Child Protection Mediation and the Circuit Court of the Provincial Court of British Columbia:
A Review of the Bella Bella, Klemtu and Bella Coola Experience

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1. Introduction

In the summer of 2011 a unique pilot project was undertaken to deliver child protection mediation services to remote communities on the central coast of British Columbia in conjunction with the Circuit Court of the Provincial Court of British Columbia. A child protection mediator joined the circuit court team for its circuit sittings in Bella Coola, Bella Bella and Klemtu. This report summarizes the background to this circuit mediation initiative, what took place and what was achieved. It also sets out recommendations for continued use of the circuit court model to provide access to mediation in traditionally under-served communities.

2. Background

When the *Child, Family and Community Service Act* (CFCSA) came into effect in 1996 it contained explicit provisions allowing the use of mediation and other alternative dispute resolution mechanisms for the resolution of child protection cases. Since then mediation has become an important part of child protection practice.

Important milestones include the creation of the Child Protection Mediation Program (“CPMP”) with a roster of specially trained mediators in 1997 and the Surrey Court Project, which in 2001 successfully piloted and evaluated the design of a unique mediation process with a focus on facilitated planning meetings. The Ministry of Justice’s Family Justice Services Division (FJSD) works in close collaboration with the Ministry of Children and Family Development (MCFD) in leading the CPMP. Private sector contractors are on contract with FJSD to ensure neutrality in the mediation process.

In 2007 MCFD introduced the *Presumption in Favour of Collaborative Planning and Decision Making*, making family group conferencing, mediation and traditional decision making the first choice for child welfare decision making and for resolving child welfare disagreements. Court is the alternative. Explicit goals of the policy include achieving timely planning decisions and reducing the amount of time spent on court processes. Policy and standards initiatives since then continue to focus on embedding collaborative planning and decision making into child protection practice.

The number of child protection mediations in the province steadily increased from 77 referrals a year in 2002/03 to 787 referrals in 2008/09. Significant resources were expended throughout that period to promote mediation, including the establishment of mediation coordinator positions and regional funding to build awareness about the role and availability of mediation in child protection disputes. The Legal Services Society (LSS) played a key role in this work through its Child Protection Funding Initiative (the LSS Project), which ran from 2003 to March 2010. In partnership with the Ministry of Attorney General (MAG) and MCFD, and with LSS and MCFD funding, it supported start-up incentives where mediation promotion, development and evaluation were needed.
While the use of mediation was becoming well established in more urban centres, outreach work during this period identified regions where more information about and access to mediation services was needed.

In 2006, with funding from MCFD, MAG and the Law Foundation of British Columbia, Mediate BC launched the Child Protection Mediation Practicum (CPP) to support the development of child protection mediation in Aboriginal and geographically remote communities throughout British Columbia. In partnership with four Aboriginal organizations across the province, the CPP provides opportunities for new mediators and individuals recognized by their communities to develop their dispute resolution skills in a hands-on, mentored environment. It aims to make mediation accessible by establishing well-trained mediators in areas where a need has been identified, as well as promoting and supporting child protection dispute resolution processes that are collaborative and responsive to community values, as well as adaptable to different cultures.

There are now 23 self-identified Aboriginal mediators on the child protection mediation roster (of a total of 82 mediators); 22 of them were trained through the CPP.

3. Genesis of the Project

On October 2, 2007 the LSS published its report Building Bridges: Improving Legal Services for Aboriginal Peoples. The report found that in many regions Aboriginal people represent over 25% of LSS clients but that there are many barriers to their engagement with LSS services. It recommended changes in four key areas: Aboriginal representation within LSS, legal representation available to Aboriginal people, communication and outreach to Aboriginal communities, and involvement of Aboriginal people in LSS program planning.

The legal needs of Aboriginal people in family law and child protection are identified as key issues, as one in seven Aboriginal children come through the child welfare system in B.C. and almost 50% of all children in care in B.C. are Aboriginal. The report recommends that LSS increase and support the availability of preventative and restorative solutions, including alternative dispute resolution and mediation within an Aboriginal context (Recommendation 14.1).

In early 2010 the Aboriginal Services Program Manager for LSS, Pamela Shields, launched a legal resource “caravan” to present a week-long series of workshops on criminal and CFCSA matters for Aboriginal people. Coordinated in partnership with NENAN, a family service agency working with Treaty 8 communities, workshops were carried out in Fort Nelson, Fort St. John, Dawson Creek and Chetwynd. Community representatives and MCFD social workers attended.

1 At page 34
Child Protection Mediator Laura Matthews, an Aboriginal member of the Roster based in Vancouver, participated in the workshops. Ms. Matthews had joined the Roster following her participation in the CPP. She explained and advocated for the use of mediation, particularly as an early intervention step to reduce the number of Aboriginal children in care. Her participation in the workshops created trust and confidence in her role as a mediator, and she established ongoing relationships with those communities.

Subsequent workshops were conducted in Haidi Gwaii and the Kootenays. Their success was evident in that several Aboriginal Communities requested mediation workshops (the Nak’azdli Band near Fort St. James, Port Hardy and Duncan) and return engagements (Haidi Gwaii and the Peace River Valley communities). The workshops generated direct mediation referrals in Haidi Gwaii, Burns Lake and the Kootenays.

4. Launch of the Circuit Court Mediation Pilot

In 2011 the LSS allocated $14,000 to continue outreach activities, with a priority on remote Aboriginal communities with challenges accessing legal representation or being served by circuit court. Its goal was to build familiarity and trust in the mediation process, foster relationships with Aboriginal mediators, and encourage increased and early intervention mediation referrals.

Pamela Shields enlisted the support of Judge Wingham, the presiding judge for the Bella Bella, Klemtu, and Bella Coola circuit, for a mediation outreach pilot project where a mediator would travel with the circuit court. The goal was to have Ms. Matthews both educate counsel and the community about mediation and be available to mediate any referrals that might arise out of the circuit court’s sitting.

The CPMP was also very interested in this initiative which aligned with the Ministry of Justice’s service plan goals to expand mediation in Aboriginal communities. The CPMP Provincial Coordinator travelled to the coast to meet with local communities and the circuit court to support further planning and commenced work on a draft project plan. The project then moved ahead very quickly on more of an ad hoc basis, with Ms. Matthews joining the circuit court for its May 2 - 6, 2011 sitting in Bella Bella and Klemtu. The success of that experience led to further opportunities so that she participated in four circuit court sittings in all:

<table>
<thead>
<tr>
<th>Date</th>
<th>Circuit</th>
<th>Presiding Judge</th>
</tr>
</thead>
<tbody>
<tr>
<td>May 2 - 6, 2011</td>
<td>Bella Bella/Klemtu</td>
<td>Judge Wingham</td>
</tr>
<tr>
<td>June 6 - 10, 2011</td>
<td>Bella Coola</td>
<td>Judge Spence</td>
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<tr>
<td>July 4 - 8, 2011</td>
<td>Bella Bella/Klemtu</td>
<td>Judge Wingham</td>
</tr>
<tr>
<td>November 21 - 24, 2011</td>
<td>Bella Coola</td>
<td>Judge Hoy</td>
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Judge Hoy replaced Judge Spence in November 2011 and the welcoming ceremony was attended by Chief Judge Crabtree.

LSS and the CPMP shared expenses for the mediator to join the May, June and July circuits. Ms. Matthews travelled with the circuit court team, and travelled from Vancouver on the circuit court charter flight. The November circuit was carried out as a regular CFCSA referral and Ms. Matthews’ travel to Bella Coola and mediation expenses were covered by the CPMP; she flew up separately on a regular commercial flight.

5. The Circuit Court Mediation Experience

Although the CPMP has historically received referrals and carried out mediations on the central coast before (organized by the mediation coordinator based in Vancouver for the Vancouver Coastal region), there were only 2 per year in 2008/09 and 10/11, and none in 2009/10.

There were initial concerns raised with LSS about effectiveness, cost and funding of a circuit court mediator. Ms. Matthews met with family duty counsel for the circuit two weeks prior to the May circuit sitting to address those concerns, and director’s counsel and the other family duty counsel supported and participated in some of the mediations.

Ms. Matthews completed two mediations during each circuit court sitting, including one CFCSA and one Family Relations Act (“FRA”) case each time. The original mandate was to provide mediation services for child protection cases, but when she was there Ms. Matthews took on family cases as well (the CPMP does not extend to providing FRA mediations). All but one of the family cases settled at mediation.

5.1 The Need for Mediation Services

The central coast circuits are part of the Vancouver Provincial Court at Robson Square. The circuit court travels once to Bella Coola and once to Bella Bella/Klemtu every three months. A typical schedule for the Bella Bella/Klemtu circuit for example is:

- Arrive Monday at noon by air from Vancouver
- Monday afternoon - family list and conduct Judicial Case Conferences (“JCC’s”)
- Tuesday morning - criminal list
- Tuesday afternoon - finish criminal list and remainder of family list, JCC’s
- On every second circuit travel by boat to Klemtu at 7:00 am on Wednesday morning (a 2 hour trip) and return late afternoon/evening
- Thursday/Friday - finish remaining criminal list and return to Vancouver
The limited availability of court time in these remote communities impacts how long parties may wait for a hearing. One of the guiding principles in the CFCSA is that “decisions relating to children should be made and implemented in a timely manner” (at s. 2(g)). The Act legislates timelines for protection hearings (no later than 45 days after the presentation hearing) and for supervision and custody orders (varying from 3 to 24 months depending on the type of order and age of the child).

At present delay in all provincial court matters across the province is an issue. In child protection, the standard set by the Office of the Chief Judge for the time between a case conference or trial date being fixed and the first available court date is three months for a typical ½ day child protection trial. In the report of the Office of the Chief Judge released on September 14, 20102 the court reported a 44% increase in the length of time to trial over the previous year for half day child protection cases. The OCJ standard for family cases is 4 months and the court reported a 46% increase in delay for half day family cases. In some registries delays in both child protection and family ranged from 7 to 11 months.

In the first circuit Ms. Matthews attended in May 2011 there was a very contentious two day CFCSA continuing custody order trial scheduled. As the court would only be in Klemtu for two days this meant that no criminal or family files would be addressed. Ms. Matthews was able to successfully mediate the CFCSA file which allowed the judge to deal with the numerous criminal and family files needing court time.

During that circuit sitting she was also able to successfully mediate an FRA access case. Family duty counsel reports that had there been time for a third mediation, there were two more families who could have used mediation services.

A further aspect of CFCSA matters in remote communities, where resources are scarce, is that children in care are often placed in foster homes some distance away. For the central coast communities the closest available foster placement might be Prince George. Access can be difficult, infrequent and expensive. In one of the mediations carried out on the circuit the family was in Klemtu (where the court typically sits for only one day twice a year) and the child was in care in Williams Lake; early resolution in mediation in that case was a high priority.

In one of the family cases mediated this saved the case being put over to the next circuit, which would have occurred as there was no more court time available. As noted by counsel, the addition of mediation allowed for more to be achieved in the limited time available, which is particularly important where the delay between circuits tends to strain already tenuous relations between parents and usually impacts the best interests of the child.

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2 The Provincial Court of British Columbia, Justice Delayed: A Report of the Provincial Court of British Columbia Concerning Judicial Resources, September 14, 2010
From the social workers’ perspective, providing mediation in FRA matters is hugely valuable, as there are many instances where child protection concerns arise out of unresolved family disputes. As we know from work done in other jurisdictions, unmet demand results in a social cost.\(^3\)

### 5.2 Participant feedback

Feedback from the court, counsel and the mediator was unequivocally positive on the success of circuit court mediation, all recommending that a mediator travel with the circuit court as part of the legal services team. The advantages are numerous:

- **Timely resolution of child protection cases**, which is a key principle of the CFCSA and an acute issue in remote communities with very limited access to court time and where children may be in foster care in far away communities for long periods of time. As noted by Ms. Matthews, this appears to be an extension of the assimilation process that has plagued Aboriginal people over the last century.

- The **cost savings** in ongoing legal fees and court costs for each case resolved at mediation are substantial; in the contentious CCO example family counsel points out that mediation saved the taxpayers the cost of a lengthy difficult trial over several days of court time.

- On this circuit court the judicial time spent on each case conference may be two hours or more, so there are also substantial savings in using the services of a mediator rather than a provincial court judge (and attendant court clerk costs). CPMP mediators, many of whom are very experienced, provide their services for child protection cases at close to legal aid rates ($90/hour for mediators with up to six years experience on the roster; $95 for those with over 6 years on the roster and 60 completed mediation cases).\(^4\)

\(^3\) The 2006 English and Welsh *Civil and Social Justice Survey* of civil justice problems concluded that what comes to the attention of the courts represents neither the nature nor prevalence of what is out there and legal processes are commenced only in relation to 10% of non-trivial justiciable events.

\(^4\) In its news release dated February 7, 2012 the Ministry of Attorney General reported that the total cost to government to support one Provincial Court judge is up to $1.4 million annually, including the judge’s salary and other costs for court administration staff, sheriffs, prosecution services and judicial support.
The average child protection case takes 4 to 5 hours to mediate, and that is with the benefit of separate pre-mediation orientations with the parties which can take another few hours – time that the court simply does not have. And in mediation, the orientations sessions which are so key to its success can be carried out ahead of time over the phone.

With limited court time available in these communities resolving disputes through mediation reduces the court list, freeing up court time for other cases.

Flexibility and nimbleness in responding to needs as they arise. Because a mediator is available the judge is able to actively canvas potential referrals during sittings in the courtroom. In one instance, Judge Wingham came out of a 2 ½ hour case conference and turned that case over to Ms. Matthews, who then set up orientations for that evening and conducted the mediation the next day.

Mediation is a proven tool with very high success and satisfaction rates. It is readily available in urban and other locations in British Columbia and should be accessible as a process tool consistently throughout the province to give effect to the Presumption in Favour of Collaborative Planning and Decision Making.

Both the mediator and counsel note the natural affinity the coastal Aboriginal communities have with the mediation process. They are familiar and comfortable with family group decision making in their culture and mediation is a far better cultural fit than the adversarial court process.

The circuit court itself is much more informal than provincial court locations with staffed registries and courtrooms; the circuit court uses local community halls, or in Bella Bella, a space above the coffee shop or a hotel meeting room. The informality of mediation is a natural fit.

It was seen as a very valuable added benefit that the mediator was Aboriginal, very skilled, and comfortable in aboriginal community and custom. Family counsel reported that this contributed to the comfort their clients felt participating in the mediation process. Similarly, the social worker reported on the importance of building trust in a community, and that over several repeat visits Ms. Matthews became recognized as a trusted mediator.

Having a mediator travel with the circuit court achieves a number of things:

- It indicates to the parties that mediation is a valued tool which is supported by the judicial system. There is likely a consequent commitment by the parties to the mediation process.
o Settlement rates during this initiative were high (100% of the CFCSA cases). Counsel suggested that this may reflect the high motivation of the parties in circuit court communities, who know that if they cannot reach a resolution there will a long wait for the next court sitting.

o Neutrality of the mediator is a key aspect to the mediation process and this does not appear to have been compromised in any way by the mediator attending with the circuit court. On the contrary the attachment to the circuit court alleviated any neutrality concerns which can arise when parents perceive the mediation as being organized by MCFD.

o Although there is a referral process available, the local social worker found that having the resources of a mediator scheduled with the court sitting made the resource much more accessible to actually utilize.

o Similarly, certainty around when the resources of a mediator will be available allows counsel to plan ahead and manage their files and clients to be ready for mediation during the next scheduled circuit court sitting weeks. Premediation orientations can be done in advance by phone.

o The circuit court mediator can fulfill multiple functions – Ms. Matthews mediated CFSCA cases, family cases, and prepared two Gladue Reports. Because the CFCSA, family and criminal lists are all juggled and heard together through the sitting week she was present in the courtroom and available to take on matters as they arose.

6. Logistics and Practice Issues

Prior child protection mediations carried out in these coastal communities followed the historical CPMP procedure in that a referral is made to the mediation coordinator for Vancouver Coastal, who is based in Vancouver. The coordinator checks for mediator availability and looks after scheduling of the parties for mediation which is formalized in a confirmation sent to the participants. As travel for just one mediation is expensive the CPMP tries to combine referrals if possible and the mediator appointed is required to

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5. A Gladue report is a pre-sentencing and bail hearing report that a court can request when considering sentencing an offender of Aboriginal background under Section 718.2(e) of the Criminal Code. The process derives its name from the 1999 Supreme Court of Canada decision in R. v. Gladue. Ms. Matthews has training in the preparation of these reports.
obtain prior written approval from the CPMP for travel expenses exceeding $1,000 per mediation. Participants are asked to complete a mediation services questionnaire to provide feedback to the CPMP and the mediator completes a case management form which captures broad statistical information on the types of issues mediated and whether they were resolved. The mediator invoices the CPMP for mediation fees and expenses.

In the circuit court initiative the process is similar except that the assistance of the mediation coordinator was not required. This represents another overall saving, as the mediation coordinators have become a more limited resource; in Vancouver for example many of the counsel have taken on the legwork of scheduling and appointing a mediator. If the mediator’s availability is linked with the circuit court the social worker, families and counsel can plan ahead knowing the resource will be available.

For the circuit court mediator there is more legwork in obtaining the background of the case and issues to be mediated, contact information for the participants, and sourcing a location for the mediation session. Where the mediation coordinator would obtain the background and contact information from the social worker and summarize it in a snapshot for the mediator, on the circuit court the mediator was able to obtain it directly from counsel, or from the parties in the case where Judge Wingham handed it over directly from the case conference he had just conducted. In the coastal communities there is a strong preference that the mediation not take place at the MCFD office (where there is one) and Ms. Matthews was able to find locations. The handling of logistics by the mediator did not pose difficulties and may in fact mirror the trend towards this model in other locations.

As mentioned above, Ms. Matthews took on family mediations while she was with the circuit as part of this pilot, but mediation funding for family cases for any future circuits would have to be addressed. There is funding available in the LSS family tariff which can be requested by counsel for family mediation fees, but only if both parties to the mediation qualify for legal aid. Counsel advises that in the coastal communities a% of the client base does not qualify for legal aid, and in rare cases where mediation fees were approved the travel costs for the mediator were not. The family cases mediated by Ms. Matthews as part of the pilot, for example, were not eligible for LSS funding.

Ms. Matthews attended the central coast again in April of this year, as a result of counsel making a CPMP referral and timing her attendance with their attendance for the circuit court sitting. Because it was a regular CPMP referral approval was needed for the travel expenses. Although counsel and their clients planned for the mediation the approval was not received until the day before, which caused some anxiety about whether they would in fact be able to proceed. Although this appears to have been an anomalous situation, it highlights the advantages of all the participants being able to rely on a mediator being available during scheduled circuit court sittings.
7. Recommendations

Given the unequivocal participant support for providing mediation services with the circuit court arising out the central coast experience to date a plan should be developed for continuation of this service for Bella Bella, Klemtu and Bella Coola. Expansion to other circuit courts serving remote communities within British Columbia should also be explored. Other circuit courts include Haidi Gwaii and Tse Keh Dene, both of which are serving remote and under-serviced communities which could benefit greatly from increased access to mediation.

The LSS Project was successful in creating awareness of mediation as a resource and the circuit court mediation experience that followed built on that to embed mediation in the central coast as an effective collaborative practice tool. While referrals are up in other northern communities where LSS outreach workshops were conducted, offering mediation services as part of the circuit court would build on that outreach to provide actual experience with the process – potentially the most effective way of introducing mediation to communities where it remains under-utilized.

As a result of the CPP there is a pool of newly trained Aboriginal mediators available to do this work. The CPP mediator training includes four Small Claims Court mediations, so these mediators also have that experience. While the central coast initiative involved child protection and family disputes and Gladue reports on the criminal side, there is also a large unmet demand in many remote communities regarding civil disputes.

While one option would be to rely on continued CPMP referrals from the central coast communities and elsewhere the circuit court initiative revealed the potential for the achievement of so much more.

I would recommend as next steps that consultations be undertaken with the CPMP, MCFD, the OCJ and LSS to:

1. Identify common goals that could be achieved by providing mediation services with circuit courts throughout the province, including:
   - timely resolution of child protection cases
   - cost savings for ongoing legal fees and court time where cases are resolved in mediation
   - using the less expensive resource of mediator versus judicial time
   - freeing up judicial time for other cases
• providing a culturally appropriate alternative to the court for Aboriginal communities
• realizing on the investment made in creating a trained pool of Aboriginal mediators
• building on the LSS Project and outreach done to introduce the concept of mediation to northern Aboriginal communities by providing actual access to and experience in mediation
• the potential for circuit court mediators to meet the need for services in multiple areas, including child protection, family, criminal (Gladue reports and restorative justice) and civil (small claims) matters.

2. Learn more about the operation and provision of services to the different circuit courts throughout the province with a view to determining which locations might have a need and be well situated for the addition of circuit court mediation, including carrying out a needs based assessment in each community.

3. Develop strategies for establishing community based models of circuit court mediation. One strategy might be creating a duty roster or small team of mediators for each circuit.

4. Explore funding options for design and delivery of mediation services, including travel expenses (for example, travelling with the circuit court team) and for mediation fees (which could be a variety of different sources depending on the type of mediation service offered).
Appendix A

List of People Consulted

Irene Robertson
Director, Family Justice Services Division, Justice Services Branch, Ministry of Justice

Andrea Clarke
Child Protection Mediation Program, Justice Services Branch

Judge James Wingham
Provincial Court of British Columbia

Laura Matthews
Mediator

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Michael Gormley
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Ingrid Grimm
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Dan Sudeyko
Director’s Counsel

Wynona Cook
Family Duty Counsel

Anja Brown
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