

Family Mediation, Distance Mediation, Intercultural Mediation – What does any of this have to do with Maintenance Enforcement? A Discussion Paper

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Introduction

In this paper, we will describe and provide some preliminary information arising out of the Child Support Eligibility Mediation Project (CSEMP), an ongoing mediation project in British Columbia (BC), Canada. The CSEMP helps parents and adult children involved in the BC maintenance enforcement system by providing them with an opportunity to mediate how the parents will support the adult child, primarily as the adult child pursues post-secondary studies. We will also examine the broader context of the project through three different aspects. First, the project's exploration of the effectiveness of interest-based (facilitative) mediation techniques in contrast to evaluative (directive) mediation techniques will be contextualized within the practice of family mediation in Canada and particularly British Columbia. Secondly, the project's use of telephone, skype and other distance technologies in mediation (what we call "distance mediation") allows us to touch on the work that has been done with respect to distance mediation in Canada. Finally, the inclusion of the child in the mediation through the use of an Educational Plan highlights the intercultural environment in which the CSEMP mediations take place and in particular, the culturally laden question of what it is to be an adult. Throughout the paper, we approach each topic as mediation practitioners with a passion for the broad family justice issues that underlie our work, stemming from our professional backgrounds in teaching, law, non-profit, mediation, and consulting.

Explanation of the Child Support Eligibility Mediation Project

The Child Support Eligibility Mediation Project (CSEMP or the "Project") is a collaborative effort between Mediate BC Society and the Director of Maintenance Enforcement in British Columbia ("DOME").¹ Mediate BC Society ("Mediate BC") is a non-profit organization the mission of which is to lead, promote, and facilitate mediation and other collaborative dispute resolution processes throughout BC.² DOME operates the Family Maintenance Enforcement Program ("FMEP"), which monitors and enforces maintenance orders and agreements for child support or spousal support. FMEP is a program of the Maintenance Enforcement and Locate Services Division of the Ministry of Justice in BC.³

¹ We would like to acknowledge and thank Hannah Roots, Managing Director, BC Family Maintenance Enforcement Program; Christopher Beresford, Director of Maintenance Enforcement, BC; and Kari Boyle, Executive Director of Mediate BC for their support and encouragement of this innovative project.

² <http://www.mediatebc.com/>.

³ <http://www.fmep.gov.bc.ca/>.

The Project is funded in large part by a grant from the Law Foundation of British Columbia (the “Law Foundation”). The Law Foundation is a non-profit foundation that receives and distributes the interest on BC lawyers’ pooled trust accounts held at financial institutions. The Law Foundation funds projects that benefit the public in the areas of legal education, legal research, legal aid, law reform, and law libraries.⁴

The Project provides up to six hours of free mediation services for parents and children either age 19 or over, or approaching age 19, to help the families determine how much child support should be provided for the adult child to carry out his or her plans for post-secondary education. The mediation model used by the Project mediators incorporates both interest-based and evaluative approaches, and gives parents and children the opportunity to discuss the child's circumstances, formulate an education or transition plan, and decide on financial support for the child as he or she becomes independent and self-supporting. Part of the mediation process includes the completion of an Education Plan by the adult child, outlining the child’s plans, goals, resources, and request for assistance, which is shared with the parents and the mediator.

In Canada, the payment of child support is governed by federal law, the Federal Child Support Guidelines, which is enforced within each province.⁵ The Guidelines, which came into effect in 1997, make clear for the vast majority of cases the levels of support that should be paid for children up to and including age 18. In addition to set levels of child support, parents are also responsible for payment of “special expenses” or “extraordinary expenses” such as daycare, medical expenses, tuition, fees and equipment for sports, dance and other activities, etc. However, child support for children aged 19 or over is contingent upon the child remaining a “child of the marriage” within the meaning of section 2 of the Divorce Act.⁶ For children of non-married spouses, section 87 of the Family Relations Act provides, ““**child**” includes a person who is 19 years of age or older and, in relation to the parents of the person, is unable, because of illness, disability or other cause, to withdraw from their charge or to obtain the necessities of life.”⁷

The most common way for a child to remain a child of the marriage or to be unable to withdraw from their parents’ charge is for the child to pursue post-secondary education. In CSEMP mediations, the legal and practical matters to be determined may generally be stated as follows:

⁴ <http://www.lawfoundationbc.org/>.

⁵ Federal Child Support Guidelines, SOR/97-175, online: <http://laws-lois.justice.gc.ca/eng/regulations/SOR-97-175/index.html>.

⁶ Divorce Act, RSC 1985, c 3 (2nd Supp), online: <http://laws-lois.justice.gc.ca/eng/acts/D-3.4/>.

⁷ Family Relations Act, RSBC 1996, c 128, online: http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96128_01. The Family Relations Act will be replaced as of March 18, 2013 by the Family Law Act, which contains essentially the same definition of “child”.

- a) Is the child eligible for support? (What is the child’s educational plan/dream? Is the child independent and able to withdraw from the parents’ care, or does the child need help?)
- b) If so, should the Child Support Guidelines be applied as if the child were under 19? (What is the best way to help the child meet that goal?)
- c) If not, what amount of support is appropriate, taking into account the relevant legislation and case law? (What are the yearly costs estimated for the educational plan? What should each parent contribute, and the child? What other financial resources are available?)
- d) What are the special and extraordinary expenses and how should those expenses be shared?

The mediations are conducted using a typical four or five stage mediation process (a “western individualistic model”) unless the mediator and the parties feel another process is more appropriate given the culture or the wishes of the parties and the constraints of the project itself. The mediation process consists of:

- a) Pre-mediation (telephone calls or in person meetings with parents and child) (2 hours total);
- b) Mediation (2 hours, one session; may include separate meetings; may include child);
 - Introduction and Welcome
 - Agenda setting
 - Discussion of issues and interests
 - Developing an agreement
 - drafting and finalizing Mediation Agreement or Agreed Statement of Facts (1 hour); and
- c) Pre- and post-mediation preparation: The mediators are responsible for all pre- and post-mediation forms and preparation (1 hour).

The mediators who are participating in the project are all experienced lawyer mediators. As stated above, the CSEMP mediation model allows the use of both interest-based and evaluative mediation skills to help the parties reach a resolution. In facilitative or interest-based mediation models, mediator techniques include:

- Encouraging the parties to articulate the issues they would like to resolve
- Facilitating communication between the parties
- Encouraging parties to express their needs and concerns
- Pointing out common interests
- Steering away from rights-based views of the dispute

- Asking questions to help parties evaluate their options
- Assisting parties to arrive at a consensual settlement of their dispute.

Evaluative mediation techniques that may be employed by the Project mediators include:

- Collecting and recording the facts of the dispute
- Informing the parties about the legal issues arising in their case, and their options with respect to legal process
- Providing an understanding of the range of likely outcomes if the parties were to obtain a judicial decision
- Based on the foregoing, providing opinions regarding acceptable settlement ranges.

All decisions regarding which skills to use and when to use them are left entirely up to the discretion of the mediator. If the parties reach an agreement on all the issues, the mediator may, at the request of the parties, draft a mediation agreement which the parties then take to their lawyers for independent legal advice and signature. If no full agreement is reached as a result of the mediation process, the mediator facilitates an exchange of documentation and information between the parties and possibly with the FMEP enforcement officer; may document partial agreements; and may provide findings of fact or an agreed statement of facts to the parties and the FMEP enforcement officer.

It is anticipated that the Project will provide mediation for 50 files, which means that it will serve approximately 50 families in British Columbia, i.e. parents and their adult children aged 19 and over who continue to require support. Participation in the Project is entirely voluntary. The Project also serves parents in other provinces who are either payors or recipients of child support for an adult child in British Columbia.

Why use mediation in maintenance enforcement?

Litigation is currently the main path for resolving disputes concerning the eligibility of adult children for child support. In BC, for support orders concerning adult children who are enrolled with FMEP, enforcement officers make decisions about enforcement based on limited information concerning eligibility from the parties. As mentioned above, since the support requirements for children aged 19 and over are not as clear as for most of those aged 18 and under, those parents who are unhappy with the enforcement officer's decision and wish to obtain a different enforcement determination are faced with a complex process that can involve varying levels of court and judicial review. For example, they can apply to court to change their support order, obtain a declaration that the support has ceased or simply accept the enforcement decision. For support orders or agreements not enrolled with FMEP, a requesting parent may go to court to enforce the order or filed agreement, independently of FMEP, or obtain a new order. Mediation is not readily available for parents in these situations as most family justice services in BC tend to be geared toward newly separated families.

As in the rest of the family justice field, the court system is often not the most appropriate or suitable venue to resolve disputes about the family who find themselves at a decision point regarding their adult child, perhaps a number of years after the parents separated. When it comes to the support of adult children, much like the support of younger children, communication and information exchange is key to engendering understanding and agreement amongst the family members. At the same time, it is also important that the parents and the child understand the legal principles and precedents which would affect their outcomes in the court system, in order that they may negotiate their agreements with an understanding of the legal context.

Also, with this population, it becomes very important to include the voice of the adult child in the conversation. In doing this, precautions must be taken to ensure that the child's voice is included in a respectful way that accommodates and supports the relationship that the child has with each parent. Part of the reason why this group of families (separated parents with an adult child) was chosen for the Project is that older children make up a surprisingly substantial group of all the families enrolled in FMEP. The FMEP 2009 – 2010 Annual Report⁸ states that 26% of the children in the FMEP caseload are aged 19 and up, and references the "general societal trend for children to remain at home dependent upon a parent for support, for longer periods of time". As of January 11, 2011 there were 17,679 children over the age of 19 eligible for support in FMEP cases. Of the more than 44,000 cases enrolled with FMEP, 12,207 involve one or more children over the age of 19. Clearly there is a large group of parents and adult children who would potentially benefit from the opportunity to mediate their support eligibility dispute.

Overall, it is hoped that the Project will increase the parents' and adult children's access to justice by offering an opportunity to meet to share perspectives and interests, receive information about the legal issues and possible court outcomes from a knowledgeable third party, and reach a consensus. If the parties wish, in the mediation adult children and their parents may also collaboratively develop a financial and educational plan, contributing to a successful launch into life for the child. If parents are given the option of accessing mediation, they will be more likely to reach a well-informed agreement, which may reduce conflict in the family and prevent families from having to resort to a court hearing (with its cost, possible delays and potential harm to relationships) to obtain a final determination. In addition, other issues may also be addressed through the participation of the parties in a collaborative process, such as arrears or break down of the relationship between one parent and the child. The Project is anticipated to support what is hoped to be the ongoing shift in the family justice arena in BC from a litigation orientation to a collaborative orientation amongst parents as well as children.

Project evaluation

An evaluation plan for the Project has been developed and is being implemented by evaluator and researcher Sarah Vander Veen, M.A., J.D. The high priority goals of the Project evaluation are:

⁸ British Columbia Family Maintenance Enforcement Program, *Annual Report 2009-2010*.

- To determine how effective the hybrid interest-based / evaluative mediation model was in this context;
- To obtain rich descriptions of the mediation processes used by the mediators during the Project;
- To explore the use of distance mediation and technology tools in this context; and;
- To determine the most and least effective elements of the mediation model and generate recommendations regarding the extent to which it might be applied in similar contexts.

Because of timing, budgetary, and other constraints, control or comparison groups will not be used, but the evaluation design allows for a comparison group to be added after the fact should there be funding and interest for that kind of study. The evaluation will collect primarily quantitative (i.e., numerical) data; some qualitative (i.e., textual) data will also be collected that will help interpret the quantitative data and capture some of the richness of participants' and mediators' experiences during the Project. The evaluation take repeated measures from participants before and after each mediation to determine whether changes occurred on specific short, intermediate, and long-term outcomes of mediation (e.g., inter-family communication, etc.).

The tools that will be used in the evaluation are:

- For participants, pre-mediation data will be obtained from existing court orders, financial documents the participants will exchange, and from the Parent Information Form they will complete for Mediate BC. They will also complete a post-mediation questionnaire and a follow-up questionnaire.
- Mediators will complete a post-mediation questionnaire, a mediator log, and potentially attend a 2-hour focus group (budget permitting).

Preliminary information from the Project

Ms. Vander Veen has provided the following preliminary information from the Project:

As of February 15, 2013, thirteen cases have been mediated.

Case characteristics:

- Fifteen parties live in urban centres in British Columbia (i.e., populations of over 5,000) while ten live in small towns. One party lives in Australia. The parties lived in the same city/town in only three cases.
- Relationships between co-parents had been over for a long time (2 - 19 years; average = 12 years).

- In most cases there was high conflict between co-parents. Parents rated three items that were designed to assess the conflict between co-parents: (1) the other parent and I can talk about things without getting angry; (2) the other parent and I are pretty reasonable with one another; and (3) the other parent and I cooperate well it comes to co-parenting. Ratings for each parent were added together to create a scale that could range from 0 to 12 (with higher scores indicating more functional co-parenting relationships). The average was 2.7 out of 12!
- Parents were also asked to rate the extent to which there was conflict around the issue of child support beyond the age of 19 (on a scale of 0 to 4, with higher scores indicating more conflict). The average was 2.8 out of a 4 point scale, indicating that this issue was less contentious than the overall relationship between the parents.
- Most parents indicated they had reasonably good relationships with adult child. Two items were used to assess this: (1) The adult child and I can talk about the things that matter to him/her; and; (2) the adult child and I handle our conflicts well. This scale could range from 0 to 8 (with higher scores indicating better relationships), and the average was 6.2. There were no differences between mothers and fathers perceptions of the quality of their relationships with the adult children.

Settlement

- Nine of the thirteen cases settled; seven of them with full agreements on child support and special expenses, and two of them with other financial agreements (e.g., terminating support, but special expenses agreed upon; lump sum and fixed payments agreed upon).

Use and Impact of Distance Mediation

- Eleven of the thirteen mediations were distance mediations and two were in-person. Eight of the eleven distance mediations settled and one resulted in a Statement of Joint Session representing a part agreement.
- Teleconferencing was used as the primary tool in ten of the eleven distance mediations, supplemented by email and fax for work on documents, etc.
- One mediator (who did 4 mediations - all of them over the phone) had a preference for distance mediation, finding it "faster, more efficient, less painful" in all of her mediations, and easier to schedule into her very busy practice.
- Other mediator comments on use of distance mediation included:
 - "I really thought it wouldn't resolve and was worried about how we could caucus not being able to see each other" [the case did settle] ... "telephone mediation can really work. That was the key to this resolution."

- "Telephone worked well as one parent suffered from a disability, and thus conducting mediation from the comfort of that parent's home was of great value to the parent and allowed that parent to use their energy to focus on the problems to be resolved"
- "It was probably good that parents were not in the same room triggering each other's buttons"
- "Worked well; everyone operating from a comfort zone because each lived about 10 hours apart. No one felt resentful of having to make a trip in order to get the job done"

Pre-mediations

- With the exception of one case, the pre-mediations (pre-mediation meetings) were universally found to be critically important.
- Pre-mediations were cited by mediators as being useful in:
 - assessing degree of hostility/conflict;
 - deciding what type of mediation to use (shuttle versus joint sessions);
 - assessing what difficulties might arise during the joint session;
 - deciding how to frame/phrase questions;
 - building trust and rapport;
 - isolating the critical issues;
 - generating strategy;
 - preparing parties who are feeling fearful of / less powerful for the mediation process;
 - assessing the child's plans (e.g., are they realistic, etc.) and character; and
 - culling the facts.
- Although the parties were not asked directly about pre-mediation, it did arise in the following comments:
 - [the most helpful thing the mediator did] was getting everyone's point of view separately before the mediation so they felt free to their express their thoughts and facts freely. She was able to communicate that information to the other party much more clearly - without the emotional baggage - during the pre-mediation.
 - Found the pre-mediation calls were the best strategy because then everyone knows where everyone else is coming from.

- I really valued that she took the time to chat with my son before the mediation

Mediator Techniques

How helpful the parties perceived interest-based and evaluative strategies to be at different stages of mediation

- The parties were asked to rate how helpful they found interest-based and evaluative strategies to be at different phases of mediation, using a scale of 0 (not at all helpful) to 4 (very helpful). Essentially, the parties found both techniques to be equally helpful during the joint session and overall. Parties believed that interest-based techniques tended to be used most during the pre-mediation and joint session phases, while evaluative techniques were used most often after the joint session. Overall, most of the parties felt that mediators used both techniques about equally.

Types of strategies used by mediators

- For each mediation, the mediators were asked to rate the extent to which they used 10 different interest-based techniques and five different evaluative techniques. Interestingly, on average the mediators reported using interest-based and evaluative techniques to exactly the same degree – mirroring the perceptions of the parties discussed as discussed above.
- The most frequently-used interest-based techniques were summarizing, emphasizing the parties were in control of their own solutions, pointing out common interests and concerns, reframing, and managing emotions. The interest-based technique that was by far the least used was encouraging the parties to see the dispute from the other party's point of view.
- By far the most frequently-used evaluative technique was providing legal information or advice. Giving understandings of what might happen in court, pointing out the strengths/weaknesses of a party's case, and giving opinions about things that were said or proposals that were made were all used to about the same degree. Suggesting that one or both of the parties had unrealistic expectations was the least-used evaluative technique.

Shifts

- Mediators completed a log after each session in which they indicated, *inter alia*, the circumstances under which they shifted between interest-based and evaluative strategies. Mirroring the perceptions of the parties, mediators indicated that they used interest-based techniques most often during the pre-mediation sessions and joint sessions (for purposes of building rapport/trust, discovering underlying interests and issues, and reminding parents of their shared goals regarding the adult child).
- Evaluative techniques (for the most part) were used further along in the mediation when proposals/potential solutions were being discussed, when one or both parties were being

unrealistic in their positions, and when there were time pressures to complete the mediation process. However, on a couple of occasions when parties began the process already entrenched in unrealistic positions, evaluative techniques were used early on. Here are some illustrative quotes from mediators on this topic:

- *both techniques used. Emphasis on getting agreement; combo works best fastest.*
- *Shifted to evaluative after parties felt their interests and their versions of the facts were heard*
- *evaluative to begin in setting up the session, interest based during the joint session and evaluative to get both parties to agreement by email and phone*
- *interest-based to start and for most; then key use of evaluative; ensuring proposals/offers were understood and clarified*
- *It was important for the parties to have pointed out to them the common interests they had, i.e., certainty/structure and also to know that their son was going to be supported during his undergraduate degree. Used more of an evaluative tone at about 1.5 hours into the mediation. I felt at that time that it was important for the father to have outlined to him the possible outcomes in court. I didn't so much assess the case at hand as outline the range of outcomes that the court could find.*
- *Relied on interest-based approaches when trying to ascertain what was most important to each parent. Used more evaluative skill when dealing with father as he wanted to know and understand more about what was expected of him.*
- *Used interest-based approaches to build trust and to remind parents of primary goals; used evaluative to assist with risk management - as shared goal is to support child and avoid court using evaluative helps with reality check. Used evaluative to remind parents of limits of "I want" and "I think this is fair" and used interest-based approaches to return parties to primary goals of achieving settlement.*
- *Parties needed understanding about what judge was likely to order despite what their desires were, especially the mother. Used both throughout; although evaluative techniques introduced during pre-mediation sessions.*
- *Used interest based most. I did not really use an evaluative approach. I did provide the parties with information in the pre mediations, but they were very knowledgeable of the legal issues and the dad had legal advice. I found that the resolution was more about acknowledgement and other interests and did not really reflect a strict legal outcome. Only when the parties were negotiating a figure at the end, I suggested a possible compromise between the two amounts, which was more an evaluative or directive approach.*

- *Used both. [Evaluative] allows you to get closer to agreement within the time frame.*

Relationship between strategies used and amount of conflict present during the mediation

- Mediators rated using more evaluative techniques when there was more conflict during the session and fewer interest-based techniques when conflict was higher. These correlations aren't particularly high (meaning the relationships are only moderately strong, i.e., it didn't happen on every occasion, it is just a tendency).

Facilitators, Impediments, and Barriers to Settlement

In their log, mediators were asked to provide qualitative information about the barriers to and facilitators of settlement. The facilitators they discussed included the parties not wanting to go to court, not wanting to fight anymore, having a child with a good plan for their education and future, the child's desire to have the issue resolved, and good relationships existing between the child and parents. Impediments and barriers included the child not being organized and/or realistic about her or his future plans, a lengthy history of high animosity and/or lack of trust between the parents, the parents being too entrenched in their beliefs/interpretations of the facts, and there not being enough time available within the CSEMP framework to mediate the issues completely.

The role of adult children in the mediation

Education Plans. The Education Plans were critical in these mediations. There were Education Plans in 10 of the 13 mediations. Both the mediators and the parties rated that these plans (overall) were very concrete/specific, very practical and realistic, and that the parents tended to agree highly with them (let me know if you want the specific numbers on this). Participants also rated there to be (on average) very little conflict between the parents around these Education Plans during the mediations. They seemed to provide an area of shared interests between all members of the family. As one mediator wrote, *"The Education Plan was very important in the discussions between the parents - it served as common ground for discussion that they could focus on."*

Adult children participating in mediations: The adult child participated (in some form) in 9 of 12 mediations (data not available for 1 mediation). I believe the mediators contacted the child in almost every case prior to mediation to determine their interests, and ascertain how they would like to be involved in the mediation process (one adult child had developmental delays that rendered this impossible). I believe (it is a little hard to tell) that the child attended the actual joint session in two cases. In most of the other cases the mediator brought the child's voice to the mediation on the child's behalf. A couple of themes arose from the mediator logs regarding the adult child's participation:

Theme: Child having clear plans and demonstrating responsibility facilitated resolution

- *I interviewed [the] child. Very anxious to keep relationship with Dad so reluctant to talk about some crucial parts of evidence, which I respected. Impressed me so was able to advocate to parents as appropriate education plan with high likelihood of success. Both parents were proud*

of her. Want to maintain relationship with her. Can see her standing on her own two feet shortly so more willing to support.

- *Child participated fully. They were able to hold the child accountable for future acts/tasks which were to be her responsibility*
- *Conducted a follow-up session with child prior to the joint session with the parents ... very helpful -- particularly as she had a clear vision as to her educational aspirations and how she was going to accomplish same with or without her parents assistance.*

Theme: Adult child's participation creates shared interests/goals

- *Adult child participated firstly in premediation session with me by phone; then secondly, I facilitated a tele-meeting between child and father which took place a day or two prior to the mediation. ... It was very helpful to the process in that father and child did not spend lots of time together due mostly to their respective work schedules and child's social scheduling. Helped father to feel that he was involved in child's education plan. By the time we reached mediation mother and father were not in conflict over child's goal, but rather spent their energy trying to problem-solve.*

Family Mediation in Canada

To our understanding, it appears that the CSEMP represents the first time that mediation has been used in Canada to deal with maintenance enforcement matters. This is not surprising as the main mandate of maintenance enforcement programs is the enforcement of court orders and agreements regarding child and spousal support. In most cases, there may not be much leeway for negotiation. However, this does not mean that negotiation does not exist in family enforcement. Legal counsel for FMEP, as well as enforcement staff, often negotiate payment terms on an existing order or agreement, but are not able to negotiate the variation of an order or arrears. Therefore, there appeared to be a gap as no opportunity existed for discussions between the parties to resolve the dispute and parents have to turn to the courts.

More generally, mediation has long been recognized in Canada as a method of resolving family disputes that allows parties to make decisions about their own family with respect to parenting, guardianship, child and spousal support, and property division, and come to agreements without resort to court. In all jurisdictions within Canada, there is a general consensus that access to justice for families must be improved. There have been numerous reports, studies, committees, and commissions that have studied the subject of access to family justice over the years. These have been referenced and canvassed in

recent report that covers Canada generally entitled *Meaningful Change for Family Justice: Beyond Wise Words*.⁹

According to *Meaningful Change*, mediation is one form of consensual dispute resolution that is seen by many as part of the prescription to assist in access to justice for families.¹⁰ The gap between the many calls for reform in the numerous studies and reports over the years and actual implementation is related to “to a certain extent, a function of the culture of the justice system and its, as yet, incomplete embrace of CDR [consensual dispute resolution].”¹¹

Reform of the culture of the justice system is necessary, for the need is great:

The substantive law relating to grounds for divorce, entitlement to and division of family property, parenting obligations, spousal support, and child support has evolved more or less continually over the last forty years. The number of families turning to the law began to grow exponentially when no fault divorce became a possibility. Before 1968 divorce was not a common event and in Quebec and Newfoundland an Act of the Canadian Parliament was necessary for a divorce. The world we live in today is utterly different. Marriage is no longer assumed to be forever. About 38% of all Canadian marriages end in divorce, resulting in approximately 70,000 divorce orders annually.

It is probable that more people are touched by family law disputes than by any other single area of the law, especially when considering the broad range of relatives, friends, employers and colleagues whose lives are affected by a single family separation. Family law cases comprise about 35% of all civil cases. They take up a disproportionate amount of court time, with many more events per case, three times more adjournments, and twice as many hearings. At the same time, only 1% of divorce cases go to trial, suggesting that the greatest volume of work of family courts involves non-trial appearances and negotiated resolutions.¹²

The “expanded use of CDR approaches, while not the only way, is probably the single most attainable, efficient and effective way to enhance access to family justice.”¹³ Certainly mediation is one of the collaborative dispute resolution approaches that would be most likely to be helpful in this regard.

⁹ Action Committee on Access to Justice in Civil and Family Matters, *Meaningful Change for Family Justice: Beyond Wise Words, Report of the Family Justice Working Group of the Action Committee on Access to Justice in Civil and Family Matters* (December 19, 2012).

¹⁰ *Ibid* at 18.

¹¹ *Ibid* at 21.

¹² *Ibid* at 35.

¹³ *Ibid* at 37.

Mediation and other consensual dispute resolution approaches have also been highlighted in the recent changes to the family law legislation in BC. The new *Family Law Act*¹⁴ makes it clear that out of court dispute resolution alternatives are to be used if at all possible. This is a welcome shift and is being embraced by most of the family law community. Section 4 of the *Family Law Act* provides that resolution out of court is preferred and further, that parties are to be informed of the various methods available to resolve the dispute and encouraged to resolve the dispute through agreements and appropriate family dispute resolution before making an application to court.

Currently in the provinces and territories of Canada there are a number of government sponsored mediation programs for those families undergoing separation. These were summarized in a background report written for the Family Justice Working Group that wrote *Meaningful Change*:

In a model in which mediation is a primary tool for the resolution of family disputes, issues of affordability and quality are becoming critical. A number of jurisdictions address affordability by offering government supported mediation services. There are a variety of service models including:

- government employees provide public mediation services for free (e.g.; family justice counsellors (BC), family court counsellors (Alberta), Family Conciliation Service (Manitoba), or on a sliding scale (e.g. Saskatchewan);
- community based mediation service providers on contract to government provide free or subsidized mediation (Ontario, Quebec)
- mediation practicum students provide free services (BC);¹⁵ and
- private mediators (on a sliding scale) and government employees (for free) provide technology assisted mediation (BC).

Services are not uncommonly limited by geography, the clients' means or the issue in dispute.¹⁶

In British Columbia specifically, mediation services in family matters can be obtained from private mediators or Family Justice Counsellors, who work at Family Justice Centres all over the province and provide free mediation services primarily for separating parents regarding their children. There are differences between the kinds of subjects that can be mediated by various mediators. For instance, Family Justice Counsellors mainly assist newly separating parents with issues related to the children – parenting plans, parenting time and responsibilities, child support – and do not deal with property division. Another issue that has arisen under current family legislation, and may arise under the *Family*

¹⁴ *Family Law Act*, SBC 2011, c 25 [*Family Law Act*].

¹⁵ This service has since been discontinued.

¹⁶ Erin Shaw, *Family Justice Reform: A Review of Reports and Initiatives* (April 15, 2012) at 37-38.

Law Act, is whether a mediator who is not a lawyer may practice evaluative mediation skills, which may be considered in some cases as giving legal advice (which generally is restricted to lawyers in BC). A related issue is whether a mediator who is not a lawyer may draft a written agreement arising out of mediation.

One of the main questions that we are hoping will be answered by the Project is how effective are interest based (facilitative) and directive (evaluative) mediation techniques? From a practitioner's point of view, it is an advantage to be able to practice both kinds of techniques – a wider range of skills that are open to the mediator results in a greater ability to meet the specific needs of the parties. It is also our understanding anecdotally from our colleagues who are lawyer mediators that while their mediation practice is primarily interest-based, it is the ability to exert the evaluative mediation muscle that sometimes can be of great assistance to the parties to understand the legal context and to come to an agreement in mediation. The information coming out of the Project so far appears to bear this out (see “Mediator techniques” under Preliminary information from the Project, above).

Distance Mediation

Several key factors led us to incorporate communication technology in our mediation project. As set out in the previous sections of this discussion paper outlining an overview of family dispute resolution services and the genesis of this project, we recognized that the focus of many family justice services in BC is newly separating families and that the justice system did not provide enough resources for parents to resolve later disputes regarding child support without resorting to court. We also recognized that access to family dispute resolution or mediation was further compromised for many people who were isolated in small communities in BC, or who lived in completely different jurisdictions. Moreover, the increased globalization of individuals, people moving and living away from where they were raised and where they had resided with more and more frequency than in the past, coupled with our increasing reliance on technology in our day to day lives, has resulted in the need, in our view, to incorporate technology to assist with the mediation, i.e. distance mediation.

We turned to the innovative work of the Distance Mediation Project, another project managed by Mediate BC and funded by the Law Foundation that provided separated couples with access to qualified family mediators with the help of information and communication technologies. Our project adopted the practices and the learning of the Distance Mediation Project. In particular, we referred to the

guidelines produced by the Distance Project the original guidelines in 2010¹⁷ and the 2nd edition in November 2012 (the “Distance Guidelines”).¹⁸

The term “distance mediation” was used because the term “ODR”, or online dispute resolution, typically referred to disputes that were facilitated by some form of computer application. Although the term “ODR” now includes tools that do not use computer technology, such as the phone or video conferencing, we have continued to use distance mediation “because its focus is more on the element of “distance” than on the specific technology used in bridging that distance for the parties”.¹⁹

The project mediators are experienced family mediators, all willing to try to use technology to help offer mediation services to parents and their adult children. Further, we also adopted a delivery model that is “client-centred” rather than “location-centred”, so that mediation could be provided to anyone regardless of their location and that the technology used in mediation was determined, ultimately, by the mediator and the parties, taking into account their own skills and comfort.²⁰

Before describing some useful tips for mediators using distance mediation, here are some useful definitions from the Distance Guidelines:

“Technology”

The term “technology” is used to refer to information and communication technologies throughout these guidelines. These technologies can be any of a range of electronic communication tools, including regular landline and cell phones, teleconferencing, email, text messaging, custom text-based applications, and video or web conferencing. Sometimes the term “platform” or “application” is used to refer to a particular piece of computer software or web conferencing technology....

¹⁷Susanna Jani, *Mediating from a Distance: Suggested Practice Guidelines for Family Mediators* (British Columbia Mediator Roster Society, 2010), online: <http://www.mediatebc.com/PDFs/1-14-Family-Mediation---FAQs/Mediating-From-a-Distance-2nd-Edition-Nov-2012.aspx>.

¹⁸Susanna Jani, *Mediating from a Distance: Suggested Practice Guidelines for Family Mediators, 2nd ed* (Vancouver: Mediate BC Society, 2012), online: [http://www.mediatebc.com/PDFs/1-14-Family-Mediation---FAQs/Guidelines-Mediating-from-a-Distance-\(Second-edition\).aspx](http://www.mediatebc.com/PDFs/1-14-Family-Mediation---FAQs/Guidelines-Mediating-from-a-Distance-(Second-edition).aspx) [*Distance Guidelines*].

¹⁹Colleen Getz, *Evaluation Of the Distance Mediation Project: Report on Phase II of the Technology-Assisted Family Mediation Project, Volume 1: Report* (British Columbia Mediator Roster Society, 2010) at 5, online: <http://www.mediatebc.com/PDFs/1-2-Mediation-Services/Distance-Mediation-Project---Evaluation-Report.aspx> [*Distance Mediation Evaluation*].

²⁰*Ibid* at 6.

“Synchronous and Asynchronous”

The terms “synchronous” and “asynchronous” are also used in these guidelines in referring to technologies. Synchronous technologies are those that enable people to communicate in real-time, or at the same time — while they are in different places. Video and web conferencing are examples of this type of technology. Asynchronous technologies allow communication over a period of time — in consecutive time — while people are in different places. Email and discussion boards are examples of asynchronous technology.

“Technology-Assisted Mediation”

The guidelines focus on the use of technologies that support or assist the mediator and parties in bridging the distance between them. They refer to situations in which the mediator, parties and mediation process drive the use of the technology, rather than the technology directing or dictating the process. While the Distance Family Mediation Project team did test some applications in which the technology itself prescribes the process steps, they did not use any of these applications in the Project’s mediations. These guidelines, therefore, primarily contemplate conducting what is sometimes referred to as “technology-assisted” mediation.

As outlined above in Preliminary information from the Project, the mediators so far have found distance mediation to be a useful mode of mediation for various reasons. In terms of how distance mediation should be utilized by mediators, here are five tips that we have chosen to highlight that are an amalgamation of learning from the Distance Mediation Project, some of the feedback we have received from the mediations in the CSEMP, our experience in the mediations that we have conducted, and our own thoughts.

1. **Mediator, know thyself!** What is your comfort zone in using different techniques and technologies? The mediators need to reflect on who they are as a mediator and what they bring to the distance mediation process. The technologies used include telephone, email, and computer videoconferencing, such as skype. Additional skills or training is needed to do distance work, including additional training in appropriate web or other technology platforms and proper cyber “netiquette”.
2. **Match the technology to the case** looking at factors such as:
 - Party preference, considering the needs of the participant with the most limited technology access or skills, both in terms of their comfort and capacity
 - The availability, accessibility, and reliability of the technology
 - Communication styles, are the parties more adept at expressing themselves verbally or in writing? Do they tend to prefer formality and structure, or are they more comfortable with informality and spontaneity in their communications?

- Security, confidentiality and privacy of information
 - Cost: What technologies are most reasonably priced, for both the parties and the mediator?
 - Dispute context, type and complexity: Do the technologies' features fit the context of the dispute? If parties are in vastly different time zones, asynchronous technologies that allow them to participate in mediation at reasonable hours may be most suitable. If certain gestures of the other party may trigger hostility, maybe audio the best technology where there are no visuals. Does the particular application or technology environment lend itself to the type of dispute? For example, a property matter or similar issue for which there is likely to be financial and other documentation will require an ability to exchange or view that documentation. What technologies would be the most helpful, given the complexity of the dispute?
 - Stage in the mediation process/communication needs: What technology is most suited to the specific stage in the mediation process, taking into account communication needs? In other words, what is best suited to the task at hand?
3. **Take time to build trust** – building rapport and trust can take more time when using technology but it is critical; some level of trust must be present, not only between the mediator and the parties, but also between the parties.
 4. **Keep it real** — the power of authenticity, and the necessity of it, is magnified when using technology. Parties may have a more difficult time correctly understanding and interpreting what you say when they've never met you. How do you take into account the loss of visual and other clues when you do not have face to face meetings?
 5. **Time management** strategies - time management may be more difficult in distance mediation. The Distance Guidelines suggest:

. . . . time management may be more difficult in distance mediation. It is important to be very clear with the parties about expectations, to monitor the time being taken, to refocus the parties, and to assist them in making their responses as efficient as possible. If using a text-based application, for instance, ensure communications indicate whether a response to a message is expected, as well as the deadline for that response. Follow up with parties immediately if responses appear to be going off-track, and check in with parties regarding unexpected silences.

An added challenge for time management is that parties may feel less pressure to resolve issues when the mediation is from a distance. Some members of the Project team found that parties seemed inclined to have more sessions, and to have longer periods between the sessions, than in face-to-face mediation. Because of this, it is

helpful for the mediator to have a well-developed strategy for maintaining momentum and building on progress made in mediation sessions.²¹

Additional insight comes from the *Distance Mediation Evaluation*:

Distance mediation employs different skills, and involves a different mediation “style” rather than simply new tools in the mediation tool box. Most of the mediators believed that additional skills or training is needed to do this work, including additional training in: appropriate web or other technology platforms; proper cyber “netiquette”; reading the nuances of non-visual or verbal cues and written communication; and the implications of timing and other impacts of distance mediation approaches, as they affect both the process and outcomes of mediation. The suggested guidelines prepared during the Project could form the basis of any training in this area. The mediators in the Project generally felt that family distance mediation ought not to be undertaken without first having a considerable amount of experience in conventional mediation.²²

We will be taking further note of the use and impact of distance technology in mediation as our project continues. So far, most of our mediations (13 out of 15) have used distance technology and there have been some positive reactions to the use of the technology. We are looking forward to a more in depth analysis at the end of our project.

Intercultural Mediation

Although intercultural issues were not explicitly stated as a direct subject of the pilot project, as practicing mediators from intercultural backgrounds we are always very interested in the subject. In our explorations of how culture can impact mediation, we have found it useful to keep in mind the following:

- a. A very broad notion of culture. Culture has been defined in numerous ways, and especially for the purposes of mediation, we have personally found that an understanding of culture that encompasses a wide range of factors is more useful than a narrow understanding. We have found the following definitions of culture to be useful as starting points:
 - “a complex frame of reference that consists of patterns of traditions, beliefs, values, norms, symbols, and meanings that are shared to varying degrees by interacting members of a community” – iceberg metaphor²³

²¹ *Distance Guidelines*, supra note 17 at 27.

²² *Distance Mediation Evaluation*, supra note 18 at iii.

²³ Stella Ting-Toomey, *Communicating Across Cultures* (New York: The Guildford Press, 1999) at 10.

- “a set of explicit is a set of explicit and tacit assumptions or understandings commonly held by a group of people; a particular configuration of assumptions is distinctive to the group; these assumptions/understandings serve as guides to acceptable and unacceptable perceptions, thoughts, feelings and behaviors; they are learned and passed on to new members of the group through social interaction; they change over time, although the tacit assumptions which are at the core of culture are most resistant to change” – “onion” definition of culture²⁴
- b. An understanding of one’s own cultural identity and cultural context. This is essential in order to see and understand our own lens through which we view the world, and how that affects how we interact with parties in the mediation, the assumptions that we make, the way we design a mediation process, and the kinds of outcomes we are seeking.
 - c. An exploration of the dimensions through which culture may considered. A compilation of some of these dimensions is attached at Appendix B.

The impact of culture on mediation was not a focus of the Project. However, there is a related question in the mediator log that each mediator completes after the mediation: *Please describe the main reasons that this case either settled (facilitators of settlement) or did not settle (barriers to settlement) in mediation. Include any cultural, power im/balance or any other factors that in your view influenced the process or the outcome.* We hope that there may be some interesting examples of intercultural issues that arise from this question.

A particular issue that arises in Project mediations, because of the subject area, is the question of what it means to be an adult and the related questions of what support adult children can expect from their parents in order to achieve some of their future goals (education, career, independence). The Education Plan, at least so far, is serving as a focal point for the parents; it appears to help them realize that they have a common interest, in spite of the passage of time and their lack of communication or even conflict – namely, their child’s successful progression into adulthood. At the same time, there are bound to be differences between the parents, and between each parent and the child, about what it means to be an adult and the kind of expectations that a child can have regarding support from his or her parents. These differences may be regarded as cultural differences – whether generationally based, ethnically based, gender based, or otherwise.

In our presentation we will share some examples from the mediations that we have personally conducted that illustrate how the difference in how adulthood is viewed by the children and the parents can arise in mediation, and how the differences may be addressed.

²⁴ Margaret E. Phillips and Nakiye A. Boyacigiller, “Cultural Scanning: An integrated cultural frameworks approach” in Nakiye Avdan Boyacigiller, Richard Alan Goodman, and Margaret E. Phillips (eds), *Crossing Cultures: Insights from Master Teachers* (New York: Routledge, 2003) at 77.

The children in the project are at a developmental stage that some social scientists and psychologists have termed “emerging adulthood”. Several studies have noted the cultural differences that exist between various groups of young adults over their own perceptions and beliefs about adulthood, and whether or not they themselves have achieved adulthood. The results of these studies highlight the notion that adulthood is a culturally constructed concept.²⁵

In addition, other studies have compared the criteria that young adults have for adulthood with the criteria held by their parent(s). Nelson et al.²⁶ found that most emerging adults and their parents both felt that the emerging adults had not quite reached adult status. The parents and the children also agreed that the criteria related to relational maturity (e.g. accept responsibility for the consequences of your actions) were the most important for the achievement of adulthood. Parents and children disagreed regarding the relative importance of criteria related to norm compliance, which parents rated as more important to adulthood than children. Gender differences, i.e. whether the parent was a mother or father and whether the child was male or female, also had an effect.

As an example of how cultural beliefs can influence and inform the assumptions underlying the mediation process, it is fruitful to examine the Education Plan that is meant to be filled out by the child in a CSEMP mediation. (We do not know in how many instances a parent filled out the Education Plan or assisted the child to do so). The Education Plan is attached to this paper as Appendix A. The questions asked and the information solicited in the Education Plan can be said to reflect these cultural beliefs and norms:

- the statute and case law regarding support for adult children (i.e. children of separated parents, aged 19 and over) in Canada (which in turn reflects some others of the beliefs below)
- the belief that adult children are capable of and perhaps responsible for putting together their own budget, analyzing their own financial needs
- the belief that adult children are responsible for accounting for their time (school, summer) as long as they are asking their parents for support
- the belief that adult children must expressly ask their parents for support (support is not assumed)

²⁵ Kostantinos Petrogiannis, “Conceptions of the transition to adulthood in a sample of Greek higher education students” (2011) 11:1 *International Journal of Psychology and Psychological Therapy* 121; Larry J. Nelson, Sarah Badger, and Bo Wu, “The influence of culture in emerging adulthood: Perspectives of Chinese college students” (2004) 28:1 *International Journal of Behavioral Development* 26; Charissa S. L. Cheah and Larry J. Nelson, “The role of acculturation in the emerging adulthood of aboriginal college students” (2004) 28:6 *International Journal of Behavioral Development* 495.

²⁶ Larry J. Nelson et al., ““If You Want Me to Treat You Like an Adult, Start Acting Like One!” Comparing the Criteria that Emerging Adults and Their Parents Have for Adulthood” (2007) 21:4 *Journal of Family Psychology* 665.

- the belief that adult children are expected to contribute their own funds to pay for their education

Examining our Project documents in this manner has the potential of leading to some insight about the cultural assumptions that underlie the Project in an unspoken way. It may also add insight to the greater challenge of creating projects, programs and processes that are capable of embracing and serving a wide range of cultural complexities that are inherent in a diverse and multicultural society such as Canada. Finally, it highlights the importance of self-awareness and transparency in designing dispute resolution systems that will work to the benefit of everyone.

Looking forward

Some intriguing, useful, and interesting information has come out of the mediations that have been completed so far in the CSEMP. The success of the project is due in great part to the excellent and experienced lawyer mediators who are participating in this project, and we salute their dedication. We anticipate that the information, experience, results and recommendations arising from the CSEMP will make a contribution to the thinking, the design, and the implementation of family justice services in BC, Canada and perhaps the world! As well, we are hopeful that the experience of the mediators and the parties with distance mediation will open up opportunities for families who live far apart, or who live in rural areas, to have the benefit of mediation services to assist them in resolving their differences. We look forward to sharing with you the final results when the Project is completed.

Appendix A

SOME CULTURAL DIMENSIONS (compiled from Sources (see below) by Yuki Matsuno and Shelina Neallani)

How a group is organized	Individualistic -organized around the individual members encouraged to be independent, look after themselves -negotiators considered interchangeable -individuals make decisions in their own interest -may defend their points of view -may take strong stands -emphasis on competency	Collectivistic -organized around the group -individuals integrated into cohesive groups that take responsibility for group members -individuals make decisions in the interests of the group -group decisions (mediation within a mediation) -defend the group -emphasis on relationship
How people personally experience time	Monochronic time -time as linear -promptness, deadlines -focused -completion, closure - one thing at a time	Polychronic time -time as fluid and flexible -things happen when they happen -don't have to finish one thing before starting another -multitasking
How context affects meaning	Low context -emphasis on written/spoken words -words taken at face value therefore word choice is important -specificity and clarity are valued -disclosure and being forthcoming are valued	High context -emphasis on context of communication -meaning derived not only from words but from situation, relationship between speaker and receiver, relative roles/status -tone, body language, etc. also provide meaning -more examples of indirect speech
The extent to which people feel either uncomfortable or comfortable with unstructured situations	Low uncertainty avoidance -don't mind rapid change and uncertainty -adapt quickly to changing circumstances -ok with rules changing and shifting	High uncertainty avoidance -prefer stable and secure situations -less comfortable with ambiguities -like rules and procedures
How time horizons are understood	Short term -shorter, more immediate time horizons -what is the impact today -what's done is done – what's important is what we decide today -history is less important than the present and (short term) future	Long term -longer time horizons -what is the long term impact -what happened in the past impacts what is happening now -history is important

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Educational Plan for «Child»

Date: (date)

1. My overall career and educational goals are:

2. In order to achieve these goals, I intend to complete the following education in the coming year (2012-2013) (programs, courses, etc.):

3. I need to do the following to complete my education: (maintain current grades, improve grades, seek admission into program, etc.)

4. I anticipate my budget for the school year will be as follows:

Expenses

Tuition and Fees

Books

Supplies (stationery, photocopies, etc.)

Computer supplies

Rent

Food

Utilities (heat, electricity, cable, internet)

Phone

Transportation (gas, carpool (transit covered by UPass)

Medical, dental, eye care

Personal (haircuts, clothes)

Entertainment

Income

Savings at start of school year

Income from part-time work

RESP

Assistance from parents

Assistance from other family members

Scholarships

