UNIFORM LAW CONFERENCE OF CANADA

Uniform Mediation Act

Discussion Paper
Civil Section

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Mediation

Mediation is a non-binding conflict resolution process where a neutral, impartial third party, with no decision-making authority, attempts to facilitate a settlement between disputing parties.[2] At least two mediation styles or approaches are identified in practice. "Interest-based mediation" involves framing the dispute between the parties in terms of underlying needs, concerns or interests, and helping the parties to formulate resolutions in terms of options which satisfy as many of the underlying needs or interests as possible. In "rights-based mediation", also described as "evaluative mediation", mediators assume that what the parties want and need is some direction as to the appropriate grounds for settlement. They will frame the dispute in terms of opposing rights and obligations, or look to the rights the parties would have in court as a guideline or benchmark for settlement.

Mediation is a commonly used form of "ADR". The abbreviation "ADR", when it first appeared, was taken to mean *alternative* dispute resolution; that is, alternative to litigation. In recent years it has come to refer to *appropriate* dispute resolution. The change in language reflects a growing consensus that dispute resolution options should no longer be seen as alternative to, or as opposed to, the litigation process. From this perspective litigation is not seen as the starting or default option with mediation considered only as an alternative in the event that a litigation approach is rejected. Rather, selecting a dispute resolution process is a matter of considering all dispute resolution options equally and selecting the one most appropriate to the individual case.

The Current Status of Mediation in Canada

Over the past several years the problems plaguing our civil justice systems have been articulated with considerable precision, and with increasing urgency. It is safe to say that a substantial consensus has emerged to the effect that the health of our civil justice systems requires a decisive response to the identified problems of cost, delay, complexity, and uncertainty. Added to this are mounting government concerns with deficits and the need to reduce the cost of operating the justice system. From jurisdictions across Canada and across the common law world one now commonly sees references not only to the need for change, but for fundamental change.

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[1] While individuals from Alberta, Quebec and British Columbia have provided input into this paper, resources have not permitted a comprehensive review of mediation law and policy across Canada. The aim of this paper is limited to initiating discussion on the question of a Uniform Mediation Act in Canada.

[2] Alberta observes that the definition of "mediation" may impact on the accessibility of mediation materials under freedom of information and protection of privacy legislation, and warns that the wrong definition might include virtually any situation where someone tries to settle a dispute among other persons. Furthermore, although there may be a privilege associated with mediation under proposed uniform legislation, some freedom of information acts, such as British Columbia's, only protect solicitor-client privilege. Alberta's legislation protects any kind of privilege but only as a discretionary exception, which requires proof that the discretion should be exercised.

The 1996 *Systems of Civil Justice Task Force Report* ("the Task Force Report") of the Canadian Bar Association, for example, states:

> Ensuring the existence and health of a forum for civil justice to which we all have access ought to be a ground-level, first-order value for our society. All of us ought to be able to protect our rights and interests and seek what is due in matters that can have a profound effect on our lives...Access to the forum in which these rights are given life and force is a matter which should not be a luxury reserved for the very few who can afford it.
>
> The fact that the majority of Canadians cannot afford to seek justice through the current system is a problem which far outstrips in magnitude concerns about maximizing procedural and due process protections for those litigants who are presently able to access the system.

And:

> ...more and more Canadians fall into the category of people unable to gain access to the civil justice system because of the cost.[3]

The Report ultimately states that:

> the Task Force is persuaded that a focus on early consensual dispute resolution holds the greatest promise for reducing costs and delays.[4]

Similarly, the Federal government and several provincial governments have become convinced that the increased use of mediation will enhance access to justice by helping to alleviate problems of cost, delay, and complexity in the civil justice system. Governments are also attracted by the growing body of experience showing that mediation is less stressful for litigants and that "process satisfaction" levels for parties in mediation tend to be very high.[5] Business interests, for example, are attracted to mediation not only because of its cost saving features, but because it tends to leave business relationships more intact than does litigation.[6] Experience with non-binding dispute resolution processes, particularly mediation, shows that mediation usually produces settlement rates of between 50% and 80%. There is also strong evidence that mediation produces earlier settlements. Parties and counsel tend to react positively to the

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[3] *Task Force Report*, p. 15-16.

[4] *Task Force Report*, p. 32. The first recommendation of The Task Force is that every jurisdiction make available as part of the civil justice system opportunities for litigants to use non-binding dispute resolution processes as early as possible in the litigation process.

[5] In the Court Mediation Practicum Project for example, now being operated out of the Robson Square and Surrey Small Claims Registries in British Columbia, exit surveys for 1500 litigants show 90% would choose to mediate again if involved in another Small Claims action. Ninety-seven percent of lawyers would use the process again. More than ½ of these parties were mandated into mediation.

[6] Fortune 500 and mid-size companies in a variety of industries report that they are using a policy that encourages use of mediation and other forms of ADR to resolve business disputes. A group of twenty-four companies of the 140 respondents to a recent survey estimated legal cost savings totaling $24 million. (see CPR Institute for Dispute Resolution at http://www.cpradr.org/ poll_597.htm New York, May 12, 1997)

mediation process and typically regard it as a fair and efficient way to reach resolution. Requiring parties to attend at mediation does not dramatically reduce these settlement rates or levels of satisfaction with the process. Accordingly there is very strong policy support for mediation in most governments across Canada.

Mediation Statutes in Canada

Some Canadian statutes merely acknowledge or encourage the use of mediation.[7] Increasingly however, litigants in the courts are being required to use mediation. Provisions requiring participation in mediation are now found in statutes, regulations, court rules and judicial practice directions. Predictably, the provisions mandating mediation are much more comprehensive and elaborate than those merely encouraging it. For example[8]:

- Saskatchewan

Section 54(2) of the *Queens Bench Act* requires that following the close of pleadings in a civil non-family contested matter, parties shall attend a mediation session prior to taking any further steps. The Crown coordinates the mediation services.

This program is now legislated in the judicial centers of Regina, Saskatoon, Prince Albert and Swift Current. It evolved from a "pilot" to a program in the fall of 1997. The existing program captures about 75% of all actions in the province. Expansion will apparently continue until all judicial centers are participating.

- Ontario

Rule 24.1 of the *Courts of Justice Act* establishes Ontario's mandatory mediation program. The program currently operates for many cases in the city of Toronto and for all cases in the regional municipality of Ottawa-Carleton. Parties to non-family civil disputes are referred on a mandatory basis to mediation within 90 days of the filing of a statement of defence. Litigants who want to opt out of the mediation process require the permission of a Case Management Master or Judge. Parties select a mediator from a roster of private sector mediators. Regulations provide that mediators are paid a maximum fee of $300 per party for the first three hours of mediation and one hour of preparation time. Fees after four hours are not regulated. The program is established as a pilot project.

- Quebec

a. Quebec Superior Court: Couples with children who want a divorce or separation are required by Bill 65 (1996) to attend one mandatory mediation information session with a free, accredited mediator. The couple may participate in up to six free

[7] See for example s. 22 of B.C.'s *Child, Family and Community Service Act* which provides that "If a director and any person are unable to resolve an issue relating to the child or a plan of care, the director and the person may agree to mediation or other alternative dispute resolution mechanisms as a means of resolving the issue."

[8] Some examples of the legislation referred to below are set out at Appendix 1.

mediation sessions (three for variation orders). Pursuant to a pilot project in the Superior Court parties, upon filing an application, are sent a letter signed by a judge advising them of the possibility of mediation and providing information on how to contact a mediator. This pilot is operating in Montreal and Quebec City.

b. Quebec Court of Appeal: In 1997 the Quebec Court of Appeal began a voluntary mediation pilot project. This is the first appeal court level mediation program in Canada. Each mediation lasts from three to five hours and is conducted by a judge. Settlements are drafted by lawyers and presented to a panel of three judges of the Court of Appeal who confirm the settlements by Judgment. The most current information is that settlement rates are very high.

- British Columbia

a) The Ministry of Attorney General is proposing to expand the Notice to Mediate process, similar to that presently in place by regulation for personal injury and for residential construction disputes; see B.C. Reg. 127/98 made under s. 44.1 *Insurance (Motor Vehicle) Act* and B.C. Reg. 152/99 made under s. 29 *Homeowner Protection Act*. In the future the Ministry of Attorney General will expand the use of the Notice to a broad range of civil, *non-family* actions in the Supreme Court. The Notice to Mediate Regulation allows any party to most actions in the Supreme Court to compel all other parties to participate in a mediation of the matters in dispute. The Notice to Mediate is used when at least one party to an action has made an assessment that mediation would be desirable.

The Notice has been used in more than 2500 Supreme Court personal injury and residential construction actions since April of 1998.

b) Fully mandatory mediation is occurring in Small Claims cases in four Provincial Court Registries. Parties are compelled to attend mediation by the terms of a Practice Direction issued by the Chief Judge of the Provincial Court.

c) Judicial pretrial mediation is mandatory in the Provincial Court under the *Small Claims Act* and under the Provincial Court (*Child Family and Community Service Act*) Rule 2. Judicial mediation is available but not mandatory for family disputes under the Provincial Court (*Family Relations Act*) Rules. More than 100 judges in British Columbia have been trained in mediation.

- Alberta

Mediation rules under the *Provincial Court Act* require certain litigants in the Small Claims Court to participate in mediation, although a party may make an application for an order to be exempted from the requirement. Under the rules the Court or a mediation coordinator may refer a case for mediation on giving notice to the parties or, where they are represented, to their counsel. The rules provide that the mediation is confidential and that the mediator shall act impartially. The rules provide that oral communications or documents or records generated for the purpose of the mediation are inadmissible or privileged, and that neither the mediator nor any other person present at the session may be subpoenaed or otherwise required to testify. Parties are obliged to negotiate in good

faith and mediators are given the same immunity from civil suit as a judge of the Court. The Court is given certain powers in the event of non-compliance.

The above list is not exhaustive. In British Columbia alone there are more than 30 separate statutes which encourage or enable mediation, albeit often with little direction or guidance respecting what mediation is or how it should be conducted. Many voluntary mediation programs operate by policy without any statutory framework.

Where parties are required to mediate, the mediation services are usually delivered in one of two formats. Either the mediation is "court annexed", that is, it occurs as an integral part of the court process, the mediators are Crown employees and the Court or the Attorney General oversees the delivery of mediation services; or the mediations are conducted in the private sector by mediators who are subject to some form of regulatory control. Saskatchewan is an example of the former, Ontario an example of the latter. Different funding models flow from these different approaches. The court-annexed models tend to be publicly funded or at least heavily subsidized by government. Where mediations occur in the private sector the parties will usually pay. In such cases the cost of the mediation service may be regulated (Ontario) or it may not (B.C.).

The American Uniform Mediation Act

The United States has had more experience with mediation and with mediation legislation than has Canada. Mediation of civil disputes in Canada began in the early 1980's and only began to build real momentum over the last 10 years. By contrast, mediation has been used extensively in some American jurisdictions since the 1970's or earlier. As both the use and regulation of mediation have expanded in U.S. jurisdiction certain practical problems began to appear, and the possibility of uniform legislation was raised. Ultimately, the Drafting Committee on Uniform Mediation Act of the National Conference of Commissioners on Uniform State Laws proposed a Uniform Mediation Act for the United States. The Prefatory Note and Reporter's Notes of the March, 2000 draft of that Act make, *inter alia*, the following points:

- *Public policy strongly supports the expanded use of mediation.* Mediation diminishes the unnecessary expenditure of personal and institutional resources for conflict resolution and promotes a more civil society.

- *Law can encourage both use and integrity of the process.* The law has a limited but important role to play in encouraging the effective use of mediation and maintaining its integrity, as well as maintaining an appropriate relationship with the justice system. In particular, law can ensure that reasonable expectations respecting confidentiality are met, that the integrity of the mediation process is assured, that the process is fundamentally fair and that mediation is used to promote private resolution of disputes through informed self-determination.

- *Many statutes in many contexts.* Hundreds of U.S. state statutes currently establish mediation programs in a wide variety of contexts.

- *There are common themes in existing statutes.* Using confidentiality as an example, the Commissioners observe that virtually all states have adopted some form of confidentiality protection, reflecting a strong public policy favouring confidentiality in mediation. However, this policy is effected through approximately 250 different state statutes, and differences among them include the definition of mediation, subject matter of dispute, scope of protection, exceptions and the context of the mediation that comes within the statute (such as whether the mediation takes place in a court or a community program or a private setting).

- *Mediations often have a multi-state character.* The cross-jurisdictional character of mediation makes uniformity important.

- *A uniform act would be timely.* The United States has had 25 years to engage in experimentation with statutory approaches to mediation. Over that time clear trends have emerged and scholars and practitioners have a reasonable sense of what types of legal standards are helpful. At the same time, the law interpreting these statutes has not yet begun to develop, minimizing the potential for disruption of current law and practices, and maximizing the potential for uniformity.

- *Structure.* The uniform act would adopt the structure used by an overwhelming majority of the statutes of general application in the United States. The March, 2000 draft of the American Uniform Mediation Act contains the following sections:

1. Title
2. Application and Construction
3. Definitions
4. Scope
5. Exclusions from evidence and discovery; privilege
6. Waiver and estoppel
7. Nondisclosure outside of discovery and evidentiary proceedings
8. Exceptions to privilege and nondisclosure
9. Mediation procedures
10. Summary enforcement of mediated settlement agreements
11. Severability
12. Effective date
13. Repeal

The drafting of the American Uniform Mediation Act appears to be moving reasonably quickly. In fact, there has been some criticism that it is moving too quickly and that there has been insufficient consultation with stakeholders. Presumably the drafters will wish to exercise great care in this respect. Consequences flowing from such legislation could be significant and the range of interests impacted by such a statute would be very wide. In Canada, stakeholders have shown themselves to be very interested in mediation legislation and most eager to have a voice, particularly where mandatory processes are contemplated. Stakeholders include all of those working in the civil justice system (the bench, the bar, mediators, court managers and governments), as well as business and the litigants themselves.

What issues might a Canadian Act address?

If a Canadian Uniform Mediation Act were considered it might, depending upon its scope and purpose, address the following issues:

1. Definition of terms - for example: mediator, mediation, mediation session, participant or disputant, mediation communication, etc.

2. Scope or application – to which mediations would the legislation apply, i.e. which cases in which settings? See footnote 2 respecting concerns raised by Alberta in the event that the scope of such legislation is too wide. In what circumstances will cases be exempt from participation in mediation?

3. Confidentiality or privilege and compellability – How is information exchanged during mediation or in anticipation of mediation to be treated? Which communications, oral or written, before, during or after the mediation, are not admissible in evidence? Should mediators and/or other participants in the mediation be non-compellable? Under which circumstances can confidentiality be waived? What is the relationship of confidentiality provisions to freedom of information and protection of privacy legislation?

4. Conduct of the mediation – Is procedural control over the mediation entirely in the hands of the mediator or is that procedural discretion limited by legislation? What must occur before a process can be called mediation and brought within the scope of the legislation? Should the legislation dictate in any way what the mediator must do, or how the parties must act? For example, the Alberta Provincial Court Rules require the parties to negotiate in good faith. Is it necessary to specify the duration of time for which parties must participate in a mandatory mediation session?

5. Qualification of the mediator - when is a mediator disqualified from acting? What specific are given about conflict of interest or other issues going to neutrality? Should legislation, as is the case in Quebec, specify the training qualifications required for mediators?

6. Formalizing resolutions negotiated in mediation – how are settlements documented? By written agreement, by written agreement filed in the Court or by order?

7. Enforcement of mediated agreements – should any special rules be put in place to enhance the enforceability of settlements made in mediation when those settlements are not formalized as orders?

8. Pre-mediation disclosure of information – what information must be disclosed in a mediation or conversely, what information, if any, can properly be withheld? How is information to be exchanged? When is information to be exchanged? What are the demands of fairness in this respect? What is the relationship between mediation and the Examination for Discovery process?

9. Attendance at mediation – who may attend and who must attend the mediation session? Some statutes provide that parties must attend, representatives may attend where parties are unable to do so, counsel may attend and any other person may attend with the consent of all parties. If a representative attends, what information must he or she have and what authority to settle must he or she bring to the table?

10. Authority of the Court – what authority will the Court have to oversee mediation? Will it have the power to give orders exempting parties from attending, adjourning mediation dates, making directions respecting disclosure or penalizing inappropriate conduct with costs?

Rationale for American Uniform Mediation Act

Individual states and the American federal government have legislated extensively in the field of mediation for several years. This has led to the following problems:

- *Conflicting requirements from state to state.* There are more than 2,000 state and federal statues related to mediation. They constitute a tangle of legal requirements regarding mediation.[9] Existing statutory provisions vary from state to state for similar programs and, within a given state, by type of program. For example, the parameters for confidentiality of domestic disputes differ from one state to the next. Compare General Statutes of Connecticut § 46b-53a (1998) (all communications confidential, unless parties otherwise agree) with Kansas Statutes Annotated § 23-605 (all communications confidential, except for information reasonably necessary to investigate ethical violations of mediators, information subject to mandatory reporting requirements, information reasonably necessary to prevent ongoing or future crime or fraud, information sought of mediator by a court order, or reports to a court of threats of physical violence made during the proceeding).

- *Different rules for different mediations.* Further, a given state may, for example, delineate one rule for mediation confidentiality in environmental and civil rights cases, and yet another rule for court-annexed mediation. Although all states provide for mediation confidentiality for some disputes, most do not cover all types of mediation; these statutes form a patchwork of "hit or miss" coverage. Compare Revised Statutes of Nebraska §§ 25-2902 - 25-2921 (1998) (dealing with most, but not all publicly approved mediation programs, though not completely of general application) with Texas Civil Practice and Remedies Code §§ 152.001-152.004 (generally covering dispute resolution programs). These statutes can be compared, in turn, with subject-specific statutes having mediation provisions within them, such as Revised Statutes of Colorado § 14-12-105 (1998) (domestic relations); Florida Statutes c. 681.1097 (1998) (motor vehicle sales warranties); Iowa Code § 13.4

[9] The California Code, for example, contains separate statutory schemes for mediation in each of the following areas: truancy, cable TV franchise, planning and zoning, regulation of pesticides, consumer affairs, water rights, services for the developmentally disabled, gangs, construction, and Native American historical and sacred sites. To research the scope of confidentiality for California mediation sessions, one would need to keep on hand eighteen separate statutes that deal with confidentiality in a variety of settings. See Rogers and McEwan, "Mediation: Law, Policy, Practice", ch. 13, p. 2.

(1998) (farm assistance program). Other states have both comprehensive and subject-specific mediation provisions, such as California Evidence Code § 1119 (West 1998) (mediation confidentiality generally); California Government Code § 12984 (West 1998) (housing discrimination mediation). As a result, a disputant in one state deciding whether to be candid during mediation does not know whether statements made during mediation will be admitted into evidence in the courts of another state.[10]

- *Applicable law hard to ascertain.* Absent uniformity, a disputant trying to decide whether to mediate may not know, or alternatively may find it hard to determine whether, for example, the law will protect against conflict of interest or breaches of mediation confidentiality. This complexity constitutes a drain on a process that is effective primarily because of its flexibility and simplicity. Apparently, mediators and participants must do legal research on mediation laws as they move from state to state and from subject matter to subject matter. This is particularly challenging for lay disputants and non-lawyer mediators.

- *Sometimes there are no rules.* Since only about half the States have enacted mediation provisions of general application, many mediation sessions are conducted without any type of legislative protection or guidance.

- *Increasing inter-state mediation.* As electronic communication grows, those taking part in telephone and electronic mediation across states will not know what law affects the conduct of that session. A litigant might decide in such circumstances that the safest course is to take no risks and to simply avoid the frank conversations which mediation statutes are intended to encourage.

Is a Canadian Uniform Mediation Act Necessary?

Arguments that might be raised in support of a Canadian Uniform Mediation Act include:

- *Public policy.* From the public policy perspective, a uniform act would likely help to foster acceptance of mediation as a process for resolving disputes. Mediation responds to three key priorities for national reform which the Canadian Bar Association identified in its *Systems of Civil Justice Task Force Report* in 1996:

    - need for faster resolution of disputes in the civil courts
    - need for more affordable dispute resolution in the civil courts; and
    - need for less complex and more understandable processes in the civil courts.

  Uniform mediation legislation would enhance access to justice for community programs by creating more certainty in the course of setting out rules for mediation. It would relieve such programs of the need to rely upon research, analysis and evolution of the common law to provide a legal framework to address fundamental questions of confidentiality, compellability and privilege.[11]

[10] See Joshua P. Rosenberg, "Keeping the Lid on Confidentiality: Mediation Privilege and Conflict of Laws", 10 Ohio St. J. on Disp. Resol. 157 (1994)
[11] a view urged by Tannis Carlson of Alberta Justice.

- *Policy development and assistance to some provinces and programs.* The creation of a uniform act could provide an impetus for provinces, and some direct assistance to programs within provinces which may have limited resources and less capacity for policy research and legislation production. Many projects or programs within the provinces are operating with relatively few resources. Legislation, policy development and accompanying commentary would provide valuable guidance in resolving some of the planning, implementation and operational issues for these programs.

  The process of drafting a uniform act would provide the impetus for participating jurisdictions to articulate their understanding and expectations of the nature, place and objectives of the mediation process. In other words, it could spur thinking respecting the theory and policy base for mediation. A uniform act could clarify nationally some important, and probably accepted practice values for mediation (the importance of confidentiality to protect candor, for example). At the same time, the discussion would unearth issues which are likely to be controversial (whether or not mediators should provide legal advice, for example).

- *Inter-jurisdictional dispute resolution.* There is currently some inconsistency in the approach to mediation rules in court-connected programs from program to program in Canada. The development of uniform conceptions of "mediation" and uniform rules relating to matters such as confidentiality would facilitate inter-jurisdictional dispute resolution. There may be economic efficiencies to be gained from having national standards with which individual disputants, mediators and businesses can become familiar regardless of where the mediation occurs. If a Canadian act were drafted with an eye to the provisions of the American act, enhanced uniformity between both the Canadian and American statutes may be possible. This presumably would create efficiencies in international commerce and dispute resolution.

- *Mediation quality and public protection.* The draft American legislation may provide an example of an effective, indirect route to addressing the issue of standards and credentials by obliging mediators to disclose information about their credentials to disputants.

- *Conflicting requirements from province to province to province.* Although we do not have this problem on the scale now being experienced by the Americans, some inconsistency may be developing between the statutory provisions governing mediation from province to province. In an article entitled "Protecting Confidentiality in Mandatory Mediation: Lessons from Ontario and Saskatchewan" (1999) 24 Queen's L.J. 561, Professor Jonnette Watson Hamilton of the University of Calgary concludes that a model statutory provision is required to address problems with confidentiality provisions. At p. 629 she observes:

  > "The scope of the legal protection for confidentiality in mediation varies with the jurisdiction in which a dispute is litigated, and with the numerous subject-matter specific statutes which incorporate mediation and provide for confidentiality. Although the institutionalization of mediation in Canada is recent, the uncertainty

of protection for confidentiality is already compounded by an array of overlapping common law decisions, statutes, court rules and professional standards."

On the other hand, there are arguments that a Uniform Mediation Act is not yet necessary in Canada:

- *Current statutory regime not complex.* One of the realities motivating the U.S. uniform act, a multitude of conflicting state laws, is not yet a compelling concern in Canada. One of the rationales for uniform legislation in general is to avoid economic inefficiencies in disputes which may arise from provinces having differing legislative provisions. Since there are relatively fewer legislative or regulatory provisions governing the practice of mediation in Canada, this rationale is not yet as apparent or persuasive as it appears to be in the U.S. At the same time, the number of Canadian statutory and regulatory mediation schemes is growing steadily.

- *Fewer inter-jurisdictional disputes.* As noted above, Canada would not appear to have, in relative terms, the same proportion of inter-jurisdictional disputes as the U.S.

- *No evidence of harm.* There are at this point very few instances of harm, or even inconvenience to the public or to mediation participants resulting from the mediation process or from mediation legislation in Canada.

- *Absence of "regulatory intrusiveness".* In the United States a trend is developing toward increasing regulatory intrusiveness. American legislatures have moved in a direction apparently not yet attempted, or at least not extensively utilized, in Canada by holding mediators accountable for the fairness, quality of and effectiveness of the mediation. For example, a mediator may have to begin a session with a warning to the parties, may have to serve as an advocate for absent children, and may be required to balance the negotiations to achieve bargaining equality.[12] Some American commentators take the view that "the increased numbers, complexity, uncertainty and intrusiveness of mediation laws may soon represent a threat to the substantial use of mediation".[13]

- *Less experience with mediation than the U.S.* Canada does not yet have the experience that the Americans have in legislating mediation. The Reporter's Notes accompanying the American uniform act expressly state that the U.S. is ready to move forward with uniform legislation at this time because it has had 25 years to experiment with mediation legislation and because certain trends and an understanding of the issues are now well-established. Accordingly, Canadian jurisdictions, with much less experience to rely on, may risk bringing premature closure to some of these issues if they were to legislate at this time.

- *Non-statutory protections in place.* The adequacy of common law or contractual protections for mediation is potentially a contentious issue. Some assert that the

[12] Rogers and McEwen, "Mediation: Law, Policy, Practice", Ch. 13, p. 2.
[13] Rogers and McEwen, "Mediation: Law, Policy, Practice", Ch. 13, p. 3.

certainty and clarity that would flow from a mediation statute is preferable to relying upon the research, analysis and evolution of the common law to provide a legal framework within which to conduct mediation. Others would argue that as long as mediation participants sign Agreements to Mediate along the lines of those presently used, for example, in British Columbia, many of the provisions of a potential uniform act may be unnecessary because the standards by which the mediation will be conducted are, by signing the agreement, made a matter of contract between the parties. Further, Professor Hamilton's comments above notwithstanding, some would argue that existing statutory provisions and common law rules, with respect to confidentiality of mediation for example, are reasonably comprehensive and consistent, and could provide adequate protection to negotiations during mediation. [14]

Conclusion

From one point of view, it could be argued that uniform mediation legislation is premature in Canada at this point in time. In any event, it is not needed in the way or to the extent that such legislation appears to be necessary in the United States. We are not experiencing problems of conflicting, overlapping or confusing legislation to anywhere near the same degree being experienced in the U.S. Our situation also differs from theirs in that we do not have as much experience with mediation or with mediation legislation.

On the other hand, perhaps some of the problems experienced in the U.S. could be avoided altogether if a uniform Canadian model for mediation legislation were developed now. The use of mediation is expanding very rapidly across Canada, and the provinces have, over the last three or four years in particular, produced a significant number of statutes, regulations and rules relating to mediation. Given the current climate of support for mediation there is every reason to assume that these trends will continue, and that more legislation will be produced. Presumably, as the number of mediation statutes and regulations grow, some of the problems being experienced in the United States will begin to occur here. From this point of view Canada might be well advised to begin to research the prospect of uniform legislation now in the hopes that it might ultimately avoid some of these problems by moving sooner, in a relative sense, than have the Americans towards a unified vision of mediation. While the need for uniform legislation is not currently pressing, there could be some considerable benefit to an organized scheme of national research in this area.

There may be a question as to the readiness of some provincial jurisdictions to consider mediation legislation at all. Saskatchewan, Ontario, Quebec and British Columbia have the most experience with legislation. It is likely that other jurisdictions, or at least some of them, would need to engage in extensive and time-consuming consultation with stakeholders before being in a position to express views upon the policy and procedural issues inherent in the drafting of mediation legislation. Provinces, which have not yet consulted with stakeholders respecting mediation legislation, should anticipate a high level of interest from stakeholders who will wish to influence any proposed mediation legislation. Because consultation in this area can be a slow and sometimes difficult

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[14] For a discussion of common law protections see "Confidentiality of Mediation Proceedings", Manitoba Law Reform Commission, April 1996.

process, policy decisions from some jurisdictions could take some time to make. A national inquiry into uniform legislation might provide both an impetus and assistance to those provinces.

Given sufficient time to consider this matter, it is probable that many different groups would be prepared to contribute to a consideration of uniform mediation legislation. Tannis Carlson of Alberta Justice advises that the Alberta Government Dispute Resolution Network (a group of approximately 25 dispute resolution practitioners representing the Personnel Administration Office, Municipal Affairs, Agriculture, Food and Rural Development, Family and Social Services and Justice) and other dispute resolution organizations in the province are interested in further consideration of this legislation. Peter Sylvester has expressed an interest in this issue for the Federal Department of Justice as has Pierre Tanguay of the Quebec Ministry of Justice. There would be some interest in British Columbia as well.

Should the Uniform Law Conference wish to direct further research in this matter, it might begin by collecting and collating all existing mediation legislation in Canada. Resources permitting, a comprehensive review would be very helpful. A comparison of definitions of mediation, the role of the mediator, confidentiality provisions, and procedural requirements (for example, disclosure) would make an interesting start.