

**CREATION OF A CREDIBLE AND ACCESSIBLE  
FAMILY MEDIATOR ROSTER IN BRITISH COLUMBIA:  
Barriers and Policy Options for  
Effective Family Dispute Resolution**

October 15, 2004

*Submitted to the Board of Directors of the BC Mediator Roster Society*

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**By Catherine Morris, BA, LLB, LLM**

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## **1 PURPOSE AND GOALS OF THIS RESEARCH PROJECT**

The British Columbia Mediator Roster Society (“the Society”) wishes to create and maintain a publicly credible and accessible province-wide roster of family mediators. The ideal is a list of rostered family mediators accessible to members of the public in all parts of British Columbia (BC). While the Society is confident that the current standards for Family Roster membership provide for an appropriate standard of qualifications of individual mediators, membership on the Family Roster as a whole has persistently remained too small to provide a credible and accessible province-wide service. After more than two years, the Society’s Family Roster has attracted only 29 qualified mediators. Numbers of Family Roster members are low even in major centres of the Province such as the Lower Mainland areas including Vancouver (12 Family Roster members) and South Vancouver Island including Victoria (4 Family Roster members). The Family Roster has not met its goal of providing public access to a group of qualified family mediators in which members of the public, lawyers, courts and mediators themselves are confident.

This policy research project was designed to test anecdotal reports that credible family mediators in BC find membership on the Family Roster to be inaccessible to them, particularly in smaller communities in BC. The research was also designed to assess other barriers mediators face in gaining experience in family mediation in BC and to develop possible policy options that the Society might consider to address barriers.

## **2 KEY QUESTIONS**

The Society conducted this research to seek answers to the following questions:

- What are the current barriers to Family Roster membership faced by practising family mediators in BC, particularly family mediators outside BC’s major urban centres?
- What policy or procedural options are available to remove inappropriate barriers to the Family Roster while retaining appropriate qualifications standards?
- What policy options are available to the Society to help address systemic barriers people face in gaining experience in family mediation in BC?

### 3 METHODOLOGY

To examine these questions, the following methodology was used:

- A very brief review of trends in qualifications standards in North America for family mediators;
- Summary examination of public policy concerns currently articulated in the area of family mediation by mediation organizations, family mediators, government officials, academics and organizations concerned with the practical well-being of family members after family breakdown;
- Ideas of family mediators in various places in BC, as well as government officials, and leaders in mediator organizations, as to the reasons for low membership on the Family Roster and what policy or procedural options might address the issues identified;
- Unstructured interviews and email correspondence with:
  - ▶ key experts on family mediation qualifications,
  - ▶ selected referrers to family mediation in several regions in BC,
  - ▶ selected family mediators who are not currently members of the Family Roster in several regions in BC,
  - ▶ relevant government officials,
  - ▶ relevant academics,
  - ▶ non-governmental organizations concerned with family mediation.

The methodology was qualitative. The purpose was to identify and probe selected issues and concerns about qualifications standards of the Family Roster by speaking with a sample of individuals from across the Province who either refer people to family mediators or who are identified by referrers as credible mediators. There was no attempt at quantitative data collection and statistical analysis was not appropriate.

#### 3.1 Interviews with referrers to family mediation and family mediators

##### Phase 1: Searching for names of credible mediators

The first stage of the telephone interview research aimed to identify and speak with potential referrers to family mediators in several regions in BC. Attempts were made to find referrers from several occupational groups including family lawyers (primarily), family mediators and organizational leaders. Selected referrers were interviewed in interviews ranging from approximately 5 to 30 minutes. Telephone interviews were conducted with 30 referrers based on a checklist of open-ended questions used as conversation prompts. The checklist is attached as Appendix A.

The interviews had two purposes:

- To identify family mediators around the Province with a reputation among referrers as

- credible;
- To identify referrers' criteria for making their own referrals or assessing credibility in family mediation.

### **Phase 2: Selecting and interviewing non-rostered family mediators**

The second stage of the field research involved telephone interviews with those mediators who were consistently on referrers' lists of mediators they considered competent and credible but who were not on the Family Roster. Because of the limitations in time and resources for this research, a limited number of mediators in several regions of the Province were selected based on the following factors:

- non-membership on the Family Roster;
- among the top five most frequently referred to family mediators in the particular region (whether or not they were on the Family Roster)
- gender and occupational balance among the interviewees;
- availability for interviews within the time frame;
- regional diversity.

Interviews from 45 to 60 or more minutes were conducted with the family mediators identified as "credible" and selected as above. In-depth interviews were conducted with 11 non-rostered family mediators from several regions in BC. The survey was structured but relatively informal with a series of open-ended questions designed to isolate the particular factors that act either as barriers or facilitators to membership on the Family Roster. See the interview format in Appendix B.

### **Phase 3: Email survey of mediators on the Family Roster**

It was noted during Phase 1 that a number of the Family Roster mediators were mentioned prominently on the lists provided by referrers, but other Family Roster mediators were not mentioned at all by any referrers. This might be for two or more reasons, including the possibility that these rostered family mediators are not doing very much mediation, or that persons who referred to these individuals were not identified in the first phase of the research. Therefore, an email survey was conducted with mediators on the Family Roster to get a sense of the numbers and types of mediation they are doing. This was also done in order to get a comparison with similar data collected from non-rostered mediators. In this survey, information was also sought on Roster members' criteria for making referrals to other mediators to test for consistency with criteria of referrers. All the members of the Family Roster with publicly available email addresses were sent an email, a total of 28. (Questionnaire attached as Appendix C.) A total of 14 Family Roster members responded within the allotted time. Reasons for non-response are unknown; all those who responded completed most of the questions in the survey. Several Roster mediators who responded are doing considerably more mediation cases than the non-rostered mediators interviewed, but some are not. (See section 4.3.1.)

### **3.2 Interviews with Policy Makers**

It was decided to wait to interview selected policy makers until after other interviews were largely completed. This was for two reasons. First, it seemed important to have a sense of the issues identified by referrers and non-rostered mediators in order to identify questions for policy makers. Second, a number of policy makers were away on vacation during the research period. It would have been desirable to talk to policy makers before developing research questions as well as after speaking to referrers and mediators; however, it seemed unlikely these people would be willing to be interviewed twice. A total of 7 policy makers were interviewed confidentially from among government officials, judiciary and non-governmental organizations. Policy comments were also made by a number of the referrers and mediators surveyed, and their relevant policy comments were put to selected policy makers to test the validity of the comments and to obtain policy makers' reactions and responses.

### **3.3 Group discussion among BC Mediator Roster Society Board members**

Research design of this project originally contemplated group discussions among family mediators about barriers and policy options. After conducting more than 50 interviews with referrers, mediators and policy makers, it was not clear what further information might be gained from focus group discussions beyond the information generated in previous consultations by the Society on this topic. Logistical issues and time were also considered. It proved challenging and time-consuming to arrange for individual telephone interviews with referrers and mediators during the summer period, and it was clear that there would be logistical difficulties in organizing meetings among people within target groups that would include people from areas other than Vancouver and Victoria. Therefore, within the time frame for this project, it was not feasible to organize group meetings with mediators from around the Province or the members of the Society Board. As an alternative, an email group discussion among Society Board members was attempted – this elicited a number of informative responses.

Further Society Board discussion was held on September 24, 2004. Further feedback could also be sought from Civil and Family Roster members, selected policy makers, organizations and other individuals.

## 4 FINDINGS

### 4.1 Supply of Mediators Considered Credible by Referrers

The research confirmed that in the Lower Mainland including Vancouver, Southern Vancouver Island, and the eastern part of central Vancouver Island there is a reasonable supply of credible mediators, twelve of whom are on the Family Roster. In the Okanagan region there are several credible mediators and some are on the Family Roster. In the Prince George area there are several credible family mediators, none of whom are on the Family Roster; most of these mediators may not qualify for the Family Roster because of insufficient training or numbers of cases conducted. In other areas of the Province there are very few family mediators and none are on the Family Roster; most of the mediators considered credible by referrers would not qualify for admission to the Family Roster.

This research found that the credible mediators interviewed have various reasons for not seeking to join the Family Roster. These reasons are discussed below.

### 4.2 Characteristics of credible mediators as seen by referrers

It is important first to discuss the findings of this research about the characteristics of mediators referrers perceive to be “credible.” Thirty-one referrers from several regions of BC were interviewed, including family lawyers, several well-known family mediators, and leaders in family mediation organizations or family mediation programs. The referrers were asked for names of mediators they themselves referred to, and then for names of additional people they might expect to see on a list of rostered family mediators (see the wording of questions in Appendix A). After they provided names they could think of, they were asked an open-ended question: “What is important to you when you are selecting a family mediator?” The referrers were not prompted to respond to specific criteria such as training, experience, substantive knowledge, style, etc. The answers may be categorized as follows:

#### 4.2.1 Knowledge of family law and family litigation

A striking number of referrers said it was important (or very important or essential) that the mediator have good, up to date, knowledge of relevant *family* law and an experienced understanding of the litigation process.(2, 4, 5, 6, 7, 12, 13, 14, 20, 21, 23, 30, 32, 37, 39, 41, 48, 49, 57, 60, 61, 64)<sup>1</sup> Virtually all the mediator referrers interviewed (including mediators from

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<sup>1</sup> Numbers in brackets refer to the number I have assigned to the interview for reference purposes. Note that numbers indicate only the number of the form created for the individual. Not all forms were used for a variety of reasons, including non-availability of an individual at the time of attempted contact. This is why there may be an interview numbered , e.g., “64” when only 31 referrer interviews were conducted.

occupations other than law) said they always refer matrimonial property division cases to lawyer-mediators. There did not appear to be much regional variation in this stance. Where clients did not have money for lawyers, referrers were positively inclined to refer people to Family Justice Centres for financial support and parenting matters within the Provincial Court jurisdiction.(13) In cases where referrers did send people to mediators from occupations other than law, these referrals were made because the individual was highly regarded for substantive skills relevant to the particular case or the parties; for example, accounting issues, adoption, psychiatric issues, or very high conflict or complex power dynamics in parenting issues, (e.g. M7) or else the referral to the non-lawyer was more reluctantly made because there were few viable options in the region.

#### **4.2.2 Mediation capability or skill**

Mediation capability or skill was mentioned by a number of referrers (2, 4, 5, 12, 13, 20, 32, 39, 48, 50, 60, 61) as measured by a sense of fairness and impartiality or by a feeling by the lawyer or client that the mediator has not “championed one [party] over the other.”(13) Also important was ability to control the process, help the parties feel at ease, hear both parties without exclusion, and be sufficiently supportive to both parties.(20) One referrer pointed out that a mediator needs to be able to work positively with both clients and their lawyers; there is a need for the mediator “to engage with all the adults there, and get the respect of the lawyers, and not be afraid or engaging, taking responsibility for the process, but not making judgements.”(4) Another referrer mentioned that a skilled mediator will “know the flow, [...] be on top of where the people are at, [...] and [have the] ability to figure out where things are going and have ‘the *gravitas*’ to be able to move it along.”(4) Other referrers felt that family mediators need to be assertive.(4, 2) One stated that mediators “... can’t be ‘namby pamby’ ... [they] have to control the situation so that neither party is running roughshod over the other.”(60) Several referrers mentioned that mediators needs to be good at managing power imbalances when necessary. (2, 5, 48, 30, 32, 60, 39, 61)

#### **4.2.3 Solution and settlement focus**

Referrers’ comments were focussed primarily on solutions and settlements (2, 4, 7, 12, 13, 15, 20, 32, 37, 39, 41, 48, 49, 60, 64) which some indicated is what their clients want.(e.g. 48) Interestingly, none expressed interest in the transformation of parties’ relationships *per se*, although a number were concerned about mediator empathy or their ability to be supportive or otherwise help with the emotional dynamics.(2, 5, 7, 11, 18, 20, 32, 62) Most referrers had strong views about the style of mediation they preferred. There was considerable variation in preferences between “true believers”<sup>2</sup> in interest-based mediation and the majority of referrers

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<sup>2</sup> Julie Macfarlane has identified five “ideal types” (after Weber) of litigators regarding their attitudes towards civil mediation including “The Pragmatist,” “The True Believer,” “The Instrumentalist,” “The Dismissal,” “The Oppositionist.” All these types seemed to be represented among the referrers interviewed for this research. See Julie Macfarlane. *Culture Change? Commercial Litigators and the Ontario Mandatory Mediation Program*. Ottawa: Law Commission of Canada, 2001. Available at [http://www.lcc.gc.ca/en/themes/sr/rj/macfarlane/macfarlane\\_toc.asp](http://www.lcc.gc.ca/en/themes/sr/rj/macfarlane/macfarlane_toc.asp).

interviewed who seemed to be “pragmatists.”<sup>3</sup> According to Macfarlane’s typology, “pragmatists” tend to view mediation as a faster and cheaper method of settlement which is better for their clients’ families. Among the lawyer-referrers interviewed for this project there was little evidence of “instrumentalist”<sup>4</sup> attitudes, defined by Macfarlane as a tendency to see mediation as a way to advance their clients’ adversarial goals.<sup>5</sup>

- **“Evaluative” or “predictive”<sup>6</sup> style:** A number of referrers said they prefer mediators who are “directive,”(7, 49) or “willing to give an opinion.”<sup>7</sup>(2, 20, 39, 41, 60) One referrer said “I believe there is a role in the process for a properly authorized person to depart from the traditional role as neutral to express an opinion on the merits, and there is not much point in their doing so if I [as counsel for one of the parties] don’t respect their opinion because they don’t have substantive knowledge.”(20) One mediator in a location where there are few family mediators said that in cases where “the client is uncontrollable,” it is sometimes better to use a Judicial Case Conference where the judge is “more willing to act in authority and make recommendations.”(2) Another referrer stated a preference for time efficiency in mediation (“speed”) (7) and “not too much sharing and caring before getting down to the nitty gritty.”(7)
- **Non-passive style:** Another referrer indicated a preference not to use mediators who “simply shuttle or restate”(4) or “simply pass messages back and forth.”(4) “It doesn’t work when there is a ... passivity about the mediator,” said this referrer, who nevertheless stated a preference that mediators not make judgements.(4)

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Also see Julie Macfarlane. "Culture Change? A Tale of Two Cities and Mandatory Court-Connected Mediation." *Journal of Dispute Resolution* (2002): 241-325.

<sup>3</sup> Macfarlane, 2001.

<sup>4</sup> Macfarlane, 2001.

<sup>5</sup> Discussed later in this paper is the fear by lawyers that if the Notice to Mediate were extended to family law disputes, it would be used as an adversarial tool. See Macfarlane’s discussion of “instrumentalist” lawyers who do see themselves using mandatory mediation in this way.

<sup>6</sup> Craig McEwen. “Pursuing Problem-Solving or Predictive Settlement” 19 *Florida State University Law Review* (1991) 77 cited in Macfarlane, 2001. “Evaluative” or “predictive” mediation means that the mediator informally evaluates the case, predicts what might possibly happen at trial, and may make suggestions concerning outcomes. See Ellen A. Waldman. “The Evaluative-Facilitative Debate in Mediation: Applying the Lens of Therapeutic Jurisprudence.” *Marquette Law Review* 82(1998): 155-170; Ellen A. Waldman. "Identifying the Role of Social Norms in Mediation: A Multiple Model Approach." *Hastings Law Journal* 48 (1997): 703-769.

<sup>7</sup> This type of response would indicate a preference for “evaluative” or “predictive” mediation.

- **Facilitative<sup>8</sup> or Transformative<sup>9</sup>:** Only one referrer (61) specified a preference for “non-decisive, non-pushy, non-recommendatory” style.<sup>10</sup> Interestingly, one of the mediators this individual makes referrals to is a lawyer-mediator described as “directive” by another referrer. Another mediator this referrer (61) likes is a non-lawyer mediator who indicated a recent tendency to be less “transformative” and more directive and problem-solving in style.(M8) No referrers mentioned a “transformative” approach as preferred. No one surveyed in this research mentioned “narrative”<sup>11</sup> mediation.

#### 4.2.4 Understanding of family dynamics

Some referrers stated that mediators need to understand (57) or “be savvy”(61) to the unique dynamics of family conflict. One referrer put it this way, saying that in “high conflict” cases “I don’t refer to people who have not been touched by the fire – who have not faced conflict eye to eye.”(57) Several referrers mentioned the need for mediators to be able understand the unique dynamics of the *particular* family conflict (2, 18, 57, 61, 62), be “in tune with the emotional make-up of what’s going on and deal with the things that prevent rational discussion”(2) and “be comfortable” in the emotional climate without getting caught up in the emotional dynamics.(62)

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<sup>8</sup> "Facilitative" mediators say they provide only process assistance for negotiation. They separate process interventions from substantive interventions, and generally they also usually use interest-based approaches to assist parties to create and test outcome suggestions. Interest-based negotiation attempts to reach solutions that meet the interests of all parties. An assumption of interest-based negotiation is that a variety of interests or motivations may underlie parties' positions. The goal of the interest-based approach is to satisfy those interests rather than bargain over bargaining positions. This approach was popularized by Roger Fisher and William Ury, with Bruce Patton in *Getting to Yes: Negotiating Agreement Without Giving In*. Second edition. New York: Penguin Books, 1991. Facilitative, interest-based mediation is taught widely in North America for the purposes of community, family and commercial mediation and tends to foster the avoidance of mediator recommendations or suggestions in order to preserve mediator neutrality and to encourage party control of outcomes.

<sup>9</sup> "Transformative" mediators say they work less toward settlements and more toward transformation of relationships, fostering “empowerment and recognition. See Bush, Robert A. Baruch, and Joseph Folger. *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition*. San Francisco, CA: Jossey-Bass Publishers, 1994; Joseph P. Folger, and Robert A. Baruch Bush, eds. *Designing Mediation: Approaches to Training and Practice within a Transformative Framework*. New York : The Institute for the Study of Conflict Transformation, 2001.

<sup>10</sup> This referrer is philosophically committed to a “facilitative” interest-based style of mediation.

<sup>11</sup> "Narrative" mediators see themselves less as independent third parties and more as joint participant with the parties in the joint creation of new possibilities for the future. They do not separate process and outcome, seeing the process and outcome as intertwined. See Sara Cobb. "A Narrative Perspective on Mediation: Toward the Materialization of the 'Storytelling' Metaphor." In *New Directions in Mediation: Communication Research*, 48-63. Thousand Oaks, CA: Sage, 1994; John Winslade, and Gerald Monk. *Narrative Mediation: A New Approach to Conflict Resolution*. San Francisco: Jossey-Bass, 2000.

#### 4.2.5 Experience

“Experience” in mediation was a criterion stated by three referrers (5, 12, 44), but most of the other referrers’ responses above *imply* preference for a good deal of mediator experience, particularly knowledgeable experience with family law disputes in litigation.

#### 4.2.6 Training

Three referrers mentioned training as important when they are selecting a mediator (11, 14, 30), and another looks at the personality of mediator rather than training or knowledge.(64) In one of these interviews (11), the referrer was prompted<sup>12</sup> by asking “how important is training” and the response was that training is “definitely” important. Thus, only two of the referrers volunteered that training was important. This does not necessarily mean that training is not considered important to those interviewed. It is possible that a certain level of training was assumed and not mentioned. Given the wide variations in the amount of training taken by family mediators (40 hours to hundreds of hours) it was notable that the issue of training was so seldom volunteered by referrers as a criteria. However, it is also important to note that none of the mediators named as “credible” had experienced fewer than 40 hours of training. Three of the “credible” mediators interviewed had taken 40 hours training plus approximately 1 or 2 days additional related training; the other eight “credible” mediators interviewed had taken extensive training including significant ongoing professional development.

#### 4.2.7 The role of rosters and credentials in selection of mediators

It was striking that only one referrer mentioned looking to the Family Roster (12), and this referrer mentioned this only in the context of checking out names of mediators whose names are not familiar. No referrers mentioned checking or referring to Family Mediation Canada’s list of certified family mediators.<sup>13</sup> One lawyer referrer said that if they don’t know someone in an area they will look up the lawyers accredited by the Law Society of BC to do family mediation. Most referrers made comments stating or implying that personal knowledge of the mediator was important, either through knowing the mediator’s work first-hand, or hearing “word of mouth” feedback from other lawyers or clients.(30, 35, 38) One referrer (37) preferred mediators who are known to have a good “success rate.” “Success” meant either settlements, or referring parties away from mediation and back to their lawyers if mediation was not proving successful (settled) within a reasonable time frame.(37)

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<sup>12</sup> The interviews with referrers were intended to be very brief because of the number of referrers hoped to be canvassed in a short time-frame, so a decision was made not to follow up referrers descriptions of their important criteria with questions seeking their answers or priorities on specific criteria such as knowledge, training, experience, style, etc.

<sup>13</sup> See the list of FMC certified mediators at <http://www.fmc.ca/Main.asp?p=Common/FindingAMediator.htm>

#### **4.2.8 Non-referrers**

Two interviewees do not refer people to family mediators. One stated that he no longer practices family law, and formerly did “high end settlements” saying that while “the family bar is not reasonable – like pit bulls... [but ] most business men [clients] don’t want to go to court.” Another lawyer avoids mediators and prefers four-way negotiation meetings (32), saying he declines to make active referrals; rather he steers people away from named “bad mediators” primarily because he perceives them as unskilled, unknowledgeable and unsuccessful as family lawyers.(60)

### **4.3 Barriers to the Family Roster for Mediators Considered Credible by Referrers**

There are two routes by which one may seek admission to the Family Roster. One is first to go through the FMC certification process<sup>14</sup> and then seek admission to the Family Roster. Certified FMC mediators are automatically qualified for the Family Roster. The other route to the Family Roster is to fulfill the training and extensive experience requirements of the Society.<sup>15</sup> Several barriers to membership on the Family Roster were mentioned by the non-rostered mediators interviewed (considered credible by referrers). The factors are listed below in order of importance.

#### **4.3.1 No reason to join the Family Roster**

All but one of the non-rostered family mediators interviewed had heard of the Family Roster, and most had considered joining. The main reason for not seeking admission (or not taking the training or securing the experience necessary to allow them to be admitted) was they saw no good reason to join. While they considered members of the Family Roster to be credible, several lawyer-mediators said the people whose opinion counted were those in their local community who referred clients to them, mainly family lawyers.(M4, M6, M8, M10) The non-rostered mediators interviewed from other occupational backgrounds have thriving practices without membership on the Family Roster.(M1, M7, M11) Some mediators have enough work.(M1, M7) Even among those who would like more work, none perceived the Family Roster as being important for the purpose of getting work.(M3, M4, M5, M8, M9, M10, M11)

It should be noted that non-rostered family mediators reported a range of 2 to 30 family mediation cases in the past six months: three mediators had conducted 2 cases each, one conducted 3 cases, two had conducted 4 or 5, one had conducted 8, three had conducted 9 or 10, and one had conducted about 30. The mediators on the Family Roster were conducting

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<sup>14</sup> For details of the FMC qualifications, see <http://www.fmc.ca/pdf/standardsweb2003.pdf>

<sup>15</sup> For details of the Society’s qualifications standards for the Family Roster, see <http://www.mediator-roster.bc.ca/becoming.html#ADMISSION%20TO%20THE%20FAMILY%20ROSTER>

considerably more family mediation cases: one mediator had conducted no cases, one mediator had conducted 2 cases, 4 mediators had conducted 6-8, one had conducted 10-12, 2 mediators conducted 13-15, 2 mediators conducted between 20-26 cases, one mediator had conducted about 30 cases and one had conducted about 60. Annual mediations were roughly double this number for most of the mediators. The research methodology was not suited to finding out whether Roster membership has anything to do with the fact that members of the Family Roster generally conducted more mediation cases than non-rostered family mediators.

#### **4.3.2 Insufficient experience for Family Roster admission (little mediation taking place in BC)**

The second most important barrier identified is that there does not appear to be enough mediation going on in BC to allow many mediators to attain the number of cases required for admission to the Family Roster.(M2, M3, M4, M5, M6, M8, M9, M10) The current standard is 50 mediation cases, 40 of which must be family mediation cases, 30 of which must have been conducted within the past five years and have been concerned with family reorganization after separation and divorce. Some of these mediators thought they themselves might be able to meet this threshold in the foreseeable future, but felt it was a barrier to those entering the field.(M6, M9, M11) The experience requirement appears to be a significant barrier for all but a few mediators who conduct much of the mediation in their own regions. The experience requirement tends to be suited only to the busiest family mediators in the most populated urban areas in BC.<sup>16</sup> This factor is relevant even in an urban area the size of Victoria.

##### **4.3.2.1 Reasons for low number of mediation cases in BC: An adversarial and court-centred culture of disputing?**

The research interviewees touched on possible reasons for a low volume of family mediation in BC. Interviews among lawyers, mediators and policy makers suggested that the practice of family law remains primarily focussed on courts and litigation rather than on settlement processes such as mediation (or collaborative law). The adversarial culture of lawyers is cited by lawyers, mediators, members of the judiciary and some policy makers. Some interviewees suggested that family dispute clients may also be focussed on court as the primary method of dispute resolution because that is what they first think of as a result of watching television or talking to friends. "A lot of people go to court in family dispute cases because they have a sense of security in the courts where there are sheriffs, lawyers and judges. They often have serious concerns about their

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<sup>16</sup> In this context, please note 1994 comments of Andrew Pirie in his frequently cited "Manufacturing Mediation: The Professionalization of Informalism." In *Qualifications for Dispute Resolution: Perspectives on the Debate*, edited by Catherine Morris and Andrew Pirie, 165-91. Victoria, BC: UVic Institute for Dispute Resolution, 1994, at 185-86. Prof. Pirie suggested that standard creation and professionalization may be more about power, market control, prestige and elitism than it is about commitment to service or the interests of society.

safety. People choose options that seem more secure. They need assurance that choices are safe.<sup>17</sup> People trust the courts – *the first time.*” This policy maker noted that parties who try the courts may not be necessarily satisfied with their experience.

This limited research cannot substantiate any of these suggestions about the adversarial culture of family disputes in British Columbia such as the attitudes and contributions of various players in the justice system including parties, lawyers, judges, court administration, government officials and non-governmental organizations (NGOs) or government organized NGOs such as the Legal Services Society (“legal aid”).<sup>18</sup> Policy makers interviewed suggested that family dispute resolution must be “child focussed” and encourage parents to put their children first rather than focus on their own rights. The Notice to Mediate is one strategy aimed at changing the adversarial culture. This is discussed later.

#### **4.3.2.2 Judges and court officials as gatekeepers to mediation?**

Another factor that emerged during research interviews is the potential of judges and court officials to act as gatekeepers to mediation. Some judges may make referrals to mediators; however, interviewees who commented on this reported that not all members of the judiciary are necessarily “sold” on mediation. It would require more interviewing among members of the judiciary to assess their views and unique needs as primary dispute resolvers in an independent judiciary (through adjudication, settlement conferences, judicial case conferences and other case management strategies) as well as their perceptions of the needs of parties and counsel and the challenges and potentials within the interfaces between the courts, court administration and government officials. It is important to note that (based on interviews with lawyers and lawyer-mediators), it appears that judges enjoy the respect of the family law bar in BC. Several lawyers reported they would favour an increase of Family Case Conferences (FCC) over a Notice to Mediate. FCCs provide opportunities for counsel to take advantage of the presence of a judge’s authority. It was beyond the scope and time frame of this research to investigate possible implications for the BC Mediator Roster Society of increased FCCs or other judicial interventions or referrals by court officials.

#### **4.3.2.3 FMC certification requires very little experience, but does not attract BC mediators**

The FMC route to membership does not emphasize experience; it emphasizes training and evaluation of knowledge and skills. This provides an option for mediators with very little

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<sup>17</sup> “Safety” meant not just physical safety but a sense that they would not “be left out on a limb.”

<sup>18</sup> For some scholarly insights, see Macfarlane, 2002; see also American Bar Association Section of Litigation. *The Vanishing Trial. Proceedings of a Conference, San Francisco, California, December 12-14, 2003.* ABA, 2003. This is a large compendium of papers many of which are available at <http://www.abanet.org/litigation/vanishingtrial/>.

experience<sup>19</sup> to enter the Family Roster. However, FMC's in-depth assessment process is unattractive to many experienced lawyer-mediators. (See section 4.3.4.) The FMC requirements are more attractive to those seeking to enter the field of family mediation than they are to experienced lawyer-mediators with at least 40 hours of mediation training (or even much more training) who do not need the FMC designation or admission to the Family Roster to gain credibility among their peers who make referrals to them.(M2, M3, M4, M8, M9, M10)

#### **4.3.2.4 Family Roster members' "confidence in competence"**

The email survey of the Family Roster asked Roster members to estimate the number mediation cases they had conducted before they felt confident in their competence. Only Family Roster members were asked this question, since they formed the only sample that had been formally qualified by the BC Mediator Roster Society. Even though the Society does not "certify" family mediators' competence, their qualifications give them public legitimacy as family mediators. Since they had all met the standards of the Society, it seemed relevant to examine the perceptions of Family Roster members' perceptions of their own competence and the factors that led to their confidence, so as to compare them with the qualifications standards of the Family Roster.

The fourteen Family Roster members' answers to this question were surprising in their range and variety, and bore little resemblance to the experience requirements of the Society: Four rostered family mediators said they felt confident from the start of their mediation experience because of their previous extensive experience in family law cases or other relevant experience.(RM2, RM5, RM8, RM9) Two mediators said they felt confident in their competence after 5 cases (RM4, RM), two after 10 cases (RM8, RM12), and one after 20 cases.(RM10) Four indicated the salient factor was the number of cases.(RM4, RM6, RM11, RM13) Two said it was a combination of advanced training and the number of cases.(RM4, RM7) One said the salient factor was a combination of the number of hours in mediation and the number of cases (predictably, longer more complex cases provided more experience than short single-issue cases).(RM4) One said it was a combination of numbers of cases and years in mediation (3 years, but this respondent did not say how many cases in that time period).(RM13) One Family Roster mediator indicated that mentoring was helpful, (RM11) and feels more confident when "mediating regularly, so I have a chance to use and re-use skills."(RM11) Three Family Roster members attributed confidence at least in part to success in passing the FMC evaluation process, (RM10) or the assessment process of the Justice Institute of BC, (RM1) or unspecified "certification processes,"(RM8) all of which required considerable training.

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<sup>19</sup> A mediator can become certified by Family Mediation Canada with as little experience as a 30 hour supervised practicum in family mediation. See <http://www.fmc.ca/pdf/standardsweb2003.pdf>

### **4.3.3 Qualifications standards of FMC**

This section considers several barriers perceived by mediators regarding the FMC certification process.

#### **4.3.3.1 FMC training requirements**

The FMC training requirements present significant barriers as do the Family Roster criteria. Three of the eight lawyer-mediators interviewed had at least 40 hours of mediation training, one had more than 80 hours of mediation training, two had more than 175 hours of training, and two had considerably more than 200 hours of training. All three non-lawyer mediators interviewed had much more than 200 hours of training. The training requirements of the Family Roster (and FMC) pose barriers particularly to lawyer-mediators who are highly experienced in handling family law disputes as counsel but who have little more than the 40 hours of training required by the Law Society of BC.

The training requirements in family dynamics and abuse met slightly less resistance, even though only four of the mediators had more than three days of training in this subject. Three had received 7-10 hours of training, and four had received 1- 4 hours. Only two lawyer mediators expressed resistance to this type of training. One said “In my middle class practice with counsel in the background to assess and only moderate power issues, it has not been relevant.”(M5) The other said “I wouldn’t want to run out and do it [even though] it’s politically correct.”(M8) The latter lawyer-mediator had no formal education in issues relating to family violence other than individual lectures but had been exposed to the issues through involvement in a women’s transition house. This lawyer-mediator (M8) tied this resistance to an overall resistance to any “credentialing body” other than the Law Society of BC, which this individual sees as the only relevant and appropriate credentialing body for lawyers.

It has been noted that several mediators including Family Roster members and non-rostered family mediators said that advanced training was the significant factor in their sense of confidence in their competence as mediators (see section 4.3.2.4). Two commented particularly on the value of knowledge and skills evaluation they had experienced either through the JIBC or FMC assessment processes. There are 64 FMC members in BC who are “Certified Family Relations Mediators,” seven of whom are members of the Family Roster. The majority of the FMC certified mediators are BC Family Justice Counsellors (FJC) because of the BC government requirement that they become certified by FMC. No FJCs are members of the Family Roster.

#### **4.3.3.2 FMC assessment process**

Five of the 11 non-rostered family mediators interviewed expressed no concern about the assessment requirements of FMC. (M1, M6, M7, M11) Six found it unattractive for reasons including the time and trouble it would take (M2, M4, M9, M10) and the “threatening” prospect of the evaluation process.(M2, M4, M5) Some of these mediators used the terms “extremely

unattractive,”(M4) “onerous”(M9) or “cumbersome”(M4) when referring to FMC assessment methods. Some found the role-play video assessment to be more of a barrier, and some found the 4-hour final examination to be more of a barrier, and some found both to be a barrier. Some questioned the value of a mock role-play as a test of competence (M2, M3) while one mediator believed role-play testing was a better indicator of skill than observing a real mediation “because the [FMC] role-plays are crafted to show a number of important dynamics.”(M7) Three saw the FMC assessment process as a deterrent to them, but also saw it as potentially useful and not unreasonable.(M4, M5, M10) One lawyer-mediator was “opposed to it – I do not accept FMC as my governing body.”(M8) Only one of the mediators interviewed was certified by FMC.( M7)

#### **4.3.3.3 Cost and time of FMC certification process**

The cost of the Family Roster was not mentioned as a deterrent to membership except in the context of several people’s mentioning that they wanted to limit their certifications and memberships to those that provided some cost-benefit (see section 4.3.1, 4.3.4.3, and 4.3.4.4). While the FMC application fee (\$50) and ongoing maintenance fee (\$100) were considered reasonable, seven mediators found the assessment fee of an additional \$650 to be unattractive and a deterrent.( M1, M3, M4, M5, M8, M9, M10) There was a clear difference between lawyers and non-lawyers in this regard; non-lawyers tended to see this cost as being in line with fees associated with other “professional qualifications.”(M6, M7, M11) Lawyers already pay considerable fees and insurance costs, and do not view FMC or the BC Mediator Roster Society as their “professional body.”

The time taken for the multi-stage FMC assessment process was also a deterrent to four lawyer mediators in various regions of the Province.(M2, M3, M4, M9) For some the deterrent was directly related to the perception that it did not seem likely that the FMC certification process would be worthwhile in terms of time and money expended compared to the likelihood of work.(M3, M9, M10, M11) No specific questions were asked concerning barriers in the length of time for the application process of the BC Mediator Roster Society; however, a number of mediators expressed their satisfaction with the Society’s administration and said it seemed to be “well run.”

#### **4.3.3.4 Multiplicity of credentialing organizations**

One lawyer mediator said “I looked at the number of organizations I was a part of and asked, ‘do I need one more?’ I’ve got enough.”(M5) Another lawyer mediator said “My governing body is the Law Society, and no one else should be credentialing me.”(M8)

#### **4.3.3.5 Credibility of FMC certification.**

A few mediators thought FMC was credible because they had known the organization for a long time (M7, M11) or they had heard a presentation on the FMC qualifications standards.(M10) Five considered FMC had low credibility, it was “irrelevant” to their own interests, (M2, M8) meant nothing, (M3) was for non-lawyers and not relevant to lawyers, (M5) or they had never

heard of it.(M9)

#### **4.3.3.6 FMC certification for Family Justice Counsellors in BC**

Family Justice Counsellors (FJC) in BC's public service are all certified as family relations mediators by FMC. The BC Ministry of Attorney General operates a network of community-based Family Justice Centres across the Province to provide services to British Columbians going through separation or divorce. Centres are staffed by FJCs to assist with child custody, guardianship, access and support issues. They assist with matters only within the jurisdiction of the Provincial Court, so they do not work on issues relating to division of family property. FJCs spend about 80% to 90% of their time doing work associated with dispute resolution. Following mandated screening for violence with each person, there are four main types of services provided by FJCs: settlement readiness counselling, mediation, conciliation (shuttle mediation) and a combination of mediation and conciliation. Mediation, conciliation or a combination of both services are provided to slightly more than half of the cases seen by FJCs, with settlement readiness services provided to the remainder which may return to FJCs for mediation or conciliation at a later date. Currently, the demand for FJC services exceeds resourced capacity in most locations in the Province. Therefore, FJCs give priority to those who meet financial eligibility requirements similar to those of LSS.

In addition to the requirement that all newly-hired FJCs either have, or acquire within 6 months, FMC family relations mediator certification, all FJCs are given additional in-house training in screening for family violence and assessing suitability for mediation. There are no plans to change this requirement. The FMC certification program is viewed as cost effective as well as a very important foundation for quality assurance. There is no shortage of applicants in most areas of the Province with the basic mandatory qualifications to apply for an FJC position (80 hours of conflict resolution training plus courses in family justice and family violence and the impact of separation and divorce.) Preferred qualifications for applicants include FMC certification, and a number of applicants already have the preferred qualifications. FJCs also receive considerable in-house training, including training in issues relating to family violence, and their work is supervised on site by FMC-certified persons. FJCs are required to participate in professional development each year to meet at least the minimum standards required to maintain FMC certification. There are about 80 FJCs in 29 centres in British Columbia with itinerant services provided to approximately 10 additional communities. No information was obtained concerning the average number of cases of FJCs for settlement readiness, mediation, conciliation, or the number of hours of a typical mediation case (including settlement readiness and mediation/conciliation parts of the process).

No information was received concerning credibility of FJCs with clients or referrers, except for suggestions of two referrers interviewed that they referred individuals to FJCs when those individuals could not afford a lawyer or a private mediator and that the availability of FJC services was limited. Further research (or discovery of any existing research) might be required

to test the credibility of FJCs with lawyers and FJC clients. Also, if privatization of the services provided by FJCs were ever contemplated, the question of qualifications and monitoring of equivalent replacement family services would become very important for public safety reasons.

#### **4.3.4 Qualifications standards of the Society**

Mediators with extensive experience are not required to go through the assessment process of FMC. Instead they can apply to the Family Roster based on training and extensive experience.

##### **4.3.4.1 Society training requirements**

In the interviews with family mediators, concerns expressed about the Society's training were similar to the concerns about FMC training requirements. The training requirements are seen as a barrier only for lawyer mediators with approximately 40 hours of training according to the requirements of the Law Society of BC. (See section 4.3.3.1.)

##### **4.3.4.2 Society experience requirements**

As discussed in paragraph 4.3.2, lack of mediation experience is one of the most important barriers for admission to the Family Roster. Several policy options in Section 5 address this barrier.

##### **4.3.4.3 Credibility of the Family Roster<sup>20</sup>**

All those interviewed said they perceived the members of the Family Roster to be credible (usually qualifying their response by saying that those whose names they recognized were credible). All the non-rostered mediators interviewed said the criteria were clear and understandable, but several said they did not have a detailed understanding of the Family Roster criteria.(M2, M3, M6, M8, M9, M10) Two had misunderstood the criteria in one way or another.(M2, M10) One had never heard of the Family Roster.(M9) Four people said they had good knowledge of the Family Roster and its requirements.(M1, M4, M7, M11)

Several indicated that membership on Family Roster is not relevant to their reputation as a family mediator.(M6, M7, M8, M10, M11) Local reputation is more important.(M10) Nevertheless, the BC Mediator Roster Society is considered credible as an organization.

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<sup>20</sup> Readers may note that the cost and application process of the Family Roster are not discussed in this section. This is because these factors had not previously been identified as particular barriers during the design phase of the research. Therefore, in the interests of time in already lengthy interviews, questions in this regard were omitted. Similar questions about the Family Mediation Canada application process had already elicited that the FMC application and annual maintenance fees and forms in themselves posed no significant barrier to applicants. The FMC assessment fee of \$650 is the only FMC fee that appears to pose any significant barrier. No concerns were raised about the administrative operation of the Civil or Family Roster; in fact several people surveyed gave unsolicited praise to the Society's administration. See sections 4.3.4.3 and 4.3.4.4 for criticisms of Society directions.

With few exceptions, the non-rostered mediators interviewed said the association of the Roster with government adds credibility to the Roster and the association is viewed positively.(M1, M4, M5, M6, M9, M10, M11) However, two people expressed strongly negative comments about the government's association with the Society. One mediator said "I'm uncomfortable with government controlling things that should be done by voluntary associations."(M7) Another said: "The government and the Roster seem too incestuous – it seems like a hoop to getting government work."(M8) Referrers were also generally favourable about the association of government with the Family Roster, although one referrer also expressed the negative view that ". . . when the government steps in and tells people what to do, we've got a problem. I'm a libertarian. Give people a choice. The more intelligent choice [people have] the better the justice."(60)

#### **4.3.4.4 Networking opportunities**

Networking opportunities through membership on the Family Roster are seen as positive by some and not relevant by others. Several non-roster mediators mentioned the day-long educational event. Some mentioned it positively even though they lived in a region that was too far away to make it accessible to them. Several people interviewed were not members of the Family Roster but are members of the Civil Roster and appreciate the efforts of the BC Mediator Roster Society to offer opportunities such as this one as well as social events. Their networking needs are satisfied through their membership on the Civil Roster. One non-rostered mediator said that the Society should not be involved in networking or training functions; this is the province of voluntary organizations.

Networking and events do not appear to be major factors in people's decisions to join the Family Roster; rather it is the likelihood of work, either directly or indirectly through enhancement of reputation. Currently the Family Roster appears to offer neither.

#### **4.3.4.5 Are the admission criteria for the Family Roster reasonable?**

The criteria for admission to the Family Roster are considered credible and reasonable by six of the 11 non-rostered mediators interviewed.(M2, M3, M5, M6, M10, M11) Several find the qualifications to be set too high to allow accessibility (M1, M4, M8, M9) either because of the training requirement (M1) or the experience requirement (M8) or both. One mediator has mixed feelings about the idea of reducing the qualifications to allow more entry (M4) and one feels that it is essential that high standards be maintained.(M7)

## 5 POLICY OPTIONS

The BC Mediator Roster Society requested suggestions for policy options to address the goal of a publicly credible and accessible province-wide roster of family mediators. Policy options are outlined in two broad categories:

- Decreasing barriers to the Family Roster by modifying admission standards (section 5.2);
- Working to increasing opportunities for mediators to gain family mediation experience, including creation of incentives for parties and lawyer to use mediation processes for early resolution of family disputes (section 5.3).

### 5.1 Historical and current trends in qualifications standards

It is important first to outline the development of qualifications standards for the Family Roster. The creation of family mediator qualifications standards was originally guided by the extensive work of Family Mediation Canada which developed its qualifications standards for family mediators using performance-based criteria recommended by the widely acclaimed recommendation reports on qualifications of the Society of Professionals in Dispute Resolution (SPIDR), now named the Association for Conflict Resolution (ACR) in the 1980s and 1990s.<sup>21</sup> The idea of performance-based standards has been promoted by people in the field of dispute resolution for more than a decade, often by those who would like to see the field of mediation professionalized. The FMC standards are recognized by proponents of performance-based standards as both credible and accessible (compared to getting degrees or certificates as required for many other occupations).

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<sup>21</sup> See, in particular Peggy English, and Linda Neilson, with Wendy Hacking. *National Certification Implementation Pilot Project 1997-1999*. Report of Family Mediation Canada in partnership with the Ministry of the Attorney General of British Columbia prepared for Department of Justice. Kitchener, ON: Family Mediation Canada, 1999; The compendious volume of consultation and research of FMC was based on thinking developed in the late 1980s and early 1990s by the Society of Professionals in Dispute Resolution (SPIDR) reported in *Qualifying Neutrals: The Basic Principles: Report of the SPIDR Commission on Qualifications*. Washington, DC: National Institute for Dispute Resolution, 1989; Society of Professionals in Dispute Resolution (SPIDR). *Ensuring Competence and Quality in Dispute Resolution Practice: Report No. 2 of the SPIDR Commission on Qualifications, April 1995*. Washington, DC: Society of Professionals in Dispute Resolution, 1995. Influential on this work was the work of Chris Honeyman and others in the Test Design Project. *Interim Guidelines for Selecting Mediators*. Washington DC: National Institute for Dispute Resolution, 1993; Honeyman, Christopher, Kathleen Miezio, and William C. Houlihan. *In the Mind's Eye? Consistency and Variation in Evaluating Mediators*. Cambridge, Massachusetts: Program on Negotiation at Harvard Law School, 1990; Honeyman, Christopher. "On Evaluating Mediators." *Negotiation Journal* 6 (January 1990): 23-36. For an outline of the process recommended by SPIDR and used (in part) by FMC in its consultation process for its qualifications standards, see Catherine Morris, and Connie Edwards. "Competence and the Role of Standards for Mediators." In *Alternative Dispute Resolution Practice Manual*, edited by Allan J. Stitt, 8591-8699. North York, ON: CCH Canadian Limited, 2002.

In establishing the qualifications of the Family Roster, the BC Mediator Roster Society followed the lead of Family Mediation Canada and kept to the basic principles of SPIDR (now ACR).

Those principles are:

- qualifications should be based on skills and performance, rather than university degrees or professional affiliations;
- standards should not create inappropriate obstacles to those wishing to enter the field, nor should they restrict the development of dispute resolution skills in any sector of society;
- since the field is diverse, no single entity should establish standards;
- standards are more vital where dispute resolution processes are mandatory, or parties lack control over selection of processes or third-parties. However, the more choices parties have over process and intervener, the more the marketplace should prevail.<sup>22</sup>

While these principles have been widely acknowledged in both the United States and Canada, they have rarely been put into practice for several reasons:

- difficulties within the field of defining the required knowledge and skills for mediation;<sup>23</sup>
- concerns by practitioners about exposing themselves to judgements of others about their competency and skills;<sup>24</sup>

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<sup>22</sup> SPIDR, 1989, 1995.

<sup>23</sup> There has been vigorous, even acrimonious, debate within the field of mediation concerning which style of mediation is to be favoured (“facilitative,” “evaluative” or “transformative”). This debate has practical ramifications for knowledge and skills evaluation, as can be seen by the discussion in this report about referrers’ preferences concerning styles (and related skills) of family mediators. Robert A. Baruch Bush. “One Size Does Not Fit All: A Pluralistic Approach to Mediator Performance Testing and Quality Assurance.” *Ohio State Journal on Dispute Resolution* 19(3)(2004): 1-40 points out that a fundamental premise of many attempts to create the qualifications standards is a faulty assumption that regardless of style, all competent mediation shares some fundamental core characteristics. In fact, this supposed common “core” has been exceedingly difficult to ascertain in a number of research efforts. Bush points out that most of qualifications standards (including those outlined by SPIDR, 1989 and reiterated by SPIDR in 1995) have been based on concepts of interest-based negotiation. According to Bush’s analysis, the FMC standards and testing favour a facilitative model of mediation. He says that FMC’s testing process “without question, represents a serious effort to incorporate measures of competency in both transformative and facilitative mediation” but, “on closer examination a pattern emerges in which transformative behavior often indicate low skills, while strong skills involve many more facilitative than transformative behaviors.” (Bush, 2004, at 25-32). There may be very good reason for the concerns of “evaluative” mediators about the FMC or other performance-based standards and testing processes (see note below). Bush believes that a more pluralistic approach is necessary but does not shy away from performance testing; rather, he proposes “multiple tests for multiple models.” (Bush, 2004, 36)

<sup>24</sup> Bush, 2004, 3. This concern was also noted in previous consultations of the BC Mediator Roster Society with family mediators in British Columbia. See British Columbia Mediator Roster Society. “The Family Roster Dialogues (2001): Participant Comments.” (undated), in which participants are recorded as stating “There is a fear of evaluation; not enough is known about the [Family Mediation Canada] FMC assessment process; applicants may not trust the process or the assessors...” There was also concern about bias of FMC evaluators. Participants are recorded

- cost of implementation of performance-based standards.<sup>25</sup>

A number of dispute resolution organizations have espoused the principle of performance-based standards. Most have moved away from insistence on particular kinds of degrees or professional qualifications, and many have adopted or are considering standards based on some combination of hours of training, experience, references, testing; and/or role-play assessments. FMC is one of the few organizations that has implemented performance-based standards through knowledge and skills testing. However, FMC has attracted relatively few people to its certification process. In fact, family mediation has not “taken off” in Canada. Most of the FMC-certified mediators in BC are Family Justice Counsellors who are required to seek FMC certification by their employer.

The BC Mediator Roster Society attempted to move in the direction of the FMC standards; however, there was resistance to the performance-based testing of FMC by a number of mediators in BC (both lawyer-mediators and people from other occupations, such as social work). This resistance led the Society to reconsider its exclusive adherence to the FMC standards. This was not done by abandoning the FMC standards, but by allowing mediators to enter the Family Roster through an alternative path based on training, experience and reference requirements, but without testing of knowledge or performance. While training and the experience-based qualifications have resulted in some mediators with extensive training and experience becoming members, the Family Roster still remains unsatisfactorily low in numbers. The departure from the FMC standards has also created concern among those who remain committed to performance-based qualifications standards.

Interestingly, the BC Roster of Child Protection Mediators<sup>26</sup> has moved toward a form of testing of knowledge, attitudes and knowledge of skills, but with no skills observation or performance testing. The Child Protection Roster has adopted qualifications standards based on the following:

- training, experience (ten mediation cases of any type) and reference requirements identical to those of the BC Mediator Roster (Civil);
- a written test based on child protection legislation;
- a 45-minute interview aimed at testing understanding of the role of the staff of Ministry

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as commenting: “I have concerns whether FMC... has a particular mediation approach which they feel is the ‘right’ one...” and “FMC would not pass a highly evaluative mediator...” and “I am concerned about being assessed by someone unknown, who comes from a different background and uses a different mediation model. FMC uses a non-interventionist model, coming from social work. Most lawyers use a different, more evaluative model...”

<sup>25</sup> Bush, 2004, at 3, citing Linda C. Neilson, and Peggy English. “The Role of Interest-Based Facilitation in Designing Accreditation Standards: The Canadian Experience.” *Mediation Quarterly* 18 (2001): 221.

<sup>26</sup> Please see the site of the BC Mediator Roster Society at <http://www.mediator-roster.bc.ca/select-cp.cfm>. See the qualifications standards for the Child Protection Roster on the website of the Ministry of the Attorney General: <http://www.ag.gov.bc.ca/dro/child-protection/documents/qualifications-selection.pdf>.

- of Children and Family Development;
- a panel of officials from relevant Ministries, plus a senior family mediator, interviews and assesses the candidates.

The Child Protection Roster now has 35 mediators on it from all over the Province. Mediators interviewed for this project, who are on the Child Protection Roster, reported receiving work from the Child Protection Roster. However, it must be noted that policy changes in the Ministry of Children and Family Development provide incentives for mediation of child protection cases.

## **5.2 Decrease barriers to the Family Roster by modifying the admission requirements**

Possible policy options for modifying the qualifications of the Family Roster would be as follows.

### **5.2.1 Leave the Family Roster training and other requirements as is, but calculate experience in a different manner**

The mediators interviewed in this research reported that the time they take in a mediation case may range from 5 to 30 hours depending on the mediator’s practice style and the complexity of cases. Mediation sessions may range from 1.5 hours up to 10 hours each depending on the case and the style of mediation (whether counsel is present or not). Some mediators use day-long sessions when parties, counsel or the mediator must travel to conduct the mediation. The sample was not large enough to do statistical analysis, but a number of non-rostered mediators interviewed (and Roster mediators surveyed) reported that “typical” cases fell into the range of 8 to 12 hours (more or less). The approximately 8 to 12 hours per mediation case often include about 3 hours of separate pre-mediation screening and preparation meetings (1.5 hours for each party).

Thus, this research provides some modest data (which could be further refined through broader surveying) that indicates how the current experience requirements could be changed from a number of mediation cases to a combination of cases and hours without substantially changing the standards. For example, instead of requiring 40 family mediation cases, the qualifications could be amended to require a particular number of hours of mediation over a minimum number of family mediation cases. This could be based on a rough estimate of what may be a “typical” mediation of 8 to 12 hours (or 10 hours as appears to have been estimated by ACR; please see section 5.2.2 below). A mediator who does fewer, but more complex, cases that take more hours would be able to complete the number of hours within fewer mediation cases. The formula could be established to require those who spend a shorter number of hours per case (e.g. 5-10 hours) to do more mediation cases, and it could also recognize those mediators who specialize in complex cases that may take 10-20 hours or up to 30 hours. Such a change could equalize accessibility to the Family Roster for those mediators who conduct counsel-present mediation cases which

generally take 5 to 10 hours, and mediators who conduct primarily party-only mediation cases which in some complex cases tend to take longer.

There is no recommendation that the requirement of recency of mediation experience be changed *per se*. Those with concerns about the requirement that the relevant numbers of family mediation cases must have been performed within five years (the “five year requirement”) were primarily concerned that the current levels of experience were such that only high-volume mediators can meet the five year requirement. The five year requirement cannot be now met by many low-volume mediators (4-5 mediation cases a year or one multi-session case every 10-12 weeks or so) who have a great deal of training, many years of family mediation experience, and who regularly mediate and are considered credible by referrers. The re-calculation of experience would remedy the problem created by the current requirement of 40 family mediation cases together with the five year recency requirement.

### **5.2.2 Adopt the qualifications for Advanced Practitioners of the Association for Conflict Resolution (ACR)**

For comparison purposes, it is useful to look at another policy option adopted by the Association for Conflict Resolution (ACR) for accreditation of family mediators as “Advanced Practitioners.” The qualifications are summarized as follows:

- a minimum of two years of family mediation experience, including 250 hours of face-to-face family mediation with clients and a minimum of 25 cases;
- a minimum of 60 hours of training in family mediation;
- a minimum of four hours of case consultation with an Advanced Practitioner member of ACR.<sup>27</sup>

The ACR Advanced Practitioner qualifications standards are substantially lower than the current standards of the Family Roster. It should also be noted that the “Advanced Practitioner” standards of ACR are not in keeping with the earlier commitment of SPIDR (now ACR) to “performance-based” standards. Detailed literature review to understand the reason for this current trend was not possible because of the emphasis on local interviews desired by the Board of the Society for this project. Interviews with Canadian and American scholars and leaders in US-based practitioner organizations proved not to be possible during the summer period or within the time frame or scope of this project.

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<sup>27</sup> For more information, see the website of the Association for Conflict Resolution at <http://www.acrnet.org/referrals/ap-family.htm>. See the *ACR Advanced Practitioner Workgroup Report*, June, 2003 at <http://www.acrnet.org/about/taskforces/APWorkgroup.htm>

### **5.2.3 Change the qualification process to allow for examination and interviews or other performance based criteria**

This option would move towards the model of FMC or the model of the Child Protection Roster (with adjustments in training and experience requirements appropriate to the family mediation context). The disadvantage of both these models is that they would create a more costly and time consuming process. The Child Protection Roster is screened by government officials and a government appointed examining panel composed of government officials and an externally appointed senior mediator. Also, the option of moving toward the FMC standards or the standards and process of the Child Protection Roster has been considered before, and is likely to be just as unpalatable to mediators as it was before. This is particularly so in the current BC regime of voluntary family mediation where increased family mediation work is unlikely. The option of moving toward the qualifications standards of the Child Protection Roster may attract more applicants, but it has the disadvantage of removing high experience qualifications without replacing them with performance testing. A written examination and an interview, while certainly very valuable for testing particular knowledge and attitudes, is not performance testing.

## **5.3 Increase opportunities for mediation in BC**

### **5.3.1 Work to create more viable practicum opportunities in various regions**

Several people interviewed commented that it is difficult to get mediation experience outside the major urban areas. Several organizations have attempted to address this problem including a Family Mediation Practicum Project.<sup>28</sup> This project provides free mediation services. However, it has been reported that relatively few people have availed themselves of this service despite the fact that it is free and despite severe cutbacks in legal aid in British Columbia.

### **5.3.2 Perception that more mediation could be encouraged through incentives in the legal aid tariff**

One policy maker suggested that the legal aid tariff is based on a litigation model and needs to be amended toward a settlement model. Another policy maker suggested that cost is not as much of a barrier as may be thought, and that free services may not be valued by members of the public.

The Legal Services Society (LSS) tariff currently provides for 3 hours of mediation without prior approval and up to 6 hours of mediation with prior approval. Lawyers are provided with up to three hours of preparation time for mediation. Lawyers are not given funds for attendance at mediation, which is to be conducted by the mediator with parties only. The tariff does not contemplate a counsel-present style of family mediation.

However, mediation may be unsuitable for most current legal aid clients. The LSS family law

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<sup>28</sup> See <http://www.ag.gov.bc.ca/dro/family-mediation/>

tariff currently provides for a maximum of 4,000 family law cases per year; these are limited to cases of family violence and child protection matters. Coverage is for restraining orders only, not trials of related family matters. Mediation of cases involving family violence is not recommended without considerable safeguards in place, including restraining orders when necessary (as they are often are in legal aid cases under the current tariff). Restraining orders require court applications.

It seems unlikely at the present time that incentives in the LSS tariff for mediation would (or should) result in substantially increased family mediation in the Province given the types of cases to which LSS is currently limited. For mediation to be a viable suggestion for legal aid cases, the LSS tariff would need to have capacity to provide service for a more “normal” range of family law disputes.<sup>29</sup> LSS is currently conducting a tariff review, but the scope of the review was not canvassed for this research.<sup>30</sup>

LSS does make referrals to Family Justice Centres in cases that are not covered by the LSS tariff. As a policy option, the Society could build collaborative relationships with LSS and the Family Mediation Practicum Project with a view to exploring viable options to increase the use of family mediation in BC in anticipation of any future changes to the LSS tariff that would make this appropriate.

### **5.3.3 Encourage the Province of BC to extend the Notice to Mediate into the area of family law disputes**

The BC Mediator Roster Society may wish to encourage the government to consider expanding the Notice to Mediate into the family law area. This research explored interviewees’ attitudes towards this option. There is a good deal of support for extending the Notice to Mediate into the family law area but many have mixed views. The Notice to Mediate would give lawyers and parties the “push” they may need to move beyond their entrenchment in a litigation process; however, the following concerns have been noted.

#### **5.3.3.1 How to address the deficiency of mediators in some regions**

Deficiency of mediators in some areas together with the perceived adversarial culture of lawyers

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<sup>29</sup> I am not prepared to suggest any policy option for the BC Mediator Roster Society that would suggest working toward replacement of the right to a court hearing with any form of obligation to use mediation in family law cases.

<sup>30</sup> Note that in 2003 the United Nations Committee on the Elimination of Discrimination against Women expressed concern that Canada was failing to uphold its obligations under the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). The UN Committee singled out BC for specific criticisms including its cuts in funding for legal aid in family law matters. See Shelagh Day and Margot Young, “A Devastating UN Indictment of Canadian Governments: UN Committee Finds that Canada Discriminates against Women,” *CCPA Monitor*, Canadian Centre for Policy Alternatives, May 2003, <http://www.policyalternatives.ca/publications/articles/article374.html>.

(and family disputants) give rise to the concern that the Notice to Mediate could be used in an adversarial manner by the more powerful or financially well off party to stall the process or otherwise abuse the process. To address the valid concern about deficiencies of numbers of qualified mediators in some areas, the roll-out of the Notice to Mediate could be done in several stages beginning with regions where there may now be enough mediators on the Family Roster, such as the Lower Mainland (including Vancouver), Southern Vancouver Island (including Victoria), and the eastern part of central Vancouver Island (including Nanaimo). The BC Mediator Roster Society could offer to work with the provincial government in a plan for a systematic roll-out of the Notice to Mediate through a pilot project starting, for example, in the Okanagan region, where there are several experienced and credible mediators, including some who are members of the Family Roster. A pilot project could provide a fixed date for the expansion of the Notice to Mediate in a given area, together with training of mediators with particular levels of experience plus practicum assistance, similar to what is currently done with Notices to Mediate used in conjunction with Court Mediation Program in some Small Claim Court registries. The pilot project could then be evaluated before expansion into other areas such as Prince George, where there are several experienced mediators. These mediators are viewed as credible by referrers, but they may require additional training including training in family dynamics and family abuse issues to qualify for the Family Roster. Advance planning and consultation in anticipation of roll-out of the Notice to Mediate could be done with regions such as the Kootenays and the North Coast and other areas in the North and the Interior of the Province.

The BC Mediator Roster Society is also equipped to assist with necessary consultations with the Bar, court administrators, judiciary, mediator organizations, women’s groups, etc. The Society could also provide assistance to the government in developing a viable and practical set of exemptions suited to family law cases.

### **5.3.3.2 Notice to Mediate exemption policies for family law disputes**

The Notice to Mediate is a form of mandatory mediation even though it is party-driven. This means considerable care must be taken to screen out parties who cannot safely participate in mediation or whose ability to consent freely and without coercion is compromised. However, a lawyer-mediator with considerable training and experience with clients of family violence shelters pointed out that people experiencing family violence are also vulnerable to significant abuse in the mainstream legal system. Nevertheless, in the event of a Notice to Mediate, there is a well-recognized need for safeguards for vulnerable parties, including “easy out” exemptions where competent screening indicates that mediation is not suitable. More study is needed to establish appropriate exemptions suited to the family dispute context, which is more likely than other types of litigation to include dynamics of power abuse, violence and coercion. Exemption policies must also take into account the increasing number of unrepresented family law parties who cannot afford lawyers, both in urban and rural parts of the Province. It is beyond the scope

of this paper to discuss exemption policies in more depth.<sup>31</sup> In any mandatory mediation scheme, it would become essential that all mediators receiving cases under Notices to Mediate be trained, qualified and obligated to conduct careful screening in each and every case.

### **5.3.4 Public education and communications strategies**

Several policy makers pointed out the importance of working towards reduction of harm to children in family dispute resolution. Broad social change including transformation of the dominant adversarial culture was seen as important. One policy maker pointed out the importance of public education in this process, including education of children, in options for dispute settlement other than adversarial or court-centred approaches. Public education of this type is best integrated with efforts at legislative and policy reform, and needs to be included as part of the allocation of available resources. To date, educational efforts of the BC Mediator Roster Society have emphasized advertising of the Family Roster in various ways as well as some professional development of mediators. The Society might wish to consider refocusing and enhancing its educational efforts to aim at *public* education about non-adversarial approaches for dispute resolution. This type of public education could be done in consultation with communications specialists who can assist with communications strategies that aim at short-term goals of increasing public use of family mediation, as well as longer-term goals of addressing the adversarial culture.

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<sup>31</sup> For discussion of the provisions of several US states, see Alison E. Gerencser. "Family Mediation: Screening For Domestic Abuse." *Florida State University Law Review* Volume 23, No. 1 (Summer 1995), available <http://www.law.fsu.edu/journals/lawreview/issues/231/gerencse.html>. See also Gwynn Davis. *Monitoring Publicly Funded Family Mediation: Summary Report to the Legal Services Commission*. London, UK: Legal Services Commission, December 2000, available [http://www.legalservices.gov.uk/old\\_docs/lsc/pdf/mediation-summary-research-report.pdf](http://www.legalservices.gov.uk/old_docs/lsc/pdf/mediation-summary-research-report.pdf)

## 6 CONCLUSIONS

In summary, there are several barriers to the Family Roster. Some of them are valuable barriers, like the insistence on training, appropriate experience and credibility as a mediator (through FMC assessment<sup>32</sup> or references with the option of reference checking or applicant interviews, as allowed in the current criteria of the BC Mediator Roster Society). However, a conclusion to be drawn from this research is that the experience requirements of the Family Roster qualifications standards cannot be rationalized as they currently stand. The experience requirements are viewed as confusing and unjust by a number of mediators. Confusion results not from lack of clarity of the criteria as drafted and promulgated, but from lack of a rational basis for calculating the sufficiency of experience of a family mediator. Injustice results from the fact that there is a wide range in the number of hours of work involved in one family mediation – with counsel-presentation mediations taking a shorter time and counsel-absent mediation cases taking longer.

This research assists by providing some information (which may need to be verified with a further survey) concerning the range of hours spent by a mediator in a “typical” mediation of a separation or divorce case. The information may assist in rationalizing the experience qualifications as suggested in section 5.2.1 of this report.

Whether the qualifications should be substantively changed is a matter for the Society to consider and decide. Before doing so, the Society may wish to consider that this research suggests that it may not be so much the qualifications standards that are the main barrier to Roster membership as the lack of opportunities to conduct family mediation cases, and a lack of reason or incentives to join the Family Roster. To address this problem, the Society could consider consulting with the Dispute Resolution Office (DRO) concerning the Society’s possible role in working with the DRO to develop viable incentives for mediation and other settlement processes that provide accessible, safe and viable options for family dispute resolution. This research confirms without doubt that mediators, lawyers, members of the judiciary and policy makers all recognize the need for accessible processes and support systems to assist parents to act in the best interest of children. As one policy maker pointed out, parties in family disputes need systems and processes such as counselling, education and dispute settlement options (including mediation) that support parents and help them understand that “they are in a life-long relationship as parents whether they like it or not.”

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<sup>32</sup> No conclusions are drawn here as to whether the FMC criteria require sufficient experience to ensure credibility. A 30-hour experience requirement means that FMC-certified mediators can become members of the Family Roster after having conducted only about 3 to 5 family mediation cases.

## Appendix A: Survey Format for referrers<sup>33</sup>

**Referrer:**

**Name/contact** \_\_\_\_\_ **Date** \_\_\_\_\_

- I am doing some research for the BC Mediator Roster Society to assess some aspects of their current criteria for admission to the Family Roster. I am calling several family lawyers in the Province to ask them about who the family mediators are who are frequently used and considered credible so that I can follow up and interview those family mediators.**
- May I speak with you for about 5 or 6 minutes? The time it will take will depend on how much you would like to say.**
- Confidentiality – remarks will not be attributed and any identifying remarks summarized in ways that will conceal identity.**

### **Questionnaire on identification of mediators**

- Who are the family mediators you use or think are credible?
- If the government extended the Notice to Mediate, what mediators would you want to see on a list of possible appointees (chosen from members of the Family Roster)
- What other family lawyers should I speak to in this locality or other localities in the Province that are relevant to you?
- (if time – a couple of minutes to tell me what is important to you when you are selecting a family mediator)*
- (if time– what is your view about the idea of extending the Notice to Mediate into the area of family law)*

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<sup>33</sup> Please note that this survey form was created not for publication, but for use by me as a rough interview guide. It is reproduced here to provide fuller information on research methodology.

## Appendix B: Survey Format for Family Mediators<sup>34</sup>

### FAMILY MEDIATORS:

Name/phone \_\_\_\_\_ Date \_\_\_\_\_

- I am doing some research for the BC Mediator Roster Society to assess some aspects of its current criteria for admission to the Family Roster. I am calling several family mediators around the Province to ask them their views about the criteria for admission to the Family Roster.
- I am hoping that you might be willing to set up a time for me to speak with you for about 30 minutes or so. The time it will take depends on how much you would like to say.
- Confidentiality – remarks will not be attributed and any identifying remarks summarized in ways that will conceal identity.
- Could I ask you a few questions about your training and experience as a family mediator?
  - 1. Training
    - a. approximately how many days or hours? \_\_\_\_\_ when? \_\_\_\_\_  
\_\_\_\_\_
    - b. what topics/days/hours? \_\_\_\_\_  
\_\_\_\_\_
    - c. training in family dynamics/power imbalance/abuse \_\_\_\_\_ hours \_\_\_\_\_
  - 2. Experience
    - a. profession/occupation \_\_\_\_\_. When called/began \_\_\_\_\_ when began family law  
\_\_\_\_\_
    - b. when first began mediating? \_\_\_\_\_ family mediation? \_\_\_\_\_  
\_\_\_\_\_
    - c. what types of family mediation do you do?  
\_\_\_\_\_
    - d. how long does an average family med take? \_\_\_\_\_ hrs? \_\_\_\_\_ sessions? \_\_\_\_\_  
\_\_\_\_\_
    - e. how long an average family mediation session? \_\_\_\_\_  
\_\_\_\_\_
    - f. how many mediations in the past six months? \_\_\_\_\_ family mediation cases? \_\_\_\_\_  
\_\_\_\_\_
    - g. how many a year on average? \_\_\_\_\_ family mediation cases?  
\_\_\_\_\_  
\_\_\_\_\_

<sup>34</sup> Please note that this survey form was created not for publication, but for use by me as a rough interview guide. It is reproduced here to provide fuller information on research methodology.

We are hoping to assess the current criteria to examine its balance between ensuring competence and accessibility to mediators who have been identified as credible by referrers.

- 3. Have you contemplated joining the Family Roster? (Seek comment)
  
- 4. How relevant are the following factors in terms of accessibility/attractiveness of the Family Roster to you?
  - a. FMC
    - I. training: 100 or 150 (comp) plus 80 including 21 of family dynamics/abuse
  
    - ii. time (“a few months, if all submissions complete and made in a timely manner, or up to one year”)
  
    - iii. cost (application \$50, “tuition fee” \$650 and annual maintenance \$100)
  
    - iv. application including lists of trainers and courses in detail
  
    - v. testing (role-play video)
  
    - vi. final exam (family violence – screening tool, what they do; emotional impacts of divorce/separation; ethics; knowledge of relevant civil and criminal remedies and resources; uses case studies to test)
  
    - vii. credibility of FMC (and credibility of membership in FMC as a certified mediator)
  
  - b. Roster criteria<sup>35</sup>
    - I. training: 100, and 80 including 24 family dynamics and abuse (availability of training? cost of training?)
  
    - ii. experience - 50, (40 “family”<sup>36</sup>), 30 in past five years must have been concerned with family reorganization after separation/divorce including parent or financial support and property issues connected to separation/divorce.
  
    - iii. interpretation of “family” mediation (and the requirement of 30 being specifically family reorganization)

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<sup>35</sup> Note that the cost and application process of the Family Roster were not been identified as a possible barrier in the design phase of the research, so in the interests of time in interviewing, no questions were posed about the Roster’s application process.

<sup>36</sup> Reorganization of the family after separation or divorce; parenting; financial support and property matters connected to separation or divorce; child protection; family business; family property or finances; family inheritance and estates; responsibility for care of elderly parents; adoption; pre-nuptial issues; intra-family conflicts.

iv. interpretation of “one mediation”

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v. how clear (understandable) are the criteria? \_\_\_\_\_

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vi. time frame (5 years for 30 family)

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vii. association with government (Notice to Mediate, Society with DRO members on board, DRO as secretariat, government funding,)

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viii. how much knowledge do you have about the Family Roster?

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ix. possibility of work

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x. credibility/meaning of membership on the Family Roster

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xi. networking and associations

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5. How reasonable/credible do you think the Family Roster is in terms of its criteria for membership?

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6. How credible do you think the persons are who are listed on the Family Roster? Why, why not?

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7. Government/court: Notice to Mediate extended to family law – what is your view about this idea?

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8. Anything else you would like to say or comment on, or that you suggest I might ask you?

## Appendix C: Email survey of Family Roster members

Dear [name],

I am doing some research for the BC Mediator Roster Society to assess some aspects of its current criteria for admission to the Family Roster. I am contacting a number of family mediators around the Province to ask them their views about the criteria for admission to the Family Roster. I am interviewing those who are not currently on the Family Roster, but I find that I would like to have some input on certain issues from selected mediators who are already on the Family Roster.

I wonder if you would be so kind as to reply to this message by Tuesday, August 31, 2004 by jotting down some brief notes in response to each of the following questions. I will be keeping all information confidential -- In my report I will not be attributing comments to you, and I will summarize any remarks that might tend to identify you. Feel free to telephone me if you'd prefer -- and of course I will understand if you prefer not to complete this survey or if you have no time. If you prefer to fax, you can send to Victoria 250-477-0152.

Many thanks!

Regards,  
Catherine Morris

THE QUESTIONNAIRE (reply by filling in anywhere you like)

1. What is your primary occupational identity? (e.g. lawyer, social worker, therapist, accountant, mediator). When did you begin this occupation? (e.g. if you are a lawyer, when were you called to the bar?)
2. When did you begin conducting MEDIATION cases? \_\_\_\_\_ When did you begin conducting FAMILY MEDIATION cases? \_\_\_\_\_
3. What types of family mediation cases do you do? (family reorganization after separation/divorce -- parenting; family reorganization after separation/divorce -- property division; child protection; family business/property/finance; wills/estates; responsibility for care of elderly parents; adoption; prenuptial; intrafamily conflicts; other) Can you give a rough estimate of what percentage each of these represents in your mediation case load?
4. How long do you find an "average" family mediation case takes? How many hours? How many sessions? How long is an average family mediation session?
5. How many MEDIATION CASES have you conducted in the past six months? How many FAMILY MEDIATION CASES? (this does not have to be exact! I'd like the number of cases rather than the number of sessions, which I can roughly calculate from your previous answers.)
6. How many MEDIATION CASES do you conduct per year on average? How many FAMILY MEDIATION CASES per year?

7. How many family mediation cases did you conduct before you felt confident in your competence? In thinking about this answer, I'd be interested in your comments on whether the salient factor in your confidence was the number of years mediating, the number of cases or the number of hours in mediation or a particular combination.

8. When you are making a referral a family mediator, what are the criteria you use? Say as much or as little as you like.

Please do feel free to phone me if you'd like the rationale behind these questions. Also, do feel free to add your comments on anything you'd like to say about the criteria or policies of the Roster Society concerning the Family Roster-- for reference, see <http://www.mediator-roster.bc.ca/becoming.html#ADMISSION%20TO%20THE%20FAMILY%20ROSTER>