Child Protection Mediation in Ontario: Conquering the Barriers to a Viable and Critical Method of Dispute Resolution

Author: Melissa Phillips*

* Counsel with the Children's Aid Society of Toronto. The views expressed in this paper are entirely my own and should not be attributed to the Children's Aid Society of Toronto.

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Child protection disputes are complex, emotionally charged and time consuming. In some cases, the society and the family involved may be able to work together to resolve the protection concerns on a voluntary basis. However, when there is a breakdown in communication between the parties, a voluntary and cooperative resolution is not feasible. In such cases, an external, third party must be introduced to resolve the family crisis. In the vast majority of cases, this third party is a judge and the method of dispute resolution is adjudication.

It is unfortunate that adjudication is the method of dispute resolution instituted so readily in the child protection sphere: it only serves to heighten the conflict between the parties. Resolution by adjudication also runs contrary to the purpose of the *Child and Family Services Act* (CFSA) governing child protection cases, which emphasizes that help provided to parents should support "the autonomy and integrity of the family unit and, *wherever possible, be provided on the basis of mutual consent*."[1] [Emphasis added.]

Yet, adjudication is not the only option available to resolve child protection disputes. In 2006, the Ontario government introduced legislative amendments through Bill 210, which require societies to consider alternative methods of dispute resolution, such as mediation, in the child protection context. Child protection mediation seems to be more in keeping with the objectives of the governing legislation. It introduces a third party mediator into the process who "encourages the parties to identify and articulate their needs and interests, as opposed to their positions, and to seek solutions which satisfy the interests of all. The process encourages co-operation and mutual gain."[2]

It has been four years since the legislative amendments encouraging ADR in child protection were introduced. Have they made a difference in the way Children's Aid Societies resolve disputes? If not, what are the barriers to the more frequent use of child protection mediation and are

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[1] *Child and Family Services Act,* R.S.O. 1990, c. C.11, section 1(2) [CFSA].

[2] June Maresca & JoanneWildgoose, "Mediating Child Protection Cases" in *Best Practices for the Conduct of a Child Protection File* (Ontario: Law Society of Upper Canada, 2004) at p. 7-2 [Mediating Child Protection Cases].

such barriers insurmountable? This paper seeks to respond to these queries by reference to an assessment of the use of child protection mediation.[3]

The following analysis will proceed through three stages. First, there will be a discussion of the historical landscape that ultimately introduced child protection mediation to Ontario. Second, there will be an assessment of the impact of the Bill 210 legislative amendments by reviewing the impact on child protection mediation services. The third section will engage in a critical analysis of the barriers to child protection mediation and an assessment of whether such barriers can be overcome.

Two fundamental claims are advanced: (1) Child protection mediation is a severely underused, yet viable and critical method of dispute resolution in the child protection context; and (2) New strategies and thinking are essential to overcoming barriers to the growth of child protection mediation in Ontario.

I. Child Protection Mediation in Ontario: A Brief History

(a) The 1980s: Igniting Awareness of Mediation as a Viable Option in Child Protection

Academic literature reveals that child protection mediation was first contemplated in Ontario in the 1980s.[4] The discussion in Ontario appears to have been driven by the growing popularity of child protection mediation across the United States. Shortly after United States Chief Justice Burger described "divorce, child custody and adoption as prime candidates for mediation"[5], a number of states passed legislation promoting the use of child protection mediation and initiated

[3] Other forms of ADR that might be instituted in the child protection context pursuant to legislative direction, such as Family Group Conferencing, exceed the parameters of this paper; rather, the paper is restricted to an assessment of child protection mediation in Ontario.

[4] Marvin M. Bernstein, "Child Protection Mediation: Its Time Has Arrived" (1998), 16 CFLQ 73 at p. 4 (Westlaw) [Bernstein Article]. See also Joanne Wildgoose, "Alternate Dispute Resolution of Child Protection Cases" (1987) 6 Can. J. Fam. L. 61 (QL). [Wildgoose Article].

[5] Krystle Jordan, "Need to be Heard: Increasing Child Participation in Protection Mediation Through the Implementation of Model Standards" (2009) 47 Fam. Ct. Rev. 715 at p. 3 (Westlaw).

pilot child protection mediation projects.[6] The pilot projects recognized mediation as a viable alternative to resolving disputes in the child protection sphere.

In Ontario, recognition of the viability of a *limited* form of child protection mediation was made following an empirical investigation of child protection cases commenced in Essex County (Windsor) between 1981 and 1983.[7] The study found that the interventionist approach of the society combined with the adversarial system created a process that undermined family autonomy and significantly limited parental participation.[8] Mediation was suggested as an option to level the playing field by allowing parents to deal with the society as "equals in the planning process"[9]. While such analysis appeared to ignite interest around the potential of mediation in child protection proceedings, translating that interest into action remained a slow moving process.

(b) The 1990s: Growing Support for Child Protection Mediation

In 1990, the Children's Aid Society of Metropolitan Toronto established a pilot project entitled the Toronto Demonstration Project.[10] The project proved mediation to be a beneficial means of dispute resolution in the child protection context. The project's success led to the creation of the Centre for Child and Family Mediation, which provides broad mediation services in child protection cases.[11] By 1998 (seven years after opening), the Centre reported handling approximately 90 mediations of which 80 per cent resulted in settlement.[12] Despite the high settlement rates, the Centre reported low referral rates for child protection mediation. Reasons for the limited referrals at that time included:

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[6] See Hon. Leonard Edwards, "Child Protection Mediation: A 25-Year Perspective" (2009) 47 Fam. Ct. Rev. 69 [Edwards]. This article sets out a detailed history of the US experience in child protection mediation. California initially led the way in instituting child protection mediation programs across the state. In the early 1980s, the National Institute for Dispute Resolution also sponsored two pilot projects dealing with voluntary child protection mediation in Denver and Washington.
[7] Wildgoose Article, *supra* note 4.
[8] *Ibid.* at para. 5.
[9] *Ibid.* at para. 55.
[10] Mediating Child Protection Cases, *supra* note 2 at p. 7-1.
[11] *Ibid.* at. p. 7-6.
[12] *Ibid.*

- Child protection mediation was a fairly new process and therefore not well understood by Society case workers.
- Societies adhere to rigid structures to resolve cases. The rigidity leaves little room for the incorporation or evolution of creative alternatives to dispute resolution such as mediation.
- Child protection mediation was not officially recognized by the courts or legislation, creating concerns for workers around the informality of the process.
- The sole responsibility for initiating mediation rested with workers; it was not court ordered.[13]

In 1995, enhanced support for child protection mediation came through the Ontario government's Civil Justice Review. The Final Report included a number of recommendations designed to enhance alternative dispute resolution in child protection cases. Specifically, the creation of a Task Force was recommended to "design a mediation process appropriate for child protection cases, including the establishment of province-wide criteria for case referral."[14]

By the end of the 1990s, academic and government research conducted in the area recognized the benefits of child protection mediation to include: reduced cost for parties; reduced time to resolve cases (where successful), which has the added benefit of achieving stability for the child earlier; improved communication and cooperation between the worker and the family; and enhanced compliance by families because of increased cooperation in negotiating the final result.[15] Many studies also reported high settlement rates.[16] Perhaps most importantly, a number of studies determined that child protection mediation provides for more "win-win" opportunities: the process

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[13] Mediating Child Protection Cases, *supra* note 2 at p. 7-7.
[14] Recommendation #14, *Ontario Civil Justice Review: Final Report* (Ontario: Ministry of the Attorney General, 1996), online: http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjr/suppreport/recommendations.asp. [Ontario Civil Justice Review].
[15] Della Knoke, "Mediation in Child Welfare" CECW Information Sheet #74E (Toronto: University of Toronto – Inwentash Faculty of Social Work, 2009) at pp. 2-4.
[16] Many studies have found that at least 60 per cent of mediated cases reached full settlement and 15 to 30 per cent of mediated cases reached partial settlement: Thoennes, N. (1999), *Dependency Mediation in Colorado's Fourth Judicial District*. Denver: Center for Public Policy Studies; Savoury, G.R., Beal, H.L. & Parks, J.M. (1995). Mediation in child protection: Facilitating the resolution of disputes. *Child Welfare*, 74(3), 743-52; Maresca, J. (1995). Mediating child protection. *Child Welfare*, 74(3), 731-35.

leaves parents with a feeling of empowerment and provides them with a broader opportunity to be heard than might normally be offered through participation in traditional court processes.[17]

However, the benefits were constantly being challenged against a number of identified risks, including: management of the power imbalance between the society and parents involved; capacity of participant parents, many of whom are plagued by mental illness or addiction; delay created if mediation fails or the agreement breaks down; and concerns that a negotiated process could compromise the safety of the child.[18] The cloud of speculation created by these risks prevented growth of child protection mediation. In consequence, as the decade came to a close, the creation of a legislative regime for child protection mediation in Ontario remained outstanding.

(c) The 2000s: Implementing a Legislative Regime for Child Protection Mediation in Ontario

The ongoing tension between the benefits and risks of mediation resulted in the creation of the London Child Protection Mediation Project in 2002. The project was designed to "study the feasibility of implementing child protection mediation in Ontario."[19] While the study did not provide a definitive "thumbs up or thumbs down" to child protection mediation, it did describe it as "a viable alternative dispute resolution strategy" for use in the child protection system.[20]

The feedback arising from the London project, combined with all of the preceding studies offering overwhelming support for child protection mediation, established an ideal foundation for government action. In 2006, Bill 210 was passed in the Ontario Legislature, resulting in significant amendments to the CFSA to encourage the use of ADR:

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[17] *Supra* note 15 at p. 4.
[18] Alison Cunningham & Judy van Leeuwen, *Finding a Third Option: The Experience of the London Child Protection Mediation Project* (London: Centre for Children and Families in the Justice System, 2005) at p. 4, online: http://www.lfcc.on.ca/third_option.html [London Child Protection Mediation Project].
[19] *Ibid.* at p. 4.
[20] *Ibid.* at p. 6 (Recommendation #1).

(i) Section 20.1(1): This section *requires* the society to consider whether a prescribed method of ADR could assist in resolving any issue related to the child or plan for the child's care if the child is or may be in need of protection.

(ii) Section 51.1: This section *permits* the court to adjourn the proceedings to allow the parties to participate in ADR to resolve any issue in dispute, where it is in the best interests of the child and with the consent of the parties.

(iii) Section 153.1(10): This section *permits* the court to adjourn the proceedings to allow the parties to participate in ADR to resolve any issue in dispute in the context of an application to vary or terminate an openness order[21] before or after adoption. Again, the decision to adjourn for this purpose must be in the best interests of the child and with the consent of the parties involved. [Emphasis added.]

With these amendments, the government also instituted a funding regime to ensure costs did not create a barrier to child protection mediation. Child protection mediation is funded through regional ministry offices which maintain responsibility for establishing transfer payment agencies in each region. In consequence, there are no user fees whatsoever to the families or the society when they choose to engage in mediation.

The introduction of section 20.1(1) imposed new obligations for societies mandating the consideration of ADR. The nature and extent of this new obligation was detailed through a Policy Directive provided by the Ministry of Children and Youth Services.[22] The directive required societies to use one of three forms of ADR: mediation; family group conferencing[23] or aboriginal approaches[24]. The directive also established reporting requirements for societies, requiring them to record in the relevant file "that ADR was considered, what decision was reached and the supporting reasons", and to "track the use of the prescribed methods and key outcomes on a quarterly basis".[25]

[21] An "openness order" is an order by the court for the purpose of facilitating communication or maintaining a relationship between the child and a parent, sibling, relative or community member: CFSA, s. 136(1).
[22] Ministry of Children and Youth Services Policy Directive: CW 005-06, online: www.lfcc.on.ca/adr-link/MCYS_Policy_CW005-06.pdf. [Policy Directive].
[23] A process that includes the family, extended family, community, child protection worker and service providers to develop a plan to address the child protection concerns. As noted above, this form of dispute resolution exceeds the parameters of discussion within this paper.
[24] These aboriginal approaches incorporate traditional methods of dispute resolution established by First Nations, such as circle processes.
[25] Policy Directive, *supra* note 22 at p. 3.

This new scheme has been in place now for approximately four years: Has it had any impact in revolutionizing Ontario's child protection regime and shifting disputes outside of the courtroom?

II. Ontario's Child Protection Mediation Regime: Has Bill 210 made a difference?

According to the Ontario Association of Children's Aid Societies, between April 1, 2008 and March 31, 2009[26], societies across Ontario investigated over 78,500 referrals; 27,152 children were in need of care from Ontario's Children's Aid Societies and approximately 25,000 families required ongoing service.[27] On a daily basis, societies work with approximately 17,800 children in foster homes, group homes and residential care.[28]

In contrast, in the 2009 fiscal year, only about 45 to 50 referrals were received by two of the main mediation service providers outside of Toronto: Hamilton and London.[29] In Toronto, in the 2009 fiscal year, only about 65 referrals were received.[30] These numbers are extremely low when compared to the number of children in care and the number of families requiring ongoing service from societies across the province. However, it must be emphasized that mediation service providers have noted a gradual increase in referrals since Bill 210 came into force. For example, in the Hamilton region, the number of referrals has doubled in the last two years and a 25 per cent increase in referrals was noted in the last year alone.[31] In Toronto, the major mediation service provider observed a 75 per cent increase in referrals in the 2009 fiscal year and expects to receive approximately 100 referrals in the next fiscal year.[32]

While the referral rates remain low when contrasted against the high activity of child protection services provided across the province, high settlement rates are being reported for those

[26] Statistics are not yet available for the period between April 1, 2009 and March 31, 2010.
[27] Ontario Association of Children's Aid Societies: "Child Welfare Report: 2009/10" at p. 4, online: http://www.torontocas.ca/OACAS%20Report_EN_Apr13-small.pdf.
[28] Ontario Association of Children's Aid Societies: "Submission to the Standing Committee on Finance and Economic Affairs – 2010/11 Prebudget Consultation" (February 2010) at p. 2, online: http://www.oacas.org/pubs/index.htm.
[29] Interview of Maggie Hall of "The Mediation Centre" (Hamilton) on April 23, 2010. [Interview: Maggie Hall]
[30] Interview of Jan Schloss of "The Toronto Mediation Centre" (Toronto) on May 17, 2010. [Interview: Jan Schloss].
[31] *Supra* note 29.
[32] *Supra* note 30.

cases that are mediated. For example, of the 45 referrals to the Hamilton region in the 2009 fiscal year, approximately 30 of those cases resulted in full or partial settlement. Similarly, the Toronto Mediation Centre reports an over 85 per cent settlement rate for mediated child protection cases. In the face of such high settlement rates, one cannot help but wonder why referrals to child protection mediation are not being seen more frequently. It is apparent that, in spite of the government's effort to institute a regime that mandates consideration of ADR mechanisms such as child protection mediation, barriers to the process persist. It is critical then, to assess the source of these barriers and whether they might be overcome.

III. Uncovering and Conquering the Barriers to Child Protection Mediation

Review of academic literature and surveys of the professionals involved in child protection work reveal a number of barriers impeding the growth of child protection mediation in Ontario. The main barriers uncovered include the following:

(1) The Power Imbalance: Mediation is often perceived as inappropriate for child protection cases because of the imbalance of power ever present between the society (acting as a quasi-state agency) and the parents.

(2) Mediation is not Mandatory: The language of the Bill 210 amendments only make it mandatory for societies to *consider* whether mediation is appropriate to resolve the dispute; there is no requirement to employ mediation.

(3) The Culture of Child Protection Professionals: Amendments to the governing legislation are insufficient on their own to transcend the tendency to gravitate toward traditional, adversarial methods to resolve child protection disputes.

It is appropriate to assess each of these barriers and determine whether the resistance they pose can be overcome to establish a viable and attractive regime for child protection mediation in Ontario.

Barrier #1: The Power Imbalance

There is widespread perception among child protection professionals that mediation represents an inappropriate dispute resolution mechanism because of the power imbalance between the society and its clients, who are often "young, poor and less-well educated than child-protection staff".[33] A number of studies have recognized this imbalance, however, there appear to be distinct viewpoints on whether this represents a concern that should prohibit child protection mediation.

The Studies

The Wildgoose study from the 1980s was perhaps the first Ontario study to acknowledge the concern around power imbalance in child protection mediation. The writer specifically acknowledged that "[t]he issue of unequal bargaining power poses the gravest threat to the viability of a child protection mediation project."[34] However, Wildgoose also noted certain safeguards could be implemented to achieve a better power balance between the parties, such as the opportunity to consult with a legal professional during the process and the integration of methods to protect the confidentiality of the process.[35]

In the report from the London Child Protection Mediation Project, participants indicated that they felt it was "unlikely" that the power imbalance in child protection disputes could be offset in mediation so that a parent could participate as an equal party. The report found that "[a]n enormous proportion of parties – 83% of those contesting the order – felt that the CAS had all the power and they had none. Three quarters of them continued to feel that way after the mediation. Indeed, one third of mediation participants did not feel like an equal party with others at the table."[36] To address

[33] London Child Protection Mediation Project, *supra* note 18 at p. 3.
[34] Wildgoose Article, *supra* note 4 at para. 49.
[35] *Ibid.* at para. 50.
[36] London Child Protection Mediation Project, *supra* note 18 at p. 14.

this concern, the report recommended special training for prospective child protection mediators so that they may be appropriately sensitive to the imbalance.[37]

Other writers have challenged the significance of the concerns around the power imbalance in child protection mediation. For example, Marvin Bernstein characterizes the power imbalance concern as a "myth". He argues that "[m]ediation can become a useful tool in neutralizing any power imbalance that exists between a child protection worker and a family member in order to facilitate a more 'principled negotiation' between the parties."[38] He points to other studies, which have similarly rejected the view that mediation cannot adequately address the power imbalance between the parties. Studies supporting this position point to the use of a skilled mediator who can employ techniques to level the playing field by adopting a plain language approach, considering and summarizing the needs and interests of each party, assisting the parties in developing creative solutions and ensuring all parties have the opportunity to consult with counsel before agreeing to a particular resolution.[39] Studies have also found that the simple presence of the mediator serves to balance the power by causing the child protection workers to be more cautious in exercising their authority so they do not look unreasonable before the mediator. Others argue that the process itself provides parents with a broader opportunity to express their position, which is in itself, empowering.[40]

Analysis

Power has been defined as "the ability of one person to dominate the will of another, whether through manipulation, coercion, or outright but subtle abuse of power."[41] The society's

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[37] London Child Protection Mediation Project, *supra* note 18 at p. 11.
[38] Bernstein Article, *supra* note 4 at p. 8 (QL).
[39] *Ibid.* at p. 9 referring to J. Maresca, "Mediating Child Protection Cases" (1995) 74 *Child Welfare* 731 at 736.
[40] *Ibid.* referring to A. Barsky, Essential Aspects of Mediation in Child Protection Cases (Ph.D. Thesis, Faculty of Social Work, University of Toronto, 1995).
[41] MacFarlane, *Dispute Resolution: Readings and Case Studies* at p. 471 referring to G. Chorneki, "Exchanging 'Power Over' for 'Power With'" in J. MacFarlane, ed. *Rethinking Disputes: The Mediation Alternative* (Toronto: Emond Montgomery, 1997) at 164-65 [MacFarlane].

role in child protection cases is often perceived by parents as fitting within this power structure. To a certain extent, the domination by societies in child protection disputes is accurate. The society clearly occupies a position superior to that of parents: It is a quasi-state agency with access to a broad array of resources and legal authority to pursue results that can have severe implications for families, such as the removal of a child from the family home. The threat of ongoing society involvement in a family's life or even apprehension of a child is ever-present during negotiations; that threat does not dissolve simply because the proceedings are shifted into the mediation sphere. This reality ultimately leads one to query: Can true mediation be facilitated in the face of this power imbalance?

In analyzing this question, it is important to recognize first that the severity of the power imbalance may increase or decrease depending on the position adopted by the society. This is a feature that appears to have been overlooked in the studies considering this issue. The strength of the power imbalance is directly tied to the negotiating capacity of the parties.[42] Where a less intrusive result is sought by the society, such as a supervision order, the negotiating capacity of parents is broader and therefore the power imbalance between the parties is weakened. In a supervision order, parents and the society may work together to negotiate terms and conditions, including: the length of the order; the expectations for the parents, the society and the child involved; and the level and frequency of the society's supervision. There is also greater freedom to negotiate around issues such as the services that should be provided by the society and accessed by the parents to address the protection concerns. The imbalance of power may not be fully equalized; however, its presence is not as apparent because parents are provided with an enhanced level of autonomy and ability to participate in the development of the final agreement. Parents walk away from the mediation session not only feeling empowered but also, to a certain extent, having been

[42] MacFarlane, *supra* note 42 at p. 469 referring to B. Mayer, "The Dynamics of Power in Mediation and Negotiation" (1987) 16 Mediation Quarterly 75 at 77-79.

empowered. A similar result is arguably achieved by adopting mediation to resolve other less intrusive issues such as placement and access plans, parent/teen conflict cases, or development of temporary care agreements.

In contrast, where a more intrusive result is sought by the society, such as Crown Wardship with no access[43], the negotiating capacity of parents is significantly limited because their perceived alternative is so weak, therefore the power imbalance between the parties is stronger. Parents have limited freedom to negotiate because the society has already assumed the position that the child will not be returned. The severity of this power imbalance may be minimized to some extent through the creation of an openness agreement during the mediation. Openness agreements formed part of the Bill 210 amendments to the CFSA. Section 153.6(1) of the CFSA provides that an openness agreement may be established between a child's adoptive family and natural family for the purpose of facilitating communication or maintaining relationships. Certainly, the opportunity to include the creation of an openness agreement in a mediation involving crown wardship, no access provides parents involved with greater negotiating power. The nature of the mediation is reframed to allow the parents involved to have some decision making authority around how continued communication with the child might be structured. However, this regime is rarely observed in crown wardship mediations because an adoptive parent does not typically become involved in the child's life until *after* the court has made an order for crown wardship, no access.[44] Thus, the possibility that a mediation will incorporate an adoptive parent and thus allow for the development of an openness agreement is significantly limited. Generally, the parties will not have the freedom to negotiate an

[43] This is to be distinguished against those cases where the society is seeking an order for Crown Wardship with access. In such cases, the mediation may focus on the issue of access and parents are provided with greater freedom to participate in the access regime instituted.

[44] Exceptional circumstances may arise where the child is placed in a foster home with foster parents interested in adoption.

openness agreement until *after* the order for Crown Wardship, no access has been made.[45] This regime leaves many child protection professionals with the perception that it is extremely challenging if not impossible to overcome the power imbalance persistent in crown wardship mediations. In consequence, resistance to child protection mediation persists.

Overall Assessment of the Power Imbalance: Can the Barrier be Overcome?

The barrier posed by concerns around power imbalance can be overcome, however, to do so, child protection professionals need to reconfigure their thinking about power and its role in the child protection mediation process. Professionals must transcend the traditional conceptions attached to 'power' and instead focus on child protection mediation as a form of 'interest-based mediation':

> [I]nterest-based mediation takes the emphasis off power as influence or control and places it on a different type of capability, that of the 'collective'. It is the voluntary joining together of parties in the pursuit of a joint problem-solving exercise rather than their successful domination of another that is at the heart of interest-based mediation's true 'promise'. When such joint efforts take place, the parties do exercise power, but not as influence or control. Instead, they are engaged in the power of the collective, here referred to as 'power-with'. …Power-with is not the absence of conflict, but the focusing of individual abilities on a common goal.[46]

In this sense, child protection mediation is not a process whereby the society assumes the dominant role by relying on the power imbalance to coerce parents into agreeing to the order sought; rather, it is a voluntary process whereby the parties work as a collective to achieve a common goal. In child protection mediation, the 'common goal' sought is a result that advances the "best interests, protection and well-being" of the child involved.[47] Once one interprets child protection mediation through this lens, the concerns around power imbalance diminish, even in the context of mediation around crown wardship, no access.

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[45] This barrier could be overcome through the development of a Practice Direction to the profession which requires parties participating in child protection mediations involving crown wardship to attend with the adoptive parent for the purpose of considering an openness agreement. However, it is acknowledged that such a structure will need to be limited to those cases where adoptive parents are receptive to an openness arrangement so as not to impair the adoption process or privacy rights of adoptive parents.

[46] MacFarlane, *supra* note 41 at p. 471.

[47] CFSA, s.1.

Barrier #2: The Absence of a Mandatory Process

In assessing the reasons for the limited participation in child protection mediation, the nature of the process itself as a voluntary one cannot be overlooked. The Ontario model does not mandate participation; it only requires the society to *consider* whether alternative dispute resolution mechanisms are appropriate.[48] A BC study examining voluntary mediation in child protection disputes noted: "Voluntary programs have low uptake rates, despite the fact that people are highly satisfied with the service.[49] Despite the apparent connection between low participation and voluntary structures of child protection mediation, the vast majority of studies assessing the viability of child protection mediation have supported a voluntary process.

The Studies

The Wildgoose analysis arising from the 1980s emphasized that it was "crucial to the integrity of [the proposal for child protection mediation] that submission to mediation be truly voluntary"[50]. To justify this position, Wildgoose highlights concerns around the process carrying with it "coercive characteristics"[51] and the importance of enhancing parents' rights.

Support for a *voluntary* child protection model in Ontario was further emphasized in the 1996 Civil Justice Review. The report recommended that, "*at this time*, referral to mediation in child protection cases be voluntary and the consent of all parties be required"[52] [Emphasis added]. This recommendation, while supportive of a voluntary regime, appears to leave open the possibility of the eventual introduction of a mandatory structure. No explanation was provided for the adoption of this recommendation. The London Child Protection Mediation Project, which followed thereafter, adopted a much firmer stance against the introduction of a mandatory child protection

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[48] CFSA, s. 20.2. See also section 51.1 which uses permissive rather than mandatory language in setting out the court's authority to adjourn to allow the parties to engage in ADR and requires consent of the parties.
[49] Jerry McHale, *et al.,* "Child Protection Mediation in British Columbia" (British Columbia: Ministry of Attorney General, March 2009) at p. 4. [Child Protection Mediation in BC].
[50] Wildgoose Article, *supra* note 4 at para. 32.
[51] *Ibid.* at para. 31.
[52] Ontario Civil Justice Review, *supra* note 14, section 5.1, paragraph 14.

mediation regime. A voluntary process was supported in part because of concerns around the potential for coercion. In addition, the report also speaks to the nature of child protection cases as themselves not being appropriate for mediation:

> Our experience suggests that the majority of court applications will not be amenable to mediation. Indeed, it is largely for this reason that we recommend strongly against enshrining mediation – in the form tested here – as a mandatory requirement for all court applications.[53]

While some Canadian jurisdictions are using child protection mediation[54], all of the regimes in place adhere to the views above and are currently voluntary in nature.[55] There is no model that mirrors the highly successful mandatory mediation regime that has been established in Ontario's civil context.[56] Is the resistance to a mandatory process of child protection mediation warranted? Could the introduction of a mandatory child protection mediation regime address the low levels of participation currently observed?

Analysis

The discussion of whether child protection mediation should be mandatory or voluntary is taken up by Linda Crush in her article entitled: "When Mediation Fails Child Protection: Lessons for the Future"[57]. Crush argues that, at its most basic level, successful mediation is accomplished when participation in the process is *voluntary*. She sides with the view that forcing parties to participate in mediation is not that different than court-imposed solutions; both processes undermine the consensual characteristic of the mediation process and power to determine how to resolve the dispute. Crush strongly cautions against the use of mandatory mediation in the child protection context, noting:

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[53] London Child Protection Mediation *supra* note 18 at p. 149.
[54] This includes: British Columbia, Alberta, New Brunswick & Nova Scotia.
[55] This statement excludes judicially mediated case conferences, which are occurring in both BC and Ontario subject to the governing legislation.
[56] See Rule 24.1 of Ontario's *Rules of Civil Procedure*. For a discussion of the success of this mandatory mediation program, see: "Evaluation of the Ontario Mandatory Mediation Program (Rule 24.1): Executive Summary and Recommendations", online: www.attorneygeneral.jus.gov.on.ca/.../exec_summary_recommend.pdf.
[57] (2007) 23 Can. J. Fam. L. 55 at paras. 47-50 (QL) [Crush Article].

> If parties are coerced into mandatory mediation and feel compelled to settle, children will be put at risk through the development of plans of care that the parties cannot or have no interest in complying with. [Child Protection Mediation] programs work when the parties choose their method of dispute resolution and the outcomes are mutually acceptable and voluntary.[58]

Crush presents a compelling argument against the introduction of a mandatory regime of child protection mediation. However, the importance of voluntariness in the process as a driving force behind its success should be clarified. A distinction should be made between mandating participation in mediation on the one hand and reaching a voluntary and consensual outcome on the other hand. Parties mandated to participate in mediation can still successfully mediate a voluntary and consensual agreement and can also decline to settle.[59] The integration of a skilled mediator can ensure that parties are achieving a mutually acceptable and voluntary agreement that adequately protects the child involved. This is a critical and overlooked difference between court-imposed solutions and forced participation in mediation.

Having said this, there are valid reasons that child protection mediation should remain a voluntary process. First, child protection cases are extraordinarily contentious and the parties often become entrenched in adversarial positions. These litigious positions are not conducive to mediation; rather, a voluntary agreement is unlikely unless the parties come to the mediation prepared to work together cooperatively to achieve that result. Second, mandatory mediation appears to be antithetical to the method proposed to address the power imbalance concern highlighted above. If the parties are to approach the mediation with a view to working as a collective to achieve a common goal, they must enter the mediation voluntarily. Third, as suggested by the London Child Protection Mediation Project, the vast majority of child protection cases are inappropriate for mediation. Child protection cases often involve parents with addiction issues,

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[58] Crush Article, *supra* note 57 at para. 50.
[59] See J. MacFarlane & C. Hart, "Court-Annexed Mediation: Right Instincts, Wrong Priorities?" *Law Times* April 28-May 4, 1997 C5).

mental health concerns or a history of domestic violence.[60] If a mandatory mediation regime were instituted in the child protection context, it is unclear how courts would deal with those cases that are entirely inappropriate for mediation. One option might be to include these cases in the mandatory mediation regime, but subject them to a rigorous screening process. However, this approach would likely introduce additional expense and delay into a process that requires urgent resolution.[61] Another option is to structure the mandatory mediation regime to exclude from the outset those cases that fall within the above categories.[62] However, since the vast majority of child protection cases fall within these categories, one wonders whether such a proposed scheme would even be worthwhile implementing. It certainly would not address the significantly low levels of participation in child protection mediation currently observed.

Overall, it does not appear that the introduction of a mandatory child protection regime in Ontario is appropriate or would even be effective in addressing the low uptake rates associated with the existing voluntary regime. Efforts to overcome the barrier to child protection mediation might be better directed towards a culture shift among child protection professionals.

Barrier #3: The Culture of Child Protection Professionals

There are currently child protection mediation services available for every region across the province.[63] The numerous pilot projects conducted province-wide have thus far recommended support for expanding child protection mediation. As noted, the governing legislation mandates societies to consider whether forms of ADR could assist in resolving the dispute. Despite the overwhelming support for child protection mediation in Ontario, resistance persists. One likely explanation highlighted in academic literature and studies on this issue is the culture of child

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[60] Edwards, *supra* note 6 at pp. 5-6.
[61] See section 37(3) of the CFSA, which sets out the factors to be considered in assessing the child's best interests and stresses the importance of avoiding delay on the disposition of the case.
[62] This is not to suggest that such cases could not still be mediated, they would simply be excluded from the mandatory mediation regime.
[63] As noted during an interview by Melissa Phillips with Susan McDougall and Esther Levy (officials with the Ministry of Child and Youth Services), April 26, 2010 [Interview with the Ministry of Child and Youth Services].

protection professionals, who tend to gravitate to traditional, adversarial methods to resolve disputes.

Cultural Resistance and the British Columbia Experience

A Child Protection Mediation Program has been available in BC since 1997. The program now operates successfully and is spreading to all regions across the province. In 2007/08, approximately 825 mediations were reported to have been initiated across the province.[64] Of particular significance is that the program receives widespread support from the child protection professionals involved. However, this support was not always forthcoming. When the program was initially introduced in 1997, expectations were high that the program would expand rapidly, particularly in view of the endorsement provided through the governing statute, introduced in 1996. Yet, the resistance among child protection professionals persisted:

> It became clear that we had underestimated the power of the existing culture and the durability of adversarial values that were deeply held by lawyers, judges, social workers, and administrators in the child welfare system. Words on paper--be it policy document or legislation--are not sufficient to displace long-standing values. If we change the system to introduce fundamentally new processes without changing the values of the people who work in the system, nothing happens except that the old values are asserted and ultimately undermine the new system.[65]

To overcome this barrier to program expansion, efforts were focused on reforming "child welfare culture and values", rather than simply the structure of the mediation process. Education through an additional pilot project was implemented to encourage new ways of thinking about mediation.[66] The pilot project established a senior social worker to act as a "Court Work Supervisor", responsible for encouraging mediation, assessing cases for mediation and aiding social workers before and during the mediation process.[67] A "pre-mediation orientation session" was also created

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[64] Child Protection Mediation in BC, *supra* note 49 at p. 14.
[65] Jerry McHale, Irene Robertson & Andrea Clarke, "Building a Child Protection Mediation Program in British Columbia" (January 2009) 47 Fam. Ct. Rev. 86 at p. 6 (Westlaw) [Building a Child Protection Mediation Program].
[66] *Ibid.* at p. 6. The new pilot project was referred to as the "Surrey Court Project".
[67] *Ibid.*

to allow parties to meet individually with the mediator before the mediation takes place to explain the process.[68] In addition, the government worked closely with child protection professionals to educate them about child protection mediation and provide them with opportunities to assist in its implementation: "The goal was to build the pilot *with*, not *for*, all stakeholders in the hope that the ultimate product would be stronger by virtue of their input and that there would ultimately be broader ownership of the project…This approach undoubtedly contributed to a shift in understanding and in openness toward mediation."[69]

Analysis

It seems that Ontario's child protection professionals currently exhibit the same culture and values carried by BC's child protection professionals in 1997. In order to overcome this barrier to child protection mediation, it is critical to consider the reasons child protection professionals maintain resistance to non-traditional methods of dispute resolution.

For child protection workers, resistance stems in part from uncertainty and suspicion around the mediation process. This concern was initially highlighted through the 1993 Toronto Demonstration Project, which reported that "[s]ome workers expressed concern that mediation would call into question their professional assessment of a case and expressed difficulty in relinquishing their perceived role as managers of the process."[70] Another reason for resistance stems from a misperception of the role of mediation. Many child protection workers view mediation as a duplication in services they already provide. Child protection workers believe they are already negotiating with the client to achieve a resolution outside of the court process. This

[68] Building a Child Protection Mediation Program, *supra* note 65 at p. 6.
[69] *Ibid.* at p. 7.
[70] Bernstein Article, *supra* note 4 at p. 12, referring to J. Maresca *et al.,* "Mediation in Child Protection: Limitless or Limited Possibilities?" Report on Demonstration Project Conducted at the Children's Aid Society of Metropolitan Toronto (October, 1992) [unpublished].

misperception overlooks the critical distinction between negotiation and mediation, and in particular, the neutrality offered by integrating a mediator into the discussions.[71]

Legal professionals are also skeptical of the mediation process, but that skepticism arises almost exclusively from concerns around loss of control over the process. This concern likely arises from the initial vision of mediation contemplated for Ontario prior to the Bill 210 amendments. That vision restricted child protection mediation to the parties involved; counsel were not invited to participate in the mediation sessions – the objective being to establish an environment in which the parties could discuss the issues themselves and develop their own options to resolve the case. Lawyer involvement was restricted to letters and phone calls at the initial stages of the process to discuss the progress of mediation and review any agreement established through the mediation process.

Contrary to the general perception among many legal professionals, this vision of mediation has not survived in Ontario. Lawyers are now invited to attend the mediation session if they are interested and if it is necessary based on the circumstances involved in the case.[72] For example, in some cases where capacity issues are involved, lawyers are encouraged to attend. The role of the lawyer at mediation differs from the traditional role in child protection: they are not in attendance to advocate for their client, but rather to support their client and provide advice and direction as the *client* mediates. Nonetheless, their enhanced inclusion in the process serves to reduce anxiety around loss of control, which in turn has the effect of enhancing confidence in child protection mediation and reducing the tendency to gravitate exclusively to adversarial methods to resolve the dispute.

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[71] Crush Article, *supra* note 57 at para. 37.

[72] "Child Protection Mediation: An Overview", DVD prepared by the Toronto Mediation Centre; This position was also articulated through the interview with Maggie Hall, *supra* note 29 and the interview with Jan Schloss, *supra* note 30.

Overall Assessment of the Cultural Resistance: Can the Barrier be Overcome?

As is apparent through the BC mediation experience, the barrier posed by the existing culture of child protection professionals across the province can be overcome. What might spark the culture shift for Ontario? In BC, the shift was stimulated through an additional pilot project. However, as discussed, Ontario has a history distinct from BC – one which includes numerous pilot projects and studies spanning the last two decades. Thus, it is unlikely that another pilot project will have the same effect on the culture of child protection professionals noted in BC. Instead, efforts might focus on implementing mandatory education sessions for child protection professionals. That education should focus on targeting the underlying reasons that perpetuate the culture of resistance to child protection mediation. For example, education for child protection workers should clearly explain the mediation process and the role of the mediator as a neutral third party who has no direct interest in the outcome of the process, as opposed to an individual that will question their handling of the case.[73] Such education should also provide child protection workers with a firm understanding of the distinction between mediation and negotiation, to overcome the view that mediation is a duplication of the services they already provide. Education for legal professionals should emphasize the role that lawyers assume in the mediation process and spread the message that lawyers may attend the mediation session to alleviate concerns around loss of control.

Educational sessions are already being provided through mediation service providers such as ADR Link[74], the Mediation Centre of Hamilton[75] and the Toronto Mediation Centre. Yet, the culture shift remains slow-moving, indicating that further efforts need to be implemented. At the agency level, reporting requirements are already in place by virtue of the Policy Directive from the Ministry of Child and Youth Services. Additional efforts that could be undertaken include creating

[73] Bernstein Article, *supra* note 4 at p. 12.
[74] Servicing the South West region.
[75] Servicing the Hamilton/Niagara region.

mandatory child protection mediation forms that must be completed by lawyers and workers together at the beginning of a case. Such forms should identify that child protection mediation was considered, the issues involved in the case and the recommendation made. Where mediation is not recommended, the form might require the lawyer and worker to reconsider the option again in another four to six months.[76] A similar form might be implemented at the judicial level.[77]

Another approach that might be adopted to stimulate the culture shift is to focus on building relationships between the mediation service providers, the agencies and the courts. A significant feature separating the Ontario model from BC is the service provider. In BC, the Ministry of Children and Family Development (MCFD) and the Ministry of Attorney General Dispute Resolution Office (DRO) administer the mediation program. The DRO contracts for mediation services with private sector mediators.[78] The MCFD is also responsible for child protection in the province. Thus, there is no separation between the child protection provider and the mediation provider.

In Ontario, funding for mediation is provided by the Ministry of Child and Youth Services and distributed to regional ministry offices which establish transfer payment agencies in each region. The transfer payment agencies are responsible for providing the mediation services. In this way, unlike BC, Ontario's mediation service providers are *external* to Children's Aid Societies. The objective of Ontario's model is to enhance impartiality in the mediation process – the transfer payment agencies enhance division in control over the process away from societies.[79] However,

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[76] This form might also assist agencies in complying with reporting requirements established through the Policy Directive issued by the Ministry of Child and Youth Services. Agencies are required to track the use of prescribed methods of ADR and key outcomes on a quarterly basis: Policy Directive, *supra* note 22.

[77] While judges across the province are becoming more receptive to the idea of child protection mediation, research reveals that the vast majority of referrals received by mediation providers still come primarily from Children's Aid Societies. The Toronto Mediation Clinic has reported receiving referrals from only two judges in the Toronto region: Interview with Jan Schloss, *supra* note 30.

[78] Mediation in Child Protection Cases Bulletin (April 2004), British Columbia Dispute Resolution Office, online: http://www.ag.gov.bc.ca/dro/publications/bulletins/child-protection-mediation.htm.

[79] Interview with the Ministry of Child and Youth Services, *supra* note 63.

this model also has the effect of weakening the ties between the agency and the service provider. Enhancing the relationship between the agency and the mediation service provider might further stimulate the culture shift across the profession. Such efforts would need to be incorporated carefully, so as not to interfere with the objective of maintaining impartiality of the service providers. One option might be to integrate, wherever possible, child protection mediation service providers directly into court buildings. This would provide all parties with an opportunity to explore mediation while at court when confronted with the issues. The viability of this option is likely only available where the court's infrastructure permits the integration. Thus, government funding is a critical component of enhancing the culture shift.

As noted, there is some evidence through the increased level of referrals made annually to mediation service providers that the culture is slowly evolving to accept child protection mediation as a viable form of dispute resolution. Implementation of the above initiatives may further serve to shift the culture among child protection professionals from perceiving mediation as an exceptional option to one that forms part of the mainstream child protection regime.

IV. Conclusion

The purpose of this analysis has been to explore the status of child protection mediation in Ontario since the introduction of Bill 210, to examine the barriers that limit its application as a method of dispute resolution and to assess whether and how those barriers might be overcome. The last thirty years of research and analysis in this area has demonstrated overwhelmingly that mediation is a beneficial and appropriate process to resolve child protection disputes in certain circumstances. For it to be successful, factors impeding its growth need to be identified and overcome. As discussed, three major factors posing resistance include concerns around the power imbalance, its existence as a voluntary regime and the culture of child protection professionals.

The voluntary regime certainly impedes the growth of child protection mediation; however, this structure will likely remain in place in view of the wealth of academic literature arguing that mandatory mediation gives rise to a coercive process that undermines the consensual nature of the process. The accuracy of this view is open to debate. Nonetheless, the very nature of child protection cases, which are highly contentious and frequently involve cases that are not amenable to mediation, further support the necessity of maintaining a voluntary regime. Thus, the resistance posed by this barrier will remain.

Yet, other identified barriers can be conquered. The barrier posed by the power imbalance may be overcome by reconfiguring the manner in which 'power' is perceived in the child protection context. Similarly, the barrier posed by the child protection culture may be undone by introducing initiatives such as education; enhanced connections between agencies, courts and service providers; and government commitment to funding mediation.

As noted by Marvin Bernstein, "[w]hereas ADR may have been perceived as something of a "luxury" in the past, it has become an absolute "necessity" in an era when governmental funding cutbacks are the order of the day for child protection agencies and for publicly funded lawyers, who would otherwise represent parents and children in protections proceedings."[80] Current economic circumstances plaguing child protection agencies mandate action to eradicate the existing barriers to child protection mediation. It is time for child protection professionals to abandon long-held views of mediation as an alternative "third option"[81] in the resolution of disputes, and recognize it as a viable and preliminary method to resolve disputes in the child protection arena.

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[80] Bernstein Article, *supra* note 4 at p. 25.
[81] London Child Protection Mediation Project, *supra* note 18.