

# CANADIAN CENTRE FOR ELDER LAW (CCEL) – ELDER AND GUARDIANSHIP MEDIATION PROJECT

EMMA J BUTT

## I BACKGROUND AND PROJECT OVERVIEW

The Canadian Centre for Elder Law ('CCEL') recently completed a legal research project, funded by the Law Foundation of British Columbia, relating to elder and guardianship mediation. The report of the Elder and Guardianship Mediation Project (the 'report') was published in January 2012 and includes a number of materials in support of elder and guardianship mediation in British Columbia ('BC').

Canada's older population is growing at an unprecedented rate. In recognition of this growth, Canadian governments at all levels have been responding by introducing and supporting the development of programs, policies and legislation aimed at addressing the needs of Canada's older population. One example is the Federal Elder Abuse Initiative, a national elder abuse awareness campaign launched in 2009, entitled 'Elder Abuse – It's Time to Face the Reality'.<sup>1</sup> As a part of this initiative, the federal government launched a nation-wide advertising campaign involving a series of television, Internet and magazine advertisements aimed at raising the general level of understanding and awareness of elder abuse and its many forms.<sup>2</sup>

Over the last decade, there has also been a noticeable trend within a wide range of professional and service provider communities across Canada towards the development of practices and services targeted at best meeting the needs and demands of older clients. The birth of 'elder law' and 'elder mediation' is a part of this trend.

The evolution of legal and mediation practices focused on matters and disputes arising in the context of ageing has led to the development of specialized practice areas referred to as 'elder law' and 'elder mediation' – elder mediation may also include mediation of adult guardianship matters involving older adults. Recent legislation and private practice experience in Canada indicates that elder and guardianship mediation are important and positive new areas of legal expansion in Canada generally, and in British Columbia ('BC') in particular.

As elder and guardianship mediation are developing and continuing to expand, there is a critical need for comprehensive research and analysis relating to a number of challenging issues and questions raised by these emerging practices, as well as guidance for practitioners working in these dynamic new areas.

The Elder and Guardianship Mediation Project creates the first comprehensive report on elder and guardianship mediation in BC and Canada. The report includes an annotated bibliography, a comparative table of adult guardianship mediation program frameworks in Canada and the

---

<sup>1</sup> Government of Canada, Federal Elder Abuse Initiative, 'Elder Abuse – It's Time to Face the Reality', Seniors Canada <<http://www.seniors.gc.ca/eng/pie/ea/signs/index.shtml>>.

<sup>2</sup> Public Health Agency of Canada, *Federal Elder Abuse Initiative* (July 2009) Public Health Agency of Canada <<http://www.phac-aspc.gc.ca/ncfv-cnivf/EB/eb-Jul-2009-eng.php#article>>.

United States ('US'), a summary of the feedback and recommendations from experts and stakeholders consulted during the course of the project, and survey results. The report presents recommendations for best practice in Canada in elder and guardianship mediation related to mediation models and styles, training and practice standards for elder and guardianship mediators, and ethical standards in elder and guardianship mediation. The report also presents a distinct set of recommendations related to the design and development of a court-connected adult guardianship mediation program in BC in response to the mandatory mediation provisions set out in recent BC legislation. Ultimately, the aim of the project is to develop informational resources to assist those engaged in the fields of elder law and elder and guardianship mediation.

## II WHAT IS THE EGM PROJECT ABOUT?

The EGM Project examines the nexus between elder law, mediation and adult guardianship. The report brings together research on ageing and the law, with particular consideration of certain legal and other issues that commonly arise in the context of ageing, which may have a significant impact on older adults. The report considers how the legal and mediation communities and legal and mediation practices are responding and evolving to address these legal issues and other concerns of older clients. Perhaps most importantly, this report identifies and provides a discussion of some of the unique challenges and concerns that arise in the context of these expanding practice areas.

The report is comparative in its approach. It examines the development of elder law, elder mediation and adult guardianship mediation practices in BC, Canada, and in the US with the goal of providing recommendations for best practice in elder and guardianship mediation and for a court-connected mandatory mediation program in BC. The report considers different mediation models and styles and comments on best practices as identified by experienced service providers. As well, the report identifies and analyzes the practical and ethical issues that confront mediators handling cases involving older persons with diminished mental capacity with a view to formulating best practices. Further, the report considers and presents recommendations related to training and practice standards for elder and guardianship mediators, including core competencies. Finally, the report compares the experience with voluntary and mandatory mediation of ageing-related and guardianship matters in Canada and selected US jurisdictions where court-connected guardianship mediation programs exist and presents recommendations for a court-connected guardianship program in BC. Although elder mediation is in its pioneer phase, much can be learned from the explorations of other jurisdictions.

The focus of the report is BC. However, this report compares elder and guardianship mediation practices, programs and processes in BC with other Canadian jurisdictions and the US in order to inform our recommendations for best practice, legislation and court-based programs in these areas generally. Accordingly, we anticipate that the report's recommendations will be broadly applicable to elder and guardianship mediation outside BC. Further, while the goal of the report is to provide some guidance to the rapidly developing field of elder and guardianship mediation, aspects of this report will apply to elder law and elder mediation more broadly.

## III WHY IS THIS REPORT NEEDED?

## *A Demographics/Ageing Population*

The world population is ageing at an unprecedented rate. With the ageing of the Baby Boomer generation (born 1946-1965), the Canadian experience suggests that population ageing will notably accelerate in the next 30 years.<sup>3</sup>

The total number of seniors (adults aged 65 and over) in Canada is estimated to increase from 4.7 million in 2009 to 9.9 million by 2036 and 11.9 million by 2061.<sup>4</sup> The demographic population share of seniors is projected to increase from a 14% in 2009 to between 24% and 28% in 2061.<sup>5</sup>

Seniors are rapidly outnumbering children. The number of people who are over 65 years old is steadily accelerating, while the number of children under 14 years old is steadily decreasing.<sup>6</sup> Statistics Canada has predicted that there will be proportionally more seniors than children, between 2015 and 2021.<sup>7</sup> It is also predicted that there will be 39 seniors (compared with 26 children) per 100 working-age people, by 2036.<sup>8</sup>

From 1981-2005, the 'younger old' cohort of seniors aged 65-74 rose from 1.5 million to 2.2 million with a total population share of 6.0 % in 1981 to 6.9 % in 2005. By contrast, the new Baby Boom cohort of age 65-74 year old Canadians is projected to increase from 2.2 million in 2005 to a doubling figure of 4.8 million by 2031, indicating a total population share of 12.4%.<sup>9</sup>

The 'older old' cohort of seniors aged 80 and older will have the most significant population increase. This population is projected to more than double, from approximately 1.3 million in 2009 to 3.3 million by 2036 and will nearly quadruple in size to 5.1 million by 2061.<sup>10</sup> It is projected that 1 out of every 3 seniors will be 80 years or over by 2036 and nearly 2 out of 5 seniors will be 80 years or over by 2061.<sup>11</sup>

As with any significant demographic shift, resources and services must be developed to serve the new cohort base. Within the context described above, Canadian services for older adults have historically been limited and there has been inadequate preparation for the 'silver tsunami' facing social systems, including the health care, social services and legal systems.

It is often noted that the ageing Baby Boomers generation is not likely to accept the current low level of service and ageist policies which its parents have been working and living within. Styles and narratives of ageing in Canada are changing, and new terms, such as media leader Moses

---

<sup>3</sup> Statistics Canada, *A Portrait of Seniors in Canada* (2006) StatCan <<http://www.statcan.gc.ca/pub/89-519-x/2006001/4122092-eng.htm>> at 12.

<sup>4</sup> Statistics Canada, *Population Projections for Canada, Provinces and Territories 2009 to 2036* (2010) StatCan <<http://www.statcan.gc.ca/bsolc/olc-cel/olc-cel?catno=91-520-XIE&lang=eng#formatdisp>> at 46.

<sup>5</sup> Ibid 16.

<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> Statistics Canada, *A Portrait of Seniors in Canada* (2006) StatCan <<http://www.statcan.gc.ca/pub/89-519-x/2006001/4122092-eng.htm>>.

<sup>10</sup> Ibid 53.

<sup>11</sup> Ibid.

Znaimer's coining of the phrase 'Zoomer', are catching on. These 'Boomers with Zip' are looking for new understandings of ageing in Canada; however, changes must be made at the social service and infrastructure level in Canada, in order to meet the needs of this generation.

### *B Growth of Elder Law and Elder Mediation*

One of the ways that the social and legal professions are seeking to more effectively serve the newly ageing Canadian client base is to market the 'elder law' and 'elder mediation' services mentioned above. Indeed specialization builds on a number of current trends. First, it responds to the growing client base of older adults generally in Canada.

Second, it reflects the growing desire for clients to be served in a more personalized manner – elder law indicates the desire for a lawyer to cater to needs of a particular client, rather than a client having to shop around for individual lawyers to do individual types of work (real estate, estates, commercial law, etc.), and also to avoid a fragmentation of legal services.

Third, the development of elder mediation in particular builds on the general trend in Canada for increased use of legislated and court-connected (mandatory or voluntary), private and community-based mediation. Mediation in Canada is rapidly expanding and research suggests its broad efficacy and value. Mediation is becoming a common stage in conflict resolution and is often integrated directly in civil court rules or into governing statutes. This has certainly been a strong trend in BC, and BC has a particularly strong mediation community.

Last, the evolution of 'elder guardianship mediation' builds upon a trend in Canada to modernize adult guardianship regimes.<sup>12</sup>

### *C Adult Guardianship Legislation and Bill 29*

Adult guardianship is a process by which the court appoints a substitute decision maker for an adult who is mentally incapable of making his or her own decisions. Guardianship may involve a range of issues including health care decisions and consent, housing choices, and financial decisions. Previous incarnations of legislation were medical-opinion based, and appeared to adopt an all-or-nothing approach – adults were either 'fully capable' or 'fully incapable' of making their own decisions. However, in the past decade, modern guardianship legislation trends across Canada have been espousing a 'most effective, least restrictive' approach, whereby a court-appointed substitute decision maker has his or her authority constrained to the specific area of incapability. Further, modern guardianship regimes are founded on principles of individual autonomy, a 'capacity-continuum approach' and a respect for the allegedly incapable adult's personhood. As such, mediation, for some aspects of guardianship matters, has become a very recent, but arguably logical, development in Canada.

On October 22, 2007 the BC Legislature passed Bill 29, *The Adult Guardianship and Planning Statutes Amendment Act 2007*<sup>13</sup>, which introduces new statutory requirements for

---

<sup>12</sup> Public Guardian and Trustee of British Columbia, *Court and Statutory Guardianship: The Patients Property Act and The Adult Guardianship Act (Part 2): A Discussion Paper on Modernizing the Legal Framework* (British Columbia: PGTBC, February 2004) <[http://www.trustee.bc.ca/pdfs/General/Modernizing\\_Guardianship\\_2005.pdf](http://www.trustee.bc.ca/pdfs/General/Modernizing_Guardianship_2005.pdf)>.

substitute decision-making<sup>14</sup> and adult guardianship<sup>15</sup>. Bill 29 amends the *B.C. Adult Guardianship Act*, repeals the *B.C. Patients Property Act*, and includes provisions requiring mandatory mediation for guardianship applications in certain circumstances.<sup>16</sup> With these changes, BC joins Ontario in the vanguard of Canadian legislative change in requiring mediation for certain guardianship matters.

On 1 September 2011, the new legislation for substitute decision-making came into effect. These changes provide options for personal, health and financial planning by introducing new requirements for enduring powers of attorney, representation agreements and advance directives.

Bill 29 replaces the committeeship system with a framework of three distinct types of guardians: statutory guardians, personal guardians, and property guardians. The system provides for two parallel processes as statutory guardians are appointed through a different process than personal and property guardians. However, the provisions relating to mandatory mediation in adult guardianship matters are not yet in force.

These developments indicate new requirements for mediation in matters that primarily focus on adults with mental capability issues. Building on the decade of work done in the United States, Canadian legislatures are increasingly mandating some form of mediation in the areas traditionally inclusive of guardianship, powers of attorney, caregiving and long-term care (nursing home) issues.

#### *D Need for Practice and Program Guidelines*

Legislated and court-ordered mediation makes up only a small segment of the larger field of elder mediation. Private bar and (non-legal) mediation services in Canada are now directly targeting attention on the expanding market of voluntary elder mediation and ‘family meetings with elders’, which encompasses issues much broader than those which may be subject to mandatory mediation. The range of common issues voluntarily mediated is very broad and continually expanding, and includes but is not limited to:

- Estate planning, administration and succession planning,
- Powers of attorney (who will make decisions and how),
- Advance directives and end-of-life care,
- Adult guardianship and alternatives to adult guardianship options including increased support services,
- Assisted Living or Long-Term Care,

---

<sup>13</sup> *Adult Guardianship and Planning Statutes Amendment Act 2007*, SBC 2007, c 34. Previous incarnations of Bill 29, known as Bill 32, include the substantially same material, online: [http://www.leg.bc.ca/38th3rd/1st\\_read/gov29-1.htm](http://www.leg.bc.ca/38th3rd/1st_read/gov29-1.htm) [Bill 29].

<sup>14</sup> Advance planning for substitute decision-making includes powers of attorney, representation agreements and advance directives.

<sup>15</sup> *Adult Guardianship and Planning Statutes Amendment Act 2007*, SBC 2007, c 34.

<sup>16</sup> *Ibid* pt 2, s 6. While a number of the sections of the AGA Amendment came into effect on 1 September 2011, the provisions dealing specifically with mediation for guardianship matters not yet in force. See online: <http://www.courthouselibrary.ca/training/BCProclamations/BCProclamationsItem.aspx?Id=101ff90d-8478-4bd7-a3ec-e2fdad71eeee>.

- Types of medical care and alternative health care options,
- Private Care Agreements,
- Caregiver issues (who, when, where, how much, respite care, etc.),
- Lifestyle choices (i.e. subsequent marriage, smoking, alcohol use, social activities, vacations),
- Independence and self-determination vs. safety issues,
- Mental illness or dementia,
- Abuse, neglect or self-neglect.

Despite the above list of elder mediation issues, mediation professionals and participants have little substantive literature or educational materials for guidance, education and information on elder or guardianship mediation.

Additionally, the American literature strongly suggests that there are serious ethical implications to be considered in the area of elder and guardianship mediation. In April 2007, the first National Symposium on Ethical Standards for Elder Mediation was held at Temple University in Pennsylvania, and identified a large number of areas of ethical concern including:

- Impartiality of mediations,
- Ensuring capability to mediate,
- Risk Management in terms of abuse, neglect and self-neglect,
- Conflicts of interest,
- How to decide if mediation is appropriate,
- Funding/Fees,
- The necessity of legal advice or representation.

There has been significant development in the American context since this symposium, including the adoption of national standards and training objectives for elder mediation and several comprehensive teaching/certification processes.<sup>17</sup>

Elder mediation is growing and there is a need to establish practice guidelines and develop competencies. Experience in other jurisdictions shows that there are some unique aspects to elder and adult guardianship mediation, and that relevant practice guidelines and protocols can only emerge from a solid understanding of legislation, the needs of older adults, and ethical issues that commonly arise in elder mediation, such as around issues of capacity. In Canada as a whole, and in BC in particular, there is a significant need for comprehensive research and analysis relating to a host of challenging issues and questions raised by this emerging practice area.

---

<sup>17</sup> See, eg, ACR Section on Elder Decision-Making & Conflict Resolution, Training Standards Committee, *Elder Care and Elder Family Decision-Making Mediation Training Objectives* and *Working with Older Persons in Mediation: Diversity Training Objectives* (2011) ACR <<http://www.acrelder.org/our-committees/training-standards>>.

Given these trends and developments, the CCEL embarked on the Elder and Guardianship Mediation Project specifically enquiring into the use of mediation within the ‘elder’ and ‘guardianship’ contexts.

#### IV OVERVIEW OF RESEARCH AND METHODOLOGY

The Elder and Guardianship Mediation Project research was conducted using a combination of methods. Each component was designed to pursue the key research questions from different data sources and perspectives. Research was both qualitative and quantitative in nature. The report summarizes and synthesizes the results of each of these components. To the greatest extent possible our conclusions and recommendations have been canvassed through formal and informal consultations and represent a high degree of consensus among the many experts and sources consulted in terms of best practices related to elder and guardianship mediation and what must be considered in the design and development of court-connected adult guardianship mediation programs.

The research components include:

- Canada, US and international legal research including statutory and case analysis (‘Legal Research’),
- Information collected from experts and stakeholders engaged in elder and guardianship mediation in Canada and the US through one-on-one interviews, roundtable discussions, and surveys (‘Field Research’),
- An extensive review of available literature on best practices and service delivery models in Canada and the US including conference papers, government reports, study papers, court mediation program policies, and mediation teaching and training manuals (‘Literature Review’),
- Data from experts and service providers of elder and guardianship mediation services, including their challenges and experiences (‘Service Provision Research’).

At each step of the research, themes emerged which influenced the approach applied to the next section. The following were key themes from EGM Project research:

- Need for credentialing and specialized training of elder and guardianship mediators (education, experience, supervision, ethics) ,
- The uniqueness of each elder or guardianship case demands broad, flexible protocols (common survey answer: ‘depends on the situation’),
- Intertwining of capacity issues with elder and guardianship issues,
- Special ethical considerations in elder guardianship mediations for the mediator and professional or fiduciary participants (lawyers, Public Guardian and Trustees, social workers, case managers, substitute decision makers),
- The multi-party aspect of elder and guardianship mediation and in particular, issues of ethical concerns, group dynamics, undue influence of a vulnerable adult and questions of who should be included in the session,
- Concerns about mediating in situations where elder abuse or neglect has, or currently is, occurring and if raised, who and how to report abuse or neglect,

- Concerns that the process of elder and guardianship mediation could be used as a tool of abuse or coercion,
- A wide variation in understanding of what constitutes elder mediation, thereby leading to confusion or clashes regarding models or goals,
- Concerns about identifying parties who should be included in the mediation, and ‘voluntariness’ in the case of mandatory mediation,
- Limitations on resources, including cost barriers, availability of necessary expertise in specialized cases, and limitations on implementation of mediation agreements due to limited community resources in the elder care field.

#### V WHERE DO WE GO FROM HERE?

The Elder and Guardianship Mediation Project aims to substantively address legal, ethical, social and practice issues raised by both mandatory and voluntary elder and guardianship mediation and to develop informational resources to assist those engaged in these expanding fields.

One of the challenges in creating the report was that discussion of elder and guardianship mediation potentially impacts such a broad community of practitioners. Different practitioners require access to different information and resources in order to participate in elder and guardianship mediation at the level of practice or policy. This is partly due to the reality that mediators enter the practice from diverse educational backgrounds, such as law, social work, justice, and health. Also, a broad spectrum of people may participate in mediation and related legal processes, including private lawyers, family, friends and supporters, judges, capacity assessors, health care providers, physicians, gerontologists, family caregivers, social workers, educators, advocacy workers, victim assistance workers, long-term care regulators and employees, and the Public Guardian and Trustee. The report serves different needs for diverse practitioners and participants in mediation processes.

We hope the report will:

- Increase understanding and awareness in legal and mediation communities of the issues raised in elder and guardianship mediation,
- Encourage rigorous discussion amongst the legal and mediation communities of standards of professional conduct, training expectations, and educational competencies in the context of elder and guardianship mediation,
- Spark further conversations and debate about elder and guardianship mediation within advocacy groups, legal bar associations, mediation communities, online and through various media,
- Inform the creation of a framework, in partnership with leaders in the mediation community, to address key issues such as training and rosters for elder and guardianship mediators in BC,
- Lay the foundation for the development of adult guardianship mediation regulations and inform the design and development of pilot court-connected adult guardianship mediation project in BC,
- Serve as a resource for the development of training and roster requirements for elder and guardianship mediators in BC,

- Serve as a rich source of information on elder and guardianship mediation for researchers and policy analysts,
- Provide practitioners from diverse disciplines with an overview of the legal context framing elder and guardianship mediation in BC,
- Encourage further research in the area.

The focus of the Elder and Guardianship Mediation Project is BC. However, as elder mediation is in its infancy in Canada, the report's recommendations will apply more broadly to elder and guardianship mediation outside BC. Also, while this report focuses on the nexus point between elder mediation, elder law, and guardianship, many of the themes addressed in the report will apply to guardianship mediation, elder mediation and elder law more broadly.<sup>18</sup>

---

<sup>18</sup> The Canadian Centre for Elder Law's *Elder and Guardianship Mediation Report* was published in January 2012 and is available online at: <http://www.bcli.org/ccel/publications/elder-and-guardianship-mediation-report>.