MediateBC
Dispute Resolution & Design

June 22, 2012

Ministry of Justice of BC
PO Box 9290 Stn Prov Govt
Victoria BC V8W 9J7

Attention: Ms. Lori Wanamaker, Deputy Minister for Justice Reform

Dear Deputy Minister:

Re: Mediate BC Society's Response to the Green Paper

Mediate BC Society offers this submission in response to that portion of the Green Paper: Modernizing British Columbia's Justice System which deals with Small Claims matters. We were advised that the BC Justice Review was limited to criminal matters and we made a submission discussing how civil dispute resolution experience and expertise could be useful in reforming the criminal justice system. A copy of our submission is attached as Schedule "A" for your easy reference. This letter focuses on Mediate BC's submissions with respect to non-criminal justice reform issues. We believe that innovative reforms are possible using collaborative engagement strategies which build on past success.

Mediate BC is a not for profit society operating since 1998 (www.mediatebc.com). It is committed to providing people with practical, accessible, and affordable choices to prevent, manage and resolve disputes. Mediate BC offers mediation information, services and programs for individuals, families and organizations. We also support mediators and other dispute resolution professionals with training, professional development and resources.

While Mediate BC specializes in mediation our expertise and experience includes a wide variety of dispute resolution tools and processes. We can help the public choose the mediation approach that matches their needs, including collaborative methods that preserve and enhance relationships.

A. Mediate BC Society's Court Mediation Program

Mediate BC's administers the Court Mediation Program which operates the mediation program in five registries of the Provincial Court of BC (Vancouver/Robson Square, Surrey, North Vancouver, Victoria and Nanaimo). In the last four registries certain categories of claims up to $10,000 are automatically referred to the Court Mediation Program for mediation. At Robson Square, the Small Claims Pilot was implemented in late 2007 and directs all claims between $5,000 and $25,000 to mediation. Since the

parties do not have a choice about this referral (or in the choice of mediator) the Court Mediation Program is widely understood to involve "mandatory mediation".

Mediations are conducted using an efficient two-hour mediation model conducted by private mediators paid on a flat fee basis. The Court Mediation Program has a roster of 50 very experienced mediators to do this work. It also runs a practicum program in which mediators seeking experience co-mediate with senior mediator-mentors. The mediations are conducted in person but one or more parties frequently participate by telephone with no change in the average settlement rate.

B. Green Paper

Page 24 of the Green Paper begins Section C on "Processes that don't work / have unintended consequences". Challenge Eight is entitled "Non-resolution of Small Claims". It begins with this statement:

> *Despite introduction of mandatory mediation, significantly less than half of the cases that go through this process resolve there and the rest end up in a court hearing.*

We found this wording very confusing. Use of the phrase "mandatory mediation" in this context led many people to conclude that this section was about the Court Mediation Program, at least in part. If so, then the sentence is incorrect. The Focus Consultants evaluation report published in 2009 (the "Focus Report") concluded that the overall settlement rate in Robson Square alone was approximately 53%. Robson Square registry alone handles approximately one-quarter of all claims in the province every year. The average settlement rate in the other four registries since 2007 is 57%.

The paragraph following is titled "example" and refers to "a settlement conference before a judge" which leads us to conclude that this section is actually about the mandatory 30 minute settlement conferences which were introduced into Provincial Court in 1991. If the section is intended to refer only to judicial settlement conferences, then we submit that it should also have acknowledged the significant contribution of the Court Mediation Program to the resolution of small claims cases in the province and the rich learning that has been gained from the Small Claims Pilot evolution and innovation.

Since 1998, the Court Mediation Program has mediated over 10,000 cases and has accumulated a rich set of data that is proving to be an extremely valuable source of information to assist in process innovation. Until 2010, the Office of the Chief Judge, Court Services Branch, MAG and Mediate BC (plus other stakeholders) collaborated on ways to improve the Small Claims Pilot processes in Robson Square. This group consulted Mediate BC data, extensive CSB statistics and other information to develop various alternative process flows that would provide effective and efficient justice for small claims litigants. Even though the pilot was initiated in 2007, the collaborative

redesign efforts continued and many creative ideas were generated in order to improve the process further.

One of the key sources of data informing this process was the Focus Report. Attached as Schedule "B" is the Dashboard summarizing the key findings of the Focus Report. We draw your attention specifically to the commentary with respect to pilot objectives 3 and 4 which highlight the key findings relating to mediation.

In addition to these findings it is important to note that Court Mediation Program surveys show that, regardless of outcome, participants are extremely satisfied with the mediation process (4.3 out of 5) and that 94% would mediate again.

If this collaborative process had continued we fully expect that a revised and improved streaming model would have been implemented in Robson Square with resulting improvements to various outcomes, including mediation settlement rates.

Mediate BC has advocated for many years that the Court Mediation Program be expanded to other registries in the province. In fact, other registries have specifically requested that the Court Mediation Program be incorporated into their small claims process and existing registries have asked to have their volume of mediation referrals increased (although that is difficult while Rule 7.2 limits mediations to cases up to $10,000 in those registries).

C. The Bigger Picture

It appears that the purpose of the Green Paper was to highlight "problems" or deficiencies in the current system in order to advocate for a more systems wide approach. We certainly support a more integrated approach incorporating effective performance management and supported by strong metrics. It is important to identify areas requiring attention and reform; at the same time, it is important to acknowledge areas in which positive and innovative work is being done which creates positive outcomes for the public.

We submit that the Court Mediation Program mediation model is efficient and is achieving good results (cost savings for the system and satisfaction for participants). Mediate BC is continuing to generate creative ideas to improve the mediation process, including ways of increasing settlement rates for higher value claims.

We suggest that if a broader systems view is taken of the small claims processes, including the Court Mediation Program, there is value in trying to preserve what is working and allowing the stakeholders to continue their good work to improve those processes with innovative ideas. This approach would require the commitment of, and collaboration among, all the stakeholders. While recent events indicate that this goal will be challenging to achieve, the positive evolution of the Court Mediation Program

suggests that this might be an area in which a collaborative and productive dialogue could occur. We are not arguing for the status quo. In fact, we are quite excited about the prospects of innovative approaches to dispute resolution that respond to the complex needs of disputants. Mediate BC would be happy to play a leadership role in working with the Civil Resolution Tribunal to build on the positive evolution of the Court Mediation Program, the Distance Mediation Project and BC's online dispute resolution pilots, to apply lessons learned and to engage stakeholders.

Now that Bill 44 is law, Mediate BC is offering its expertise for the challenging design and implementation process ahead. We believe that we have much to offer in the areas of design, training, triage, caseflow administration and streaming and, of course, mediation. It should be noted that mediation skills are easily transferable to other related processes such as negotiation, facilitation and case management. Our experience and expertise will be useful for both strata claims and small claims matters in the context of the Tribunal. Most strata disputes involve conflict between neighbours and mediation is a natural fit for achieving peaceful resolution of disputes between people with ongoing relationships.

The Ministry has made a huge investment in the development of skilled private mediators who have dedicated themselves to providing excellent mediation services to small claims litigants through the Court Mediation Program. It would be wise to consider how to capture and use these resources for the benefit of the system as a whole.

We would be pleased to discuss any of these issues with you in more detail. Thank you for the opportunity to contribute to this important public discussion.

Yours very truly,

Kari D. Boyle, Executive Director

MediateBC
Dispute Resolution & Design

SCHEDULE A

Submission to the BC Justice Review
May 9 2012

The Green Paper "Modernizing British Columbia's Justice System" seeks system-wide ways of addressing increasing costs and delays in the BC criminal justice system. It suggests that the solutions must be capable of being accurately measured and must be developed in consultation with stakeholders in order to effect lasting systemic and structural change.

Mediate BC Society is a not-for-profit society which is committed to providing people with practical, accessible, and affordable choices to prevent, manage and resolve disputes. While it focuses on mediation, it possesses expertise and experience in a wide variety of dispute resolution tools and processes and supports effective triage which matches the process to the situation and the needs of the parties.

In this submission, Mediate BC offers some observations as well as its support of and involvement in further collaborative dialogue with respect to how effective conflict resolution mechanisms can be utilized to achieve the goals of the Justice Review.

Mediate BC's experience has been in the civil justice system, although many of the mediators listed on its Civil and Family Mediator Rosters also have extensive expertise in restorative justice and related initiatives. We are certain that there is much to be learned from the civil justice experience in fashioning a plan for criminal justice reform. While, in practice, "dispute resolution" has been applied in the civil matters and "restorative justice" has been allocated to the criminal sphere, dispute resolution and restorative justice evolved from a common origin. The dispute resolution and restorative justice communities in BC believe in similar foundational concepts including:

> *"Peace is not the absence of conflict but the presence of creative alternatives for responding to conflict -- alternatives to passive or aggressive responses, alternatives to violence."* - Dorothy Thompson

The Green Paper makes numerous references to "alternative measures" (methods to divert lower-risk accused persons to other options short of a criminal trial) and laments that they appear to be under-used. While it is not specifically mentioned in the Green Paper, we assume "alternative measures" includes the wide variety of approaches included within "restorative justice".

We support the views of the restorative justice community that alternative measures of all kinds need to be considered earlier and in a more organized and consistent way across the system. In particular:

- the goals of sentencing as outlined in section 718 of the Criminal Code of Canada and the Youth Criminal Justice Act (YCJA), in many circumstances, can be best served and accomplished by these models and approaches.

- Canadian law, policy and legal precedents make clear that there is an obligation to consider restorative and Aboriginal justice approaches at all levels of the system from police diversion through post incarceration.

- Significant research and case study examples exist, illustrating that the primary goals of Canadian law, as well as those of the Criminal Justice System, can often best be achieved through restorative applications of Alternative Measures (section 717), Extrajudicial Measures (YCJA), Conditional Sentencing (section742.1), Probation (section 731), Corrections and Conditional Release Act (sections 81 and 84) and the Gladue Decision.[1]

These processes have such a huge potential to meet needs currently largely ignored by the system (involving and hearing the voices of victims for example), to take a proportional approach to criminal justice, to open the right doors for low-risk offenders and to resolve conflict before engaging the expensive and formal criminal justice system. They deserve to be carefully considered, funded, implemented and tested.

We believe creative ideas can be drawn from the civil context that may well provide solutions in the criminal context. For example, in Mediate BC's experience in Small Claims Court, effective triage (i.e. assessing the needs of cases and parties and then assigning them to the most appropriate process) is crucial to making alternative-to-court reform options work. We have no doubt that early triage will also be an essential component of a revitalized criminal justice system.

As the Green Paper is looking for broad, system-wide solutions which break down silos and gather creative ideas across boundaries, it makes sense that consultation on these critically important issues involve a broad spectrum of stakeholders, including those who may be able to bring fresh eyes to the criminal system and apply concepts and processes that are working well in other areas of the justice system.

The Green Paper supports engagement of stakeholders and the public and says:

> *"We must find a framework in which independent participants can have a common dialogue and create a shared understanding of how the system functions, its strengths and its challenges." Page 19*

[1] http://www.heartspeakproductions.ca/rj-is-the-law/

Mediate BC is ready to engage in this dialogue. We don't yet have specific solutions, but we have the expertise and experience to work collaboratively with other stakeholders to explore and implement options in a reflective way that allows for an emerging, rather than a blue-print approach to reform.

Based on our experience in civil justice reform we believe that the following is necessary to move towards an effective criminal justice system:

1. A transformative reconciliation approach to the Canadian criminal law system's relationships with the Aboriginal peoples of Canada. We have learned from our involvement in both our Child Protection Mediation Practicum Program and a project we are just completing, in partnership with the Tsleil Watuth First Nation, on how to reflect First Nations' legal traditions and customary laws in *Canadian Human Rights Act* processes, that we need to think quite differently about process when we are purporting to resolve conflicts involving Aboriginal peoples. We need to consider our obligations as a state in the context of the *UN Declaration on the Rights of Indigenous People*, and its emphasis on the role of community, as well as the individual.

2. Collaboration among diverse agencies and stakeholders. For example, from our perspective, the criminal justice reform initiative is an irreplaceable opportunity to bring the Dispute Resolution and Restorative Justice communities/experts together to share ideas and begin a creative dialogue. This discussion would be most fruitful if it also involved the other key players in the criminal context including the Judiciary, Crown Counsel, defence counsel, probation officers, the police, the aboriginal community etc. We are happy to offer to that process our long-standing strong working relationship with the Provincial Court, built through many years working closely with the Judiciary and Court Services Branch through our Court Mediation Program in five registries of the Provincial Court.

3. Thoughtful design of conflict resolution alternatives. Again we are happy to offer our experiences in design. They include:
    a. Office of the Police Complaint Commissioner: we designed and administer a mediation referral process for police complaints as well as conflict resolution training program for professional standards and front-line supervisors;
    b. Child Protection Mediation Practicum Program: we designed and successfully implemented a mediation practicum using a co-mediation model in order to increase the number of child protection mediators in the province from remote and aboriginal communities;
    c. Vancouver Justice Access Centre: we assisted in the design of the civil portion of the VJAC including a multi-disciplinary approach and a civil mediation referral service. This service aligns well with the criminal

initiatives which support a more holistic approach to preventing and responding to criminal activity.

4. The development of rosters of people with specific skills to provide conflict resolution services. If reform in the criminal law system offers alternative-to-court measures as the norm, the need to offer the public some assurance of qualified practitioners in the area will arise, as it has in the civil and family areas. The civil and family rosters that Mediate BC administers became a necessity when government introduced the Notice to Mediate regulations for Civil disputes, and then later in the Family Law area.

5. Research, evaluation, financial analysis and metrics. Over the past 14 years our Court Mediation Program has engaged in extensive collecting, analyzing and reporting on performance data. We recognize how important monitoring progress is to shaping emerging strategies and programs to implement reform.

6. Well-designed and implemented pilot projects. We can attest, from 14 projects we have been involved in that were funded by the Law Foundation of BC, that the Foundation is a supportive partner for pilot projects to test out reform ideas that are potentially scalable to province wide programs.

7. Nimbleness, flexibility and innovation by collaborating with extra-government not-for-profit organizations. Government bureaucracies are not often well-placed to innovate. In Mediate BC's experience, being outside of government allows an organization to be nimble and flexible enough to take on the risks that are attendant upon innovation.

Mediate BC appreciates this opportunity to contribute to the BC Justice Review process. We would be pleased to discuss this submission at your convenience.

Yours truly,

Peter C. P. Behie, QC
Chair

Kari D. Boyle
Executive Director

MediateBC
Dispute Resolution & Design

SCHEDULE B

September 8, 2009

Focus Consultants - Dashboard
Evaluation of the Small Claim Pilot Project – Final Report Summary

The Small Claims Court Pilot Project was launched by Order in Council on November 26, 2007 as part of the Ministry of Attorney General's Justice Transformation program. In its first year, the pilot received 4,342 cases filed at Robson - one quarter of all small claims filings in BC - including 982 in the Summary Trial stream (23%), 1,203 in the Simplified Trial stream (28%) and 1,836 in the Mediation stream (42%).

Highlights:

Pilot Objectives	***Evaluation findings***

1. Provide early just solutions and faster justice within the provincial small claims process	• All three pilot streams are faster than their historical counterparts (table 26, p. 37). The median time required to reach case conclusion has decreased by:
	  • 7% for summary trials
	  • 31% for simplified trials
	  • 52% for mediations
	• simplified trials and mediations are now concluded within 4 to 5 months of filing (previously 6 to 8 months)
	• Less court time overall is being incurred in each pilot stream than in the historical comparison streams, both in terms of number of appearances per case and the total time per case (s. 3.5, p. 30)
	• The average number of appearances per case has decreased in all three streams by 23% (table 19, p. 32)
	• The average amount of court time per case decreased by 17% in the summary trial stream, 8% in the simplified trial stream and 7% for mediations (table 20, p. 32)
	• Pilot users were more satisfied with the speed of the process than historical users (s. 5.3.1, p. 111)

2. Provide small claims processes that are even more accessible and easy to use	• Court users gave high ratings for speed, accessibility and simplicity-related issues (helpfulness of registry, information sheets, websites) • Of the three basic accessibility indicators measured in the study - speed, cost and simplicity – simplicity was considered the most important to court users and ratings of simplicity were higher in the pilot than the historical sample • 50% felt they needed help or explanation about how the small claims process worked; 46% used a website and 42% received help to complete their documents (half from lawyers)

	• There was a moderately higher degree of satisfaction with Richmond day time court than the Robson night time court (table 75, p. 105) for the simplified trial stream • Among all court users there was clear preference for daytime over evening court, the predominant reason being to keep business related activities within daytime hours; conversely, 26% preferred evening to avoid losing time off work (table 76) • Positive assessments about cost were related to stream processes saving time (table 78, p. 109)

3. Dedicate court resources to areas where they are most needed	• For mediations that do not settle and proceed to trial:
	  • parties are considered better prepared for trial conference and trial (s. 5.5, p. 129)
	  • the duration of trials is 15% less than historically following settlement conferences (s. 7.7, p. 149)

4. Provide more parties with opportunities to resolve their disputes by agreement	• In 39% of mediations the parties sign a Form 25 mediation agreement documenting the settlement at the conclusion of the mediation (s. 3.8, p. 43) • Including cases that do not proceed to trial conference the mediation settlement rate is considered to be 53% • There is a lower settlement rate in cases over $15,000 (table 37, p. 49) • The presence of counsel has a marked impact on settlement rates: with both counsel it is 23%, with defence counsel only it is 34%, with no counsel it is 45%, and with claimant counsel only it is 52% (table 38, p. 50) • Goods and services cases, which make up 41% of the case load (table 14, p. 24) have the highest settlement rate (48%) while personal injury and insurance cases (each 6% of the case load) have the lowest (21 and 20%) (table 39, p. 50) • The two principal conclusions of the attrition study are that 36 – 38% of claims that are initiated drop out, primarily in the early stages of the court process, and 60% of attrition cases are the result of out of court settlements (s.6.0 to 6.2) • The three primary barriers to settlement recorded by mediators following non-settlement in pilot cases are unrealistic expectations by one or more parties, lack of representation or advice, and lack of preparation

MediateBC
Dispute Resolution & Design

Other highlights:

- On average 47% of Small Claims Court users who responded to the survey have a university degree (compared to 31% of Greater Vancouver citizens).
- 54% of claimants and 65% of defendants were businesses or institutions rather than individuals.
- Exit surveys report between 74% and 88% of pilot respondents gave positive rating to the appropriateness of their stream (depending on the stream). Between 61% (mediation) and 73% (simplified trial) of respondents prefer their own stream as opposed to a hearing before a judge or another stream.
- Thirty- eight percent of pilot cases involve legal representation. Representation varies based on
    - Claim value (24% in cases under $5,000 to 68% in cases $20,000 and over)
    - Case type (higher for employment, personal injury and insurance)
    - Stream (a high of 53% in mediation cases to a low of 22% in Simplified Trials)

Scorecard on Expected Outcomes:

Expected outcomes from the Small Claims Pilot Project included the following:

EXPECTED OUTCOME	MET
▪ Cases will be resolved through mediation with the goal of a 50% settlement rate.	
▪ Cases will be resolved faster through Simplified and Summary Trials than through Regular Trials.	
▪ The ability to reallocate court resources.	
▪ Parties proceeding through trial conferences will be better prepared for trial.	
▪ Processes will use resources in a manner that is proportionate to the amount in dispute.