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## Mediation: Principles, Process, Practice (Canadian Edition)

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## **Mediation: Principles, Process, Practice (Canadian Edition)**

Laurence Boulle and Kathleen J. Kelly  
Toronto: Butterworths, 1998, 356 pp.

*Reviewed by* Roxanne Porter

In the past twenty years mediation and other forms of alternative dispute resolution (ADR) have seen a tremendous growth in use for the resolution of various types of conflict. In *Mediation: Principles, Process, Practice*, Laurence Boulle and Kathleen Kelly purport to discuss the basics of mediation for the increasing number of people in Canada who are studying and practicing mediation.

In 1996, Laurence Boulle, a professor of law and director of the dispute resolution centre at Bond University in Queensland, wrote the first edition of this book, which concentrated primarily on mediation in Australia<sup>1</sup>. Kathleen J. Kelly, a lawyer and director of the Canadian Foundation for Dispute Resolution, has since updated the text and adjusted its focus to the experience of mediation in Canada, while at the same time maintaining many of the Australian examples for comparison.

As the subtitle suggests, the book is divided into three parts: principles, process and practice. The first two parts remain largely the same as in Boulle's earlier Australian edition with some input from Kelly on principles and processes in Canada. The framework of the third part has also remained the same but Kelly has reshaped the content significantly to reflect Canadian practices.

The first section of the book provides an interesting discussion of some of the many difficulties inherent in establishing a singular definition for mediation, given that there are many possible styles of mediation and many ways of defining terms such as "neutrality" and "voluntary" that are frequently used in describing mediation. There is also an in-depth discussion of some of the more common questions

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<sup>1</sup> L. Boulle, *Mediation: Principles, Process, Practice* (Sydney: Butterworths, 1996).

relating to mediation, such as whether mediators should be neutral, and whether mediators should intervene in disputes. The authors caution mediators to remember that mediation operates “in the shadow of the law” and that mediation should not be viewed as a means to an end, but as an end in itself.

The authors also address the future direction of mediation. They advise that mediation may need to be regulated in order to keep it from becoming either a system of second class justice for those who cannot afford to go to the courts for a remedy; or a system of privatized justice that only the rich can afford, which would leave everyone else at the mercy of an expensive and lengthy litigation process through the courts.

The first section of the text ends with a comparison between mediation and the many other alternatives to litigation, including settlements made on the steps of the courthouse, negotiation, conciliation, counseling, arbitration, case appraisal, and facilitation. This section will be helpful for both mediators and participants in assessing which method of dispute resolution would be most appropriate for a particular situation. However, there is no discussion of aboriginal systems of dispute resolution such as healing circles or how well they function compared to mediation.<sup>2</sup> The failure to include such a discussion is an unfortunate gap in the text’s analysis.

The section on process begins with a description of the various stages of mediation and the roles participants have in the mediation process. The most controversial issue discussed in this area is whether the mediator should impose pressure to settle on the participants. The authors express concern that mediators may tend to apply pressure on the weaker party, or that they may push settlements that are not in the best interests of the participants in order to register a success in their record. Because of these issues, the authors support the implementation of standards for mediators, which would include a prohibition on the exertion of such pressure. In some ways this is not surprising, as Kelly is co-chair of the Standards and Credentials Committee of the Canadian Foundation for Dispute Resolution.

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<sup>2</sup> Those who are interested can find an article on this topic written by Judge B.D. Stuart, “Sentencing Circles: Making ‘Real Differences’” in J. Macfarlane, ed., *Rethinking Disputes: The Mediation Alternative* (Toronto: Emond Montgomery Publications Limited, 1997).

The section on process also includes an analysis of necessary skills for mediators as well as some of the techniques that can be used to facilitate mediation, including organization, negotiation, communication, note-taking, and drafting. As the book is not intended to be a mediator's practice manual the authors do not attempt to describe and explain mediator skills in an exhaustive manner.<sup>3</sup> This appears to contradict earlier commentary that the book is intended to be a teaching tool and practitioner's companion.<sup>4</sup> However, the discussion is useful for those not familiar with the process of mediation. Overall, the process section is a thorough outline of the mediation process from start to finish, with several suggestions for avoiding pitfalls and conducting a successful mediation.

The final section of the text surveys the practice of mediation in Canada, with reference to the process in Australia. Kelly states that the freelance practice of mediation is not fully developed in Canada, but that private sector mediation institutes have been growing in recent years. She also outlines the differences between private mediation, court-connected mediation and mediation provided by government agencies, tribunals, and legal aid commissions. The authors highlight the fact that private and government sponsored mediation have been a growing method of dispute resolution in Canada for many years, but that court-connected (mandatory) mediation is in its infancy in Canada. Kelly pays particular attention to the new programs that have been started in the Unified Family Court in Hamilton, Ontario, the Ontario Provincial Court, and in the Small Claims courts in various jurisdictions of British Columbia and Ontario and then compares them to the Australian programs outlined by Boulle. As most of the Canadian programs of court mandated mediation were pilot projects or in development when this book was written, a thorough examination of the successes and failures of these programs will have to be found elsewhere.<sup>5</sup>

The authors take the position that it is better if all parties enter the mediation process voluntarily. While neither Kelly nor Boulle are proponents of mandated mediation they do suggest that if proper

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<sup>3</sup> L. Boulle & K.J. Kelly, *Mediation: Principles, Process, Practice*, Canadian ed. (Toronto: Butterworths, 1998) at 164.

<sup>4</sup> *Ibid.* at iv.

<sup>5</sup> A final report on the pilot project in Family Mediation in Ontario has been prepared by D. Ellis, *Family Mediation Pilot Project: Final Report*, Oakville, Ontario, 1994.

safeguards are imposed to make both sides feel comfortable in the process, court-connected mediation could be successful despite the fact that it is mandated.

The discussion of quality, standards, training, education, accreditation, and accountability in mediation touched on in the discussion of the role of mediator is expanded here in reference to the practice of mediation. The authors discuss both the positives and negatives of regulating mediation, but in the end caution that if mediation is regulated only by market forces it will lead to practice by unqualified individual and false representation to the public.

Several legal issues regarding mediation are also discussed, including the liability of mediators and whether lawyers are required to advise their clients about the possibility of using mediation or other alternative dispute resolution mechanisms before proceeding with litigation. As of yet, there have been no cases in Canada or Australia where mediators have been found liable. The authors, however, believe that such suits are inevitable.

The text concludes with an examination of themes and trends in the practice of mediation. Kelly and Boule explore whether there is an actual spontaneous demand for mediation, or if mediations are usually the result of outside pressure or encouragement. The authors also outline some possible directions mediation may take in the future, such as fast tracking, the use of cross-examination, mootings, and a more rights based focus not currently in use in mediation.

A final caution from the authors is that the benefits of mediation have sometimes been overstated. The authors suggest that mediation has been promoted without criticism, particularly by government agencies.<sup>6</sup>

*Mediation: Principles, Process, Practice* is a good summary of the area of mediation for those new to the subject. Teachers instructing new practitioners in the field can also use this text, because it provides a thorough summary of the stages of mediation, from the initial contact with the participants, to the stages of the meeting itself, to the necessary follow-through. However, as this book does not provide any new information or substantive analysis, it may not be overly useful to those who have been practicing in the field for some time. As this publication focuses on the legal perspective of mediation it may be a useful learning

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<sup>6</sup> *Supra* note 3 at 323.

supplement to those practicing meditation in the fields of management and social work, particularly as the bibliography refers to other works that offer a specialized perspective of mediation in family<sup>7</sup>, labour<sup>8</sup>, and commercial<sup>9</sup> law, as well as mediation for managers in both the public<sup>10</sup> and private<sup>11</sup> sectors.

If the reader is looking for in depth information on specific techniques for mediators such as negotiation or communication skills, it is recommended that they refer to works specific to those topics.<sup>12</sup>

*Mediation: Principles, Process, Practice* is the Canadian version of a book that was originally written to tell of the mediation experience in Australia. Another edition, highlighting the practice of mediation in New Zealand was published in 1998,<sup>13</sup> and a British edition is due this spring<sup>14</sup>. This reviewer hopes that the authors take the next logical step and amalgamate the different editions to produce a general text on mediation as practiced in these Commonwealth countries.

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<sup>7</sup> See J. Walker, "Family Mediation" in J. Macfarlane, ed., *Rethinking Disputes: The Mediation Alternative* (Toronto: Emond Montgomery Publications Limited, 1997); B. Landau, M. Bartoletti & R. Mesbur, *Family Mediation Handbook*, 2<sup>nd</sup> ed. (Toronto: Butterworths, 1997); D. Chalke, "Family Mediation in British Columbia: A Struggle to Get out of the Starting Gate" (1985) 11 *Therapy Now* 22; D. Camozzi, "Divorce Mediation: A Perspective from Quebec" (1985), 11 *Therapy Now* 20.

<sup>8</sup> J. McCormack & S. Lanyon, "Alternative Dispute Resolution in Labour Relations: A Tale of Two Provinces" in J. Macfarlane, ed., *Rethinking Disputes: The Mediation Alternative* (Toronto: Emond Montgomery Publications Limited, 1997).

<sup>9</sup> Genevieve A. Chomenki, "Mediating Commercial Disputes: Exchanging 'Power Over' for 'Power With'", in J. Macfarlane, ed., *Rethinking Disputes: The Mediation Alternative* (Toronto: Emond Montgomery Publications Limited, 1997); D.P. Emond, *Commercial Dispute Resolution* (Aurora, Ont.: Canada Law Book, 1989).

<sup>10</sup> A.M. Zack, *Public Sector Mediation* (Washington: Bureau of National Affairs, 1985).

<sup>11</sup> J. Burton & F. Dukes, eds., *Conflict: Readings in Management and Resolution* (New York: St. Mary's Press, 1990).

<sup>12</sup> For more information on negotiation: M. Anstey, *Negotiating Conflict: Insights and Skills for Negotiators and Peace-makers* (Kenwyn, South Africa: Juta & Co., 1993); C.B. Craver, *Effective Legal Negotiation and Settlement* (Charlottesville, Va.: Michie Co., 1993); D. Hawkins, M. Hudson & R. Cornell, *The Legal Negotiator: a handbook for managing legal negotiations more effectively* (Melbourne: Longman Professional, 1991); W. Ury, *Getting Past No – Negotiating With Difficult People* (London: Business Books, 1991).

<sup>13</sup> L. Boule, Jones & Goldblatt, *Mediation: Principles, Process, Practice* (Wellington: Butterworths, 1998).

<sup>14</sup> M. Nesic & L. Boule, *Mediation: Principles, Process, Practice* (London: Butterworths, due spring 2000).