



# CANADIAN CENTRE FOR ELDER LAW

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## Backgrounder

### Elder and Guardianship Mediation

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#### INTRODUCTION

Recent legislation and private practice experience indicates that elder and guardianship mediation are important new areas of legal expansion in Canada generally, and in BC in particular. Mediation is rapidly expanding and research suggests its broad efficacy and value. In BC there is a strong mediation community and respect for this growing practice.

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 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.

This project is the first of its kind in Canada to substantively address legal, ethical, social and legal practice-issues raised by both mandatory and voluntary elder and guardianship mediation. Outcomes such as model recommendations for practice will fill an important need for private lawyers, mediators, older adults and other mediation participants such as family, friends and supporters, legislators, judges, capacity assessors, health care providers, social workers, educators, advocacy workers, long-term care regulators and employees, and the Public Guardian and Trustee.

#### BACKGROUND

On October 22, 2007 the BC Legislature passed Bill 29, *Adult Guardianship and Planning Statutes Amendment Act, 2007* (the "AGA Amendment") into law, with its anticipated implementation in 2009. The AGA Amendment now requires mandatory mediation for guardianship applications in many common circumstances. (Previous incarnations of Bill 29 include the substantially same material known as Bill 32.) With these changes, BC joins Ontario in the vanguard of Canadian legislative change in requiring mediation for guardianship matters.

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.

Legislated (mandatory) mediation is actually 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 must be mandatorily mediated. 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
- Alternatives to adult guardianship options including increased services
- Assisted Living or Long-Term Care
- Types of medical care and alternative health care options
- Private Care Agreements
- Caregiver issues (who, when, where, how much, respite care etc.)
- Lifestyle choices (ie 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 no substantive literature or educational materials for guidance, education and information. 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

## **PROJECT OUTPUTS**

The report produced as a project output will assist in the creation of a body of literature on elder and guardianship mediation in Canada. It will support much-needed continuing private and public legal education initiatives, provide model recommendations for practice, provide scholarly research into these subjects and the potential need for law reform in the

area. To ensure that this research is accessible to mediation professionals and policy makers, an advisory committee will be formed at the outset of the project. This committee will review project progress on an ongoing basis in order to provide expertise on key areas. As well, members of this committee will participate in the dissemination of information gathered during this research project through participation in media events and online discussions in the mediation field regarding issues such as self-regulation, expertise and educational competencies regarding elder and guardianship mediation. In order to coordinate this aspect of the project with the academic research Joan Braun, M.S.W., LL.B., has been hired to liaise with BCLI and the advisory committee, and to conduct interviews and carry out field research in the mediation community. Joan Braun has both recognized mediation credentials, and knowledge of legal and community mediation.

### **DESIRED OUTCOMES**

It is hoped that at the project will:

1. Increase the understanding and awareness of the significantly different issues raised in an elder or guardianship mediation amongst the legal and mediation communities
2. Increase discussion amongst the legal and mediation communities about self-regulation, expertise and educational competencies regarding elder and guardianship mediation
3. Spark discussion and debate about elder and guardianship mediation within advocacy groups, the Canadian Bar Association, online and through various media.
4. Create a framework, in partnership with leaders in the mediation community, to address key issues such as training and rosters for elder and guardianship mediation in BC.