounter in using mediation?

B. Program Structure and Process

- ❖ How well are clients being served by lawyers in the mediation process?
- ❖ How satisfied are you with the advance information provided to you by the court and/ or your lawyer, and how could this be improved?
- ❖ Some clients have told us that they would prefer mediation to be offered even earlier, perhaps before a lawsuit is begun – and others have said that it is pointless to mediate until just before trial. What do you think?
- ❖ Are there any other issues which you think are affecting the effectiveness of the mediation program for clients? For example
  - Is it important to select your own choice of mediator?
  - To be able to attend mediation without counsel present on either side?
  - Should there be some way of monitoring that disclosure has taken place and that lawyers are properly prepared for mediation?

Check back to opening question

Check first go-round to ensure that all issues have been captured by discussion

All Things Considered Question

Do you think mandatory mediation is a good thing for people who need to bring civil actions in Saskatchewan? What would you change?

Have we missed anything?

## Appendix C

### *Interviews with Judges*

1. General impression/ perspective of program
2. Relationship between mediation and pre-trials (purpose, objectives, duration, outcomes, skills)
3. What should be the role of the judge in settlement, from a philosophical perspective? How does this compare with the role of a mediator?
4. What matters should be exempted from mediation?
5. What leadership role might judges play in building the credibility of mediation?
6. Referrals by judges into mediation
  - i. In the present process
  - ii. Any suggested modifications?

Any other comments on the mediation program?

## Appendix D

### *Follow-up interview questions*

- ❖ Generally, what has been your experience with the mediation program?
- ❖ What effect, if any, have you seen the mediation process have on your future (business or personal) relationships (for example the likelihood of future litigation)/ the way you might handle a future conflict?
- ❖ Specifically for institutional clients, insurers etc
  - a. How is the present process perceived as useful and constructive by your corporation/ institution?
  - b. What are the objections that your corporation/ institution has to mediation?
  - c. What would make this a more useful process for your particular needs?
  - d. What is the impact on your internal complaints practices & system/ culture?
- ❖ Have you encountered any surprises in mediation? (ask for stories)
- ❖ Would you be interested in pre-mediation contact with the mediator (review purposes e.g. to clarify who will be coming with what authority, to facilitate exchange of information, ascertain that all parties coming prepared and in good faith etc)
- ❖ Would you be interested in any post-mediation follow-up by the mediator to ensure that next steps were completed?
- ❖ How creative are the agreements? How durable are the agreements?
- ❖ (For lawyers) Do you see secondary/ collateral benefits from mediation? Can you describe these/ give examples?
- ❖ Do you think that the present program would benefit from increased judicial oversight? For example, cost consequences for parties who come unprepared?
- ❖ What types of further training do you think would improve the effectiveness of lawyers in the program?

## **Bibliography**

Brazil, W. "Comparing Structures for the Delivery of ADR Services by Courts : Critical Values and Concerns" 14 Ohio State Journal on Dispute Resolution (1999) 715

Clarke, S., Ellen, E. & McCormick, K. Court-Ordered Civil Case Mediation in North Carolina : Court Efficiency and Litigant Satisfaction Institute of Government, University of North Carolina 1995

Galanter M. & Cahill, M. " 'Most Cases Settle': Judicial Promotion and Regulation of Settlements", 46 Stanford Law Review (1994) 1339

Hann, R. Baar, C. and Associates Evaluation of the Ontario Mandatory Mediation Program (Rule 24.1) Final Report – The First 23 Months Queen's Printer 2001

Hanson, R. The Use of Mediation to Resolve Worker's Compensation Cases : A Report to the Tenth Appellate District of the Court of Appeals of Ohio National Center for State Courts, 1997

R.E. Hartley, Alternative Dispute Resolution in Civil Justice Systems (New York: LFB Scholarly Publishing LLC, 2002

Huberman, A.M. & Miles, A.B. Qualitative Data Analysis : An Expanded Sourcebook Sage 1993

Krueger, R. Discussion groups : A Practical Guide for Applied Research Sage 1994

Kakalik, J., Dunworth, T., Hill, L, McCaffrey, D., Oshiro, M., Pace, N., & Vaiana, M., Just, Speedy and Inexpensive? The Rand Institute for Civil Justice, 1997

Kovach, K. "Good Faith in Mediation – Requested, Recommended or Required? A New Ethic" 38 South Texas law Review (1997) 575

Lande, J. "Using Dispute System Decision Methods to Promote Good-Faith Participation in Court-Connected Mediation Program" 50 UCLA Law Review (2002) 69

Macfarlane J. Court-Based Mediation in Civil Cases : An Evaluation of the Toronto General Division ADR Centre Ontario Ministry of the Attorney-General, 1995

Macfarlane, J. "Culture Change? A Tale of Two Cities and Mandatory Court-Connected Mediation" 2 Journal of Dispute Resolution (2002) 241

Macfarlane, J. 'Why do People Settle?' 45 McGill Law Journal (2001) 663

Tolbert, P. & Zucker, L. "Institutional Sources of Changes in the Formal Structure of Organizations : The Diffusion of Civil Service Reform 1880-1935" 28 Admin. Sci. Q. (1983) 22

Trubek, Sarat, Felstiner, Kritzer & Grossman, "The Costs of Ordinary Litigation", 31 UCLA Law Review (1983) 72

Wissler, R. "Court-Connected Mediation in General Civil Cases : What We Know from Empirical Research" 17 Ohio Journal on Dispute Resolution (2002) 641

Palton M., Qualitative Evaluation and Research Methods (1991) Sage

Ross, P. & Freeman, H. Evaluation : A Systematic Application" SAGE 1993



**APPENDIX B:**

**Annotated Bibliography:**

**Evaluation of Court-Connected and Related ADR Programs**

**(Reports and Literature)**

## Civil Mediation Program Evaluation: References & Resources

Michaela Keet, 2002

### 1. Canadian Evaluations: Court-connected DR Programs and Other Related Programs

#### a. Alberta

***Edmonton Provincial Court Civil Mediation Pilot Project Evaluation Report, (Strategic Planning & Operational Coordination Court Services, Alberta Justice, 1999).***

**Method:** Statistics, surveys to lawyers and clients; questionnaire attached

#### b. B.C.

***Roberts, I. An Evaluation of the Effectiveness of the Court Mediation Practicum Project as a Training Program, (British Columbia Dispute Resolution Practicum Society, 1999).***

**Methods:** telephone interviews with mentors and mediators; interview guide attached; some open-ended questions, some using a scale of responses

***Mandatory Parenting after Separation Pilot: Final Evaluation Report, (British Columbia Ministry of Attorney General Policy, Planning & Legislation Branch Corporate Planning Division, 2000).***

**Objective:** measure change in litigation patterns after mandatory education

**Methods:** statistics, interview with court staff and parents

***An Evaluation of the Notice to Mediate Regulation under the Insurance (Motor Vehicle) Act, (Dispute Resolution Office Ministry of Attorney General, 1999).***

**Objective:** to assess views of lawyers on effectiveness of program

**Method:** surveys of lawyers (some done by telephone interview); mostly a scale / multiple choice format, questionnaire attached

c. Quebec

**\*\*Évaluation des Résultats du Projet Pilote de Conciliation en Matière Civile à la Cour Supérieure de Montréal, (1998).**

2. U.S. Court-connected DR program evaluations

Note: The articles on victim-offender studies are examples of the inclination in that particular field to examine that period of time *following* the mediation – the impact of the process on behavior, the impact beyond the process of problem solving within the mediation itself. The following articles represent some samples.

The same tends to be true for the evaluation of family mediation programs. They are much more likely to use an expanded time frame for the study, unlike traditional court-connected civil program research, which focuses more on the “moment in time” – the snapshot of what occurred in the session itself.

Both these sets of studies do show the potential for inquiries which attempt to capture lasting impact, and the current contrast, but neither set of studies offers research questions which are of much use. Their questions are inevitably directed at the unique dynamics of the type of dispute. One can get, however, a sense of what post-mediation variables the studies explore.

**Bahr, S.J., Chappell, C.B. & Marcos, A.C., “An Evaluation of a Trial Mediation Program” (1987) 18 Mediation Quarterly. 37.**

**One objective** of this study is to compare the adjustment of parents and children in mediated and non-mediated divorce cases

**Methods:** interviews

**Questions:** asked interviewees a series of questions about stress and happiness levels in their lives, and related issues.

**Bautz, B.J. & Hill, R.M., “Divorce Mediation in New Hampshire: A Voluntary Concept” (1989) 7(1) Mediation Quarterly. 33.**

Examines, among other things, the impact of the process on the post-divorce relationship (is it harmonious? Cordial? Strained? Other?)

**Bohmer, C. & Ray, M.L., “Effects of Different Dispute Resolution Methods on Women and Children After Divorce” (1994) 28 Family Law Quarterly. 223.**

Attempt to compare equity of outcomes, from perspective of women and children.  
Uses data from other surveys.

**California Family Court Services Snapshot Study, Report 3: The Impact of a Case Characteristics and Mediation Service Models**, (Administrative Office of the Courts Judicial Council of California, 1994). Available online at:  
[www.courtinfo.ca.gov/programs/cfcc/resources/publications/r03sum.htm](http://www.courtinfo.ca.gov/programs/cfcc/resources/publications/r03sum.htm)

**Camplair, C.W. & Stolberg, A.L.**, "Benefits of Court-Sponsored Divorce Mediation: A Study of Outcomes and Influences on Success" (1990) 7(3) *Mediation Quarterly*. 199.

**Carpez, J.V. & Armstrong, M.A.**, "Mediation Developments: A Study of Domestic Mediation Outcomes with Indigent Parents" (2001) 39 *Fam. Ct. Rev.* 415

**Clarke, S.H., Ellen, E.D. & McCormick, K.**, *Court-Ordered Civil Case Mediation in North Carolina: An Evaluation of its Effects*, (Institute of Government, University of North Carolina at Chapel Hill, 1995).

*Good example of traditional range of questions to explore impact of the program on lawyers and clients*

**Policy goals:** described in legislation as "to make the operation of the superior courts more efficient, less costly, and more satisfying to the litigants"

**Criteria:** implementation issues (rate of mediations ordered, time frame, what happened to cases unresolved); impact of program on compliance rates (follow through on outcomes); impact on court efficiency (time from filing to disposition; frequency of settlement, etc); variations across regions or types of claims; satisfaction (how participants evaluated their experience and whether they were more satisfied with entire process and outcome); comparisons between mediated cases and cases which settled conventionally.

**Methods:** court files; surveys to lawyers and clients; use of a control group

**Satisfaction criteria** for clients divided into these issues: overall evaluation of experience; sense of control and self-expression; fairness of outcome and procedure; evaluation of mediator; cost and disruption

**Interesting results:** no increase of litigant satisfaction (when compared to conventional settlement), or compliance rates; lawyer responses more favorable than client

**Daniel, J.**, *Assessment of the Mediation Program of the U.S. District Court for the District of Columbia*, (Washington, DC: Administrative Conference of the United States, 1995).

**Method:** stats, surveys to lawyers, clients and mediators

**Criteria:** traditional

**Donnelly, L.F. & Ebron, R.G., *The Child Custody and Visitation Mediation Program in North Carolina*, (North Carolina Administrative Office of the Courts, 2000).**

**Emery, R.E. & Jackson, J.A., "The Charlottesville Mediation Project: Mediated and Litigated Child Custody Disputes" (1989) no 24 Mediation Quarterly. 3.**

In looking at outcomes, examined levels of post-mediation parenting conflict, acceptance of marital termination, and depression.

**Evje, A. & Cushman, R.C., *A Summary of the Evaluations of Six California Victim Offender Reconciliation Programs*, (The Judicial Council of California, 2000).**

**Hanson, R.A., *The Use of Mediation to Resolve Workers' Compensation Cases: A Report to the Tenth Appellate District of the Court of Appeals of Ohio*, (National Center for State Courts, 1997).**

**Hanson, R.A., *A Report on Workers' Compensation Mediation Program of the Supreme Court of Appeals of West Virginia*, (National Center for State Courts, 2000). Available online at: [www.factory7.com/~rah/appellate.shtml](http://www.factory7.com/~rah/appellate.shtml)**

**Jones, T.S. & Bodtker, A., "Satisfaction with Custody Mediation: Results from the York County Custody Mediation Program" (1998) 16(2) Mediation Quarterly. 185.**

Includes research on both short-term and long-term satisfaction, and compares these rates.

**Kakalik, James S. et al., *An Evaluation of Mediation and Early Neutral Evaluation Under the Civil Justice Reform Act*, (Rand Institute for Civil Justice, 1996).**

*Four court-connected mediation programs were evaluated; all of them were summarized as having a "program emphasis" of "settlement". This is the report that concluded that there was no significant impact on any of the criteria except the monetary settlement.*

**Methods:** court files, surveys, interviews (not with clients)

**Criteria:** time to disposition, cost (lawyer hours and fees), cost to court, monetary outcomes; provider, litigant and lawyer satisfaction and views of fairness

**Kelly, J. B. & Duryee, M.A., "Women's and Men's Views of Mediation in Voluntary and Mandatory Mediation Settings" (1992) 30(1) Family and Conciliation Courts Review. 34.**

Asks about post-mediation levels of anger and other emotions.

**Kelly, J.B., "Mediated and Adversarial Divorce: Respondents' Perceptions of Their Processes and Outcomes" (1989) no 24 Mediation Quarterly. 71.**

**MacFarlane, J. *Court-Based Mediation of Civil Cases: An Evaluation of the Ontario Court (General Division) ADR Centre, (University of Windsor, 1995).***

**McEwen, C.A., *An Evaluation of the ADR Pilot Project: Final Report, (Bowdoin College, 1992).***

**Method:** statistics, surveys to lawyers (questionnaire attached)

**McEwen, C.A. & Maiman, R.J., "Small Claims Mediation in Maine: An Empirical Assessment" (1981) 33 Maine Law Review. 237.**

**Method:** interviews, observation of sessions, court files, at six sites.

**Criteria:** correlated 'success' (settlement) with nature of case, characteristics of parties (individual / business), and involvement in a continuing personal or business relationship; on fairness questions, asked about extent to which clients understood what was going on, were nervous, angry, opportunities to express emotion, understood the other side. Examined compliance rates.

*Seems to use a broader range of questions than standard.*

**Nugent, W.R. & Paddock, J.B. "The Effect of Victim-Offender Mediation on Severity of Reoffense" (1995) 12(4) Mediation Quarterly. 353.**

Examines impact of process on offenders by studying probability of re-offense. Reviewed court files only.

**Pearson, J. & Thoennes, N., "Mediating and Litigating Custody Disputes: A Longitudinal Evaluation" (1984) 17(4) Family Law Quarterly. 497.**

Examine a variety of post-mediation variables; including relationship ("in the last 3 months, have there been improvements in communication, anger, cooperation, understanding?); how well spouse is complying with agreement; magnitude of disagreements with each other.

**Rauma, D. and Krafka, C. *Voluntary Arbitration in Eight Federal District Courts: An Evaluation (Federal Judicial Center, 1994)***

**Roy, S., "Two Types of Juvenile Restitution Programs in Two Midwestern Counties: A Comparative Study" (1993) 57(4) Federal Probation. 48.**

Impact of programs on compliance (repayment to victims) and on recidivism. Reviewed court files only.

Schildt, K., *Major Civil Case Mediation Pilot Program: 17<sup>th</sup> Judicial Circuit of Illinois, Preliminary Report*, (Dekalb, Illinois: Northern Illinois University, College of Law, 1994).

Interview guide attached.

**Policy goals:** described in report as efficiency (speed of disposition for all cases, including those referred to mediation, reduction of costs), “enhance satisfaction of litigants and lawyers with the mediation process and the overall quality of justice” (p.4)

**Criteria:** quality (participants’ satisfaction with process, and perceptions of justice and fairness), pace (settlement rates, effects of case type and complexity, impact on case processing), legal costs, mediator styles (impact of, caucusing, training implications)

**Methods:** surveys, followed by face-to-face interviews or telephone interviews with lawyers and mediators, court data

**Surveys and interview guide attached**

Sullivan, B.F., Schwebel, A. & Shimberg-Lind, J., “Parties’ Evaluations of Their Relationships With Their Mediators and Accomplishments in a Court-Connected Mediation Program” (1997) 35(4) *Family and Conciliation Courts Review*. 405.

Taaffe, L., Morokuma, S. & Gordon, E.E., *Participant Satisfaction Survey of Court-Connected ADR Programs*, (State Justice Institute, Georgia Office of Dispute Resolution, 2000).

*A summary of findings from a widespread survey on mediation programs. Illustrates standard questions.*

Thoennes, N., “An Evaluation of Child Protection Mediation in Five California Courts” (1997) 35(2) *Family Conciliation Courts Review*. 184.

Umbreit, M.S. & Coates, R.B., *Victim Offender Mediation: An Analysis of Programs in Four States of the US*, (Citizens Council Mediation Services, 1992). Available online at: <http://ssw.che.umn.edu/rjp/Resources/Resource.htm>

Umbreit, M.S., et al., *Mediation of Criminal Conflict: An Assessment of Programs in Four Canadian Provinces*, (Center for Restorative Justice and Mediation, School of Social Work, University of Minnesota, 1995). Available online at: <http://ssw.che.umn.edu/rjp/Resources/Resource.htm>

Umbreit, M. Coates, R.B. & Vos, B., *Juvenile Victim Offender Mediation in Six Oregon Counties*, (National Organization for Victim Assistance, 2001). Available online at: [www.odrc.state.or.us/toc.htm](http://www.odrc.state.or.us/toc.htm)

**Vidmar, N., "An Assessment of Mediation in a Small Claims Court" (1985) 41(2) Journal of Social Issues. 127.**

**Method:** Interviews. Satisfaction and fairness measured on a 4-point scale. Mostly focused on question of whether settlement rates differed as a function of the admission of liability.

**Wissler, R.L., "Mediation and Adjudication in the Small Claims Court: The Effects of Process and Case Characteristics" (1995) 29(2) Law & Society Review. 323.**

**Methods:** interviews

**Criteria:** clients were asked to describe the process, identifying characteristics such as: pace of the process (hurried?), number of solutions discussed, opp to tell one's story, depth (superficial?), understandable / confusing, characteristics of the mediator (personality & presence, active / passive, etc.); also assessed litigant's relationship with each other – 'negative ratings', understanding each other's point of view, impact on future relationship; compliance rates

*Also seems to use broader range of questions*

**Wissler, R.L., "The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts" (1997) 33 Willamette Law Review. 565.**

**Yates, S.M. and Shack, J.E., *An Evaluation of the Lanham Act Mediation Program: U.S. District Court for the Northern District of Illinois* (Center for Analysis of Alternative Dispute Resolution Systems, Chicago, Illinois, November, 2000) available online at [www.caadrs.org](http://www.caadrs.org)**

**Criteria:** opt-in rate; lawyers' and neutrals' perceptions of "efficacy of mediation"

**Methods:** surveys (mostly closed questions, multiple choice); court files

**Questions asked of lawyers:** to identify characteristics to indicate a case's suitability for mediation (p. 14, list of options); to identify benefits and disadvantages of mediation (p. 15); why they did or did not mediate specific cases; general opinions about med.

**Questions asked of mediators:** factors leading to or interfering with agreement  
**Survey attached.**

### 3. Other Evaluations

***Evaluation of the Occupational Safety and Health Review Commission Settlement Part Program, (Indiana Conflict Resolution Institute, 2000).***



*What is interesting about this study is the criteria. Among the standard (efficiency, settlement rates), was "satisfaction with justice", broken into 3 forms: distributive (satisfaction with outcome), procedural (with the larger process) and transformative (impact on relationships).*

**Cavenagh, T.D., "A Quantitative Analysis of the Use and Avoidance of Mediation by the Cook County, Illinois, Legal Community" (1997) 14(4) Mediation Quarterly. 353.**

**Description:** assessment of lawyers' use and perception of voluntary mediation

**Criteria:** rate of use, reasons for avoiding mediation (11 possible reasons explored – each was rated), level of training and knowledge (self-assessment)

**Methods:** survey (survey itself included)

**Interesting results:** high rate of education & knowledge but low usage rates; lawyers' tendency to rule out classes of cases

**Davies, M., Davis, G. & Webb, J., *Promoting Mediation: Report of a Study of Bristol Law Society's Mediation Scheme in its Preliminary Phase*, (London: The Law Society, 1996).**

(voluntary, not court-annexed)

**Methods:** reviewed file material for the 24 cases referred; telephone interviews with lawyers; interview guide attached

**Félix-Ortiz, M. et al., "A Qualitative Evaluation of an Assisted Self-Help Group for Drug-Addicted Clients in a Structured Outpatient Treatment Setting" (2000) 36(4) Community Mental Health Journal. 339.**

**Method:** observation and interviews; interviews began with general questions (asking about strengths and weaknesses, followed by 10 more specific questions about process, disclosure of information, impact of the process on the person, etc.)

**Lawson, K., *Evaluation of a System-Wide Admission and Discharge Department: Final Results Report*, (Regina Health District, 2000). [unpublished]**

*An example of the centrality of focus groups when evaluating perceptions of the quality / success of new program in service delivery*

**Program description:** new dept in RHD, coordinating service delivery on admission & discharge

**Criteria:** quality of services, access to services, degree of integration achieved, health outcomes and cost efficiency

**Methods:** focus groups, interviews, surveys and review of internal documents; through focus groups, obtained qualitative data on each of these criteria. Results

of focus groups used to help analyze other data; used more extensively in discussion of the results than the data obtained through other means.

**Raines, S. & O'Leary, R. "Evaluating the Use of Alternative Dispute Resolution Techniques and Processes in U.S. Environmental Protection Agency Enforcement Cases: Views of Agency Attorneys" (2000) 18 Pace Environmental Law Review. 119.**

Mostly surveys; some interviews. Interesting in that authors attempt to measure "transformational benefits" through some survey questions (p.128), although arguably not very effectively (question like: extent to which mediator helped to clarify parties' goals and choices, others listened to & learned something new about lawyer's point of view, and vice versa).

**Soutter, A. & McKenzie, A. "Evaluation of the Dispute Resolution Project in Australian Secondary Schools" (1998) 19 School Psychology International. 308.**

#### 4. Articles / Books

***Evaluating ADR Programs: A Handbook for Federal Agencies, (Administrative Conference of the United States Dispute Resolution Systems Design Working Group, March 1995).***

**Bussin, N., "Evaluating ADR Programs: The Ends Determine the Means"(2000) 22 Advocates Quarterly. 460.**

##### a. Books on Program Evaluation and Qualitative Research

**Krueger, R.A., *Focus Groups: A Practical Guide for Applied Research*, (Thousand Oaks, CA: Sage Publications Inc., 1994).**

**Marshall, C. & Rossman, G.B., *Designing Qualitative Research*, (Newbury Park, CA: Sage Publications Inc., 1993).**

*This book explores the use of qualitative research methods, and how to construct such a project. What seems most interesting about this short book are the brief vignettes that are incorporated throughout – all examples of the use of qualitative approaches, and all seem to be explorations of cultural change within an organization or system. Support for the argument that cultural change is best studied through qualitative methodology.*

**Miller, G. & Dingwall, R., *Context & Method in Qualitative Research*, (Thousand Oaks, CA: Sage Publications Inc., 1997).**

**Morgan, D.L., ed., *Successful Focus Groups: Advancing the State of the Art*, (Newbury Park, CA: Sage Publications Inc., 1993).**

*Establishes the following: 1. Focus groups are an advantage when investigating complex behavior and motivations (p. 16). 2. Consider focus groups to learn more about the degree of consensus on a topic (p.17).*

*One chapter explores the reasons for a multi-method approach. Provides an example – studying impact of an educational program for diabetes. Used focus groups for patients, and in-depth interviews for doctors, and statistics. Briefly describe why chose each method, and what it offered. (p.146) Other case studies at the back of the book.*

b. General articles on use of focus groups, and resulting benefits

**Butterfross, F.D. et al., “Use of Focus Group Data for Strategic Planning by a Community-based Immunization Coalition” (1997) 20(3) *Fam. Community Health*. 49.**

**Carey, M.A., “Comment: Concerns in the Analysis of Focus Group Data” (1995) 5(4) *Qualitative Health Research*. 487.**

**Halloran, J.P. & Grimes, D.E. “Application of the Focus Group Methodology to Educational Program Development” (1995) 5(4) *Qualitative Health Research*. 444.**

**Henderson, N.R., “A Practical Approach to Analyzing and Reporting Focus Groups Studies: Lessons From Qualitative Market Research” (1995) 5(4) *Qualitative Health Research*. 463.**

**Kalafat, J. & Illback, R.J., “A qualitative evaluation of school-based family resource and youth services centers. (Special Issue: Qualitative Research in Community Psychology)” (1998) 26(4) *American Journal of Community Psychology*. 573.**

**Kitzinger, J. “Introducing focus groups. (Qualitative Research, part 5)” (1995) 311 *British Medical Journal*. 299.**

**Krueger, R.A., “The Future of Focus Groups” (1995) 5(4) *Qualitative Health Research*. 524.**

**Loriz, L.M. and Foster, P.H., “Focus Groups: Powerful Adjuncts for Program Evaluation” 36(3) *Nursing Forum*, July-September, 2001. 31.**

**Morgan, D.L., “Pearls, Pith, and Provocation: Why Things (Sometimes) Go Wrong in Focus Groups” (1995) 5(4) *Qualitative Health Research*. 516.**

**Parker, T., Race, K.E.H & Hotch, D.F., "Focus Groups: a tool for consumer-based program evaluation in rehabilitation agency settings" (1994) 60(3) The Journal of Rehabilitation. 30.**

**Race, K.E.H., Hotch, D.F. & Packer, T., "Rehabilitation Program Evaluation: Use of Focus Groups to Empower Clients" (1994) 18(6) Evaluation Review. 730.**

**Smith, J.A., Scammon, D. L. & Beck, S.L., "Using Patient Focus Groups for New Patient Services" (1995) 21(1) Journal on Quality Improvement. 22.**

**Smith, M.W., "Ethics in Focus Groups: A Few Concerns" (1995) 5(4) Qualitative Health Research. 478.**

**Straw, M.K. & Marks, K., "Use of Focus Groups in Program Development" (1995) 5(4) Qualitative Health Research. 428.**

**Straw, R.B. & Smith, M.W., "Potential Uses of Focus Groups in Federal Policy and Program Evaluation Studies" (1995) 5(4) Qualitative Health Research. 421.**