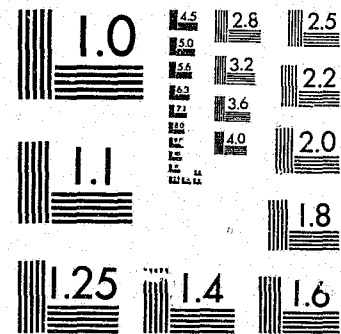


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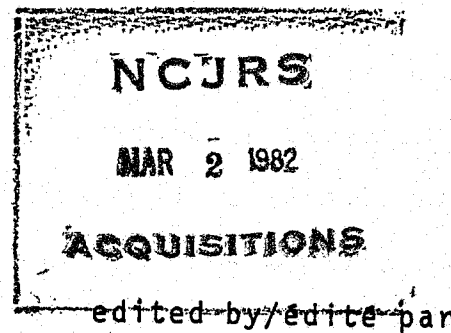
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CONCILIATION AND ARBITRATION
(criminal and commercial matters)

CONCILIATION ET ARBITRAGE
(affaires pénales et commerciales)

DEPARTMENT OF CRIMINOLOGY
FACULTY OF SOCIAL SCIENCES
UNIVERSITY OF OTTAWA

DEPARTEMENT DE CRIMINOLOGIE
FACULTE DES SCIENCES SOCIALES
UNIVERSITE D'OTTAWA



Louis Kos-Rabcewicz-Zubkowski

U.S. Department of Justice
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CONCILIATION AND ARBITRATION
CONCILIATION ET ARBITRAGE

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AUTHORS - AUTEURS

René-C. Alary, c.r.

Bachelier-ès-arts, Université d'Ottawa (philosophie et théologie), 1950-1952; Licencié en droit, Université de Montréal (Faculté de droit), 1952-1956. Avocat (légalisation d'évaluation et d'expropriation; investissement foncier et développement, problèmes fiscaux inhérents; arbitrage international). Professeur (droit civil et commercial), Ecole des hautes études commerciales, Montréal, 1956-1964. Conseiller juridique: Fédération des chambres de commerce du Québec, 1956 à 1966; Catholic Immigrant Services, 1957 à 1967. Président: Chambre de commerce de la Province de Québec, 1972-1973; Comité d'étude provinciale sur l'expropriation, 1964 à 1969; American Right of Way Association, Chapitre 34 (Québec), 1979-1971. Co-président: Comité supérieur de révision (Ministère de la voirie), novembre 1967 à 1969. Vice-président: Conseil international A.R.W.A., Comité de législation, 1974-1975.

Francine Bertrand

Chief, Criminal Justice Policy Research Section, Ministry of the Solicitor General, Canada. Chef de la section de la recherche sur les politiques de justice criminelle au Ministère du Solliciteur général du Canada.

Robert Coulson

Robert Coulson is President of the American Arbitration Association. He is a member of the New York and Massachusetts Bar; and is a member of numerous Bar Association Committees. He is also on the Board of Directors of the Institute for Mediation and Conflict Resolution, the Center for Community Justice, the Federation of Protestant Welfare Agencies, the Fund for Modern Courts and the Edwin Gould Foundation for Children; and is First Vice President of the Police Athletic League of New York; formerly Secretary of the Association of the Bar of the City of New York, 1961-1963. He is the author of "Labor Arbitration - What

You Need to Know" and "How to Stay Out of Court". Mr. Coulson has written and lectured extensively on the settlement of disputes. He is a graduate of Yale University and Harvard Law School. He lives in Connecticut with his family.

Patrick Fitzgerald

MA Oxon, Barrister-at-law. Law practice, London, 1951-56. Law teaching (Oxford, Leeds and Canterbury), 1956-71. Law professor at Carleton, 1971. Consultant at Law Reform Commission of Canada, 1971. Author: 8 books and articles on criminal law, jurisprudence and law for high schools.

Louis Kos-Rabcewicz-Zubkowski

Doctor of laws of the University of Paris, Member of the Bar of Montreal, Professor at the University of Ottawa, Chairman of the Private International Law Committee, Inter-American Bar Association, Chairman of the International Criminal Law Committee, International Law Association, President of the Canadian Section, and Member of the Executive Committee, Inter-American Commercial Arbitration Commission, Vice-president, Panamerican Institute of Procedural Law, Member of the Council of the International Association of Penal Law, President, Canadian Inter-American Research Institute, Vice-President, Canadian International Academy of Humanities and Social Sciences, and member of several international, inter-American and national learned societies and professional associations. He has lectured and done research work at various universities in Canada, Argentina, Australia, England, France, Germany, Guatemala, Mexico, the Netherlands, New Zealand, Peru, Poland, the United States and the USSR. He has published books and papers in English, French, Spanish, German and Polish in thirteen European and American countries. He works in English, French, Polish, Spanish, German and Russian, he reads in Italian, Portuguese and several Slavic languages.

Docteur en droit de l'Université de Paris, avocat du Barreau de Montréal, professeur à l'Université d'Ottawa (Ecole des études supérieures). Il est le président du comité de droit international privé de la Fédération inter-américaine des avocats, le président du comité de droit

pénal international de l'International Law Association, le président de la section canadienne et membre du comité exécutif de la Commission interaméricaine d'arbitrage commercial, le vice-président de l'Institut panaméricain du droit judiciaire, le membre du Conseil de l'Association internationale de droit pénal, le président de l'Institut canadien interaméricain de recherche et le membre d'autres sociétés savantes et associations professionnelles internationales, interaméricaines et nationales. Il a enseigné à titre de professeur invité et il a fait des recherches aux universités au Canada, en Allemagne, Angleterre, Argentine, Australie, Etats-Unis, France, Guatemala, Mexique, Nouvelle-Zélande, Pays-Bas, Pérou, Pologne et U.R.S.S. Ses livres et articles ont été publiés en anglais, français, polonais, espagnol et allemand dans quatorze pays de l'Amérique et de l'Europe. (environ 110 publications)

Charles R. Norberg

Received a BS in A.E. (Administrative Engineering) from Cornell University in 1934; an M.A. in International Economics from the University of Pennsylvania, 1937; and an LL.B. from Harvard University Law School in 1939. Member of the bars of Philadelphia, Pennsylvania, and District of Columbia. Admitted to practice before the United States Supreme Court, 1946. World War II service in the China-Burma-India Theatre and now a Colonel USAF (ret.). Department of State and Executive Office of the President (1948-1954). Chief of Special AID Missions to Ecuador and Uruguay (1961). Member of U.S. Delegations to international conferences including the OAS Specialized Inter-American Conference on Private International Law, Panama, 1975 where he helped to negotiate the Inter-American Convention on International Commercial Arbitration. President, Inter-American Bar Foundation. Treasurer and General Counsel, Inter-American Commercial Arbitration Commission.

Basil V. Orsini

Basil V. Orsini is an Arbitrator and a Professor of Arbitration. He spent twenty-five years in the construction industry as a foreman, site engineer, safety representative, superintendent, project manager, claims manager, contract and claims management, labour management, general

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manager, President of Swansea Construction and associated companies. He holds an undergraduate degree from the University of Toronto, a law degree from LaSalle University, Chicago, Illinois, and a degree from the College of Estate Management, London, England. He has served as a member of the education committee of the Canadian Construction Association, Panel member of the American Arbitration Association, Faculty of Arbitration at the University of Toronto and Seneca College (Toronto), the CESO, the American Institute of Industrial Engineers, Toronto Chapter, the Institute of Real Estate Management, Ontario Chapter, the American Military Engineers, and of CASE. He is the President of the Rotary Club Toronto West, Director and Chairman of the Education Committee of the Arbitrators' Institute of Canada, a Fellow in the Institute of Arbitrators, London, England, the 1978 Vice President of the Arbitrator's Institute of Canada, a member of the Arizona Industrial Relations Association and he participated at the sixth International Arbitration Congress at Mexico City (March, 1978).

Jean Claude Plourde

Baccalauréat ès Arts de l'Université de Montréal, Baccalauréat en Service Social de l'Université McGill. Membre de la Corporation des travailleurs sociaux du Québec (11 ans de pratique professionnelle dans le domaine de la délinquance adulte). Responsable d'un programme de déjudiciarisation pour adultes en milieu policier.

INTRODUCTION

Prof. Louis Kos-Rabcewicz-
Zubkowski, LL.D.
Professor, University of Ottawa

Conciliation and arbitration have been known since times immemorial. Although they continued to be used in private relations, especially between traders, these techniques lost their importance, and in fact, were virtually eliminated in criminal matters with the gradual increase of the powers of the State. Recently it was recognized that a complete elimination of private rights from the field of criminal law is not always beneficial. Various forms of conciliation are again being used, often leading to restitution and compensation in favour of victims of crime. Also, in the field of private relations, conciliation and arbitration are now seeing an increased interest in their use to settle disputes.

It was felt that an exchange of information and ideas in both fields, criminal law conflicts and commercial law disputes, will lead to a better comprehension of various aspects of conciliation and arbitration, show their advantages and disadvantages and assist in the search of improved methods.

Dr. L. Kos-Rabcewicz-Zubkowski undertook to act as the coordinator of workshops at the Department of Criminology, Faculty of Social Sciences, University of Ottawa. November 16, 1979 was devoted to conciliation and arbitration in criminal/penal law conflicts. The session was held under the auspices of the Canadian National Group, International Association of Criminal Law and chaired by its Vice-President, Miss Inger Hansen, Q.C., Privacy Commissioner, Human Rights Commission, Canada. Miss Francine Bertrand, Chief, Criminal Justice Policy Research Section, Ministry of the Solicitor General of Canada, spoke on the use of mediation, conciliation and negotiation techniques in the context of adult diversion in Canada.* Professor Patrick Fitzgerald, Department of Law, Carleton University and a member of the research group of the Reform Commission of Canada, dealt with the work of the Commission on diversion.*

Mr. Robert Coulson, President, American Arbitration Association, explained the activities of his Association as to mediation in criminal law conflicts, especially when their causes are of civil law nature, e.g., relations between the landlord and the tenant. Such conflicts between the alleged offender and the wronged party may be subject to mediation and also, when the parties agree so, to arbitration. Mr. Coulson's exposition was completed by projection of a film showing a case of conciliation.

Mr. Jean-Claude Plourde, Head of the Diversion Team at the Social Services Centre in Metropolitan Montreal, dealt with his experience in conciliation in Montreal.* Mr. Plourde's presentation was completed by a video tape projection.

Dr. L. Kos-Rabcewicz-Zubkowski, Professor, Department of Criminology, Faculty of Social Sciences, School of Graduate Studies, University of Ottawa, presented conciliation systems in Poland, France and Mexico.*

November 17, 1980 was devoted to conciliation and arbitration in commercial matters. The session was held under the auspices of the Canadian Section, Inter-American Commercial Arbitration Commission. Mr. Gordon F. Henderson, Q.C., President, Canadian Bar Association was in the chair.

Dr. L. Kos-Rabcewicz-Zubkowski, President, Canadian Section, Inter-American Commercial Arbitration Commission compared private arbitration in the Canadian common law provinces and that in the province of Québec.* Mr. Robert Coulson, President, American Arbitration Association, dealt with the settling of disputes outside courts (within the framework of his Association).*

Mr. Willem Vis, Chief, International Trade Law Branch, United Nations dealt with the work of his Branch in the fields of commercial arbitration and conciliation.

Mr. Charles Norberg, Treasurer and General Counsel, Inter-American Commercial Arbitration Commission, acquainted the participants with the Commission and with the Inter-American Convention on International Commercial Arbitration.*

Mr. Basil Orsini, f. Vice-President, Arbitrators' Institute of Canada, Inc., spoke on arbitration procedures especially as to arbitration in construction disputes in Ontario.* Mr. René Alary, Q.C. of Montreal was prevented by an accident from attending the Workshop but he submitted in absentia his paper on conciliation and arbitration according to the rules of the International Chamber of Commerce.*

The Workshop was followed by the meeting of the Canadian Section, Inter-American Commercial Arbitration Commission. (The Canadian Section was established on March 10, 1972.) The board of Directors adopted unanimously a resolution calling for the organization of a Conciliation, Amicable Composition and Arbitration Centre.* Dr. L. Kos-Rabcewicz-Zubkowski submitted his report on the VIIth Inter-American Conference on Commercial Arbitration.*

* Indicates that the corresponding text is included in the present volume.

1. CONCILIATION AND ARBITRATION IN
CRIMINAL/PENAL MATTERS

1. CONCILIATION ET ARBITRAGE EN
AFFAIRES PENALES

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THE USE OF MEDIATION, CONCILIATION AND
NEGOTIATION TECHNIQUES IN THE CONTEXT
OF ADULT DIVERSION IN CANADA

Francine Bertrand
Chief, Criminal Justice
Policy
Research Section
Ministry of the Solicitor
General

The views expressed are those of the author and do not necessarily reflect the views of the Solicitor General of Canada.

Canada started to show an interest for diversion in the early 1970's, no doubt as a result of the increasing popularity of this practice in the United States. Many very different kinds of projects, covering a wide range of functions from prevention to correction, developed under this umbrella.

In 1973 concern arose, at the political level, over the seemingly unguided development of projects. Since then, official committees, the Law Reform Commission, and a National Conference have served as the most influential forums for the evolution of a Canadian concept of diversion. In 1979, a Federal Discussion Paper on Diversion was submitted to the combined meeting of the Deputy Attorneys General and Deputy Ministers of Corrections of Canada. It was discussed, in June 1979, at two separate workshops for diversion practitioners and provincial representatives. The Federal Discussion Paper restricts the use of the concept of diversion to post-charge/pre-trial alternatives to court programmes, for prosecutable offences. Programmes which are non-adversarial and resolve conflicts by way of mediation are advocated.

Before I discuss the use of mediation, conciliation and negotiation in diversion projects in Canada, I will trace the evolution of the concept of diversion. This will provide the conceptual background for the use of mediation and other techniques in the resolution of minor criminal disputes in Canada and circumscribe the context within which they are to occur.

THE DEVELOPMENT OF THE CONCEPT OF DIVERSION IN CANADA

The Sub-Committee on Diversion

In December 1973, the Attorney General of Canada requested a Paper on the subject of diversion. A Paper was prepared jointly by the Federal Ministry of the Solicitor General and the Province of British Columbia and submitted to a Committee of Deputy Ministers in June 1974. As a result, a sub-committee were to develop a theoretical concept and definition of diversion. In an attempt to

circumscribe the phenomenon, a distinction was established between "informal" and "formal" diversion. Informal diversion was equated with decriminalization, prevention, discretion and screening. The suggestion was offered that formal diversion be conceived of as a process, a process of redefining some criminal behaviours as socially problematic behaviours and allowing for the shift of responsibility for these behaviours from the criminal justice system to the community. An operational definition was offered:

"Formal Criminal Justice Diversion refers to the routine suspension (my emphasis) of further Criminal Justice processing at any point of decision-making from first contact with police to final discharge for any predetermined category of offender otherwise liable to such continued processing, coupled with referral to a community program open as well to community referrals on conditions that further processing will be terminated if he fulfills obligations specified by such programs"
(Glinfort, 1974, p. 10)

In this definition of diversion, emphasis was placed on restoring the equilibrium upset by the commission of some offences by holding the offender responsible for his acts. There was no place in this approach for a 'treatment model'. Also, the process of restoring social harmony would take place outside the criminal justice system, in programmes based in and operated by the community.

The Law Reform Commission

Concomitantly, the Law Reform Commission of Canada published a Working Paper on The Principles of Sentencing and Dispositions and on Diversion. The Commission defined diversion (Working Paper No. 7) very broadly including within its scope, community absorption of socially problematic behaviour, screening by police, pre-trial diversion bore more resemblance to the concept of formal diversion developed by the sub-committee on diversion than the other forms of diversion.

The Commission recommended (Working Paper No. 7, page 11) that pre-trial diversion be used when:

- a) the incident being investigated cannot be dealt with at the police screening level;
- b) the circumstances of the event are serious enough to warrant prosecution, and the evidence would support a prosecution;
- c) the circumstances show a prior relationship between the victim and offender;
- d) the facts of the case are not substantially in dispute;
- e) the offender and victim voluntarily accept the offered pre-trial settlement as an alternative to prosecution and trial;
- f) the needs and interests of society, the offender and the victim can be better served through a pre-trial program than through conviction and sentence;
- g) trial and convictions may cause undue harm to the offender and his family or exacerbate the social problems that led to his criminal acts.

It also recommended that the cases be dealt with by way of settlement where the "agreement by the offender in such cases may be to make restitution, to undergo counselling, treatment or to take up training, education or work programs for a stated period" (Working Paper No. 7, page 9).

The most important contribution of the Commission was, in my view, to formulate a strong philosophical rationale for diversion. In Working Paper No. 3, The Principles of Sentencing and Dispositions, the Commission asked: "In framing a criminal law and sentencing policy for the next few years, can we do better than to recognize the limitations of criminal law and corrections? Can we do better than to insist that whatever state intervention is taken through the criminal law in the lives of indivi-

duals it should be justifiable as serving some common good, and that the intervention be limited by considerations of fairness, justice and humanity?" (page 2). The Commission advocated that the criminal law, the adversarial court system and incarceration be used with restraint; that the 'minor' conflicts between members of society be resolved whenever possible outside the courtroom by a procedure more propitious to conciliation and settlement; it stressed the importance of recognizing that in criminal matters there is not only injury caused to society at large but also to very specific individuals, the victims.

The diversion sub-committee and the Law Reform Commission did not agree about the scope, definition and modes for the operationalization of diversion. However, they did share a common philosophical approach. They agreed on the value of resorting to the criminal law with restraint, on the appropriateness, in certain circumstances, of resolving conflicts between citizens in a non-adversarial fashion and on the idea that communities should play a greater role in the resolution of such conflicts.

The National Conference on Diversion

The work of the sub-committee on diversion and of the Law Reform Commission succeeded in bringing the concept of diversion in Canada to the forefront and in stimulating much public debate. It did not succeed in bringing about a consensus. As a result, a National Conference on Diversion, sponsored by the Ministry of the Solicitor General of Canada and the Federal Justice Department, was convened in the Fall of 1977. The purposes of the Conference were: "to assess experience to date and set future directions; to develop guiding principles for policy formulation and the required legislative amendments; and to work toward a generally-acceptable definition of Diversion as a viable conflict-resolution mechanism available to the criminal justice system, and the community" (Ministry of the Solicitor General, 1978).

The conference served to re-affirm the potential benefits of diversion and to provide support for its continued

use. Diversion was seen as offering "a promise": a promise to the disadvantaged for a more appropriate handling of their cases, to communities and individual citizens for the opportunity to play a role in the resolution of minor social conflicts, to victims for the receipt of compensation, a promise to offenders for expeditious and accountable justice and a promise to the criminal justice system for reduced caseload.

The conference also served to stress the dangers of diversion, particularly with regard to due process and the protection of individual rights under our criminal law and with regards to the discretionary power of police and crown. Two basic issues were raised about diversion. First, should diversion be based in the community without recourse to the criminal justice system or should it be managed by the system, that is, controlled by the prosecutor? Second, should eligibility criteria be elaborated on the basis of the characteristics of the offence or on those of the offender? It was argued by the tenets of the offence-based approach that such an approach would contribute substantially to a reduction of workloads in the criminal justice system, and foster a greater participation of communities in the management and resolution of minor social conflicts. Further it was argued that this approach would foster greater equity in the selection of cases for diversion and focus on the resolution of the conflict rather than on changing the offender.

The Federal Interdepartmental Committee on Diversion

After the Quebec City Conference, an interdepartmental committee was struck of representatives of the Department of Justice and of the Solicitor General of Canada to develop federal policy proposals on diversion. In developing these proposals, the committee drew extensively from the public debate which has taken place in the preceding years and attempted to consolidate the experience which had developed over the years in the practice of diversion in Canada. However, the committee was primarily concerned that its choices of options be compatible with the fundamental and procedural limits of our criminal law.

The policy proposals restrict the scope of 'diversion' to post-charge/pre-trial programs, they grant the crown prosecutor the control of the screening and referral processes and they emphasize questions of due process accountability and protection of the rights of individuals. Thus 'diversion' constitutes an alternative to the traditional court process and sentence, but remains a part of the criminal justice system.

Diversion is defined (Federal Discussion Paper on Diversion) as a formal procedure:

- a) whereby the processing of designated persons¹ through the formal criminal justice process is suspended² and these persons are dealt with³ through an alternative program;
- b) undertaken at any point after a person has been arrested⁴ or charged and prior to commencement of a trial;
- c) undertaken on condition that future justice processing will be terminated⁵;

The objectives of diversion are:

- a) to promote community tolerance⁶ and community responsibility⁷ for the management of some types of criminal behaviour⁸;
- b) to promote more effective use of criminal justice resources⁹ and community resources;
- c) to foster the restoration of social harmony¹⁰ between the victim, the offender and the community.

The emphasis placed on the involvement of the community and on the restoration of the equilibrium upset by the offence provides the rationale for the selection of a non-adversarial third party intervention technique for the preferred strategy. It is defined as an intervention to promote reconciliation, settlement or compro-

mise. The mediated agreements may take the form of community work service or of compensation in money or work to victims, of an agreement to do nothing, to offer a personal apology to the notion, or to participate in an offence related education program. The diversion program can also refer cases to social service resources in the community. However, such referrals are strictly voluntary and are not enforceable.

I should like to point out that, in Canada, much emphasis has been placed on "conceptualizing" diversion. Furthermore, this conceptualization was done by official bodies, and it does not seem to have evolved primarily from clearly identified problems with our system of justice but rather to have arisen out of philosophical principles. In this, diversion seems to have evolved in a very different way than in the United States. Thus, the question of the viability of diversion as it has come to be defined in Canada might be raised, and with it, perhaps, the viability of mediation. Will "diversion" live up to the challenge of reality? There is also the danger that we might not find out whether this approach to diversion will contribute as well or better to the resolution of our social and criminal justice problems than other possible forms of diversion. Federal funds are likely to be directed solely towards projects which meet the requirements of the federal policy proposals. Thus, there is a probability that one type of diversion programme will become more widespread in Canada than other criminal justice alternatives such as neighbourhood justice centres. Canadian diversion practitioners were very vocal in expressing these concerns to the federal government last summer.

MEDIATION IN THE CONTEXT OF THE FEDERAL POLICY PROPOSALS ON DIVERSION

In the policy proposals, the following conditions surround the application of mediation:

- a) The participation in the diversion programme is voluntary
- b) The selection criteria do not exclude cases where

there were no prior personal relationship between the offender and the victim. This is different from the Law Reform Commission recommendation in Working Paper No. 7 on Diversion.

In the policy proposals it is the on-going relationship between the offender and society which is seen as having been affected by the commission of an offence. It is proposed that, in certain circumstances, a negotiated settlement might represent a more appropriate method than the accusatorial procedure of the court for repairing the harm done and for developing in the offender a sense of responsibility for present and future actions. If the offence involves a specific victim, it is postulated that the resolution of the conflict with the victim will de facto restore social harmony.

- c) The selection criteria for diversion do not exclude victimless crimes, cases of refusal by a victim to participate in a diversion program nor cases where the victim refuses to meet the offender face to face. In such cases, it is anticipated that agreements may be "mediated" on behalf of society.

The application of the term "mediation" to such cases, in the policy proposals, deviates from the generally accepted use of the word. Usually mediation techniques are applied to attempts to resolve conflicts between parties unable to resolve their disputes on their own but who are willing to come together voluntarily to resolve them with the help of a neutral party whose role is to assist the disputants in coming to a mutual agreement. Thus, it would appear that, by definition, there cannot be mediation if the parties do not meet (McGillis and Mullen, 1977).

This could be resolved if a neutral mediator, the offender and a representative of society were brought together to resolve the dispute. However, unless this representative of society is a crown

prosecutor such a solution could cause serious threats to the rights of individuals because of the lack of legitimacy of other symbolic representatives of society. The other, and simplest, solution is to recognize that it may be more beneficial for an offender and society to negotiate a settlement for their dispute than it would be to go to court, even if the victims are not active participants in the process. However, it must be recognized that the process used to arrive at such settlements cannot be mediation and must be described differently.

I suggest that the term "conciliation" be used to describe the process of arriving at a negotiated settlement between an offender and a victim who are not willing to come together physically but who agree to negotiate through the intermediary of a third party. The use of the term "conciliation" to describe these situations might not be totally orthodox. Indeed, for McGillis and Mullen (1977) the distinction between conciliation and mediation resides mainly in the level of involvement of the third party in the dispute settlement, the mediator being more active. In mediation, as in conciliation, I read their definition to imply that the parties would meet to resolve their conflicts. However, because the conciliator is seen as a go-between, this function would seem appropriate in cases where there is a willingness to negotiate but an unwillingness to meet. For cases where the victim does not wish to negotiate with an offender or for victimless crimes, the intervention could be called "negotiation" and described as the process of arriving at a voluntary and non-adversarial settlement, involving a third party and an offender. McGillis and Mullen (1977) do not classify 'negotiation' as a third party intervention technique but rather as one of the 'dyadic options' for dispute settlements. In the cases I have mentioned above, the conflict would be resolved

between two people, the offender and the project manager. Interestingly, the project manager is a third person to the conflict, while being a vicarious second party. To avoid confusion a different term should be invented to describe these situations.

In relations to other third party intervention techniques, "negotiation" resembles conciliation, mediation and arbitration by virtue of their voluntary, non-adversarial and non-judicial character. It is also akin to administrative procedures leading to compromises in settlements out of court, such as plea bargaining. Indeed in many of these cases the victims are not involved in the settlement. However, "negotiation" differs substantially from these methods of settlement because of its requirement for the voluntary participation of the offender¹¹.

In concluding this section I should like to stress that the key point I wish to make, quite apart from the names given to particular intervention techniques, is that different processes must be set in plan to deal with situations involving different sets of actors.

Please note that I have not retained the level of involvement of the third party as an element in distinguishing the various techniques of conflict resolution. Also, I would like to raise for discussion the question of whether or not the 'negotiation' can be considered a "neutral party" to the dispute. In my view, the negotiator acting as a representative of society is in a conflict of interest and cannot be "neutral".

- d) In the policy proposals, failure to reach a negotiated agreement constitutes an exclusion criterium for diversion programs. In such cases the offender is referred back to the crown prosecutor for further criminal justice processing. Because of this requirement there would be no place in diversion practice in Canada for the use of arbitration, or for "med-arb", the sequential use of mediation and ar-

bitration. Indeed, in arbitration, the parties submitting to the process accept voluntarily at the onset that the arbitrator will come down with a binding decision at the end of the dispute processing (McGillis and Mullen, 1977).

- e) Failure to comply with the terms of an agreement under the policy proposals constitutes 'wilful failure'. The case is then referred back to the crown prosecutor for further criminal justice processing. The mediated or otherwise negotiated agreement is thus binding and as such may be equated to "perceptual arbitration" or to a de facto arbitration award (McGillis and Mullen, 1977).¹² The Federal proposals concerning the enforceability of the negotiated agreement are at odds with the usual practice in the fields of conciliation and mediation: as a rule these agreements are not written down and/or enforceable. Rather, these are the characteristics of arbitration awards. However, some projects handling the resolution of criminal offences in the United States do establish with their clients the likelihood of charges being filed if agreements are not respected (see McGillis and Mullen, 1977, pp. 66-67).

THE PRACTICE OF 'DIVERSION' IN CANADA AND THE EXTENT AND NATURE OF THE USE OF MEDIATION, CONCILIATION AND NEGOTIATION IN THE RESOLUTION OF CRIMINAL CONFLICTS

Currently, there are in Canada ten programmes classified as 'diversion projects' as per the requirements of the policy proposals concerning referral. All of these projects accept referrals of cases when there are reasonable grounds to assume that a criminal act has been committed. Also, if the diversion projects did not exist these charges would be proceeded with in court. It should be noted, however, that none of the ten projects represent a "pure model" under the policy proposals. A pure model would only accept referrals by the Crown, would not require the consent of the victim, would not exclude victimless offences or offences where there were no prior relationship between the offender and the victim, would use mediation, conciliation or negotiation as techniques for the resolution of conflicts and would entail a reinstatement of criminal proceedings in failure to

comply with the terms of an agreement. The projects closest to this model are the Vancouver Adult Diversion Program in British Columbia (there are no legal consequences upon default) and the Saskatchewan Mediation Project in Moose Jaw and Regina (the consent of the victim is a condition of referral). The other projects operate with one combination or the other of the features outlined above (see attached table).

The Projects

I will now describe¹³ these ten projects briefly concentrating only on those aspects of the projects bearing on the dispute settlement process.

Four projects use only mediation as a technique of conflict resolution. Typically, these projects require the consent of the victim for the participation of the offender in the diversion programme and do not accept victimless offences. These projects are the Saskatchewan Mediation Project, the Programme de conciliation au poste de police de Montréal, the Programme de conciliation dans la communauté de Québec and the Cornerbrook Diversion and Neighborhood Justice Programme in Newfoundland.

Three programmes use mediation and negotiation as techniques of conflict resolution. These projects are the Community Diversion Centre in Victoria, B.C., the Vancouver Adult Diversion Program, B.C., and the High Level Diversion Program in Alberta. In these projects, the consent of the victim is required for participation in the diversion programme (except in Vancouver). However, victimless crimes are not excluded and the victims may refuse to meet the offender face to face.

Two programmes use primarily negotiation techniques. The North Vancouver Adult Diversion Programme, B.C., concentrates on negotiation but also uses mediation on occasion. In the North End Diversion and Neighborhood Justice Project in Halifax, N.S., cases referred by the police or the business community (one source of referral) are first resolved by way of negotiation. However, the negotiated settlement is then presented to the victim jointly by the negotiator and the offender. At this point it could be re-

negotiated by way of mediation. The first project does not require the consent of the victim and accepts cases of victimless crimes. The second operates under opposite conditions.

One project, the Mid-Island Diversion Program in Nanaimo, B.C., combines conciliation with negotiation. This project requires the consent of the victim for participation in the diversion programme and accepts cases of victimless crimes.

Concluding Overview

In concluding I should just like to note that:

- none of the projects limit their operation to cases where there was a prior relationship between the offender and the victim. This is in line with the policy proposals.
- that all the projects, except the North End Diversion and Neighbourhood Justice Project, conclude written agreements. However, these are not enforceable in a criminal court in any of the N.B. projects.
- very few projects resort to trained mediators, conciliators or negotiators. Also few involve the 'community' in the operation of the diversion projects.
- this paper was prepared on the basis of written documentation and telephone conversations with project staff. It was not possible on the basis of these sources to obtain always a good description or understanding of how each of the projects operate on a day to day basis. I think it would be essential to revise this paper on the basis of first hand observations.

Programme Name/Key Features	Source Referral			Victim Consent		Victimless Crimes		Technique			Consequences on Default	
	Police*	Crown	Other*	Yes	No	Yes	No	Médiation	Conciliation	Negotiation	Yes	No
Saskatchewan Mediation Project, Moose Jaw and Regina		X		X*			X*	X			X	
Programme de conciliation au Poste de Police de Montréal, Québec	X*			X*			X*	X			X	
Conciliation dans la communauté, Québec, P.Q.		X		X*			X*	X			X	
Cornerbrook Diversion & Neighbourhood Justice, Newfoundland	X*			X*			X*	X			X	
Community Diversion Centre, Victoria, B.C.	X*	X		X*		X		X		X		X*
Vancouver Adult Diversion Programme, B.C.		X			X	X		X		X		X*
High Level Diversion Project, High Level, Alberta	X*			X*		X		X		X	X	

Programme Name/Key Features	Source Referral			Victim Consent		Victimless Crimes		Technique			Consequences on Default	
	Police*	Crown	Other*	Yes	No	Yes	No	Mediation	Conciliation	Negotiation	Yes	No
North Vancouver Adult Diversion Program, B.C.		X			X	X		X Rare		X		X*
North End Diversion & Neighbourhood Justice Project, Halifax, N.S.	X*		X*	X*			X*	Approved by victim and may be re-negotiated		X		X*
Mid-Island Diversion Program, Nanaimo, B.C.	X*	X		X*		X			X	X		X*

Legend: *Differs from the policy proposals in this respect.

Note: None of the projects exclude cases where there were no prior relationship between the victim and the offender.

SASKATCHEWAN MEDIATION PROJECT, REGINA AND MOOSE JAWSource of Referral: Crown, post-charge - pre-courtConsent of the Victim Required: Yes, if appropriateSelection Criteria:

- Selection criteria exclude victimless crimes
- List of offences specified

TechniquesMediation

An initial contact is established separately with the offender and the victim. The purpose of this contact is to establish the willingness to participate in the project, and to offer specific information concerning the right to refuse, the right to legal counsel, to explain the program procedures and consequences. A general offer of assistance is also made.

The mediation meeting is an informal event usually taking place in the office of the John Howard Society, but occasionally taking place at stores, places of business, neighbourhood centres, etc. The meeting itself follows the following general process. The mediator introduces herself/himself to the people present, clarifying their identity and introducing them to each other. The mediator then reviews, briefly, the objectives of the meeting, assuring that both complainant and respondent understand the procedures, its consequences and their rights. The complainant is then invited to describe his/her perception of the incident, the loss or harm suffered and general expectations concerning the means of resolving the conflict. The respondent is then invited to respond to the complaint, express qualifications or in other ways react to the statements of the complainant. The mediator then guides the discussion toward an agreement for future action, either by way of a resolution or a referral back to the office of the prosecutor. In the natural course of discussion the mediator does contribute suggestions concerning possible actions and alternati-

ves; however he/she is limited to that role. He or she is not an arbitrator or judge and has neither the right nor the authority to impose decisions.

The volunteer mediator is informed only of the names of those involved and the general circumstances of the complaint, discouraging as much as possible the development of "pre-judged" assessments and expectations on the part of the mediator.

Types of agreements

- Apology
- Restitution to the victim
- Community service work

Time limit: 3 months

Consequences upon Failure

The case is referred back to the referral source by way of letter.

Consequences upon Successful Termination

The referral agent is informed in writing and the charge is formally withdrawn

Type of mediators

Volunteer mediators chosen from a pool of interested individuals in the community

Training of mediators

Persons possessing particular characteristics and/or skills are sought because of the stated expectations of the parties or because of the specific characteristics of the case.

Monitoring of the Agreement

Project staff

PROGRAMME DE CONCILIATION AU POSTE DE POLICE DE MONTREAL,
QUEBEC

Source of Referral: Police, alternative to charge

Consent of the Victim Required: Yes

Selection Criteria

- Selection criteria exclude victimless offences
- List of offences specified

Technique (s)

Mediation

A meeting is arranged with the involved parties at which point the program's objectives and procedures are outlined, a realistic and feasible solution is worked out.

The referring police officer may specify some of the conditions which must be part of the settlement.

What happens if there is failure to reach agreement

The case is returned to the referral source.

Types of agreements:

Compensation to victims

Time Limit: 2 months

Consequences upon Failure

The case is referred back to the referral source and a charge is laid.

Consequences upon Successful Termination

The referring officer is advised of the results of the results of the project. No further action is taken.

Type of mediators: Not specified in documentation

Training of mediators: Not specified in documentation

Monitoring of the Agreement: Project staff

CONCILIATION DANS LA COMMUNAUTE, QUEBEC

Source of Referral: Crown, alternative to charge

Consent of the Victim Required: Yes

Selection Criteria

- Selection criteria exclude victimless offences
- List of offences specified

Technique (s)

Mediation and on occasions Negotiation

Mediation

The mediation process begins when a file sent by the designated prosecutor reaches the project. A meeting is first held with the victim to explain his rights to him and provide explanations about the program. Then a meeting is held with the offender for the same purpose.

If the principle of mediation is accepted, the mediator brings the parties together in order to analyze with them the advantages of the program and to have them propose their own solution taking into account any harm that was caused, the personal abilities or resources of each party and the acceptance of responsibility for performing the contract.

If the parties cannot reach a satisfactory solution, the mediators can suggest new formulas.

Negotiation

In cases of shoplifting where the stolen property has been recovered by the victim, the type of alternative proposed takes the form of volunteer social involvement in

community agencies. In such cases the parties do not meet although the victim's consent (given by a person with full authority to do so) is still essential for the offender to participate in the diversion programme.

Types of agreements

- Restitution to the victim
- Volunteer social involvement in community agencies

Time Limit: 3 months from the date of the offence

Consequences upon failure

A report is made to the Crown who authorizes an information and a charge is laid.

Consequences upon Successful Termination

A report is made to the Crown who closes the file after reporting to the police.

Types of mediators

Not specified in the documentation.

Training of mediators

Not specified in the documentation.

Monitoring of the Agreement?

Mediator

CORNERBROOK DIVERSION AND NEIGHBOURHOOD JUSTICE PROJECT,
CORNEBROOK, NFLD.

Source of Referral: Police

Consent of the Victim Required: Yes

Selection Criteria

- Selection criteria exclude victimless offences
- For first offenders, for minor offences

Technique (s)

Mediation

The mediator first holds separate meetings with the victim and the offender to determine their desire to participate, concerns and common grounds. An agreement is virtually reached before the two parties sit down together. When the victim and offender do meet in the presence of the mediator, the mediator acts primarily as a supervisor over the meeting, has little play and remains relatively quiet. The aim of the meeting is to bring the offender and victim face to face for a confrontation. The terms of the agreements are set down and discussed.

What happens if there is failure to reach agreement

The case is referred back to the police.

Types of agreements

Generally restitution to the victim in work or money. Occasionally community work order.

Time Limit: 3 months

Consequences upon Failure

The case is referred back to the police.

Consequences upon Successful Termination

A letter is sent by the mediator to the project and the police. Charges are not proceeded with.

Type of mediators

Volunteers from the community such as business people, clergy (a pool of 11)

Training of mediators

No formal training, however, the diversion project holds its own training sessions.

Monitoring of the Agreement

Project worker

COMMUNITY DIVERSION CENTRE - VICTORIA, B.C.Source of Referral: Police or Crown, alternative to charge.Consent of the Victim Required: Yes (if appropriate)Selection Criteria:

- Selection criteria do not exclude victimless offences
- Selection criteria not specific

Technique (s)

Mediation or negotiation

The project worker first interviews the victim and the offender separately, to establish if both wish to participate in mediation.

Mediation

If it is established that both parties agree to sit down together, the project worker sits down with the victim and the offender. The process usually involves getting the victim to express how he feels and then getting the offender to respond. They also talk about what they would like to do to resolve their differences. One party makes a statement about the situation and the other responds with his ideas. The role of the mediator is to facilitate the process of coming to a mutual understanding. Both parties are informed that the purpose of their coming together is to reach an understanding. They are also encouraged to explore what led up to the situation and possible solutions.

According to the project director the focus in the sessions is on emotions. It is important that each party expresses what he would like to do about the situation. She stresses that the most important result of the mediation process is that both parties should have a sense that the incident that brought them together in the first place is forgotten and that the incident is over.

Negotiation

If the victim does not want to meet the offender, the project worker meets with the victim, with his consent, to allow the victim to express his feelings. A negotiated agreement is worked out between the project and the offender.

An assessment of the offender's and personal and social needs is undertaken and is taken into consideration in developing the diversion agreement.

Types of agreements

- Restitution of stolen goods or money
- Apology to the victim in writing or in person
- Performance of a period of voluntary community service
- Attendance at a regularly held meeting discussing law and personal and social responsibilities

Time Limit: Not specified in documentationConsequences upon failure: No legal consequenceConsequence upon successful termination:

Written report is sent to the referral sources or information only.

Type of mediators: Diversion project workersTraining of mediators:

- Training in counselling
- Project co-ordinator runs a training course in mediation skills for diversion workers

Emphasis placed on ability to understand the principles of communication.

Monitoring of the Agreement: Project Worker/Mediator

VANCOUVER ADULT DIVERSION PROGRAMME, VANCOUVER, B.C.Referral: Crown, post-charge - pre-courtConsent of the Victim Required: NoSelection Criteria

- Selection criteria do not exclude victimless offences
- For first time offenders
- For summary offences

Technique (s)

Mediation or negotiation

The project manager contacts the offender and the victim separately to explain the program, their legal rights and the responsibilities involved in participating in mediation. He then requests the consent of the parties. The project manager tries to convince the parties to get together to reach an agreement in order to get things back to normal.

Mediation

If the victim accepts to meet with the offender, the mediator sits down with them to discuss a suitable agreement. The agreement is usually a restitution agreement.

Negotiation

If the victim does not agree to a meeting, a negotiated agreement is developed between the project and the offender.

A community investigation is carried out and is taken into consideration in developing agreement.

Types of agreements

- Restitution to the victim in money or work, in mediated cases.
- Referral to appropriate social service or community service work.

Time Limit: 6 months

Consequences upon failure: No legal consequenceConsequences up on Successful Termination

Report is submitted to the Crown.

Type of mediators: Project managerTraining of mediators

No special training. The project manager is a police officer who worked in institutions. He has been a probation officer for 10 years.

Monitoring of the Agreement: Project ManagerHIGH LEVEL DIVERSION PROJECT, HIGH LEVEL, ALBERTASource of Referral:

Police with the concurrence of the Crown as an alternative to charge

Consent of the Victim Required: Yes, if appropriateSelection Criteria

- Selection criteria do not exclude victimless crimes.
- List of offences specified

Technique (s)

Mediation or Negotiation

Mediation

The diversion co-ordinator sets up a meeting with the victim and with the offender separately to obtain their consent to participate in the project. Following this the victim and the offender are brought together for a meeting with the diversion co-ordinator and the screening committee acting as mediators. The diversion co-ordinator gives the circumstances surrounding the offence and make as to what type of work projects are available.

Negotiation

If the victim does not want to meet with the offender or if the offence is a victimless offence, a negotiated agreement is developed with the project.

The diversion co-ordinator carries out a community investigation on the offender gathering evidence regarding past history, etc.

Types of agreements

- Restitution
- Community work service or work for the victim
- Apology
- Referral to a treatment program

Some terms are not enforceable, such as referrals.

Time Limit: 6 months

Consequences upon failure

The police is notified and charges may be laid or another contract may be negotiated

Consequences upon Successful Termination

Police are notified and no further action is taken in cases of police referrals. If the case was referred by the Crown, the charge is withdrawn.

Type of mediators

Diversion Co-ordinator and screening committee made up of two citizens chosen from a list of volunteers and a Crown prosecutor

Training of mediators

The mediators have no formal training in mediation or conflict settlement but are well informed about the community and the criminal justice system. Volunteers also go through a training session explaining the role of the screening committee.

Counselling and an ability to work with people are considered assets.

Monitoring of the Agreement

Diversion Co-ordinator with assistance from community members

NORTH VANCOUVER ADULT DIVERSION PROGRAM, VANCOUVER, B.C.

Source of Referral: Crown, post-charge - pre-court

Consent of the Victim Required: No

Selection Criteria

- Selection criteria do not exclude victimless offences
- For offenders who are not "hard core" criminals

Technique (s)

Negotiation and on occasion Mediation

Usually negotiated agreements are reached between the probation officer and the offender.

Occasionally mediation occurs. In those cases, the probation officer contacts the victim and offender by means of separate meetings. The meetings are held to ensure that there is no animosity present and to explain the mediation process. In the mediation process, emphasis is on letting the victim and offender work out a mutually satisfactory agreement. The probation officer guides the discussion then, asking questions of the victim, thus allowing him to come up with ideas of how he should be compensated for the harm done. An exchange of feelings about the agreement takes place during the mediation process between victim and offender.

A probation investigation is carried out and a plan is developed by the probation officer.

Types of agreements.

Voluntary probation including restitution to the victim, community service work and/or referral to a social service agency

Time Limit: 6 months

Consequences upon failure: The Crown is notified

Consequences upon Successful Termination

The police are notified of what took place and how the client responded to diversion.

Type of mediators: Probation Officer

Training of mediators

Degree in Sociology and Psychology, probation course and experience in community work

Monitoring of the Agreement: Probation Officer

NORTH END DIVERSION AND NEIGHBOURHOOD JUSTICE PROJECT, HALIFAX, N.S.

Source of Referral

Business or police when charges are contemplated. (the programme also accepts referrals from the community, at the pre-charge level. This aspect of the project is not discussed here.)

Consent of the Victim Required: Yes

Selection Criteria

- Selection criteria exclude victimless offences
- Petty crimes, particularly shoplifting

Technique (s)

Negotiation with some element of mediation on occasion.

A community based settlement is developed with the offender. The settlement is presented to the merchant by the project staff and the offender. The victim must approve the plan or become involved in a negotiation of the settlement.

The criteria for a settlement is that it be socially constructive and provide the offender with the opportunity to become involved in a meaningful alternative to court.

In cases where the merchant refuses the proposal or a settlement cannot be re-negotiated the merchant decides whether to lay charges.

Types of agreements

- Restitution to the victim in work or money
- Community service
- Apology
- Controlled confrontation
- Referral to a community-based agency or programme

Note: The agreements are oral.

Consequences upon failure

No legal consequences. Oral feedback is given to the parties.

Consequences upon Successful Termination

In cases where an agreement is reached, the victim waives his right to lay charges.

An oral feedback is given to the referral source.

Type of mediators: Program Staff

Training of mediators

- Background in criminal justice and a degree in social sciences
- Experience in community involvement

Monitoring of the Agreement

Rarely the mediators, usually community members or organizations.

MID-ISLAND DIVERSION PROGRAM- NANAIMO, B.C.

Source of Referral: Police or Crown, Alternative to charge

Consent of the Victim Required: Yes, if appropriate

Selection Criteria

- Selection criteria do not exclude victimless offences
- For offenders with no more than two prior convictions

Technique (s)Conciliation and Negotiation

The victim and the offender are met separately. It is believed that mediation cannot occur because the two parties are in different positions of power.

The diversion worker establishes contact with the offender by telephone, mail or in person, discusses the diversion program and makes arrangements to discuss matters further. An initial meeting is then set up with the offender. The purpose of the meeting is to provide the offender with as much information about the diversion program as possible, and to let the offender respond in terms of whether he/she can fit into the program, and, if so how this can best be accomplished. Following this, a contact with the victim is arranged. This usually involves one telephone call followed by a meeting, most frequently at the victim's house or place of business. The main purpose of the session is to secure the victim's consent and to get the victim's views regarding what the offender's diversion plan should consist of with respect to the amount of restitution, nature and amount of community work, and the nature of apology, written or personal. The conciliator may make suggestions to the victim. A second meeting with the offender then occurs. The purpose of this session is to work out the specific requirements for the diversion plan. The offender is asked to propose his own plan with the assistance of

the diversion counsellor, and with respect to the victim's requirements. Finally, the victim is contacted to confirm the plan. The victim is presented with the proposed plan, and if he agrees, signs the agreement along with the offender and diversion worker. Occasionally the victim and the offender do meet to talk over the events. However, this only occurs after an agreement has been reached.

Negotiation

If the victim does not want to meet the offender, or in cases of victimless crimes, an agreement is negotiated with the project staff. The diversion worker carries out a victim check and forwards the offender's name and birthdate to the probation service to establish whether relevant information in the probation files may be used in planning a program for the offender.

Types of agreements

- Restitution: monetary or work settlement with the victim
- Reconciliation: an apology
- Community Work: 10-50 hours
- Meetings with diversion worker
- Referral to counselling agencies

Time Limit: 2-3 months

Consequences upon Failure: No legal consequence

Consequences upon Successful Termination

Report is submitted to the victim, the RCMP and the Crown, for information.

Type of mediators: Diversion Worker

Training of mediators:

Diversion workers receive staff training. They also have taken courses at university. Emphasis is placed on under-

standing human nature and on using common sense.

Monitoring of the Agreement

Diversion Worker

FOOTNOTES:

1. "designated persons" - Persons are designated to be eligible for diversion, according to a set of objective and equitably applied criteria. Eligibility criteria are written down and form the guidelines for decision making at the screening stage.
2. "suspended" - This means that the formal justice process is stopped for a specified period of time never exceeding the statute of limitation for continuation or reinstatement of criminal justice processing.
3. "dealt with" - This means that alleged offenders go through a series of stages including referral, decision making with regard to accepting and being accepted by the diversion project, mediation leading to a diversion agreement, completion of the diversion agreement and termination of the formal justice process.
4. In this case, the arresting officer arrests with the intent to release the person for subsequent court appearance.
5. "terminated" - This means that future criminal justice processing is stopped and will not be restarted for the offense in question.
6. "community tolerance" - This means the extent to which the community will accept the response to some types of criminal behaviour to be other than the traditional format for dealing with such behaviour.
7. "community responsibility" - This means that lay people perceive the task of dealing with some types of criminal behaviour as their own task rather than the job of the criminal courts. This also means that lay people form groups to develop, operate, and manage programs which are used by justice officials as an alternative to the formal court process.

8. Eligibility criteria for diversion projects should be developed by and be specific to the community in which the diversion project operates. At the same time there may be a need for governments to develop a list of specific offenses which are excluded from being dealt with in the diversion process.
9. "more effective use of criminal justice resources" - This means that diversion should provide an adequate alternative way of dealing with some types of offenses, thereby freeing up court and legal and law enforcement resources to deal with types of crimes that are not now receiving the share of resources which they require for example computer crime or environmental crime.
10. "Restoration of social harmony"

With regard to the victim and the community this means, at the stage of termination, having the same readiness to interact with the offender as existed before the offense occurred.

With regard to the alleged offender this means that the completion of the diversion agreement leads to the perception that there is no further obligation to compensate for the offense either the victim or the community.
11. Negotiation, conciliation and mediation are also very different from fact finding techniques used by media action-lines or ombudsmen and from adjudication, which is the judicial, adversarial form of dispute settlement.
12. It should be noted that guidelines for diversion developed by British Columbia do not allow for a reinstatement of criminal procedures in cases of failure to carry out the terms of a diversion agreement. However, it remains possible under these guidelines for the victims to invoke civil procedures.
13. The project descriptions are derived from the National Inventory of Diversion Projects: an Update, Ministry of the Solicitor General, 1979, from project proposals and from telephone conversations with project staff. I am thankful to Ms. Kim Stringer for her assistance in contacting the projects and elaborating on the project descriptions provided in the Inventory and proposals.

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