Abstracts (listed in order of appearance in programme)

Judicial Involvement in Conferences: Opportunities and Issues
Professor Tania Sourdin

The judicial role has changed significantly over the past few decades, particularly in response to access to justice issues. The court system is increasingly turning its focus to the efficient resolution of disputes through methods other than adjudication. In many parts of the world, it is now widely accepted that judges may support settlement discussions. Indeed, this often forms a significant feature of the judicial workload in those jurisdictions. Judges are well-positioned to make strategic interventions that assist the parties in resolving their dispute. This process is often termed mediation, but may be better referred to as settlement conferencing. This paper explores the evolving nature of settlement conferences, and recognises the important role they can play in the new dispute resolution model. Both the issues and opportunities associated with judicial involvement in conferences are explored. It is argued that while some iterations of the model, such as where the judge meets privately with one party in the absence of another, should be avoided, judges can and should have some involvement with settlement conference work.

Civil Law Judge in Canada: from a Judicial to a Justicial role in mediation
Professor Jean-Francois Roberge

Civil law judge’s role is currently evolving in Canada. We now expect active involvement from him to improve quality and access to justice. Under the Quebec Civil Code of procedure reform enforced in 2016, he must perform proper case management and judicial mediation in the “best interests of justice.” Further, the revised guiding principles enshrined in the preliminary provision provide that dispute prevention and resolution must be achieved through “appropriate fair-minded processes that encourage persons involved to play an active role” and “exercise rights in a spirit of co-operation and balance”. In this paper, we explore the hypothesis that judges may see changes as efficiency driven “adjustment of their judicial function,” but should instead see a “renewal towards a justicial role.” While “judicial” is an adjective appropriate to a law court or judge, “justicial” is an adjective referring to an ideal of justice (Oxford dictionary). Through the lens of “single and double loop” problem-solving processes (Argyris and Schön, 1974), we will analyze how the Quebec civil law procedure reform tackles the challenge of improving access to justice. Applications to judicial mediation approaches and practices will be discussed.

Trust and Procedural Safeguards
Professor Nancy Welsh

In both the U.S. and Singapore, the courts may require or strongly encourage the use of mediation. In both nations, judges or private mediators may conduct these mediation sessions. In Singapore, judicially mediated settlement agreements may become orders of the court. In the U.S., judicially-facilitated or mediated settlements may serve as the basis for consent decrees. Courts in the U.S. also may retain jurisdiction over a case that has settled and are extremely likely to enforce mediated settlement agreements.
Courts have institutionalized mediation because they value its ability to provide parties with a forum in which they can come to their own, customized agreements and do so in a manner that saves time, money and relationships. However, when courts mandate or strongly encourage mediation and also lend their coercive power to the enforcement of mediated settlement agreements, should they be obligated to provide for meaningful procedural safeguards? For example, should courts be required to exercise some form of supervision, enable parties to provide confidential feedback, and/or establish a grievance procedure to ensure the quality of the mediation process? Do courts in the U.S. or Singapore provide for any of these? Could they? Alternatively, should courts be obligated to permit some degree of transparency regarding the occurrence and outcomes of mediation? Again, do they? Could they?

**Ethical Issues in Court-Connected Mediation**

Dr Lola Akin Ojelabi

The exponential growth of mediation is in many ways linked to the use of mediation by courts and tribunals. Mediation is now an integral part of most civil justice systems with lawyers, judges and other court officials now participating in mediation in various roles including as mediators and client representatives. Specifically designed rules have also developed to ensure that mediation achieves its goals of increasing access to justice within the court system. This paper will focus on ethical issues that may arise in court-connected mediation including the intersection between legal practice and mediation practice, lawyers’ attitudes to and practices in court-connected mediation and the realisation of the traditional values of mediation beyond dispute settlement. In particular, the paper explores elements of party self-determination and the extent to which those are preserved in court-connected mediation.

**Mediation in the Singapore Family Justice Courts: The Impact of the Judge-Led Approach**

Assistant Professor Eunice Chua

In order to reduce acrimony and the adversarial quality of family litigation, the Singapore family justice framework went through an overhaul in 2014. Chief among the changes was the creation of the Family Justice Rules (“FJR”) unique to the newly constituted Family Justice Courts. The FJR are meant to reflect a new judicial philosophy for family law disputes, with a “judge-led” approach mandated by Rule 22 of the FJR. As part of the directions a court may give in the exercise of this “judge-led” approach, Rule 22(3)(a) introduces a new, express power for the court to direct that parties attend mediation or counselling.

This paper seeks to examine the impact of this judge-led approach on mediation in the Family Justice Courts. In particular, how and when is the judge to exercise the power under Rule 22(3)(a) to mandate mediation or counselling? What would the relevant factors for consideration be? Is the judge the best person to make the call? What would be the role of counsel in assisting the judge to make this decision? Drawing from empirical research, academic literature, and practices in other jurisdictions, this paper makes recommendations to guide family judges in exercising their power under Rule 22(3)(a).
The Need for a Shift in Judicial Attitudes Towards Compulsory Mediation
Associate Professor Masood Ahmed

Although the senior judiciary has, since the Woolf Reforms, adopted a consistent approach in promoting and encouraging the use of mediation, it has failed to speak with a clear and consistent voice on whether the courts should compel parties to mediation. The official judicial stance has been to reject the idea of compulsory mediation because, as Lord Woolf put it in his Access to Justice Final Report “it would not be right for the court to compel parties to use ADR and to take away or postpone their right to seek a remedy from the courts....” However, the courts have, through the exercise of costs powers under the Civil Procedure Rules, impliedly compelled parties to mediate and have, consequently, endorsed compulsory mediation. This paradoxical situation has had the undesired effect sending out confused and contradictory messages on the issue of whether mediation is, in fact, compulsory within the English civil justice system. This paper critically explores diverging judicial approaches and attitudes towards compulsory mediation in the light of recent case law and civil justice reforms, in particular, Lord Justice Briggs’ Civil Court Structure Review and his proposal for a new Online Solutions Court for modest claims. It also puts forward possible solutions to introduce a more consistent approach to compulsory mediation within the English civil justice system.

Advances in Civil Mediation Reform: Balancing the Scales of Procedural and Substantive Justice
Associate Professor Shahla Ali

Courts in multiple jurisdictions face the challenge of reconciling procedural and substantive justice in designing court mediation programs. How such programs provide opportunities for party directed reconciliation on the one hand, while ensuring access to formal legal channels remains an area of continued inquiry. In some jurisdictions, mandated programs require initial attempts at mediation, while in others, voluntary programs encourage party-selected participation. This paper explores initial comparative empirical findings examining the impact of judicial mediation structure (mandated or voluntary) on perceptions of justice, efficiency and confidence in courts in ten jurisdictions by investigating whether, and if so how, variation in civil mediation policy as one factor, affects variation in judicial efficiency, confidence in courts, and perceptions of justice. Given the highly contextual nature of court mediation programs, the paper highlights achievements, challenges and lessons learned in the implementation of mediation programs for general civil claims. The principal finding indicates that overall, while both voluntary and mandatory mediation programs demonstrate unique programmatic strengths and are associated with positive gains in the advancement of civil justice quality, sampled voluntary mediation programs are associated with a higher proportion of longitudinal advancement over a five year time period in levels of efficiency, with a slightly higher proportion of advancement in terms of confidence and perceptions of justice within sampled civil justice systems. At the same time, from the perspective of the 83 court mediation practitioners surveyed, practitioners report slightly higher levels of confidence in mandatory mediation programs, higher perceptions of efficiency with respect to voluntary programs, and regard voluntary and mandatory mediation programs with relatively equal perceptions of fairness. Program achievements largely depend on the
functioning of the civil litigation system, the qualities and skill of the mediators, safeguards against bias, participant education, and cultural and institutional support.

**Californian Court ADR and Access to Justice: Trends and Challenges**  
Professor Sheila Purcell

California has a robust and diverse court ADR history and community. This has taken significantly different forms in each local jurisdiction, with some favoring mandatory mediation and others, such as the San Mateo Multi-option ADR Project, emphasizing voluntary programs. This presentation, by an early Court ADR Program designer and director, will examine trends and the ongoing financial and other challenges in providing access to justice in California and other US jurisdictions. The use of both voluntary and mandatory mediation services as well as the importance of Self Help services and Online Dispute Resolution tools will be addressed.

**‘Fine words butter no parsnips’: Can the principle of open justice survive the introduction of an online court?**  
Associate Professor Sue Prince

Many jurisdictions are embracing technology as a potential gatekeeper for new court processes. In order to encourage less reliance on legal aid and free up judicial resource, policy makers are keen to embrace ‘online court’ solutions, and ‘digital by default’ approaches to resolving legal problems. In British Columbia, Canada, for example, the online small claims process has replaced the court building with an end-to-end pathway-style online process which provides legal advice, mediation, and access to an online judge. In the UK, plans are afoot for all civil cases under £25,000 to be referred to an ‘Online Solutions Court’.

In the recent case of R (on the application of UNISON) v Lord Chancellor (2017), Lord Reed said that the court is more than a service to the user and that access to the courts is not of value only to the particular individuals involved but is fundamental to the rule of law and society. The question is whether once the institution of the court is not a place or a building, how can we measure whether the service provided to litigants is fair? Will technology change the nature of the legal process so that the traditional vision of the court has to be amended or qualified?

This paper will consider whether the principle of open justice can be upheld effectively in this new technological environment. Open justice exists to protect the right of the public to be informed about what happens in the court; both through their ability to attend individual cases and the right of the media to be in the courtroom and to inform more broadly. Open justice has been upheld by the senior judiciary in significant historic cases such as Scott v Scott (1913) and R v Sussex Justices, ex p McCarthy (1924). Open justice is guaranteed as part of the right to a fair trial, such as in Article 6, European Convention on Human Rights: ‘…everyone is entitled to a fair and public hearing...’. The question of openness is therefore essential to the design of the online court.
The Multi-Door Courthouse at Middle Age: Life in Canada
Professor Archie Zariski

Over forty years ago Frank Sander facilitated the birth of a “dispute resolution centre” in his speech at the Pound Conference of 1976. The new idea was quickly christened the “multi-door courthouse” and became prominent in the ADR movement worldwide. This paper asks, and tries to answer, the question whether the multi-door courthouse as an immigrant to Canada is having a highly productive middle age or a mid-life crisis. The paper first examines the elaboration of the multi-door concept and its global spread and institutionalization. It then traces the history of multi-door in Canada to the present time within the unique constitutional and jurisprudential framework of Canadian courts. The current challenges and opportunities for multi-door courts in Canada are examined with particular focus on the Provinces of Alberta and British Columbia. It concludes with observations on the possible futures of multi-door courts as a mature concept with established strategies and practices.

The Convergence of ADR and ODR Within the Courts: The Impact on Access to Justice
Assistant Professor Dorcas Quek Anderson

The complexion of justice within many judiciaries has changed dramatically through the influence of two global movements – the modern alternative dispute resolution (ADR) movement and the more recent development of online dispute resolution (ODR). The former wave led to the creation of multi-door courthouses, court-annexed mediation programs and innovations such as judicial settlement conferences. In the last decade, the rapid growth of ODR has precipitated more changes in the administration of justice. Online courts have been designed in England and Wales (the Online Solutions Court suggested by Lord Briggs), British Columbia (the Civil Resolution Tribunal) and in Hangzhou, China.

This paper discusses the impact of the ADR and ODR waves on access to justice within the courts. It examines how substantive justice, procedural justice and accessibility to the judiciary have undergone transformation as the courts have incorporated these two waves into the justice system. The paper also considers the implications of the increasing convergence of both waves within the justice system. It argues that greater clarity is needed concerning the changes to access to justice, and highlights significant aspects within substantive and procedural justice that ought to be safeguarded amidst the courts’ embracing of innovation.
Exploring the Forest and the Trees: The Mediation Eco-system and the Role of the Courts
Professor Nadja Alexander

In this paper Nadja Alexander offers a systemic view of the use of court-related mediation. She highlights the importance of examining the mediation system as a whole and demonstrates how court initiatives in mediation affect the system and vice versa. Her paper begins with an examination of access points to mediation with a focus on those in which courts play a role. It then considers the impact of regulatory-institutional factors (including referral systems, practice directions and jurisprudence) on mediation practice models within and connected to courts. Illustrations from courts and tribunals in a number of jurisdictions are presented. To conclude the paper, Alexander offers case study of the Singaporean eco-system.