THE PROFESSIONALIZATION OF MEDIATION

BY

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ABSTRACT

Dispute resolution processes can be separated into two categories: the formal and the informal. Though the boundaries of these divisions are fluid, formal processes tend to embody a greater number of structural attributes than their less formal counterparts. The conventional adversarial process exemplifies the first type - a process characterized by a series of clearly defined legal rules and procedures - and the mediation process is representative of the second - a dispute resolution process which lacks any semblance of formal structure.

The relationship between formal and informal methods of dispute processing is symbiotic. It is common to address criticisms of the one process by introducing features of the other. Attacks on adversarial justice culminate in the removal or softening of many of its formal features. Likewise, the response to complaints about mediation is the introduction of formal attributes. The recent growth of mediation has generated considerable criticism of this dispute processing venue and as anticipated one response is the suggestion that mediation be formalized. The formal feature being considered as a remedy is the creation a class of professional mediators.

This thesis questions the value of formalizing the mediation process. Professionalization has the potential to nullify many of the benefits that mediation sought to bring to dispute resolution. The evidence intimates that professional regulation increases costs, suppresses diversity of occupational practice and inaugurates a form of inequality. These empirical manifestations suggest that when this institutional structure is superimposed onto the mediation process, there is a distinct possibility that professionalization will eliminate the advantages associated with informal dispute resolution and recreate many of the problems encountered with the adversarial justice process.

Two primary candidates of professional regulation are being considered, licensure and certification. This thesis suggests that regardless of the regulatory scheme selected, much of the social utility of mediation is lost when this occupation is regulated. In the final analysis, the issue becomes how to achieve an appropriate equilibrium between formal and informal dispute resolution processes. Injecting a moderate amount of professionalism into the mediation process may achieve this balance but not without sacrificing some of the many advantages of informalism.
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CHAPTER I

Formal and Informal Methods of Dispute Processing

I. Introduction

The past two decades have witnessed the exponential growth of mediation as a means of conflict resolution.\(^1\) Until the 1970s, mediation was primarily used to resolve labor-management disputes - to prevent the occurrence of strikes and, once a strike began, to quickly resolve work stoppages.\(^2\) Recently, mediation has transcended the labor context and is currently used to resolve a wide variety of disputes: family law disputes, environmental disputes, public interest disputes, young offender matters, mortgagor/mortgagee disputes, landlord/tenant disputes, commercial disputes. In some jurisdictions, resort to mediation has become a prerequisite to trial.\(^3\)

\(^1\) Mediation has been entrenched in statutory provisions ranging from the *Farm Security Act* in Saskatchewan, S.S. c. 5, s.12 to the *Federal Divorce Act*, R.S.C. 1985, c. C.3 s. 9(2) to the *Ontario Insurance Act*, R.S.O. 1990, c. I.8 s. 280. Most of these provisions have been introduced in the last 10 years. Family Justice Centers, Community Justice Centers and Young Offender Mediation programs have sprung up across the country along with a number of mediation-related organizations including Family Mediation Canada, the National Network: Interaction on Conflict Resolution (a network that coordinates mediation initiatives on a national basis) and the Arbitration and Mediation Institute of Canada (the latter term being added in 1988). On the educational front, law schools and graduate programs have recently introduced courses in mediation and alternative dispute resolution: see generally, D. Issac, ed., *Teaching Conflict Resolution in Canada: A Syllabi Sampler for Universities* (Waterloo, Ont.: The Network: Institute for Conflict Resolution, 1991).


\(^3\) See, for example, the *Employment Equity Act*, S.O. 1993 c.35 s.35 and the *Insurance Act* S.O. c. I.8. Mediation has become mandatory in many jurisdictions in the United States in divorce proceedings. A trial project launched in January 1994 in Saskatchewan requires 60% of all civil suits filed attempt mediation prior to proceeding with court action. Source: G. Sloan, mediator, interview with M. Gallant, February 1st, 1995, Vancouver, British Columbia.
Briefly, mediation is a dispute-resolution technique in which a neutral third party, a mediator, assists disputants in settling their differences.\(^4\) The mediator is not the advocate for either party but, rather, is an individual who facilitates the process of dispute resolution. The third party has no power to impose a resolution. The decision to settle their differences, including the terms and conditions of settlement, lies with the parties.

The extension of mediation beyond the labor context and the increasing interest in this method of conflict resolution has generated considerable debate. Advocates of mediation point out that this process allows parties to resolve conflict in a conciliatory fashion without resort to an authoritative third party. They argue that mediation decreases the costs of dispute resolution, reduces the demand on court resources and allows conflict to be resolved at a much quicker pace. Critics contend that the virtues of mediation are largely overstated. They argue that mediation creates a second class justice system in which the safeguards of procedural justice are sacrificed to cost, speed and efficiency.

While there are merits to both sides of the argument, the controversy has not halted the proliferation of mediation as a means of conflict resolution. Instead, this debate has pointed mediation in new directions. One such direction is the professionalization of mediators. This thesis questions taking the mediation process in the direction of professionalization.

In this work, professionalization refers to the regulation of the central actors in the mediation process, mediators. Currently, efforts are being made to design and implement mechanisms that will regulate the practice of mediation. The principal objective is to address the criticisms leveled at the mediation process. Professionalization is a regulatory instrument that can be used to achieve the objective. But the regulation of mediators has the potential to improve upon the delivery of mediation services, there is equally the potential that this remedial measure will nullify the benefits of this particular method of dispute resolution. This thesis examines the possibilities and limitations of the professionalization of mediation with a view to determining whether the practice of mediation should be regulated and, if so, what form that regulation should take. To create the framework of analysis for this work, this chapter serves as a general introduction to the mediation process.

II Informal Methods of Dispute Resolution

A. Informal Justice Processes and Dispute Processing

Informal justice refers to a wide range of institutional and non-institutional mechanisms that regulate social interaction. In legal scholarship, the concept of informal justice and informal justice processes embraces everything from vigilantism⁵ to settlement conferences⁶ to mediation. What does, or does not, constitute an informal justice process is unclear. One method of


defining informal processes is by contrasting them to methods of dispute resolution that are
thought to be more formal. An informal justice process is something that differs from a formal
process. Abel captures this perspective in stating that informal processes are:

"...legal phenomenon, e.g., with institutions that declare, modify and apply norms
in the process of controlling conduct and handling conflict. Such institutions are
informal to the extent that they are non-bureaucratic in structure and relatively
undifferentiated from the larger society, minimize the use of professionals, and
eschew official law in favor of substantive and procedural norms that are vague,
unwritten, commonsensical, flexible, ad hoc, and particularistic. Every instance
of informal justice will exhibit some of these characteristics to some degree,
though in none will all of them be fully developed." 7

According to this definition, informal justice is something less institutional, less
structured, less
reliant on legal norms than the formal law and formal legal institutions. As a general rule, the
court system of dispute resolution is thought to epitomize formal justice.

The weakness of this conception of informal justice processes lies in its failure to appreciate that
formal justice process are not found in all societies. Although formal processes such as courts
are a central feature of north-American social organization, anthropological and sociological
study of dispute processing in a number of different communities around the world reveals that
in many societies informal processes are the dominant, if not the only, method used to process
disputes. 8 These processes only appear to be informal when they are contrasted with the

[hereinafter The Politics].

8 See generally, K. Avruch, P. Black and J. Scimecca, eds., Conflict Resolution: Cross-
Cultural Perspectives (Westport, Conn.: Greenwood Press, 1991); M. Barkum, Law Without
Sanctions (New Haven: Yale University Press, 1968); P. Gulliver, “Case Studies in Law in
Non-Western Societies” in L. Nader, ed., Law in Culture and Society (Chicago: Aldine Press,
structured process personified by courts. In most of these societies, there is a complete absence of court-like procedures. If informal processes are the only processes used to resolve disputes, they can hardly be described as informal. They may be based on an institutional or quasi-institutional structure that is less visible than the court process but a structure may be present nevertheless. And, while it is true that these processes are different, their importance to the particular social milieu in which they occur may render them just as formal to the groups they serve as the court process is to north-Americans.

Individual communities have different social relationships and different value systems which shape their dispute processing techniques. Each community has its own distinct understanding of the world and its own particular historic and geographic circumstances. But despite these differences, there are certain features that recur with some regularity in societies which lack court-like structures though they are by no means common to all. Most societies whose dispute processing practices would fall within Abel’s definition of informal justice processes exhibit higher degrees of racial homogeneity than heterogeneity.9 Contributing to that homogeneity, or
perhaps as a consequence, many of these communities share a cultural identity predicated on
kinship bonds - extended families, tribal or clan relationships, shared ancestral roots.\textsuperscript{10} Many of
these societies have a collectivist, rather than individualist, social or political orientation.\textsuperscript{11}
Often, these societies are described as primitive or simple societies by contrast to more
industrially developed societies.\textsuperscript{12}

It is generally thought that the social organizational structure of these societies gives birth and
effect to informal methods of dispute processing.\textsuperscript{13} External policing forces, the existence of
which is common to societies with formal systems of dispute processing, are rarely in evidence
in because these communities rely on internal enforcement mechanisms - social ostracism,
shaming or expulsion from the community or a common belief in supernatural retribution.\textsuperscript{14} In
order for these internal mechanisms to be effective, they require significant degrees of social
cohesion. It is the community itself, rather than an external body, that ensures compliance with

\textsuperscript{10} L. Girdner, “How People Process Disputes” in A. Milne and J. Folberg, eds., \textit{Divorce
\textsuperscript{11} Nader, \textit{The Disputing Process}, \textit{supra} note 8 at 29.
\textsuperscript{12} Although the term primitive is used to describe these societies, it relies on an assumption
with which I cannot agree: that technological advancement correlates with a more civilized
society. The societies whose dispute processing methods are less formal than the court process
are no more nor less civilized than our present north-American society.
\textsuperscript{13} S. Roberts, Order and Dispute Processing (New York: St. Martin’s Press, 1979) at 35 - 42;
J. Rothenberger, “A Sunni Muslim Village in Lebanon” in Nader, \textit{The Disputing Process}, \textit{supra}
note 9 at 162 -168; W. Felstiner, “Influences of Social Organization on Dispute Processing”
(1974) 9 Law & Soc. Rev. 62 at 63; Hamnett, \textit{supra} note 8 at 6 -7;
\textsuperscript{14} Nader, \textit{The Disputing Process}, \textit{supra} note 8 at 31.
the outcomes of informal processes. If there is not enough community support for the mechanism used, the capacity of informalism to produce social order will be substantially reduced.

Dispute processing mechanisms in place in many of these communities often involve a third party intervenor. The role of that intervenor differs from one social setting to the next. In most, the third party possesses some form of moral or quasi-legal social power that enables them to exert pressure during the dispute resolution process. In her examination of the use of mediation in Chinese societies, Bailey found that the third party intervenor, the mediator, exerted extra-legal pressures on the disputants to persuade them towards a particular result. The mediator represented the interests of society and pressured disputants to resolve differences in a manner that was consistent with widely-held social values. Similarly, other scholars have found that third parties have different resources available to them with which to manipulate the process of dispute resolution and influence the substantive outcome.

This understanding of the role of third parties differs sharply from the role that is ascribed to mediators in societies where mediation co-exists with more formal dispute resolution processes. In the latter societies, there is an outright prohibition against mediators attempting to influence the parties towards a particular result. The mediator's intervention is strictly procedural.


16 Ibid. at 71.

17 See generally, Merry, supra note 9.
Mediators work with the parties but remain neutral with respect to the positions of the parties and the substantive outcome. One of the fundamental tenets of the north-American variety of mediation is that resolution depends solely on the consent and agreement of parties and not on the wishes of a particular mediator nor on the interests that that individual may represent.

B. Informal Justice in the North American Context

While informal dispute processing techniques in some communities appear to be predicated on social organization, the current trend towards mediation in north-American is less a reflection of social organization than it is a reaction to more formal methods of conflict resolution. More organic informal justice processes do occur - intervention by rabbis within the Jewish kibbutz or the role of priests in the Catholic community, for example - but the recent growth of mediation is a response to the perceived inadequacies of formal, court-based dispute resolution rather than the product of a particular form of social organization. Similar to processes in many other parts of the world, mediation may be a part of an evolutionary process, a reflection of the changing nature of north-American society but the growth of informalism is, in large measure, driven by antagonism towards formal processes.


19 Mediation is part of a wider movement identified as Alternative Dispute Resolution, ADR. This acronym is used to describe current efforts to reorganize justice delivery. Three processes constitute the core of ADR - arbitration, negotiation and mediation. Arbitration, the most
Formalism generally refers to the formal features of the court process. The central figures in this process are an impartial adjudicator and the legal representatives of the parties involved. The presentation of each case is governed by a series of predetermined legal rules and procedures. The adjudicator applies the rules to the evidence presented and renders a decision. The inadequacies of this formal model of dispute resolution are described as delay, costs, complexity and alienation. Decisions of judicial tribunals may appear to be abstract and unfair. Legal fees are perceived to be excessive. Evidence brought forth for consideration is thought to be overly constrained by formal rules thus denying the relevance and validity of the context in which the dispute arose. Such deficiencies culminate in the perceived systemic failure to adequately deliver justice. In response, a call goes out for a more socialized, more responsive, formal of these three alternatives, involves intervention by a third party, an arbitrator, who has the power to decide the dispute. Negotiation has historically been part of the court-oriented dispute resolution process and occurs on a relatively informal basis between opposing counsel. Mediation, typically characterized as the least formal alternative, usually occurs without the benefit of counsel leaving the decision to resolve the dispute firmly within the control of the parties. For a discussion of ADR see generally, J. Wilkinson, “ADR is Increasingly Effective and Averts Litigation in Many Cases” (1988) Nat’l L. J. 22 and R. Delgado, “ADR and the Dispossessed: Recent Books About the Deformalization Movement” (1988) 13 Law & Soc. Inq. 145. See also, R. Sharma, From Small Acorns Do Large Oaks Grow: The Rise of Alternative Dispute Resolution in Canada (Masters’ Thesis, Dalhousie University, 1991)[unpublished].


22 Harrington, Delegalization, supra note 15 at 51.
system of justice delivery.23 This response manifests itself as less formal dispute processing systems - less structured and more participatory such as small claims courts, conciliation processes, mediation programs.24

When the system of justice delivery is restructured, or “destructured”, and more informal methods of dispute resolution assume the central role in dispute processing, attacks on informalism begin with a vengeance.25 The attacks range from claims that informal justice creates second-class justice processes26 to claims that informal processes legitimate covert, rather than overt, coercion27 to claims that informal justice mechanisms compound and perpetuate social inequality.28 In response to these assaults, informal methods of dispute resolution are remodeled by the introduction of formal features: the intervenors in informal processes are professionalized, the informal processes are integrated into the court structure, a system of rules is created to govern the dispute resolution process.29

23 Ibid. at 51 - 52.


25 See generally, Abel, The Politics, supra note 7 at 1 - 13 and Harrington, Shadow Justice, supra note 21 at 1 - 35.

26 Auerbach, supra note 24 at 100.


The reintegration of formal protections into the informal justice process illustrates the symbiotic relationship of informalism and formalism. Formalism and informalism share a circular existence - the criticisms of one gradually giving birth to the other. Neither model excludes the other - instances of each co-exist at all times. Shades of informality are present even in the most formal of structures - informal settlement conferences, for instance, share a life within the formal court structure. Formalism and informalism are in a constant state of flux - informality calcifying into formality followed by the melting of formality into informality. Presently, Canada appears to be experiencing the resurgence of the informal part of this cycle, the proliferation of informal justice processes.

III. The Mediation Process

A. The Philosophy of Mediation

Much of the growth of mediation over the past two decades can be attributed to the philosophy that underlies this process - the philosophy of participatory justice. The emphasis in mediation is on the parties themselves and their own capacity and responsibility to make the decisions that affect their own lives. Mediation fosters autonomy and self-determination rather than reliance on a third party decision-maker.

30 A particularly illustrative example of an informal processes that was formalized is found in B. Mann, "The Formalization of Informal Law: Arbitration Before the American Revolution" (1984) 59 N.Y.U.L. Rev. 443.

The ultimate authority in mediation belongs to the parties themselves, and they may fashion a unique solution that will work for them without being strictly governed by precedent or being unduly concerned with the precedent that they may set for others.\(^\text{33}\)

The mediation process seeks to liberate participants from the legalistic approach of court-based dispute resolution, an approach that is seen to be overly constrained by legal rules and procedures. The structured process defined by the substantive law yields to an approach to conflict resolution that is governed by context. Participants determine the relevancy of issues and facts without being compelled to abide by formal legal rules. This is not to say that legal provisions are ignored but, rather, are relaxed in cases where the parties agree that their interests are better served by applying their own particular norms and values.

Part of the reason that the litigation process falls into disfavor is because of objective rules of conduct are applied to situations of conflict that are informed by subjective experience. While legal rules may embody public values, the relationship between the disputants and the production of the law is often so remote that disputants perceive the law to be arbitrary.\(^\text{34}\) They become antagonistic towards objective rules being applied to conflicts that are the product of each party’s subjective experience. In mediation, the disputants see and experience the connection between


themselves and the rules that govern dispute settlement. They create the rules that are applied therefor they are less apt to feel alienated from the dispute resolution process. This ability of the mediation process to connect disputants with the production of the law permits the accommodation of particularized values within the dispute resolution process. Diverse cultural, social and religious values become an integral part of the dispute resolution process. A forum is created in which the parties participate not only in the resolution of the dispute but also in the production of the rules that govern settlement. For this reason, mediation may have more appeal than litigation for those individuals or groups who presently feel alienated from the legal process.

In addition to creating a more participatory justice process, much of the appeal of mediation lies in the fact that the focus in mediation is on the mutual interests of the parties rather than the conflict. The adversarial process is often faulted for compounding existing grievances by requiring a measure of adversarial posturing and the consequent attribution of blame to one or both parties. Tensions between the parties may increase dramatically when the rules of the game require that each party justify their own acts and establish the liability of the other in order to succeed on their claim. Mediation, on the other hand, is not predicated on fault or liability but on the common interests of the parties. Disputants are encourage to work as a team to come up with a solution to their problem. Less emphasis is placed on allocation of fault and greater emphasis on the type of arrangements that will protect the interests of both parties in future. Indeed, Fuller credits the central quality of the mediation process as the ability to re-orient the

35 See T. Ison, *The Forensic Lottery* (London: Staples Press, 1967) at 7-10. Ison discusses the problem of attributing fault in the context of tort liability. He notes, for example (at 9), the disruptive capacity of allegations of fault to otherwise harmonious relationships.
parties towards a new and shared perception of their relationship without causing any further friction.\textsuperscript{36}

In stating that the mediation process is directed towards the mutuality of interests, this is not to say that mediation is simply an exercise in reciprocal compromise wherein each party makes certain sacrifices until a solution is found that is acceptable to both parties. Part of the value of mediation lies in its ability to synthesize competing interests rather than treating conflict resolution as a question of the compromise.\textsuperscript{37} Compromise connotes distribution, equal or unequal, of limited resources: a loss to one results in a gain to the other. While each party perceives compromise as better than other alternatives, each party is required to give up something. Synthesis contemplates something greater than compromise - the integration of competing interests. Although the mediation process undoubtedly involves an element of compromise, it also involves the quest for ways in which the interests of all disputants can be creatively fitted together.

\textsuperscript{36} See Fuller, \textit{supra} note 34 at 325.

\textsuperscript{37} This technique of dispute resolution draws on the ideas of Mary Parker Follett in her work on interest based bargaining. Follett contends there are three ways of dealing with conflict: domination, compromise and integration. Domination is an exercise in sheer power, a victory for the stronger party at the expense of the weaker. Compromise is the distribution of a limited pool of resources. Integration is the synthesis of competing interests. Follett advocated the latter, integrative bargaining, as the most productive means of resolving conflict. See, H. Metcalf \& L. Urwick, \textit{Dynamic Administration: The Collected Papers of Mary Parker Follett} (London: Harper \& Brothers Publishers, 1940) at 30 - 49.
In discussing the synthesis of competing interests, the distinction needs to be drawn between interests and positions. Positions connote a form of one dimensional bargaining. Assuming that there are two parties to a dispute, each party enters into negotiations by setting out their position on the issues in dispute. The span separating the two positions forms the lineal area of possible resolution - all possible settlements lie on this line. Through negotiation, each party gravitates from their original position to arrive at an agreed position located somewhere on the line of separation. The degree to which each party has compromised represents the distance each party has traveled from their original position. Interests are the underlying motivations that inform the stated positions. If negotiations proceed on the basis of interests, the area of possible resolution is greatly expanded because the negotiations no longer proceed in a linear fashion but become multi-dimensional. By examining the underlying interests, it may be possible to accommodate the interests of both parties without requiring that either party compromise. What is required is a reconceptualization of the conflict.

The classic example of the distinction between positions and interests is the case of two parties who fight for possession of an orange. If the negotiations are positional, the solution requires a division of the orange into equal or unequal parts. If the negotiations proceed on the level of interest, the result may be different. If one party wants the orange for the pulp and the other, for the peel, each party can receive exactly what they desire if the underlying interests are brought out. It is this notion of underlying interests and the possibility of creatively fitting these interests

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38 The distinction between interests and position is fully explored in R. Fisher & W. Ury, Getting to Yes: Negotiating Without Giving In" (New York: Penguin Books, 1991). The authors emphasis the greater value produced by interest based bargaining than the alternative, positional bargaining.
together that gives mediation the potential to create win-win scenarios rather than lose-lose or lose-win.  

Despite the appeal of resolving disputes by synthesizing competing interests, not all conflict lends itself to the mediated format of conflict resolution. In his schema of disputes, Aubert divides conflict into two categories, conflicts of interests and conflicts that involve dissensus.  

Conflicts of the first type involve questions of competing interests. Each party seeks to maximize the benefits to him or her and perceives that are better off reaching an agreement than having no agreement at all. Dissensus results where the conflict involves questions of values or facts. The parties do not seek to maximize benefits but to vanquish over the other. One party may believe they know the truth or are on the right side of the conflict consequently seeing no value, or at least less value, in compromise: the cost of negotiation is simply too great because the dispute involves questions of moral imperatives. Conflicts of interest can, though are not always, be resolved by negotiation or mediation but dissensus requires an adjudicative resolution because the divergent views cannot be reconciled. Dissensus requires that a third party decide between the competing claims. As mediation does not decide disputes, it will prove ineffective in resolving conflicts rooted in dissensus.

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The point should be made that mediation can be of value in preventing disputes involving conflicts of interest from transforming themselves into dissensus. Aubert suggests that engaging the adjudicative process requires that conflicts of interest disputes be reformulated as dissensus.\textsuperscript{41} Once a dispute moves into the realm of adjudication, it loses its capacity to be resolved through mediation or negotiation because the process of dispute resolution demands that disputes be defined in a certain way - what was previously a conflict of interests is restated as a conflict of values or facts. Mediation can be used to pre-empt that transformation by impeding a conflicts of interest dispute from metamorphosing into dissensus. Mediation may moderate tensions between the disputants by keeping the conflict on the level of interests rather than elevating it to questions of fact or values. Of course, this is of no use if the origin of the dispute lies in dissensus.

\section*{B. Empirical Research on Mediation}

Preliminary research on the mediation process indicates that it has been quite favorably received by users. Admittedly, research on mediation is still in the embryonic stage, particularly when compared to the libraries of research on the adversarial process. Labor mediation has existed since the mid-1950s but other forms of mediation - family mediation, neighborhood mediation, commercial mediation, etc. - are relatively new phenomenon having only been introduced in the last 20 years. Moreover, although labor mediation pre-dates other forms, it does not appear to have generated debates of the same intensity as the use of mediation in other contexts.\textsuperscript{42}

\textsuperscript{41} Aubert, supra note 40 at 12.

\textsuperscript{42} Criticisms of mediation seem to intensify with the extension of mediation beyond the labour contest. Labour mediation does not seem to quite as problematic as other forms of mediation.
A consideration of a selection of studies on mediation provides some indication of the positive responses that have greeted this method of dispute resolution. Typically, empirical research evaluates the success of mediation by gathering information on participant satisfaction. The success of mediation is assessed by reference to four factors: party satisfaction with the process used, rates of compliance with mediated agreements, monetary costs of using the mediation process and resolution rates, the percentage of cases that have been successfully settled through mediation. While each of these factors is important to dispute resolution, this method of evaluating the success of mediation is not without controversy.

Schedemann’s explains why this is so in D. Schedeman, “Reconciling Differences: The Theory and Law of Mediating Labor Grievances” (1987) 9 Ind. Rel. L. J. 523 at 533-536. Much of the literature on labour mediation seems to accept the principle that the power of participants will influence outcomes, a principle that has generated considerable debate in other contexts, particularly family mediation. See H. Lovell, “Pressure in Mediation” (1952) 6 Ind. Labour Rel. Rev. 20 and A. Meyer, “Mediation in Collective Bargaining” (1959) 13 Int. Labour Rel. Rev. 151. These works seem to accept the general principle that mediation will work to the disadvantage of weaker parties.


See, for example, K. Lowry, “Evaluation of Community Justice Programs” in Merry and N. Milner, supra note 43 at 89.
The empirical studies indicate high levels of party satisfaction with the mediation process. On average, 75% of participants were satisfied with mediation. The typical response of participants was that they found this process preferable to litigation. Litigation was perceived to aggravate existing tensions. While mediation did not necessarily reduce levels of conflicts, it was not perceived to exacerbate stress and tension. Rates of settlement, the success of mediation in producing agreements, ranged from a high of 91% to a low of 64%.

Evidence of the impact of mediation on the costs of dispute resolution and the rates of compliance with mediated agreements is ambivalent. The studies do not indicate any appreciable monetary saving to participants directly attributable to the use of this process rather than litigation. There is some indication that, where successful, mediation may move more quickly to resolution than the court process but, again, the results are not conclusive. Evidence on compliance rates is also inconclusive. While one study found compliance rates with mediated

45 See Thoennes, supra note 43 at 19; Irving, supra note 43 at 55 and Richardson, supra note 43 at 27.

46 Richardson, supra note 43 at 43.

47 Lebow, supra note 43 at 142 - 143.

48 Richardson, supra note 43 at 28: see also, Irving, supra note 43 at 54 (70%) and Thoennes, supra note 43 at 18 (80%).

49 Richardson, supra note 43 at 32 and Thoennes, supra note 43 at 27.

50 J. Pearson and N. Thoennes, “Mediation and Divorce: The Benefits Outweigh the Costs” (1982) 4 Fam. Advocate 26 at 28; N. Dolan, supra note 43 at 13 (finding that mediation averaged 17 days to settle a dispute whereas 225 to 330 was found to be the time required for a litigated solution.
agreements to be higher than compliance with court imposed agreements,\textsuperscript{51} others found no appreciable difference.\textsuperscript{52}

\section*{IV. The Negative Construction of Litigation}

Much of the force behind the mediation movement stems from a general dissatisfaction with the adversarial process. There is nothing novel about this discontent. Attacks on the adversarial model of dispute resolution are found in ancient Chinese proverbs\textsuperscript{53} and echoed by statesmen such as Abraham Lincoln.\textsuperscript{54} Eminent jurist Learned Hand once stated that "...as a litigant, I should dread a law-suit beyond almost anything else short of sickness and of death."\textsuperscript{55} Recent literature on mediation buttresses this negative construction of litigation. Mediation scholarship commonly characterizes litigation as a type of warfare from which all combatants emerge as losers.\textsuperscript{56} And while the negative construction of litigation found in mediation literature is not

\begin{itemize}
\item \textsuperscript{51} Pearson, \textit{supra} note 50 at 21.
\item \textsuperscript{52} Robertson, \textit{supra} note 43 at 33.
\item \textsuperscript{53} "A Lawsuit breeds 10 years of hatred" as quoted in S. Robinson and G. Doumar, "Is it Better to Enter a Tiger’s Mouth than a Court of Justice?” (1986) 5 Dickinson J. Int’l. L. 252 at 254.
\item \textsuperscript{54} According to Lincoln, "...one should discourage litigation and persuade one’s neighbours to compromise. The nominal winner in litigation is often the real loser - in fees, expenses and waste of time." Lincoln’s sentiments are found in P. Stern, ed., \textit{The Writings & Speeches of Abraham Lincoln} (New York: Crown, 1961).
\item \textsuperscript{55} New York State Judge Learned Hand as quoted in W. Pue, "Consumers, Monopolies, and Prospects for the Canadian Legal System" in Pue, \textit{supra} note 40, 139 at 140.
\end{itemize}
novel, some scholars claim that mediation advocates mobilize energies for alternatives by overstating the case against litigation.\(^{57}\) As a preliminary point, it is important to recognize this exaggeration and point out that litigation is not quite the adversarial dogfight that certain mediation proponents would suggest.

If engaging the adversarial process inevitably lead to courtroom warfare, almost any alternative would be preferable. In fact, although court action is often initiated, most disputes are settled prior to entering the courtroom door.\(^{58}\) Only 10% of cases filed with the court lead to a full-fledged trial.\(^{59}\) Not that courtroom battles do not occur but they are the exception rather than the rule. Any construction of the adversary system that focuses solely on what may occur in a courtroom is inaccurate.\(^{60}\) Moreover, although the claim is often made in mediation literature that excessive volumes of litigation have induced a court crisis, a recent study of the Canadian court system found that while the court process was slow, it was not particularly congested.\(^{61}\)

\(^{57}\) See L. Nader, “A Reply to Professor King” (1994) 10 Ohio St. J. Disp. Res. 99 at 100. See also, J. Rothschild, Mediation and Social Control (Department of Sociology, University of California, Berkeley, 1984) [unpublished]. Rothschild concludes that the ideology of mediation required a negative construction of the adversarial process.

\(^{58}\) See, D.C. McKie, B. Prentice and P. Reed, Statistics Canada: Divorce, Law and the Family in Canada (Ottawa: Supply and Services Canada, 1983) at 151.

\(^{59}\) Ibid, at 152.

\(^{60}\) It should be noted that there is an abundance of literature that supports a strictly adversarial approach to dispute resolution. See, for example, A. Donegan, “Justifying Legal Practice in the Adversary System” and D. Luban, “The Adversary Excuse System” both in D. Luban, ed., The Good Lawyer (NJ: Rowman & Allenheld, 1984); see also, O. Fiss, “Against Settlement” (1984) 93 Yale L. J. 1073.

\(^{61}\) Canadian Bar Association, Report of the Canadian Bar Association Task Force on Court Reform in Canada (Ottawa: Canadian Bar Association, 1991) at 36.
Court overload or the crowding of court dockets was not found to be a particularly acute phenomenon. This study did find high levels of dissatisfaction with the adversarial process but found that dissatisfaction resulted more from a perceived exclusion from the court process.\(^\text{62}\)

Certain American studies suggest a similar exaggeration of the notion that courts are in a state of crisis.\(^\text{63}\) Furthermore, although the study of court processes has revealed dissatisfaction with the economic costs of litigation, there is also evidence to suggest that litigants place a high value on having their day in court.\(^\text{64}\) Litigants feel their claim has been validated by being heard and determined by an authoritative tribunal. Equally, sophisticated analysis of the court process suggests that at least for plaintiffs, litigation often turns out to be a good investment.\(^\text{65}\)

Undeniably, the potential economic benefit does not always outweigh the emotional and psychological costs involved in processing a dispute though the adversarial system.\(^\text{66}\)

Similarly, if one considers the counsel aspect of the litigation process, there is considerable debate over whether legal counsel conduct themselves like warriors on the battlefield or whether

\(^{62}\) _Ibid._ at 156.


\(^{64}\) Galanter, _Reading_, _supra_ note 59 at 61 - 62.


\(^{66}\) See generally, M. Feeley, _The Process Is The Punishment_ (New York: Sage Publications, 1979). In the criminal context, Feeley argues that the process of dispute resolution is in itself the greatest punishment not the final outcome.
their actions are of a more conciliatory nature. Legal and historical literature is replete with images of counsel as gladiators, a construction which does have some truth to it. However, since a large percentage of cases are settled, it can be assumed that lawyers do not always seek to have disputes resolved in the courtroom. Adversarial posturing may influence settlements but the final resolution is by consent. Studies of the actual mechanics involved in the negotiation process indicate that the behaviour of lawyers is not particularly adversarial.67 A well-known American study found that most counsel adopt a co-operative, rather than an antagonistic, negotiating style.68 This study found that lawyers were not particularly interested in a court imposed resolution because negotiated settlements tended to optimize value.69 Lawyers have a vested interest in maximizing value because it is consistent with their own financial interest, particularly where they work on a contingency fee basis.

V. Towards the Professionalization of Mediation

The recent growth of mediation results, in part, from the appeal of participatory justice and, in part, from an aversion to the litigation process. But in propelling the movement forward,


68 See Williams, supra note 67 at 20. For a Canadian perspective, see Couglan, supra note 67 at 169.

69 See K. Kressel, The Divorce Process (New York: Basic Books, 1985) at 178. Kressel found the attitudes of lawyers and mediators towards settlement were similar.
attention has been paid to the voices those who would severely circumscribe the use of mediation. The result of these counterveiling forces has been the suggestion that formal protections be introduced onto the mediation process. These formal protections take the form of professionalization.  

One way of responding to the complaints leveled at the mediation process is by regulating the provision of mediation services. Regulation means regulating the conduct and practice of mediators because they form the nucleus of the mediation process.  

Presently, only lawyers who mediate are subject to any form of regulation. Any other individual can, without prior training or qualifications, hang up their shingle and offer their services as mediators.

In discussing the professionalization of mediation, it is important to distinguish between two different perspectives on professionalism: one is professional persons as a generic category of individuals practicing mediation and the other is professional mediators. Some scholars look to


72 See, Law Society Rules promulgated pursuant to the Legal Professions Act, S.B.C. 1987, c. 25, s.25. Rule 154 provides that in order to act as a family mediator, lawyers must have at least 3 years of legal practice.
the nature of practitioners to determine whether mediation is professionalizing. These conclude that mediation is substantially a professional occupation because it is peppered with individuals who qualify as professionals under a different label - professional lawyers, professional social workers, etc. The second perspective considers the professionalization of mediation as the creation of a separate and distinct class of professional mediators, a group whose share the status of professionals \textit{qua} mediators.

This thesis is concerned with the implications of creating of a professional class of mediators. In this sense, it is concerned with the occupational regulation of mediation services and what effect this will have on the practice of mediation. If mediation is valued because of its informality, will the introduction of the formality of professionalization ensure the integrity of this process or will it simply reintroduce the problems encountered in more structured dispute resolution processes?

The approach used in the work differs from much of previous critical work done on mediation. Often, the study of informal dispute resolution is restricted to the use of this technique in a particular context - family mediation, labor mediation, criminal mediation. While such an approach is instrumental in uncovering the problems raised by the practice of mediation in a specific setting, such segmentation inhibits detection of the wider social impact of shifting from one form of dispute resolution to another. The approach used in this paper is somewhat different.

It draws on information gleaned from the various uses of mediation in different contexts in an attempt to elevate the discussion beyond the limits of a specific context and permit the process itself, mediation, to be the central line of inquiry.

Of course, the obvious weakness in adopting this approach lies in the problems incumbent in generalization. Generalization tends to ignore subtle nuances, to smooth over critical distinctions and to categorize rather than analyze.\textsuperscript{74} Despite these drawbacks, generalization is a useful analytic tool for the present work because it permits the questioning of the combination of two wide ranging phenomenon, mediation and professional regulation. Absence this technique, the sheer abundance of minute distinctions and permutations of both subjects renders any questioning of the professionalization of mediation impossible.

\textsuperscript{74} See generally, C. Smart, \textit{Feminism and the Power of Law} (London: Routledge, 1989) c. 4, "The Quest for a Feminist Jurisprudence".
CHAPTER II

Critical Perspectives On Mediation

I. Introduction

Most of those who are critical of mediation take the adversarial process as their starting point and condemn mediation for removing the formal safeguards provided by the more traditional process of dispute resolution - the assistance of independent legal counsel, the protections afforded by the substantive law and the authoritative voice of an impartial adjudicator. Ironically, many who criticize the adversary system find mediation more palatable because of the removal of the constraints imposed by the former.\(^1\) The very features that distinguish one system from the other are the nadir and the zenith of each. It is not surprising therefore that as mediation begins to dominate the field of dispute resolution, the features once condemned in litigation become essential requirements of the dispute resolution process and the new comer is criticized for not measuring up to the adversarial ideal.

Neither the mediation process nor the litigation process is perfect. Both systems of dispute resolution have advantages and limitations. Indeed, although the advantages of each may differ, the limitations of both processes are often similar. What differs is the form these limitations take rather than their substance. Although both systems have their weaknesses, there is a need to ensure that neither process compounds existing social problems. The architecture of both the

adversarial process and the mediation process should be one which, to the extent possible, will not open up either process to abuse.

In both Canada and in the United States, much of the current controversy around mediation results from a perception that this process will perpetuate relationships of dominance and oppression. Critical literature on mediation clearly illustrates a concern for the abuse of this process by individuals or social groups who enjoy social, economic or political advantages. Because mediators are central to the mediation process, they are perceived as the shields against such abuse. Some form of occupational regulation, perhaps the creation of a profession, is thought to be one way of ensuring that the mediation process does not become a purveyor of inequality. This chapter discusses the criticisms that have been directed at mediation in order that measures taken to prevent the abuse of this process may be analyzed against this backdrop.

II. Critical Perspectives on Mediation

It is difficult to separate the many criticisms leveled at mediation into distinct categories. Scholars adopt a number of different theoretical framework and apply that framework to the practice of mediation in a wide variety of contexts. Reducing the many issues raised in the body of critical literature is difficult however several themes do recur. To facilitate discussion, these are separated and discussed under different headings. It should be bore in mind that all of these themes, and all the issues raised, are interconnected. They are by no means analytically distinct.
A. Reinforcing the Existing Social Order

1. The Individuation of Conflict

Mediation, like other forms of informal dispute resolution, has been condemned for inhibiting social change and reinforcing the status quo. While the process is not designed to achieve this end, it contributes to this result. One way in which mediation contributes to this result is by individuating conflict.

Where a dispute is mediated, it is processed in private and resolved on an individual basis. The friction between two parties is treated as an individual problem that requires individual action and a specific remedy. Conflict is compartmentalized, split into discrete and separate episodes of discord. By isolating instances of discord in this manner, mediation inhibits detection of wider social problems. Although a dispute manifests itself as a conflict between two individuals, that dispute may be rooted in a phenomenon that extends beyond the two particular individuals. But, because conflict is individualized, the source of that conflict is not identified:

This interpersonal view of disputes ignores the ways in which individuals may benefit qua individuals but lose as members of a larger social class whose interests cannot be fully satisfied through law or private case by case resolution of personal grievances because the issues involve questions of political power that extend beyond legality.¹


Individuation of conflict succeeds in obscuring detection of systemic problems. A dispute may stem from a flaw or injustice in the social structure. That flaw or injustice may impact only on certain groups of individuals, groups that are linked by a common social, religious or economic bond. The fact that a conflict only emerges amongst individuals who share a common bond may be evidence of a systemic problem. If a problem is systemic, political action may be required to change the social structure to prevent the problem’s recurrence. Persistent claims of racism, for example, indicate racial intolerance. If each incidence of discrimination is mediated, the racist undercurrents of the problem are rendered invisible because the privacy of the dispute resolution structure blinds both individual participants and the wider populace to the source of the conflict, racism. Individuation of the symptoms obscures the existence of a social disease.

By splitting conflict into discrete incidents, mediation undermines the transformative capacity of public conflict. Where conflict is visible, individual struggles emerge and congeal as social struggles against political systems or oppressive regimes. The conglomeration of a series of individual conflicts can amount to a broad based challenge to the existing social order. Identification of trends, particularly trends that disadvantage specific groups, can lead to change


or, at a minimum, can elevate issues to the political plane where a decision can be made as to whether a systemic response is required. But for trends to be perceived, they must be visible. By splitting conflict into separate and discrete incidents, each of which is resolved in private the power of conflict to engender change is neutralized. And where social change is repressed, so the status quo is reconstituted.

Some scholars see the capacity of mediation to inhibit social change as a function of the capitalist state. Mediation disperses conflict, prevents it’s solidification into an instrument of social change consequently reinforcing the capitalist divide. The required components of capitalism, relationships of dominance and oppression, continue undaunted. Dominant groups continue to enjoy benefits without the need to address the more over-arching question of whether the system should be changed and benefits more equally distributed.

Certain feminist scholars view the individuation of conflict from a different perspective. These writers focus on the power disparity between men and women and descry mediation as means of reinforcing the patriarchal order. As a group, women are subject to greater social and economic disadvantage than their male counterparts. Individual resolution of disputes inhibits detection of

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7 See Abel’s discussion of the capacity of informal dispute resolution mechanisms to neutralize conflict in *The Contradictions, supra* note 5 at 280 - 293

8 Both Abel and Hofrichter adopt this perspective. See Abel, *supra* note 1 and Hofrichter, *supra* note 3.

these disadvantages. Individual conflict may be the result of systemic inequality. If that is the case, a change to the social structure is more desirable than an individual mediated solution. Broad-based system wide reordering might result if the underlying conflict, the systemic disadvantage to women, were allowed to emerge. The visibility of the conflict, the repetition of claims that advance similar concerns, might lead not only to the resolution of an individual conflict but might correct the power imbalance. But if the emergence of conflict is denied the existing social order, one seen by many to be patriarchal, is reconstituted.

2. The Danger of Harmony Ideology

Another means by which the mediation process serves to reinforce the status quo is by encouraging harmony ideology. Harmony ideology presupposes that conflict is negative, a sign of a dysfunctional society. Conflict is equated with evil and harmony with good. Harmony of relationships, the absence of overt conflict, is pursued as a valid social objective. Where dissension erupts, third party intervention seeks to restore harmony.

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11 See A. Sarat, “The New Formalism in Disputing and Dispute Processing” (1988) 21 Law and Soc. Rev. 777 at 700. Sarat criticizes the belief that disputes are a social evil. “The view reflects a preference for harmony and social order that in turn is based on the association of order with peace and fairness and of disorder with violence and unfairness.” Such ideology denies the value of overt conflict and dissent as political struggles against patent social unfairness.

12 See Auerbach, supra note 2 at 22 - 46. In reference to certain Christian communities, Auerbach notes that “dissent was an unwelcome intrusion which only encouraged “unhappy division” (22), an unchristian thought and act. “The process of dispute resolution was designed, at every stage, to suppress conflict”(30).
While harmony of relations is not necessarily an undesirable objective, the deficiency of harmony ideology lies in its blanket acceptance of the underlying fairness or rightness of existing social relations. The quest for harmony assumes that when a dispute arises, the discord itself must be eliminated. An investigation of the actual causes of the discord might reveal oppressive relationships or similar situations of patent unfairness. Change might be required in order to bring social relationships closer to a more ideal harmony. However, because harmony ideology focuses on conflict as the evil that must be suppressed, it fails to address the greater evil of oppression.

Mediation is criticized for adopting a philosophy that resonates with harmony ideology. Mediation is perceived as a pacification device used to restore harmony without delving into the fairness or rightness of the underlying dynamic from which the conflict emerged. Mediation ideology exalts notions of compromise and agreement because these will restore harmony of relations. There is an implicit assumption that methods of dispute resolution that might aggravate conflict should be avoided.

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15 Ibid. at 5.

16 Ibid. at 3; see also, C. Harrington & S. Merry, “Ideological Production: The Making of Community Mediation” (1988) 22 Law & Soc’y Rev. 710 at 730 - 732. In their study of a community mediation centre, Harrington and Merry found that mediation ideology - the ideology
The danger of harmony ideology is that it may be used to suppress conflict in instances where that conflict is rooted in an unacceptable or wrongful situation. If conflict is suppressed, the wrongful situations goes unchallenged. If mediation emphasizes the value of compromise, it will not challenge the wrongfulness that might be inherent in the situation that preceded the conflict. Allowing the conflict to emerge by refusing to compromise might serve a greater social good. Conflict can be construed positively as a force that seeks to redefine social relations. For the systematically disadvantaged, conflict can be transformed into an instrument of social change. For those who benefit from the status quo, conflict remains an evil as it will disrupt and reorganize a system which operates to their advantage. Where conflict is suppressed, mediated dispute resolution validates the existing paradigm: overt conflict disappears, social stability is ensured and no attempts are made to change, disrupt or destabilize oppressive regimes.

Although mediation acts an impediment to social change, the traditional adversarial route is not without its own obstacles. Though conflict may emerge in this latter forum, this does not

of compromise - was produced through the mediation process. As an illustration of the assumption that conflict is destructive, see J. Dieffenbäch, “Psychology, Society and the Development of Adversary Posture” (1992) 7 Ohio St. J.Disp. Resol. 205. Dieffenbach contrasts the adversarial system with a system predicated on co-operation and values the latter as if the value of compromise and co-operation were in all cases more advantageous than adversarial posturing.

17 See the exchange between C. King, “Are Justice and Harmony Mutually Exclusive? A Response to Professor Nader”(1994) 10 Ohio St. J. Disp. Resol. 65 arguing that justice and harmony can co-exist and L. Nader, “A Reply to Professor King” (1994) 10 Ohio St. J. Disp. Resol. 99 responding that harmony ideology is only objectionable when it is used to suppress conflict.
necessarily translate into political, economic or social change.\textsuperscript{19} The visibility of the assertion of legal rights in a public forum in the effort to bring about some form of social change can mobilize countervailing forces thereby creating its own opposition.\textsuperscript{20} Moreover, litigation may provide little assistance to weaker antagonists because when they encounter stronger opponents they find that despite power imbalances all parties are treated as equals.\textsuperscript{21}

B. Neutrality and Unequal Bargaining Power

The interaction of neutrality and unequal bargaining power leads to a further criticism of the mediation process. Mediation is based on the creed of neutrality. Neutral intervention ensures that it is the disputants themselves who decide on an appropriate resolution of their dispute. The mediator adopts a neutral stance with respect to the individuals involved. By embracing neutrality and refusing to actively influence the substantive outcome, the mediator must treat unequals as equals thus according a distinct advantage to those possessed of greater bargaining power. Therefore, neutral intervention fosters mediated agreements that reflect pre-existing power imbalances.\textsuperscript{22}

\textsuperscript{18} See W. Felstiner, R. Abel and A. Sarat, “The Emergence and Transformation of Disputes: Naming, Blaming, Claiming...” (1980) 15 Law and Soc. Rev. 631. Felstiner, et. al., suggest that even under an adversarial model of dispute processing there may be too little conflict that finds it’s way into the public realm.

\textsuperscript{19} See, for example, J. Fudge, “What Do We Mean By Law and Social Transformation” (1990) 5 Can. J. Law & Soc. 47

\textsuperscript{20} \textit{Ibid}. at 57 - 58.

Certain feminist scholars have been particularly active in their condemnation of the creed of neutrality in mediation. Some argue that neutrality is a socially constructed concept that cannot be separated from social formation thus it reflects the dominant ideology of a particular society. The process claims to be neutral but it is an understanding of neutrality that is constructed by dominant social groups thus reflects their own particular world view.

22 S. Merry, “The Social Organization of Mediation in Non-industrial Countries” in Abel, The Politics, supra note 3 at 32. In anthropological studies of mediation, Merry found that mediated agreements reflected pre-existing social inequalities between disputants.


24 S. Cobb and J. Rifkin, “Neutrality as a Discursive Practice: The Construction and Transformation of Narrative in Community Mediation” in Studies in Law, Politics and Society, Vol. II (Greenwich, Conn.: JAI Press, 1991) at 69. Cobb and Rifkin suggest that neutrality serves to legitimate relationships of dominance and oppression. From their observations of mediation in practice, they concluded that primary narratives marginalized subservient narratives. The first speaker, the primary narrative, established the negative position of the second speaker, the subservient narrative. All subsequent speech was structured by the primary narratives, forcing the marginalized speaker to continually struggle to regain his or her position. The neutrality of the mediator reconstituted the dominance of the primary narrative. The mediator used the primary narrative as a starting point and forced the second speaker to examine their actions within the context defined by the first speaker. See also, S. Cobb and J. Rifkin, “Practice and Paradox: Deconstructing Neutrality in Mediation” (1991) 16 Law and Soc. Inquiry 35 [hereinafter Practice and Paradox] see also, M. Shaffer, “Divorce Mediation: A Feminist Perspective” (1988) 46 U. Toronto L. Rev. 1 at 10 - 15 and J. Shailor, Empowerment in Dispute Mediation: A Critical Analysis of Communication (Westport, Ct.: Praeger, 1994) at 131 -137.

problem is that the intervention is neutral in form but not in substance: neutrality favors a particular vision of social relations. It is the claim to neutrality that legitimizes the use of mediation thereby justifying the imposition of a vision of social relations that favours one group of disputants at the expense of another.

Many of these scholars also challenge the ideal of striving to create a dispute resolution process that embraces neutrality as its functional governing concept. They argue that neutral intervention should not be encouraged in a society characterized by power imbalances between men and women. Neutrality does not seek to upset power imbalances between disputants but to resolve disputes in a manner that is consistent with that imbalance consequently reinforcing the status quo. If disputing parties do not enjoy commensurate levels of bargaining power, the strength and force of substantive formal intervention is at least an attempt to struggle against inequality in the dispute resolution process.

This criticism of neutrality is not limited to mediation that occurs between men and women. Neutral intervention will deliver similar results where there is an imbalance of power between any two or more parties. Various groups - the poor, the dispossessed, the unskilled - possess less


27 Interestingly, one scholar dismisses this entire critique of mediation on the basis that social inequality existed long before mediation and will continue to exist with, or without, this process. See J. Rosenberg, “In Defense of Mediation” (1992) 30 Fam. & Conciliation Crt. Rev. 422 at 423.
power than their counterparts - the wealthy, the propertied, the skilled. Should members of the former groups encounter the latter in mediation, it is the advantaged who will come out ahead.

Neutrality and power imbalances play a similar role in the adversarial process. Like mediation, this process can be criticized both for assuming that neutral intervention is possible and for accepting that neutral intervention is desirable. Studies of Canadian courtrooms have clearly demonstrated that these arenas of conflict resolution are not free from bias. Furthermore, judicial neutrality serves a similar legitimizing function in the adversarial process. Litigants present their case to an impartial adjudicator who assesses the merits of each and renders a decision. Though this process is thought to introduce a measure of equality into the dispute resolution process, it clearly suffers from the same defect as the mediation process - formal neutrality perpetuating or augmenting the benefits of stronger players. Weaker adversaries do not have access to the same resources and expertise as their stronger opponents. In both mediation and in litigation, social, political and economic power impact on the dispute resolution process and tip the scales in favor of the more powerful players.

28 See the report of the Federal/Provincial/Territory Working Group of Attorneys General Officials Gender Equality in the Canadian Justice System: Summary Document and Proposals for Action (Canada: Department of Justice, 1992) which documents the incidence of bias in Canadian courtrooms. See also, S. Martin & K. Mahoney, eds., Equality and Judicial Neutrality (Toronto: Carswell, 1987).


30 Ibid. at 95. Galanter concedes that the rules of the legal system are not designed to favor stronger players but that this is the result.
C. Public versus Private Dispute Processing

One of the principal benefits of the mediated approach to dispute resolution is that control over dispute resolution resides with the disputants. The formal requirements of the court process are relaxed so that disputants can formulate their own rules and make their own determination of the appropriate way to resolve conflict. Legal norms contained in statutes and developed in case-law recede into the background and the norms and values of the particular disputants assume a central role. The content of the rules, the process of resolution and the final outcome is less a product of any broad-based game playing than it is the creation of the individual participants.

Consequently, the mediation process relies more on private-ordering in a private forum than public ordering in a more public forum. This shift to private-ordering has sparked considerable debate both over the merits of public versus private dispute processing.

1. Compromise of Public Values

Those who are critical of mediation emphasize the value of public dispute resolution in upholding public ideals.\(^{31}\) Judicial decisions are said to express widely-held social values, the recognition and public expression of which constitutes the moral fiber that keeps a society together. To enforce this moral order, the force and authority of the state accompanies the decision serving to "bring recalcitrant parties closer to our own ideals".\(^{32}\) Behavior deemed unacceptable by public standards is visibly condemned sending out a message to the public that

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\(^{32}\) Fiss, Against Settlement, supra note 31 at 1089.
certain types of behavior will not be tolerated. Vested state power ensures that public values are respected and demonstrates that failure to adhere to these values requires public accountability. The criticism of mediation is that the removal of disputes from the public realm facilitates the compromise of public ideals.\textsuperscript{33} In the private forum, public ideals are relaxed in favor of a normative order defined by participants. That privacy shields the mediation process from public review excluding any public comment, either vindication or condemnation, on behavior.

Some of the force behind this criticism is lost if one considers the number of disputes that are actually resolved in a courtroom. Although the court process may be initiated, most disputes are settled.\textsuperscript{34} A courtroom determination is the exception rather than the rule. This is not to say that judicial proclamations do not influence the terms and conditions of settlement nor that they do not serve to uphold public ideals. The point is simply to recognize that a great deal of private dispute resolution is presently being carried out within the confines of the adversarial process.

Another aspect of this argument in favor of public rather than private forums for dispute resolution is concerned with issues of visibility and invisibility. Apart from in camera hearings, courtrooms are open to public viewing. There is a formal written record of the decision complete with the reasons therefore. Such visibility permits public scrutiny of the process. Where decisions rendered deviate from public values, the visibility of the pronouncements permit public

\textsuperscript{33} \textit{Ibid.} at 1890.

\textsuperscript{34} See, for example, D.C. McKie, B. Prentice & P. Reed, \textit{Statistics Canada: Divorce, Law and the Family in Canada} (Ottawa: Supply and Services Canada, 1983) at 152.
examination and inquiry. Mediation, on the hand, is cloaked in privacy. While there is a final product that can be examined, the settlement agreement, there is little scrutiny of actual process of dispute resolution. Whether that process meets the twin ideals of fairness and justice is difficult to assess because the process is invisible.

Private ordering may also deny the importance of the formal public law to the dispute resolution process. By delineating the parameters of social responsibility, legislation both establishes and embodies public values. The written law expresses the rights of individual person so that these rights may be guaranteed to all. Mediation does not require adherence to the provisions of substantive law. This does not mean that the law is completely irrelevant in the mediation

35 There have, however, been a few cases in which mediators were compelled to testify about what occurred during the mediation process. See Pearson vs. Pearson [1992], Y. J. No. 106. The opposite finding was made in Porter vs. Porter (1993), 40 O. R. (2nd) 417.

36 One scholar compared the content of mediated divorce agreements with agreements that were negotiated with the assistance of counsel. She found a preponderance of joint-custody arrangements in the agreements achieved through the mediation process. Agreements that had been negotiated with assistance of counsel favoured sole-custody arrangements. She attributes this difference to mediator bias. See M. Fineman, “Dominant Discourse, Professional Language and Legal Change in Child Custody Decision making” (1988) 101 Harv. L. Rev. 727. One family mediator expressed his own preference for joint-custody arrangements stating that “co-parenting to the maximal degree possible is the goal towards which mediators should strive.” He continues by advising that parents should be instructed as to the benefits of co-parenting and the dangers of failing to co-parent. Clearly, this mediator is pre-disposed to a particular type of resolution and, though without malicious intent, will attempt to direct the mediation process towards this ends. See, D. Saposnek, Mediating Child Custody Disputes (New York: Henry Holt & Company, 1983) at 78 - 81.

37 Maccoby and Mnookin determined that the mediation process did not operate in a legal vacuum. In their study of the use of mediation in California, they found that legal imperatives, did indeed structure mediated outcomes. This conclusion is based on the similarity between mediated agreements and the settlements that would have been imposed by court schedules. See, E. Maccoby & R. Mnookin, Dividing The Child (Cambridge, Mass.: Harvard University Press, 1992) at 278.
process but that the role of the law is secondary to the rules that the parties chose to apply. That being the case, the concern is that mediation will be used to subvert obligations imposed by the substantive law.

Some feminist scholars have been particularly critical of the move towards private forums of dispute resolution. At first blush, mediation appears to a more feminist approach to dispute resolution: the strictures of the forum are rejected, formal rules are relaxed and a more relational approach to dispute resolution is adopted. Abstract principles of substantive law yield to norms of conduct that are subjectively determined. Yet, some scholars are severely critical of mediation because of the very removal of the force of law. The principal concern is that women will be denied the protection afforded by public dispute resolution: substantive legal rights that are protected by power and authority of the state. This power is required to support women in their struggle to achieve social equality. Absent this power, women lose the force and protection of the formal law.


39 Rifkin, supra note 39 at 23 - 27.

A great deal of attention has been paid by some feminist scholars to the fact that mediation adopts the language of interests instead of the language of rights.\textsuperscript{41} The intent of mediation is to integrate competing interests not to assess and vindicate or deny claims of right. These scholars are critical of this shift because it ignores the substantial gains made by women through the assertion of rights in a public forum.\textsuperscript{42} Marital property legislation, for example, resulted from repeated claims being advanced by women in the court forum. The language of rights is capable of being recognized and enforced in the formal court venue but the language of interests is not. Interests do not have the same claim to authenticity and authority as legal rights. Therefore, private ordering has the potential to detract from the many gains made by women through the use of the formal court process.

2. The Sovereignty of Preference

Neo-classical economic theory provides that value is increased where private preference is respected.\textsuperscript{43} Where preference is reduced to contractual form, the agreement represents the greatest value to the contracting parties because it is the product of a rational mind and is based on a subjective assessment of well-being.\textsuperscript{44} Accordingly, a high value is attached to private


\textsuperscript{42} See Lefcourt, \textit{supra} note 41 at 267 - 268.


\textsuperscript{44} \textit{Ibid.} at 2.
exchange. This is predicated on the assumption is made that if private agreements were not in
the parties best interests they would not have entered into them.

The philosophy that underlies the mediation process supports this preference for privately
negotiated agreements. Individuals, with the assistance of mediators, negotiate settlements that
represent the best interests of all concerned. The interests of each party emerge during the
mediation process and are integrated into the final settlement thus maximizing value:

In a secular and increasingly pluralistic society, private-ordering holds out the
possibility for individuals to fashion life plans for themselves and intimates which
meet their aspirations in a way that no across-the-board legal norms or expansive
ad hoc judicial discretion exercised by others who are not privy to those life plans
of aspirations are often likely to achieve.45

But while personal preference does have the potential to maximize value, personal preference is
not always an accurate indictor of an individual’s best interests. There is always the question of
whether preference actually represents the product of rationale choice - is the preference
expressed in the mediated settlement an accurate representation of the best interests of each
participant? The answer depends on how one conceives of choice and the ability to freely enter
into contracts.46 Because we live in a social milieu, choices made are influenced by the social
context in which they are made.47 Social, political and economic forces at work within the social

45 M. Trebilcock and R. Keshani, "The Role of Private-Ordering in Family Law: A Law and

46 For a discussion of the freedom to chose, see generally, M. Kelman, "Choice and Utility"
(1979) Wis. L. Rev. 769.

47 R. West, "Taking Preferences Seriously" (1990) 64 Tulane L. R. 659 at 671 - 675.
environment may warp an individual's perception of his or her best interest.\textsuperscript{48} The preferring of one option over another is shaped by powerful hierarchies. Because these hierarchical forces are not benign, preferences may reflect submission to dominant social forces rather than the actual exercise of free will.\textsuperscript{49} Caught within a web of social influences, decisions made may not necessarily reflect one's own welfare. Instead, that decision may reflect the interests of dominant social groups. The faith that mediation places in subjective assessments of best interest is undermined if account is taken of the social context in which the assessment is made and the forces that influence choice.

The sovereignty of preference is also challenged by what are nominally called relational forces.\textsuperscript{50} Relational forces are one component of social forces but are more narrowly defined as

\textsuperscript{48} \textit{Ibid.} at 673 - 674.

\textsuperscript{49} \textit{Ibid.} at 670. See also, P. Atiyah, \textit{An Introduction to the Law of Contract} (Oxford: Clarendon Press, 1989) at 17 - 30. In his discussion of the decline of freedom to contract, Atiyah traces the increased interventionist role of the courts to perceived inequalities of bargaining power. Freedom to contract lead to unacceptable results for the poor and the weak. Judges recognized that the concept of freedom to contract could not be isolated from the injustice of the wider social system in which the contract arose. For example, the decision to enter into a contract was not necessarily freely made where it was required by the exigencies of life. The decline of freedom to contract doctrine marked an awakening to the fact that the poor and the otherwise socially disadvantaged often lacked the resources that would enable them to make free and informed choice. Chained by circumstance, these individuals were in no way "free" to negotiate and enter into contracts that reflected their own best interests.

\textsuperscript{50} See B. Meyer, "The Dynamics of Power in Mediation" in C. Moore, ed., \textit{Practical Strategies for the Phases of Mediation} (San Francisco: Jossey - Bass, 1987) at 75. Meyer discusses the various sources of individual power and analyses the impact of that power on the negotiation process. Meyer divides the sources of power into ten categories: formal authority, power derived from the formal position of power within the dispute resolution process; expert/information power, power derived from the possession of information or expertise; associational power, power derived from association with other individuals with power; resource
forces that are unique to a particular relationship. These arise out of the history of a relationship consisting mainly of emotional and psychological ties that one or more disputing parties have to one another. The use of mediation to resolve disputes involving domestic violence are a prime example of this type of force. In certain cases of extreme domestic violence, studies suggest that a victim may lose the ability to distinguish between his or her own interests and the interests of their abuser. The response to repeated domestic violence is an internalization of the needs and desires of an abuser. The victim identifies these needs and desires as her own and is unable to distinguish between her own welfare and that of her abuser. When reduced to this state, the victim of the domestic violence could readily agree in mediation to assume certain obligations or forego certain rights but it is clear that the choices she makes are not representative of her best interests nor do those choices accurately indicate her subjective well-being. Thus, a force

power, power of control over valued resources; procedural power, control over procedures by which decisions are made; sanction power, the power to inflict harm or to interfere with another party’s interests; nuisance power, the ability to cause discomfort, to intervene without applying any direct sanctions; habitual power, the power of the status quo that rests on the presumption that it is easier to maintain a particular arrangement or course of action than to change it; moral power, the power that comes from appealing to widely held values; personal power, the power derived from a variety of personal attributes such as the ability to articulate, self-assurance, endurance and determination.


52 See also, H. Astor, “Swimming Against the Tide: Keeping Violent Men Out of Mediation” in J. Stubbs, ed., Women, Male Violence and the Law (Sydney, NSW: Institute of Criminology, Sydney University Law School, 1994) at 59 -61. Astor discusses the impact of domestic violence on an abused spouse in the context of mediation and states that “they may be prepared to bargain away almost anything in the hope that this will bring an end to the violence and harassment.
derived mainly from the relationship between the parties becomes an operative force in the dispute resolution process.

Although there a great deal of criticism about how these forces, the social and the relational, may distort perceptions of preference, this criticism is not proffered as evidence that the mediation process never produces solutions that are qualitatively better than those that might be determined by a third party adjudicator. The disputants familiarity with, and knowledge of, the dispute makes it eminently feasible that, with the assistance of a mediator, agreements born of the mediation process can be of a superior quality to those determined by a third party. Instead, the criticisms are offered to demonstrate that to rely on the premise that personal preference always represents the greatest value for all concerned is to rely on a foundation that has more than a few cracks in it.

The second issue raised by sovereignty of preference is that a decision taken may not be in the best interests of a particular individual because it results from a failure to appreciate alternatives. Unlike the consideration previously given to the factors that can influence choices, this concern relates primarily to the ability to make choices in the absence of complete information. In mediation, an individual may choose to follow a certain course of action because of a failure to appreciate the full range of options available to him. Elster refers to this concept as “inexperienced preference” - an individual chooses to pursue a course of action because of a

lack of knowledge of the alternatives. Where there is only a partial appreciation of alternatives, preferences cannot be said to truly represent the expression of personal welfare because the choice is basely on largely imperfect knowledge. A fuller appreciation of the possibilities increases the chances that personal preference corresponds to one's best interests.

It is true that all choices made are the product of imperfect knowledge. Decisions are always made on the basis of limited information. Judicial as well as personal decisions suffer from the same deficiencies. However, the concern here is that there are no safeguards in mediation to ensure that decisions are made on the basis of the best available information. Disputing parties bring to mediation the information that they deem to be relevant to the issues in dispute. No one bears the burden of ensuring that all pertinent information is brought to the mediation session.

Much of the discussion of the sovereignty of preferences considers preference, private ordering, as an alternative to judicial decision-making. The question normally considered is whether judges should yield to private preference based on the presumption that manifest preference is the best indicator of the parties best interests. This question usually arises at the moment of trial, when disputes have already found their way into the courtroom. As previously noted, most disputes do not cross the courtroom threshold. Most are resolved through negotiation. Therefore, the value mediation attributes to the sovereignty of preference should be juxtaposed

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54 J. Elster, Sour Grapes: Studies in the Subversion of Rationality (Cambridge: Cambridge University Press, 1983) at 17 - 18. Elster refers to the phenomenon of "inexperienced preference" that results from a lack of knowledge about the consequences of one's decisions or an appreciation of the options that are available.
with the value of preference determined by disputants with the assistance of counsel. Part of
the role of counsel is to ensure that any decision that the client makes is based on the best
available information. The mediation process relies on the individuals involved in the dispute to
provide the relevant information. Where counsel are not present in the adversarial process,
similar concerns over the accuracy and completeness of information clearly arise.

Despite the concerns regarding the sovereignty of preference, another factor that should be
considered is procedural preference. Individuals may prefer to have their disputes resolved
through the mediation process for the simple reason that that process may not be as arduous as
the litigation process. Litigation can be a lengthy process that, because of adversarial posturing,
engenders a great deal of hostility and anger. Issues of blame and fault arise causing individuals
to act defensively, to respond with anger and in extreme cases, to respond with violence.
Mediation, on the other hand, assists the parties to work together to resolve their differences.
Mediation does not seek to allocate blame or to vindicate rights. Because of the conciliatory
tone, mediation may not breed antagonisms of the same degree as litigation. As a result,
mediation may simply be the process that is preferred by those who find themselves in a situation
of conflict.

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55 Mediation programs that incorporate and encourage the use of counsel in the mediation
process do not raise this concern. The sovereignty of preference argument is more concerned
with the subjective assessment of best interest which occurs in the absence of the advice of
independant counsel.
III. Conclusion

It is clear that both systems of dispute resolution, litigation and mediation, have limitations. Both processes have a number of flaws, many of which they share in common. However, if one accepts the premise that mediation is a valuable tool for resolving conflict, the question is not whether it is better or worse than the adversarial process but how that process can be improved upon. And it is this question that leads to the debate about the professionalization of mediation.
CHAPTER III

Regulating Professional Activity: Theoretical Frameworks and Practical Implications

The Professions...inherit, preserve and pass on a tradition.....they engender modes of life, habits of thought and standards of judgment which render them centers of resistance to the crude forces which threaten steady and peaceful evolution....all great professions stand like rocks against which the waves raised by these forces beat in vain.¹

....All Professions are a conspiracy against the laity.² George Bernard Shaw

I. Introduction

Lawyers, doctors and clergymen were amongst the first groups of individuals to whom a professional identity was ascribed. The past 100 years have brought many others into the professional fold. Since the end of the nineteenth century, professions have expanded beyond the traditional realms of law, medicine and clerical work to embrace engineering, architecture, social work and copious other areas of occupational activity. Like many pervasive phenomenon, the increased professional presence generates considerable controversy. Some view the emergence of professions as a positive force of social development, institutions which arise to protect the public interest by ensuring that the provision of professional services are of the highest quality. Others are much more dubious about the social importance of professions. Sceptics perceive professions as institutions that arise to protect the professional interest by consolidating wealth and legitimating higher incomes while simultaneously bringing


professional persons both a measure of status and prestige. Current debates over the functional value of professions suggest that it is the more critical view that has gained greater credence in contemporary thought.

In its modern manifestation, a profession is a means of regulating occupational activity. Typically, this work is of a service nature - legal services, medical services, engineering services. Services are usually distinguished from other types of commodities such as goods or manual labor although the service itself has aspects of both. The performance of the professional services requires a certain amount of expertise and judgement. For this reason, consumers of the service are ill-suited to accurately judge the quality of the service provided. Occupational regulation is required to counteract problems of asymmetry of knowledge, the public lacking the sophistication required to determine whether the service is of an acceptable quality or not.

The types of occupational activity that are, or are not, professional services is not an easy question to answer. While some claim there are objective criteria against which the "professionalism" of an occupational activity can be defined, others staunchly refute this contention. If one considers the spectrum of occupational groups that lay claim to a professional designation - from doctors and lawyers to social workers and accountants to hairdressers and estheticians - there appears to be little that links these activities together. However, at various points in time each of these groups has operated under the mantle of a profession.

Despite these definitional difficulties, there is some agreement on the ways in which the activity of professional groups is regulated. Ordinarily, professional activity is regulated a licensing or a certification scheme.\(^4\) This scheme may be administered by a government body or by the occupational group itself. The type of regulatory scheme varies in the degree to which it impacts on an occupation.\(^5\) Licensure, for example, restricts occupational activity to those who possess a license. Certification does not. Regulatory regimes that are self-administered grant the profession the greatest degree of autonomy because it is the group, not an external body, that manages the service.\(^6\)

Whatever the type of regulatory tool is chosen, the underlying rationale is that regulation will elevate the quality of professional services. This chapter explores the issues that arise when attempts are made to regulate the quality of services of different types of occupational activity. The first part of this chapter is devoted to a consideration of the theoretical literature on professions. The second part examines the practical implications of professional regulation and the recent efforts to deal with some of the problems. In the subsequent chapter, these

\(^4\) Registration is another way in which professional activity is regulated but those operating under a registration scheme are generally referred to as a “registered” service rather than a professional service. Because registration is the least restrictive form of occupational regulation, practitioners need simply sign a register, this raises the obvious question of whether or not is actually amounts to regulation.


considerations will be applied to the practice of mediation to determine whether the professional paradigm should be used to regulate the provision of mediation services.

II The Study of Professions - Theoretical Frameworks

Until the latter part of this century, academic commentators had generally taken a particularly favorable view of the professions. Considerable scholarly attention was devoted to an analysis of why in an era characterized by free-market competition, professions emerged as an anomalous countervailing force. Occupational regulation interferes with free market forces. In large part, early twentieth century study of the professions sought to understand and justify the existence of professional regulation by identifying the characteristics that distinguished this type of occupational activity from other types of work. These scholars engaged in the study of professions as a process, the accumulation of a series of professional traits which yielded a professional structure.


9 None of the literature surveyed divides the study of professions into the same segments. For the purposes of this work, I have chosen to discuss the professions under three different, though not mutually exclusive, categories: trait theory, structural-functionalism and monopoly theory. Reliance in placed on the approach delineated by Richard Abel in R. Abel, The Legal Profession in England and Wales (Oxford: Basil Blackwell, 1988) at 3-31 and T. Johnson, Professions and Power (London: Macmillan Press, 1972) at 9-38. Abel collapses the trait approach into structural-functionalism while Johnson separates these into two distinct but related theories. Marxian theory is also used to explain professionalism but because professions are somewhat of an anomaly to Marx’s divisions of society, being neither owners of means of production nor fitting neatly into the traditional labour class, it is not particular useful.
A. Trait Theory

Early study of the professions sought to distinguish occupational groups who had succeeded in obtaining public recognition as a profession from those who had not by identifying professional characteristics. The “achieved” professions were examined to discern their essential professional attributes. A cluster of professional characteristics was thought to separate and distinguish a profession from other occupational groups. Commonly found on the list of professional attributes were: the exercise of skill based on theoretical knowledge; the provision

While I do not exclude it from consideration, I have not seen fit to discuss it as a distinct and separate category. However, it should be noted that monopoly theory draws on Marxian analysis by focusing on professional control of the means of the production. In this case, that means is not capital but control of the service itself. Abbott divides the study of professions along lines of formal and substantive theoretical differences. What each scholar observes about a profession is, in Abbott’s view, a reflection of the theoretical framework that each chooses to adopt. In setting out the theoretical differences amongst the various scholars, Abbott divides this study into four separate categories: functional, structural, monopolist and cultural. See, A. Abbott, The System of Professions (Chicago: University of Chicago Press, 1988) at 3 - 20. Credit for developing the monopoly tradition of the analysis of the professionalization phenomenon is given to S. Larson who one of the first to articulate a specific theory on the rise of professionalism based on an analysis of professions as a structural market advantage. See generally, M. Larson, The Rise of Professionalism (California: University of California Press, 1977). See also, M. Burrage & R. Torstendal, Professions in Theory and History: Rethinking the Study of Professions (London: Sage Publications, 1990)

Abbott, supra note 9 at 1 - 4.


See, for example, Greenwood supra note 11 at 206 - 217.
of training and education requirements; mechanisms designed to test competency; an organizational structure; the establishment of codes of conduct which embraced an ethic of altruism typically expressed as a preeminent concern for the public, rather than the professional, interest.¹³

This approach to the study of professions is referred to as trait theory. It regards the professionalization of an occupation as a natural occurrence. Once practitioners of an occupation exhibit certain traits, a dynamic process occurs through which the occupation quite naturally transforms itself into a profession.¹⁴

Such an approach to understanding the professions suffers from a number of deficiencies. Firstly, explaining the phenomenon of professionalization by this method relies, to a considerable extent, on the professions' own conceptions of themselves.¹⁵


¹⁴ W. Wilensky, “The Professionalization of Everyone?” (1964) 70 Amer. J. Sociology 137. Wilensky characterizes professionalization as a five stage process undergone by any number of white-collar occupations. The stages include full-time commitment by members to a task that needs doing; the founding of a professional association to promote the interests of its members; the development of a formal course of study in connection with an academic institution; the adoption of the occupation by the state as requiring formal protections in the form of acceptable credentials, registration and licensure; the promulgation of a formal code of ethics. See also, Voller and Mills, supra note 11 at 7. See also, H. Siegrist, “Professionalization as a Process: Patterns, Progression and Discontinuity” in M. Burrage & R. Tormedaal, eds., Professions in Theory and History: Rethinking the Study of Professions (London: Sage Publications, 1990) at 177.

professional traits is limited to a consideration of occupational groups that have achieved professional status. This ignores or at least discounts, the question of whether professional rhetoric is used to legitimate the privilege of being recognized as a profession.\textsuperscript{16} Is the appearance of traits a natural phenomenon or do the traits emerge as part of a strategy to obtain an occupational advantage? Relying on the elite professions own conceptions of themselves may accurately reflect the nature and importance of works they pursue yet it may also be an exercise in self-legitimization, using traits to distinguish established professions from other forms of occupational activity with the distinctions drawn justifying any occupational advantage that occurs.\textsuperscript{17} Moreover, definitions derived from existing professions are not without strong political undercurrents. The attributes themselves reserve professional designation onto the established professions at the expense of those occupational groups seeking admission to the professional ranks.\textsuperscript{18}

Secondly, although embracing the term "theory", the trait approach lacks any coherent theoretical basis.\textsuperscript{19} It is descriptive, listing the attributes of a profession in the absence of a

\textsuperscript{16} Ibid. at 30.

\textsuperscript{17} Johnson, \textit{supra} note 9 at 21 - 38.


\textsuperscript{19} Johnson, \textit{supra} note 9 at 25; see also, E. Freidson, \textit{Profession of Medicine} (New York: Dodd Mead, 1970) at 10.
theoretical framework which would explain how, why or when professions arise. By confining
the framework of analysis to the professions themselves, no account is taken of the political,
economic or social forces that may play a part in their formation.\textsuperscript{20} Professions do not arise in a
vacuum but within a social context. The forces that are active within that context need be taken
into account in any comprehensive attempt to understand the professional phenomenon.
Establishing a theoretical framework which permits the answering of these questions is a
problem that has plagued subsequent scholars.

Thirdly, the trait approach fails to consider whether the professional attributes are the exclusive
properties of a profession. While education, codes of ethics and the public interest are
characteristic of a profession, so too are prestige, status and high incomes. Though the former
responds to the interest of the wider body politic, the latter indisputably furthers the interest of
the collective. Thus, if these additional professional traits are brought into consideration, can
the emergence of particular traits be said to accurately reflect the underlying motivation of an
occupational group seeking to define itself as a profession?

B. Structural - Functionalism

The inability of trait theory to provide a sufficient explanation for the emergence of professions
lead to it's collapse into structural - functionalism.\textsuperscript{21} Similar to the trait approach, structural -
functionalist seek to aggregate the characteristics of a profession however unlike their

\textsuperscript{20} See generally, Larson \textit{supra} note 9 at x - xviii.

\textsuperscript{21} See discussion at \textit{supra} note 9.
predecessors the analysis proceeds on the basis of functional significance. Structural-functionalists identify theoretical justifications for professional groups, emphasizing their functional significance to the social order rather than their professional attributes.

Emile Durkheim is a principle contributor to the structural-functionalist theme. For Durkheim, professions emerged as a positive force in social development. Durkheim was concerned with the impact of the shift from primitive to complex societies and the effect of this shift on "social solidarity". Through the process of industrialization, the traditional social bonds once born of similarity of lifestyle and occupation ceded to social differentiation. Social and moral restraints imposed automatically by virtue of membership in a homogeneous society were eroded by occupational diversification and specialization. Collective consciousness was lost to individuality. Durkheim saw the shift from simple to industrial society as creating a moral crisis. He was concerned with the moral foundations of a society that was losing it's social cohesiveness. Professions were one answer to this problem.

For Durkheim, social solidarity was an essential tenet of a moral community. The organic growth of solidarity required shared occupational experience. Occupational groups, professions,


25 Durkheim does not use the term profession but refers to "occupational groups".
provided the milieu for this solidarity. They filled the void left by labor differentiation.

Occupational groups are:

"...individuals devoted to the same tasks, with solidarity or combined interest. No soil is better suited to bear social ideas and sentiments. Identity of origin, culture and occupation makes occupational activity the richest sort of material for a common life."\(^{26}\)

Professions emerged as new centers of community. As society breaks up into atomistic units, professions bring people together in a new moral milieu founded on occupation.\(^{27}\) Social cohesiveness, community, is restored.\(^{28}\) Occupational groups, because of their shared interest, replace many of the moral and social restraints once provided by the family, the community or the social homogeneity that characterized simple societies.

Structural - functionalist thought is dominated by the public interest creed. The value of professionalism lies in it’s ability to protect the public interest.\(^{29}\) The social benefit of professions is their functional significance as protectors of the communal interest, particularly in areas of great social importance:

\(^{26}\) E. Durkheim, *Suicide: A Study in Sociology* (London: Routledge & Paul Kegan, 1951) at 378. Durkheim continues, at 378, in stating that occupations are the milieu of friends "...nurtured by a shared activity in the division of labour...whose aim it is to cause coherence among friends and stamp them with it’s seal”.


\(^{28}\) See P. Olson, “Credentialism as Monopoly, Class War and Socialization Scheme” (1983) 7 Law & Human Behavior 291 at 294 - 296.

Professions serve to restrain the otherwise unfettered pursuit of self-interest in areas of work too important to be left to an unregulated free market and too sensitive or arcane to trust to state regulation.30

Areas of social importance are defined by complexity of subject matter and asymmetry of knowledge, two factors which combine to undermine the wisdom of permitting individual, non-professional judgment to govern decision-making.31 Uncontrolled occupational activity would cause irreparable harm to the public. The complexity of the subject matter requires decisions based on expertise, an expertise embodied in, and provided by, a professional organization.

Scholars in this tradition emphasize the importance of the nature of the work done by professionals. Professionals work in areas of such social significance that the doctrine of caveat emptor cannot prevail.32 The expertise and judgment required in areas of professional practice exceeds the abilities of the common individual - professionals make decisions on matters that the client is ill-equipped to make.33

Advances in knowledge, particularly scientific knowledge, reinforce the structural-functionalist take on professions. In an increasingly technological society, the degrees of complexity of

30 See Pue, supra note 8 at 387.
32 Marshall, supra note 29 at 328. Marshall draws the distinction between manual labour, which he urges is standardized and can be provided by anyone and professional work which requires a measure of expertise.
33 Ibid. at 330.
knowledge associated with each task increase markedly. Knowledge, particularly scientific knowledge, must be controlled in order to ensure that it exercised for the benefit of all. Professional control permitted the localization of knowledge together with the assurance that that knowledge would be used to advance the public good.34

Equally important to structural-functionalism is the meditative effect of professions in relations between society and the state. Social forces would seek to break societies into discrete competitive units, each acting egoistically. Separation and division amongst social actors facilitates the imposition of the state will: the organized coherent state imposing it's will on unorganized inchoate individuals. Professions exhibit a similar organizational structure to that of the state and, if they are self-regulating, enjoy a measure of immunity to state intervention. Therefore, professions are ideally situated to resist state authoritarianism, a countervailing force, organized and united, creating centers of balance within the social structure.35

Structural-functionalists locate the professions within the social strata by focusing on functional relevance. Like the trait theory from which it emerges, this perspective of professions is criticized for relying more on professional rhetoric than empirical evidence.36 Moreover, this approach is prescriptive, rather than descriptive, focusing on what professions ought to be or

34 Parsons, supra note 29 at 34-49. Parsons focuses on the science professions concluding that professionalisation ensures that advances in science are used for the benefit of all.

35 See Carr-Saunders, supra note 1 at 10.

36 Johnson, supra note 9 and Abel, supra note 9 at 12-13.
ought to be doing but not necessarily on whether professions live up to the ideals they articulate. Some have seen fit to characterize this approach as simply professional apologetics. Structural - functionalists are criticized for developing a professional ideology which reinforces, perhaps even constitutes, their own existence.

C. Monopoly Theory

Recent analysis of the professions have reversed the rather positive view of professions put forth by trait theorists and structural - functionalists. In her path - breaking work on the rise of professionalism, Larson adopts an economic framework of analysis and concludes that professions are occupational monopolies to whom professionalization is a strategy of social closure which guarantees both market - control and collective mobility.

Larson focuses on the power of self-regulating professions to dominate the occupational market. Unlike capitalists in a free market economy, professions cannot control the means of production: they offer services - legal services, medical services, engineering services - the essence of which does not lend itself to ownership in the same way as physical property. Professionals need to control the service itself - the production of producers - in order to enjoy the benefits of monopoly.

37 Abel, supra note 9 at 7.
38 Ruschmeyer, supra note 9 at 30 and E. Freidson, supra 18 at 10.
39 See generally, Larson supra note 9.
40 Ibid. at 34 - 38.
The analysis of professions advanced by Larson relies on the work of Terrence Johnson.\footnote{See Johnson, \textit{supra} note 9.} According to Johnson, a profession is a particular type of occupational control and not an expression of the inherent nature of a particular occupation.\footnote{\textit{Ibid.} at 45.} He suggests that there are three types of professional control, each of which is a direct result of the relationship between the consumer of the service and the producer: collegiate control, patronage control and mediative control.\footnote{\textit{Ibid.} at 45 - 46.} Collegiate control occurs where the consumers are a large heterogeneous group and the producers are a relatively small homogenous group. The monopoly control held by the small group permits the producers to maintain and control collective homogeneity and thus control the professional service. Moreover, collegiate control relies on the belief that the producer is more knowledgeable than the consumer. Patronage control occurs where the consumer is a small sophisticated group. The hierarchical status of the professional groups results from their association with a powerful client group. The third form of occupational control articulated by Johnson is mediative control, a form of occupational control that is exercised by the state in order to intervene between consumer and producer. Under this third control model, the profession enjoys the least amount of control over an occupation.

At each step in his analysis, Johnson stresses the different levels of autonomy enjoyed under the different models of professional control. It is primarily the first type of control, collegiate

\footnote{See Johnson, \textit{supra} note 9.}
control, that becomes central to Larson's analysis. Like Johnson, Larson's conception of professions differs from trait theory and structural functionalist theory because of a change in the locus of analysis. Larson focuses, in part, on the consumer/producer relationship. She studies professions from an external perspective and locates the consequences of professionalism within the broader body politic. While previous theorists were not naive to the implications set forth by Larson, they sought to justify these consequences by arguments based on the social significance of professional work. And while Larson and other monopoly theorists do not completely deny the value of a profession, they are much more concerned with the benefits that accrue to the groups who succeed in being recognized as a profession.

Casting professions as monopolistic institutions is not without historical antecedent. Adam Smith's criticism of occupational groups was predicated on a market oriented system of exchange. Smith's attacks were directed at the guild system, a precursor to modern conception of professions. Guilds were organized around craftsmanship, passing credentials - the right to earn a livelihood - through birthright and apprenticeship. Smith saw guilds as restrictive trade practices, a means of controlling numbers and entry into the craft market. Craftsmanship was not founded on ability or talent but on the holding of specific credentials. Smith did not see these

44 See Abbott, supra note 9 at 14.
45 Hughes, supra note 31 at 364.
credentials as guaranteeing any measure of quality or workmanship but as a means of ensuring a livelihood.\textsuperscript{47}

Max Weber echoed Smith’s criticisms. For Weber, individuals in a society compete for economic advantage and seek out mechanisms to curb competition.\textsuperscript{48} Traditionally, in a market based economy that advantage is ensured by control of capital, control of profit producing assets. Where the commodity involved is a service, groups organize to gain control over the distribution of that service. Practitioners of an occupation join together as a unit to exclude “outsiders” from interfering with the unit’s economic livelihood.\textsuperscript{49} Although practitioners are individually competitive, the competitive instinct recedes in favor of a group advantage. By acting as a restricted collective, the group closes off economic opportunities to non-group members thus channeling economic rewards into the group purse.

For both Smith and Weber, professionalism is an economic venture. Occupational groups have a vested interest in limiting competition and consolidating economic benefits. The “capital” that requires control is the service itself. Regulation ensures that benefits flow to the group not to outsiders. Weber concedes that the group may have some minimal interest in ensuring quality performance - excluding those less capable of performing the task - but contends that “normally

\textsuperscript{47} See generally, P. Olson, “Credentialism as Monopoly, Class War and Socialization Scheme” (1983) 7 Law & Human Behavior 291.


\textsuperscript{49} \textit{Ibid.} at 342. Outsiders are typically defined by external identifiable characteristics such as race, religious, social status, origin or descent.
this concern for efficient performance recedes behind the interest in limiting the supply of candidates for the benefices and honors of a given occupation. Like Smith and Weber, Larson uses the marketplace as her central line of inquiry. She locates professions within the market system where occupational works is traded for other commodities. Larson concludes that the pursuit of professionalism is a strategy of social closure which permits the foreclosure of economic opportunities to others and turns those opportunities into group benefits.

The difference between the monopoly and the trait and structural-functionalist approach to professions is one of emphasis. Whereas the latter two focus on the social benefits derived from professionalization, the former emphasizes the consequences to the profession itself. Larson dichotomizes this difference into “ideal types” and empirical forms. Adherents of the structural-functional school present professions as ideal types, social units that, as theoretical constructs, serve a valid social purpose - concentrating the development of knowledge, rectifying problems of asymmetry of knowledge, ensuring quality and integrity of service delivery. Monopoly theory focuses on other aspects of professionalism - the empirical benefits to the group itself.

51 *Abbott supra* note 9 at 6.
52 *Larson supra* note 9 at xii.
53 It is this very tension between the social costs and the social benefits that are focus of the reform measures recommended in the *MLRC, supra* note 6.
III. The Consequences of Professional Regulation

Currently, one of two regulatory schemes is used to control professional occupational activity, certification or licensure. Each of these schemes can be administered by the professional group itself, self-regulation, or by an external administrative authority, usually a governmental or quasi-governmental body. Licensing regimes are exclusive: one cannot engage in a particular activity unless in possession of a license. Certification regimes do not grant exclusive rights over an occupation. Certified practitioners have the exclusive right to bear the title of a certified practitioner but not the exclusive right of practice.

Much of the preceding discussion of professions deals with self-regulatory licensing professions. This type of occupational regulation accords the greatest degree of occupational control and autonomy. Licensing power is delegated by the state to an administrative body that is largely, if not entirely, composed of members of the professional group. Because licenses can be granted and revoked, this power is one of immense dimensions because it gives the governing body dominion over the ability of its members to earn a livelihood. Where licensing power is held by an entity that is independent of the licensed group, the profession is less autonomous because the

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54 As noted earlier, registration is a third means of controlling occupational. There are a variety of indirect means by which professional activity is regulated. This includes legislation that, while not specifically directed at a particular occupation, indirectly affects the way an occupation is conducted. The provisions of provincial Motor Vehicle Acts, for example, affect the way in which truck drivers conduct themselves in their work but that legislation does not govern truck drivers qua truck drivers.
right to practice must be acquired from an external regulator. This type of control is more apt to fall under Johnson’s third division of occupational control, mediative control.

Certification, whether self-regulatory or not, bestows a lesser degree of occupational control. Membership in the administrative organization is not required by law. The consequences of professional sanction, the loss of the designation of certified practitioner, does not eliminate the right to pursue the occupational activity. While this may have professional implications, engendering the disfavor of the administrative institution, it does not take away the right to earn a living. And while the market influence of certification regime is usually rather benign, there are instances where the public reliance on certification is so strong that de jure certification amounts to de facto licensing. This phenomenon is apt to occur where the regulated service is of sufficient importance to consumers that it is unlikely they would elect to use uncertified services. In health matters, for example, it is unlikely that a consumer would opt for the services of an uncertified physician when a certified physician is available

Whichever regulatory regime governs professional activity, the principal justification lies in the need to protect the public interest. The services that professional persons provide are too

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55 See discussion of the ramifications of certification versus licensing in W. Gellhorn, *Individual Freedom and Governmental Restraints* (Baton Rouge, Louisiana: Louisiana State Press, 1956) at 105 - 151. Gellhorn concludes that certification produces results that are similar to those of licensure but at far less of a social cost because it is less intrusive in the occupational market.

56 See Trebilcock, *supra* note 5 at 94.

complex, too important or too dangerous to be regulated by traditional market forces such as supply and demand.\textsuperscript{58} The quality of the product must be ensured prior to its being offered for sale. Thus, regulation must be in the form of "input" rather than "output" controls.\textsuperscript{59} Inputs are designed to ensure a measure of quality goes into the production of a service. Typical input controls are examinations, educational requirements or a period of training. Outputs controls consist of measures such as civil suits which often arise after damage has been incurred.\textsuperscript{60} Input controls regulate quality in the production of the marketable commodity.

While the regulation of professional activity can be successful in protecting the public interest, it does not always promote the public interest. Regardless of the type of regulation used, the potential benefits are not without corollary costs. And part of that cost to consumers may, as the monopoly theorists would suggest, be a benefit to the profession. The public and the professional interest may be co-terminus or the two may be in conflict. If we accept that professional regulation can advance the public interest, we must equally consider the costs incurred in order to determine at what point professional regulation loses its value because the costs outweigh the advantages.

\textsuperscript{58} See Trebilcock, \textit{supra} note 5 at 83 - 87.

\textsuperscript{59} \textit{Ibid.} at 92 - 104.

\textsuperscript{60} See D. Dewees, G. Matheson & M. Trebilcock, Policy Alternatives in Quality Regulation" in D. Dewees, \textit{supra} note 57 at 28 - 31.
A. The Regulation of Expertise

The commodity that professional persons sell in the marketplace is expertise - their ability to solve a problem, make a judgment, design a system or render an opinion. And where professionals have dominion over a field of occupational activity, they also have an important role in constructing that expertise.\(^1\) The profession establishes links with educational institutions which permit it to influence the content of professional instruction and examination. The group itself is the institution through which expertise is administered. This control allows the profession to shape the development of expertise and to affirm the legitimacy of that expertise.\(^2\) Under a self-regulatory licensure scheme, this control is hegemonic - from the production of expertise to its distribution to its transmission to the consumers. Lesser degrees of control are present where the profession administers a certification scheme or is regulated by an external body.

Control over expertise creates the greatest controversy in the context of self-regulatory licensure. That controversy results from professional domination over the definition of expertise. The


\(^2\) *Ibid.* at 37. See also, Friedson *supra* note 18 at chap 3.
problem arises where control serves to exclude different methods of occupational practice by characterizing the different ways of performing a service as illegitimate, unqualified or unsafe simply because they do not conform to the profession’s definition of professional competence.

While the motivation may be to keep unskilled practitioners out of the occupational market, the fact that is skill is defined by the profession itself and not necessarily by the quality of the service rendered. There may be other ways of acquiring professional expertise or other ways of providing a quality service but these are excluded as illegitimate or unsafe because they do not conform to the profession’s definition of expertise. Exclusive control over the occupational service gives the profession the right and the power to determine that which is expert service and that which is not. Anything that differs from the profession’s notion of expertise can be characterized as unsafe or illegitimate.

This point is illustrated by developments within the medical discourse. The appropriateness of medical treatment is defined by the medical model, a model designed and structured by physicians. Alternative methods of healing - homeopaths, chiropractors and natureopaths - have historically been dismissed as quacks. The practice of these individuals did not conform to the prevailing orthodoxy. Recently, health practitioners such as chiropractors have succeeded in gaining public recognition of the legitimacy of their services. Much of their difficulty in


64 Note the recent debates between British Columbia Medical Doctors and Natureopaths. The former are denied access to diagnostic clinics despite being licensed to practice in the province. Medical doctors control access to these clinics. Source: C.B.C. New Broadcast, December 11, 1995.
achieving recognition may be a consequence of operating outside of the medical discourse. Their healing techniques were different but not necessarily unsafe.\textsuperscript{65} This is not to say that there were not many individuals who engaged in non-traditional medical practices that were dangerous to public health and who should have been prohibited from practicing medicine. The problem is when a way of delivering a service is excluded simply because it is different and not because the practitioner lacks expertise or ability.

Exclusive jurisdiction over expertise creates difficulties when other definitions of expertise are denounced as illegitimate without any consideration being given to the actual quality of a different type of service. The question of whether an occupational activity can be conducted with a high degree of skill by someone outside the profession, someone who did not participate in the prescribed institutional medical education, is not raised because there is deemed to be only one way of acquiring expertise in health care and that route is the appropriate formative institution. Because different types of expertise are excluded at the outset, the contributions that these might make to development in a particular area of occupational activity are closed out.\textsuperscript{66}

\textsuperscript{65} For a discussion of the battles between midwives and medical doctors see A. Witz, \textit{Professions and Patriarchy} (London: Routledge, 1992) c.4. Abbott has a somewhat different theory about the relationship between areas of occupational expertise and experts. Professions form an entire interactive system within which all compete to occupy areas of social activity, jurisdictions. As vacancies arise, professional groups compete for control of these areas. See Abbott, \textit{supra} note 9 at 59 - 85 and 285 - 314.

\textsuperscript{66} See Gellhorn, \textit{supra} note 63 at 152 - 153. Gellhorn suggests that the practice of medicine would be radically different had other healing techniques been permitted to flourish.
B. Occupational Regulation and Quality

Much of the justification for occupational control lies in the quest for quality. Professional services are regulated for a very good reason: to ensure quality service.\textsuperscript{67} Instead of leaving consumers open to the possibility of damage from negligent performance of a service, occupational regulation assists in preventing damage. Launching a civil suit may provide the consumer with a remedy for negligent service but the damage has already occurred. By ensuring a high level of quality service, occupational regulation may prevent harm.

Although occupational control can introduce a measure of quality into the delivery of a particular service, the study of regulated occupations suggest that the relationship between regulation and quality can be problematic.\textsuperscript{68} One study of occupational regulation attempted to discern qualitative differences in optometry services by comparing regulated and unregulated services.\textsuperscript{69}

\textsuperscript{67} Marshall, \textit{supra} note 29 at 328 - 330.


\textsuperscript{69} See Bond, \textit{supra} note 68.
Quality was measured as a function of performance - thoroughness of examinations and the diagnosis of unnecessary prescriptions. That study found no correlation between enhanced performance and regulation. Similar studies of different regulated services have lead to similar conclusions. Indeed, one study involving a self-regulatory body went so far as to suggest a relationship between a lack of restrictions and quality, finding that a legal clinic offered better quality service than traditional law firms.  

The assumption that occupational regulation translates into quality of service is further challenged when the distinction is drawn between quality of service delivered and quality of service received. Conceding that restrictive practices may eliminate some of the worst practitioners from a trade, the quality engendered by occupational regulation is not necessarily reflected by higher quality of services received because the costs of professional quality may prohibit access. As demonstrated below, quality imports higher acquisition costs. Prospective clients would who would avail themselves of the service at a lower cost receive no service at all. Consumers lose the option of trading quality for price. They either perform the service themselves or do without, either of which is apt to result in a lesser quality of service received.

70 See McChesney & Murris, supra note 68.
71 Carrol and Gaston, supra note 68 at 140.
72 Note that licensing requirements may keep the least qualified individuals out of a profession but that the use of grand-father clauses may keep some of the worst in. See C. Curran, “The American Experience With Self-Regulation” in M. Fauve, et. al., eds., Regulation of Professions (Uitgevers, N.V.: MAKLU, 1994) 47 at 71 - 72.
The institutional structure of occupational regulation poses a unique obstacle to anyone who might seek to expose the claim to quality of service as, if not a myth, than at least an uncertainty. Occupational closure may make it difficult to prove allegations of substandard performance. If a professional group's claim to expertise is valid, the capability of assessing quality lies with the collective. Individuals who are not part of the group are not imbued with sufficient expertise to judge the quality of performance. The only persons capable of making that determination are members of the collective. Requiring a member to present evidence against the group ostracizes them from the very group in which they have a vested occupational interest. The profession insulates itself from external challenge.

C. The Cost of Regulation in the Marketplace

Any form of regulation interferes with free market forces. Under a licensure scheme, occupational regulation creates an exclusive class of service providers thus restricting traditional market forces such as competition amongst the various service providers. Certification schemes

73 D. Lees, Economic Consequences of the Professions (London: Institute of Economic Affairs, 1966) at 13. Lees makes the point that consumers are willing to assume greater risk in exchange for lower quality services.


76 See Larson, supra note 9 at 46 - 47. Larson perceives professional education as a socialization process, one that creates group solidarity, strengthened group solidarity.
do not interfere with free market forces in the same manner. Certification interferes to the extent that service providers have the exclusive right to market their services as "certified" signaling to consumers the availability of a potentially better product. Where, as discussed earlier, certification results in de facto licensing, the interference with free market forces is similar to that of licensure.

The introduction of a licensing scheme is a form of economic closure. Licensed practitioners enjoy a privileged market position. Several economic analyses of the impact of occupational regulation link mandatory licensure to increases in service costs.77 These scholars conclude that regulation can, and often does, increase the cost to consumers of accessing a professional service. This connection contrasts sharply with an earlier view that licensure, particularly self-regulatory licensure, entailed solely administrative costs absorbed by the governing body.78 Perhaps not surprisingly, the economic closure aspect of professions has been compared to the types of activities caught by legislation which prohibits companies from acting together with the intent to control market prices.79


78 MLRC, supra note 6 at 8.

Where occupational regulation takes the form of self-regulatory licensure, an additional cost factor may come into play. Some scholars advance the thesis that because licensure insulates a profession from the classic economic relationship between supply and demand, occupational groups limit the supply of service providers to ensure that availability of service remains at a level that will optimize returns. The perception of too many professionals results in a closing of the tap. Where service demand increases, the flow can be reopened.

The predictable, and not untenable, response of the occupational groups is that price increases are a reflection of personal investment, an investment which yields a quality product. Many professional practices require lengthy periods of training or education - 6 to 7 years of university and a period of articling for lawyer, 7 - 8 of schooling and at least two years of internship for general practice doctors. Additionally, higher incomes induced by higher service costs attract the best candidates to the profession. While both of these contentions may be true, they clearly illustrate the point that while professionalism is generally justified by reference to the protection of the public interest, it can also advance the professional interest.

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80 See Abel, supra note 9 at 10 - 11.

81 See E. Hughes, *The Sociological Eye: Selected Papers* (Chicago: Aldine Atherton Press, 1971) at 364. Hughes refers to the deference of structural - functionalist to the belief that high incomes are required to draw the best possible candidates into the professions.
D. Professions and Collective Mobility

Social closure is the enhancement of the social situation of one group through the subordination of others. Assuming a limited amount of resources - social, political, economic - a group advances its own interests by appropriating resources that would be shared by the wider populace. The creation of a profession is often identified as the pursuit of collective social mobility, the closing of avenues to others in order to enhance the social status of the collective.

A survey of the composition of the social hierarchy supports the view that professionalism results in collective mobility. A profession attracts status, prestige and high incomes. These combine to place professional persons into the upper echelons of the social strata. For some, this is perceived as inaugurating a new form of social inequality founded on occupation. However, while this may be the case for some professional groups, it is clearly not the case for

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82 See generally, F. Parkin, “Strategies of Social Closure in Class Formation” in F. Parkin, ed., The Social Analysis of Class Structure (London: Tavistock Publications, 1974) at 1. Parkin divides social closure into two principal components: the power of exclusion and the power of solidarism. While I agree with the former, I do not necessarily agree with the latter. Parkin sees a distinct power of solidarity in those who are excluded by social closure, a solidarity that results from the exclusion. My sole concern here is with the former, the social and economic power of exclusion.

83 Larson, supra note 9 at xvi. See also, M. Saks, “Removing the Blinkers?: A Critique of Recent Contributions to the Sociology of the Professions” (1983) 31 Sociological Rev. 1.


85 See Larson, supra note 9 at xvi
all. Traditional professional groups such as doctors and lawyers have experienced collective mobility and do, on the whole, have higher than average incomes and a privileged social status. But if the definition of a profession is expanded to include other professional groups - social workers and nurses, for example - then the evidence of collective mobility is less compelling.

There is no doubt that recognition as a professional occupation does confer a degree of status but the link between status, prestige and incomes is much more tenuous in the context of these latter professions than is the case with the older, more established, professions.

Assuming that the creation of a profession is an exercise in collective mobility, that mobility could be justified, in part, were the rewards diffused amongst a wide variety of social groups. If collective mobility crossed the boundaries of class, race and ethnicity than the formulation of a class advantage based on occupation could serve to redistribute social privilege. Individuals from different socio-economic backgrounds could share in that collective advantage and see their social position improved. It is true that it would inaugurate a new form of social inequality but it is equally true that it could provide a means for the disempowered to climb the social hierarchy together with their privileged colleagues. However, professional collective mobility does not advance the interests of disempowered groups because despite embracing egalitarian ideals of equal access, professional groups tend to exclude, rather than include, socially disadvantaged groups. Therefore, collective mobility serves the interests of the already collectively mobile.

E. The Quest for Recognition - Process Concerns

When an occupational group seeks recognition of their métier as a profession, they encounter little public opposition. On the hand is the occupational group, politically organized around their shared occupational interest, united in a common effort. On the other is the opposition, the public, unorganized and disinterested because the consequences of professionalism are diffused. What is concentrated in the one group confronts the fractured public consciousness. Few will organize to counter a claim for professional status because their individual interest in each specific case is minimal. Claims for professional recognition are rarely opposed. 

Ironically, the same concentration of power that structural-functionalists value for engendering resistance to state activity also serves to insulate the occupational group from public resistance to their pursuit of occupational closure

The exclusive claim to expertise assists the occupational group in this venture. Those engaged in a particular type of work have an intimate knowledge of the nature of the work performed and the expertise involved. The authority that considers whether or not the claim is valid often lacks

87 Young, supra note 7 at 23-28.
a similar knowledge base. Typically, an occupational group lobbies a governmental body for a
delegation of power to regulate their own affairs. In rendering it’s decision, the granting
authority place a great deal of reliance on the information provided by the lobbyists.90

Moreover, the asymmetrical distribution of expertise mitigates against compelling arguments
being raised in opposition.91 These forces combine to permit the occupational group to advance
it’s case with relative ease.

Groups seeking professional status may encounter opposition from other professional groups. In
Abbott’s analysis, professional groups compete for jurisdiction over areas of practice.92 A group
that has succeeded on a previous occasion in its claim for professional recognition may seek to
limit competition or may feel their jurisdiction is being threatened thus will try to discredit
competitors. For Abbott, professions are not mutually exclusive but interconnected parts of a
professional tapestry. The boundaries between the work of doctors and nurses or lawyers and
paralegals are not necessarily rigid and fixed. Distinctions may be arbitrarily drawn to protect
the scope of work over which one group has jurisdiction and when the distinctions are
challenged, the profession resists. Therefore, although the public may not dispute a claim for
professional recognition, opposition may come from within the professional network.

90 See Young, supra note 7 at 23 -24.

91 Ibid. at 24. Young notes the lack of research funding available to administrative bodies to
investigates professional claims. See also, Friedson, supra note 18 at 192.

92 See generally Abbott, supra note 9.
IV. Changing the Professional Model

The tension between the structural-functionalists portrayal of professions as institutions that serve the public interest and the monopoly theorists depiction of professions as institutions that advance the professional interest is stark. At one extreme are occupational groups with a genuine interest in introducing controls that will enhance the quality of service provided and protect the public from the harm of unfettered practice. At the other extreme is an organized collective that usurps control from the masses at tremendous public cost. Equally apparent is the important role played by the model of professional regulation in determining the degree of control exercised by an occupational group. Self-regulatory licensure power grants the professional group the greatest amount of control because it induces the greatest degree of professional autonomy. The professional group has less control over occupational activity where it administers a certification scheme and even less where it operates under a licensure or a certification scheme administered by a third party.

The problem for scholars is how to reconcile the regulation of professional activity with the public interest. Some suggest that this reconciliation is occurring naturally as part of a deprofessionalization trend. The belief is that rising levels of consumer sophistication, the routinization and standardization of work and demographic changes result in a skepticism over the value of and need for professional regulation. What is questioned is not necessarily the

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94 Ibid. at 189 - 201.
need for occupational regulation but the nature and complexity of the work in which professional
groups claim to be engaged. There is a growing recognition of the similarity between
professional work and other forms of work resulting in the persistent questioning of why certain
groups should enjoy occupational privilege and not others. This is not to suggest complete
deregulation of professions but to suggest that there is considerable erosion of the faith once
placed in professional regulation.

More direct attempts to reconcile the competing visions of professions are legislative initiatives
directed at reforming the process of professionalization and the structure of professions.95 The
consensus is that the only consideration that should govern any requests for regulation should be
the public interest.96 In deciding whether or not regulation is required, the benefits to the public
should be analyzed in light of the potential economic and social costs. Clearly, this is a rejection
of the trait - theory approach by which groups justified their claim to professional recognition by
drawing analogies between themselves and the established professions. It is more apt to
describe this approach as an attempt to blend structural - functionalism with the concerns raised
by scholars of the monopolist school.


96 See, for example, *MLRC, supra* note 6 at 19.
The typical formula that has been put forward to determine whether, if and how professional activity should be regulated is relatively simple: where the negligence performance of an occupational activity presents a serious risk to the public, or where there is a serious risk of injury to a third party, that occupation should be regulated by a licensure scheme. Licensure schemes are the most restrictive form of occupational control and should therefore only be used when there is a serious risk of harm. Where an occupational activity does present a risk to the public but one that is less dire that a serious risk, that activity should be accommodated by a less exclusive regulatory mechanism, such as certification.\textsuperscript{97} Certification leaves much of the risk assessment to the consumer. He remains free to chose uncertified services because should the consumer suffer harm from the use of uncertified services, the damage will not be serious. Self-regulatory licensure should only be granted where it is clearly the most cost-effective way of protecting the public interest and should only be granted in the rarest of cases.\textsuperscript{98}

While the formula for creating professions is rather simple, it is not so simple to apply. Defining a serious risk requires a consideration of the level of risk that a society is willing to assume. That is not a simple task. If we take two extremes, the neuro-surgeon and the librarian, the level of risk involved may be clear. But the level of acceptable risk becomes blurred if one considers nurses, truck drivers and mediators. The simplicity of the formula may trivialize the difficulties inherent in its application.

\footnote{97 See Prince Edward Island, \textit{supra} note 94.}

\footnote{98 See, \textit{MLRC supra} note 6 at 48 - 52.}
V. Conclusion

The proposed reforms to the professionalization process may go a long way towards alleviating many of the problems associated with professions. They may result in professions that are more accountable to the public they serve. On the other hand, they may serve to preserve the status quo by allowing existing professions to continue to enjoy the benefits of their achieved status and simply inhibiting the evolution of new professions.

The possible implications of professional regulation require that serious consideration be given to the nature of a particular occupation prior to introducing any form of occupational regulation. With the practice of mediation, the question that arises is whether the professionalization of this process can be successful in preventing its abuse or whether regulation will cause more problems than it will solve.
CHAPTER IV

The Professionalization of Mediation

Most human activity involves costs or disadvantages as well as benefits or advantages. A wise decision-maker will consider both sides of the ledger and will weigh all the consequences of a particular course of action to determine if it will produce greater net benefits than acting in another way or doing nothing at all.\(^1\)

I. Introduction

There are advantages and disadvantages to almost any course of action. It is impossible to know what will or will not happen if we chose to do one thing or we chose to do another or we chose to do nothing at all. If would ideal if we could consult a crystal ball to see what lies ahead if one were to chose to follow one route or another. But although we can’t know with absolute certainty where a particular course of action will lead, we can explore the possible advantages and disadvantages of heading in one direction or another by marshaling the available evidence and on the basis of the information gleaned, make an informed decision as to which course holds the most promise.

Sometimes when we arrive at the fork in the road there are no signposts to indicate which road we should follow. But when the journey consists of the travels of mediation and the question is whether we should proceed down the path of professionalism, there are many signposts. The signposts are made up of what we know about professions and the consequences of professional regulation and what we know about mediation. The study of these phenomenon provide us with

\(^1\) Manitoba Law Reform Commission, *Regulating Professions and Occupations* (Winnipeg, Man.: Queen’s Printer, 1994) at 11 [*hereinafter MLRC*].
the tools required to make an informed decision. This chapter reads these signposts in an attempt to foresee the possibilities and limitations of the professionalization of the practice of mediation.

The first part of this chapter considers some of the more general implications of the professionalization of mediation, demonstrating how some of the more common consequences of professionalism seem to contradict the basic tenets of the mediation process. In the latter part of this chapter, the need for the professionalization of mediation is analyzed in light of the contemporary public interest test: does the protection of the public interest require that the practice of mediation be regulated?

II. The Contradictions of the Professionalization of Mediation

Requiring any type of occupational activity to operate within a professional structure has many implications. Regardless of the structure imposed - self-regulatory licensure, self-regulatory certification or the administration of either of these schemes by a governmental body - that structure will have an impact. That formal mechanism should be examined in light of the peculiarities of a specific occupational activity. The structure must accommodate the nature and intent of the service and should not distort or eliminate its value. In the earlier discussion of certification it was noted that a scheme which on its face appears to be one of permissive certification may, under certain conditions, transmute into de facto licensure: permissive regulation being transformed into mandatory regulation thus eliminating the value inherent in permissive certification schemes. Similarly, the imposition of an institutional onto a particular occupation may negate the benefits of that service by converting it into something different. A
regulatory regime should yield identifiable benefits but the advantage of regulation is lost when the structure negates the very benefits that the occupation itself has to offer. The professionalization of mediation has the capacity to negate the benefits that mediation sought to bring to the dispute resolution process.

A. Cost Considerations

It is very likely that some form of occupational regulation will increase the cost of mediation services. Educational investment, training requirements and the establishment and maintenance of a professional governing body each elevate the costs of service delivery. Under the present system of mediation delivery, there are no administrative costs nor any formal requirements that need be satisfied prior to practicing mediation.\(^2\)

Licensure regimes tend to generate the greatest costs increases. In part, this is due to the fact that licensure eliminates or severely constrains competition: service providers are insulated from the influence of free market competition. Absent legislation that restricts occupational practice, service cost reflects the consumer evaluation of the service working in tandem with the consumer ability to pay. Presently, the delivery of mediation services is relatively unaffected by regulatory controls. Any individual can establish a mediation practice, analyze the market for the service and determine what price he or she will charge.

\(^2\) Lawyers who act as family mediators are the exception. See, Law Society Rules, R. 154 issued pursuant to Legal Professions Act, S.B.C. 1987, c.25, s.25.
Though the professionalization of any occupation is prone to increase costs, this potential economic impact detracts from one of the principal benefits that mediation brings to the dispute resolution process: mediation has gained favour because it is viewed by many as a means of reducing the costs of conflict resolution. One of the main complaints about the current system of justice delivery is that excessive costs prohibit access. Excessive costs inhibit access to the legal system by the impecunious. Informal methods of dispute resolution are valued, in part, because they demand less economic resources. As such, mediation is valued because it is perceived to facilitate access to justice. Therefore, while professionalizing mediation regulates service delivery, it also take away from one of the central benefits that mediation sought to bring to the dispute resolution process.

While the potential cost consequences of professionalization can be justified by the need to prevent abuse of the mediation process, this leads into the eternal debate between informal and formal justice processes. Informalism may be less costly but that may be because the justice delivered is of a lesser quality. Despite the truth of this assertion, it is equally true that access to some level of service is apt to better than no access to no service at all. Therefore, if occupational regulation improves the quality of service delivered but not quality of service received impecunious disputants may be no better off under a regulated mediation system than an unregulated one.

What is particularly vexing about increasing the costs of mediation services is that this will bring the expense of informal dispute resolution more in line with those of the formal process:
professional mediators will command fees comparable to those of professional lawyers. 3

Assuming that professionalization ensures quality dispute resolution services, it is the cost of obtaining professional legal services that presently limits access to the judicial process. Legal services may protect rights and mitigate against inequalities amongst litigants but if the disputants cannot afford these services the benefits provided by professional service cannot be claimed. However, the evidence thus far suggests that the costs of professional mediation services will not rival those of professional legal services. 4 The formal requirements contemplated for mediators tend to be relatively modest, in the nature of certification regimes rather than more stringent licensure schemes. Less restrictive regulatory structures do not import cost consequences of the same scale. With certification, competition amongst service providers continues to influence prices because certified practitioners practice along with the uncertified. Moreover, consumers retain the option of choosing between certified and uncertified mediation services and are free to balance costs concerns against the risks of each type of service. Thus, while the costs of the professionalization of mediation may detract from the economic advantage of informal justice process, if costs can be kept at a minimum, the impact should be modest.


4 See generally, supra note 3 on the training requirements that are suggested for mediators. These are far less than the investment required of lawyers, generally four years of undergraduate study and three years of legal education. If the cost of attaining the right to practice remains at a minimum, the costs of services should remain at a relatively affordable level.
B. Quality Considerations

In a society dominated by capitalist ideology, there is general acceptance of the principle that quality exacts a price. Because an institutional structure assures a measure of quality in the service delivered, the consumer must be prepared to pay for the quality. However, the study of certain regulated occupations suggests that the relationship between institutional prerequisites and quality of service can be tenuous. Regulation does not guarantee a qualitative increase in service delivery. In fact, there are occasions when the introduction of professional requirements serves to protect substandard practitioners from accountability.⁵

When the inverse relationship of quality of service delivered and quality of product received is considered, the link between occupational regulation and quality of further attenuated. Even where professional regulation produces a better product, this does not necessarily translate into better quality of service received. Prohibitive costs may result in individuals electing not to access a particular service, choosing instead to perform the service themselves. Improvements to the quality of service may matter only to those who can afford the costs of upgrading.

The point here is not that occupational regulation does not generate quality service outputs.

Clearly, educational requirements and examinations can elevate standards of practice. Formal

training requirements can ensure that practitioners are aware of the problems or issues involved in the exercise of any occupational activity and are prepared to deal with these contingencies. Instead, the point is that occupational regulation does not always translate into quality of service delivered. Therefore, if mediation is professionalized, this will not guarantee a qualitative increase in the service delivered.

But there is a much more compelling quality concern that arises in the context of the professionalization of mediation. While the cost/quality conundrum applies to the professionalization of any occupation, the professionalization of mediation raises a peculiar quality question. That question is whether quality in dispute resolution is capable of definition and, if so, is it desirable to define the quality of mediation services?

In the context of dispute resolution, quality is an exceeding difficult concept to define. It tends to be rather elusive because effective dispute processing means different things to different people. For example, if one were discussing the quality of automobiles, a list of generally accepted criteria can be created against which the qualitative merit of that vehicle can be measured - repair records, durability, road safety, etc. In dispute resolution, it is much more difficult to generate a similar list. Principally this is because the concept of quality in dispute processing tends to be the product of a more subjective analysis. In dispute processing, values, goals and objectives become the central defining forces of quality. These defining forces may be determined by the participants to the mediation or by the community in which the conflict occurs. Therefore, quality in dispute resolution is not quite so readily known or definable as it might be in the case
of the quality of an automobile. Does quality mean the greatest possible outcome for each
person? Does quality mean settling disputes without antagonizing existing tensions? Is quality
in dispute resolution a function of social values, whether a settlement upholds these values, or is
quality a function of individual values, something to be determined solely by the disputing
parties?

The mutable nature of quality was seen earlier in the discussion of disputes and dispute
processing in other cultural milieus. Disputes and dispute processing are cultural phenomena
the meaning of which shifts with the particular cultural context in which the dispute occurs.6
Judgements of the appropriateness, acceptability or correctness of dispute resolution are a
function of the values, social practices, political and sociological imperatives of the social
organization in which the dispute emerged. In some societies, that meant that disputes had to be
resolved through a particular process. In others, it meant that the result produced was consistent
with social values. In still others, the appropriateness of dispute resolution was a question of
whether or not harmony was restored. A survey of dispute resolution processes in different
cultural settings suggests that the quality of dispute resolution is a function of numerous
variables. Quality will be achieved where the process and outcomes correspond to the particular
social characteristics of the community in which the conflict arose.

6 See generally, W. Felstiner, R. Abel & A. Sarat, “The Emergence and Transformation of
The question of how to measure quality in dispute resolution is currently the subject of extensive
debate. A recent conference on the quality of dispute resolution processes resulted in a series of
clusters of statements that were thought to define quality in dispute resolution: quality may
mean individual satisfaction, the extent to which individual participants feel that their needs and
interests have been met; quality may refer to autonomy, the valuation of internal, rather than
external, dispute resolution - disputants resolving the problem rather than referring the problem
to a third party; quality can mean social control, the extent to which dispute resolution facilitates
the control of public or private institutions; quality can refer to social justice, the public
perception that the resolution of a particular dispute does not exacerbate existing social

7 See M. Galanter, "Compared to What? Assessing the Quality of Dispute Resolution" (1989)
Luban, "The Quality of Justice" (1989) 66 Denv. U. L. Rev. 381; T. Tyler, "The Quality of
Dispute Resolution - Processes and Outcomes: Measurement Problems and Possibilities"

8 The results of a symposium on the quality of dispute resolution held in Denver, Colorado, in
1989 were a series of clusters of statements defining quality in dispute resolution. Dispute
resolution processes achieve quality resolutions when one of the following definitions is met: 1)
they leave disputants feeling that their individual desires, as defined by themselves, have been
satisfied, in terms of the experience and the outcome of the process (Individual Satisfaction); 2)
they strengthen the capacity of and increase the opportunity for disputing parties to resolve their
own problems without being dependent on external institutions, public or private (Individual
Autonomy); 3) they facilitate or strengthen the control of public or private institutions or the
interests they represent, over exploitable groups and over possible sources of social change or
unrest (Social Control); 4) they ameliorate, neutralize or at least do not exacerbate existing
social inequalities in the societal distribution of wealth and power (Social Justice); 5) they
provide common values, referents or "texts" for individuals and groups in a pluralistic society,
and thereby increase social solidarity among these individuals and groups (Social Solidarity); or
6) they provide opportunities for and encourage individual disputants to experience personal
change and growth, particularly in terms of becoming less self-centered and more responsive to
others (Personal Transformation). These results are found in R. Bush, "Defining Quality in
Dispute Resolution: Taxonomies and Anti-Taxonomies of Quality Arguments" (1989) 66
inequalities; quality can mean social solidarity, the recognition of communal values and the increased solidarity amongst individuals who share these values; finally, quality can refer to personal transformation, the opportunity for individuals to learn and experience personal growth through the dispute resolution process.

Each of these definitions illustrates the transitory nature of "quality" in the context of dispute resolution. Unlike automobiles, there is little agreement on the list of criteria against which the qualitative value of mediated resolutions can be assessed. The absence of agreement renders the task of defining professional qualifications extremely difficult. How does one design an institutional structure that will yield a specific product when the end result is ill-defined?

Developing a functional definition of quality is not the only difficulty that professionalization presents to the mediation process. The nature of mediation itself raises the question of whether in fact it is consistent with the intent and purpose of this process that we seek to construct a definition of quality? Is the imposition of a definition of quality mediation consistent with the flexible, self-determinative temperament of mediation? As an alternative to the court-centered approach to dispute resolution, the mediation processes offers disputants an instrument of dispute resolution in which the constraints of universalized legal texts are relaxed and subjective ideals of justice, equity and appropriateness of dispute resolution allowed to operate. Mediation encourages self-determination and autonomy, the production of, and agreement on, the values and considerations that will guide dispute resolution. Seeking to define quality in dispute
resolution appears to anesthetize the very quality that mediation sought to bring to the dispute resolution process.

Part of the danger in requiring any degree of uniformity in the definition of quality in dispute resolution lies in the impact of professional definitions of quality on other quality discourses. Where one definition of quality is accepted as the governing standard, and professional qualifications designed and implemented to achieve that standard, other equally valid quality discourses are suppressed. This is reminiscent of the problems encountered where a profession monopolizes expertise, a problem particularly acute where the occupational group exercises exclusive control over all aspects of an activity such as occurs under a self-regulatory licensure scheme. Similar to the control exercised by medical doctors over the medical discourse, a profession of mediators exercising comparable power may result in that group's particular understanding of quality being used to suppress other definitions of quality.

Members of a professional institution are the medium through which a particular quality discourse is imposed on an occupational practice. Contenders for membership in the occupational group undergo a homogenization process. That process is designed to educate potential practitioners in the skills required to exercise a profession, in this case, the profession of mediation. The discourse of quality that has been accepted by the professional institution is the discourse to which students are exposed and in which they are taught. While it might be too

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harsh to say students are socialized to one particular discourse of dispute resolution, there is certainly greater exposure to the professional discourse of quality than to other quality discourses. For mediators, this would mean they are introduced the concept of quality the profession has selected. What is relevant to mediation is the capacity of a homogenization process to wean out any predisposition to other quality discourses because it is that predisposition to a variety of quality discourses that is the very value mediation brings to the dispute resolution process. As a reaction to formal methods of dispute resolution, informal process allow diverse quality discourses to inform the dispute resolution process. Entrenching a professional definition of quality in dispute resolution means that an individual with an understanding of quality shaped by his or her own cultural context must shed that understanding and have it replaced with another. Essentially, the cultural norms and values that a potential mediator might have brought to dispute resolution are remodeled to correspond to the dictates of the professional quality paradigm: the cultural diversity that mediation sought to bring to the dispute resolution process is effectively neutralized.

This discontinuity between professionally constructed concepts of quality and culturally diverse notions of quality is clearly illustrated in numerous works that draw out the link between culture and dispute resolution.\(^{10}\) In her work in this area, LeBaron Duryea has found that attempts to

determine and evaluate the abilities of mediators were based on dominant ideological understandings of the appropriate methods and practices for resolving disputes. She determined that the criteria used to qualify mediators reflected the views of dispute resolution held by dominant cultural groups. These criteria failed to take into account culturally specific perspectives on dispute settlement. The validity or appropriateness of mediator qualifications reflected the values of the dominant culture. Other views on dispute resolution, other understandings of what is or is not an appropriate way to resolve a dispute, were ignored.

This is not to say that a professional group intentionally adopts the concept of quality defined by dominant cultural groups nor that the collective intentionally ignores other discourses. It may be a natural consequence rather than a deliberate attempt to have the profession's own views entrenched by the way in which a particular occupation is practiced. The principal motivation may be a genuine effort to elevate the standards of practice in order to protect individual users of the service from harm. In some instances, the exclusion of particular persons from a practice or the exclusion of certain notions of quality are justified by the public interest. Just as there are compelling reasons to keep incompetent persons out of the practice of medicine, there are compelling reasons to keep certain definitions of quality out of the mediation practice. For example, a quality discourse whose central governing concept was the oppression of the weak

Dispute Resolution, 1994) 109[hereinafter The Quest]. See also, S. Merry, “Disputing Without Culture” (1987) 100 Harv. L Rev. 2057

11 LeBaron - Duryea, The Quest, supra note 10 at 113 - 118.

12 Ibid. at 111 - 113.
should be excluded. But though extreme cases of unacceptable quality may be clear, the problem is that in addressing these cases by establishing a professional definition of quality, other quality discourses distinguishable only by their difference not by the absence of quality, may be equally excluded.

Currently, it is the absence of an institutional structure that permits the mediation process to accommodate diverse understandings of quality. Individuals drawn from the cultural context in which the dispute emerged often serve as mediators. These individuals, because of their familiarity with the cultural context of the dispute, can appreciate the social imperatives of the disputants. These mediation practitioners embody a wide range of quality discourses. When a dispute finds its way into the mediation process, a mediator can readily be found whose history and values resemble those of the disputants. Institutionalization could minimize this diversity amongst mediation practitioners and might result in mediation no longer being offered by community members whose methods are shaped by the same social milieu as the disputants.

Again, it is the nature and intent of mediation itself that makes defining quality in dispute resolution problematic. Mediation is used to remedy some of the problems encountered in the traditional litigation approach to dispute resolution. One of those problems is alienation from the dispute resolution process. The application of formal objective rules breeds a feeling of alienation in participants because their perceive their conduct as being measured against an arbitrary standard. The distance separating litigants from the formulation of the law induces a degree of abstraction between the applicable law and the conduct of the parties. The informality
of mediation permits the application of particularistic rules of conduct derived from subjective experience. Rules that are intimately connected to the participants become the barometer of conduct. Creating a regulatory system that teaches each mediator a system of rules used to regulate quality may have a similar distancing effect. Rules defined by the profession may alienate disputants from the process of dispute resolution. Professional regulation of quality may recreate the very alienation problems that mediation sought to remedy. If the value of mediation lies in its ability to connect participants to the production of the law, it seems contradictory to improve upon this process by taking the regulation of quality out of the hands of disputants by requiring that settlements be judged against objective criteria defined by a mediation profession.

C. Professionalization and Inequality

One of the principal complaints about mediation is that it will perpetuate social inequality. It is thought that by introducing a form of occupational control inequality concerns might be minimized. This would come about if professional mediators were accountable for settlements reached and required to shed their neutral posture and actively intervene in disputes where they detected a severe power imbalance.\(^\text{13}\) If substantive intervention were not possible, the mediators could terminate the mediation session leaving the disputants to resolve their dispute by some other mechanism. The training and educational requirements of professionalization would

\(^{13}\) Many arguments have been advanced for a reconceptualization of the role of mediators in dispute resolution. The argument put forth is that in certain circumstances, mediators should shed their neutrality and actively intervene in dispute resolution. A discussion of this reconceptualization of the role of mediators is found in J. Maute, "Mediator Accountability: Responding to Fairness Concerns" (1990) 2 J. Disp. Resol. 527 and J. Maute, "Public Values and Private Justice: A Case for Mediator Accountability" (1991) 4 Geo. J. Legal Ethics 503. See also, S. Purnell, "The Attorney as Mediator - Inherent Conflict of Interest?" (1985) 32 U. Cal. L. A. Law Rev. 986.
ensure that mediators were able to identify such situations and equipped to deal with this contingency.

While it is plausible to introduce occupational regulation to mitigate against inequality problems, it is somewhat contradictory that the creation of a professional class of mediators may itself create a new layer of social inequality. The inequality results from the creation of different classes of individuals based on occupation. While the problem that inequality presents to mediation may be abated, the cost of this abatement is the creation of a new form of inequality. Inequality in one sphere of social activity is relocated to another. Therefore, although professional regulation succeeds on one front, that success predicated on failure on another. It seems antithetical to solve mediation's inequality problems by manufacturing inequality in a different context.

Each of these points illustrates the potential of the professionalization of mediation to negate the benefits that informal justice processes bring to dispute resolution. The value of informalism lies in its ability to socialize justice delivery. Creating a professional class of mediators appears to recreate many of the problems that the introduction of mediation sought to alleviate. This seems to bring reform efforts full circle with a return to the roots of the criticism that first lead to informalism. Ironically, the very changes that the phenomenon of deprofessionalization suggests are occurring within the realm of the professions are changes that place the professions more in

line with the central tenets of mediation. Deprofessionalization seeks to socialize the professions just as mediation seeks to socialize justice delivery. To professionalize mediation, to formalize the informal, may eliminate much of the value that mediation has as a dispute resolution process.

III. The Public Interest Test - Licensure or Certification or Neither

Most of the preceding problems with the professionalization of mediation are more common to professional regulation by self-regulatory licensure rather than other forms of regulation.

Licensing schemes administered by an independent body or certification schemes, whether self-regulating or not, can cause similar problems but because these regulatory measures confer a lesser degree of occupational control the impact on any particular occupation is less severe. Any form of regulation will effect the exercise of an occupation but the rigor of the impact varies with the strictures of the regulatory scheme implemented. In this final section, the question asked is whether a professional model of occupational regulation, specifically the regulatory instruments of certification or licensure, is required in order to protect the integrity of the mediation process.

A. Conventional Approaches

The traditional approach used by most groups who sought to obtain recognition as a profession was rooted trait theory. Groups of occupational workers sought to demonstrate their similarity with the existing professions by focusing on professional attributes. Adopting this approach, Picard argues that mediation is becoming a profession because it has or is developing many of these attributes.15 As we have seen, this approach is sorely deficient as it focuses on the

characteristics of an occupation or an occupational group rather than its function. Trait theory devotes little attention to the question of whether occupational regulation is required to protect the public interest. The structural-functionalist approach does not fair much better. Although it focuses on the public interest, structural-functionalism assumes that professionalism is in the public interest thereby explaining the consequences of professionalism as ancillary but necessary evils. Monopoly theorists point to this deficiency but like their predecessors their analysis of professions is somewhat one dimensional because it focuses on the negative consequences of professionalism and ignores many of the benefits of occupational regulation. Moreover, although monopoly theorists devote considerable attention to the fact that professionalism can be in the professional interest, they seem to ignore that the fact that the professional interest and the public interest are not always mutually exclusive: the emergence of a profession may serve the interests of both. More recent analysis of professions suggests that in deciding whether or not a particular occupation should be recognized as a profession and thus operate under some form of regulatory structure, the predominate concern should be whether professional regulation is in the public interest.

B. Licensure - The Possibility of Serious Harm

Recent studies of professional work suggest that occupational activity should be licensed if the inadequate performance of an occupational service poses a serious risk to the public or to third parties. What constitutes serious harm is defined by reference to three factors: the likelihood

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16 MLRC Report, supra note 1 at 105
of its occurrence, the significance of its consequences and the number of people it threatens.  

This creates a two part test: first, it is necessary to determine what harm would result if mediation were improperly practiced; second, it requires determining whether that harm creates a risk that qualifies as "serious".

If one considers the question of harm in the medical context, the answer to whether improper or negligence practice causes harm readily leaps to mind. Improper treatment or diagnosis can lead to death, deformity, pain and excessive suffering. With mediation, the consequences of negligence practice are not quite so clear. If improperly conducted, mediation could result in the failure to reach an agreement. If the mediator does not possess the skills necessary to assist the parties to work together, if he or she does not ask the right questions or fails to occasion within each participant sufficient confidence in the process to permit them to work together, no agreement will be reached and mediation will have failed. But this failure can hardly be considered harmful. Simply, the parties have exhausted one dispute resolution option and are free to pursue others. More importantly, the mediation process may fail to produce an agreement even if the mediator is ably qualified. Differences between the parties may simply be incapable of a mediated resolution. It is extremely difficult to establish the causal connection between the improper performance of mediation and the failure to reach an agreement because improper performance and irreconcilable differences both yield similar results - no agreement is reached. Disputes rooted in dissensus, for example, are not likely to be resolved through

mediation, not because of any fault or inability of the mediator but simply because the dispute is not amenable to resolution by this type of intervention.

Ironically, harm may arise where the parties succeed in reaching an agreement but is it an agreement that, upon reflection, is simply unacceptable. Recalling the concerns raised about the use of mediation, a principal concern is that mediation will perpetuate systemic power imbalances: existing inequities between disputants will be reflected by the mediated agreement. Disparity between the powerful and the powerless is entrenched by mediation. The harm that results is the perpetuation of relationships of dominance and oppression. But can this result be attributed to the improper exercise of mediation skills? If the objective of mediation is to reach an agreement and the process achieves this goal, then the mediator has successfully performed his task. If, on the other hand, the objective of mediation is to reach agreements in instances where a mediated resolution is appropriate, then a link between the harm and improper practice of mediation can be established. The link is not necessarily related to the skills of the mediator himself but to the failure of the mediator to perceive that under certain conditions a mediated agreement produces more harm than good.

This is a complicated argument to make because it requires an understanding of when mediation is appropriate and when it is not. That, of course, requires the evils of deciding on a definition of quality and imposing that definition on the disputants. However, there may be cases in which society deems it inappropriate to allow an oppressive situation to continue. If we take the example of victims of domestic violence, it may be more appropriate for a skilled mediator to
terminate the mediation session rather than allow the session to continue and result in an agreement that is severely distorted in favour of one party. In that instance, a mediator who was able to identify the signs of domestic violence could avoid greater harm descending upon the victim by refusing to continue a mediation session that is likely to operate to the victim’s disadvantage. The harm caused by mediation would be the perpetuation of abuse.

Despite the fact that improper use of mediation will result in a continuation of oppression, this does not appear to be a harm that would qualify as serious. It is certainly not death nor is it irreparable. Settlements negotiated in mediation can be subsequently overturned by the courts.\footnote{Mediated agreements are contracts that, where court action has been initiated, are filed with the court. It is not easy to have a court overturn these agreements. See B. Cossman, “A Matter of Difference: Domestic Contracts and Gender Equality” (1990) 28 Osgoode Hall L. J. 317 and M. Neave, “Resolving the Dilemma of Difference: A Critique of the Role of Private-Ordering in Family Law” (1994) 44 U. Toronto L. J. 97.}

It is not a harm that causes physical injury, either to the participants or to third parties. Moreover, if mediation is a voluntary process this also reduces the threat of harm. It is not required in the same sense that medical treatment may be required. And, even were it required by the courts as prerequisite to court action, the parties could not be required to settle because settlement is predicated on the consent of the parties. Unlike the patient, the parties do not need mediation in the same sense that an individual needs medical treatment.

Thus far, analogies of harm and serious harm have referred to medical treatment. A more likely comparison for mediation would be legal services. Does the harm that might result from negligence performance of legal practice require licensure and, by extrapolation, does mediation
require licensure? My inclination is that if legal services were subjected to the test of serious harm, it is unlikely that lawyers would be required to operate under a licensing scheme. There is very little activity in which a lawyer engages that could not be adequately dealt with by an insurance scheme or by post damage litigation. Much of the damage caused is capable of some form of monetary compensation. Auto mechanics who repair brake systems are more likely to cause harm of such a serious nature that their occupation requires the safeguards of a licensure scheme than lawyers in legal practice. If compensation can remedy the damage, the argument for the licensure of mediators loses much of its force.

All types of occupational activity can, in one way or another, cause harm to individuals. In discussing serious harm, one might be better to focus on direct serious injury rather than more remote notions of harm. There is no doubt that the improper use of mediation can cause harm but that harm is, in my estimation, much too remote to require mediators to be licensed. Furthermore, it is a type of harm whose roots lie the social structure rather than in the particular abilities of a mediator. To require mediators to be licensed to prevent against the occurrence of this type of harm takes one to a level of abstraction that, in my view, far exceeds the social utility of this regulatory mechanism.

C. Certification - Less Serious Harm

In considering whether mediators should be certified, once again the question revolves around the issue of harm. If the harm caused by improperly exercised mediation skills does not cause serious harm than is any harm caused of such a degree that certification would be beneficial?
Similar to the case of licensure, it is difficult to see how the harm caused by improper mediation can be of a sufficient degree to consider certification as an appropriate regulatory measure. If the mediation process is voluntary, the parties have the existing option of accessing the services of a professional legal counsel should they deem that the risks involved in dispute resolution warrant special protection. In that sense, the choice of using uncertified or certified services already exists: an individual can opt for legal services instead of mediation services. Costs, of course, may be a factor in opting for the latter but costs will also be a factor in opting to use certified mediation services also because certified services will cost more.

This brings up an interesting point with respect to the existing remedies available in the formal court venue. Presently, professional dispute resolution services exist in the form of legal counsel. While there may be problems with these services, the creation of an additional layer of professionalism may compound, rather than alleviate, the difficulties. If we set out a course of requirements that mediators must meet in order to practice their occupation, we begin to garb mediators in legal robes. Will certified mediator be more effective in mitigating against public harm than legal counsel? Costs of certified mediation services may rival those of legal counsel but is that a compelling reason to introduce a certification regime when it appears to be an exercise in duplication? Is it not perhaps the more appropriate response to attempt to reduce the costs of access to existing legal services?
Undoubtedly, the prerequisites of certification such as training, testing and upgrading mechanisms can create an awareness in mediators of the potential problems encountered with mediation. It is eminently logically to conclude that knowledgeable and informed mediators would be better able to prevent the abuse of the mediation process. Mediators could be schooled to perceive their own cultural biases, to understand the dynamics of personal relationships and to expand their knowledge of the techniques and skills available to assist in the dispute resolution process. In this context, certification appears to be a viable professional model for mediation. However, if the protection offered by certification is set against the protection afforded by independent legal counsel, the distinction between certified and uncertified services becomes rather moot. Setting aside the issue of costs, if there is a risk of harm to an individual from the exercise of improper mediation, is one not more likely to protect against this contingency by choosing legal counsel rather than certified mediation services?

IV. Conclusion

There is no simple answer to the question of whether mediation services should be professionalized or not. Any form of professional regulation will detract from the advantages the mediation brings to the process of dispute resolution. It is important to appreciate that mediation is an informal process and that its appeal lies in that informality. Formalizing this process by creating a class of professional mediators will inevitably annul some of mediation’s advantages.

Perhaps a better way to deal with the deficiencies of mediation is to take a more holistic approach to the analysis of dispute resolution and to consider mediation along with the
adversarial process instead of seeking to reform one by adding attributes of other. The professionalization of mediation may fail to give sufficient consideration to advantages of the adversarial justice process. While mediation may be a more preferable process to some because of its lack of occupational regulation, the adversarial process may be preferable because a part of that process, legal counsel, operate pursuant to a regulatory structure. If one conceives of mediation and the adversarial process as two parts of a complete dispute processing system, then the benefits of professional regulation already exist within this wider structure. The answer to the problems with mediation may lie with the adversarial process. If access to professional dispute resolution services is one of the problems with the adversarial process then the remedy may be to work towards increasing access to those services. Similarly, if mediation is valuable because it is informal then the mediation process will best retain its functional utility if it is permitted to remain in its present state. Addressing criticisms with the advent of professionalization may simply complete the arc of the circle and return us to the original problem incumbent in formal dispute resolution processes.
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