How legal culture & traditions shape systems & practices of mediation & conciliation: Lessons from Canada's judicial system

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Speaking notes

1. Introduction

Thank you for inviting me to share some thoughts about how culture and legal traditions have shapes Canadian practices and systems for dispute resolution.[2]

Contemporary training in dispute resolution in Thailand and Canada has some similarities, but the history and culture of dispute resolution in our two countries are quite different. The culture of disputing in Thailand has traditionally emphasized negotiation and settlement. Literature on dispute resolution in Thailand[3] indicates that people in conflict historically turned to village elders, monks and local leaders for help with dispute resolution. Contemporary legal traditions centering more on courts began to take root starting in the late 1800s when Thailand began to modernize its legal system after studying, selecting and importing ideas from various countries.

Compared to Thailand, the recorded history of informal dispute resolution in Canada is sparse and short. Lawyers and courts have been central to dispute resolution in Canada, even though some commentators have suggested that historically "mediation, arbitration and other informal dispute settlement methods have been preferred over formal state-operated methods of conflict resolution."[4] The practice of mediation has increased dramatically in Canada over the past three or four decades. Today, I have time to discuss only two or three themes using examples from three Canadian provinces, Alberta, British Columbia (BC) and Ontario, plus Canada's Federal Court, which has jurisdiction over intellectual property matters and some trade issues.[5]

2. Canada as a federal state

For the past couple of centuries, Canada, formerly colonies of England and France, have adopted the traditions and practices of the courts of those countries. The legal traditions of Indigenous Peoples in Canada were completely displaced as waves of foreign immigrant settlers began to predominate, and Indigenous Peoples became a small minority forced into the legal systems of the colonial authorities.[6]

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[3] See David M. Engel, "Globalization and the Decline of Legal Consciousness: Torts, Ghosts, and Karma in Thailand," *Law and Social Inquiry* 30 (2005): 469-514; also see this article in *Thai Law Forum*, http://www.thailawforum.com/articles/legal-consciousness.html; Also see Central Intellectual Property and International Trade Court Thailand, Judicial System and Reforms in Asian Countries (Thailand), IDE Asian Law Series No. 6, available at http://www.ide.go.jp/English/Publish/Download/Als/pdf/06.pdf. Also see Central Intellectual Property and International Trade Court Thailand. *Dispute Resolution Process in Asia (Thailand): Alternative Dispute Resolution in Thailand*. IDE Asian Law Series No. 19 Japan: Institute Of Developing Economies (Ide-Jetro), March 2002. Available http://www.ide.go.jp/English/Publish/Download/Als/19.html.

[4] See, e.g. Morris Catherine, ed. *Resolving Community Disputes: An Annotated Bibliography about Community Justice Centres*, Victoria: UVic Institute for Dispute Resolution, 1994, available at http://www.peacemakers.ca/bibliography/CommunityDRBibliography1994.html .

[5] International trade issues are address by a network of federal laws For a very brief summary overview, see Riyaz Dattu, "International Trade and Investment Law," Chapter 9 in *Doing Business in Canada*, Osler, Hoskin & Harcourt LLP, 2014, available at https://www.osler.com/osler/media/Osler/reports/doing-business-in-canada/International-Trade-Law.pdf. Customs and excise matters and anti-dumping issues are addressed by the Canadian International Trade Tribunal (CITT), see Canadian International Trade Tribunal Act, R.S.C., 1985, c. 47 (4th Supp.), available at http://laws-lois.justice.gc.ca/eng/acts/c-18.3/FullText.html, and appeals from that tribunal ultimately end up in the Federal Court. Trade disputes may also be resolved through the mechanisms of specific trade agreements Canada has no trade agreement with Thailand, although there were exploratory discussions with Thailand's previous government and Canada's government that was defeated in our recent election. Canada is a dialogue partner with ASEAN.

[6] Recently, Canada has started to try to come to terms with the colonial history of oppression of indigenous peoples. See Canada. Royal Commission on Aboriginal Peoples. People to people, nation to nation: Highlights from the report of the

Canada is now an independent federal State with ten provinces and three territories. Under Canada's Constitution, the Provinces have exclusive jurisdiction to make laws in their own areas of responsibility. Each province has its own courts and court administration. Canada's provinces are common law jurisdictions, except for the one civil law jurisdiction of the Province of Quebec. Canada's multiple jurisdictions make it challenging to talk about mediation in Canada, because of the provinces' differing approaches to alternative dispute resolution (ADR).

3. The 1970s and 1980s

Canada's formal experiments with mediation began during the 1970s and 1980s in response to concerns about access to justice and adversarial disputing. When I first became engaged in the dispute resolution field in the early 1980s, most lawyers, legal academics and members of the public had never heard of mediation. Many people confused mediation with arbitration. Lawyers and judges were suspicious and often disparaged mediation as "naïve" or "soft."[7]

But attitudes have changed! Mediation is now a permanent feature of Canada's justice system.

Let me take you back about four decades. I became interested in mediation in the early 1980s while I was a legal aid lawyer in Victoria, BC. At that time, I joined mediation proponents who were working to convince lawyers, judges and government officials that mediation was "faster, cheaper and better" than litigation.

4. Who were the proponents?

At that time, the Canadian mediation movement included lawyers and judges along with social workers, community activists, teachers, other professionals, academics, and government officials. Their interests ranged from family law, community, school and public policy disputes to commercial and construction mediation and arbitration.

This diverse group of people had differing visions.[8] Some focussed on societal peacebuilding; many of them emphasized research findings that consensual methods of dispute resolution helped parties create their own solutions that were longer lasting than decisions imposed by courts.[9] Others promoted increased autonomy of parties over the choice of dispute processing options other than courts. Some promoted mediation as better than adversarial and often hostile disputing, especially for families and children in divorce cases.[10] Others emphasized access to justice. Government officials wanted cheaper and more efficient administration of justice.

By the mid-1980s, proponents had persuaded various officials across Canada to consider mediation as a way to increase court efficiency and thus improve access to justice.[11] Running parallel to the mediation movement were efforts to improve court efficiency through judicial case management, including experiments in what later became known as "judicial dispute resolution" (JDR).[12]

Royal Commission on Aboriginal Peoples. Ottawa: Minister of Supply and Services Canada, 1996, available at https://www.aadnc-aandc.gc.ca/eng/1307458586498/1307458751962. Also see the *Truth and Reconciliation Commission* of *Canada,* Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada*, May 2015, available at http://www.trc.ca/websites/trcinstitution/index.php?p=890*

[7] Quoted in "Chief Justice Puts Boots to ADR," *Lawyers Weekly* October 26, 1989. This critique echoes the concerns famously articulated by American scholar. Owen Fiss. See Fiss, "Against Settlement."

[8] See Catherine Morris. "Where Peace and Justice Meet: Will Standards for Dispute Resolution Get Us There?" In *Qualifications for Dispute Resolution: Perspectives on the Debate*, edited by Catherine Morris, and Andrew Pirie, 3-24. Victoria, B.C.: UVic Institute for Dispute Resolution, 1994, available, at pp. 4-5, available online: http://www.peacemakers.ca/publications/MorrisQualificationsDebate1994.pdf

[9] Morris Catherine, ed. *Resolving Community Disputes: An Annotated Bibliography about Community Justice Centres, Victoria: UVic Institute for Dispute Resolution*, 1994. Available at http://www.peacemakers.ca/bibliography/CommunityDRBibliography1994.html.

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

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

[12] See, eg, Hughes. Also see commentary on Zuber by Ian Greene, 'The Zuber Report and Court Management' (1988) 8 Windsor Yearbook of Access to Justice 150.

5. The Anglo-Canadian legal tradition

All these ideas presented major challenges to Canadian legal culture. In the Anglo-Canadian common law tradition, judges limited their role to adjudication. Lawyers – not judges – initiated the steps in litigation, utilizing court processes to gain power in settlement negotiations. This so-called "litigotiation" process[13] led to settlements in 85-95% of cases, but often not until just before the trial started.[14] Lawyers and judges rarely had any training in negotiation or settlement skills;[15] they resisted challenges to the adversarial legal system, saying lawyers already settled the vast majority of cases.

Other critics worried that institutionalizing mediation through mandatory mediation or judicial mediation could result in unfair settlements or pressure on vulnerable people, such as abused women, to settle in secret processes without adequate rights protection.

6. Philosophical collisions

By the late 1980s and early 1990s, mediation advocates had persuaded legal education programs to offer elective courses in dispute resolution. However, three decades later, dispute resolution education continues to be on the periphery of curricula in most Canadian law schools.

Since the 1980s, Canadian negotiation mediation education has been heavily influenced by Roger Fisher and William Ury's 1981 book, *Getting to Yes.*[16] These American scholars from Harvard proposed a 'interest-based' or "integrative" approach to negotiation as distinguished from "distributive" or adversarial and competitive negotiation.[17] Mediators are trained to facilitate conversations in which parties generate and integrate their ideas into workable solutions that maximize satisfaction of all parties' needs and interests and attempt to address the roots of conflict.

This theory of integrative negotiation and mediation differed from the realities of mediation practice. Many of the Canadians who started mediation practices in the 1990s, such as commercial litigators and retired judges, wanted to achieve quick settlements; they were not too interested in integrative negotiation and mediation.[18] These mediators often evaluated and predicted how the case might be decided in court and suggested the terms of settlements accordingly.[19] This approach has become known as "evaluative" or "predictive" mediation.[20]

These differing philosophical approaches have created sharp divisions among mediators and educators.[21] Idealists[22] who believe in integrative, facilitative mediation are focussed less on quick settlements and more on developing long-lasting solutions that address the roots of the parties' conflicts. Some of these idealists say evaluative mediation is not mediation at all; rather it is a form of non-binding adjudication.[23] In practice, however, mediators may use evaluative or facilitative approaches depending on the wishes of parties or their lawyers.[24]
In some Canadian provinces, mediations are conducted mostly by private mediators. Judicial dispute resolution has not taken root in many provinces.

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[13] American legal scholar, Marc Galanter, called this process "litigotation." Marc Galanter, 'Worlds of Deals: Using Negotiation to Teach About Legal Process' (1984) 34 Journal of Legal Education 268.
[14] This was the US estimate in the early 1990s by Marc Galanter and Mia Cahill, 'Most Cases Settle: Judicial Promotion and Regulation of Settlement' (1993-94) 46 Stanford Law Review 1339.
[15] The Hughes Report 190.
[16] Roger Fisher, William Ury and Bruce Patton, *Getting to Yes: Negotiating Agreement Without Giving In* (2nd edn, Penguin Books 1991).
[17] ibid 41. See Albie M. Davis, 'An Interview With Mary Parker Follett' (1989) 5 Negotiation Journal 223.
[18] James J. Alfini, 'Trashing, Bashing, and Hashing it Out: Is This the End of 'Good Mediation'?' (1991) 19 Florida State University Law Review 47.
[19] For a concise explanation of these mediation styles, see Zena Zumeta, 'Styles of Mediation: Facilitative, Evaluative, and Transformative Mediation' (*Mediate.com*, September 2000) <www.mediate.com/articles/zumeta.cfm> accessed 6 June 2013.
[20] The 'facilitative' and 'evaluative' terminology is attributed to Leonard L. Riskin, 'Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed' (1996) 1 Harvard Negotiation Law Review 8. American critics of both evaluative and interest-based mediation cultivated methods that focussed less on solutions and more on transformation of relationships. See Robert A. Baruch Bush and Joseph Folger, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* (Jossey-Bass Publishers 1994); Joseph P. Folger and Robert A. Baruch Bush (eds), *Designing Mediation: Approaches to Training and Practice within a Transformative Framework* (The Institute for the Study of Conflict Transformation 2001). 'Transformative mediation' has not deeply penetrated mediation training for lawyers in Canada, although it is taught in programs aimed at community and workplace conflict management.
[21] For further definitions of mediation, see Morris, 'Definitions in the Field of Conflict Transformation' (online)
[22] Julie Macfarlane, 'Culture Change - A Tale of Two Cities and Mandatory Court-Connected Mediation' (2002) 2 Journal of Dispute Resolution 241.
[23] Jane Kidner, 'The Limits of Mediator 'Labels': False Debate Between 'Facilitative' versus 'Evaluative' Mediator Styles' (2011) 30 Windsor Review of Legal and Social Issues 167.
[24] Kidner 167.

In Ontario, Canada's most populous province, the provincial government gradually introduced mandatory mediation starting in 1994, but it was not until 2002 that mandatory mediation was introduced into Ontario's three largest court registries: Toronto, Ottawa and Windsor. Mediations are conducted by a roster of qualified private mediators. Settlement rates have been in the range of 40 to 45%.[25] However, mediation may not be practiced widely in Ontario outside the mandatory mediation program.[26] This fits the trend in Canada that mediation is often not taken up unless it is made mandatory.

There seems to be an increasing tendency of lawyer-mediators in Canada to practice "evaluative" mediation. One researcher found that Ontario's mandatory mediation program involves "undeniably" coercive practises by some mediators, such as what the researcher called "assertive legal advice."[27] Coercion in mediation is cause for concern, because it affects the voluntariness of outcomes.[28] By definition, the mediation process is voluntary.

7. Justitia's scales and blindfold

Why have integrative, non-adversarial forms of negotiation and mediation been slow to take root in Canada? Cultures change slowly. The adversarial system and judge-centred adjudication are integral to Canada's cultural sense of justice that is rooted in the idea that seeking of truth and fairness is best done by listening carefully to all sides.

Canadian legal culture is also a key reason that judges opposed judicial mediation when it was proposed in the early 1980s as part of case management initiatives. In the Anglo-Canadian common law tradition, the judge is separated from the litigants. This is symbolized by the blindfolded Greco-Roman goddess of justice.[29] She symbolizes judicial independence, impartiality, transparency and incorruptibility. These ideals are deeply embedded in Anglo-Canadian legal culture. One Ontario judge explains that formal, public hearings "conducted on the record, in a courtroom, with all parties present, the rules of evidence adhered to, and under the … *Rules of Civil Procedure"* prevent "the dreaded descent into the arena" of the parties' dispute.[30]

Many judges feared that judicial mediation would put them at risk of getting too close to the parties' private 'arena' with no protective blindfold, without the transparency of the public courtroom and without procedural safeguards. This led many Canadian judges to be hostile to judicial case management and mediation.[31] It probably did not help that much of the pressure for reform came from governments. Canadian judges uniformly, zealously and rightly guard their independence from the executive branch of government or other forms of infringement on the integrity and independence of the courts and legal system.

8. Judicial Dispute Resolution (JDR)

Over time, lawyers and judges in many parts of Canada have gradually changed their views and now see judicial case management and judicial dispute resolution as compatible with judicial roles. One common procedural safeguard is to ensure that judges do not mediate and adjudicate in the same case.

Judicial case management conferences are now common throughout Canada, but judicial mediation (usually called Judicial Dispute Resolution or JDR) has taken firm hold in the province of Alberta.[32]

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[25] For more detail, see paragraphs 3.54ff in Catherine Morris, "The Impact of Mediation on the Culture of Disputing in Canada: Law Schools, Lawyers and Laws." In *Mediation in Asia-Pacific: A Practical Guide to Mediation and Its Impact on Legal Systems*, edited by Fan YANG and Guiguo WANG. New York: Wolters Kluwer Law & Business, and Hong Kong: CCH Hong Kong, 2013.

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

[27] Colleen M. Hanycz, 'Through the Looking Glass: Mediator Conceptions of Philosophy, Process and Power' (2005) 42 Alberta Law Review 819.

[28] In 2005, the Uniform Law Conference of Canada recommended an International Commercial Mediation Act based on the UNCITRAL model law. A key feature of the model law makes it possible to enforce a mediated agreement without first having to commence a lawsuit. Section 13(2) of the Act allows a party to a mediated agreement to apply to the court for a judgment in the terms of the agreement. Civil Law Section, Uniform Law Conference Of Canada, *Uniform Act On International Commercial Mediation: Report Of The Working Group* (2005) http://www.ulcc.ca/en/uniform-acts-new-order/current-uniform-acts/662-uncitral-international-commercial-mediation/1427-international-commercial-mediation-report . Ontario and Nova Scotia are the only provinces to enact the model law. See Commercial Mediation Act, SNS 2005, c 36. The Ontario *Commercial Mediation Act* 2010, S.O. 2010, c 1, departs slightly from the Model Law in terms of confidentiality of the mediation. See a critique by Rick Weiler, who believes that confidentiality may be undermined by Ontario's departure from the Model Law in allowing information about mediation to be drawn into court cases involving costs. See Weiler, 'Good Intentions Gone Bad – Ontario Commercial Mediation Act, 2010' (Kluwer Mediation Blog, 22 January 2012), available at http://kluwermediationblog.com/2012/01/22/good-intentions-gone-bad-ontario-commercial-mediation-act-2010/.

[29] Judith Resnick, 'Managerial Judges' (1982) 96 Harvard Law Review 374.

[30] Winkler 3-4.

[31] *Ibid* 3.

[32] JDR is particularly popular in the Alberta Court of Queen's Bench (ACQB).

Private mediators are widely available in Alberta, but JDR[33] has become so popular that litigants in Alberta's superior court[34] 'wait longer for a mediation date than a trial.'[35] A 2009 report[36] indicates that evaluative mediation is predominant in JDR in Alberta. Settlement rates are reportedly at least 80%.[37] One of the main reasons given for the popularity of JDR is that lawyers like to give their clients their 'day in court' [38] without the formality and expense of a trial.

9. What has changed?

The normalization of JDR in Alberta may not signal much shift away from historic adversarial, court-centred norms. The role of judges remains central. In Alberta, the adjudicative norm has been replaced by the "multi-tasking judge"[39] whose core function is not the determination of cases on the merits but the settlement of disputes.

Critics worry that JDR may emphasise settlement at the expense of deeper and more long-lasting resolution of the parties' conflicts. Some worry that in seeking court efficiency, JDR could perpetuate social inequalities by reducing emphasis on legal rights and leading to pressure on parties to settle at the expense of justice.[40] The very presence of a judge is believed to add pressure to settle, particularly if judges use an evaluative style of mediation.

Judicial mediation has also taken hold in Canada's Federal Court, where intellectual property disputes and some trade disputes are heard (along with tax issues and a number of other federal matters). In 1998, the Federal Court introduced dispute resolution into its Rules of Court.[41] The Rules mandate settlement discussions between the parties and provide for non-mandatory[42] JDR by separate case management judges.[43] One study suggests about 80% of Federal Court cases are mediated, and in 2012, a Federal Court report noted[44] a shift in the culture of the court, saying that in 1998 there was an assumption that the purpose of the Rules was "'to secure the just, most expeditious and least expensive *determination* of every proceeding on its merits" but that now "words like 'disposition' or 'resolution' … reflect the current reality."[45] Federal Court "'case management and mediation have proven so effective in achieving settlement" that in some subject areas trials are rare.[46] There are no plans to make pre-trial JDR mandatory,[47] but the Federal Court sees a need to simplify court procedures to address the needs of increased numbers of self-represented litigants.[48]

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[33] Justice John A. Agrios and Janice A. Agrios, *A Handbook on Judicial Dispute Resolution for Canadian Lawyers* (Canadian Bar Association, 2004) <www.cba.org/alberta/PDF/JDR%20Handbook.pdf> accessed 21 May 2013.
[34] John D. Rooke, 'Improving Excellence: Evaluation of the Judicial Dispute Resolution Program in the Court of Queen's Bench of Alberta' (Edmonton: Court of Queen's Bench of Alberta, 2009) 806-807 <www.cfcj-fcjc.org/sites/default/files/docs/hosted/22338-improving_excellence.pdf> accessed 6 June 2013.
[35] Cummings Andrews Mackay LLP, 'Court Suspends Mandatory ADR' 13 Februry 2013 <www.camllp.com/2013/02/13/court-suspends-mandatory-adr/> accessed 6 June 2013..
[36] Alberta's superior court is called the Court of Queen's Bench
[37] Rooke found that facilitative mediation is more predominant in the city of Calgary and mini-trials more predominant in the city of Edmonton', but that settlement rates for all mediation approaches are similar (at least 80%), ibid ix.
[38] Rooke, 'The Multi-Door Courthouse is Open in Alberta: Judicial Dispute Resolution is Institutionalized in the Court of Queen's Bench' 178.
[39] Tania Sourdin and Archie Zariski (eds), *The Multi-Tasking Judge: Comparative Judicial Dispute Resolution* (Thomson Reuters Australia 2013).
[40] Hugh F. Landerkin and Andrew Pirie, 'What's the Issue? Judicial Dispute Resolution in Canada' (2004) 22 Alternative Dispute Resolution and the Courts: Law in Context 25, 58.
[41] Federal Courts Rules, SOR/98-106, Rule 257; Susan Haslip, 'Making a Federal Case Out of Dispute Resolution' (1999-2000) 22 Advocates Quarterly 231.
[42] Unless a court orders dispute resolution (Rule 386), it is not mandatory.
[43] They are called "prothonotaries." For more information, see Allyson Whyte, 'Canada: ADR in the Federal Court of Canada' (Mondaq, 12 December 2001) <www.mondaq.com/canada/x/14490/ADR+in+the+Federal+Court+of+Canada> accessed 21 May 2013.
[44] Subcommittee on Global Review of the Federal Courts Rules, *Report of the Subcommittee* (Federal Court Rules Committee, 16 October 2012) http://cas-cdc-www02.cas-satj.gc.ca/fct-cf/pdf/ENG_Global%20review%20report%20FINAL.pdf .
[45] ibid 10. Italics in original.
[46] ibid 10.
[47] ibid 10-11.
[48] ibid 17, 34-39.

Canada's legal system is not designed for self-representation, and Courts of all levels across Canada are struggling to deal with dramatically increased self-representation in the courts.[49] In Ontario, Alberta and BC courts, the number of self-represented litigants 'now reaches to 80% and is consistently 60-65% at the time of filing.[50] Unrepresented litigants face extreme difficulties navigating the court system.[51]

Efforts are underway to reconfigure the delivery of legal services in Canada, and dispute resolution is high on the list for reforms.

10. British Columbia

British Columbia (BC) is one example. In cases in the superior courts, most mediation in BC is done privately. There is no time to discuss the history of innovation in the BC Supreme Court,[52] but I want to mention a new initiative in the BC Small Claims Court, which takes cases up to $25,000 (close to 674,000 Thai Baht). The BC Small Claims Court has conducted mandatory JDR since 1992 with settlement rates of about 35-40% of disputed cases.[53] The BC government has passed a new Civil Resolution Tribunal Act (CRT Act)[54] which it expects to come into force in 2016.[55] The CRT is ground-breaking in that it will use online dispute resolution (ODR). Disputants will be able to sidestep the Small Claims Court in favour of a range of Civil Resolution Tribunal processes including negotiation, "facilitated dispute resolution," "neutral case evaluation" and adjudication.[56] It is expected that this tribunal will eventually become mandatory for most Small Claims Court disputes in BC. We will see whether this innovation impacts the culture of disputing towards non-adversarial, integrative forms of dispute resolution.

11. **The impact of mediation on the culture of disputing in Canada**

Mediation is now well established in Canada, but adversarial legal culture has had a reciprocal influence on mediation practices. Cost-saving and efficiency through settlement have become dominant goals. The increased predominance of evaluative mediation means that private mediation and JDR in Canada often resemble adjudication, albeit non-binding.

Coercion in mediation, particularly in mandatory mediation or judicial mediation processes is a concern. The United Nations has taken note of similar concerns in its *Basic Principles on the use of restorative justice programmes in criminal matters,* which forbid coercion.[57] I believe it may be only a matter of time

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

[50] ibid 15.

[51] ibid 9-12. Right Honourable Beverley McLachlin, 'The Challenges We Face' (Remarks delivered to the Empire Club of Canada, Toronto, Ontario, 8 March 2007). She says: "An unrepresented litigant may not know how to present his or her case... The trial judge may try to assist, but this raises the possibility that the judge may be seen as "helping," or partial to, one of the parties. The proceedings adjourn or stretch out, adding to the public cost of running the court... Different, sometimes desperate, responses to the phenomenon of the self-represented litigant have emerged. Self-help clinics are set up. Legal services may be "unbundled," allowing people to hire lawyers for some of the work and do the rest themselves. The Associate Chief Justice of the British Columbia Provincial Court is quoted as saying this is "absurd," not unlike allowing a medical patient to administer their own anaesthetic. ... Lawyers on the other side may find the difficulty of their task greatly increased, driving up the costs to their clients. Judges are stressed and burned out, putting further pressures on the justice system. And so it goes."

[52] Please see paragraphs 3.37ff in Catherine Morris, "The Impact of Mediation on the Culture of Disputing in Canada: Law Schools, Lawyers and Laws." In *Mediation in Asia-Pacific: A Practical Guide to Mediation and Its Impact on Legal Systems*, edited by Fan YANG and Guiguo WANG. New York: Wolters Kluwer Law & Business, and Hong Kong: CCH Hong Kong, 2013.

[53] Peter Adams and others, *Evaluation of the Small Claims Program, Vol. 1* (Province of British Columbia, Ministry of Attorney General 1992) 32.; Province of British Columbia, *Modernizing British Columbia's Justice System* (Minister of Justice and Attorney General February 2012)

[54] *Civil Resolution Tribunal Tribunal A*ct, SBC 2012, c 25

[55] It is to come into force after the BC Cabinet passes the required regulation.

[56] The CRT Act was drafted with unrepresented disputants in mind. In the absence of special circumstances specified by the Act, parties will be required to represent themselves in the CRT Section 20, Civil Resolution Tribunal Tribunal Act, SBC 2012, c 25. BC Branch of the Canadian Bar Association, 'Government Consultation and Collaboration Falls Short When it Comes to Improving Justice' (Canadian Bar Association, 8 May 2012) <www.cba.org/bc/Public_Media/news_2012/news_05_08_12.aspx> accessed 6 June 2013. It is doubtful that Canada's courts would strike down a requirement that people not be represented by lawyers in a voluntary tribunal. The Court of Quebec, Small Claims Division, which hears civil cases involving $7,000 or less, has required self-representation since 1980. The Supreme Court of Canada has affirmed the competence of the National Assembly of Quebec to exclude representation by counsel before the Small Claims Division of the Quebec Provincial Court in the case of *Nissan Automobile Co. (Canada) Ltd. et al. v. Pelletier et al.* [1981] 1 SCR 67 General Assembly resolution 67/187, United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, A/RES/67/187, annex (28 March 2013), available at http://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidlines_on_access_to_legal_aid.pdf

[57] UN Basic principles on the use of restorative justice programmes in criminal matters, ECOSOC Resolution 2002/12, available online:http://www.un.org/en/ecosoc/docs/2002/resolution%202002-12.pdf. The UN Basic Principles provide that restorative justice processes (such as reconciliation and mediation) should be used only "with the free and voluntary consent" of the parties, which parties must be free to withdraw at any time during the process. Agreements should be made voluntarily and should contain only reasonable and

before the UN creates similar principles against coercion in civil mediation processes. There is a fine line between evaluation and coercion. I believe this line needs to be thickly drawn and carefully guarded by due-process safeguards so as to ensure protection of the rights of parties, particularly vulnerable parties.

Fulfilling the integrative promise

The early visions of idealists for integrative mediation remain largely unfulfilled. However, Canada's adversarial legal culture is not the only reason for slow movement towards integrative approaches to dispute resolution. I believe the idealists, including myself, have needed to be more firm in our emphasis that speedy settlement and efficiency are not enough. A cultural shift towards integrative approaches will require concentrated – not peripheral – education for law students and lawyers, as well as unified and consistent policy leadership from mediation practitioner organizations, scholars, lawyers, judges and officials.

proportionate obligations (Principle 7). Principle 8 provides that the parties "should normally agree on the basic facts of a case as the basis for their participation in a restorative process."