Civil Justice, Privatization and Democracy

Trevor C. W. Farrow, Osgoode Hall Law School of York University

Available at: https://works.bepress.com/trevor_farrow/66/
University of Alberta

CIVIL JUSTICE, PRIVATIZATION AND DEMOCRACY

by

Trevor C. W. Farrow

A thesis submitted to the Faculty of Graduate Studies and Research in partial fulfillment of the requirements for the degree of

Doctor of Philosophy

Department of Political Science

©Trevor C. W. Farrow
Spring 2011
 Edmonton, Alberta

Permission is hereby granted to the University of Alberta Libraries to reproduce single copies of this thesis and to lend or sell such copies for private, scholarly or scientific research purposes only. Where the thesis is converted to, or otherwise made available in digital form, the University of Alberta will advise potential users of the thesis of these terms.

The author reserves all other publication and other rights in association with the copyright in the thesis and, except as herein before provided, neither the thesis nor any substantial portion thereof may be printed or otherwise reproduced in any material form whatsoever without the author’s prior written permission.
NOTICE:

The author has granted a non-exclusive license allowing Library and Archives Canada to reproduce, publish, archive, preserve, conserve, communicate to the public by telecommunication or on the Internet, loan, distribute and sell theses worldwide, for commercial or non-commercial purposes, in microform, paper, electronic and/or any other formats.

The author retains copyright ownership and moral rights in this thesis. Neither the thesis nor substantial extracts from it may be printed or otherwise reproduced without the author's permission.

In compliance with the Canadian Privacy Act some supporting forms may have been removed from this thesis.

While these forms may be included in the document page count, their removal does not represent any loss of content from the thesis.

AVIS:

L'auteur a accordé une licence non exclusive permettant à la Bibliothèque et Archives Canada de reproduire, publier, archiver, sauvegarder, conserver, transmettre au public par télécommunication ou par l'Internet, prêter, distribuer et vendre des thèses partout dans le monde, à des fins commerciales ou autres, sur support microforme, papier, électronique et/ou autres formats.

L'auteur conserve la propriété du droit d'auteur et des droits moraux qui protège cette thèse. Ni la thèse ni des extraits substantiels de celle-ci ne doivent être imprimés ou autrement reproduits sans son autorisation.

Conformément à la loi canadienne sur la protection de la vie privée, quelques formulaires secondaires ont été enlevés de cette thèse.

Bien que ces formulaires aient inclus dans la pagination, il n'y aura aucun contenu manquant.
[T]hat grounded maxim,
So rife and celebrated in the mouths
Of wisest men, that to the public good
Private respects must yield....

John Milton¹

Publicity is the very soul of justice.

Jeremy Bentham²


CIVIL JUSTICE, PRIVATIZATION AND DEMOCRACY
EXAMINING COMMITTEE

James Lightbody, Department of Political Science, University of Alberta (Chair)

Judith Garber, Department of Political Science, University of Alberta (Supervisor)

David Kahane, Department of Political Science, University of Alberta

Ian Urquhart, Department of Political Science, University of Alberta

George Pavlich, Department of Sociology, University of Alberta

Gerald Baier, Department of Political Science, University of British Columbia
To Morley and Joseph, for your energy and spirit that invigorates my every day;

and to

Mary, for your unwavering support and love.
This project is about the privatization of civil justice and its potential ramifications for democracy. Privatization is rapidly and increasingly occurring at all levels of the public justice system, including courts, tribunals and state sanctioned private dispute resolution regimes. This reform movement is driven by a wide-spread ethos of efficiency-based civil justice reform. There are many sound reasons for these privatization trends, including reduced costs, increased speed and efficiency, privacy, enhanced participation and autonomy through increased party choice within and control over dispute resolution processes, and improved access to the tools of justice. However, these trends also have a number of costs in the form of negative impacts on the development of the common law, potential procedural unfairness, power imbalances between disputants and a potential negative impact on systems of democratic governance. Civil society is publicly regulated largely through legislation and adjudication. To the extent that we are actively privatizing how we do adjudication, we are in effect actively privatizing a large part of the way we govern ourselves in modern democracies.

By raising these issues, this project has three main goals. First, it seeks to bear witness to the modern and wide-ranging privatization initiatives that are currently defining the way we think about and resolve almost all non-criminal disputes. Given its importance, we need to publicize, politicize and ultimately temper – although not eliminate – this move to the private. Second, this project seeks to articulate the benefits and costs of these privatizing initiatives,
particularly including their potential negative impacts on the way we publicly regulate ourselves in modern democracies. Third, this project makes recommendations for future thinking about, and approaches to, civil justice practice and reform. In so doing, it calls on academics, jurists, civil justice reformers, elected representatives, practitioners and citizens to engage in a robust debate about all aspects of the privatization of civil justice, the future of which will have a fundamental impact on our public processes of democracy.
This project – a study of the privatization of civil justice and its potential ramifications for democracy – represents the confluence of my early days as a practicing litigation lawyer and my subsequent and ongoing career as a full time academic, as well as my research and teaching interests in political theory, internationalism and globalization, and law and the administration of civil justice. In my view, there is a necessary interdisciplinarity to the topic of civil justice reform, the study of which has been facilitated for me, as a legal scholar, through my pursuit of a Ph.D. degree in the University of Alberta’s Department of Political Science. Because in the end, through the tools of law, we are really talking about the pursuit of justice in the name of democracy.

While my early days as a litigator helped to set the stage for my academic interest in the administration of civil justice, it was my participation in a commercial arbitration proceeding, which I describe in the introduction to this project, which really sparked my interests in and ongoing concerns about civil justice practice and reform. Seeing first-hand how a modern private dispute resolution regime could run rough-shod over well-established rule of law values in a case involving informed clients, sophisticated counsel, a senior and experienced lawyer-arbitrator and important corporate law principles has motivated both my general and ongoing academic interests as well as my specific interest in writing this thesis.
Current procedural reforms and practices designed to improve the efficiency of and access to our civil courts – through tools of privatization – have the potential to do a lot of good in terms of improving our overall systems of civil justice. However, left unchecked and unexamined, these tools also have the potential seriously to damage some of the core values underlying the institutional structure that makes up our modern democracies. This thesis engages directly with those trends and reforms. I have been fortunate to raise these concerns and to think about some potential solutions on a couple of previous occasions. My first direct attempt at formulating an early and brief articulation of these issues was published in 2006.\(^1\) Subsequently, I further developed these ideas and published them in the proceedings\(^2\) of the 2007 annual conference of the Canadian Institute for the Administration of Justice (CIAJ).\(^3\) Many of the comments and discussions at that conference have been extremely helpful for developing my arguments in this project.

While I certainly feel that I have pushed my thinking much further since those earlier publications, I also acknowledge that a primary goal of this project is not necessarily to finally answer all questions, but rather is to identify a number of important challenges and, in particular, to open further debate and encourage


\(^2\) Trevor C. W. Farrow, “Public Justice, Private Dispute Resolution and Democracy” in Ronalda Murphy and Patrick A. Molinari, eds., Doing Justice: Dispute Resolution in the Courts and Beyond (Canada: CIAJ, 2009) 301.

\(^3\) CIAJ, “Doing Justice: Dispute Resolution in the Courts and Beyond” (CIAJ Annual Conference, Halifax, Nova Scotia, 10-12 October 2007).
further research about the appropriate balance of efficiency, proportionality and justice in the context of the civil justice system. These are important issues with direct implications for the way we govern ourselves in modern democracies. As such, I hope that this project is of interest to legal and political theorists and practitioners. By engaging with past and present practice, policy and academic conversations on these issues, my hope is, in addition to adding to those conversations, that this project will directly contribute to the shaping of the future trajectory of our modern civil justice reform movement.

T. C. W. F.
August 2010
Toronto, Canada
Acknowledging that it "takes a village" to finish a project like this feels like a major understatement. Many generous people have provided me with significant help, support and encouragement along my Ph.D. journey, which has culminated in this thesis. There are numerous people who I would like to specifically mention here.

First, my supervisor, Judith Garber (University of Alberta, Department of Political Science), who has been absolutely instrumental in assisting me with the shaping, writing and completion of this thesis. I am truly grateful for her guidance, wisdom and humour and for the countless hours that she has spent reading drafts of this thesis and providing me with extremely insightful, timely and helpful comments and suggestions. I am also very appreciative of the significant efforts made on my behalf by the other members of my examining committee, including James Lightbody (Chair), David Kahane and Ian Urquhart (all of the University of Alberta, Department of Political Science), George Pavlich (University of Alberta, Department of Sociology) and Gerald Baier (Department of Political Science, University of British Columbia). Catherine Kellogg (University of Alberta, Department of Political Science) provided very useful comments on a draft of this thesis. Additionally, Julie Macfarlane (University of Windsor) also provided input at an earlier stage of this project. Numerous other people at the University of Alberta have also played a significant role in the completion of my Ph.D. studies. In particular, I am grateful for the generous
ASSISTANCE I have received from numerous members of the Department of Political Science, including Janine Brodie, Marilyn Calvert, Don Carmichael, Lois Harder, Fred Judson, Thomas Keating, Caroline Kinyua, Andy Knight, Lori Thorlakson, David Whitson and Jane Wilson. My former Deans, Lewis Klar and David Percy, were very supportive of my doctoral studies during my time as a full-time faculty member at the University of Alberta, Faculty of Law. Michael Pratt, a former colleague at the University of Alberta (now at Queen’s University) reminded me early on of the importance of continuing to read, something for which I continue to be grateful.

In terms of research assistance for several civil justice and related projects over the past number of years that have both directly and indirectly influenced and assisted me with the writing of this thesis, I would like to thank Patricia Hania, Ada Ho, Alan Melamud, Ziad Reslan, Jason Sacha, Ian Smith and Anton Tabuns for their excellent and very dedicated research support. The Canadian Forum on Civil Justice has also been very supportive and helpful in terms of research materials and ideas. In particularly, I would like to thank Diana Lowe, the Forum’s former Executive Director, for helpful ideas along the way, and Kim Taylor, a former staff lawyer at the Forum, for regularly sending me helpful research materials. Additionally, I am also grateful for the assistance that members of the Osgoode Hall Law School Information Technology department provided me in connection with the survey that I conducted for this project.

Other important influences – from former Ph.D. student colleagues who were with me during the early days of my Ph.D. studies; former and current
ACKNOWLEDGMENTS

students who constantly push me to think about civil justice in fresh and progressive ways; judges and lawyers with whom I have worked in a number of educational, development and rule of law contexts (locally and internationally) who have helped to shape the way I think about the administration of civil justice; and a number of fellow academics with whom I continue to collaborate in the ongoing project of civil justice reform – can be seen on most of the pages throughout this thesis.

My research for this project has also been greatly assisted by generous financial support from a number of organizations and institutions. Specifically, I would like to thank the Social Sciences and Humanities Research Council of Canada (SSHRC) for awarding me a Doctoral Fellowship in support of my Ph.D. studies; the Canadian Institute for the Administration of Justice for awarding me the Charles D. Gonthier Research Fellowship; Borden Ladner Gervais, LLP for the opportunity to act as a BLG Research Fellowship Directing Professor on two occasions; the University of Alberta for several generous research fellowships and grants; York University for support from the Research at York funding program; and Osgoode Hall Law School for generous research fellowship and grant support.

Finally, on a more personal note, I would like to thank Jane and Dale Birdsell for their constant support and encouragement; David Birdsell, who, through a friendly wager, helped push me to finish this project; Susan, Jill and Grant Farrow, my loving sister, mother and father, who have been major sources of support throughout my entire academic career; the “Langley gang” for ongoing
Acknowledgments

friendship and encouragement; my kids, Morley and Joseph, for the joy they bring to my days and for helping me to keep all things in perspective; and finally to my spouse, Mary Birdsell, for supporting, encouraging and believing in me at every step of this process – I could not have done it without you. For all of that assistance and support I am incredibly grateful.
TABLE OF CONTENTS

LIST OF TABLES

CHAPTERS

1. INTRODUCTION ........................................................................................................... 1

2. COURTS AND DEMOCRACY ...................................................................................... 14

3. PRIVATIZATION OF CIVIL COURTS ........................................................................... 62

4. OTHER STATE-BASED OR SANCTIONED DISPUTE RESOLUTION REGIMES ... 142

5. PRIVATIZING PREFERENCES AND INFLUENCES ................................................. 184

6. JUSTIFYING PRIVATIZATION ................................................................................... 231

7. FIVE CONCERNS ABOUT PRIVATIZATION ............................................................. 274

8. CHALLENGES AND THE FUTURE OF REFORM ...................................................... 336

BIBLIOGRAPHY ............................................................................................................. 398

APPENDICES

1. POTENTIAL DISPUTE RESOLUTION PROCESS ALTERNATIVES .................. 494

2. NATIONAL ALTERNATIVE DISPUTE RESOLUTION SURVEY .................... 495
### LIST OF TABLES

1. **Table 5.1: Mediation** .................................................................209

2. **Table 5.2: Arbitration** .................................................................209

3. **Table 5.3: Dispute Resolution Clauses** ........................................210

4. **Table 6.1: Moderate to Critical Factors for Recommending Arbitration** .................................................................242

5. **Table 6.2: Moderate to Critical Factors for Recommending Mediation** .................................................................243

6. **Table 6.3: Lawyers Recommending Arbitration “Sometimes or Always”** .................................................................245

7. **Table 6.4: Lawyers Recommending Mediation “Sometimes or Always”** .................................................................247

8. **Table 6.5: Lawyers Recommending Dispute Resolution Clauses “Sometimes or Always”** .................................................................247
CHAPTER 1
INTRODUCTION

1. THE DEALERSHIP CASE

For almost 50 years, John, who immigrated to the United States when he was very young, operated a dealership in the Midwest. He sold merchandise made exclusively by one of the biggest and most familiar manufacturers in United States history (the “Manufacturer”). John was an extremely popular dealer who won sales awards in almost all categories. He was a true American success story.

Late in his career, John was asked – purportedly by the local representative for the Manufacturer’s computer service division (whom John had known and dealt with for years) and as part of the overall obligations and expectations set out in his dealership agreement – to purchase a new computer system and computer service package. Doing, as he always did, what the computer representative suggested and what he understood to be what the Manufacturer required, John agreed to purchase, without doing any research or comparison shopping, the full computer system and a long-term service package (the “Contract”).

---

1 The Dealership case, which has dramatically influenced my thinking and driven my concerns in this project, is a case in which I was directly involved at one point in my life: in my previous career as a litigator, I was co-counsel on the case. As such, I have a very close, inside perspective on it. For the same reason, I am also limited in what I can reveal about the case both because of basic solicitor-client confidentiality obligations and also because of a strict confidentiality agreement that binds the parties and their counsel. However, although I have changed and omitted names and facts to comply with all of my professional, ethical and legal obligations, the Dealership case is a case that actually happened. For an earlier account of the Dealership case, see Trevor C. W. Farrow, “Public Justice, Private Dispute Resolution and Democracy” in Ronalda Murphy and Patrick A. Molinari, eds., Doing Justice: Dispute Resolution in the Courts and Beyond (Canada: Canadian Institute for the Administration of Justice, 2009) 301 at 305.
CHAPTER 1

As it turned out, the computer representative did not work for the Manufacturer but rather for a newly-reorganized, separate and privately-held multinational corporation (the “Corporation”). Notwithstanding the change in corporate structure, ownership and employment relationship, the representative’s uniform, business card and letterhead continued – as they always had – to use the Manufacturer’s logo. The computer system that the representative recommended, and that John purchased, was designed for a much bigger dealership (or group of dealerships) than what John operated. Further, the cost of the equipment and services was vastly higher than the cost of the same equipment and services found on the open market. Finally, there was no Manufacturer requirement under John’s dealership agreement to purchase the equipment or services. Put simply, the Corporation, relying on John’s good faith, history of service, relationship with the representative and virtually blind loyalty to the Manufacturer, sold John an incredibly overpriced computer system and unreasonably lengthy service package that he did not need or in fact want.

Subsequently, when John discovered the truth about the Corporation, the computer equipment and the service package, he decided to stop further payments and seek to resolve the matter with the Manufacturer and the Corporation. Because of the separate ownership structure of the Corporation, the Manufacturer wanted nothing to do with the dispute. The Corporation, for its part, was not willing to make any concessions. Further, based on the clear wording of the Contract and on John’s refusal to pay, the Corporation proceeded to take legal
INTRODUCTION

action. Because the Contract provided that “all disputes” arising under the Contract were to be resolved pursuant to the commercial arbitration rules of a major American arbitration association, the Corporation initiated arbitration proceedings against John.²

The Corporation’s claim was simple: John should make the payments owed under the Contract. John argued in his defense and counterclaim, in a nutshell, that because the costs of the system and services were not only unreasonably high but were based on what amounted to at least an unreasonable contract of adhesion,³ if not actual fraud, the Contract should be set aside and he should be compensated for his losses (the payments that he had made to that date under the Contract). An animating (and aggravating) factor for John’s defense and counterclaim was the fact that, given the system’s incompatibility for a smaller dealership, it did not function for John as advertised (or really at all). After a lengthy and costly pre-hearing process that involved extensive document gathering, depositions in various cities in various states and numerous pre-hearing motions, the dispute proceeded to arbitration. The hearing lasted for a week, at the conclusion of which the arbitrator found for the Corporation and dismissed John’s counterclaim. Notwithstanding several years of preparation, volumes of documentary discovery and weeks of depositions (several problematic parts of

² For a further discussion of contract-based mandatory dispute resolution clauses, see infra cc. 4-5.

³ A contract of adhesion is a contract in which one party is given little or, more typically, no choice as to its terms. These types of contracts often involve standard forms as well as unequal bargaining positions.
CHAPTER 1

which I discuss further in this project\(^4\)), the arbitrator – consistent with the arbitration association’s practices, rules and guidelines – provided no oral or written reasons at all for his judgment. And because of the terms of the Contract, John had no right of appeal.

Reasonable people can always disagree, particularly in hindsight, as to what the correct result should have been in a given case. While I am convinced – as one of John’s two lawyers in that case\(^5\) – that the arbitrator in the Dealership case got it wrong, I do not think that he acted in bad faith. However, as I discuss later in this project,\(^6\) I am of the view that the business practices of the Corporation that led to the dispute were at least unfairly aggressive; were likely pursued – at least by some – in bad faith; were part of a systematic and nation-wide approach of the Corporation to target similarly situated dealers through deceptive business practices; and, as a result, likely amounted to fraud. Further, in addition to the questionable conduct on the part of the Corporation, I am also of the view that the lawyers for the Corporation, as I also discuss later in this project,\(^7\) acted on numerous occasions unprofessionally and in bad faith.

Unfortunately, the private dispute resolution regime in which we were working – state-sanctioned confidential commercial arbitration – protected the conduct of the Corporation and its lawyers from being properly discovered, made

---

\(^4\) See infra c. 7.

\(^5\) See supra note 1.

\(^6\) See infra c. 7.

\(^7\) Ibid.
INTRODUCTION

public, prohibited or sanctioned. Part of the reason, as I discuss further elsewhere, was the system’s lack of meaningful procedural safeguards. The more significant reason, in my view, was the curtain of secrecy, provided for by strategically drafted and wide-ranging contractual confidentiality provisions, that shielded the systematically suspect conduct of the Corporation and its lawyers in our proceeding, and in all of the similar proceedings with other dealerships in which they were involved and about which we knew but could do nothing about. As such, because no reasons for judgment were ever written, let alone published, and because the entire proceedings were shrouded in secrecy, the Corporation was free to continue its problematic pattern of present and future dealings with other dealerships across the country. Further, any similarly-situated corporations would not have the burden (or benefit) of a public precedent that could guide its future conduct and/or curb its future misbehavior.

2. PRIVATIZING CIVIL JUSTICE

As an English literature teacher once told me, there are often two ways to come at a discussion. You can start widely, with the big picture, and work toward the finer points; or you can start narrowly, with the details, and work your way out. Put differently, you can look at a room through a wide-open door or through the narrow opening of a key hole. They are very different vantage points providing very different perspectives. In the end, typically, it’s the combination that is often most instructive.

---

In approaching this research, I’ve tried to come at it from both the narrow as well as the broad. It is a project about an individual dispute: the Dealership case. It is also a project about the entire civil justice system. By telling John’s story, I seek to raise some specific and problematic aspects of private justice. Then, by linking his story to the theory and practice of everyday civil justice, I hope to provide a critical account of the purpose, current privatizing trends within, and future directions of civil justice as a tool of societal regulation. My main focus of consideration is the privatization movement that has engulfed the practice and reform of modern civil justice. Specifically, I am concerned that, through the increasing privatization of civil justice, a key aspect of how democratic governance is realized in society – public adjudication – is jeopardized. What the Dealership case highlights is the potentially negative impact that privatized processes can have on the immediate dispute resolution interests of particular litigants, as well as the future regulation of potentially large sectors of society. These are the issues – framed in a discussion of the role of courts and other dispute resolution processes in our systems of democratic governance – that are at stake in this project.

Privatization is occurring at a rapid rate in all levels of the public justice system. First, in the civil justice system, there is an increasing and overwhelming tendency to resolve disputes through mechanisms other than the traditional public court process. For example, mandatory court-based mediation rules, judicial dispute resolution initiatives, case management regimes, pre-trial conferences, and
INTRODUCTION

cost-based settlement incentives have all become central pillars of the modern civil justice system and its reform. Each of these tools, either directly or indirectly, and in different ways, encourages the resolution of disputes through methods that are outside of the formal, public trial process. Second, alongside civil court initiatives, privatization is occurring in the administrative system as well. Tribunals and other administrative processes are increasingly experimenting with formal and informal alternatives to their traditional hearing-based processes. Third, legislative regimes – typically arbitration statutes – also continue to sanction (and encourage) the resolution of civil disputes outside the formal court system. The Dealership case was governed by this kind of regime. Fourth, privatization is also occurring in parts of the criminal justice system. Although the state is always an essential part of the criminal process, plea-bargaining, community-based diversion programs and restorative justice initiatives have been, and are increasingly becoming significant alternatives (or complements) to the more formal, public trial-based criminal dispute resolution system. Finally, all of these state-based privatized (or privatizing) systems – civil, administrative, legislative and criminal – operate in addition to the already robust, millennia-old tradition of resolving the vast majority of virtually all disputes through mechanisms entirely separate from formal state processes (private negotiations, religious and community-based dispute resolution tools, etc.).

There are many sound reasons for these privatization trends, including reduced costs, increased speed and efficiency, privacy, enhanced participation and
autonomy through increased party choice within and control over dispute resolution processes, and improved access to the tools of justice. That such benefits can result from privatization of dispute resolution is relatively well documented.

However, these trends also have a number of costs in the form of negative impacts on the development of the common law, potential procedural unfairness and power imbalances between disputants. These costs are all reasons enough, in themselves, to be concerned about these wide-ranging trends. However, my main concern, which is the driving concern behind this project, is the larger question of the negative impact that the privatization of public dispute resolution processes has on systems of democratic governance. Civil society is publicly regulated largely through the twin pillars of legislation and adjudication. The adjudicative function is clearly a central pillar of democratic processes of government. To the extent that we are actively privatizing how we do adjudication, we are in effect actively privatizing a large part of the way we govern ourselves in modern democracies. Put differently, the more we actively and systematically move the resolution of disputes like the Dealership case out of public civil justice and related dispute resolution processes and into private regimes, the less democratic control and scrutiny we will have over the regulation of and influence over large sectors of both our public and private lives.

Unlike the benefits of privatization about which people have been actively talking for some time, there is comparatively very little discussion or debate about
the costs of privatizing civil justice. As one commentator has noted, although the move to privatize the justice system and its results are being “recently discovered,” they are certainly “still not understood.” This lack of understanding is of particular concern given the ongoing and significant institutional reforms that are presently occurring in civil justice systems the world over and the fundamental public interest values that are at stake. However, having raised these concerns, I also want to make it very clear at the outset that the overall goal of this project is not to do away with privatization of civil justice all together. There are many sound legal and policy reasons, as supported by the voices of practicing stakeholders from all corners of the dispute resolution system, to support some aspects of current privatization initiatives. As such, the difficult question becomes one of balance: how to think about and harness aspects of the privatization movement without jeopardizing the underlying civil justice system.

To develop my overall analysis in this project, I primarily look at three parts of the justice system. The primary focus of attention is the public civil court system. Additionally, I also look at both the administrative law system and legislative initiatives (typically including arbitration statutes) that actively sanction the resolution of non-criminal (primarily civil) disputes outside of the public court and administrative law regimes. This project also touches on the

---


10 For a diagram of these dispute resolution processes, see Appendix 1.
entirely private system, including negotiation and mediation for example, to the extent that the private system is annexed directly or indirectly through the public stream (through the court system, the administrative system and legislative initiatives). This project does not focus on privatizing initiatives in the criminal justice system. And while I certainly do look at the relevant preferences for, influences on and justifications for privatization, this project does not deal directly with some of the underlying influences of or debates in the general public

11 Again see ibid.


13 See e.g. infra cc. 5-6.
INTRODUCTION

policy literature\textsuperscript{14} or some of the important and underlying sociological questions raised by general conflict theory.\textsuperscript{15}


CHAPTER 1

By focusing on the primary elements of the civil justice system, coupled with further discussions of the Dealership case as it relates from time to time to broader themes and discussions, this project in turn has three main goals. First, it seeks to bear witness to the modern and wide-ranging privatization initiatives that are currently defining the way we think about and resolve almost all non-criminal disputes. Given its importance, we need to publicize, politicize and ultimately, I will argue, temper (although not eliminate) this ever-increasing move to the private. Second, this project seeks to articulate the benefits and costs of these privatizing initiatives, particularly including their potential negative impacts on the way we publicly regulate ourselves in modern democratic societies. Third, this project makes recommendations for future thinking about, and approaches to, these initiatives. In so doing, it calls on academics, jurists, civil justice reformers, elected representatives, practitioners and citizens to engage in a robust debate about all aspects of the privatization of civil justice, the future of which will have a fundamental impact on our public processes of democracy.

3. PROJECT OUTLINE

The purpose of this introductory chapter has been to tell the story of the Dealership case as well as to start identifying the larger procedural landscapes in which the Dealership case was, and all other civil disputes are as well played out. A critical discussion of those landscapes now becomes the primary focus of the balance of this project, the outline for which proceeds as follows. Following this introductory chapter, chapter 2 looks at the public court system, including its
INTRODUCTION

history, functions and central role in democracy. Chapters 3 and 4 then provide detailed accounts of the privatization of the pubic court system, as well as current administrative and alternative, legislatively-sanctioned dispute resolution processes. Chapters 5 and 6 discuss the primary preferences, influences and justifications for these privatization initiatives. Chapter 7 then sets out my five main concerns regarding privatization. Finally, in chapter 8, I conclude by responding to several main challenges to my arguments as well as sketching out some directions for future thinking in the context of the practice, teaching, research and reform of civil justice.
CHAPTER 2
COURTS AND DEMOCRACY

1. SUPERIOR COURTS

Modern provincial superior courts throughout Canada are the primary public venues in which Canadians resolve their disputes. They provide a public dispute resolution system that is, at least in theory, open to all parties and to all disputes. I say in theory because formally open they may be; widely accessible they are not. As the Irish judge Sir James Mathew reportedly stated about the English courts many decades ago: “justice is open to all – like the Ritz Hotel.”

Pursuing the resolution of disputes through traditional public litigation processes, particularly with the assistance of legal counsel, presents a series of challenges for most Canadians. As the Chief Justice of Canada has acknowledged, “many

---

1 For a further discussion of other courts in Canada (including small claims courts, courts of appeal and the Federal Court) and recent reform initiatives in those courts, see infra c. 3, pt. 5. For further discussions of other state-based or sanctioned tribunals, see infra c. 4.


Canadian men and women find themselves unable, mainly for financial reasons, to access the Canadian justice system.\(^4\) This lack of access to the tools of civil justice, which has, at least significantly, fueled the engine of privatization, is addressed later in this project.\(^5\)

However, notwithstanding these significant challenges, it is also important to acknowledge that we continue to maintain a very active and robust public court system in this country. Again according to the Chief Justice of Canada, “Canada has a strong and healthy justice system. Indeed, our courts and justice system are looked to by many countries as exemplary.”\(^6\) The animating historical spirit of that system – of openness to all parties and to all disputes – can be found very early on, for example, in the following promise from the Magna Carta: “To … none will we deny, to none will we delay right or justice.”\(^7\) In modern times, it is the state’s court system that, at least in large measure, is provided to make good on this promise of justice. In the year of confederation, Brooke J.A. of the


\(^{5}\) See infra cc. 6 and 8.


\(^{7}\) Magna Carta, or The Great Charter of King John (15 June 1215) at cl. 40. For a discussion of the Magna Carta in the context of early civil procedural reforms, see Adolph J. Rodenbeck, “The New Practice in New York” (1916) 1:2 Cornell L.Q. 63 at 76.
Ontario Court of Appeal commented (with reference to Justice Willis in *Manor of London v. Cox*) that “nothing shall be intended to be out of the jurisdiction of a superior Court, but that which specifically appears to be so.” As such, as with the corresponding Queen’s Bench courts in England, if a “right exists, the presumption is that there is a Court which can enforce it.”

Modern superior courts in this country enjoy the plenary jurisdiction, power and authority at law and in equity that were historically exercised by the courts of common law and equity in England and subsequently in early Canada and in

---

8 (1867), 1 E. & I. App. 239 at 259.


many of the states in the United States. This plenary jurisdiction provides courts with “all the powers that are necessary to do justice” (typically within the province), which is a jurisdiction that is “unlimited and unrestricted in substantive law in civil matters.” This jurisdiction is limited only “where provided specifically to the contrary” by a “special law.” A “special law” could, for example, include a law that refers a certain kind of case to the Federal Court of Canada or perhaps to a provincial or federal tribunal. Arbitration legislation

---


13 80 Wellesley St East Ltd v Fundy Bay Builders Ltd et al, supra note 9.


15 80 Wellesley St East Ltd v Fundy Bay Builders Ltd et al, supra note 9. See also TeleZone Inc v Canada (Attorney General), supra note 9, Board v Board, supra note 10. For a brief history of the courts in Canada, see The Civil Litigation Process, supra note 14 at 18-44.

16 80 Wellesley St East Ltd v Fundy Bay Builders Ltd et al, supra note 9. See also Black v Canada (Prime Minister) (2001), 54 O.R (3d) 215 at paras 66-76 (C.A.).

17 For examples of contrary jurisdictional legislation, see Ontario’s Courts of Justice Act, supra note 11 at s 148 or Alberta’s Judicature Act, supra note 11 at s 27 (recognizing the jurisdiction of the Federal Court of Canada or the Supreme Court of Canada for certain “controversies”).
also permits parties to agree, by way of arbitration contracts, to put jurisdiction for a given case in the hands of an arbitrator and not the court. Further, forum selection clauses in modern contractual relations also allow parties to limit a court’s jurisdiction over certain matters (in favour of a foreign jurisdiction).

2. FUNCTIONS OF SUPERIOR COURTS

RETROSPECTIVE FUNCTION: DISPUTE RESOLUTION

A typical, but incomplete, understanding of the purpose of a civil justice system is that courts exist primarily to resolve disputes. For example, according to Berlins and Dyer, the “courtroom” has for “centuries … been the setting for the final settlement of disputes.” Similarly, according to a more recent treatment of civil justice systems and reform by Alon Klement and Zvika Neeman, the “main goal of the court system is to differentiate between those who obeyed the law and those who did not, and to administer the disputes that are brought before it.

Human Rights Code, R.S.O. 1990, c. H.19, s. 39 (providing that: “[t]he Tribunal has the jurisdiction to exercise the powers conferred on it by or under this Act and to determine all questions of fact or law that arise in any application before it”). See further Black v. Canada (Prime Minister), supra note 16.

Discussed further infra c. 4. See also TeleZone Inc. v. Canada (Attorney General), supra note 9 at 28, para. 5.


These descriptions focus on the retrospective function of the judicial system. The court looks backward in time to understand what happened in a given dispute, based on the "facts" of a case, and decides what should have been done, or at least what should now be done, in order to make things right for the immediate parties involved according to settled law. Of course Klement and Neeman as well as Berlins and Dyer are correct (at least in part): dispute resolution is clearly one of the purposes of a civil justice system. However, it certainly is not its only purpose, and further, is not necessarily always its most important purpose.

**PROSPECTIVE FUNCTION: SOCIETAL REGULATION**

There are many aspects to the ways in which we order ourselves and our affairs in society. At the personal level, custom, religion, morality and tradition, for example, all often play significant roles. These factors and forces help shape what Roberto Unger, borrowing from Charles Fourier, refers to as the "micropolitics of personal relationships". However, once we step out of the spheres of the personal and into the light of a more generalized civil society,

---


23 For a discussion of various treatments of the notion of civil society, see Jürgen Habermas, Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy, trans. by William Rehg (Cambridge, MA: MIT Press, 1996) at § 8.3.2, pp. 366-373. See also Charles Taylor, Philosophical Arguments (Cambridge, MA; London: Harvard University Press, 1995) c. 13 ("Liberal Politics and the Public Sphere").
increasingly generalized and systematic regimes of rules for governance – largely in the form of laws and legal rules – have been required. As W. H. Jennings has pointed out:

As soon as man began to live in groups, rules became necessary to govern his relations with his fellows. Even in the most primitive forms of society both the rights of the individual and the common interests of the community were bound to emerge and create a need for governing social relationships.24

The regulation, by laws and legal institutions, of humans – as “political animal[s]”25 who choose “to live in groups”26 – is clearly a central concern of political and legal theory that pervades the work, in different ways and to different degrees, throughout the canonical tradition. For example, in his shift from an ideal state in the Republic to a law-governed state (albeit still idealized) in The Laws, Plato sketched a political theory in which law, conceived of as “the sacred and golden cord of reason”,27 is “the master of the government”.28 Aquinas, in


26 Jennings, Canadian Law: For Business & Personal Use, supra note 24 at 1-2.


COURTS AND DEMOCRACY

*Summa Theologica*, discussed a vision of “human” law,\(^{29}\) “regulated by reason”, that “must have as its proper object the well-being of the whole community” and the “ordering of the common good.”\(^{30}\) Subsequently, theorists born of the enlightenment developed a vision of positive law that was part of the necessary architecture of an increasingly complex and secular civil society.\(^{31}\) As discussed further below, that enlightenment vision of law, and its developing relationship


> The central case of law and legal system is the law and legal system of a complete community, purporting to have authority to provide comprehensive and supreme direction for human behavior in that community, and to grant legal validity to all other normative arrangements affecting the members of that community.


with rights-based procedural and substantive justice, still largely animates the
theories of modern liberal democratic legal and political scholars.\textsuperscript{32}

Notwithstanding the continued complex and pluralistic nature of the private
and public aspects of modern society and its sources of regulation,\textsuperscript{33} our social
relationships at the level of civil society – contemplated above for example by
Jennings\textsuperscript{34} – continue to be governed by two primary regulatory legal tools:
legislation and adjudication. As supported by additional public institutions,
including the executive branch and increasingly important legislatively-created
administrative agencies,\textsuperscript{35} legislation and adjudication can be seen as the

\textsuperscript{32} See e.g. John Rawls, \textit{A Theory of Justice}, rev. ed. (Cambridge, MA: Belknap, 1999); John
Rawls, \textit{Justice as Fairness: A Restatement}, ed. by Erin Kelly (Cambridge, MA and London:
University Press, 1986); Ronald Dworkin, \textit{Law’s Empire} (London: Fontana, 1986); R. M.
Oxford University Press, 1977) at c. II; Ronald Dworkin, \textit{Freedom’s Law: The Moral Reading of
the American Constitution} (Cambridge, MA: Harvard University Press, 1996); Ronald Dworkin,
\textit{A Matter of Principle} (Cambridge, MA: Harvard University Press, 1985); Ronald Dworkin, \textit{Taking

\textsuperscript{33} As Rawls correctly points out, other powerful regulating institutions include social rituals,
markets, etc. See \textit{A Theory of Justice}, supra note 32 at §10, p. 48. For further discussions of legal
pluralism, particularly from an historical perspective, see e.g. Louis A. Knafla and Susan W. S.
Binnie, “Beyond the State: Law and Legal Pluralism in the Making of Modern Societies” in
Knafla and Binnie, \textit{Law, Society, and the State: Essays in Modern Legal History}, supra note 11 at
c. 1; H. Robert Baker, “Creating Order in the Wilderness: Transplanting the English Law to
Rupert’s Land, 1835-51” (1999) 17:2 L.H.R. 209; Deborah A. Rosen, “The Supreme Court of
235-245. See also generally John McLaren, Hamar Foster and Chet Orloff, eds., \textit{Law For The
Elephant, Law For The Beaver: Essays in the Legal History of the North American West}
(Pasadena, CA: Ninth Judicial Circuit Historical Society, 1992); Hall, \textit{The Magic Mirror: Law in
American History}, supra note 12; G. R. Rubin and David Sugarman, \textit{Law, Economy and Society,
C. Green, \textit{Law and Society} (Dobbs Ferry, NY: Oceana Publications, 1975) at c. 1; Farrow,
“Sustainable Professionalism”, supra note 3 at 90-95.

\textsuperscript{34} See \textit{supra} note 24 and accompanying text.

\textsuperscript{35} For a further discussion of administrative agencies, particularly their dispute resolution function,
see \textit{infra} c. 4. For a general discussion of the interaction of the branches of government in the
fundamental public law making and resolving tools for societal regulation.\textsuperscript{36} They are what Hart and Sacks referred to as the “institutionalization of procedures for the settlement of questions of group concern”;\textsuperscript{37} or as the Supreme Court of Canada more recently recognized, the “institutional … aspect” of democracy.\textsuperscript{38} Further, according to Raz,

\begin{quote}
[Legal philosophers have been agreed that one of the defining features of law is that it is an institutionalized normative system. Two types of institutions were singled out for special attention: norm-applying institutions such as courts, tribunals … etc., and norm-creating institutions such as … parliaments, etc.\textsuperscript{39}]
\end{quote}

Of these two tools, adjudication – the focus of this project – clearly plays a central function in our regulatory state. Indeed, again according to Raz, “the existence of norm-creating institutions though characteristic of modern legal systems is not a necessary feature of all legal systems, but … the existence of

\textsuperscript{36} Blackstone similarly recognized that the “municipal law of England, or the rule of civil conduct prescribed to the inhabitants of this kingdom, may with sufficient propriety be divided into two kinds;… the unwritten or common law; and the … written or statute law.” William Blackstone, \textit{Commentaries on the Laws of England} (Oxford: Clarendon Press, 1765-1769), elec. ed. (Novi, MI: Lonang Institute, 2005) at intro., sec. 3, online: Lonang <http://www.lonang.com/exlibris/blackstone/>. See similarly Friedman, \textit{A History of American Law}, supra note 12 at 3.

\textsuperscript{37} Hart and Sacks, \textit{The Legal Process: Basic Problems in the Making and Application of Law}, \textit{supra} note 35 at c. 1, sec. 1, pp. 3-4.


\textsuperscript{39} Joseph Raz, \textit{The Authority of Law: Essays on Law and Morality}, \textit{supra} note 32 at 105.
certain types of norm-applying institutions is. Key to this discussion, however, is the recognition that the conceptual distinction between norm-creation and norm-application does not always, or indeed necessarily, map directly onto two distinct institutional tools. While legislatures only act as norm-creating institutional tools, modern common-law courts – in effect – act as both. Judges apply norms (typically laws) to facts in order to resolve disputes. They also, however, create norms by interpreting and applying existing laws, in the form of precedential judgments, for the purpose of regulating the future behavior and future outcome of similarly situated parties in similarly situated cases or negotiated settlements.

This dual role of the courts was described by de Tocqueville in his observations of the American judicial system:

[J]udicial power ... pronounces on particular cases and not on general principles. [However] [i]f a judge, in deciding a particular question, destroys a general principle, because one is quite sure that all consequences deriving from that principle will be alike undermined, and so the principle becomes barren, he stays within the natural sphere of his authority.... An American judge can pronounce a decision only when there is litigation. He never concerns himself with anything except a particular case, and to act he must have cognizance of the matter.... Nevertheless he is invested with immense political power.... [T]he American judge is dragged in spite of himself onto the political field. He only pronounces on the law because he has to judge a case, and he cannot refuse to decide the case. The political question he has to decide is linked to the litigants' interests, and to refuse to deal with it would be a denial of justice. It is by fulfilling the

---

40 Ibid.

41 I recognize that in some circumstances legislatures delegate significant powers, including norm-creating and norm-applying powers, to administrative agencies, which are further discussed below. See infra at c. 4.
narrow duties imposed on his status as a judge that he also acts as a citizen. 42

Similarly, John Stuart Mill, when describing English law and its “adaptation of barbarous laws to the growth of civilised society”, recognized that much of this legal development was done by “stealth” through the court system. 43 These “adaptations”, according to Mill, were “generally made by the courts of justice, who could not help reading the new wants of mankind in the cases between man and man which came before them; but who, having no authority to make new laws for those new wants, were obliged to do the work covertly.” 44

More recently, Mirjan Damaška described the “two faces of adjudication” as including “conflict-solving” and “policy-implementing” functions. 45 Similarly, Habermas recognizes the dual – retrospective and prospective – aspects of the public adjudicative role as framed by modern rules of civil procedure: “The institutionalized self-reflection of law promotes individual legal protection from two points of view, that of achieving justice in the individual case and that of consistency in the application and further development of law”. 46

42 Alexis de Tocqueville, Democracy in America, trans. by George Lawrence, ed. by J. P. Mayer (New York: Perennial, 2000) at 100, 103.


44 Ibid. For a further background discussion of the various roles and functions of courts, see Hart and Sacks, The Legal Process: Basic Problems in the Making and Application of Law, supra note 35 at c. 3, pp. 341-344.


46 Habermas, Between Facts and Norms, supra note 23 at § 5.3.4, p. 236; § 6.1.2, p. 244-246.
Dworkin has also recognized the norm-creating function of the court (in addition to its dispute resolution function): “judicial decisions affect a great many ... people ... because the law often becomes what judges say it is.”

Duncan Kennedy pushes this judicial norm-creation discussion further by fully recognizing not only the “judicial law making” function, but also its history as an active “vehicle of ideological projects”.

In these norm-creation senses, then, as Héctor Fix-Fierro comments, courts “participate openly in the constitutional and political process” and have become a “real branch of government, at least in the sense that they now play an important role in shaping the general direction of society.” Similarly, again according to de Tocqueville, when commenting on the 19th century American judicial system, “Judicial institutions exercise a great influence on the fate of the Anglo-Americans; they have a very important place among their political institutions properly so called.... [C]ourts are the most obvious organs through which the

---

47 Ronald Dworkin, Law’s Empire, supra note 32 at 2.


COURTS AND DEMOCRACY

legal body influences democracy.” Miguel Schor has also recently commented, particularly with respect to courts that wield modern American-style powers of judicial review, that “courts ... are powerful political as well as legal actors.”

50 Democracy in America, supra note 42 at 138, 269. Further, according to de Tocqueville, “[a]n American judge, armed with the right to declare laws unconstitutional, is constantly intervening in political affairs. He cannot compel the people to make laws, but at least he can constrain them to be faithful to their own laws and remain in harmony with themselves.” Ibid at 269. The same observation could essentially be made today, both of American judges and of Canadian judges.

51 Miguel Schor, “Judicial Review and American Constitutional Exceptionalism” (2008) 46:3 Osgoode Hall L.J. 535 at 537. See also Gerald Baier, Courts and Federalism: Judicial Doctrine in the United States, Australia, and Canada (Vancouver: UBC Press, 2006). Debates continue as to the extent and propriety of “judge made law” (as opposed to law made by a majority of the people through their elected officials), which some criticize as improper “judicial activism”. For previous comments of mine on this debate, see e.g. Trevor C. W. Farrow, “Re-Framing the Sharia Arbitration Debate” (2006) 15:2 Const. Forum Const. 79 at 82, n. 50 and accompanying text. See also further infra c. 8. For an early but useful commentary, see John Austin, The Province of Jurisprudence Determined in The Province of Jurisprudence Determined Etc. (London: Weidenfeld and Nicolson, 1954) lecture v, “Note”, 184 at 191, in which Austin – when disagreeing with Bentham’s criticism of “judge-made” law – stated:

I by no means disapprove of what Mr. Bentham has chosen to call by the disrespectful, and therefore, as I conceive, injudicious, name of judge-made law. For I consider it injudicious to call by any name indicative of disrespect what appears to me highly beneficial and even absolutely necessary. I cannot understand how any person who has considered the subject can suppose that society could possibly have gone on if judges had not legislated, or that there is any danger whatever in allowing them that power which they have in fact exercised, to make up for the negligence or the incapacity of the avowed legislator. The part of the law of every country which was made by judges has been far better made than that part which consists of statutes enacted by the legislative. Notwithstanding my great admiration for Mr. Bentham, I cannot but think that, instead of blaming judges for having legislated, he should blame them for the timid, narrow, and piecemeal manner in which they have legislated, and for legislating under cover of vague and indeterminate phrases....

CHAPTER 2

Finally, similar descriptions of the role of courts in our regulatory state come from judges of the Supreme Court of Canada as well as other courts. For example, according to Justice LeBel of the Supreme Court of Canada, “courts play a key role in a democracy.” Alberta’s former Chief Justice stated that “what happens in the courthouse has a profound impact upon what happens in the community. And when I say ‘community,’ I am not just referring [to] the legal community, but rather the community at large.” Similarly, according to the Chief Justice of Canada: “Judges give effect to our laws and give meaning to our rights and duties as Canadians. Courts offer a venue for the peaceful resolution of disputes, and for the reasoned and dispassionate discussion of our most pressing social issues.” This “discussion” includes reviewing the law in light of current societal expectations. Again according to the Chief Justice of Canada:

“Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country”. It is implicit in this duty that the courts will, from time to time, take a fresh look at the common law and re-evaluate its consistency with evolving societal expectations through the lens of Charter values.


AN "ESSENTIAL CONDITION OF DEMOCRACY"\textsuperscript{56}

So where does all of this leave us? Taken together, the previous historic, academic and judicial discussions, in sum, clearly see a dual role for courts, which is to provide a robust retrospectively-looking public dispute resolution system, as well as to create a predicable, accessible and just prospectively-looking common law-based regulatory regime. As such, superior courts clearly play a central regulatory role in rule-of-law-based democracies. They have done so for some time now. For example, when referring to the development of the modern courts in England after the passing of the \textit{Judicature Acts} of 1873-1875 and into the 20\textsuperscript{th} century, R. M. Jackson argued that the "growth and expansion of the King's Courts was doubtless an excellent thing for the building of a uniform law and standard of justice."\textsuperscript{57} Similarly, in this country, courts provide an adjudication tool that has played and continues to play an "instrumental" role in the "historical development of Canada" and in its "economic growth"\textsuperscript{58} and that, therefore, continues to be "an essential component of our democratic form of

\textsuperscript{56} See \textit{infra} note 60 and accompanying text.

\textsuperscript{57} J. R. Spencer, ed., \textit{Jackson's Machinery of Justice} (Cambridge: Cambridge University Press, 1989) at 8. At the same time, however, Jackson does acknowledge that uniformity of courts in England did come potentially at the price of "competing courts which were perhaps more suitable for poor litigants and small cases." \textit{Ibid.}

\textsuperscript{58} M. H. Ogilvie, "Recent Developments in Canadian Law: Legal History" (1987) 19 Ottawa L. Rev. 225 at 237, 239.
CHAPTER 2

government.”59 Again according to Chief Justice Beverley McLachlin (when characterizing the role of courts in the democratic process):

[C]ourts are seen as ways of compensating for the weaknesses of electoral decision-making and contributing to deliberative democracy by providing a forum where citizens can test laws for conformity to the fundamental values upon which the society is premised — the shared commitments and values that constitute the deeper community constitutional morality.... These values may be at risk of being overlooked or overridden in the short-term perspective of elected legislators. Yet they are fundamental to deliberative democracy, the goal of which is decisions that best represent the interests of the community as [a] whole. Independent courts thus emerge as an essential condition of democracy.60

Procedures by which courts act as an “essential condition of democracy” create power at both the retrospective and prospective levels of the judicial role.

As I have stated elsewhere, when speaking about the specific tools and impacts of civil procedure (domestically and internationally):

Civil procedure is, in the end, about power. It is about power — albeit often retrospectively — to regulate individual and corporate behaviour. It is about power to manage efficiently and resolve expectations, transactions, and disputes. And, ultimately, it is about power to access meaningful substantive rights and remedies in a fair and fulsome way. In the context of globalization and international human rights, far from merely being a tool of parochial domestic process, civil

59 Wayne D. Brazil, “Hosting Mediations as a Representative of the System of Civil Justice” (2007) 22 Ohio St. J. Disp. Resol. 227 at 241. For comments that these progressive values were more present in American than in Canadian courts in the 1800s and early 1900s, see Ogilvie, “Recent Developments in Canadian Law: Legal History”, supra note 58 at 250-251. See also Bogart, Courts and Country, supra note 3. Regardless, the influence of the courts on the development of economic and social relations in Canada, particularly over the past 25 years, is undeniable.

60 Rt. Hon. Beverley McLachlin, P.C., “Judges in a Multicultural Society” (paper presented at Chief Justice of Ontario’s Advisory Committee on Professionalism, First Colloquium on the Legal Profession, “Inaugural Colloquium on the Legal Profession”, 20 October 2003, Faculty of Law, University of Western Ontario) at 3-5-3-6, online: LSUC <http://www.lsuc.on.ca/media/mclachlin_judges_multicultura_society.pdf>. For a further discussion of deliberative democracy, see e.g. Habermas, Between Facts and Norms, supra n. 23.
procedure has become a gatekeeper in this era of modern commerce and social intercourse: a gatekeeper to the access of meaningful justice — through the protection and/or the recognition of basic rights and liberties — for parties involved in civil matters with global contacts.61

There is no doubt, given the challenges posed by the realities of the cost and inaccessibility of modern superior courts, that the procedural power at stake here often militates in favour of parties who already enjoy a power advantage in society (financial or otherwise). In this sense, the courts can be seen as tools that simply distribute power to power. While the justice system is becoming increasingly inaccessible to ordinary people for several reasons, the primary barriers largely stem from the significant costs of the court process as well as, often, from the financial inequalities of potential users of the system. These challenges, as mentioned earlier, provide significant justifications for the privatization movement discussed in the following chapter and again in chapter 6. However, as I discuss further later on,62 the answer is not simply always to acquiesce to (or indeed encourage) the current privatization trajectory (as we currently do). Doing so potentially further aggravates imbalances of power by simply taking the imbalances that exist in the public sphere and shifting them behind closed doors to unregulated private venues.63 Parties will typically retain the choice to make those moves to the private, which is sometimes a good thing.


62 See e.g. cc. 7-8.

63 For an earlier comment on this move to the private, see Trevor C. W. Farrow, “The rule of law in developing countries is not just about courts” 26:31 The Lawyers Weekly (15 December 2006) 11.
However, we need a balance. Because, as I will also argue, there are many disputes for which the court system, guided by fair procedures administered under the watchful eye of the public, is more appropriate for redressing power imbalances and resulting injustices that can have far-reaching implications for disputants as well as the wider community. Privatization, therefore, does not always flatten power imbalances. In fact, in some cases, like in the Dealership case that I will discuss further later on, it can aggravate them.

In addition to power issues between litigants, often – but not exclusively – seen most sharply at the dispute resolution level of the court’s operations (either by parties having less money or inadequate representation, or simply by being excluded altogether because of cost or other access issues that I discuss further later on in this project), there is another form of power at stake here, this time at play largely at the prospective, societal regulation level. This is a shared institutional power along the lines of what I earlier identified as the power for citizens to “access meaningful justice”, or put differently, what the Chief Justice of Canada identified as the court’s role in “contributing to deliberative democracy by providing a forum where citizens can test laws for conformity to the fundamental values upon which the society is premised – the shared commitments and values that constitute the deeper community constitutional morality...”

---

64 For a useful discussion of institutional power and process, see Habermas, *Between Facts and Norms*, supra note 23 at § 8.3.1, p. 363.


What I am talking about here, at heart, is the court’s democratic institutional role, or what makes the court, according to the Chief Justice of Canada, “an essential condition of democracy.”

Liberal democratic theorists and legal positivists – clearly influenced by rights-based enlightenment sensibilities but firmly entrenched in modern, robust, rule-of-law values (values that I discuss further below) – take the view that the role of law, including the law developed by courts, is essentially to frame a landscape in which fair contests of rights can take place. Formal institutional structures, including laws and courts, are put in place to regulate the relationships and distributional choices of citizens in social life. For example, according to Joseph Raz:

The law provides the general framework within which social life takes place. It is a system for guiding behavior and for settling disputes which claims supreme authority to interfere in any kind of activity. It also regularly either supports or restricts the creation and practice of other norms in the society. By making these claims the law claims to provide the general framework for the conduct of all aspects of social life and sets itself up as the supreme guardian of society.

Similarly, according to Rawls, “the law defines the basic structure within which the pursuit of all other activities takes place.”

Important to this liberal vision of the role of law and courts is a requirement that, subject to some basic procedural and constitutional requirements (discussed

---

67 Ibid.


CHAPTER 2

below), citizens must be free to pursue their own notion of the good life. Courts –
premised on a procedural architecture that acts as a precondition, or gatekeeper, to
substantive justice – are largely there to provide citizens with the procedural tools
with which to realize their substantive rights and interests. The state, which
directly or indirectly appoints judges and operates (although importantly does not
control) the courts is neutral vis-à-vis the parties’ substantive claims, provided
that their claims are at least within the bounds of what the state has pre­
determined as a minimally acceptable landscape on which to participate. Beyond
that, the parties are free to conduct their affairs, pursuant to fulfilling their life
interests, in any way they choose. For example, parties are welcome to make and
contest good or bad bargains; they are not, however, welcome to make or contest
illegal ones. As such, the state, under this liberal notion of democratic
participation, prioritizes the right over – or at least as a precondition for – the
good. In the specific context of the civil justice system, citizens are free to pursue
their legal rights and interests largely unconstrained by any particular obligations
stemming from what the state might think about those rights and interests.

Intimately connected to this overall liberal premise of the system are the
substantive core values that animate that system, specifically including robust
notions of constitutionalism and the rule of law.70 These values typically

70 The concept of the “rule of law” is enshrined in Canada’s constitutional documents as an
animating principle upon which the country is founded. See Canadian Charter of Rights and
Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.),
1982, c. 11, pt. I, preamble, which provides that “...Canada is founded upon principles that
recognize the supremacy of God and the rule of law”.

34
delineate, in essence, what I described above as the “minimally acceptable landscape” on which the court process plays out. Again, courts are central to the development and maintenance of those core values. Without these core values, any amount of preference for an open – public – system would not advance the project and legitimacy of liberal democracy. What is at stake here, in essence, is what Rawls contemplates as the difference between a procedural democracy and a constitutional democracy. For Rawls, a procedural democracy is one “in which there are no constitutional limits on legislation and whatever a majority ... enacts is law, provided the appropriate procedures ... are followed.”\footnote{See Rawls, \textit{Justice as Fairness}, supra note 32 at § 44.1, p. 145.} In contrast, a constitutional democracy, according to Rawls, is one “in which law and statutes must be consistent with certain fundamental rights and liberties.”\footnote{See \textit{ibid.}}

A useful place to look for the court’s understanding and treatment of these underlying core values that animate the adjudicative elements of democracy’s “institutional ... aspect[s]”\footnote{\textit{Reference re Secession of Québec}, supra note 38 at para. 61.} is the Supreme Court of Canada’s judgment in \textit{Reference re Secession of Québec}.\footnote{\textit{Ibid.}} To contextualize the importance of these underlying values, the Court first looked at the place of democracy in our political culture. According to the Court:

\footnote{See \textit{ibid.} When thinking about Rawls’ articulation of political theory and justice, it is important to recall that his arguments are framed in the context of tiers – or levels – of justice. Specifically, he distinguished between “levels” of justice: “local”, “domestic” and “global”. He was primarily concerned with the “domestic” level of justice, which contemplated “principles applying to the basic structure of society”; and then, secondarily, with the other levels of justice. See \textit{ibid.} at § 4.2.}
61 Democracy is a fundamental value in our constitutional law and political culture.

62 The principle of democracy has always informed the design of our constitutional structure, and continues to act as an essential interpretive consideration to this day. A majority of this Court in *OPSEU v. Ontario*, [[1987] 2 S.C.R. 2] ... at p. 57, confirmed that “the basic structure of our Constitution, as established by the *Constitution Act, 1867*, contemplates the existence of certain political institutions...”[.] As is apparent from an earlier line of decisions emanating from this Court, including *Switzman v. Elbling*, [1957] S.C.R. 285, *Saumur v. City of Quebec*, [1953] 2 S.C.R. 299, *Boucher v. The King*, [1951] S.C.R. 265, and *Reference re Alberta Statutes*, [1938] S.C.R. 100, the democracy principle can best be understood as a sort of baseline against which the framers of our Constitution, and subsequently, our elected representatives under it, have always operated....

The Court then proceeded to articulate its vision of democracy’s connection to fundamental substantive goals of society. Key to this discussion is the Court’s articulation of an institutional framework – clearly including courts – that fosters the achievement of those substantive goals:

64 Democracy is not simply concerned with the process of government. On the contrary ... democracy is fundamentally connected to substantive goals.... In considering the scope and purpose of the *Charter*, the Court in *R. v. Oakes*, [1986] 1 S.C.R. 103, articulated some of the values inherent in the notion of democracy (at p. 136):

> The Court must be guided by the values and principles essential to a free and democratic society which I believe to embody ... faith in social and political institutions which enhance the participation of individuals and groups in society....

---


76 *Ibid.* at para. 64.
In order to make sense of these institutional requirements of a democratic process, the Court then proceeded to discuss at length the underlying and fundamental pre-conditional principles of the rule of law and constitutionalism:

67 The consent of the governed is a value that is basic to our understanding of a free and democratic society. Yet democracy in any real sense of the word cannot exist without the rule of law. It is the law that creates the framework within which the “sovereign will” is to be ascertained and implemented. To be accorded legitimacy, democratic institutions must rest, ultimately, on a legal foundation. That is, they must allow for the participation of, and accountability to, the people, through public institutions created under the Constitution. Equally, however, a system of government cannot survive through adherence to the law alone. A political system must also possess legitimacy, and in our political culture, that requires an interaction between the rule of law and the democratic principle. The system must be capable of reflecting the aspirations of the people. But there is more. Our law’s claim to legitimacy also rests on an appeal to moral values, many of which are imbedded in our constitutional structure. It would be a grave mistake to equate legitimacy with the “sovereign will” or majority rule alone, to the exclusion of other constitutional values.

... Constitutionalism and the Rule of Law

70 The principles of constitutionalism and the rule of law lie at the root of our system of government. The rule of law, as observed in Roncarelli v. Duplessis, [1959] S.C.R. 121, at p. 142, is “a fundamental postulate of our constitutional structure”. As we noted in the Patriation Reference, supra, at pp. 805-6, “[t]he ‘rule of law’ is a highly textured expression, importing many things which are beyond the need of these reasons to explore but conveying, for example, a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority”.[77] At its most basic level, the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs. It provides a shield for individuals from arbitrary state action.

In the *Manitoba Language Rights Reference*, [[1985] 1 S.C.R. 721] ... at pp. 747-52, this Court outlined the elements of the rule of law. We emphasized, first, that the rule of law provides that the law is supreme over the acts of both government and private persons. There is, in short, one law for all. Second, we explained, at p. 749, that “the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order”.... A third aspect of the rule of law is, as recently confirmed in the *Provincial Judges Reference*, [[1997] 3 S.C.R. 3] ... at para. 10, that “the exercise of all public power must find its ultimate source in a legal rule”. Put another way, the relationship between the state and the individual must be regulated by law. Taken together, these three considerations make up a principle of profound constitutional and political significance.  

Clearly this articulation by the Supreme Court of Canada of the constitutional and rule of law premises for Canada’s system of government is consistent with the liberal democratic model of law and courts as regulatory tools in society. With this articulation in hand, the Court then proceeded to drill deeper by discussing the specifics of the principle of “constitutionalism”,  as well as that principle’s difference from, and connection to, the “rule of law” principle:

The constitutionalism principle bears considerable similarity to the rule of law, although they are not identical. The essence of constitutionalism in Canada is embodied in s. 52(1) of the *Constitution Act, 1982*, which provides that “[t]he Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.” Simply put, the

---


79 For further, non-judicial treatments of “constitutionalism” and the fundamental norms underlying that concept, see e.g. Rawls, *Justice as Fairness: A Restatement*, supra note 32 at §44; Finnis, *Natural Law and Natural Rights*, supra note 29 at § X.4, pp. 272-273. See also generally Hart, *A Concept of Law*, 2d ed., supra note 32 at c. vi.
constitutinalism principle requires that all government action comply with the Constitution. The rule of law principle requires that all government action must comply with the law, including the Constitution. This Court has noted on several occasions that with the adoption of the Charter, the Canadian system of government was transformed to a significant extent from a system of Parliamentary supremacy to one of constitutional supremacy.

78 It might be objected ... that constitutionalism is ... incompatible with democratic government. This would be an erroneous view. Constitutionalism facilitates – indeed, makes possible – a democratic political system by creating an orderly framework within which people may make political decisions. Viewed correctly, constitutionalism and the rule of law are not in conflict with democracy; rather, they are essential to it.

A key element of the Supreme Court's treatment of the rule of law, above, is its recognition that the rule of law exists as a necessary precondition to the institution of democracy. Again, we see the public court system's central role in democratic governance. Further, in terms of the elements of the rule of law, the court recognized that it is "highly textured" and includes "many things". For the purpose of this project, which is focused on process, several of those "many things" include that legal rules are "known" and that the law "vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs." Without publicity of those rules, through published laws and open judicial processes, key aspects of the rule of law are missing.

---

80 Reference re Secession of Québec, supra note 38 at paras. 72 and 78.

81 Discussed further infra at pt. 3.
A different treatment of the principle of the rule of law comes from John Finnis. Without needing to adopt his modern natural law theory, I do find that his multi-faceted articulation of the concept of the rule of law is particularly clear as well as particularly instructive for the purpose of this project. Finnis, like the Supreme Court of Canada, acknowledges that there are a number of aspects to the concept. According to Finnis, a legal system “exemplifies” the rule of law to the extent that:

- “its rules are prospective, not retroactive,” and “are not in any other way impossible to comply with”;
- “its rules are promulgated,” “clear,” and “coherent one with another”;
- “its rules are sufficiently stable to allow people to be guided by their knowledge of the content of the rules”;
- “the making of decrees and orders applicable to relatively limited situations is guided by rules that are promulgated, clear, stable, and relatively general”;
- “those people who have authority to make, administer, and apply the rules in an official capacity” are “accountable for their compliance with rules applicable to their performance” and “do actually administer the law consistently and in accordance with its tenor”;
- its judiciary is “independent”;
- it maintains an “openness of court proceedings”;
- its courts have “the power … to review the proceedings and actions not only of other courts but of most other classes of official”; and
COURTS AND DEMOCRACY

• its courts are accessible “to all, including the poor.”

There is clearly overlap between the treatment of the rule of law by the Supreme Court of Canada and the treatment by Finnis. Again, for modern civil justice systems, specific attention must be paid to Finnis’ articulation that the rule of law requires that a society:

• has rules that are “clear”, “prospective” and not “retroactive”;

• has rules that “allow people to be guided by their knowledge of … the rules”;

• maintains an “openness of court proceeding”; and

82 Finnis, *Natural Law and Natural Rights*, supra note 29 at § X.4, pp. 270-271. In Finnis’ discussion, he identifies “eight desiderata” (elements) of the rule of law, together with “further desiderata” derived from “historical experience”. See *ibid*. The set of considerations that I have cited above from Finnis collapses the “eight” and “historical” desiderata into one list.


CHAPTER 2

- has courts that are “accessible”.  
  
While each of these aspects of the rule of law identified by Finnis are distinct elements, they do have a common thread that joins them all: publicity through requirements of openness, knowledge and accessibility. It is this notion of publicity that is at the heart of this project. Put differently, it is the idea that, by privatizing significant sections of the adjudicative function, we are systematically – and knowingly – treading on key rule of law protections and thereby are at risk of impoverishing a significant aspect of the democratic process.

I will shortly turn to the open nature of the court system. Before doing so, however, it is important to recognize that the rights-based sense of liberalism that I have been discussing – what Taylor refers to as the “popular” or “dominant” sense of liberalism – and the resulting role for law and courts contemplated by that vision (that clearly plays itself out in our modern court system today) is certainly not the only story of law and the judicial process. For example, both forerunners and beneficiaries (of all stripes) of Marx have taken issue, in

83 Finnis, Natural Law and Natural Rights, supra note 29 at § X.4, pp. 270-271.


86 See e.g. Max Horkheimer and Theodor W. Adorno, Dialectic of Enlightenment, trans. by John Cumming (London and New York: Verso, 1979); Herbert Marcuse, Eros and Civilization

42
various ways and to varying degrees, with the “illusion” of law’s basis in individual rights, liberties, freedom and “free will”. Given the inequities – natural, financial, sociological, historical, etc. – that exist between individuals and groups in pluralistic societies, the idea that a procedural architecture that is largely agnostic to the values that animate its participants or the outcomes it produces has the potential to fly in the face of a sense of justice that sees substantive equality as its ultimate end game. As Rousseau argued,

[I]nequality ... becomes stable and legitimate by the establishment of property and laws.... This is enough to determine what we ought to think, in this respect, of the kind of inequality that prevails in all civilized nations, because it is obviously contrary to the law of nature ... for a handful of people to wallow in luxury while the starving multitude lacks the necessities of life.

Communitarians, for example, reviving Aristotle’s sense of the good life in the context of what counts as important for citizens in their deliberations about life choices at the personal and the political level, have pushed the idea that democracy must contemplate more than a procedural shell of justice if it is to (London: Sphere Books, 1969). The liberal conception of law has also been robustly critiqued by others, including critical legal studies and critical race theory scholars. See e.g. Duncan Kennedy, A Critique of Adjudication (fin de siècle), supra note 48; Richard Delgado and Jean Stefancic, Critical Race Theory: An Introduction (New York and London: New York University Press, 2001).


Rousseau, Discourse on the Origin and Basis of Inequality Among Men, supra note 85 at 200-201.
make sense of what is important to people, families and communities living in modern societies. Personal and group notions of the good, on these readings, do play a determining role of who we are and therefore must take a front seat in how we interact and govern ourselves through modern democratic institutions. In this sense, courts provide a place for the citizenry to debate what is most important to them as situated individuals, or – borrowing a phrase from the Chief Justice of Canada – a place “where citizens can test laws for conformity to … the shared commitments and values that constitute the deeper community constitutional morality.”

For the purpose of this discussion of the court’s regulatory function as a central tool of liberal democracy, perhaps the most useful counterpoise to the Rawlsian notion of rights-based liberal democracy is Habermas’ treatment of deliberative democracy. As will be seen, these two thinkers clearly come at the project of understanding the process of democracy quite differently. However, they are both – in different ways – sympathetic to the liberal tradition of taking

---


the role and moral agency of individuals in society seriously. Both thinkers, influenced by Locke, Kant and others, contemplate an empowered citizenry with a significant rational capacity for moral deliberation. In this way, as Michelman has quipped, the views of Rawls and Habermas – both engaged in a project of “liberal justification of politics” – are not radically different, with the differences that do exist being described as something akin to “family quarrels” as opposed to out-and-out war.

In Habermas, we clearly see an understanding of judicial institutions, as tools of democracy – or as what the Chief Justice of Canada contemplated by referring to the courts’ “ways of ... contributing to deliberative democracy” by offering “a venue for ... the reasoned and dispassionate discussion of our most pressing social issues” – come alive not simply through the provision of value neutral laws and procedures, but rather by facilitating a discursive environment in which citizens participate in the making of the laws that regulate their lives. The citizenry, on this account, is intimately connected to the law making function. As such, through this form of institutionally provided deliberative participation, the law derives its legitimacy. According to Habermas, through the “procedure of lawmaking” – including the processes of civil dispute resolution – law receives its

“full normative sense” and its “legitimacy”;95 and further, this proceduralist sense of law and legal institutions therefore “privileges the communicative presuppositions and procedural conditions of democratic opinion- and will-formation as the sole source of legitimation.”96 Legitimacy, simply put, comes from the fact that parties to a proceeding move from simple disputants to agents of law and law making. Objects and subjects of law and legal process now also become its creators. According to Habermas, “the modern legal order can draw its legitimacy only from the idea of self-determination: citizens should always be able to understand themselves also as authors of the law to which they are subject as addressees…. [T]he legal community constitutes itself not by way of social contract but on the basis of a discursively achieved agreement.”97 Similarly, again according to Habermas,

Law can be preserved as legitimate only if enfranchised citizens switch from the role of private legal subjects and take the perspective of participants who are engaged in the process of reaching understanding about the rules for their life in common…. [T]he structures of a vibrant civil society and an unsubverted political public sphere must bear a good portion of the normative expectations,

95 Habermas, Between Facts and Norms, supra note 23 at § 4.1.1, p. 135 [emphasis omitted].

96 Ibid. at “Postscript” (1994), § 1, p. 450. See also Jürgen Habermas, “Paradigms of Law” (1996) 17 Cardozo L. Rev. 771; Habermas, Between Facts and Norms, supra note 23 at c. 9 (“Paradigms of Law”).

especially the burden of a normatively expected democratic genesis of law.\textsuperscript{98}

As such, courts – as public law-making and applying tools – matter, not simply to know what the law is or to make sure it is being applied fairly, but as central features of public norm generation and legitimation, which guide the formation and understanding of relationships in pluralistic and democratic societies.

These generalized accounts of law and legal process\textsuperscript{99} – rights-based and deliberative – clearly see differently on the role of the individual and individual rights vis-à-vis each other and the collective. Asking citizens to become object, subject and author of law – as a legitimating process – allows for a grander vision of citizenship than the one championed by either “night-watchman” libertarians\textsuperscript{100} or even robust, rights-based democrats.\textsuperscript{101} However, notwithstanding their

\textsuperscript{98} Habermas, \textit{Between Facts and Norms}, supra note 23 at “Postscript” (1994), § 5, p. 461. See also Jürgen Habermas, \textit{Legitimation Crisis}, trans. by Thomas McCarthy (Boston: Beacon Press, 1975) at 98-102. For a further discussion of Habermas, in the context of my discussion of access to justice, see infra c. 8.

\textsuperscript{99} Of course much more could be said, and has been said, about liberalism and its various critics. For various accounts, see further \textit{e.g.} Rawls, supra note 32; Dworkin, supra note 32. Additionally, see Will Kymlicka, \textit{Liberalism, Community and Culture} (Oxford: Clarendon Press, 1989). There are many varied sources of historical roots of liberalism. See \textit{e.g.} Locke, supra note 31; Smith, infra note 82. For Marxist and Continental critiques and treatments of liberalism, see \textit{e.g.} Marx, supra note 87; Horkheimer and Adorno, supra note 86; Marcuse, supra note 86. For a modern natural law critique, see \textit{e.g.} Finnis, supra note 29. For a discourse theory critique, see further \textit{e.g.} Habermas, supra note 23. And for communitarian critiques of liberalism and its typical prioritizations of the right over the good, see \textit{e.g.} Sandel, supra note 89 and accompanying text. Although a comprehensive treatment of liberalism and its critics is not the focus of this project, because this project does take issue with current challenges to and changes within the public civil justice system, it is important to keep in mind the normative political underpinnings of that system. See further George Pavlich, “The Art of Critique or How Not to be Governed Thus” in Gary Wickham and George Pavlich, eds., \textit{Rethinking Law, Society and Governance: Foucault’s Bequest} (Oxford, Portland: Hart Publishing, 2001) c. 9.

\textsuperscript{100} See \textit{e.g.} Robert Nozick, \textit{Anarchy, State, and Utopia} (New York: Basic Books, 1974) 25, 26-27.

\textsuperscript{101} For a useful discussion of the differences between these political theories, see Habermas, \textit{Between Facts and Norms}, supra note 32 at Postscript (1994), § 3, p. 457.
differences, these two accounts do share a sense, albeit in clearly different ways, that courts are key sites for law making in modern democratic societies. Citizens claim, protect, deliberate about and/or create rights and law that, in turn, regulate their life choices and activities. Limiting, curtailing or impoverishing this democratic tool through the tools of privatization (which I take up in the next chapter), again on either account, will therefore clearly have dramatic repercussions for the ways in which we regulate our individual and collective wellbeing. Doing so will also, again on both accounts, have implications for the system’s legitimacy. And while the purpose of this project is not ultimately to provide an account or defence of democracy, linking the civil justice system to the core of the democratic process (on any account) brings into sharp relief what is at stake when I talk about the privatization of the civil justice system as a regulatory tool of democracy.

3. OPEN AND PUBLIC PROCESS

OPEN COURTS

As Chief Justice Beverley McLachlin recently stated, “justice is a process.” Without meaningful process, infused with core constitutional and rule of law values, there is little hope of any kind of meaningful participation or sustained justice. In this sense, process creates order, which – as the Supreme

102 Rt. Hon. Beverley McLachlin, P.C., “Lawyers’ Professional Obligations, Public Service and Pro Bono Work (remarks made during a question-and-answer session following her presentation at the University of Alberta, Faculty of Law, 19 September 2008), available online: University of Alberta
<http://www.law.ualberta.ca/docs/19sep08%20University%20of%20Alberta%20Faculty%20of%20Law%20English.pdf>.
Court of Canada has acknowledged – is a “precondition” to justice. Various levels of procedure facilitate the operation of the public court system. However, key to this procedural regime for the purpose of this project – and, as we saw, central to any notion of the rule of law – is its open and public nature. In addition to the general rules and procedures that guide lawyers and parties through all steps of the court-based dispute resolution process, orders of the court are entered in the entry book of a provincial registrar, precedents are published and “all court hearings shall be open to the public.” In-line with the spirit of openness of these provisions, any “person is entitled to see” the “list maintained by a court of civil proceedings commenced or judgments entered” as well as “any document filed in a civil proceeding in a court” (subject only to limited exceptions). Put simply, when speaking about the civil justice system in Canada, the court-based system is an open, publically accessible system. As Archibald J., Killeen and


104 See e.g. Ontario Courts of Justice Act, supra note 11; Ontario Rules of Civil Procedure, supra note 14.

105 The term “order” typically includes “orders” and “judgments”. See e.g. Ontario Rules of Civil Procedure, supra note 14 at r. 1.03(1) at “order”.

106 See e.g. ibid. at r. 59.05.

107 For a useful discussion of the history of reported precedents and Bentham’s influence on that system, see Neil Duxbury, The Nature and Authority of Precedent (Cambridge and New York: Cambridge University Press, 2008) 43, n. 57 and accompanying text. See a further discussion of Bentham and “judge-made” law, infra at note 51 and accompanying text.

108 See e.g. Ontario Courts of Justice Act, supra note 11 at s. 135(1) (subject to the limited exceptions provided for in s. 135(2)).

109 See e.g. ibid. at s. 137.
Morton have commented, the “general rule provides for full access to and
disclosure and publication of court proceedings ... coverture is the exception and
openness the rule.”

The importance of the requirement of openness of the public court system
cannot be overstated. As Justice Fish of the Supreme Court of Canada stated in a
2005 ruling, “What goes on in the courts ought ... to be, and manifestly is, of
central concern to Canadians.” Further, according to Justice Iacobucci also of
the Supreme Court of Canada:

In our country, courts are the institutions generally chosen to resolve
legal disputes as best they can through the application of legal
principles to the facts of the case involved. One of the underlying
principles of the judicial process is public openness, both in the
proceedings of the dispute, and in the material that is relevant to its
resolution.... The importance of public and media access to the courts
cannot be understated, as this access is the method by which the
judicial process is scrutinized and criticized. Because it is essential to
the administration of justice that justice is done and is seen to be done,
such public scrutiny is fundamental.

These elements of openness and access (through the media) were raised in
the Supreme Court of Canada’s judgment in Canadian Broadcasting Corp. v. New
Brunswick (Attorney General) (Re R. v. Carson). The case engaged s. 2(b) of

---


112 Sierra Club of Canada v. Canada (Minister of Finance), [2002] 2 S.C.R. 522 at paras. 1, 52, Iacobucci J. (citations omitted). See also ibid at para. 36.

the Charter, which provides that: “Everyone has the following fundamental freedoms:... (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication...”.

Justice La Forest extensively discussed the elements of openness and access in the following very lengthy but foundational series of passages from the Supreme Court’s judgment in that case:

17 This appeal engages two essential issues in relation to s. 2(b). The first is integrally linked to the concept of representative democracy and the corresponding importance of public scrutiny of the courts. It involves the scope of public entitlement to have access to these courts and to obtain information pertaining to court proceedings. Any such entitlement raises the further question: the extent to which protection is afforded to listeners in addition to speakers by freedom of expression. The second issue relates to the first, in so far as it recognizes that not all members of the public have the opportunity to attend court proceedings and will, therefore, rely on the media to inform them. Thus, the second issue is whether freedom of the press protects the gathering and dissemination of information about the courts by members of the media. In particular, it involves recognition of the integral role played by the media in the process of informing the public. Both of these issues invoke the democratic function of public criticism of the courts, which depends upon an informed public; in turn, both relate to the principle of openness of the courts.

To support its approach to the importance of openness, the Court went on to discuss some key 19th century theoretical underpinnings of a free press’ involvement in the open court process:

114 Canadian Charter of Rights and Freedoms, supra note 70 at s. 2(b).

CHAPTER 2

18 The freedom of individuals to discuss information about the institutions of government, their policies and practices, is crucial to any notion of democratic rule. The liberty to criticize and express dissentient views has long been thought to be a safeguard against state tyranny and corruption. James Mill put it this way:

So true it is, however, that the discontent of the people is the only means of removing the defects of vicious governments, that the freedom of the press, the main instrument of creating discontent, is, in all civilized countries, among all but the advocates of misgovernment, regarded as an indispensable security, and the greatest safeguard of the interests of mankind.


With this historical and theoretical underpinning in hand, the Court then proceeded to review some of the central occasions on which it has considered the issues of a free press and open courts, together with the direct connection of open courts to democratic rule:

19 This Court has had occasion to discuss the freedom to criticize encompassed in freedom of expression and its relation to the


If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind.... [T]he peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.

\[\text{Ibid. at 142-143.}\]
democratic process in *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, where Cory J. stated that it is difficult to think of a guaranteed right more important to a democratic society than freedom of expression. At page 1336, he declared:

> Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasized.

20 It cannot be disputed that the courts ... play a critical role in any democracy....

21 The concept of open courts is deeply embedded in the common law tradition. The principle was described in the early English case of *Scott v. Scott*, [1913] A.C. 419 (H.L.). A passage from the reasons given by Lord Shaw of Dunfermline is worthy of reproduction for its precise articulation of what underlies the principle. He stated at p. 477:

> It moves Bentham over and over again. “In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice.” “Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial.” “The security of securities is publicity.” But amongst historians the grave and enlightened verdict of Hallam, in which he ranks the publicity of judicial proceedings even higher than the rights of Parliament as a guarantee of public security, is not likely to be forgotten: “Civil liberty in this kingdom has two direct guarantees; the open administration of justice according to known laws truly interpreted, and fair constructions of evidence; and the right of Parliament, without let or interruption, to inquire into, and obtain redress of, public grievances. Of these, the first is by far the most indispensable; nor can the subjects of any State be reckoned to enjoy a real freedom, where this condition is not found both in its judicial institutions and in their constant exercise.”
The importance of ensuring that justice be done openly has not only survived: it has now become “one of the hallmarks of a democratic society”; see *Re Southam Inc. and The Queen (No.1)* (1983), 41 O.R. (2d) 113 (C.A.), at p. 119. The open court principle, seen as “the very soul of justice” and the “security of securities”, acts as a guarantee that justice is administered in a non-arbitrary manner, according to the rule of law. In *Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175, openness was held to be the rule, covertness the exception, thereby fostering public confidence in the integrity of the court system and understanding of the administration of justice.\(^{117}\)

With the importance of the open court process firmly linked to the process of democracy, the Court returned to the link between open courts and meaningful public informational access to those courts, primarily (and realistically) through the press:

23 The principle of open courts is inextricably tied to the rights guaranteed by s. 2(b) [of the Charter]. Openness permits public access to information about the courts, which in turn permits the public to discuss and put forward opinions and criticisms of court practices and proceedings. While the freedom to express ideas and opinions about the operation of the courts is clearly within the ambit of the freedom guaranteed by s. 2(b), so too is the right of members of the public to obtain information about the courts in the first place. Cory J. in *Edmonton Journal* described the equally important aspect of freedom of expression that protects listeners as well as speakers and ensures that this right to information about the courts is real and not illusory. At pages 1339-40, he states:

> [A]s listeners and readers, members of the public have a right to information pertaining to public institutions and particularly the courts. Here the press plays a fundamentally important role. It is exceedingly difficult for many, if not most, people to attend a court trial. Neither working couples nor mothers or fathers house-
bound with young children, would find it possible to attend court. Those who cannot attend rely in large measure upon the press to inform them about court proceedings – the nature of the evidence that was called, the arguments presented, the comments made by the trial judge – in order to know not only what rights they may have, but how their problems might be dealt with in court. It is only through the press that most individuals can really learn of what is transpiring in the courts. They as “listeners” or readers have a right to receive this information. Only then can they make an assessment of the institution. Discussion of court cases and constructive criticism of court proceedings is dependent upon the receipt by the public of information as to what transpired in court. Practically speaking, this information can only be obtained from the newspapers or other media.

24 That the right of the public to information relating to court proceedings, and the corollary right to put forward opinions pertaining to the courts, depend on the freedom of the press to transmit this information is fundamental to an understanding of the importance of that freedom. The full and fair discussion of public institutions, which is vital to any democracy, is the raison d’être of the s. 2(b) guarantees. Debate in the public domain is predicated on an informed public, which is in turn reliant upon a free and vigorous press.118

Many of the cases involved in the various publication ban judgments of the Supreme Court of Canada, contemplated above,119 involved criminal proceedings. However, as the Ontario Superior Court of Justice recently confirmed, “the principles expressed apply to all civil and criminal proceedings which involve restrictions on freedom of expression and freedom of the press.”120 Similarly,


according to Justice Bastarache of the Supreme Court of Canada, the open court principle “is clearly a broad principle of general application to all judicial proceedings.”

From the Supreme Court’s extensive guidance, we can derive several important elements to and/or justifications for the importance of the open court principle, including: the “pursuit of truth”; the “integrity of judicial proceedings”; and the principle that “justice is done and that it is seen to be done.” Similarly, it is important to note, as Justice Iacobucci stated in *Sierra Club of Canada*, that public access to the courts “is the method by which the judicial process is scrutinized and criticized.” This, in turn – as articulated for example by James Mill – helps society in its vigilance against “the defects of vicious governments”, or similarly, as argued by John Stuart Mill, against

---


121 *Named Person v. Vancouver Sun*, supra note 52 at para. 34.

122 For useful articulations of the various purposes of the open court principle, see *Named Person v. Vancouver Sun*, *ibid.* at paras. 31-37, Bastarache J. and 81-88, LeBel J. For a further and useful background discussion of “fair and open” trials, see John Rawls, *A Theory of Justice*, supra note 32 at §38, p. 210.

123 *Named Person v. Vancouver Sun*, *supra* note 52 at 82-84, LeBel J. For a further general discussion, see *Ontario Superior Court Practice*, 2008 ed., *supra* note 110 at 288 (“Practice Notes”, §1).

124 *Sierra Club of Canada v. Canada (Minister of Finance)*, supra note 112 at para. 52.

COURTS AND DEMOCRACY

"corrupt or tyrannical government." 126 This sensibility, of course, extends to potential defects in judicial proceedings. 127 The vehicle by which this dissemination of information becomes a reality is, as these various cases also recognize, the press. That is why the freedom of the press in these matters is so intimately connected to the notion of an open court process, 128 which, as I discussed earlier, is in turn a central part of the rule of law.

Further, and equally important for purposes of this discussion, is the importance of the open court principle vis-à-vis the law-recognizing and law-making aspects of the judicial process (its norm-creation function). As we’ve seen, courts resolve disputes by determining what the law is – or what the rights or equities are – in a given case. This judicial norm-applying function is of immediate concern to the interested parties in any given case. Courts also determine what the law, rights and equities might be in future cases for future parties. This potentially norm-creating function is not of limited but rather of general concern to all citizens in a democracy. It follows then, as Justice Cory recognized, that citizens have a “right to information pertaining to public institutions and particularly the courts” in order “to know not only what rights


127 See e.g. La Forest J. in Canadian Broadcasting Corp. v. New Brunswick (Attorney General) (Re R. v. Carson), supra note 110 at para. 22 (references omitted).

128 As de Tocqueville also noted, “freedom of the press … modifies mores as well as laws.” Alexis de Tocqueville, Democracy in America, supra note 42 at 180. He defines “mores” as covering “the sum of the moral and intellectual dispositions of men in society.” Ibid. at 305, n. 8. For a further general discussion of the principle of a free press and its place in American history, see Ibid. at 180-188.
they may have, but how their problems might be dealt with in court.”

Similarly, as summarized by John Godfrey Spragge (when advocating — before becoming Chancellor of Upper Canada and later the Chief Justice — for an early court of equity in Upper Canada), the public court system, which is “built upon precedent and authority”, is established by the state “so that a man may, with reasonable certainty, know what the law is, and govern himself accordingly”.

**Legitimacy**

To the extent that the legitimacy of the system is bound up in the citizenry’s ability to participate, openness and the public nature of the deliberative process is again key to the process. According to Habermas,

> [T]he public sphere is not conceived simply as the back room of the parliamentary complex, but as the impulse-generating periphery that surrounds the political center: in cultivating normative reasons, it affects all parts of the political system.… [A] publicly mobilized critique of judicial decisions imposes more-intense justificatory obligations on a judiciary engaged in further developing the law.

While certainly in favour of protecting the “intimate sphere” from “intrusive forces and the critical eyes of strangers”, for Habermas, to “talk about something is not necessarily the same as meddling in another’s affairs”; and further, “not

---


131 Habermas, *Between Facts and Norms*, supra note 23 at § 9.3.2, p. 442 [emphasis omitted].
everything reserved to the decisions of private persons is withdrawn from public thematization and protected from criticism.”\textsuperscript{132} Rather, for Habermas, “every affair in need of political regulation should be publically discussed, though not every legitimate object of public discussion will in fact be politically regulated.”\textsuperscript{133} These are not uncontroversial statements. The more sympathetic one is to the libertarian branches of the liberal family tree, the less sympathetic one will be with Habermas’ view of deliberation that treads into the private.\textsuperscript{134} However, assuming even a minimum level of citizen participation in the norm-generating aspect of the judicial process, if the adjudicative process is increasingly privatized, then – taking a phrase from Michelman – the “law that people would regularly confront would increasingly be law with whose creation they have had nothing whatsoever to do.”\textsuperscript{135}

While the legitimacy of the retrospective – dispute resolution – aspect of the court’s function is increased from its openness, clearly seeing courts as public venues for political debate and deliberation is fundamental to the legitimacy of the prospective – societal regulation – function of the court in democratic societies. Both Rawlsian and Habermasian notions of democratic judicial process contemplate such openness. Similarly, from the court’s perspective, as recognized

\footnotesize{
\begin{enumerate}
\item Ibid. at §7.2.2, p. 313.
\item Ibid.
\item For a much fuller treatment of Habermas’ use of and distinction between the “public sphere” and the “private sphere” and their roles in deliberative politics and his procedural concept of democracy, see e.g. \textit{ibid.} at c. 7.
\item Michelman, “W(h)ither the Constitution?”, \textit{supra} note 92.
\end{enumerate}
}
by LeBel J., “stress has been laid on the relationship between open courts and the promotion of democracy.” Open information about the courts is, therefore, clearly tied to the court’s legitimacy and norm-creation function. As Justice Bastarache remarked:

Information is at the heart of any legal system ... lawyers and witnesses present information to courts; juries and judges make decisions based on that information; and those decisions, reported by the popular and legal press, make up the basis of the law in future cases. In Canada, as in any truly democratic society, the courts are expected to be open, and information is expected to be available to the public.

An open court system, animated by strong constitutional and rule of law values, is clearly what is contemplated and promised by modern Canadian judicature and courts of justice legislation. Such a court system plays, as the Supreme Court of Canada has acknowledged, a key role in realizing a form of democracy that is “fundamentally connected to substantive goals” including “the promotion of self-government through the democratic process.” It is also the justice system that facilitates democracy’s ability to “accommodate[] cultural and group identities”. To the extent that the civil justice system is being actively privatized by modern court reform initiatives, as I discuss next in the following

---

136 Named Person v. Vancouver Sun, supra note 52 at para. 85.
137 Ibid. at para. 1.
138 See e.g. Alberta’s Judicature Act, supra note 11.
139 See e.g. Ontario’s Courts of Justice Act, supra note 11; Alberta’s Court of Queen’s Bench Act, supra note 11.
140 Reference re Secession of Québec, supra note 38 at para. 64 (reference omitted).
141 Ibid. (reference omitted).
chapter, its role and legitimacy as an “essential condition of democracy”\textsuperscript{142} get called into question. Democracy itself, in turn, is potentially impoverished. That is what is at stake in this discussion.

\textsuperscript{142} See \textit{supra} note 60.
CHAPTER 3
PRIVATIZATION OF CIVIL COURTS

1. PRIVATIZATION

BACKGROUND

Privatization, broadly defined, is a shift from the public to the private. In the context of public services, privatization generally speaking involves shifting the provision of government – public – services or assets to various non-state entities. The literature on privatization “is often confusing”\(^1\) given the broad scope of issues, interests, problems and solutions that are potentially at stake when it comes to talking about privatization. This confusion often stems from definitional debates. Commentators variously conceive of “privatization” as “contracting for services”, “denationalization”, “commercialization”, “marketization”, “asset sale”, “managed competition”, and other processes.\(^2\)

As a general starting point, to “privatize”, according to Savas, means “to rely more on the private institutions of society and less on government to satisfy people’s needs.”\(^3\) According to Brodie and Trimble, “privatization … makes the claim that services and assets initially created or regulated in and through the public service are better delivered and maintained through market mechanisms

---


3 Savas, “A Taxonomy of Privatization Strategies”, supra note 1 at 344-345.
PRIVATIZATION OF CIVIL COURTS

and the price system.”

Similarly, according to Savas, privatization is “the act of increasing the role of the private sector, or decreasing the role of government, in an activity or in the ownership of assets.” It has also been defined as: a “process aimed at shifting functions and responsibilities, in whole or in part, from the government to the private sector”; “privatiz[ing] ... the ownership and control of state-owned enterprises”; and “the deliberate sale by a government of state-owned enterprises ... or assets to private economic agents”. Privatization is also not necessarily an either-or phenomenon: “mixed public-private” arrangements are also part of this discussion.

A mixture of – and shift between – state and private ownership or provision of public assets and services has been part of the thinking and workings of society

---


6 GAO, “Privatization: Lessons Learned by State and Local Governments”, supra note 2 at 1.


from ancient Greece\textsuperscript{10} through the Enlightenment\textsuperscript{11} and the Industrial Revolution;\textsuperscript{12} the Great Depression\textsuperscript{13} and the Keynesian Revolution;\textsuperscript{14} and the post-War break-up of colonial empires.\textsuperscript{15} However, modern privatization trends – anchored, for example, in the economic theories of Friedrich von Hayek\textsuperscript{16} and Milton Friedman\textsuperscript{17} and located in the economic policies of post-War Adenauer and subsequent governments in Germany and certainly with the Thatcher government of the late 1970s and 1980s in the U.K.\textsuperscript{18} – have become widespread and on the rise.\textsuperscript{19} According to Kikeri and Nellis, “privatization has become a

\begin{footnotesize}
\begin{enumerate}
\item For an historical summary of privatization, see \textit{e.g.} Megginson and Netter, “From State to Market: A Survey of Empirical Studies On Privatization”, \textit{supra} note 8 at pt. 2.
\item See \textit{e.g.} Megginson and Netter, “From State to Market: A Survey of Empirical Studies On Privatization”, \textit{supra} note 8 at pt. 2.
\item See \textit{e.g.} \textit{ibid}.
\item See \textit{e.g.} Megginson and Netter, “From State to Market: A Survey of Empirical Studies On Privatization”, \textit{supra} note 8 at pt. 2.
\item See \textit{e.g.} Friedrich A. von Hayek, \textit{The Road to Serfdom} (London: Routledge Press; Chicago: University of Chicago Press, 1944).
\item See \textit{e.g.} Milton Friedman, \textit{Capitalism and Freedom} (Chicago: University of Chicago Press, 1962).
\item See \textit{e.g.} Megginson and Netter, “From State to Market: A Survey of Empirical Studies On Privatization”, \textit{supra} note 8 at pt. 2.
PRIVATIZATION OF CIVIL COURTS

central element of the structural reform agenda in developed and developing countries alike."20 Other commentators describe current characteristic privatization trends as: "worldwide",21 “accelerating”,22 “extensive”,23 “activ[e]”,24 “ambitious”,25 and “growing”.26

Economic indicators directly support these statements. For example, the annual privatization revenues for divesting governments went from approximately US$38 billion in 1988 to US$ 180 billion in 2000.27 The result of divesting

---


23 Kikeri and Nellis, “Privatization in Competitive Sectors: The Record to Date”, supra note 20 at 1-2.

24 Ibid.


26 Ibid. See also Janice Gross Stein, The Cult of Efficiency (Toronto: House of Anansi Press, 2001) at c. 2.

CHAPTER 3

revenues, framed as the total global proceeds from privatization between 1990 and 1999, amounted to US$ 850 billion. And notwithstanding government statements and news reports about the current global economic crisis and policy moves by the U.S., Canadian, European and other governments around the world to combat the crisis, privatization-related reports argue that the private sector, through privatization, which continues to be viewed as an “accepted … legitimate – often core – tool of statecraft”, will continue to “drive[] … modernization efforts.” For example, as Leonard Gilroy has recently

---


commented, “Privatization remains a key policy focus as public officials grapple with deteriorating fiscal conditions”.\textsuperscript{33}

There are several primary objectives that typically drive the widespread trend of modern privatization, including a strengthened private sector, improved financial health of the public sector, freedom to reallocate public resources, and – “fundamentally”\textsuperscript{34} (and most notably for this project, as is discussed in more detail below\textsuperscript{35}) – efficiency.\textsuperscript{36} According to Megginson and Netter, for example, “the goal of government is to promote efficiency”\textsuperscript{37} (which can be realized in both competitive and non-competitive – infrastructure – sectors\textsuperscript{38}). A focus on efficiency, in the context of privatization, is not new for scholars and policy makers. For example, Adam Smith, when writing about societal revenues and funds of sovereigns, argued that:

\textsuperscript{33} Leonard C. Gilroy, “Reason Foundation’s 22nd annual analysis of privatization and outsourcing” (1 August 2008), online: Reason Foundation\textsuperscript{<http://www.reason.org/news/show/1003047.html>>. For example, according to one report, “No government asset is being spared scrutiny as the Harper government considers auctioning off holdings while it grapples with record deficits…. Ottawa aims to generate up to $4-billion through privatizations or sales in this fiscal year.” See Steven Chase, “Ottawa considering asset sales, from VIA Rail to Royal Canadian Mint” \textit{The Globe and Mail} (2 June 2009) A4.

\textsuperscript{34} Sheshinski and López-Calva, “Privatization and Its Benefits: Theory and Evidence”, supra note 25 at 430.

\textsuperscript{35} See infra c. 6.

\textsuperscript{36} See e.g. Sheshinski and López-Calva, “Privatization and Its Benefits: Theory and Evidence”, supra note 25 at 430. See also \textit{ibid.} at 432, 440 and 450-451. See further Kikeri and Nellis, “Privatization in Competitive Sectors: The Record to Date”, supra note 20 at 6-7.


CHAPTER 3

In every great monarchy of Europe the sale of the crown lands would produce a very large sum of money, which, if applied to the payment of the public debts, would deliver from mortgage a much greater revenue than any which those lands have ever afforded to the crown…. When the crown lands had become private property, they would, in the course of a few years, become well-improved and well-cultivated.39

Modern privatization scholars continue to focus heavily on efficiency. For example, according to Kikeri and Nellis, “[t]here is now a wealth of information from a wide range of countries showing that privatization is associated with … efficiency”,40 and further, “private firms are found to be more efficient than state enterprises”.41 According to Megginson and Netter, “research[42] … supports the proposition that privately owned firms are more efficient and more profitable than otherwise-comparable state-owned firms”;43 and further, “[w]e know that privatization ‘works,’ in the sense that divested firms almost always become more


40 Kikeri and Nellis, “Privatization in Competitive Sectors: The Record to Date”, supra note 20 at 7.

41 Ibid. at 14. This observation by Kikeri and Nellis about the efficiency of private firms was made specifically “[i]n terms of growth”, and “especially in competitive industries”. See ibid.

42 When speaking about their research into the empirical realities of privatization, scholars such as Megginson and Netter acknowledge that “[t]o a large extent we ignore the arguments concerning the importance of equitable concerns…. The effect[ ] of privatization on productive efficiency … is the focus of most of the empirical literature we review”. Megginson and Netter, “From State to Market: A Survey of Empirical Studies On Privatization”, supra note 8 at pt. 3.1. This acknowledgment by Megginson and Netter is qualified by their further statement that: “We do so not because they [arguments concerning the importance of equitable concerns] are unimportant, but because they are beyond the scope of this review.” Ibid.

43 Ibid. at pt. 9.1(2).
PRIVATIZATION OF CIVIL COURTS

efficient”.44 Similarly, according to Sheshinski and López-Calva, “private ownership has advantages over public ownership in terms of being inherently more efficient”.

SYSTEMS OF CIVIL JUSTICE

At specific issue in this project is the increasing and wide-spread privatization of one particular aspect of the state’s infrastructure: the civil justice system. In the last chapter I commented that “Modern provincial superior courts throughout Canada are the primary public venues in which Canadians resolve their disputes. They provide a public dispute resolution system that is, at least in theory, open to all parties and to all disputes.”46 It is this dispute resolution system that is becoming subject to an increasingly wide-spread and aggressively pursued trend of privatization through modern court reforms.47

44 Ibid, at pt. 9.1(5).


46 See supra c. 2, n. 1 and accompanying text (footnote and emphasis omitted).

Before proceeding to a more detailed examination of the range of privatization efforts in Canada’s systems of civil justice (both past and – increasingly – present), I first discuss with more detail the basic idea of privatization as it specifically applies to the public justice system. Of course the state’s public dispute resolution tools – courts (as well as administrative tribunals) – continue to exist and function under the public authority of the state. In this sense, there clearly continues to be a well-functioning public justice system. However, both separate from, as well as part of the administration of that public system, large elements of the state’s civil justice regime are increasingly being shifted away from the traditional public court process and into a range of other – private – processes. And notwithstanding earlier private elements and alternatives that have certainly existed for centuries (which are discussed

---

48 See infra pts. 2-5.

49 See further supra c. 2.

50 Discussed further infra c. 4.
elsewhere in this project\(^{51}\), the current privatization moves in the civil justice system are active, aggressive, increasing and extremely far-reaching. What does this form of civil justice privatization entail? There are several elements to it, including jurisdictional, informational and financial aspects, to which I now turn.

**JURISDICTION**

Historically, sovereigns, prior to modern governing systems with a robust separation of powers, largely maintained the judicial authority.\(^{52}\) In this early context, the first jurisdictional move – in recognition of what Adam Smith commented on as the “increasing business of ... society, in consequence of its increasing improvement”\(^{53}\) as well as what James Madison described as the tendencies toward “tyranny” of this retained sovereign authority\(^{54}\) – came with the

---


development of separate and independent judicial powers.\textsuperscript{55} The result was a robust, independent public court system.\textsuperscript{56} It is this public court system, as modified and modernized, that still exists and functions today.\textsuperscript{57}

Over time (as I discuss further below), calls to improve the efficiency and lower the costs of state-funded and state-run dispute resolution processes (civil courts and, more recently, administrative tribunals) have resulted in initiatives that take cases or parts of cases out of the full-blown public dispute resolution process and move them into more nimble, streamlined and private arenas (both separate from and increasingly as part of the overall state funded system). Arbitration legislation, as increasingly supported by private arbitration dispute resolution providers,\textsuperscript{58} was an early (and continuing) example of the kind of reform initiative that actively seeks to move cases out of the public arena and into a fully private stream (although still legislatively contemplated, sanctioned and increasingly encouraged). This move has led to what the Supreme Court of Canada has recently described as the creation of a “private justice system.”\textsuperscript{59} It was this form of privatization that was specifically at issue in the Dealership case: a forum

\textsuperscript{55} For a discussion of this development, see e.g. Adam Smith, \textit{An Inquiry Into the Nature and Causes of The Wealth of Nations}, supra note 11 at vol. 2, bk. V, c. I, pt. II, p. 244.

\textsuperscript{56} Discussed further supra c. 2.

\textsuperscript{57} \textit{Ibid.}

\textsuperscript{58} See e.g. American Arbitration Association (AAA), online: AAA <http://www.adr.org/>; ADR Chambers, online: ADR Chambers <http://adrchambers.com/ca/>. Private arbitration is discussed further below. See e.g. \textit{infra} c. 4.

selection clause in the Corporation’s standard form Contract, in the form of a mandatory arbitration agreement, which ousted the jurisdiction of a court in favour of a private (for-profit) arbitration regime.\textsuperscript{60} Equally significant privatizing initiatives have also been pursued for some time \textit{within} the publicly funded dispute resolution system. Early mandatory mediation efforts, in a very different way and as part of the public court system, still had the effect of moving disputes – at an early stage of development – off the public court track (and away from the eyes of the press) and into private and confidential venues for early and confidential resolution (again, all as legislatively contemplated, sanctioned and increasingly encouraged).

Recently, these trends have not only continued but significantly increased. As I discuss more fully later on in this chapter, modern civil justice reform has taken off like wildfire essentially across the common law world. Here at home, as will be seen, there is essentially no jurisdiction in Canada at the moment that is not in the midst of, just coming out of, or contemplating continued civil justice reform. By the end of the calendar year of 2010, three provinces and one territory will have adopted a full new set of civil justice rules of court over approximately the preceding two years alone. And during this time period and just before, essentially all other jurisdictions in the country have also made (and are making) further significant changes and reforms. This modern reform movement, as I call it, is expressly promoted by members of all stakeholders in the public civil dispute

\textsuperscript{60} See \textit{supra} c. 1.
resolution system, including governments, courts and judges, law societies, bar associations, lawyers, clients and law schools.\textsuperscript{61} This movement, fuelled by a strong ethos of reform, involves a continued and increasing move toward using private processes such as mandatory mediation, judicial dispute resolution, arbitration, settlement negotiations, and so forth, rather than the publicly-scrutinized open-court aspects of the public system.\textsuperscript{62} This collection of varied reform-oriented procedures, taken together, is the jurisdictional aspect of privatization to which I am referring.

Now before going on, it is important, to avoid any misunderstandings or immediate objections, to underscore two points. First, I recognize that jurisdictional privatization in the civil justice system is not new. As I have said, and as I discuss further below, various efforts involving various different processes have been in place for some time. However, the current, active and wide-spread initiatives – taken together in what I have called the modern civil justice reform movement – amount to an entirely new wave of privatization that, given its sheer volume, is at least different in degree if not different in kind to earlier, piece-meal efforts. Second, it is important also to acknowledge that the tools through which privatization is happening – case management, judicial dispute resolution, arbitration, mediation, cost-shifting incentives, and so forth (that I discuss in much more detail below) – are all very different processes and

\textsuperscript{61} All discussed further below: see infra cc. 5-6.

\textsuperscript{62} These privatizing processes are discussed at length further below. See infra pts. 2-5.
tools, which operate in very different ways and in different circumstances, one from the other. There is no doubt of that. However, for my purpose in this project, the remarkable phenomenon now at work is the overall jurisdictional privatization that happens when all of these processes are seen, as a collective of a privatizing whole, acting together in concert. So while I certainly identify, discuss and make use of many different civil justice reform tools in the context of this project, it is their collective force that lights up this discussion.

**Privacy**

In addition to the issue of jurisdiction, privatization also impacts the amount of information about civil disputes that is available to the general public. As I discussed at the end of chapter 2, a central element of the public court system is its open and informationally-accessible nature. As we saw, the court’s effectiveness and legitimacy as tools of societal regulation depend on its transparency. The following statement by Justice Bastarache that I raised in chapter 2 bears repeating:

> Information is at the heart of any legal system ... lawyers and witnesses present information to courts; juries and judges make decisions based on that information; and those decisions, reported by the popular and legal press, make up the basis of the law in future cases. In Canada, as in any truly democratic society, the courts are expected to be open, and information is expected to be available to the public.63

In direct opposition to this open and transparent sensibility, one of the central goals of the privatization movement is to move disputes out of the public

---

CHAPTER 3

Eye and into confidential, or at least largely private, settings. This aspect of
privatization is part of the confidential processes that operate within the publicly
funded justice and administrative law systems (e.g. mandatory or voluntary
mediation programs that increasingly form part of both of those publicly funded
systems). It is also clearly a defining badge of private processes (e.g. private
mediation, commercial arbitration, etc.). Again, this informational aspect of
privatization was at issue in the Dealership case: it was clearly a key motive of the
Corporation to keep its affairs out of the eyes of the public. And as we will see
in chapter 7, many parties – including public authorities – actively favour these
private venues specifically because they are off limits to public scrutiny and
public debate.

FINANCING

Another element to current privatization trends in the civil justice system
involves at least a partial shift of financial responsibility. When parties engage
the public civil justice system to resolve their disputes, they typically pay for any
legal assistance they receive in terms of their own legal fees. Unless people

64 Discussed further infra pts. 2-5 and in c. 4. For a recent press discussion of court-based
informational-privacy, see Ingrid Peritz, “Quebec court imposes ban on reporting details of
Groupe Polygone talks” The Globe and Mail (18 April 2009) at A5.

65 Discussed further infra c. 4.

66 See supra c. 1.

67 In jurisdictions in which fee-shifting occurs (i.e. there are loser-pay rules with respect to at least
part of a winning party’s legal expenses), there may be additional “costs” to pay. These may
include, for example, at least part of the legal expenses of the winning party. See e.g. Ontario’s
Courts of Justice Act, R.S.O. 1990, c. C.43 at s. 131; Ontario’s Rules of Civil Procedure, R.R.O.
1990, Reg. 194, as amended at r. 57. See also generally Janet Walker, gen. ed. et al., The Civil
choose to represent themselves in court (which, I acknowledge, is increasingly occurring, and certainly not always by choice), the process of retaining and paying for legal representation is part-and-parcel of modern self-regulatory legal regimes in which the private bar enjoys virtually a monopoly over the provision of legal services.\(^{68}\) But for being represented by a legal aid lawyer (either by a clinic lawyer or, unlikely in the case of a civil dispute, a lawyer being paid by the state through some form of legal aid certificate program),\(^{69}\) the typical options for legal representation in superior court civil matters amount to either self-representation or private lawyer representation. In this sense, then, a large part of the system involves a self-regulating, for-profit private bar, and has done for some time now. While this self-regulatory regime brings with it a number of access to justice ramifications that are in need of further discussion, those are not my focus of attention here.\(^{70}\)

However, what I am now talking about is not directly focused on the fees paid for legal representation, but rather the financial arrangements of the underlying dispute resolution institutions. Other than court administration fees (e.g. nominal filing fees), the state’s dispute resolution costs, including court house expenses, judicial and court administrative salaries, and so forth are all paid

---

\(^{68}\) See \textit{e.g.} \textit{Law Society Act}, R.S.O. 1990 c. L.8, s. 26.1.

\(^{69}\) See \textit{e.g.} \textit{Legal Aid Services Act}, 1998, O. Reg. 107/99, as amended by O. Reg. 151/10.

for by the state. When the regular citizen goes to court, other than her own lawyer’s fees (which clearly are often not insignificant) and nominal filing fees, she does not expect also to pay for the services that are provided at the courthouse (like the judge’s salary, for example). The cost of those services is the cost to the taxpayer of running a public court system.

In contrast, when parties choose to resolve their disputes using non-state-based tribunals (e.g. private mediation or arbitration regimes such as are provided by the AAA\textsuperscript{71} or the ADR Chambers\textsuperscript{72}), they still pay for their own legal fees. Additionally, however, they also pay for the private provider’s fees, which consist of mediator or arbitrator services, filing and administration fees, boardroom rental, etc. Those fees are not insignificant. According to the AAA, for example, rates for AAA mediators range from $125-$800 an hour.\textsuperscript{73} And while fees and rates for AAA arbitrators vary depending on the arbitrator and the type and complexity of the case,\textsuperscript{74} those fees are certainly at least no lower than those charged by their mediating counterparts.\textsuperscript{75} Even in the context of private tools within the public system (e.g. court-based mandatory mediation), additional fees, including for example mediator fees, are often incurred. In Ontario, for example,

\textsuperscript{71} See supra note 58.

\textsuperscript{72} See ibid.

\textsuperscript{73} See AAA, “Case Filing Fees”, online: AAA <http://www.adr.org/sp.asp?id=29297>.

\textsuperscript{74} See ibid.

\textsuperscript{75} For example, the reported pre-hearing hourly rate for one of the arbitrators in the Vulcan arbitration, which I discuss in chapter 7, was $610. See Vulcan’s Motion to Vacate Arbitration Award, filed in the Superior Court for the State of Washington, County of King (8 March 2010), pt. II.C (together with underlying declaration materials), discussed further infra c. 7.
the mandatory mediation rules\textsuperscript{76} provide for a default mediator fee scale – for mediators on the county mediation co-ordinator’s list (or “roster”) of mediators\textsuperscript{77} – of a total of $600-$825 for one-half hour of preparation time for each party plus up to three hours of actual mediation time.\textsuperscript{78} However, to the extent that the parties choose a non-roster mediator,\textsuperscript{79} or in any event, even with a roster-based mediator, if the mediation exceeds three hours, additional fees will apply (as determined, on consent of the parties, by the mediator).\textsuperscript{80} These fees can be based on market rates and are often significantly higher than the scheduled fees allowed for roster-based mediators for the first three hours of a mandatory mediation session.\textsuperscript{81}

**OVERALL RESULT**

The overall result of this form of infrastructural privatization, taken together (including its jurisdictional, informational and financial aspects), is a systematic increase in the number of disputes that are being dealt with – albeit in many different ways and using many different processes – in private; using private

\textsuperscript{76} See Ontario *Rules of Civil Procedure, supra* note 67 at r. 24.1, discussed further *infra* pt 4.

\textsuperscript{77} *Ibid.* at r. 24.1.08(1).

\textsuperscript{78} The range is determined by the number of parties involved in the dispute. See “Mediators’ Fees (rule 24.1, *Rules of Civil Procedure*),” O. Reg. 451/98 at s. 4(1).

\textsuperscript{79} For example, a mediator from the ADR Chambers in Toronto (see *supra* note 58).

\textsuperscript{80} See Ontario *Rules of Civil Procedure, supra* note 67 at r. 24.1.08(2); “Mediators’ Fees (rule 24.1, *Rules of Civil Procedure*),” *infra* note 78 at s. 4(3).

\textsuperscript{81} According to the ADR Chambers, for example, mediators’ fees range from $150-$700 an hour. See ADR Chambers, “Mediation, Fees”, online: ADR Chambers <http://adrchambers.com/ca/mediation/>.
CHAPTER 3

funding; by private negotiators, mediators and/or adjudicators; with no public informational access; and without necessarily any (or at least all) of the procedural safeguards that are typically provided for by public court or tribunal systems.\(^82\) This form of privatization, taken together, is encouraged (and at times mandated) by all justice system stakeholders, including the state. It is happening, through the use of many different dispute resolution tools, in all sectors and at all levels and stages of the civil court system,\(^83\) the administrative system,\(^84\) and through statutorily-encouraged private dispute resolution initiatives.\(^85\) This form of privatization is also involving all kinds of civil disputes, including, for example, commercial manufacturing and service disputes (like the Dealership case), employment disputes (like the Vulcan case that I discuss in chapter 7), pay-equity disputes, police complaints, human rights complaints, and so forth. In sum, it is this form of wide-ranging privatization that animates the various arguments that I make in this project.\(^86\)

\(^{82}\) For earlier discussions on this point, see e.g. Farrow, “Public Justice, Private Dispute Resolution and Democracy”, supra note 47; Farrow, “Re-Framing the Sharia Arbitration Debate”, supra note 47.

\(^{83}\) Discussed further infra pt. 4.

\(^{84}\) See infra c. 4.

\(^{85}\) See ibid. For a summary diagram of these collected processes (courts, tribunals and private initiatives), see Appendix 1.

\(^{86}\) While many of the arguments that I make are also directly applicable to privatizing initiatives in family law, this project does not specifically focus on dispute resolution in the family law context. For some useful treatments of privatization in the family law context, see e.g. Jana B. Singer, “The Privatization of Family Law” (1992) Wis. L. Rev. 1443; Kelly Browe Olson, “Lessons Learned from a Child Protection Mediation Program: If At First You Succeed and Then You Don’t…” (2003) 41:4 Fam. Ct. Rev. 480; Martha J. Bailey, “Unpacking the ‘Rational Alternative’: A Critical Review of Family Mediation Claims” (1989) 8 Can. J. Fam. L. 61. See also further infra pt. 5. For a recent collection of materials, see Julie Macfarlane, “Mediating Family Disputes” in
PRIVATIZATION OF CIVIL COURTS

ALTERNATIVE DISPUTE RESOLUTION

Before looking further at specific aspects of privatization in the civil justice system, I spend a moment here discussing the terminology of this kind of privatization and its relation to the terminology of alternative dispute resolution. As with privatization literature generally, terminology in the context of the privatization of civil justice can be equally problematic and “confusing.” Many of the tools by which the civil justice system is being privatized – negotiation, court-annexed and/or private mediation, judicial dispute resolution, arbitration, etc. (all as further discussed below) – fall within the broad ambit of what has come to be commonly referred to as tools of “alternative dispute resolution” or “ADR”. Defining ADR is not a simple task. As I have discussed elsewhere with respect to ADR: there is “significant debate” over its meaning. As Andrew Pirie has commented when discussing ADR: “there continues to be a complicated fascination with what lies behind these three words.” As I have also previously


87 Generally discussed supra pt. 1.

88 See supra note 1 and surrounding text.

89 See infra pt. 3, and further, cc. 4-5. See also Appendix 1. For federal provisions relevant to Canadian federal judges acting in a settlement capacity pursuant to provincial settlement regimes, see Judges Act, R.S.C. 1985, c. J-1 at ss. 55-56.


stated, “[p]art of this debate stems from the recognition that, given its prevalence, ADR is no longer ‘alternative.’ Many theorists and practitioners now refer to ADR, in its current form, simply as ‘Dispute Resolution’ or ‘DR.’”92 Another reason for this definitional challenge is the fact that many different types of processes have been loosely collected under this broad label: from very collaborative and consensus-based processes of negotiation all the way through to highly scripted and adversarial tools of arbitration. Complicating things further is the inclusion, again under the same ADR tent, of both court-based (e.g. court-annexed mediation) and non-court-based (e.g. private arbitration) ADR tools.

However, in this project, as elsewhere, I use the term “ADR” – for simplicity and consistency – as it “has come to be commonly used in legal scholarship and practice.”93 This means that I include a wide range of tools under the ADR label (recognizing, again, that the tools themselves that I am collecting


are often very different, one from the other). However, more importantly, for the purpose of my argument, is the fact that while privatization and ADR are not synonymous terms or concepts, many of the methods by which privatization in the civil justice system is occurring involve various tools of ADR.

2. Privatization of Civil Courts

Many of the current and far-reaching privatization initiatives discussed in this project have been developed and introduced in the context of modern civil justice reform initiatives. As discussed in the next section of this chapter (as well as further in chapter 6), there have been several reasons articulated for these reform initiatives. A primary reason has been cost. Over the millennia the cost of justice has been both a source of revenue and, more recently, an issue of concern for sovereigns and governments. Adam Smith, for example, when discussing a sovereign’s “duty of establishing an exact administration of justice” for “protecting, as far as possible, every member of the society from the injustice or oppression of every other member of it”, discussed at length the “expense of justice.” As discussed briefly above, early sovereigns, prior to a meaningful separation of judicial and executive branches, maintained the “judicial authority”, which, “far from being a cause of expence [sic], was for a long time a source of revenue”. Subsequently, when judges began receiving fixed salaries (rather than


95 Supra pt. 1.

“the ancient emoluments of justice”, which was an effort to improve on those “ancient governments” whose “administration of justice appears for a long time to have been extremely corrupt”), and increased taxes were levied for the purpose of defraying the sovereign’s judicial expenses, “[j]ustice was then said to be administered gratis.” However, even so, and as I briefly mentioned above, as Smith also recognized: “Justice ... never was in reality administered gratis in any country. Lawyers and attorneys [sic], at least, must always be paid by the parties”, and those payments were part of the significant and “necessary expense of a law-suit.” As such, almost since their inception, concerns over the high cost of public justice processes have led to continued reform efforts.

executive power” over the centuries, including its increasing independence from the executive power, see ibid, at vol. 2, bk. V, c. I, pt. II, pp. 243-244. For a general foundational commentary on the importance of the separation of powers, see e.g. Madison, “Federalist No. 47”, supra note 54 at 301: “The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.” For a recent discussion of judicial independence, particularly in the U.S. context, see Judith Resnik, “Interdependent Federal Judiciaries: Puzzling About Why & How to Value the Independence of Which Judges” (2008) 137 Daedalus 28.


98 Ibid. at 238.

99 Ibid. at 239.

100 Ibid.

101 Ibid. at 240. With respect to at least some of the costs of a lawsuit, Smith commented that:

It has been the custom in modern Europe to regulate, upon most occasions, the payment of the attorneys and clerks of court, according to the number of pages which they had occasion to write; the court, however, requiring that each page should contain so many lines, and each line so many words. In order to increase their payment, the attorneys and clerks have contrived to multiply words beyond all necessity, to the corruption of the law language of, I believe, every court of justice
In addition to cost, other related concerns have been (and continue to be) raised, including low efficiency and imperfect access to public court systems (all of which I discuss further at length in chapters 6 and 8). These primary concerns continue to drive reform efforts. And it is largely in the context of these reform efforts, discussed below in this chapter, in which we find many of the modern privatization of civil justice initiatives.\(^{102}\)

### 3. INFLUENTIAL INTERNATIONAL REFORM INITIATIVES

**UNITED KINGDOM**

"Modern" common law court reform really started more than 150 years ago with the efforts of Jeremy Bentham. In his studies of the then existing British system, Bentham identified several (now very familiar) "mischiefs" with the "non-penal" (civil-side) branch of the court process, including: "Expense", "Delay" and "Complication" (among others).\(^{103}\) Bentham’s argument, then, was that all elements of a reform effort must be designed to address one or more of those "mischiefs":

> So many mischiefs as are liable to be found in a system of procedure, so many mischiefs to be avoided in every such system: so


many mischiefs, the avoidance of which may in any such system be considered as respectively constituting so many ends to be kept in view ... no provision that can be proposed can be entitled to a place in any such system, but in so far as it can be shown to be conducive to the attainment of one or more of these several ends.\textsuperscript{104}

It was ultimately Bentham’s efforts that influenced Henry Brougham and others to pursue the major court reforms that resulted in the \textit{Judicature Acts} of 1873 and 1875 (which, together with subsequent rules reforms, provided the foundation for our modern common law codes of civil procedure and court processes).\textsuperscript{105}

More than 100 years later, in 1996, Lord Woolf released his seminal report on civil justice reform in the U.K.: \textit{Access to Justice}.\textsuperscript{106} The \textit{Woolf Report} ultimately led to a new code of civil procedure for England and Wales.\textsuperscript{107} Like previous major English reform proposals and rules restructurings, the \textit{Woolf Report} and the new rules significantly influenced not only English procedural practices but really those that have subsequently been pursued throughout the

\textsuperscript{104} \textit{Ibid.}

\textsuperscript{105} \textit{Supreme Court of Judicature Act, 1873} (U.K.), 36 & 37 Vict., c. 66; \textit{Supreme Court of Judicature Act, 1875} (U.K.), 38 & 39 Vict., c. 77. For a helpful discussion of this history, see Michael Lines, “Empirical Study of Civil Justice Systems: A Look at the Literature” (2005) 42 Alta L. Rev. 887 at 891-892.


entire common law world. Many of the “problems” and “defects” identified by Woolf were similar to those identified earlier by Bentham:

The defects I identified in our present system were that it is too expensive in that the costs often exceed the value of the claim; too slow in bringing cases to a conclusion and too unequal: there is a lack of equality between the powerful, wealthy litigant and the under resourced litigant. It is too uncertain: the difficulty of forecasting what litigation will cost and how long it will last induces the fear of the unknown; and it is incomprehensible to many litigants. Above all it is too fragmented in the way it is organised since there is no one with clear overall responsibility for the administration of civil justice; and too adversarial as cases are run by the parties, not by the courts and the rules of court, all too often, are ignored by the parties and not enforced by the court.

An underlying theme of Lord Woolf’s response, motivated primarily by fundamental access to justice concerns, was to recommend making “courts with the assistance of litigants” more “responsible for the management of cases.”

Key elements of this approach included balancing expanded case management rules with a modern approach to ADR. As I have commented previously,

The Woolf Report generally provided an expansive review and set of recommendations for increasing access to civil justice ... it specifically considered the importance of ADR initiatives as tools for increasing access and efficiency. For example, when describing the “new landscape” of reformed civil justice, Lord Woolf stated that

---


109 Woolf, Access to Justice, supra note 106 at §1(2).

110 Ibid. at §1(3).
litigation “will be less adversarial and more co-operative.” As such, the “court will encourage the use of ADR ... and will take into account whether the parties have unreasonably refused to try ADR or behaved unreasonably in the course of ADR.”

Further, and in terms of specific recommendations in response to his observations about the system’s “problems” and “defects”, Lord Woolf made numerous major reform recommendations in his report, which included (most notably for this project) a number of privatizing elements:

Litigation will be avoided wherever possible.

(a) People will be encouraged to start court proceedings to resolve disputes only as a last resort, and after using other more appropriate means when these are available.

(b) Information on sources of alternative dispute resolution (ADR) will be provided at all civil courts.

(c) Legal aid funding will be available for pre litigation resolution and ADR....

(e) Before commencing litigation both parties will be able to make offers to settle the whole or part of a dispute supported by a special regime as to costs and higher rates of interest if not accepted.

Litigation will be less adversarial and more cooperative....

(b) The court will encourage the use of ADR at case management conferences and pre trial reviews, and will take into account whether the parties have unreasonably refused to try ADR or behaved unreasonably in the course of ADR....

111 Farrow, “Dispute Resolution, Access to Civil Justice and Legal Education”, supra note 47 at 749 (footnotes omitted).

112 Woolf, Access to Justice, supra note 106 at §1(8)-(11) (emphasis omitted).
PRIVATIZATION OF CIVIL COURTS

Other significant reform proposals dealt with the complexity, timeliness, cost and proportionality, accessibility, administration and structure, judicial training and overall responsiveness of the system and its participants. All of these reforms have been very influential on other countries’ reform efforts. For example, as I have said elsewhere, the Woolf Report, as further discussed below, “was certainly the international study that was most influential in terms of subsequent civil justice reform thinking in Canada.”

AUSTRALIA

Australia has also been significantly involved in civil justice reform, including major recent privatizing initiatives. For example, shortly after the Woolf Report was released, the Australian Law Reform Commission released an influential discussion paper: Review of the Federal Civil Justice System. As with Lord Woolf’s approach, the terms of reference led the Commission to have regard to “the need for a simpler, cheaper and more accessible legal system”.


114 Farrow, “Dispute Resolution, Access to Civil Justice and Legal Education”, supra note 47 at 749 (footnote omitted).


CHAPTER 3

Following its review of the Australian system, the Commission made recommendations that were also not dissimilar to those found in the Woolf Report. In terms of specific initiatives relevant to this project, the Commission’s overall reform goals comprised several privatizing recommendations, including: “emphasise dispute avoidance and prevention” and “encourage appropriate, effective and timely settlements”.117 Many of these initiatives have been advanced through dispute resolution and access to justice initiatives being developed in the context of the Australian Government’s recent civil justice and related initiatives,118 including its current “Access to Justice” project.119


UNITED STATES

As with other common law systems, the United States has also, over the centuries, experienced its share of efficiency and other related civil justice systemic “mischiefs”. For example, early reports of civil justice in New York in the late 1600s and 1700s comment that litigation was becoming “lengthier and somewhat more complicated ... and ... complex”. At the same time, there were reports: of an “increase in delays in the court”, that the court was “astonishingly inefficient and ineffective”, and that “litigation was ... [in]convenient and ... expensive.”

As a result (around the time that Bentham was making significant strides in the English context), major reform efforts were pursued in the United States. For example, in the mid-19th century, again in the State of New York, significant reforms were pursued in the areas of both civil and criminal procedure. Primary goals of these reforms were “directness and efficiency”. According to the 31 December 1849 report from the commissioners responsible for presenting a

---

120 Bentham, Principles of Judicial Procedure, with the Outlines of a Procedural Code, supra note 103 at c. iii.


122 Ibid, at 220 and 227.


reform report to the New York State Legislature, reforms to the civil procedure system of that state were pursued in the spirit of making “legal proceedings more intelligible, more certain, more speedy, and less expensive.” As part of those wide-ranging civil justice reform initiatives, several efforts to eliminate civil actions were made, including “extending the inducements to a compromise during a litigation” with the intention that “actions commenced may often be settled before a trial. Thus it is to be hoped, there will be fewer cases, requiring the decision of the courts”.

Over the next 50 years, further reforms were pursued that were designed to fill in gaps left by the “Field Code”. These efforts resulted in a new Civil Procedure Act and Civil Procedure Rules, which were designed “not … for the benefit of the legal profession … but … to make the administration of justice more speedy, more certain and less expensive and thus advance the interests of the entire people of the state.” Key themes of the reforms were promptness and efficiency, which were pursued in the spirit of “greater expedition, greater certainty and less expense in the administration of justice.”

---

125 Ibid.
126 Ibid. at viii.
127 See supra note 123.
129 Ibid. at 63.
130 Ibid. at 63, n. 2.
131 Ibid. at 75.
**Federal Rules of Civil Procedure** were promulgated in 1938, which set up the modern civil practice throughout the federal court system in the United States.\(^{132}\)

Notwithstanding these significant and ongoing efforts, the major modern ADR movement, which finds its roots in the United States, started more than a century after the “Field Code” was introduced in the context of widespread and growing dissatisfaction with the overall administration of civil justice.\(^{133}\) Those early modern reform initiatives – notably including the 1976 Pound Conference convened by former Chief Justice Warren Burger that examined ways of improving the administration of justice and further discussions by Frank Sander and his colleagues\(^{134}\) about a “multi-door courthouse”\(^{135}\) – continue to drive

---


\(^{133}\) For further discussions of early ADR initiatives, see e.g. **supra** note 51 and accompanying text; **infra** c. 4.


modern thinking about ways of making the delivery of civil justice more accessible and efficient.\textsuperscript{136}

Around 1975, ADR was considered a “relatively obscure” concept.\textsuperscript{137} Two years later, following the 1976 Pound Conference, the ABA’s dispute resolution committee was established. The committee was designed to examine the growing importance of alternative processes for the efficient delivery of justice.\textsuperscript{138} It was also at that time that the current court-based and other ADR-related privatizing reform initiatives really took off.

Ten years later, the ADR movement in the United States was described as “dramatically different.”\textsuperscript{139} During that time, the ABA established goals to “integrate dispute resolution into every aspect of the legal system and society.”\textsuperscript{140}

For example, between 1988 and 1989, the ABA adopted resolutions “[t]o promote


\textsuperscript{137} ABA Blueprint, supra note 135 at 31. See further the ABA, Just Solutions: Seeking Innovation and Change in the American Justice System, by Stephen P. Johnson (Chicago: ABA, 1994).

\textsuperscript{138} ABA Blueprint, supra note 135 at 31.

\textsuperscript{139} Ibid.

\textsuperscript{140} Ibid.
continued use of and experimentation with ADR, both before and after suit is filed, as welcome components of the justice system” (adopted August 1989); and “[t]o support the increased use of ADR by federal agencies, which included support for the recently passed Administrative Dispute Resolution Act of 1990” (adopted August 1988).141

In 1992, with a specific focus on legal education, the ABA – in Robert MacCrate’s report on legal education and professional development142 – strongly advocated for increased practical, clinical courses and approaches at law schools designed to “address the lack of competence among graduating lawyers.”143 Included in these recommendations (for improved lawyer skills training) was a focus on negotiation and litigation and ADR processes.144 An underlying basis for this focus, according to the ABA, was its understanding that “continued public

141 Ibid. at 35.


and professional education about ADR is necessary to aid in the transformation of a legal system now centered around litigation into a system that includes non-adversarial ADR mechanisms.145

Other influential reform-related ADR initiatives, at both the federal146 and state147 levels, also continued to develop in the U.S. after the publication of the 1992 MacCrate Report.148

145 ABA Blueprint, supra note 135 at 39. As a result, the ABA actively “promote[d] greater awareness of ADR through its publications, conferences, workshops and seminars” (ibid. at 38). In fact, as the ABA itself commented, in the context of its consideration of the report of the President’s Council for Competitiveness (President’s Council on Competitiveness, Agenda for Civil Justice Reform in America (Washington, D.C., 1991)), it was “the prime mover in the creation of the Multi-Door Courthouse” (ABA Blueprint, ibid. at 35). For further background on the “Multi-Door Courthouse”, see supra note 135 and accompanying text.

146 For example, on 5 February 1996, the President signed Executive Order 12988 on Civil Justice Reform. The Preamble to Title 3 of the Order highlights the Federal Government’s intention “to improve access to justice for all persons who wish to avail themselves of court and administrative adjudicatory tribunals to resolve disputes, to facilitate the just and efficient resolution of civil claims involving the United States Government, ... to promote fair and prompt adjudication before administrative tribunals, and to provide a model for similar reforms of litigation practices in the private sector and in various states.” EO 12988 – Civil Justice Reform, 66 Fed. Reg. 4727-4734 (1996), Title 3, p. 4729, s. 1, revoking EO 12778, 56 Fed. Reg. 55195 (1991), supplemented by EO 13083, 63 Fed. Reg. 27651 (1998) (which was suspended by EO 13095, 63 Fed. Reg. 42565 (1998)); EO 13132, 64 Fed. Reg. 43255 (1999). The Order, among other things, provides that in the context of civil litigation involving the federal government in federal courts, ADR processes should be canvassed “[w]henever feasible”; EO 12988, ibid. at Title 3, p. 4729, s. 1(c)(1). Further, to “facilitate broader and effective use of informal and formal ADR methods,” the Order provides that “litigation counsel should be trained in ADR techniques”; ibid. at Title 3, p. 4729, s. 1(c)(3). Finally, and importantly, although outside the specific federal government mandate, the Order expressly contemplates acting as a “model” for litigation reform in both the private sector and in the various states; EO 12988, ibid. at Title 3, p. 4729, s. 1. For a general discussion, see e.g. Jeffrey M. Senger, “Turning the Ship of State” [2000] J. Disp. Resol. 79. For somewhat similar government preferences and initiatives in Canada, see infra c. 5.

PRIVATIZATION OF CIVIL COURTS

In sum, the post-Pound Conference ADR era amounted to a siren call for a massive rethinking of how civil disputes are resolved in the United States (and increasingly in other countries as well). Although initially stemming from the efforts of key individuals at elite U.S. institutions, ADR quickly became seen as an elegant and deceptively simple potential answer to the problems of increasingly inefficient and inaccessible public dispute resolution regimes. The bar – given dominant models of professionalism that continued to jealously guard visions of the zealous advocate trained in and working with the fine art of rights-based, client-centered advocacy – was initially generally resistant to a wholesale move to ADR. However, demands from various voices including rules reformers and clients continued to break down this initial practice-based resistance.

Today, ADR is part of the mainstream diet of American academics and practitioners. Court-annexed ADR has become a fixture throughout the state and federal court systems. It is clearly part of the plan for law schools going

---

148 For general discussions, see e.g. MacCrate, "Yesterday, Today and Tomorrow", supra note 144; Engler, "The MacCrate Report Turns 10", supra note 143; Douglas S. Adams, “Alternative Dispute Resolution Programs in Law School Curricula – What’s Next?” (A project for the ABA Section of Dispute Resolution, 24 August 2001), online: ABA <www.abanet.org/dispute/adamspaper.pdf>.

149 I am thinking here, for example, of people like Derek Bok, Frank Sander and Roger Fisher at Harvard University.


152 For a discussion of the state and federal court mediation initiatives, see e.g. Louise Phipps Senft and Cynthia A. Savage, “ADR in the Courts: Progress, Problems, and Possibilities” (2003) 108
CHAPTER 3

forward.153 And as one source has noted, "[t]here is a growing sense … that it is
time to look beyond adjudication as a single model for dispute resolution, and to
consider instead a spectrum of dispute resolution alternatives."154 Similarly,
according to another source:

I see ADR as having become a part of the judicial system, perhaps
inevitably and certainly for the present. Regardless of the
effectiveness of ADR in particular situations, there is no doubt that
socio-political forces will continue to promote it and will not be
turned back by a call for adoption of (or a return to) a greater use of
traditional, full-dress adjudication of disputes.155

As a result, as a further commentator noted several years ago, the ABA “Section
on Dispute Resolution Conference, only three years old, is larger than the ABA
Litigation Section Conference.”156

Penn St. L. Rev. 327. See also Roselle L. Wissler “Court-Connected Mediation in General Civil

153 See e.g. Roy Stuckey et al., Best Practices for Legal Education: A Vision and a Road Map
(United States: Clinical Legal Education Association, 2007); William M. Sullivan et al.,
Educating Lawyers: Preparation for the Profession of Law (San Francisco: Jossey-Bass, 2007)
[“Carnegie Report”].

154 Macfarlane, Dispute Resolution: Readings and Case Studies (2003), supra note 86 at xvii.

155 Stempel, “Reflections on Judicial ADR”, supra note 135 at 305-306 (citations omitted). See
further Stephen N. Subrin, “A Traditionalist Looks at Mediation: It’s Here to Stay and Much
Better than I Thought” (2002/2003) 3 Nev. L.J. 196, all discussed further in Farrow, “Dispute
Resolution, Access to Civil Justice and Legal Education”, supra note 47 at 745, n. 20 and
accompanying text. See also Subrin, “David Dudley Field and the Field Code: A Historical
Analysis of an Earlier Procedural Vision”, supra note 123 at 311.

156 Lela Porter Love, “Twenty-Five Years Later with Promises to Keep: Legal Education in
Dispute Resolution and Training Mediators” (2002) 17 Ohio St. J. Disp. Resol. 597 at 601. See
further Thomas J. Stipanowich, “ADR and the ‘Vanishing Trial’: The Growth and Impact of
PRIVATIZATION OF CIVIL COURTS

SUMMARY

With all of this international reform activity, the “face of the legal profession – and in particular the way modern disputes are thought about and resolved – has dramatically changed … over the past decade.” In sum, and put simply, as a further recent report confirmed: “[c]ivil justice reform initiatives are unfolding all around us in the Commonwealth … [and] throughout the common law world.” And clearly, based on the international reform efforts discussed in this section, privatization is a common theme within this “global revolution”.

5. CANADA

Reform initiatives across Canada – described recently as a “wave … sweeping across Canadian jurisdictions” – have followed their English,
Australian and American counterparts. Similar (and familiar) reform goals have also been pursued, and for some time. For example, as with the 19th century reform initiatives in New York, early superior court rules initiatives in Canada – for example in 1842 in Upper Canada were made “for simplifying the proceedings … and rendering the same less expensive to Suitors”. Similarly, reports of the 1873 and 1881 reforms in Ontario described these initiatives as being in pursuit of the “speedy, convenient and inexpensive administration of justice”, which had been reported as being formerly “expensive and time-consuming”. Many of these early reforms, in response to criticisms of cumbersome and inefficient court procedures, came as a result of the modernization of early Canadian societies. For example, according to a dispatch from Sir Peregrine Maitland, Lieutenant-Governor of the Province of Upper Canada, changes in the justice system were needed in order to accommodate the “rapid growth of the population, and the consequent increase in the number of


162 See e.g. Journals of the Legislative Assembly of … Canada (1842), vol. 2, appendix Q (p. 48). See also Rules of Court, 1831-1895, cited in William R. Riddell, The Bar and the Courts of the Province of Upper Canada, or Ontario, supra note 51 at 183-184, n. 4.

163 Riddell, The Bar and the Courts of the Province of Upper Canada, or Ontario, supra note 51 at 183.


166 Ibid. at 523.
commercial and other transactions”. As with their American counterparts, then, a key theme of these kinds of reforms was “efficiency”.

**MODERN NATIONAL INITIATIVES**

As the primary modern national starting point, in 1996, the Canadian Bar Association engaged in a wide-ranging and influential review of the delivery of civil justice in Canada. The result was the CBA’s “Systems of Civil Justice Task Force Report”. Numerous observations and recommendations made in that report have led to significant and still ongoing reform initiatives in this country.


168 See *e.g.* supra pt. 2.

169 See *e.g.* Paul Romney, “From Constitutionalism to Legalism: Trial by Jury, Responsible Government, and the Rule of Law in the Canadian Political Culture” (1989) 7:1 L.H.R. 121 at 141-142.


171 For a useful review of the CBA’s recommendations and their subsequent implementation, see Margaret A. Shone, “Civil Justice Reform in Canada: 1996 to 2006 and Beyond” (December 2006), online: CFCJ <http://fcjc-cfcj.org/docs/2006/shone-final-en.pdf>.
CHAPTER 3

By way of background, the CBA Task Force was created “to inquire into the state of the civil justice system on a national basis and to develop strategies and mechanisms to facilitate modernization of the justice system so that it is better able to meet the current and future needs of Canadians.” 172 As part of its inquiry, the CBA Task Force specifically focussed on the role that ADR methods can and should play in making the justice system more efficient and accessible. 173 The Task Force strongly encouraged the use of a “multi-option civil justice system.” 174 In a multi-option civil justice system, according to the CBA, “litigation lawyers must move away from a focus on rights-based thinking and adopt a wider problem-solving approach.” 175 This move – the “adoption of a dispute resolution approach” to “litigation practice” 176 – was described by the Task Force not only as desirable, but as a “new professional obligation.” 177

172 “CBA Task Force Report”, supra note 170 at iii.


174 See e.g. “CBA Task Force Report”, supra note 170 at c. 4.

175 Ibid. at 63.

176 Ibid. at 64.

177 Ibid. See generally Farrow, “Dispute Resolution, Access to Civil Justice and Legal Education”, supra note 47 at 750-754.
There were a number of key reform proposals in the “CBA Task Force Report” that were aimed at these overall reform goals, the summaries for many of which are set out immediately below.

1. Every jurisdiction

   (a) make available as part of the civil justice system opportunities for litigants to use non-binding dispute resolution processes as early as possible in the litigation process and, at a minimum, at or shortly after the close of pleadings and again following completion of examinations for discovery; [and]

   (b) establish, as a pre-condition for using the court system after the close of pleadings, and later as a pre-condition for entitlement to a trial or hearing date, a requirement that litigants certify either that they have availed themselves of the opportunity to participate in a non-binding dispute resolution process or that the circumstances of the case are such that participation is not warranted or has been considered and rejected for sound reasons...

2. Each jurisdiction through its rules of procedure impose on all litigants a positive, early and continuing obligation to canvass settlement possibilities and to consider opportunities available to them to participate in nonbinding dispute resolution processes.

3. Every court undertake studies or pilot projects to determine best practices concerning the integration of non-binding dispute resolution processes in the post-discovery stages of litigation...

21. Every jurisdiction

   (a) develop a system of incentives and sanctions to encourage settlement and the prudent use of court time...
CHAPTER 3

27. Every court provide point-of-entry advice to members of the public on dispute resolution options in the civil justice system and available community services...\(^{178}\)

All of these reform recommendations were clearly designed to promote greater efficiencies in the public justice system, primarily by actively encouraging the use of privatizing tools.

Shortly after the Task Force published its report, and specifically pursuant to Recommendation No. 52 of the Report,\(^{179}\) the Canadian Forum on Civil Justice was created.\(^{180}\) Several of the primary purposes of the CFCJ, which has been very active and successful over the past decade, are to assist with the research about and dissemination of, court reform and court reform information at a national level.\(^{181}\)

In light of these significant reform initiatives, the “CBA Task Force Report” was followed four years later, in 2000, by the CBA’s *Attitudes – Skills – Knowledge* report.\(^{182}\) That report was generally a response to the CBA Task

\(^{178}\) “CBA Task Force Report”, *supra* note 170 at v-vi, “Summary of Task Force Recommendations” nos. 1-3, 21 and 27. Other provisions included recommendations concerning professional responsibility obligations as well as legal education and training obligations. For a further discussion of the CBA’s approach to reform and legal education, see infra c. 5, pt. 4.

\(^{179}\) “CBA Task Force Report”, *supra* note 170 at 73-74.

\(^{180}\) See CFCJ, online: <http://cfcj-fcjc.org/> (I am the current chair of the CFCJ’s board).

\(^{181}\) A key national initiative organized by the CFCJ – in addition to its ongoing and significant research agenda – was its two-part national civil justice reform conference: “Into the Future: The Agenda for Civil Justice Reform” (Montréal, Québec, 30 April-2 May 2006; Toronto, Ontario, 8 December 2006), online: CFCJ <http://cfcj-fcjc.org/publications/itf-en.php#1>, mentioned earlier at note 170.

PRIVATIZATION OF CIVIL COURTS

Force’s Recommendation No. 49, which was designed primarily to consider the creation of a “legal education plan to assist in civil justice reform.” More recently, further national reform initiatives continue to be pursued.

PROVINCIAL AND TERRITORIAL INITIATIVES

Notwithstanding these significant national initiatives, the same calls for reforms to address cost, speed and backlogs continue to be made. For example, in December 2006, former Ontario Chief Justice Roy McMurtry made the following comments:

In Ontario, it has been recognized for some years that our civil justice system is in a crisis....

I became a judge in 1991 and very quickly learned that the issue of access to civil justice would be the principal justice challenge for the foreseeable future. In 1995, as the Chief Justice of the Superior Court, I referred to the crisis and stated publicly that:

As well as the increasing cost, the system is labouring under the tremendous weight of a growing backlog of cases and a serious lack of adequate resources. Litigants must wait an inordinate length of time to resolve their civil disputes. Significant initiatives are absolutely essential if our court is to be able to provide timely and affordable justice to the citizens of this province.

183 “CBA Task Force Report”, supra note 170 at 73. For a further discussion of the CBA’s approach to reform and legal education, see infra c. 5, pt. 4.

184 See e.g. the 2008 establishment of the national “Action Committee on Access to Justice in Civil and Family Matters”, largely at the initiative of the CFCJ, the Honourary Chair for which is the Rt. Hon. Beverley McLachlin, P.C., Chief Justice of Canada. (I am currently a member of that committee.)

185 For a recent report citing these factors, see Donalee Moulton, “Vanishing trials: Out-of-court settlements on the rise” 28:23 The Lawyers Weekly (17 October 2008) 22 at 22.
Well, almost twelve years later, the crisis has deepened despite the best efforts of a lot of people, judges, lawyers and officials in the Ministry of the Attorney General. 186

Because the administration of civil justice largely falls within the jurisdiction of the provinces,187 the majority of the extensive and ongoing civil justice reform initiatives are being carried out at the provincial level. At this level, numerous ongoing efforts are being made to address the kinds of “crisis” that the former Chief Justice of Ontario described. 188 Put simply, every jurisdiction in Canada has been looking189 – in some capacity – at ways of making


187 See Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5, s. 92(14), which provides that:

In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say...

188 Not everyone believes there is a “crisis” in the civil justice system. According to Peter Lown, Director of ALRI, who does certainly believe that civil justice – particularly in Alberta – is in need of reform, there has not been “a complete breakdown” or a “crisis” in the civil justice system. Peter J. M. Lown, Q.C., quoted in Guly, “Alberta leads the way in injustice reform”, supra note 160 at 15. For a different view, in the context of a comparative study of international reform initiatives, see Adrian Zuckerman, Civil Justice in Crisis: Comparative Perspectives of Civil Procedure, supra note 102 at v.

PRIVATIZATION OF CIVIL COURTS

civil dispute resolution processes more efficient and effective.190 And it is largely in the context of these very extensive and ongoing modern provincial reform efforts, some significant examples of which are discussed immediately below, that the privatization of the civil justice system in Canada is being heavily promoted and pursued today.191 As one commentator recently described, “it is clear that there is a wholesale move toward alternative dispute resolution which will not disappear.”192 Similarly, according to Justice Eleanore Cronk of the Court of Appeal for Ontario, there has been a “spectacular growth of the alternative dispute


191 Much of my awareness and understanding of these initiatives – including superior and inferior court reform initiatives and related materials, commentaries, etc. – has been directly influenced and assisted by the work of the CFCJ. See e.g. CFCJ, “Inventory of Reforms”, supra note 170.

192 Ronalda Murphy, “Introduction” in Murphy and Molinari, eds., Doing Justice: Dispute Resolution in the Courts and Beyond, supra note 47 at xiii.
resolution industry in Canada…. The business community and individual litigants have seized upon ADR, almost with passionate abandon”.

**BRITISH COLUMBIA**

B.C. is currently engaged in a wide-ranging civil justice reform movement. The B.C. Justice Review Task Force recently released its “Effective and Affordable Civil Justice” report and proposed new rules of civil procedure, which recently came into force on 1 July 2010. The basic premises behind these civil justice reforms are clear. According to the B.C. Justice Review Task Force: “British Columbia is working to reform its civil justice system in order to provide people with ways to resolve legal problems more simply, quickly and affordably.” Building on current B.C. programs, including mediation and

---

193 Hon. E. A. Cronk, “Examining Barriers that Prevent Litigants from Accessing the Civil Justice System” (paper given at CFCJ “Into the Future” conference, Montréal, Québec, 1 May 2006) at 6-7.


197 See e.g. B.C.’s “Notice to Mediate” process, which allows a party to a proceeding to require another party to attend a mediation session. See “Notice to Mediate (General) Regulation”, B.C. Reg. 4/2001 (effective 15 February 2001), online: B.C. Dispute Resolution Office <http://www.ag.gov.bc.ca/dro/regulations-rules/regulations/general.pdf>. For a further description of the process, see B.C. Dispute Resolution Office, “Bulletin: Notice to Mediate, (General)
other ADR-related options,\(^{198}\) key aspects to these reforms include proposals for increasing tools for people to resolve their disputes before going to court, as well as tools to reduce costs for people who do go to court.\(^{199}\) Regarding the first of these (out of court) aspects, the B.C. Justice Review Task Force stated that:

The Working Group found that most citizens are seeking early and fair dispute resolution, not a costly and prolonged trial. The Working Group, therefore, proposed that citizens should be provided with the information and services they need to resolve their legal problems on their own before entering the court system.\(^{200}\)

---


\(^{199}\) B.C. Justice Review Task Force, “Civil Justice Reform in British Columbia Supreme Court”, \textit{supra} note 196 at §III-IV.

\(^{200}\) \textit{Ibid.} at §III.
Proposals here include the creation of legal service “hubs”, which are locations at which the public can obtain a variety of legal information regarding the potential resolution of their disputes, including information about available services, appropriate means of resolving disputes (specifically including mediation), etc.\textsuperscript{201}

With respect to in-court reforms, key aspects of the B.C. reforms include creating rules that, among other things, provide “judges with more authority to control the adversarial process so as to reduce complexity, cost and delay.”\textsuperscript{202} Relevant to this project is part 9 of the new rules, which deals with “pre-trial resolution procedures”.\textsuperscript{203} Included in these procedures are rules encouraging offers to settle and private settlement conferences run by judges or masters.\textsuperscript{204} The new rules also provide for a Case Planning Conference, an order from which can include:

... requiring the parties of record to attend one or more of a mediation, a settlement conference or any other dispute resolution process, and giving directions for the conduct of the mediation, settlement conference or other dispute resolution process.\textsuperscript{205}

\textsuperscript{201} \textit{Ibid.} For an example of one these legal services “hubs”, see the Nanaimo Justice Access Centre, online: <http://www.justiceaccesscentre.bc.ca/content/contactNanaimo.asp>, which specifically includes information on mediation and other available legal services.

\textsuperscript{202} See B.C. Justice Review Task Force, “Civil Justice Reform in British Columbia Supreme Court”, supra note 196 at §V.A.

\textsuperscript{203} B.C. Supreme Court Civil Rules, supra note 195 at pt. 9.

\textsuperscript{204} \textit{Ibid.} at rr. 9-1-9-2.

\textsuperscript{205} \textit{Ibid.} at r. 5-3(1)(o).
Further, overlaying all of the proposed rules is an "interpretation" section, which provides, among other things, that cases should be dealt with "in ways that are proportionate to" the "amount involved", the "importance of the issues in dispute," and the "complexity of the proceeding".\(^{206}\)

Taken together, the recent B.C. reforms – which are very wide-ranging in nature – contemplate significant in-court and out-of-court privatizing initiatives. In fact, the totality of the proposals that led to the reforms was at one point described by the President of the Trial Lawyers Association of B.C. as a "nuclear explosion" to "everything" in B.C.'s civil justice sector.\(^{207}\)

**ALBERTA**

Alberta is also in the midst of a major civil justice system overhaul, which one report has described as "lead[ing] ... the way in justice reform".\(^{208}\) In fact, Alberta has been re-working several aspects of its superior court civil justice system over the past several decades. These reform efforts, taken together, all go

\(^{206}\) *Ibid.* at r. 1-3.

\(^{207}\) See Steve Frame (President of the Trial Lawyers Association of B.C.) in Christopher Guly, “Storm erupts over B.C.'s proposed civil reforms” 28:7 *The Lawyers Weekly* (13 June 2008) 1 at 1. As such, notwithstanding significant broad-based support for the recent reforms, there was also significant opposition to the proposed changes. For example, the Trial Lawyers Association of B.C. would have preferred a more "laser-guided" approach to reform. See Guly, “Storm erupts over B.C.'s proposed civil reforms”, *ibid.* at 1. Individuals from other justice sectors also voiced criticism, including members of the judiciary and bar. See *ibid* at 18. For a useful summary of the B.C. experience, see Advocates' Society, *Streamlining the Ontario Civil Justice System: A Policy Forum, Final Report, supra* note 113 at 4-7. For specific commentary on B.C.'s various reform initiatives over the past number of years, see e.g. Jill Leacock, “British Columbia Court of Appeal Judicial Settlement Conference Pilot Project” (2004) 62 Advocate (B.C.) 879; Gordon Turriff, “On the Road to Civil Justice Reform in British Columbia” (2004) 62 Advocate (B.C.) 863; Jack Giles, “The Compulsory Mediator” (2004) 62 Advocate (B.C.) 537. For earlier B.C. reform initiatives, see e.g. Hon. E. N. Hughes, *Access to Justice: Report of the Justice Reform Committee* (Victoria: Ministry of Attorney General, 1988).

\(^{208}\) Guly, “Alberta leads the way in justice reform”, *supra* note 160 at 1.
to the promotion of early dispute resolution, primarily through privatization
initiatives.

The first of these privatizing initiatives, which has been in place informally
since the late 1980s and more formally since 1996,\(^{209}\) is Alberta’s judicial dispute
resolution (JDR) initiative. The JDR program provides litigants with the
opportunity to book a confidential dispute resolution session, often with a superior
court judge of their choosing (or court of appeal judge, depending on the case).\(^{210}\)
This voluntary, judge-run, still relatively *ad hoc* program – created largely
through the initiative of Alberta’s judiciary – has become extremely active and
quite successful from a settlement perspective. For example, according to the
recent “Alberta JDR Survey”, the percentage of JDR settlements of parts or all of
cases studied (between approximately 1 July 2007 and 30 June 2008) was
reported at approximately 90%\(^{211}\). Further anecdotal reports support these
findings. For example, according to Belzil J. of the Alberta Court of Queen’s

\(^{209}\) See Hon. Allan H. Wachowich, “Court of Queen’s Bench of Alberta, Judicial Dispute
Resolution (JDR), Participant’s Survey – Lawyers – 2007-2008” (cover letter to Hon. John D.
Rooke’s “Survey of Participants in the Court’s JDR Program”, September 2007) [“Alberta JDR
Survey”] [unpublished, archived with author].

\(^{210}\) For a summary of the JDR process, see *e.g.* Alberta Court of Appeal, “Guidelines for Judicial
Dispute Resolution (JDR)”, online: Alberta Courts <http://www.albertacourts.ab.ca/ca/practicenotes/l.htm>. ALRI has also looked comprehensively
at judicial dispute resolution initiatives – in the context of its Alberta Rules of Court revision
project – designed to promote early settlement of disputes in Alberta through the use of ADR
tools. See *e.g.* ALRI, “Promoting Early Resolution of Disputes”, *supra* note 92. For a discussion
of this Alberta study, see Margaret A. Shone, “Alberta Rules of Court Project: Promoting Early
Dispute Resolution Through Settlement” *The Barrister* 68 (June 2003) 18. See further Christine
E. Hart, “Draft Model Guidelines for Court-Connected Mediation Programs” (Prepared for the
CBA Systems of Justice Implementation Committee’s Working Group on Dispute Resolution
Standards, 3 September 1998).

\(^{211}\) Hon. John D. Rooke, “Interactive Survey Results – Excerpts (17 February 2009) (preliminary
results from “Alberta JDR Survey”, *supra* note 209) [unpublished, archived with author].
PRIVATIZATION OF CIVIL COURTS

Bench, “[o]ver the last number of years JDR has become hugely popular in the Province of Alberta ... Lawyers and clients report a high degree of satisfaction with the system, with ever increasing request for JDR.”212 Similarly, according to Wachowich C.J., “[t]o say the least, it [JDR in Alberta] has been an overwhelming success”.213

Following the establishment of JDR in Alberta, civil mediation was also being developed as part of the tool-kit available for litigants at the superior court in Alberta.214 At present, what has resulted is a pilot program, being offered in


214 For a discussion of Alberta’s mediation program, see Court of Queen’s Bench, “Civil Mediation”, online: Alberta Courts <http://www.albertacourts.ab.ca/CourtofQueensBench/CivilMediationProgram/tabid/74/Default.aspx>. By way of background to this mediation program, Alberta Justice sponsored a 2001 consultation session in Calgary that brought together ADR practitioners, court personnel, policy makers and academics. Behind this session was the provincial government’s stated commitment “to improving access to courts and to simplifying our provincial justice system.” See Hon. Dave Hancock, “Message from Alberta’s Minister of Justice and Attorney General” in Alberta Justice, “Alberta Justice’s Consultation on Court-Annexed Mediation” (Consultation Brochure, Calgary, 16 November 2001) [archived with author]. One of the outcomes of the 2001 Alberta consultation was the making of recommendations to the Minister of Justice concerning dispute resolution alternatives, including possible court-annexed mediation programs in civil cases. See ibid.
Edmonton and Lethbridge,\textsuperscript{215} which provides “private, user pay, interest-based mediation in Alberta.”\textsuperscript{216}

Further, and perhaps most significantly, Alberta is also in the midst of a total re-write of its rules of court, which has been conducted by the Alberta Law Reform Institute (ALRI).\textsuperscript{217} The rules are scheduled to come into force on 1 November 2010.\textsuperscript{218} A significant aspect of the new rules is the promotion of private dispute resolution. According to ALRI, provincial reform initiatives are interested in the use of ADR as a tool for addressing the “timeliness, affordability and complexity of civil court proceedings”.\textsuperscript{219} As part of this overall interest, ALRI’s proposals include the following dispute resolution dictate:

\begin{quote}
The responsibility of the parties to manage their dispute includes good faith participation in one or more of the following dispute resolution processes with respect to all or any part of the action:
\end{quote}

\textsuperscript{215} See Court of Queen’s Bench, “Civil Mediation”, \textit{supra} note 214.

\textsuperscript{216} Court of Queen’s Bench of Alberta, “Civil Practice Note No. 11: Court Annexed Mediation” (effective 1 September 2004), online: Alberta Courts <http://www.albertacourts.ab.ca/qb/practicenotes/civil/pn11CourtAnnexedMediation.pdf>. For a recent survey of Alberta justice system stakeholders regarding the future of Alberta’s court-annexed mediation program, see Alberta Court Services, “Online Survey Results: Court Annexed Dispute Resolution” (online responses to survey conducted 24 November 2008 - 8 December 2008), online: Alberta Justice <http://www.justice.gov.ab.ca/downloads/documentloader.aspx?id=48831>.


\textsuperscript{219} ALRI, “Promoting Early Resolution of Disputes by Settlement”, \textit{supra} note 92 at xiii.
PRIVATIZATION OF CIVIL COURTS

(a) a dispute resolution process in the private or government sectors involving an impartial 3rd person;

(b) a court annexed dispute resolution process;

(c) a judicial dispute resolution process …;

(d) any program or process designated by the court for the purpose of this rule.  

Finally, in addition to the various Alberta reform initiatives discussed above, other initiatives include Alberta’s new “law information centres”, which are conceptually similar to B.C.’s legal information “hubs”.  

Further, by way of important research initiatives, the CFCJ is undertaking the “Alberta Legal Services Mapping Project”, which is designed to map and catalogue all legal services that are – and are not – available in Alberta.

SASKATCHEWAN, MANITOBA AND THE TERRITORIES

Saskatchewan introduced an ambitious court-annexed mediation program in 1995. The legislative debates surrounding the introduction of the program highlighted the motivations driving the initiatives, which focused largely on

220 See ALRI, “Proposed Rules of Court”, supra note 217 at div. 3, r. 4.16(1).


increasing the efficiency and reducing the costs of Saskatchewan’s civil justice processes. According to the legislative report of the second reading of the proposed legislation, Justice Minister Robert Mitchell articulated some relative “failure[s]” of the “justice system … to serve the needs of our citizens.”\(^{224}\) And in that context, he also articulated his view that: “In the best of all possible worlds, justice would be done efficiently, inexpensively and with minimal emotional pain to those involved.”\(^{225}\) What was required, in his view, was a court-annexed mediation program. According to Mitchell:

> Mr. Speaker, in an appropriate situation, mediation does provide a less costly and more effective method of solving problems. Mediation must be viewed as an integral part of the court process. To maximize its benefits, mediation must be a standard option in the early stages of litigation, an option to be explored before positions have become crystallized, before the parties have become inflexible.\(^{226}\)

What followed was the creation of Saskatchewan’s mandatory mediation program. First introduced as a pilot project in two centres, it now covers approximately 80% of non-family cases in the province.\(^{227}\) In line with Mitchell’s view, the program requires that all parties to non-family civil actions “shall”

---


\(^{225}\) *Ibid.*

\(^{226}\) *Ibid.* at 999.


116
proceed to a mediation session after the close of pleadings and before proceeding further in the litigation.\textsuperscript{228} Evaluations of the program have generally been very positive.\textsuperscript{229}

Manitoba’s Civil Justice Review Task Force reviewed the workings of its civil justice system more than 10 years ago, including traditional and alternative methods of resolving disputes.\textsuperscript{230} Currently, Manitoba judges have the power to engage in JDR initiatives pursuant to Manitoba’s rules of court.\textsuperscript{231} These powers have proved very effective in terms of settlements. For example, according to Schulman J. of the Manitoba Court of Queen’s Bench:

As a result of pre-trial procedures including Judicially Assisted Dispute Resolution Conferences the vast majority of civil actions in Manitoba are settled before trial. In our Court [Winnipeg Centre] fewer than 100 civil cases each year are brought to trial.\textsuperscript{232}

\textsuperscript{228} See \textit{Queen’s Bench Act, 1998}, supra note 223 at s. 42(1.1). For a further description of Saskatchewan’s program, see Justice and Attorney General, Dispute Resolution Office, “Mediation”, online: Government of Saskatchewan <http://www.justice.gov.sk.ca/Mediation>.


Privatizing initiatives, through court-connected ADR programs, are also present in the Territorial systems of civil justice. For example, part 19 of the Northwest Territories rules of court\textsuperscript{233} provides for a case management regime that affords parties to a civil dispute the assistance of a conference judge who can facilitate settlement through assisted settlement discussions, or a mini trial in which the conference judge may provide the parties with an "in camera ... non-binding advisory opinion" regarding a probable outcome on the merits, etc.\textsuperscript{234} The Northwest Territories rules also apply to civil proceedings in Nunavut.\textsuperscript{235}

The Yukon recently, as of 15 September 2008, adopted its own rules of court.\textsuperscript{236} ADR plays a central role in these new rules.\textsuperscript{237} For example, a case management judge has the power to order parties to engage in ADR or JDR


\textsuperscript{237} See \textit{e.g.} Rules of Court, \textit{ibid.} at r. 1(8)(e)-(f). See also the importance of proportionality: \textit{ibid.} at r. 1(6).
PRIVATIZATION OF CIVIL COURTS

processes. Further, private judicial settlement conferences can be scheduled at the request of a party and/or on order of a judge.

ONTARIO

Ontario’s first major modern ADR reform came in the form of a mandatory mediation pilot project. The program was codified in the Ontario’s rules of court in 1999. As of 2004, mandatory mediation provisions (together with case management provisions) apply to actions commenced in Toronto, Ottawa and Essex County (with some exceptions). Central to these mandatory mediation provisions, both in Toronto and elsewhere, is an attempt by the rules and by the court to encourage parties to settle their cases, in private, at the “earliest stage it is likely to be effective.”

238 Ibid. at r. 36(6)(i).
239 Ibid. at r. 37.
240 Rules of Civil Procedure, supra note 67 at r. 24.1. See further r. 75.1 (“Mandatory Mediation – Estates, Trusts and Substitute Decisions). See further r. 76.08, which requires parties to an action under Ontario’s Simplified Procedures regime to consider settlement.
242 See Rules of Civil Procedure, ibid. at r. 77. See also former r. 78, together with former “Toronto ‘Backlog Reduction / Best Practices Initiative’”, ibid. at ss. 1, 16-23.
243 See Rules of Civil Procedure, ibid. at r. 24.1.04(2), provide for certain proceedings to be exempted from the mandatory mediation rules, including, for example, actions on Toronto’s Commercial List. For a further discussion of Ontario’s case management regime, including proceedings that are exempted from that regime, see infra note 246 and accompanying text.
244 See e.g. former “Toronto ‘Backlog Reduction / Best Practices Initiative’”, supra note 241 at “overview”. See also ibid. at ss. 3-6, 28, 32, appendix (“Roster of Mediators) at s. 7(c)-(d); Rules of Civil Procedure, supra note 67 at r. 24.1 and r. 77. See also ibid. at r. 50 (Pre-Trial Conference) and r. 75.1 (“Mandatory Mediation – Estates, Trusts and Substitute Decisions).
CHAPTER 3

This process, typically requiring parties to submit to a mediation service run by private, often roster-based mediators, has by and large been successful.\footnote{245} Notwithstanding some criticism of the mediation (and case management) provisions’ (now former) across-the-board application in Toronto,\footnote{246} evaluations


\footnote{246} Although many have viewed the Ontario initiatives as helpful, there have been numerous members of the Bar and Bench, particularly in Toronto, who have increasingly criticized the across-the-board application of Ontario’s r. 24.1 and r. 77 mediation and case management provisions. See e.g. Martin Tepitsky, “Universal mandatory mediation: A critical analysis of the evaluations of the Ontario mandatory mediation program” (2001) 20:3 Advocates’ Soc. J. 10; Martin Tepitsky, “Excessive cost and delay: Is there a solution?” (2000) 19:2 Advocates’ Soc. J. 5; John Jaffey, “Memo suggests axing case management, mandatory mediation” \textit{The Lawyers Weekly} (1 October 2004) 3; Jan Weir, “Mandatory mediation meltdown” \textit{The Lawyers Weekly} (8 October 2004) 6. See also generally Hughes, “Mandatory Mediation: Opportunity or Subversion?”, \textit{supra} note 190.

At least in part because of these criticisms, a practice direction – suspending the automatic operation of rr. 24.1 and 77 in Toronto – was published that revised the approach to ADR and case management in Toronto civil cases. See “Toronto ‘Backlog Reduction / Best Practices Initiative’”, \textit{supra} note 241 at ss. 1-6. However, notwithstanding these significant changes, pre-trial mediation continued to be “mandatory” in Toronto. See \textit{ibid.} at ss. 3-6. For a further discussion of the Toronto program, see Hon. Warren K. Winkler, “New Civil Case Management Pilot for Toronto Region: Rule 78 Cases” (paper given at CFCJ “Into the Future” conference, Montréal, Québec, 1 May 2006).

Finally, as of 1 January 2010, Ontario \textit{Rules of Civil Procedure}, r. 78 has been revoked and r. 77 has been amended – by O. Reg. 438/08, ss. 64, 65, 68(1) – to include many of the initiatives of the Toronto practice direction as well as revised versions of the purposes and practices of former rr. 77-78. New r. 77 provides for a revised version of case management for cases subject to that rule. Currently, the rule applies to actions and applications commenced after 1 January 2010 in Ottawa, Toronto and Essex County, with certain exceptions, including: proceedings under rr. 74-75 (estates); proceedings on the Commercial List in Toronto; simplified procedures actions (r. 76); and others. The general principles of new r. 77 are essentially both to keep a “greater share” of the responsibility for the case “with the parties” (as opposed to the court), and to be flexible enough to accommodate local “practices, traditions, customs or judicial resource[s]”. These principles are specifically articulated as follows:

77.01 (1) The purpose of this Rule is to establish a case management system that provides case management only of those proceedings for which a need for the court’s intervention is demonstrated and only to the degree that is appropriate, as determined in reliance on the criteria set out in this Rule.

77.01 (2) This Rule shall be construed in accordance with the following principles:
PRIVATIZATION OF CIVIL COURTS

of the Ontario mediation initiative have generally been quite positive.247 As such, according to Justice Chadwick of the Ontario Superior Court of Justice, “[i]n my view, mandatory mediation and case management is here to stay.”248

More recently, Ontario has embarked on a further civil justice reform agenda.249 Significantly based on the Honourable Coulter Osborne’s recent Civil

---

1. Despite the application of case management under this Rule to a proceeding, the greater share of the responsibility for managing the proceeding and moving it expeditiously to a trial, hearing or other resolution remains with the parties.

2. The nature and extent of the case management provided by a judge or case management master under this Rule in respect of a proceeding shall be informed by any relevant practices, traditions, customs or judicial resource issues that apply locally in the region in which the proceeding is commenced or to which it is transferred. O. Reg. 438/08, s. 64.

Ontario Rules of Civil Procedure, r. 77, as amended by O. Reg. 438/08, s. 64.


CHAPTER 3

Justice Reform Project,\(^{250}\) Ontario has adopted – as of 1 January 2010 – a number of rules-related and other reform proposals.\(^{251}\) As part of an overarching goal of dispute resolution proportionality,\(^{252}\) which is expressly included in Ontario’s new rule 1.04 (1.1),\(^{253}\) the reform proposals included specific provisions directed at pre-trial settlement. For example, the Civil Justice Reform Project recommended


\(^{251}\) In addition to the reforms to Ontario’s Rules of Civil Procedure, see the opening of the PBLO “Law Help Ontario” pilot project. This program – in a similar spirit to burgeoning self-help centres in B.C. and Alberta (discussed further supra) – is designed to assist people who cannot otherwise afford legal services with civil matters. It currently operates in two courts in Toronto. For information on this program, see e.g. PBLO, “LawHelpOntario.org”, online: PBLO <http://www.lawhelpontario.org/>; PBLO, Media Advisory, “Pro Bono Law Ontario to launch resource centre for unrepresented litigants” (28 November 2007), online: CNW Group <http://www.newswire.ca/en/releases/archive/November2007/28/c5154.html>. For background reform material, see e.g. Civil Justice Reform Project, ibid. at §6. For further comments, see Valerie Mutton, “Provincial pro bono initiatives get a helping hand from firms” 27:32 The Lawyers Weekly (21 December 2007).


\(^{253}\) Ontario’s Rules of Civil Procedure, as recently amended by O. Reg. 438/08, ss. 2, 68(1), provide – at r. 1.04 – an interpretation section with the following general principles:

1.04 (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

1.04 (1.1) In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.
reforming Ontario’s pre-trial conference rule (rule 50) “to discuss settlement of some or all of the issues” and to ensure that “[j]udges skilled in negotiation and with expertise in the relevant subject matter should, where possible, preside over pre-trial conferences.” These judicial settlement-based proposals, which are in addition to Ontario’s mandatory mediation provisions, have been expressly included in Ontario’s new rule 50. Further, in a similar spirit to the Alberta Legal Services Mapping Project, discussed above, a civil justice needs assessment and mapping project is underway in Ontario in order to quantify and make recommendations about the “civil legal needs experienced by low and middle-income Ontarians.”

---

254 Civil Justice Reform Project, supra note 250 at §11.

255 Ontario’s Rules of Civil Procedure, as recently amended by O. Reg. 438/08, ss. 47, provide – at r. 50 – among other things:

50.01 The purpose of this Rule is to provide an opportunity for any or all of the issues in a proceeding to be settled without a hearing and, with respect to any issues that are not settled, to obtain from the court orders or directions to assist in the just, most expeditious and least expensive disposition of the proceeding, including orders or directions to ensure that any hearing proceeds in an orderly and efficient manner….

50.06 The following matters shall be considered at a pre-trial conference:

1. The possibility of settlement of any or all of the issues in the proceeding.

2. Simplification of the issues.…

11. Any other matter that may assist in the just, most expeditious and least expensive disposition of the proceeding.

See also the pre-trial settlement provisions provided for under r. 76 (Simplified Procedures).

256 See supra note 222.

257 See Ontario Civil Legal Needs Project, “Listening to Ontarians” (Toronto: Ontario Civil Legal Needs Project Steering Committee, May 2010) at 2. The project is co-sponsored by the Law
CHAPTER 3

QUÉBEC

Like many other provinces, Québec also took a serious look at its systems of civil justice following the time of the work of the CBA Task Force. The Civil Procedure Review Committee, established by the Minister of Justice on 4 June 1998, released its report in August 2001. The mandate of the Committee was quite clear:

As its name suggests, the Committee’s mandate was to review the civil procedure and propose measures that would [translation] “implement a more rapid, efficient and reassuring justice, which is less time consuming and less expensive in terms of energy and money for both the person subject to trial and the justice system”.

Like other reform initiatives, and with a foundational concern for proportionality of proceedings, the Committee identified a multi-faceted vision for its revised civil procedure regime that included a focus on: “respect of persons”; “accountability of the parties”; “increased intervention of the judge”; “proportionality of the procedure”; and the use of “information technologies”.

Of particular interest to this project were the Committee’s recommendations regarding settlement and ADR. One aspect to those recommendations was the


259 Ibid.

260 Ibid. at 1 (citation omitted).

261 Ibid. at 3-4.
adoption of a private mediation process as an alternative process.\textsuperscript{262} Additionally, the Committee also, in furtherance of its vision for increasing the role of judges in civil proceedings, provided recommendations regarding the active involvement of judges in the settlement of disputes. According to the Committee:

In order to allow the courts to play their full role in the proper conduct of the proceedings, the Committee considers it appropriate to plan measures that would allow a greater intervention of the judge in the administration of proceedings by allowing him, in addition to the pre-trial conferences, to hold case management conferences and settlement conferences.\textsuperscript{263}

Although a judge-assisted settlement conference process existed in Québec from 2001 (prior to the revision of the rules of court coming out of the Committee’s recommendations\textsuperscript{264}), the new rules specifically included judicial settlement provisions.\textsuperscript{265} Those rules provide for a very flexible and confidential process.\textsuperscript{266} Three years after the enactment of those rules, judicial settlement

\textsuperscript{262} Ibid. at 10.

\textsuperscript{263} Ibid. at 4. See also ibid. at 9.


\textsuperscript{265} \textit{Code of Civil Procedure}, \textit{ibid.} at div. IV, rr. 151.14-151.23. For useful background information on these reforms, see Hon. François Rolland, “Access to Justice: 3 Years After the Reform of the Code of Civil Procedure” (paper given at CFCJ “Into the Future” conference, Montréal, Québec, 1 May 2006) at section entitled “Settlement Conference” [pagination for parts of the online version of this article are not available], online: CFCJ <http://cfcj-fcjc.org/docs/2006/rolland-en.pdf>. For further discussion of the “Into the Future” conference, see \textit{supra} note 181).

\textsuperscript{266} See \textit{e.g. Code of Civil Procedure, ibid.} at rr. 151.16-151.18, 151.21.
processes were being described as very successful. According to François Rolland, Chief Justice of the Superior Court of Québec:

This system is fabulous and facilitates access to justice. It has received an overwhelming reception from both the parties and their attorneys.

However, in some ways, the Superior Court is now a victim of its own success.

In fact, the problem is that we cannot keep up with the demand.

Between 2001 and 2004, 1,295 settlement conferences were held throughout Québec. Last year, in the District of Montréal alone, we held close to 700 conferences. The delay to obtain a date was three weeks two years ago, and now it is seven months.

Five judges are allocated full-time to preside over these conferences, plus judges who accept on a volunteer basis to preside over conferences. The success rate of these conferences is very impressive: 80% in civil matters and close to 70% in family matters.

Obviously, the parties and the attorneys are extremely satisfied with these conferences because they have access to judges on an informal basis to explain their case and to settle their dispute. Normally, this is done quickly in the process.267

Similar to other provincial initiatives, Québec’s approach to confidential settlement is clearly extremely active and successful from a settlement perspective.268

267 Rolland, “Access to Justice: 3 Years After the Reform of the Code of Civil Procedure”, supra note 265. Notwithstanding this positive support for judicial dispute resolution, perceptions of the overall results of the Québec reforms have been mixed. See e.g. ibid. at 5-6.

PRIVATIZATION OF CIVIL COURTS

MARITIMES

Nova Scotia, largely through the work of the Nova Scotia Civil Procedure Rules Revision Project, has recently been engaged in a significant review of its civil justice system. Animating that process was the Project’s “particular attention” to how the rules of court “affect the speed, costs, and understandability of civil court proceedings.” According to the Project, “Rules which are efficient, effective, and clear should reduce delays, lessen expenses and lead to more satisfactory results.”

One of several key processes of interest to the Project was “early dispute resolution”. On this topic, the Project examined the following questions:

- Should there be a rule regulating settlement conferences?
- Should the rules provide for a choice of process between pure mediation and a judge’s second opinion?
- Should procedures be standardized for early dispute resolution?
- Should there be sanctions for a party who rejects a judge’s suggested resolution and obtains a worse outcome after trial?

Following the Project’s work, Nova Scotia’s rules were revised and recently went into effect on 1 January 2009. Many of the Project’s “early dispute...

---


270 “Issues Memorandum”, ibid. at 3.

271 Ibid. at 6.
resolution” issues are specifically contemplated by the settlement provisions of the new rules, which include a very comprehensive, flexible and confidential judicial settlement conference regime.273

ADR processes are also being used elsewhere in the Maritimes. For example, Newfoundland and Labrador has several ADR tools in its rules, including judicially assisted settlement conferences274 as well as court-ordered mediation.275 Prince Edward Island’s rules of court provide for a judge assisted pre-trial conference.276 New Brunswick’s rules of court specifically provide for a comprehensive, flexible and confidential judicial settlement conference regime as part of its pre-trial offerings.277

5. OTHER COURTS

In addition to general superior courts of record, other courts in Canada are also experimenting with significant reform initiatives. Many of these initiatives

---


275 See ibid. at r. 37A.


are pursuing the same reform goals of reduced cost and increased speed and efficiency. They are also resulting in similar privatizing trends.

**Small Claims Courts and Courts of Appeal**

Small claims courts have played an important role in the state’s goal of providing a just, cost-effective and accessible public venue for the resolution of many day-to-day disputes in society. According to Marvin Zuker, these courts “originated in response to a perception that the complex and technical regular civil procedure made it virtually impossible for wage earners and small businessmen to use the court system to collect wages or accounts which they were owed.”

Key to these small claims court regimes are major efforts to reduce cost and delay by simplifying the processes by which disputes get resolved. Put simply, the basic purpose of these processes is to provide parties with a “quick, economical [dispute resolution] solution”.

Badges of the small claims court system include less of a need for litigants to be represented by lawyers, more interventionist judges (able to assist the parties when necessary to narrow the issues and move through the trial process), relaxed rules of evidence and

---


280 In Québec, lawyers are typically prohibited from acting. See Code of Civil Procedure, supra note 264 at s. 959.
CHAPTER 3

simplified rules of trial procedure. In sum, again according to Zuker, the “crux of the small claims procedure is informality and simplicity.”

Informality, however, does not equal privacy. The traditional small claims court model still contemplates an open, public dispute resolution process. Having said that, for some years now small claims courts have also been experimenting with and implementing various alternative private process options. Many of these initiatives include case management and other ADR (typically mediation-oriented) regimes. For example, Alberta’s small claims regime includes a pre-trial conference and active mediation programs. The first of several stated purposes of the pre-trial conference regime is to consider the “possibility of settling the claim”. The “aim” of the mediation program is to “increase the number of civil cases resolved through mediation and reduce the number of civil

281 See e.g. Ontario Small Claims Court Rules, O. Reg. 258/98, as amended. See also e.g. Ontario Ministry of the Attorney General, “Small Claims Court Guides to Procedures”, online: Ontario Government <http://www.attorneygeneral.jus.gov.on.ca/english/courts/guides/>.

282 Zuker, Small Claims Court Practice, supra note 278.


285 Provincial Court Act, ibid. at s. 64(1)(a).
cases that proceed to court.”\textsuperscript{286} The 2007-2008 settlement (“success”) rate for Alberta’s program was 65%, which was a 2% increase over both the 2006-2007 settlement rate as well as the 2007-2008 target settlement rate.\textsuperscript{287}

Other provincial small claims courts are pursuing similar initiatives. For example, Saskatchewan’s Small Claims Court also offers a pre-trial case-management process.\textsuperscript{288} As with the Alberta process, a primary motivation behind that process is to help the parties to settle their dispute with the assistance of a case-management judge.\textsuperscript{289} B.C.’s small claims process includes a settlement conference regime and a multi-level mediation program for claims involving different amounts.\textsuperscript{290} Québec’s small claims regime includes a voluntary court-annexed mediation program.\textsuperscript{291} Similarly, the Yukon’s small claims regime also


\textsuperscript{287} Ibid.


\textsuperscript{291} See e.g. \textit{Code of Civil Procedure, supra} note 264 at s. 973.
includes a voluntary court-annexed mediation option.\textsuperscript{292} And other provinces have similar initiatives.\textsuperscript{293} Further, although not a specific focus of this project,\textsuperscript{294} additional court initiatives include a wide range of mediation and case management programs in family law cases.\textsuperscript{295}

In addition to small claims courts, courts of appeal in Canada have also, more recently, been experimenting with various forms of voluntary, court-annexed ADR processes. For example, as I mentioned above,\textsuperscript{296} the JDR program in Alberta is also available, in some cases, at the Court of Appeal.\textsuperscript{297} The B.C. Court of Appeal offers a judicial settlement conference.\textsuperscript{298} Similarly, some judges of the Court of Appeal for Ontario are also engaged in voluntary court-annexed

\begin{footnotesize}
\begin{enumerate}
\item See \textit{e.g.} Ontario’s Small Claims Court Rules, supra note 281 at r. 13; Ontario Small Claims Court, “What is Small Claims Court?”, online: Government of Ontario <http://www.attorneygeneral.jus.gov.on.ca/english/courts/guides/WhatisSCCJan08EN.pdf>.
\item As mentioned above, see supra note 86.
\item See \textit{e.g.} Ontario \textit{Family Law Rules}, O. Reg. 439/07, s. 40. For a relatively recent comment, see Daryl-Lynn Carlson, “Family lawyers flocking to ADR” \textit{Law Times} (18 June 2007), online: Law Times <http://www.lawtimesnews.com/200706182260/Headline-News/Family-lawyers-flocking-to-ADR>.
\item See supra note 210 and accompanying text.
\item See \textit{e.g.} Alberta Court of Appeal, “Guidelines for Judicial Dispute Resolution (JDR)”, supra note 210.
\end{enumerate}
\end{footnotesize}
PRIVATIZATION OF CIVIL COURTS

mediation initiatives.\textsuperscript{299} Other provincial courts of appeal also offer various ADR-related services, including Québec,\textsuperscript{300} New Brunswick,\textsuperscript{301} and Newfoundland and Labrador.\textsuperscript{302}

FEDERAL COURTS

Similarly, at the federal court level, case management and ADR – primarily through the court’s “case management and dispute resolution services” program\textsuperscript{303} – have been implemented for some years now and are being actively pursued as tools to reduce backlog and eliminate “dead wood” proceedings from the court’s docket.\textsuperscript{304} Dispute resolution services, performed by a case management judge or prothonotary, include confidential mediations, early neutral evaluations and non-binding mini-trials designed to render an opinion as to the probable outcome of a proceeding.\textsuperscript{305}

---

\textsuperscript{299} See \textit{e.g.} “Brief Biographical Note of Justice Karen M. Weiler”, online: Court of Appeal for Ontario <http://www.ontariocourts.on.ca/coa/en/judges/weiler.htm#>, which provides that “mediation” is “now offered by the Court of Appeal as a voluntary option to litigants who request it.”

\textsuperscript{300} For a discussion of the Québec Court of Appeal’s confidential judicial mediation program, see \textit{e.g.} Court of Appeal of Québec, “Mediation”, online: Court of Appeal of Québec <http://www.tribunaux.qc.ca/mjq_en/c-appel/about/conciliation.html>.

\textsuperscript{301} See \textit{Rules of Court, supra} note 277 at r. 62.1, which provides for judicial “settlement conferences”.

\textsuperscript{302} See \textit{Rules of the Supreme Court, 1986, supra} note 274 at r. 57.22, which provides for a prehearing conference designed to canvass, in addition to other things, “the appropriateness of conducting a settlement of mediation hearing”.

\textsuperscript{303} See \textit{Federal Court Rules}, SOR/98-106, as amended, at pt. 9, rr. 380-391.

\textsuperscript{304} Hon. Allan Lutfy, Swearing-in Ceremony, Associate Chief Justice (as he then was) (7 January 2000), online: Federal Court of Canada <http://cas-ncter03.cas-satj.gc.ca/portal/page/portal/fc_cf_en/Speech>.

\textsuperscript{305} See \textit{Federal Court Rules, supra} note 303 at rr. 386-388.
Settlement of civil cases is clearly not a new concept. As we saw, for example, in reports from the 19th century court reforms in New York, "inducements to a compromise during a litigation" have been part of court reform initiatives for some time. And these sorts of inducement regimes are certainly standard fair in modern civil court rules. However, with all of the recent provincial and federal privatizing trends has come a concomitant phenomenon known as the "vanishing trial." It is now widely recognized that fewer and fewer disputes that would typically proceed in the public civil courts are actually going to trial. As Julie Macfarlane notes, there are "fewer trials today than there were 10 years ago." Although historically always present, settlement through private means has become increasingly the norm in civil justice systems throughout the common law world. Put simply: almost all disputes settle; put


307 See e.g. Ontario Rules of Civil Procedure, supra note 67 at r. 49.


differently: civil trials are “vanishing”. As Chief Justice François Rolland of the Superior Court of Québec recently commented:

The ... middle class has simply deserted the Common Law courtrooms. Most civil cases heard before the Superior Court in Montréal are filed by companies rather than individuals. This is with the exception of family matters, of course. At this rate, it looks as though, at least in the short term, a civil case between two individuals will become a rarity.\textsuperscript{310}

In the U.S., according to one recent report, 98.2 percent of civil cases are settled before trial.\textsuperscript{311} Similar trends are occurring elsewhere. For example, according to Australia’s ALRC, “[a]s the empirical data ... confirms, the vast majority of civil disputes commenced within the federal court and tribunal system are concluded by means other than formal adjudication.... They are settled by negotiation or through other dispute resolution mechanisms (such as mediation, conciliation or arbitration)”.\textsuperscript{312} Additionally, there is some further evidence relating to civil cases in the U.S. Federal Court system that points to an increasing number of cases that are also being resolved at the pre-trial stage by adversarial processes (summary judgment, dismissal, etc.).\textsuperscript{313}


\textsuperscript{311} See Moulton, “Vanishing trials: Out-of-court settlements on the rise”, supra note 185 at 22. See further Special Issue, “Vanishing Trial”, supra note 308.

\textsuperscript{312} ALRC, “Review of the Federal Civil Justice System”, supra note 115 at c. 3, para. 3.40 [footnotes omitted], discussed further in Farrow, “Dispute Resolution, Access to Civil Justice and Legal Education”, supra note 47 at n. 44 and surrounding text.

CHAPTER 3

Settlement figures are similar in Canada, where the “vast majority [of cases] ... are ... resolved through a variety of related processes that have come to be grouped under the broad heading of ‘alternative dispute resolution’”.

According to one recent report, approximately 95-96 percent of civil cases settle prior to trial. Paul Emond puts the high end of that settlement range even higher, with: “the vast majority (95% to 98%) of disputes” being “resolved through negotiation and not adjudication”. Julie Macfarlane puts it higher still, at 98.2%. Similarly, an Alberta study indicates that “current ratio of trials to filings in ... Canadian and foreign jurisdictions” is “less than 2%.”

These numbers are in line with reports from other Canadian provincial jurisdictions. For example, the number of civil cases going to trial in B.C. is reportedly at an “all time low”. According to one B.C. source, 4% of cases that are initiated in the civil justice system actually proceed to trial. Another source puts the B.C. trial-

---


318 ALRI, “Promoting Early Resolution of Disputes by Settlement”, supra note 92 at 8, n. 17.

319 Darrell Roberts (associate counsel with Miller Thomson LLP in Vancouver) in Guly, “Storm erupts over B.C.’s proposed civil reforms”, supra note 207 at 18.

to-filing ratio at 5%. Similar figures are coming out of Québec. Again according to Chief Justice Rolland, 

[In 2001, out of 100 cases filed in the Superior Court of Québec, seven cases ended with a judgment after a trial. On December 31st, 2005, out of 100 cases introduced in the Superior Court, 7% will still end with a judgment after a trial.]

Comprehensive longitudinal Canadian statistics for activity in the civil side of the justice system have been traditionally very hard to come by. A relatively recent initiative from Statistics Canada has started to collect statistics in several Canadian jurisdictions regarding the number of civil actions that are initiated or are active during a given calendar year. For the purpose of this project, the statistics include relevant information for six jurisdictions: Nova Scotia, Ontario, British Columbia, Yukon, Northwest Territories and Nunavut. The most recent available results of this initiative are consistent with the anecdotes and annual trends from other jurisdictions. For example, but for the Northwest Territories, the number of cases that were initiated in each of the other five jurisdictions has declined from the 2006/2007 to the 2007/2008 reporting periods.

Estimates as to the way, and at what stage of the process, disputes are resolved vary and are not precise. However, at least one Ontario report found that “approximately 55% of cases commenced never proceed to the point where a

321 See e.g. Guly, “Storm erupts over B.C.’s proposed civil reforms”, supra note 207 at 18.

137
statement of defence is filed” and the “remaining 45% of the case load proceeds through various additional stages of litigation, with the vast majority settling at some point between the pleading stage and the eve or morning of trial.”

These general settlement figures also blend different areas of practice, which are reported not to have uniform rates of settlement. For example, according to one lawyer practicing in the field of corporate dispute resolution, the number of cases involving commercial litigation issues that are settled prior to trial “is as high as 90 percent.” Regardless of jurisdictional and subject matter differences, one thing is patently clear from these various studies and reports: almost all civil cases are resolved outside of court. Public civil trials are a “rarity” and may be “vanishing”. And as we have seen in this chapter (and as will be further discussed below), that is clearly a major goal of the modern civil justice reform movement.

7. OVERALL MOVE TO ADR AND RELATED PRIVATE PROCESSES

Many of the concerns raised by law commissions, law reformers, policy makers, etc. – identified above – regarding our current systems of civil justice


327 See e.g. Special Issue, “Vanishing Trial”, supra note 308 and accompanying text.

328 See infra cc. 5-6.
continue to relate to what Adam Smith called the “expense of a law-suit”;\(^{329}\) to what Bentham subsequently identified as “mischiefs” within the civil-side of the court process including: “Expense”, “Delay” and “Complication”;\(^{330}\) to what Lord Woolf more recently identified as “problems” and “defects” within the system including it being “too expensive”, too “cost[ly]”, “too slow”, “too unequal”, “too uncertain”, “incomprehensible”, “too fragmented” and “too adversarial”;\(^{331}\) and to what former Ontario Chief Justice Roy McMurtry referred to as amounting to a “crisis”, including the system’s “increasing cost”, “tremendous … backlog”, and “serious lack of adequate resources”.\(^{332}\) These are the kinds of concerns that have resulted in ongoing reform projects over the past centuries, including the recent modern civil justice reform movement over the past 10 years or so. And based on a review of the recent Canadian national and provincial reform initiatives,\(^{333}\) there can be no doubt that a major goal of policy-makers is to get cases out of the traditional public trial stream and into a variety of ADR settlement processes, including court-connected mediation,\(^{334}\) judge-assisted and judicial dispute


\(^{330}\) Bentham, *Principles of Judicial Procedure, with the Outlines of a Procedural Code*, supra note 103 at c. iii, discussed further *supra* notes 103 and 120 and accompanying text.

\(^{331}\) Woolf, *Access to Justice*, supra note 106 at §1(2), discussed further *supra* note 109 and accompanying text.

\(^{332}\) “McMurtry Remarks”, *supra* note 186 at 3-4, discussed further *ibid.* and accompanying text.

\(^{333}\) See generally *supra* pt. 4.

\(^{334}\) See *e.g.* the court-connected mediation programs in Alberta, Saskatchewan and Ontario, discussed *supra* pt. 4.
resolution programs, notice to mediate initiatives, and so forth. Put simply, as McMurtry J. acknowledged, "we recognize that ADR is now firmly entrenched" in our modern, reforming systems. Further, case management and pre-trial conference initiatives – together with incentives built into typical Canadian fee-shifting costs rules that provide parties with added legislatively-sanctioned court-based incentives for private, non-trial-based settlements – provide judges and parties with other robust tools for the encouragement and facilitation of these ADR settlement tools.

Taken together, these recent ADR and related litigation management and settlement initiatives are the sorts of civil justice tools that make up "all of the efforts over many years to encourage settlement between parties;" or what one

335 See e.g. the JDR programs in Alberta, Québec and Nova Scotia, discussed supra pt. 4.

336 Numerous family ADR services, which I do not specifically address in this research, are either in place and/or are being experimented with across the country. See e.g. Ontario Ministry of the Attorney General, “Family Mediation Services”, online: Ontario Government <http://www.attorneygeneral.jus.gov.on.ca/english/family/mediation.asp>; Ontario Ministry of the Attorney General, “Family Mediation”, online: Ontario Government <http://www.attorneygeneral.jus.gov.on.ca/english/family/divorce/mediation/>.

337 See e.g. B.C.’s “Notice to Mediate” regime, supra note 197 and accompanying text.

338 “McMurtry Remarks”, supra note 186 at 7.

339 See e.g. Ontario Rules of Civil Procedure, supra note 67 at r. 77. Further, see e.g. specifically ibid. at rr. 77.13(5)-(6), both of which provide for the referral of “any issue for alternative dispute resolution”.

340 See e.g. ibid. at r. 50.

341 See e.g. ibid. at r. 49.

342 Hagel v. Giles, supra note 245 at para. 34, D. J. Power J.
commentator, as mentioned above, referred to as a “global revolution”. They are also, taken together, what amounts to a major and systematic privatizing trend – as part of an increasingly widespread civil justice reform movement – throughout our public civil court system.

343 Karl Mackie (referring specifically to mediation) in Economist Staff, “Knocking Heads Together”, supra note 159. Further and as also mentioned earlier, according to Mackie, “Interest in mediation is rocketing, in countries of all legal traditions and none.” See ibid.
CHAPTER 4
OTHER STATE-BASED OR SANCTIONED DISPUTE RESOLUTION REGIMES

1. ADMINISTRATIVE SYSTEM

BACKGROUND

Over the years, administrative tribunals and related regimes\(^1\) have developed largely as alternative, specialized dispute resolution forums. As Kaye Joachim recently commented, administrative tribunals “were created to provide a speedy, efficient, and more cost effective alternative to court adjudication.”\(^2\)

\(^1\) Other regimes, which I do not generally discuss in this project (although many of the same issues apply), include ombud and related dispute resolution services. There are a number of these types of ombud processes in Canada, including in the banking and insurance industries, as well as in other federal and provincial ombud regimes. In terms of the banking industry, see e.g. the Ombudsman for Banking Services and Investments (OBSI), which provides an optional dispute resolution process for disputes of less than $350,000 between customers and more than 600 participating organizations in the banking and investment industries. With respect to OBSI’s dispute resolution services, see e.g. OBSI, “Our Work”, online: OBSI <https://www.obsi.ca/UI/AboutUs/OurWork.aspx>, which provides that:

We are independent and impartial, and our services are free to consumers. You must first complain to the firm involved, but if you remain unsatisfied you have a right to bring your case to us. As an alternative to the legal system, we work informally and confidentially to find a fair outcome…. If you don’t like our findings in your case, you are still able to go to a lawyer or seek other ways of resolving your dispute.


\(^2\) Kaye Joachim, “New Models in Administrative Hearings: The Human Rights Tribunal of Ontario” in Ronalda Murphy and Patrick A. Molinari, eds., Doing Justice: Dispute Resolution in the Courts and Beyond (Canada: Canadian Institute for the Administration of Justice, 2009) at 89.
Similarly, according to Régimbal, administrative “agencies, boards, commissions and tribunals”, which are “often populated by experts in the area”, provide:

specialized and technical resolutions to different situations, ensure greater innovation, flexibility and efficiency in the delivery of governmental programs and strategies, provide an informal and rapid forum for public hearings (thereby minimizing time and costs related to litigation before ordinary courts) and relieve politicians from what might be otherwise very sensitive political issues.3

However, notwithstanding their “alternative” position,4 administrative regimes clearly perform central dispute resolution and societal regulation functions in Canada in many of the same ways that public courts do.5 In fact, as the Supreme Court of Canada recently confirmed, administrative panels, subject to express jurisdictional limitations, are considered to be “court[s] of competent jurisdiction”6 for purposes of granting remedies pursuant to s. 24(1) of the


3 Régimbal, Canadian Administrative Law, ibid. at 2-3.


5 See further infra c. 2.

CHAPTER 4

Charter. Administrative proceedings – like courts – are also typically meant to be open to the public. Further, in the same way that courts play a central role in our processes of democratic governance, so too do administrative regimes. For example, according to David Mullan,

[A]dministrative law … is inevitably enmeshed in theoretical controversies about the legitimate roles of the state, the proper scope of individual autonomy, the content of democratic values, including the rule of law, and the ways in which they can best be realized. In addition … administrative law raises … some fundamental questions about the nature of law: the extent to which law is discrete and autonomous from other social phenomenon, on the one hand, or, on the other, is merely a vehicle for transporting to another forum debates about public policy and political power.

An example of administrative law’s democratic governance role can be seen clearly, for example, in the mission statement of the Québec Human Rights Tribunal (QHRT), which states that the QHRT “contributes in its own way, as part of the third pillar of government, to the building of an egalitarian society, with proper regard for the principles of fundamental justice and procedural fairness.”

---


8 See e.g. Statutory Powers Procedure Act, R.S.O. 1990, c. S.22 at s. 9. For a recent discussion of the open court process as it applies in the administrative context, see Palkowski v. Ivancic (2009), 100 O.R. (3d) 89 at 101-102 (C.A.).

9 See further infra c. 2.


OTHER STATE-BASED OR SANCTIONED DISPUTE RESOLUTION REGIMES

Finally, as discussed further in this part of this chapter, in the same way that public civil courts are actively looking at ways of privatizing major aspects of their dispute resolution processes, again, so too are administrative regimes, which have embraced a similar ethos of reform.12 As one source notes, over the past 10-15 years, there has been “an explosion” in the use of ADR by various statutory bodies in Canada.13 The research for this chapter turned up literally hundreds of provincial and federal statutes and legislative provisions in Canada regarding administrative-based dispute resolution processes, as well as hundreds of instances of discussions of the use of mediation, arbitration and other forms of privatizing tools in publicly-available materials for many of these administratively-based privatizing regimes.14

12 For an earlier discussion of privatization in the context of administrative dispute resolution processes, which has significantly influenced this part of this chapter, see Trevor C. W. Farrow, “Public Justice, Private Dispute Resolution and Democracy” in Murphy and Molinari, eds., Doing Justice: Dispute Resolution in the Courts and Beyond, supra note 2 at 324-332. For a diagram contemplating the relationship between administrative processes and other dispute resolution processes discussed in this project, all of which are engaging privatizing tools, see Appendix 1.

13 Genevieve A. Chornenki and Christine E. Hart, Bypass Court: A Dispute Resolution Handbook, 3d ed. (Canada: LexisNexis, 2005) at 283. See also ibid, at 257. For judicial discussion of the issue, see e.g. Reference re Amendments to the Residential Tenancies Act (N.S.), [1996] 1 S.C.R. 186.


145
FEDERAL PROCESSES

There are many examples of federal administrative processes that actively encourage and engage various privatizing tools.15 According to Marian Robson, the former chair of the Canadian Transportation Agency, “[i]n recent years, government tribunals that have introduced innovative mediation programs have

15 As mentioned, many federal administrative regimes actively promote and employ privatizing initiatives as part of their dispute resolution processes. In addition to those specifically discussed in this part of this chapter, see further e.g. the Immigration and Refugee Board of Canada, Immigration Appeal Division (IAD), “Alternative Dispute Resolution (ADR) Program Protocols” (amended 13 January 2003), online: Government of Canada <http://www.irbcisr.gc.ca/eng/brdcmen/refebr/diastai/adrmarl/Pages/protoc.aspx> (ADR at the IAD is discussed briefly further at infra note 65 and accompanying text); Canadian Transportation Agency, “Canadian Transportation Agency Launches A New Pilot Project Offering Mediation Services”, online: Government of Canada <http://www.ctaotc.gc.ca/doc.php?did=542&lang=eng>. For a further example, see Public Works and Government Services Canada, “Conflict Management and Alternative Dispute Resolution (ADR) Services”, online: Government of Canada <http://www.tpsgc-pwgsc.gc.ca/crdcccrb/index-eng.html>, which provides:

The Conflict Management and ADR Services Group offers a range of options for managing conflict and resolving disputes – from providing advice and coaching in managing conflict, to facilitating voluntary processes for the resolution of disputes.

Parties are encouraged to attempt to reach a solution through discussion and negotiation before seeking more formal options. (Many contracts require that the parties attempt to resolve a dispute through alternative dispute resolution processes). Should negotiation and facilitated discussion fail to result in satisfactory agreement, parties may agree to enter into mediation. The Contract Conflict Resolution Board (CCRB arbitration boards) may also be an option. The most appropriate method to resolve any given dispute can only be chosen after a careful assessment of the facts and circumstances of the case. In making this evaluation, one must consider the interests of the parties, the nature of the dispute and any statutory or policy restrictions governing the use of a particular dispute resolution process.

The consensual nature of most dispute resolution methods requires that the choice of process be made jointly by all parties. It is the ability of the parties to agree to which dispute resolution process best fits the case at hand that will improve the quality of and access to justice. Acceptable settlements, which may not be available through the litigation process, can be developed by the parties when using an ADR process.
OTHER STATE-BASED OR SANCTIONED DISPUTE RESOLUTION REGIMES

seen a huge success rate among their clients”.\(^1\) For example, the Canadian Human Rights Commission (CHRC), established pursuant to the *Canadian Human Rights Act*,\(^17\) has adopted a wide-ranging ADR program that actively promotes the simplification and privatization of many disputes brought to the CHRC. According to the CHRC’s materials:

Alternative dispute resolution (ADR) is a non-adversarial way of resolving disputes that is being increasingly used in the public and private sectors. The Commission actively promotes ADR with disputing parties because it is timely and effective.\(^18\)

Within its former 1999 pilot project and now within its established ADR programs, which in 2005 were brought under the newly created Dispute Resolution Branch, the use of ADR has been quite wide-spread and reportedly successful. According to its 2006 annual report, for example, nearly half of the cases dealt with by the CHRC in 2006 were settled, mostly using a CHRC-appointed conciliator or mediator.\(^19\) Since that time, the CHRC “continues to place increased emphasis on early dispute resolution.”\(^20\) As is discussed further below,\(^21\) one of the important aspects of the CHRC’s approach to ADR is its


\(^{17}\) R.S.C. 1985, c. H-6, s. 26.


\(^{21}\) See *infra* notes 24-25 and accompanying text.
recognition that not all cases are suitable for ADR. However, notwithstanding this recognition, it continues, as stated above, to make ADR an “increased” priority.  

There are many reasons cited for pursuing ADR in the administrative context, all of which are consistent with the general reasons behind most of the civil court reform initiatives discussed elsewhere in this project, including cost and efficiency-based reasons, etc.  

For example, according to its materials specifically on mediation, the CHRC describes mediation as “confidential and voluntary” and “quicker, less adversarial, less expensive and less time-consuming than investigation or litigation.” Similarly, according to the CHRC’s ADR materials generally:

ADR helps parties resolve their differences without resorting to a more confrontational adjudicative process. It is voluntary, timely and confidential. It looks at needs and interests, and is designed to yield solutions that are adapted to the particular circumstances of individual cases. Unlike adjudication, ADR is about finding mutually agreeable solutions rather than determining which party is “right” and which is “wrong”. ADR can also yield creative and far-reaching solutions to issues of systemic discrimination....

Another example of a federal process that actively promotes the use of ADR tools is the Commission for Public Complaints Against the RCMP (CPC), which


23 See e.g. supra c. 3 and infra c. 6.  


OTHER STATE-BASED OR SANCTIONED DISPUTE RESOLUTION REGIMES

was established in 1988 by the Federal Government. The CPC is designed to provide “civilian oversight” of the conduct of members of the Royal Canadian Mounted Police (RCMP).26 According to the CPC, it actively promotes the use of ADR for the resolution of complaints:

Once the CPC analyst determines the relevant facts and understands the goals of the complainant, the analyst explains the citizen’s options for dealing with his or her concern. In appropriate cases, the analyst invites the complainant and the RCMP to work together informally to resolve the complaint. The complainant always retains the right to file a formal complaint.

Where the complainant elects to resolve the complaint informally, the CPC analyst serves as a facilitator, helping the complainant obtain information by enlisting the aid of the senior RCMP officer in the jurisdiction where the problem arose. When facilitating in this manner, the analyst provides the RCMP with a summary of the concern expressed by the complainant, normally on the same day that the citizen raises the concern.27

Again, the merits of this process are well-known. Speed, cost and efficiency are important justifications for the CPC’s use of alternative, more private, processes. However, it is clear that the CPC and the RCMP, particularly given budgetary realities, encourage the use of ADR to enable them to deploy their energies on matters that they view as more pressing. For example, according to the CPC:

The informal resolution of complaints against members of the RCMP has been highly successful – the needs of complainants often


can be addressed more quickly than through the formal process. Informal resolution makes it possible for both the CPC and the RCMP to deploy scarce resources to higher priority work.28

Provided other endeavors are more pressing and assuming the intake analyst who receives complaints gets the complaint-channeling process right, of course that policy approach makes sense. However, to the extent that a case of significant public importance is run through the CPC’s ADR channel, because of a bad decision by an intake analyst, bad faith on the part of the RCMP or the CPC, or simply because of “scarce resources” that are deemed to be needed for “higher priority work”, concerns need to be raised.29 These are the concerns of this project, which are further developed below.30 Given the active promotion of ADR by the CPC, it is clear that, like the CHRC, its strong preference, which is also in-line with the Federal Government’s stated preferences,31 is to try to resolve disputes using ADR tools.

**Provincial Processes**

As with the federal administrative regime, provincial processes are increasingly promoting and employing privatizing initiatives as part of their

---


29 According to the CPC, “It should be noted that the CPC does not resolve serious incidents informally.” See CPC, *Annual Report, 2007-2008* at “Enquiries, Informal Resolutions and Complaints”, supra note 27. What “serious” means, and whether it could include a pattern of less serious individual incidents that, taken together, amount to a serious problem, is not defined.

30 See infra cc. 7-8.

31 See e.g. infra cc. 5.
dispute resolution systems.\textsuperscript{32} As a preliminary matter, several provinces, including British Columbia and Ontario, have enacted administrative legislation of general application that allows for individual administrative regimes within those jurisdictions to create and administer ADR processes. These legislative initiatives are clearly in-line with, and are in fact motivated by the overall government preferences in these and other jurisdictions to promote the use of privatized dispute resolution mechanisms generally.\textsuperscript{33} For example, according to the B.C. legislation, “The chair of the tribunal may appoint a member or staff of the tribunal or other persons to conduct a dispute resolution process.”\textsuperscript{34} Similarly in Ontario, tribunals are given broad authority to develop and administer privatizing ADR regimes, including mandatory regimes. According to the 

\textit{Statutory Powers Procedure Act},

\begin{quote}
A tribunal may make rules … classifying the types of proceedings that come before it and setting guidelines as to the procedural steps or processes (such as … alternative dispute resolution mechanisms, expedited hearings) that apply to each type of proceeding and the circumstances in which other procedures may apply…. 

A rule … may provide that participation in an alternative dispute resolution mechanism is mandatory or that it is mandatory in certain specified circumstances.\textsuperscript{35}
\end{quote}


\textsuperscript{33} Discussed further at infra c. 5.

\textsuperscript{34} \textit{Administrative Tribunals Act}, S.B.C. 2004, c. 45 at s. 28(1). For legislative commentary about this statute, see e.g. B.C., Legislative Assembly, \textit{Hansard}, 37th Parl., 5th sess., vol. 25, No. 15 (18 May 2004) at 11191-11196 (Hon. G. Plant).

\textsuperscript{35} R.S.O. 1990, c. S.22 at ss. 4.7, 4.8(4).
CHAPTER 4

Of particular interest to the arguments presented in this project are administrative regimes that deal with significant public interest values and resources. One area of particular focus, in which these sorts of ADR mechanisms have been put in place, includes the various provincial human rights regimes. For example, the Manitoba Human Rights Commission (MHRC) “encourages” the use of ADR processes as part of its overall dispute resolution process.36 Similarly, the B.C. Human Rights Tribunal (BCHRT) offers various forms of “off the record” ADR settlement processes, including mediation, early evaluation, structured negotiation and final determinations on the merits.37

The policy reasons behind the BCHRT initiatives, again, include speed, simplicity (often including reduced costs) and privacy. Specifically, according to the BCHRT, parties “may be interested in a settlement meeting for a number of reasons. Settlement meetings are often the quickest and simplest method of


OTHER STATE-BASED OR SANCTIONED DISPUTE RESOLUTION REGIMES

resolving disputes, and they are confidential. *If there is a settlement, there will not be a public hearing.*”

Similar processes and policy advantages are identified as part of the ADR-based settlement initiatives of the Alberta Human Rights and Citizenship Commission (AHRCC) and the Nova Scotia Human Rights Commission (NSHRC). According to the AHRCC, for example, which provides for a “confidential” conciliation process, “[t]he success rate of conciliation is high: more than half of complaints are resolved through conciliation.” Similarly, according to the NSHRC:

While information from a Human Rights Board of Inquiry hearing is made public, information exchanged during settlement initiatives is kept confidential. This allows participants of settlement initiatives to discuss their situation openly and candidly without fear of repercussion.

Other provincial administrative bodies that deal with significant public resource issues include environmental protection tribunals. Again, in this segment of the administrative law process, significant privatizing initiatives have been put in place. For example, the Alberta Environmental Appeals Board

---


AEAB – an independent body that reviews decisions regarding development approval, water licenses, reclamation certificates and enforcement orders—actively encourages ADR. According to its materials, the AEAB “places a high value on its mediation program and encourages participants to use mediation as the primary way to resolve appeals that come before the Board.”

In addition to its policy statements, the AEAB’s preference for resolving disputes through its ADR process can also be seen from its settlement statistics. For example, according to the AEAB’s available annual mediation information:

From April 1, 2004 to March 31, 2005, the Board held 18 mediations, all of which were successfully resolved, resulting in a 100 percent success rate for this reporting year. Since the Board’s inception in 1993, it has conducted 139 mediations with 116 being successfully resolved. This reflects an overall success rate of 83 percent.

Similar environmental assessment and protection issues are dealt with by the Ontario Environmental Review Tribunal (OERT), which also actively deploys

---


43 Ibid. (emphasis added).

44 AEAB, 2004-2005 Annual Report at 24 (“Mediation Program”), online: Alberta Government <http://www.eab.gov.ab.ca/pub/2004-05-AR.pdf>-. By comparison, the settlement rates using these sorts of ADR-based processes in the human rights tribunal context are moderate to strong. For example, according to the AHRCC, more than 50 percent (394 complaints) of the 749 complaints that were resolved in the 2005-2006 year (of a total of 778 complaint files opened) were resolved using the AHRCC’s conciliation process. AHRCC, Annual Review, April 1, 2005-March 31, 2006 at 10 (“Conciliated files”). Almost 60 percent were resolved that way the previous year at the AHRCC. See ibid. Since that time, similar resolution rates are being achieved. For example, in 2007-2008, 52 percent of the complaint files (378 of 733 files) were resolved with the assistance of a conciliator. In 2006-2007, 58 percent of cases were resolved with a conciliator. All of these rates exceed the AHRCC’s stated settlement goal of 50 percent case closure through conciliation. See AHRCC, Annual Review, April 1, 2007-March 31, 2008 at 10 (“Conciliated files”), online: AHRCC <http://www.albertahumanrights.ab.ca/AHRCC_Annual_Review__07_08_FINAL.pdf>.
ADR techniques for the resolution of disputes. For example, according to the OERT:

Parties are encouraged to narrow or settle their differences at an early stage of the hearing process. Mediation services are offered to the parties by the Tribunal following a preliminary hearing and generally 30 days prior to the commencement of the main hearing. The number[s] of required hearing days and issues to be adjudicated are often reduced, resulting in lower costs to the parties and taxpayers. The Tribunal will continue to offer these services in every appeal and, upon request, in all applications filed in order to encourage parties to resolve their issues.45

According to the OERT, its “target” in this regard is to “increase the number of mediation sessions.”46 Further, even after an initial settlement attempt, or if “parties choose not to participate” following the preliminary hearing, mediation services “are available throughout the hearing process, upon request.”47 Because a “number of the Tribunal Members are certified to conduct mediation”,48 it is clear, even at the hearing stage, that mediation is actively considered and promoted by the OERT.

In addition to human rights and the environment, there are numerous other areas of administrative law in which ADR is playing an increasingly prominent role. For example, Ontario’s new home warranty regime is governed by


CHAPTER 4

legislation$^{49}$ that includes various facilitation and mandatory arbitration provisions.$^{50}$ Another example includes the regulation of financial industries, specifically including disputes involving those industries, are, in addition to ombud services,$^{51}$ actively using ADR techniques to resolve disputes. An example of this area of administrative regulation is the Financial Services Commission of Ontario (FSCO), which is an arm’s-length body of the Ontario Ministry of Finance.$^{52}$ As of 1 March 2008, the FSCO reportedly regulated or registered: “394 insurance companies, 7,755 pension plans, 207 credit unions and caisses populaires, 55 loan and trust companies, 1,290 mortgage brokers, 1,610 co-operative corporations, as well as approximately 39,700 insurance agents, 4,040 corporate insurance agencies and 1,145 insurance adjusters.”$^{53}$ As part of this extensive program, FSCO has put in place a Dispute Resolution Group (DRG), which provides dispute resolution services for consumers and insurers in Ontario. It has been described as “the largest, most comprehensive dispute


$^{50}$ See *ibid*. at ss. 17(1)-(4).

$^{51}$ See e.g. *supra* n. 1.

$^{52}$ See FSCO, “About FSCO”, online: Government of Ontario <http://www.fsco.gov.on.ca/english/about/>, which provides further that:

The ... FSCO ... was created on July 1, 1998, as an arm’s-length agency of the Ministry of Finance. FSCO integrates the operations of the former Ontario Insurance Commission, Pension Commission of Ontario, and Deposit Institutions Division of the Ministry of Finance. FSCO comprises three key parts: the Commission; the Financial Services Tribunal (Tribunal); and the Superintendent and Staff.

resolution system of any Ontario administrative agency, board or commission.”

That regime, which has been reportedly quite successful in terms of resolving disputes, provides several ADR processes, including a mandatory mediation regime.

---


56 According to the DRG’s materials:

The Dispute Resolution Group at the Commission provides mediation, neutral evaluation and arbitration services. There is also a process for appealing arbitration orders on a question of law, and a process for varying or revoking orders.

If consumers and insurers are unable to resolve disputes about statutory accident benefits, the first step in the dispute resolution process is mediation. Mediation of such disputes is mandatory in Ontario and must be conducted through the Commission before the dispute can proceed to arbitration or court. The insured person is charged no fee for mediation. However, each party must pay for its own expenses, which may include lawyer’s fees, travelling expenses, accounting services, and additional medical reports.

Mediation is an informal process in which a mediator helps parties involved in a dispute to clarify issues and find solutions that lead to a satisfactory outcome. The Mediation Unit of the Dispute Resolution Group has established a successful record in mediation, achieving full or partial success in over 75 percent of mediations. In December 1998, the Unit was awarded the prestigious Amethyst Award for outstanding achievement by the Ontario Public Service.

If the dispute remains unresolved after mediation at the Commission, the insured person has a number of choices. He or she can continue to negotiate directly with the insurance company. Alternatively, the insured person can opt for arbitration at the Commission, private arbitration, private neutral evaluation or a court action. Each option has its own rules, and the insured person may not be able to switch from one system to another. For example, once an action has been commenced in court, the insured person may not be able to switch to arbitration at the Commission, or vice versa.
CHAPTER 4

SETTLEMENTS INVOLVING MATTERS OF PUBLIC INTEREST

Notwithstanding policy-based provisions in various administrative regimes that often encourage or require matters of "public interest" to proceed to a tribunal hearing, 57 or at least to be resolved pursuant to "public interest" values, 58 as well as annual lists of some settlement details and summaries, 59 there are numerous cases being settled using private ADR tools that involve matters of significant public interest and importance that receive little or no public scrutiny or attention. Some of these settlements involve matters that are discontinued and not pursued at all through either the formal or informal administrative processes. 60 Nothing further may be heard of these matters. Of those that do continue into the system, many are resolved based on confidential processes and are only reported on in a very summary fashion, if at all, in the administrative regime's public materials. For example, private settlements at the administrative level over the past several years have involved matters of public interest such as: subsidized housing discrimination, 61 physical disability and gender discrimination, often in the

57 See e.g. AEAB, "About Mediation: When is Mediation not Appropriate?", online: Alberta Government <http://www.eab.gov.ab.ca/mediation_about.htm>. See further infra nn. 60 and 64 and accompanying text.

58 See e.g. CHRC, Overview, Resolving Disputes: "Mediation", supra note 18.

59 See e.g. Ontario Human Rights Commission [OHRC], "Settlements and Decisions at the Human Rights Tribunal of Ontario" at Appendices, online: OHRC <http://www.ohrc.on.ca/en/resources/annualreports/AnnualReport20052006EN?page=vmfgh-APPENDIC.html>, which were posted prior to the recent and significant reforms to Ontario's human rights regime.

60 See e.g. AEAB, 2004-2005 Annual Report at 36, supra note 44.

61 See e.g. MHRC, Annual Report 2005 at 11, supra note 36.
context of employment and services; significant complaints about police mistreatment involving potential discrimination of members of First Nations; environmental protection matters; and immigration matters. It is the public interest aspect of these privatized administrative settlements that brings them within the scope of this project. Put simply, while there are clearly important and persuasive efficiency-based justifications underlying various federal and provincial administrative-based privatizing initiatives, they do not, as I argue below, come without significant potential costs to both the dispute resolution and societal regulation purposes of public dispute resolution processes. However, before addressing those concerns, I first look at the final process of dispute resolution at stake in this project.

2. NON-COURT OR ADMINISTRATIVE-BASED LEGISLATIVE ADR PROCESSES

INTRODUCTION

The third aspect of the dispute resolution system that I focus on in this project, in addition to public courts and administrative regimes, is the

62 See e.g. AHRCC, Annual Review, April 1, 2005-March 31, 2006 at viii (“Resolution and adjudication of human rights complaints: summary of results”), supra note 44.
64 See e.g. AEAB, 2004-2005 Annual Report at 36, supra note 44.
65 See e.g. Immigration and Refugee Board of Canada, IAD, “Alternative Dispute Resolution (ADR) Program Protocols”, supra note 15.
66 See e.g. infra c. 6.
67 See infra cc. 7-8.
68 See supra cc. 2-3.
increasingly-important aspect of the system that lies in between those state-based dispute resolution regimes and the purely private realm of dispute resolution processes that occur completely outside of the state’s influence.\footnote{See supra pt. 1.} This hybrid system typically involves arbitration processes that are set up pursuant to agreements between individuals or private entities but that are, at the same time, often enabled by (or at least contemplated by) federal\footnote{See Commercial Arbitration Act, R.S.C. 1985 (2nd Supp.), c. 17.} or provincial arbitration statutes.\footnote{See e.g. Alberta Arbitration Act, R.S.A. 2000, c. A-43.} The paradigmatic case is a private arbitration between two corporate entities, such as the Dealership case,\footnote{See supra c. 1. However, a key distinguishing feature between the Dealership case and the paradigmatic case here is the fact that the Dealership case occurred in the U.S., and was subject to a U.S. commercial arbitration regime.} under the authority of federal or provincial arbitration legislation. This aspect of the discussion could also include non-court-annexed mediation processes under specific circumstances in which provincial mediation statutes are in force.\footnote{See e.g. the Nova Scotia Commercial Mediation Act, S.N.S. 2005, c. 36.} However, because provincial mediation legislation is less typical than arbitration legislation (and for the sake of clarity), I will generally refer to arbitration as the paradigmatic process for this aspect of the discussion.\footnote{See further Appendix 1.}
The arbitration processes at issue here are hybrid processes. They are partly public regimes, given the enabling and sanctioning arbitration legislation pursuant to which they receive much of their recognition and many of their powers. But they are primarily private regimes in the sense that they are initiated by private contractual agreement and, once underway, they allow parties essentially free reign to conduct proceedings that are fully private and largely out of reach of all state actors (including the courts). Arbitration and related processes, therefore, are examples of what Hart and Sacks approvingly contemplated in their discussion about the “interplay of private and official [public] procedures of decisions”. According to Hart and Sacks:

Not every question of group concern … can be decided by officials…. Every society necessarily assigns many kinds of questions to private decision, and then backs up the private decision, if it has been duly made, when and if it is challenged before officials…. So may a host of … matters be settled which are immediately of private, but potentially of public, concern. In a genuine sense, these procedures of private decision, too, become institutionalized. An understanding of how they work is vital to an understanding of the institutional system as a whole.

The most important summary of the form of privatized dispute resolution processes – “back[ed] … up” by public procedures – that I am discussing in this part of this chapter is found in the relatively recent Dell case from the Supreme

---


161
CHAPTER 4

Court of Canada. When describing arbitration clauses and the jurisdiction they create, Justices Bastarache and LeBel stated that:

Exclusive arbitration clauses operate to create a “private jurisdiction” that implicates the loss of jurisdiction of state-appointed forums for dispute resolution, such as ordinary courts and administrative tribunals, rendering contractual arbitration both different and exclusive of the later entities.... Contractual arbitration has also been described as creating a “private justice system” for the parties:.... “From a theoretical standpoint, arbitration is a private justice system that ordinarily arises out of an agreement. Thus, it has a contractual source and an adjudicative function”....

What makes contractual arbitration a “private jurisdiction” or “private justice system” is the degree of freedom the parties have in choosing the manner in which their dispute will be resolved:

Arbitration is therefore the settling of disputes between parties who agree not to go before the courts, but to accept as final the decision of experts of their choice, in a place of their choice, usually subject to laws agreed upon in advance and usually under rules which avoid much of the formality, niceties, proof and procedure required by the courts....

Also in the Dell case, Justices Bastarache and LeBel similarly stated that “the effect of exclusive arbitration clauses is to create a ‘private jurisdiction’ that implicates the loss of jurisdiction of state-appointed authorities for dispute resolution, such as domestic courts and administrative tribunals.”

As a final introductory comment, in addition to paradigmatic commercial arbitration proceedings, essentially any arbitration that is not excluded from the

---

79 Dell Computer Corp. v. Union des consommateurs, [2007] 2 S.C.R. 801. For further references to and discussions of Dell, see infra note 108 and accompanying text.

80 Ibid, at paras. 132-133 (references omitted).

OTHER STATE-BASED OR SANCTIONED DISPUTE RESOLUTION REGIMES

benefits and burdens of provincial arbitral statutory provisions could be contemplated in the context of this discussion. Examples of such arbitral proceedings could potentially include disputes involving consumer issues, contracts, property, tortious activity, and so forth. Potential notable exceptions, depending on the province, are some religious arbitral proceedings, specifically including those that do not accord with certain provincial or federal legal requirements. For example, religious arbitral proceedings in Ontario that employ Sharia or other religious laws and customs, in ways that are not consistent with Ontario or federal family law, are not recognized under Ontario’s arbitration legislation.82 Other exceptions include arbitrations that are contemplated by other dispute resolution regimes, most notably including administrative proceedings and many labour proceedings, which are typically governed by specific collective


83 Discussed supra pt. 1.
CHAPTER 4

bargaining agreements and provincial labour codes. Further, some provincial consumer legislation is also being amended to provide further protections for consumers in the form of limits to wide-ranging private arbitration regimes.

BACKGROUND

Arbitration has a long history. For example, according to Thucydides’ account of the Peloponnesian War, “arbitration” was proposed by the Athenians to the Spartans as the preferred method “to settle” their differences. Centuries later, arbitration found its “modern” roots in the work of canon lawyers in the later 12th century in England and subsequently in secular application in the middle of the 14th and 15th centuries. By that time, and subsequently, arbitration


85 See infra cc. 6-7.

86 Thucydides, History of the Peloponnesian War, trans. by Rex Warner, rev. ed. (London: Penguin, 1972) at §78, p. 82. The arbitration contemplated in that case was provided for by treaty. See ibid. For a brief world-wide review of the ancient roots of some alternative dispute resolution tools, specifically including mediation, see Jay Folberg, “A Mediation Overview: History and Dimensions of Practice” in (1983) 1 Mediation Q., c. 1, p. 3 at 3-7.


had become an active part of the dispute resolution landscape.\footnote{For further discussions of early attempts at ADR in the United States, Canada and England, see e.g. Lawrence M. Friedman, \textit{A History of American Law}, 3d ed. (New York: Simon \& Schuster, 2005) at 13-14, 22-23 and 405; Kermitt L. Hall, \textit{The Magic Mirror: Law in American History} (New York, Oxford: Oxford University Press, 1989) at 27, 86, 228 and 296; William R. Riddell, \textit{The Early Courts of the Province} (Toronto?, 191? [specific publication details unknown]) at 8; Harry W. Arthurs, “Special Courts, Special Law: Legal Pluralism in Nineteenth Century England” in G. R. Rubin and David Sugarman, \textit{Law, Economy and Society, 1750-1914: Essays in the History of English Law} (Oxford: Professional Books Limited, 1984) at 380; Katherine V. W. Stone, \textit{Private Justice: The Law of Alternative Dispute Resolution} (New York: Foundation Press, 2000) at 10-12 (references omitted). See also further supra c. 3.} In England, for example, non-court-based dispute resolution was regularly used during the 1500s and 1600s. According to James Jaffe, by the end of the Tudor and Stuart periods, “arbitration had become especially popular in the commercial sector, principally in order to avoid the costs and delays engendered by proceedings in the courts of common law and equity.”\footnote{Jaffe, “Industrial Arbitration, Equity, and Authority in England, 1800-1850”, \textit{supra} note 87 at 530. Further, see generally Powell, “Settlement of Disputes by Arbitration in Fifteenth-Century England”, \textit{supra} note 87.} The \textit{Arbitration Act}, for example, was enacted in 1698.\footnote{Cited and discussed in Jaffe, “Industrial Arbitration, Equity, and Authority in England, 1800-1850”, \textit{supra} note 87 at 531. See also Stewart Kyd, \textit{A Treatise on the Law of Awards}, 2d ed. (Philadelphia: Farrand, 1808), also cited in Jaffe, “Industrial Arbitration, Equity, and Authority in England, 1800-1850”, \textit{supra} note 87 at 531, n. 22 and accompanying text.} By the 19\textsuperscript{th} century, again according to Jaffe,

[Life and work in England had been penetrated by forms of dispute resolution that were meant to secure “order without law.” Indeed the arbitration of disputes by reference to independent individuals, frequently beyond the supervision or interference of the courts, was a well-recognized and common way to resolve contentious issues in many areas of English social life, including business ventures, contracts, property, and employment relations.\footnote{Jaffe, “Industrial Arbitration, Equity, and Authority in England, 1800-1850”, \textit{supra} note 87 at 525 (citations omitted).}]

\footnote{\textsuperscript{90} Jaffe, “Industrial Arbitration, Equity, and Authority in England, 1800-1850”, \textit{supra} note 87 at 530. Further, see generally Powell, “Settlement of Disputes by Arbitration in Fifteenth-Century England”, \textit{supra} note 87.}
Similar trends were occurring in the early United States and Canada in the late 1700s, 1800s and 1900s. According to one commentator, although U.S. “high courts” continued to develop and expand during that time as “busy institutions”,

[M]ost ordinary business and nonbusiness disputes avoided the courts. The courts were too slow [and] ... too expensive.... Delays piled up.... Aside from the expense and the delays, there was the problem of the law itself, and the judges who expounded it. They were men trained in the law; they did not necessarily understand what business people wanted or needed.93

For example, according to one report of civil dispute resolution in the State of New York in the 1750s: “Since New Yorkers were familiar with the arbitration mechanism as a substitute for formal litigation, particularly for resolution of commercial disputes, it is not surprising that they were inclined to resort to some form of private settlement even after a lawsuit had been commenced.”94 Other reports of merchant trade in and near the border territories around Cornwall, Kingston, Detroit, Michillimackinac, and others – prior to the Quebec Act of 1774 – discussed disputes being typically submitted either to military courts or courts of civil jurisdiction held by justices of the peace. However, “[t]hese failing”, merchants were reported to “submit their differences to Arbitration.”95

Again, almost a century later, reports of civil proceedings in the Court of Queen’s Bench in Upper Canada, specifically in Cobourg, commented on actions

93 Friedman, A History of American Law, supra note 89 at 291.


95 William R. Riddell, The Bar and the Courts of the Province of Upper Canada, or Ontario (Toronto: Macmillan, 1928) at 48. See also ibid. at 52. For a brief discussion looking at early concerns about arbitration’s fairness, see infra c. 7.
started in that court that were “settled by reference to arbitration”. Similarly in the West, specifically in the 1820s and 1830s in Red River, Rupert’s Land, Alexander Ross and the Reverend Roderick MacBeath (whose father was a magistrate in Assiniboia) described a “primitive” administration of justice “largely dependent on arbitration and equitable settlements.”

More recently, the introduction of a modern arbitration regime in Canada has largely tracked significant commercial arbitration developments on the international stage. This modern background has been recently and usefully summarized by Justice Deschamps of the Supreme Court of Canada:


The New York Convention entered into force in 1959. Article II of the Convention provides that a court of a contracting state that is seized of an action in a matter covered by an arbitration clause must refer the parties to arbitration. At present, 142 countries are parties to the Convention. The accession of this many countries is evidence of a broad consensus in favour of the institution of arbitration.... Canada acceded to the New York Convention on May 12, 1986.

The Model Law is another fundamental text in the area of international commercial arbitration. It is a model for legislation that the UN recommends that states take into consideration in order to standardize the rules of international commercial arbitration. The Model Law was drafted in a manner that ensured consistency with the New York Convention....

96 Riddell, The Bar and the Courts of the Province of Upper Canada, or Ontario, ibid. at 184.

CHAPTER 4

The final text of the Model Law was adopted on June 21, 1985 by the United Nations Commission on International Trade Law ("UNCITRAL"). In its explanatory note on the Model Law, the UNCITRAL Secretariat states that it:

...reflects a worldwide consensus on the principles and important issues of international arbitration practice. It is acceptable to States of all regions and the different legal or economic systems of the world.

(Explanatory Note by the UNCITRAL secretariat on the Model Law on International Commercial Arbitration, at para. 2)

In 1986, Parliament enacted the Commercial Arbitration Act, R.S.C. 1985, c. 17 (2nd Supp.), which was based on the Model Law....

Key motivating purposes for these internationally developed and accepted arbitral procedures include order, consistency, predictability and efficiency in commercial affairs. These motivating purposes, particularly, although certainly not exclusively, at the international level, have been recently highlighted by the Federal Court of Australia:

The New York Convention and the model law deal with one of the most important aspects of international commerce – the resolution of disputes between commercial parties in an international or multinational context.... An ordered efficient dispute resolution mechanism leading to an enforceable award or judgment by the adjudicator, is an essential underpinning of commerce. Disputes arising from commercial bargains are unavoidable. They are part of the activity of commerce itself. Parties therefore often deal with the possibility of their occurrence in advance by the terms of their bargain. Unreliable or otherwise unsatisfactory decision making, or the fear of such, distorts commerce and makes markets less efficient, raising the cost of commerce.... It is another illustration of the importance of consistency in the working of international commerce....

---

98 *Dell Computer Corp. v. Union des consommateurs*, supra note 79 at paras. 38-41, Deschamps J. (majority).
illuminated so clearly by Lord Diplock in The “Maratha Envoy” [1978] AC 1 at 8; [1977] 2 All ER 847 at 852 in his discussion of the role and place of well-known or usual forms of contract in international commerce and the place of courts in their consistent interpretation. The above considerations ground the importance to be given to party autonomy and holding parties to their bargains in international commerce....

The recognition of the importance of international commercial arbitration to the smooth working of international commerce and of the importance of enforcement of the bilateral bargain of commercial parties in their agreement to submit their disputes to arbitration was reflected in both the New York Convention and the model law. 99

Canada’s federal arbitration regime reflects this widespread acceptance of the policies and practices of this internationally accepted dispute resolution process. 100 So too do its provincial counterparts, which have been enacted across the country. 101

**Basic Characteristics**

Arbitration is largely a private, contractual arrangement determined and designed, in large measure, by individual disputing parties to fit the specific requirements and contexts of individual disputes. According to the Supreme Court of Canada:

> [A]rbitration is a creature that owes its existence to the will of the parties alone ... the parties to an arbitration agreement are free, subject to any mandatory provisions by which they are bound, to choose any place, form and procedures they consider appropriate...

---


100 See *Commercial Arbitration Act*, supra note 71.

The choice of procedure does not alter the institution of arbitration in any of these cases. The rules become those of the parties, regardless of where they are taken from.²

Given the importance of party autonomy, there really is no single model or format of arbitration. Each one is, at least in theory, unique. Having said that, given arbitration’s increasing popularity and sophistication, there clearly are a number of shared components, typically as provided for in Canadian arbitration statutes, including:

- broad subject matter coverage,
- significant ability to vary many provisions of the legislation,
- limited court intervention,
- wide procedural flexibility,
- binding awards,
- limited appeal rights,
- powers of enforcement, and
- powers to award costs.³

² *Dell Computer Corp. v. Union des consommateurs*, supra note 79 at paras. 51-52, Deschamps J. (majority). See further *ibid.* at para. 133, Bastarache and LeBel JJ., discussed further supra at note 80 and accompanying text. For a recent commentary on the flexibility of arbitration, see Jennifer McPhee, “Arbitration becoming the ‘new’ civil litigation” *Canadian Lawyer* (January 2008) 53 at 54.

The ultimate touchstone of arbitration, therefore, is its significant respect for party autonomy. As a result, according to Frank Nussbaum and Meah Rothman Tell, "[a]rbitration, a privatization of civil justice, is a process … free of the constraints of certain constitutional rights."104

Of particular significance to typical arbitrating parties – and to this project – is the overwhelming purpose of arbitration legislation to provide parties with a powerful, flexible, and confidential dispute resolution process that is largely out of the reach of the public court system. This underlying policy principle, of putting arbitration largely out of the reach of the state’s dispute resolution branches, can be seen in the many legislative debates that led to the development of these regimes. For example, according to the legislative debates regarding Alberta’s arbitration legislation:

[T]he purpose of the Act and the purpose of the arbitrating parties … is to avoid the courts…. The Bill provides limits on court intervention and prescribes grounds upon which an award may be appealed or set aside. Mr. Speaker, this Bill is … responsive to the marketplace, and it may very well assist our courts by assisting in reducing the backlog of cases before our courts.105

Similarly, according to legislative debates regarding Ontario’s arbitration legislation:

The purpose of the Arbitration Act, 1991, is to provide a framework for the private settlement of disputes that will be as clear as possible for those who use it, while preserving the fairness of the process. The


ability of an unwilling party to delay or derail an arbitration has been reduced to a minimum. The parties are generally free to set their own rules for arbitrations – that is, to override the act – so they have a great deal of flexibility. However, the law and the courts will ensure that the parties stick to their agreement to arbitrate, do not proceed unfairly, and abide by the result when it is given.  

In the context of the debates leading to the enactment of Manitoba’s arbitration legislation, similar policy interests were articulated. As one legislator stated:

I have always, Madam Speaker, and will continue to argue and articulate as to the benefits of arbitration as opposed to ultimately having to go to a court. Where we can provide an alternative to a courtroom setting, I think it is a very positive thing ... the concept of anything that allows a larger role for arbitration over the court process is something I do not have any problem ... being ... supportive of.... I think far too often we underestimate the importance of arbitration and mediation as a viable positive alternative to the court system. That is in essence, as I say, the reason why, when I have looked at this particular piece of legislation, Madam Speaker, that I think it is a very positive move towards bringing more of a reliance on arbitration. 

**JUDICIAL DEFERENCE TO ARBITRATION**

In recognition of these legislative intentions, which have found their way into the policies and provisions of Canadian arbitration statutes, courts have typically taken a very deferential approach to arbitration challenges. The *Dell*

---


case provides the leading Canadian statement on this issue.\textsuperscript{108} The dispute in \textit{Dell} involved temporary discrepancies between the internet prices of two different handheld computers. Specifically, for approximately one day, Dell advertised two computers at two low (incorrect) prices on its order webpage and at two higher (correct) prices on its product advertising webpage. After being notified about the discrepancy, Dell blocked access to the order pages through the usual address (although the pages were not removed from the website). Notwithstanding Dell’s initial action, one of the respondents in the case, Olivier Dumoulin (who was identified by the Court as a Québec “consumer”\textsuperscript{109}), was able to order one of the products online at the lower price by accessing a “deep link” in Dell’s web system. The “deep link” enabled him to access to the incorrect order page without proceeding through the normal advertising links that had been corrected by Dell. Shortly after he made his order, Dell corrected the error and announced that it would not process orders made at the lower prices.\textsuperscript{110} When Dell refused to honour Dumoulin’s order at the lower price, Dumoulin – together with the Union des consommateurs – filed a motion seeking to bring a class proceeding against Dell. Because the conditions of purchase and sale included a mandatory arbitration clause, Dell sought to have the claim referred to arbitration (and not to court), as well as to have the motion seeking authorization to bring the claim by


\textsuperscript{109} \textit{Dell Computer Corp. v. Union des consommateurs}, supra note 79 at para. 4.

\textsuperscript{110} \textit{Ibid.}
way of class proceeding dismissed (again pursuant to the conditions of purchase and sale).

Because the arbitration clause provided that disputes under it would be governed by the “National Arbitration Forum”, which is located in the U.S., and further, because Québec rules of private international law prohibit a waiver of Québec jurisdiction being set up against a consumer, the motions court found that the arbitration clause could not stand. The Court of Appeal dismissed Dell’s appeal, not on the basis of the motion court’s jurisdictionally-driven decision, but rather because the arbitration clause was contained in a hyperlinked contractual provision that did not, according to the Court of Appeal, adequately form part of the main contract to which the consumer was a party. However, a majority of the Supreme Court of Canada allowed Dell’s appeal, finding that the matter should have been referred to arbitration. The fact that the matter was initially brought to the lower court by way of class proceeding did not change the Supreme Court’s view that, because of the mandatory arbitration clause, it should have proceeded by way of arbitration. As a threshold matter, the Court recognized that:

It is ... well established that the effect of a valid undertaking to arbitrate is to remove the dispute from the jurisdiction of the ordinary courts of law.... There is consequently no question that, if the arbitration agreement is valid and relates to the dispute, the Superior Court has no jurisdiction to hear the case and must refer the parties to arbitration.

---

111 See ibid. at paras. 6, 128.

112 See ibid. at paras. 7, 129.

113 Ibid. at para. 150, Bastarache and LeBel JJ.
One of the central questions of the case, then, was whether a hyperlinked contractual provision in which the arbitration clause was located was valid. Both the majority and the minority judgments in *Dell* found that it was. The minority of the Court then went on to find against Dell, largely on private international law grounds.\(^{114}\) The majority, however, rejected these private international law arguments and allowed Dell’s appeal, finding no reason to deviate from a traditionally deferential approach to arbitration clauses. In addition to recognizing the well-established nature of valid contractual agreements to arbitrate, the majority confirmed that courts should only disrupt the jurisdiction of an arbitrator in limited circumstances. As Justice Deschamps stated:

First of all, I would lay down a general rule that in any case involving an arbitration clause, a challenge to the arbitrator’s jurisdiction must be resolved first by the arbitrator. A court should depart from the rule of systematic referral to arbitration only if the challenge to the arbitrator’s jurisdiction is based solely on a question of law….

If the challenge requires the production and review of factual evidence, the court should normally refer the case to arbitration, as arbitrators have, for this purpose, the same resources and expertise as courts. Where questions of mixed law and fact are concerned, the court hearing the referral application must refer the case to arbitration unless the questions of fact require only superficial consideration of the documentary evidence in the record.

Before departing from the general rule of referral, the court must be satisfied that the challenge to the arbitrator’s jurisdiction is not a delaying tactic and that it will not unduly impair the conduct of the arbitration proceeding. This means that even when considering one of the exceptions, the court might decide that to allow the arbitrator to

---

\(^{114}\) See *ibid.* at paras. 179-217.
rule first on his or her competence would be best for the arbitration process.\textsuperscript{115}

This approach by the Supreme Court of Canada, which has been the subject of a recent wave of significant judicial inquiry in several appellate courts in Canada since the judgment was released,\textsuperscript{116} clearly endorses a deferential approach to arbitration in Canada. And while there are some jurisdictions in which legislative steps are being taken to limit the applicability of mandatory arbitration clauses in the context of consumer contracts (in order to provide increased protections to consumers in similar circumstances, including, for example, Ontario and Québec),\textsuperscript{117} the Court’s approach in \textit{Dell} certainly aligns itself with, and thereby reinforces, the general and increasingly well-established domestic and foreign judicial landscape, particularly in non-consumer related situations, that fully recognizes arbitration as an important part of (and alternative to) the overall civil justice system. For example, according to the Court of Appeal for Ontario, arbitration has clearly become a recognized, accepted and now promoted tool of dispute resolution. That Court’s position can be seen, for example, in Justice Finlayson’s 1999 statement that: “there has been a significant change since 1970 … in the attitude of the courts and the legislature as to the

\textsuperscript{115}Ibid. at paras. 84-86. See also Rogers Wireless Inc. v. Muroff, 2007 SCC 35 at para. 11.


\textsuperscript{117}See infra cc. 6-7.
OTHER STATE-BASED OR SANCTIONED DISPUTE RESOLUTION REGIMES

desirability of encouraging the resolution of disputes between the parties other than by resort to the courts."\(^{118}\) Similarly and more recently, according to Justice Feldman, agreements to arbitrate have "become a common and cost-effective method of dispute resolution."\(^{119}\) These statements are also in line with other statements from the Supreme Court of Canada regarding arbitration. According to Justice LeBel:

In general, arbitration is not part of the state’s judicial system, although the state sometimes assigns powers or functions directly to arbitrators. Nonetheless, arbitration is still, in a broader sense, a part of the dispute resolution system the legitimacy of which is fully recognized by the legislative authorities.\(^{120}\)

Taking this judicial recognition of arbitration one step further, Justices Bastarache and LeBel also recognized the further policy of legislatures, building on Desputeaux, which "now accepts arbitration as a valid form of dispute resolution and, moreover, seeks to promote its use."\(^{121}\) Recently, an Ontario court has confirmed, quoting from Deluce Holdings Inc. \textit{v.} Air Canada\(^{122}\) in the context of its discussion of Ontario’s arbitration regime, that:

\begin{quote}
This legislation represents a shift in policy towards the resolution of arbitrable disputes outside of court
\end{quote}


\(^{121}\) \textit{Dell Computer Corp. v. Union des consommateurs, supra} note 79 at para. 143 (emphasis added).

\(^{122}\) (1992), 12 O.R. (3d) 131 (Ont. Gen. Div.) [Commercial List], Blair J.
proceedings. Whereas prior to the enactment of this legislation the courts in Ontario had a broad discretion whether or not to stay a court action, the focus has now been reversed: the Court must stay the court proceedings and allow the arbitration to go ahead unless the matter either falls within one of the limited exceptions or is not a matter which the parties have agreed to submit to arbitration.

The philosophy underlying the legislation is to encourage parties to submit their differences to a consensual dispute resolution process outside the regular court process and to hold them to that course once they have agreed to do so....

Similar judicial support comes from other jurisdictions as well, including the U.S., U.K. and Australia. In light of this significant domestic and foreign judicial support, there can be no doubt that arbitration is a well-accepted and well-established alternative to the public dispute resolution processes.


126 See e.g Comandate Marine Corp v Pan Australia Shipping Pty Ltd, supra note 99, Seeley International Pty Ltd (A.C N 054 687 035) v Electra Air Conditioning B V (2008), 246 A L R 589, [2008] F.C.A. 29 (F.C.A.)
OTHER STATE-BASED OR SANCTIONED DISPUTE RESOLUTION REGIMES

INFRASTRUCTURAL PRIVATIZATION

This strong legislative and judicial recognition and encouragement of arbitration, taken together, amounts to a clear example of general infrastructural privatization.\textsuperscript{127} Put simply, arbitration provides cost savings for the state. Policy debates leading to the enactment of various arbitration regimes highlight many legislators’ intentions, in-line with more typical privatization legislative intentions generally, to increase the use of arbitration as a way to off-set the use of public resources in resolving certain civil matters. For example, in advance of amendments to Manitoba’s arbitration legislation, one legislator commented that arbitration, “[i]n the long run ... will provide ... the potential for savings.”\textsuperscript{128} In Ontario, prior to the enactment of Ontario’s arbitration legislation, one legislator commented that the “use of ADR is widespread in the United States on the assumption that it reduces the financial burden on the justice system...”.\textsuperscript{129} When Ontario legislators were debating Bill 101, the Franchises’ Arbitration Act, 1996, one legislator commented that, as a result of the legislation, “franchisees and franchisors” would save “not only their own money but ... also ... tax dollars, taxpayers’ money in the form of not accessing court resources.”\textsuperscript{130} Similarly, in

\textsuperscript{127} For a further discussion of infrastructural privatization, and privatization generally, see supra c. 3.

\textsuperscript{128} Manitoba, Legislative Assembly, \textit{Official Report of Debates (Hansard)}, 36th Leg., 3d sess., No. 58 (10 June 1997) at 1720 (Hon. Keven Lamoureux).

\textsuperscript{129} Ontario, Legislative Assembly, \textit{Official Report of Debates (Hansard)} (27 March 1990) at 1350 (Hon. Ian Scott).

\textsuperscript{130} \textit{Ibid.} (5 December 1996) at 1020 (Hon. Bruce Crozier).
Alberta, one legislator acknowledged that ADR – specifically including mediation – results in a “win” situation for the courts because resources that “otherwise would be spent in the courts taking up time of ... the court staff at the counters or ... the court staff and the judge in the courtroom, can be spent on cases that, in fact, need be tried.”\textsuperscript{131}

These sentiments have also led to the expression of some legislators’ views that arbitration should be \textit{mandated} for some commercial circumstances. Again in the context of Manitoba’s legislative debates leading up to amendments to its arbitration legislation:

We on this side acknowledge the value of arbitration as a way to resolve disputes. Arbitration usually costs less to the disputing parties. At least, we recognize that it can cut down on some costly legal costs and pretrial procedures. It certainly costs less to the taxpaying public, because the expensive judicial system is not called on to resolve the disputes. Arbitration is often, although not always – but usually faster than litigation. It is also informal, accessible and flexible, which meet the needs of the parties to a greater extent than formal litigation. Of course, arbitration also allows privacy. It is confidential, as long as one of the parties does not pursue an appeal.

It is clear that arbitration does have a very important role in our society and, indeed, it is my firm belief that we should rely more on alternative dispute resolution. We should be looking for not only a greater reliance on arbitration but other ways of resolving disputes outside of the courts.

I think one of the greatest arguments to support my belief is that when there are limited resources to deal with conflicts between individuals and limited resources to deal with Criminal Code infractions, we have to think why are we putting so many resources into the resolution of disputes between, for example, two large corporations that may have extensive resources and, yet, are going head to head in a battle over

\textsuperscript{131} Alberta, Legislative Assembly, Committee of Supply, \textit{Alberta Hansard} (30 May 2007) at 1433 (Hon. Mr. Stevens).
many years.... We really, I think, have to think in larger terms about how we are using public resources to solve disputes between certain kinds of parties and, in that regard, I wonder if we should not be looking toward a more affirmative statement or a more effective way of getting parties to use arbitration as an alternative to civil litigation, including requiring arbitration clauses in certain commercial contracts.\textsuperscript{132}

To the extent calls obtain for limiting the state’s involvement in the resolution of civil disputes for parties with “extensive resources”, those calls are not new. Albeit without the revolutionary undercurrent, they echo sentiments expressed by Marx more than 150 years ago: “The administration of … civil justice is concerned almost exclusively with conflicts over property and hence affects almost exclusively the possessing classes. Are they to carry on their litigation at the expense of the national coffers?”\textsuperscript{133} However, as I argue further in this project,\textsuperscript{134} there are clearly good reasons for continuing to fund and to encourage the use of public dispute resolution processes for all kinds of public and private disputes that engage, directly or indirectly, issues of significant importance to the public.

**Popularity**

Notwithstanding that calls for mandatory use in most circumstances have not succeeded to-date, the freedom and power that are clearly provided by arbitral

---

\textsuperscript{132} Manitoba, Legislative Assembly, \textit{Official Report of Debates (Hansard)}, 36th Leg., 3d sess., No. 59, Orders of the Day (11 June 1997) at 1520 (Hon. Gord Mackintosh) (emphasis added). For further treatment of this legislative statement, see \textit{infra} cc. 6, 8.


\textsuperscript{134} See \textit{e.g. infra} c. 8.
legislative regimes have made arbitration increasingly popular, particularly as a method to resolve commercial disputes. (As such, these processes have become the subject of increasing attention in academic\textsuperscript{135} and popular commentary.\textsuperscript{136}) In the United States, for example, reports indicate that total case filings for the American Arbitration Association (AAA) dramatically increased over the 10 year period from 1993 to 2003 (from over 60,000 cases in 1993 to over 230,000 cases in 2003).\textsuperscript{137} Reports out of England suggest that there could be between 5,000 and 10,000 arbitrations every year, with these numbers increasing year over year.\textsuperscript{138} Put simply, as I discuss further in chapter 5, arbitration has become a preferred dispute resolution process for disputing parties, and increasingly, for

\begin{footnotesize}
\begin{enumerate}
\item Reported in Stipanowich, “ADR and the ‘Vanishing Trial’: The Growth and Impact of ‘Alternative Dispute Resolution’”, supra note 135 at 872.
\item See Goswami, “A game of survival: why the bar is embracing arbitration”, supra note 135 (references omitted).
\end{enumerate}
\end{footnotesize}
OTHER STATE-BASED OR SANCTIONED DISPUTE RESOLUTION REGIMES

their lawyers. Not surprisingly, given their popularity, arbitration and other related ADR processes are now also being offered on-line.  

Taken together, the statutory, judicial and popular sanctioning, encouraging and/or preferencing of private arbitration – which, like with arbitration’s court-based and administrative counterparts, are rapidly increasing – evidence another very significant aspect of the overall trend of systematic efforts to privatize much of how we do civil dispute resolution today. Having now discussed the breadth and depth of that privatizing trend, it is to its underlying preferences, influences and justifications to which I now turn in the next two chapters.

CHAPTER 5
PRIVATIZING PREFERENCES AND INFLUENCES

1. GOVERNMENTS

There are several sources of influence and support for the current civil justice privatization movement and its driving ethos of reform. However, because public regulation is a significant focus of this project, a good place to start is with governments. The introduction and encouragement of privatization initiatives in and through the civil, administrative and non-court or administrative-based legislative ADR regimes accord with, and in some cases are part of, general federal and provincial government dispute resolution strategies. These strategies are designed to encourage the privatization of dispute resolution in relation essentially to all activities in which governments are directly or indirectly involved. Put simply, governments and related public entities (rules committees, task forces, etc., which have been significant drivers of public privatization efforts) have become extremely active promoters of the privatization of dispute resolution. The primary justifications for this promotion, as I discuss further in chapter 6, include increased efficiency and access to the tools of justice.

FEDERAL GOVERNMENT

At the federal level, the Dispute Resolution Service was established in 1992, under the watch of the Department of Justice.\(^1\) Now under the name Dispute

---


184
Prevention and Resolution Services (DPRS), the program actively promotes ADR and related services in disputes relating to the affairs of the federal government. According to its materials:

DPRS … is devoted to the prevention and management of disputes. Our mandate is to serve as a leading centre of dispute prevention and resolution (DPR) excellence within the Government of Canada and beyond. Our role is to promote a greater understanding of DPR and assist in the integration of DPR into the policies, operations and practices of departments and agencies of the Government of Canada, Crown corporations, federal tribunals and administrative agencies, and federally constituted courts.²

Given the proliferation of privatization initiatives in the federal administrative regime, the goals and objectives of the DPRS are clearly materializing. Examples of these ADR-related initiatives in federal tribunals that are relevant to this project, which are discussed further in chapter 4, include dispute resolution initiatives in the Canadian Human Rights Tribunal, the Canadian Transportation Agency, and others.³ Further, an example of ADR-related initiatives in the federal courts that accord with the principles of the DPRS objectives include, as discussed further in chapter 3, the Federal Court of Canada’s “case management and dispute resolution services” program.⁴

---


⁴ See Federal Court Rules, SOR/98-106, as amended, at pt. 9, rr. 380-391.
CHAPTER 5

PROVINCIAL GOVERNMENTS

At the provincial level, similar government initiatives have been actively pursued. In British Columbia, for example, the Government, through the Ministry of Attorney General, has developed an active policy of ADR promotion through the 1996 creation of the Dispute Resolution Office (DRO). According to its public materials:

The Ministry of Attorney General’s … [DRO] develops and promotes non-adversarial dispute resolution options within the justice system and government. Options such as mediation encourage early settlement of disputes and are less expensive than processes used in the formal court system.⁵

The policy considerations behind these initiatives are animated largely by ADR-friendly research,⁶ anecdotal evidence, some empirical data,⁷ and general reform trends that have been pursued over the past several decades – largely in


⁶ Often this kind of research is commissioned by governments, or research organizations at the behest of governments, to study ways to increase efficiencies and to improve access to the tools of dispute resolution. I have recently been involved in some of this kind of research. See e.g. Trevor C. W. Farrow, “ADR in Canada: Courts and Administrative Tribunals” (a report prepared for the British Institute of International and Comparative Law, 2009) [unpublished]. Other significant funders in this area include various provincial law foundations. For examples of important Canadian research that has benefitted significantly from law foundation and other funding, see e.g. the Canadian Forum on Civil Justice (“CFCJ”), “Research”, online: CFCJ <http://cfcj-fejc.org/research/>; Advocates’ Society, Streamlining the Ontario Civil Justice System: A Policy Forum, Final Report (9 March 2006), online: Advocates’ Society <http://www.advocates.ca/assets/files/pdf/publications/streamlining-justice.pdf>. There is also a growing body of non-governmental, academically-based research in this area. Much more, however (as I discuss further in chapter 8), is needed. For a recent historical review of empirically-based civil justice and related research, see Carrie J. Menkel-Meadow and Bryant Garth, “Process, People, Power and Policy: Empirical Studies of Civil Procedure and Courts” (2009) in Peter Cane and Herbert Kritzer, eds., Oxford Handbook of Empirical Legal Studies (Oxford: Oxford University Press, forthcoming), draft available online: SSRN <http://ssrn.com/abstract=1537448>.

⁷ For further discussions of ADR-related empirical research, see infra c. 6.
pursuit of increased efficiencies – in various Commonwealth countries\textsuperscript{8} toward simplified and privatized ADR initiatives across all aspects of the public civil dispute resolution spectrum.\textsuperscript{9} Again according to the B.C. Ministry of Attorney General:

There is considerable interest in resolving civil disputes outside of the formal court system. Options such as mediation are being employed by the courts, administrative tribunals, and ministries and agencies of the Government of BC to provide people with viable dispute resolution processes.\textellipsis

The Ministry of Attorney General has adopted an ADR Policy, signaling its commitment to a justice and conflict resolution environment which includes a wide range of dispute resolution options. In 1996, the ministry established the ... DRO ... to develop and implement dispute resolution options in the court system and in government.

Since 1996, the DRO has worked with a number of government ministries, boards, agencies and commissions to design and help implement \[\text{...}\] dispute resolution processes. It has also helped organizations consider ways to improve existing processes to make them more efficient and effective.\textsuperscript{10}

The goals of these sorts of initiatives are clear. For example, the Ministry of Attorney General states its intention to, among other things:

\[\text{...}\]

\textsuperscript{8} See \textit{e.g. supra} c. 3.

\textsuperscript{9} The B.C. Ministry of Attorney General specifies that the DRO initiatives “are largely outcomes of considerable research and study carried out in the 1990’s by organizations and professional groups across common law jurisdictions, for example, the Canadian Bar Association’s Systems of Civil Justice Task Force Report, Lord Woolf’s Report on Access to Justice, England, and Managing Justice: A Review of the Federal Civil Justice System, a report published by the Australian Law Reform Commission.” See B.C. Ministry of Attorney General, “Alternative Dispute Resolution Policy and Design”, online: Government of B.C. <http://www.ag.gov.bc.ca/dro/policy-design/index.htm>. Some of these reform initiatives are cited and discussed further earlier in this project. See \textit{e.g. supra} c. 3.

\textsuperscript{10} B.C. Ministry of Attorney General, DRO, “Alternative Dispute Resolution Policy and Design”, \textit{ibid.}
Further develop the ADR policy to broaden and encourage the application of dispute resolution options through:

a) continuing consultation with dispute resolution stakeholders and advocates;

b) promoting the use of alternative dispute resolution options among all ministries and agencies of government;

c) promoting the use of alternative dispute resolution techniques in neighbourhood or community disputes;

d) identifying and removing barriers to the understanding and use of alternative dispute resolution options;

e) supporting multi-party alternative dispute resolution processes such as land use planning, aboriginal treaty [sic].

Examples of B.C. court initiatives that were supported by the DRO include B.C.'s notice to mediate program\textsuperscript{12} and its small claims mediation program.\textsuperscript{13} Its proposed new rules on expanded settlement powers, as also discussed earlier,\textsuperscript{14} are also in-line with these principles. Additionally, the ADR-enabling provisions of B.C.’s Administrative Tribunals Act,\textsuperscript{15} as well as the various ADR provisions provided for by the B.C. Human Rights Tribunal,\textsuperscript{16} are also in-line with the

\textsuperscript{11} Ibid. at “Alternative Dispute Resolution Policy and Design: Policy Statement, Objectives” (objective 12), online: Government of B.C. <http://www.ag.gov.bc.ca/dro/policy-design/statement.htm>.

\textsuperscript{12} See supra c. 3.

\textsuperscript{13} Ibid. See further DRO, online: Government of B.C. <http://www.ag.gov.bc.ca/dro/>.

\textsuperscript{14} See supra c. 3.

\textsuperscript{15} S.B.C. 2004, c. 45 at s. 28(1), as discussed further, supra c. 4.

\textsuperscript{16} Discussed further, supra c. 4.
objectives of B.C.’s DRO initiatives. Other provincial governments have also been actively encouraging the use of ADR as a general policy matter in various areas. For example, in 1998, Alberta’s Department of Justice and the Attorney General was “committed to working … with the judiciary and the bar … so that we have an extensive [ADR] program.” Ten years later, similar legislative sentiments were continuing to be expressed in Alberta. For example, according to one legislator: “as a minister I feel that mediation is the way of the future…. I can tell you this: we continue to emphasize alternative dispute resolution.” Many (if not all) of Alberta’s extensive privatization efforts, in its court and tribunal-based dispute resolution regimes (discussed earlier in this project), are in line with the spirit of these various legislative statements. Earlier, Ontario, which has also actively pursued numerous tribunal and court-based privatizing dispute resolution initiatives, also examined ADR as a general governmental policy preference.

---

17 For further comments on specific provincial court and administrative regime initiatives, see additionally infra cc. 3-4.


19 Alberta, Legislative Assembly, Committee of Supply, Alberta Hansard (30 May 2007) at 1433 (Hon. Mr. Stevens). See similarly the legislative debates surrounding Alberta’s Bill 216, Crown Contracts Dispute Resolution Act, 1996, in which one legislator commented, without taking away peoples’ right to sue, that “[w]hat we need in this province is, yes, to facilitate arbitration, to facilitate mediation.” Alberta, Legislative Assembly, Alberta Hansard, 23rd Leg. 4th sess. (14 August 1996) at 2146 (Hon. Mr. Dickson).

20 See supra cc. 3-4.

21 See ibid.

22 Prior to the B.C. initiatives discussed immediately above, the Ontario legislature engaged in a wide-ranging consideration of ADR and its promotion in the province. No significant dissenting views were noticed in the research for this project. For the Ontario Legislative Assembly’s standing committee report, see Ontario, Legislative Assembly, Standing Committee on
CHAPTER 5

RULES COMMITTEES, TASK FORCES, ETC.

In addition to in-house government dispute resolution initiatives and facilities (including, for example, the Federal Government’s DPRS and the B.C. Government’s DRO services), there are numerous other initiatives that have been put in place to study, make recommendations about, and assist with the implementation of, dispute resolution reform in this country. Various law reform and rules committees, commissions, task forces, reviews and reform projects, have actively encouraged some form of dispute resolution process privatization through the promotion of various ADR initiatives.

---


27 See e.g. Ontario Civil Justice Reform Project, online: Government of Ontario <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/>. 
JUDGES

In addition to governments, some of the most influential voices with respect to civil dispute resolution law reform have been (and continue to be) those of current and former judges. There is no doubt that Canadian judges are, at least as a comparative matter, typically of the view that Canada’s justice system is a leader in the world. As I noted earlier, the Chief Justice of Canada has recently commented that “Canada has a strong and healthy justice system. Indeed, our courts and justice system are looked to by many countries as exemplary.” This view is clearly right. Having spent a significant amount of time working on judicial education projects in various parts of the world, I can say that not only does Canada have a “strong and healthy” justice system, but judges (and others) around the world look to our system as a leader and as a source of inspiration for institutional thinking and reform.

Regardless of the recognized high quality of the Canadian justice system, there is also no doubt that our judiciary is increasingly concerned about efficiency and access to justice problems in our systems of civil justice, and that, as a result, they are of the view that the system is in need of reform. Further, more and

---

28 For further discussions of some of these initiatives, see supra c. 3.


30 See e.g. Judges Act, R.S.C. 1995, c. J-1, s. 60(1).
more judges are publically vocalizing these concerns. For example, the current Chief Justice of Canada has often acknowledged that “many Canadian men and women find themselves unable, mainly for financial reasons, to access the Canadian justice system.”

Similarly, former Chief Justice of Canada Brian Dickson commented in 1989 that “[i]t is an unfortunate fact that legal proceedings in the civil ... courts ... have become increasingly lengthy and protracted.”

Earlier in this project I cited the former Chief Justice of Ontario, Roy McMurtry, who stated that our civil justice system is in “crisis”.

As a result, judges are increasingly speaking up and encouraging lawyers and parties to make use of all sorts of private tools, including mediation, negotiation (either directly or through lawyers), other ADR settlement processes and cost-based settlement incentives. For example, when speaking generally about resolving disputes out of court, Justice Robert Armstrong of the Court of Appeal for Ontario stated that: “Settlement discussion is something which pervades, and should pervade, almost every lawsuit.”

According to Justice E. E. Gillese, also of the Court of Appeal for Ontario, the “policy of the courts is to encourage the settlement of litigation...” Justice G. E. Taylor similarly


33 See supra c. 3.


commented that “Offers to settle are to be encouraged.”

Finally, Justice Gonthier, when speaking about the modern, expansive role of the advocate, stated that:

[C]ontrary to popular belief, not only will a good advocate not foment dissension and promote disputes between parties, he will seek to reconcile opposing interests in order to avoid the ultimate confrontation of a trial. He will be called on to play the role of moderator, negotiator and conciliator. Indeed, it is his duty to facilitate a rapid solution to disputes and to avoid fruitless or frivolous actions.... Thus, whenever it is appropriate to do so, the advocate must discuss alternative dispute resolution methods (mediation, conciliation and arbitration) with his client, and must properly advise the client regarding the benefits of settling disputes. He may also hold discussions with the opposing party and negotiate a resolution of the dispute between the parties.

Put simply, judicial commentary from case law and from secondary literature demonstrates a general judicial view, as expressed perhaps most succinctly by former judge George Adams, that “ADR is an approach to justice

---


CHAPTER 5

whose time has come.\textsuperscript{38} And it has come not only because of perceived crises in our civil justice systems, but also in response to the realities of our modern, complex administrative state. For example, when speaking about ADR in the administrative context, the Supreme Court of Canada has stated that: "As our society has become more urbanized, complex and regulated, the need for efficient and speedy dispute resolution has become an important goal of provincial administration."\textsuperscript{39} Indeed, this observation from the Supreme Court of Canada tracks the primary underlying motivations for privatization generally,\textsuperscript{40} as well as the privatization of civil dispute resolution more specifically.\textsuperscript{41}

In addition to judicial commentary in the case law and literature, empirical research also evidences a general judicial support for ADR. For example, a recent U.S. report indicates that judges are supportive of, and further, are "usually" or "always" recommending ADR.\textsuperscript{42} In Canada, a nation-wide survey looking at specific aspects of court-annexed ADR and other programs confirmed much of the earlier case law and literature-based evidence regarding ADR preferences.\textsuperscript{43}


\textsuperscript{39} Reference re Amendments to the Residential Tenancies Act (N.S.), [1996] 1 S.C.R. 186 at para. 2, Lamer C.J. and Sopinka and Cory JJ.

\textsuperscript{40} Discussed further supra c. 3.

\textsuperscript{41} Discussed further supra cc. 3-4, 6.


\textsuperscript{43} Margaret A. Shone, "Civil Justice Reform in Canada: 1996 to 2006 and Beyond" (December 2006), online: CFCJ <http://cfcj-fcjc.org/docs/2006/shone-final-en.pdf>.

194
While it is important to recognize that this survey canvassed many civil justice system participants, and not just judges, its results are instructive. Specifically, this survey found that 89% of the survey’s respondents agreed – 53% “strongly” and 36% “somewhat” – that “[d]ispute resolution techniques should be promoted as integral components of the civil justice system, not alternatives to it.” Similarly, 94% of the survey’s respondents agreed – 57% “strongly” and 37% “somewhat” – that the “court system should provide users with a broad array of integrated dispute resolution options focused on early settlement (e.g., mediation, early neutral evaluation, judicial settlement conferences and mini-trials, consensual arbitration and adjudication).”

Not only are many judges individually supportive of domestic privatizing reform initiatives, the judiciary as a whole is also actively involved in various international privatizing reform initiatives. For example, the National Judicial Institute (NJI), together with three partners in the Philippines – the Supreme

---

44 The survey was based on 123 questionnaires, which were sent to “governments, Chief Justices of every Court, the Canadian Bar Association, Law Societies, the Association of Canadian General Counsel, law school deans, legal aid organizations and public legal education bodies throughout Canada, and to the Consumers Council of Canada.” There were 52 questionnaires completed and returned. It must be acknowledged, for purposes of this section of this chapter, that it is not clear how many of those 52 responses came from judges. See *ibid.* at 3-4. As such, I am including this survey in this project for information purposes only. I do not rely on it for the proposition that Canadian judges are definitively encouraging the use of ADR (other evidence for which I have presented above, for example, at nn. 29-39 and accompanying text).

45 See *ibid.* at 147, 156-158 and 160-161.

46 See NJI, “About the NJI”, online: NJI <http://www.nji-inm.ca/nji/inm/a-propos-about/index.cfm>, which provides that:

Based in Ottawa, the ... NJI ... is an independent, not-for-profit institution [the Board of Governors for which is chaired by the Chief Justice of Canada] committed to building better justice through leadership in the education of judges in Canada and internationally.
CHAPTER 5

Court of the Philippines, the Philippine Judicial Academy, and the Alternative Law Groups Inc. (a coalition for access to justice advocacy) – is the Canadian executing agency for a 5-year, $6.5 million project called the Justice Reform Initiatives Support Project (JURIS). The project started in 2003 and is funded by the Canadian International Development Agency (CIDA). Other Canadian funded international administration of justice programs, which include active court reform and ADR elements, are also ongoing and involve members of the Canadian judiciary.

Notwithstanding the significant judicial support for ADR initiatives, it is important to recognize that this support is not without some reservation. For example, as I discussed in chapter 3, prior to 2004, concerns were raised primarily by certain members of the “bench and bar” that the court-based management and mediation initiatives that had been in place for several years in Ontario, specifically in Toronto, were not improving but were in fact disrupting the

Since its inception in 1988, the NJI has continued to develop and deliver stimulating programs and a variety of electronic resources that foster judicial excellence. Alone or in partnership with courts and other organizations, the NJI is involved in the delivery of the majority of education taken by judges in Canada.


48 See e.g. Judicial Development and Grassroots Engagement Project, a 5-year, $12.5 million justice sector project in Vietnam funded primarily by CIDA as well as by the Vietnamese Government, online: Agriteam Canada <http://www.agriteam.ca/projects/profile/judicial-development-and-grassroots-engagement-judge/> (I am part of the consulting team on this project).
efficient flow of certain civil justice cases.\textsuperscript{49} Following the raising of these concerns, primarily on his own initiative but with the assistance of a working group, Justice Warren K. Winkler – as the Senior Regional Justice of the Toronto Region (before being appointed the Chief Justice of Ontario) – penned a practice direction\textsuperscript{50} that exempted cases in Toronto from the universal application of

\begin{footnotesize}
\begin{enumerate}

\item Practice directions are statements, typically from the court, designed to assist in the interpretation and efficient use of various processes found in rules of practice. They can be of wide, provincial application, or narrow, regional application. For a rules-based definition, see Ontario \textit{Rules of Civil Procedure}, \textit{ibid.} at r. 1.07, which provides that:

\begin{description}
\item[Definition] 1.07 (1) In this rule, “practice direction” means a direction, notice, guide or similar publication for the purpose of governing, subject to these rules, the practice for proceedings....

\item[Court of Appeal] (2) A practice direction for proceedings in the Court of Appeal shall be signed by the Chief Justice of Ontario....

\item[Superior Court of Justice] (3) A practice direction for proceedings in the Superior Court of Justice throughout Ontario shall be signed by the Chief Justice of the Superior Court of Justice....

\item[(4)] A practice direction for proceedings in the Superior Court of Justice in a region shall be signed by the regional senior judge and countersigned by the Chief Justice of the Superior Court of Justice....

\item[Filing, Posting and Publication of Notice] (5) A practice direction shall be filed with the secretary of the Civil Rules Committee and posted on the Ontario Courts website (www.ontariocourts.on.ca), and notice of the practice direction shall be published in the \textit{Ontario Reports}....

\item[Effective Date] (6) A practice direction does not come into effect before it is filed and posted and notice of it is published as described in subrule (5)....
\end{description}
\end{enumerate}
\end{footnotesize}
CHAPTER 5

Ontario Rule 77.\textsuperscript{51} The practice direction was implemented as a pilot project in Toronto in the form of former Rule 78 and was co-signed by Justice Heather J. Smith, Chief Justice of the Superior Court of Justice. In a nutshell, the practice direction, through Rule 78, provided for a more modest and flexible case management system for civil cases in Toronto as well as a longer period of time in which mandatory mediation was to occur.\textsuperscript{52} However, while certainly reining in what some viewed as overly aggressive case management and ADR reform initiatives, even these more modest provisions in the Toronto region still maintained some case management provisions as well as mandatory mediation requirements. As such, notwithstanding incorrect assumptions at the time that court-annexed ADR was dead in civil cases in Toronto, even judicial critics of mandatory court-annexed ADR initiatives still supported versions of these privatizing initiatives. Finally, through very recent reforms in Ontario, a reformed Rule 24.1 and a new Rule 77 have been adopted, which, together, seek to balance many of the competing aspects of the former rules and practices.\textsuperscript{53}


\textsuperscript{52} Rather than requiring mediation typically “within 90 days after the first defence has been filed” (Ontario Rules of Civil Procedure, supra note 49 at former r. 24.1.09(1)), mediation had to occur for typical cases in Toronto (as governed by former r. 78) much later in the life of a case: at least “within 90 days after the action is set down for trial…” (ibid. at former r. 24.1.09.1(2)(c)). This change allowed parties and lawyers more time to develop their case, particularly in evidence-heavy proceedings, and as such more time to understand the dispute and whether, and if so, how the case could be resolved by ADR prior to trial.

\textsuperscript{53} For a more fulsome discussion of these Ontario rules and recent reforms, see supra c. 3. For a critical discussion of judges and ADR, particularly judicial dispute resolution (JDR), see Hon.
PRIVATIZING PREFERENCES AND INFLUENCES

BAR ASSOCIATIONS

Largely in response to external criticism about the cost, speed and inefficiency of, and overall lack of access to, the civil justice system, bar associations have also actively been encouraging the use of privatizing dispute resolution tools. As I discussed at length in chapter 3, the foundational civil justice reform report in Canada was done in 1996 by the Canadian Bar Association,54 which described the “adoption of a dispute resolution approach” to “litigation practice” as a “new professional obligation.”55 Through the various rules reform projects and initiatives discussed above,56 a huge number of the CBA’s 1996 recommendations have been implemented, either fully or partially, across Canada’s court systems over the past ten or so years.57

In line with this “new professional obligation”, again at the national level, the CBA’s Code of Professional Conduct provides model code provisions that encourage settlement and the use of ADR, including, for example:

Whenever the case can be settled reasonably, the lawyer should advise and encourage the client to do so rather than commence or continue


55 Ibid. at 62-63. For a discussion of these reforms and obligations, see e.g. Farrow, “Dispute Resolution, Access to Civil Justice and Legal Education”, supra note 37 at 750.

56 See supra c. 3, pts. 4-5.

57 For a useful review of the CBA’s recommendations and their subsequent implementation, see Shone, “Civil Justice Reform in Canada: 1996 to 2006 and Beyond”, supra note 43.
CHAPTER 5

legal proceedings. The lawyer should consider the use of alternative dispute resolution (ADR) for every dispute and, if appropriate, the lawyer should inform the client of the ADR options and, if so instructed, take steps to pursue those options.\textsuperscript{58}

Provincial regulators, through codes of professional conduct, have typically adopted versions of these CBA model ADR provisions.\textsuperscript{59} Additionally, provincial bar associations are publishing publically available best practices statements that discuss and encourage the use of ADR by their members on behalf of the members’ clients.\textsuperscript{60}

\textbf{LAW SOCIETIES}

Law societies are increasingly viewing alternative, private settlement tools as appropriate matters for professional regulation. The regulation by law societies of lawyers and their ADR attitudes and practices was also a very specific goal of the “CBA Task Force Report”, which recommended that:

Every jurisdiction specify in its rules of professional conduct an obligation on lawyers to explore fully the prospects of settlement with their clients and an obligation to explain available dispute resolution options to clients in relation to litigation matters.\textsuperscript{61}

\begin{footnotesize}
\begin{enumerate}
\item See \textit{ibid}.
\end{enumerate}
\end{footnotesize}
Following the CBA's model *Code of Professional Conduct*, law societies, through their own codes of professional conduct, are increasingly requiring lawyers to consider and potentially use ADR tools on behalf of their clients. For example, according to the *Legal Ethics Handbook* of the Nova Scotia Barristers' Society (NSBS):

A lawyer has a duty to advise and encourage the client to settle a case rather than commence or continue legal proceedings where the case can be settled fairly and reasonably.

The lawyer should consider the appropriateness of alternate dispute resolution (ADR) to the resolution of issues in every case and, if appropriate, the lawyer should inform the client of ADR options and, if so instructed, take steps to pursue those options.

Ontario's Law Society of Upper Canada (LSUC), in its *Rules of Professional Conduct*, has adopted similar provisions, although with an even stronger ADR mandate:

A lawyer shall advise and encourage the client to compromise or settle a dispute whenever it is possible to do so on a reasonable basis and shall discourage the client from commencing useless legal proceedings.

The lawyer shall consider the use of alternative dispute resolution (ADR) for every dispute, and, if appropriate, the lawyer shall inform the client of ADR options and, if so instructed, take steps to pursue those options.

---

62 See *supra* note 58 and accompanying text.


Nova Scotia’s provisions require lawyers, through a “duty”, to “advise and encourage” a client to settle a case in the appropriate circumstances; further, they encourage lawyers, through the word “should”, to consider using ADR. Ontario’s rules also require lawyers, through the use of the word “shall”, to “advise and encourage” clients to settle their cases in appropriate circumstances. However, they go further than Nova Scotia’s rules by requiring lawyers, again through the word “shall”, to consider the use of ADR whenever possible for “every” dispute. These and other provinces’ law society regulations provide clear encouragement as well as, at times, clear obligations for lawyers both to consider settlement as well as to use ADR tools on behalf of their clients. Put simply, they provide clear and important examples of privatization in action.

Former Chief Justice Brian Dickson also argued, in a similar vein, that protecting and fostering access to justice is not just about adequate institutional design. Rather, it is a lawyer’s “professional duty, as an officer of the court, to ensure that matters proceed as expeditiously as possible”. For Justice Dickson, this may mean going further than the basics set out in various code provisions: “While the Canadian Bar Association’s Code of Professional Conduct states that

See e.g. Law Society of Alberta (LSA), Code of Professional Conduct (in effect 29 November 2008), online: LSA <http://www.lawsocietyalberta.com/files/Code.pdf>, which provides that: “A lawyer must recommend that a client accept a compromise or settlement of a dispute if it is reasonable and in the client’s best interests” (ibid. at c. 9, r. 16); and “a lawyer should consider alternative dispute resolution” (ibid. at c. 9, r. 16, c. 16). For a general discussion, see Farrow, “Dispute Resolution, Access to Civil Justice and Legal Education”, supra note 37 at 786-787, n. 290.

lawyers should encourage clients to settle disputes on a reasonable basis and avoid useless legal proceedings, lawyers need to go further and should consider how ADR may best serve their clients”.  
(Access to justice, as a basis for justifying privatization, is further discussed later on in this project.)

**LAWYERS**

In addition to the ADR initiatives of bar associations and the requirements of regulators discussed above, individual lawyers and firms are increasingly recognizing, and now espousing, the merits of ADR with their clients. This dramatic and ongoing opening up to ADR is occurring at one level as a practical, client-service, matter. Lawyers are realizing the increased benefits for their clients in using ADR tools in terms of cost and time savings. They are also increasingly discovering their own economic opportunities and benefits that can result from expanding their practice skills to include ADR tools. Privatization of

---


68 See *infra* cc. 6 and 8.
dispute resolution processes allows for an increased role for private, for-profit actors in the resolution of civil disputes. Obviously lawyers can be at the centre of this opportunity. As evidence of this new business reality, one only needs to look at the front – “general display” – pages of the most recent law reports to see that the number of lawyers and former judges advertising an expertise in all ADR areas and processes continues to expand in Canada.69

**LAWYER SURVEY**

As part of the research for this project, I conducted a national survey of lawyers on the issue of ADR. This was a unique survey in Canada, the results of which provide a very current and useful window onto the ADR practices and preferences of practicing litigation lawyers in Canada.70 The goal of the survey was to canvass the basic ADR practices and preferences of a wide sample of

---


70 In addition to surveying lawyers, I also thought seriously about surveying in-house corporate counsel, who would for many of the lawyers I surveyed be the instructing minds of many of their clients. The reason to do this kind of further survey would have been to see, directly from the client-side of the equation (without any filtering by advising lawyers), why ADR is used, preferred or not preferred by clients. It would also provide an extremely useful set of comparison data vis-à-vis my study about if, when, why or why not lawyers recommend private processes. I drafted the survey and had ethics approval to conduct it. Although receiving some preliminary encouragement and cooperation from one major Canadian corporate counsel organization, I did not ultimately get the kind of assistance I needed to circulate the survey to a meaningful target audience in a reasonably efficient and predictable way within a reasonable timeframe. As such, I did not complete that additional survey. I do think that it would be a useful survey for purposes of this project (although not critical to my ultimate analysis given my other survey findings and other available research on which I ultimately base my arguments). I also, however, think it would be useful research for an overall understanding of why ADR is chosen, and when it is and is not appropriate (as a general matter). As such, I continue to be very supportive of the idea of this kind of further, client-centered research being done in the future.
litigation lawyers who work primarily in a range of civil-side practice areas in all provinces and territories in Canada. The survey was not designed to be comprehensive in terms of canvassing all civil litigation lawyers in Canada, nor does it purport to be statistically representative of all litigation lawyers in Canada. It also does not purport to provide a detailed accounting of all of the nuanced and varied ADR options that are currently being used in this country. However, it was designed for several purposes (in addition to providing a window onto the basic ADR preferences of Canadian litigation lawyers today), including: to develop some fresh empirical research for purposes of this project (and perhaps other related projects and research); to provide current Canadian research by which to compare previous studies and assumptions; and to examine whether there are any differences between previous studies and assumptions and current litigation practices and preferences.

By way of brief introduction and methodological background, I conceived of the survey in the spring of 2008. Prior to designing the survey, discussions with practicing lawyers assisted with questions of how best to access a broad range of lawyers as well as how best to encourage a significant response rate. I determined that a short and easily accessible survey, linked through a short introductory note sent from me directly to lawyers by e-mail, was appropriate and would garner the greatest likelihood of response. The survey was designed to be hosted through Osgoode Hall Law School’s Information Technology web-

---

71 For a copy of the e-mail note, see Appendix 2.
based facilities. Specifically, a host research web-page was created on which the survey was completed, and through which the final data was collected. Not only did this format allow for efficient data collection and organization, it also allowed the responses to be collected anonymously.

With this model in mind, the survey was developed in the spring and early summer of 2008. Ethics approval to conduct the survey was received in August 2008. The survey was conducted between 14 October and 3 November 2008. This 3-week time frame was selected to accommodate typical projected work and holiday patterns as well as to provide an adequate window of time to complete the survey. Based on background discussions, it was determined that a longer response window was not required given the nature of typical correspondence practices of the target audience. Specifically, it was assumed that the response rate would significantly decline after a relatively short time following the receipt of the survey. Put simply, lawyers would either take the time to fill out the survey relatively quickly, or they would likely not fill it out at all. The projected time for a lawyer to complete the survey was 3-6 minutes (a fact that was mentioned in the survey’s cover note).

For purposes of the survey, approximately 1,000 litigation lawyers were contacted by e-mail. Because some e-mails were forwarded to other lawyers, this number is a close approximation and not an exact reflection of every lawyer that necessarily did receive the survey. The lawyers who were contacted were located

---

72 See *ibid.*

206
PRIVATIZING PREFERENCES AND INFLUENCES

across all regional jurisdictions in Canada. The sample also included lawyers from large firms and small firms as well as sole practitioners. As such, the survey included lawyers from a wide variety of civil litigation practice areas. Of the approximately 1,000 litigation lawyers who received the survey, 256 lawyers responded, representing a response rate of approximately 25%.73

The survey began by asking the lawyers, without personally self-identifying, to indicate which practice area, from a number of practice areas listed, best described their law practice. By far the largest number – 180 of the 240 lawyers who answered that question – self-described as having a general “litigation” practice area.74 The subsequent survey questions, primarily using a variation of the “widely used” and “very common” Likert scale survey method,75

---

73 I was extremely pleased with the overall response rate of 25% (256 lawyers) in the context of approximately 1,000 potential respondents. It should be noted that, because not all lawyers responded to all questions, some response rates for individual survey questions amounted to less than the overall total response rate. In terms of general survey practice, the answer to the question: “What counts as a response rate that would produce a ‘high degree of accuracy’ in terms of being able to draw reliable inferences regarding the practices and preferences of a given population” is: “It depends.” See W. Lawrence Neuman and Karen Robson, Basics of Social Research: Qualitative and Quantitative Approaches, Cdn. ed. (Toronto: Pearson Education Canada, 2009) c. 7 at 156. According to Neuman and Robson, for “small” survey populations of “under 1000”, a “researcher needs a large sampling ratio (about 30 percent) … for a high degree of accuracy. For moderately large populations (10 000), a smaller sampling ratio (about 10 percent) is needed to be equally accurate....” Ibid. at 157. Given that this survey involved slightly more than 1,000 lawyers, a response rate of 25% provides at least a relatively high degree of accuracy in terms of providing a useful window onto the ADR practices and preferences of Canadian litigation lawyers (particularly given the survey’s sample size, substantial response rate, geographic coverage and range of practice areas). However, as mentioned, the survey does not purport to be statistically representative in order to allow for reliable inferences to be drawn – in this project – about the actual practices of all Canadian litigation lawyers.

74 See Appendix 2.

75 Neuman and Robson, Basics of Social Research: Qualitative and Quantitative Approaches, supra note 73 at c. 6, p. 127. When describing Likert scales, Neuman and Robson state that:

Likert scales … are widely used and very common in survey research. They were developed in the 1930s by Renis Likert.... Likert scales usually ask people to
then sought to canvas practices and preferences with respect to several ADR tools. Specifically, through a total of 16 possible questions, the survey was designed to elicit information with respect to arbitration, mediation and the use of dispute resolution clauses. The primary survey questions for purposes of this chapter dealt with the lawyers’ propensity to recommend some form of ADR to their clients. The answers to questions looking at motivational factors for various responses are examined further in chapter 6. Additionally, all of the survey questions and answers, including questions that focus on specific details and contexts within the three broad focus areas, are included in Appendix 2.

Set out in the following three tables – Tables 5.1-5.3 – are the survey results with respect to the use of mediation, arbitration and dispute resolution clauses, together with data regarding the frequency with which these tools are used.

---

Ibid. I acknowledge that not all of the survey questions (all of which are set out in Appendix 2) offered the same number and kind of response options. For example, some of the threshold questions had 2 response options (see e.g. questions 1, 7 and 13), some had 4 response options (see e.g. questions 2, 8 and 15) and some had 6 response options, which included a 1-5 response scale plus a further response option of “never” or “N/A” (see e.g. questions 3-6, 9-12 and 14). Proceeding on this flexible basis is consistent with basic survey practice (see e.g. ibid.). Further, and in any event, because the survey results are not presented as being necessarily statistically representative, the variation in survey questions is not of any concern for purposes of this project.
### Table 5.1
**Mediation**

**Q. Do you ever recommend to your clients that they resolve a dispute using mediation?**

- Yes: 179 (91.33%)
- No: 17 (8.67%)
- Total: 196 (not all lawyers responded to this question)

**Q. How frequently do you make the recommendation that a client use mediation?**

- Very frequently: 54 (33.33%)
- Frequently: 53 (32.72%)
- On occasion: 43 (26.54%)
- Rarely: 12 (7.41%)
- Total: 162 (not all lawyers responded to this question)

### Table 5.2
**Arbitration**

**Q. Do you ever recommend to your clients that they resolve a dispute using arbitration?**

- Yes: 206 (80.47%)
- No: 50 (19.53%)
- Total: 256

**Q. How frequently do you make the recommendation that a client use arbitration?**

- Very frequently: 12 (7.45%)
- Frequently: 37 (22.98%)
- On occasion: 87 (54.04%)
- Rarely: 25 (15.53%)
- Total: 161 (not all lawyers responded to this question)
Table 5.3
Dispute Resolution Clauses

Q. Do you recommend that your clients insert dispute resolution clauses into their contracts?

- Yes: 132 (74.16%)
- No: 46 (25.84%)
- Total: 178 (not all lawyers responded to this question)

The basic results of these aspects of the survey confirm a significant propensity for the lawyers who responded to use some form of ADR process in their practice. Of particular note was the fact that over 90% (179) of the lawyers who responded to the mediation questions recommended the use of mediation to their clients, with 92.59% of those 179 lawyers making the recommendation either occasionally (43), frequently (53) or very frequently (54) (see Table 5.1). In the case of arbitration, over 80% (206) of the lawyers who responded to the arbitration questions recommended the use of arbitration to their clients; with 84.47% making the recommendation either occasionally (87), frequently (37) or very frequently (12) (see Table 5.2). Finally, over 74% (132) of the lawyers who responded to the dispute resolution clause questions recommended that their clients insert some form of dispute resolution clause into their contracts (see Table 5.3). In the case of lawyers (157) who recommend that clients insert dispute resolution clauses into their “business” contracts, over 70% of those 157 lawyers
do so sometimes (71) or always (40). The results of this portion of the survey confirm that lawyers who typically practice in the field of civil dispute resolution are making significant use of ADR tools. (Again, the factors driving those choices that were identified through the survey are taken up in chapter 6.)

Further evidence of individual lawyers’ enthusiastic acceptance and promotion of ADR, which is consistent with the responses from the lawyers who were surveyed for purposes of this project, can be seen in the number of firms that self-identify as promoting ADR. For example, 1,500 Canadian and international law firms, including 400 of the 500 largest laws firms in the U.S., have signed the “ADR Pledge” of the International Institute for Conflict Prevention & Resolution (CPR). The CPR’s “ADR Pledge” provides that:

We recognize that for many disputes there may be methods more effective for resolution than traditional litigation. Alternative dispute resolution (ADR) procedures – used in conjunction with litigation or independently – can significantly reduce the costs and burdens of litigation and result in solutions not available in court.

In recognition of the foregoing, we subscribe to the following statements of policy on behalf of our firm.

First, appropriate lawyers in our firm will be knowledgeable about ADR.

Second, where appropriate, the responsible attorney will discuss with the client the availability of ADR procedures so the client can make an informed choice concerning resolution of the dispute.  

---

76 See Appendix 2.

CHAPTER 5

Taken together, ADR’s various privatizing influences and opportunities fit with, and are increasingly driven by, the skills and preferences of what Julie Macfarlane has called “the new lawyer”: one who is open to a dispute resolution world that is dominated by non-court based venues, tools and sensibilities.\(^{78}\) This new dispute resolution world of individual lawyers accords with the ADR preferences and initiatives of bar associations and law societies as well as judges.\(^{79}\) The justifications underlying these new realities will be discussed further in chapter 6.

3. CLIENTS

Even if lawyers were not participating in the promotion of ADR initiatives, which we have now seen they very much are, lawyers would find that clients are increasingly demanding these new skills from their legal representatives. Clients are “expecting lawyers to actively canvass methods of alternative dispute resolution – the alternative to the adversarial and costly litigation process...”\(^ {80}\)


\(^{79}\) Discussed supra n. 29 and accompanying and following text.

According to another commentator, “clients are all demanding a problem-solving approach.” And while it is certainly the case that different types of clients are demanding the use of different types of ADR tools (a family law mediation, for example, is a very different process than either a contract negotiation or a commercial arbitration), the point that I am trying to make here is more of an aggregate argument. The preferences driving these client demands – albeit for different processes for different people – taken together provide persuasive evidence of a generalized (and increasing) client preference for ADR. And, as I’ve mentioned, it is a generalized preference that lines up with, as well as fuels, the preferences of other justice system stakeholders, including lawyers, law schools and elected officials.

**General ADR Preferences**

International empirical research confirms these general statements. For example, a survey in the U.S., which examined “the use of ADR among 1,000 of the largest U.S. corporations”, found that ADR is “widespread and likely to grow significantly in the foreseeable future.” Other international surveys report similar findings in terms of positive views toward ADR. For example, a survey of lawyers and parties involved in international private business arbitrations

---


82 David B. Lipsky and Ronald L. Seeber, “The Appropriate Resolution of Corporate Disputes: A Report on the Growing Use of ADR by U.S. Corporations” (Cornell/PERC Institute on Conflict Resolution, Summer 1998), online: Cornell University, ILR School <https://www.ilr.cornell.edu/alliance/resources/Articles/approp_resol_corp_disputes.html> at “Description of Report”. The study was based on a “phone and mail survey of 606 respondents”.

213
conducted through the American Arbitration Association (AAA) in 2000 revealed consistently high rankings in terms of lawyer and client opinions of the fairness of arbitral results.  

As we saw with their outside counsel, corporate clients are also actively pledging their allegiance to ADR (even though they are under no similar professional obligation to do so). For example, 4,000 corporations, representing more than two thirds of the U.S. gross national product, have signed the CPR’s “ADR Pledge”, the corporate version of which provides:

We recognize that for many disputes there is a less expensive, more effective method of resolution than the traditional lawsuit. Alternative dispute resolution (ADR) procedures involve collaborative techniques which can often spare businesses the high costs of litigation.

In recognition of the foregoing, we subscribe to the following statements of principle on behalf of our company and its domestic subsidiaries:

In the event of a business dispute between our company and another company which has made or will then make a similar statement, we are prepared to explore with that other party resolution of the dispute through negotiation or ADR techniques before pursuing full-scale litigation. If either party believes that the dispute is not suitable for ADR techniques, or if such techniques do not produce results satisfactory to the disputants, either party may proceed with litigation.


84 See supra note 77 and accompanying text.

Similar ADR pledges are being made in Canada. For example, a number of significant corporate entities – and leading Canadian law firms – have signed the ADR Institute of Canada’s “Dispute Resolution Pledge”. The “Dispute Resolution Pledge”, in a similar fashion to the CPR’s pledge process,⁸⁶ “commits signatories to willingly consider and suggest alternative dispute resolution processes in appropriate situations prior to turning to the courts.”⁸⁷ While the pledge is voluntary, signing it certainly indicates an institution’s willingness to consider alternative, private, processes.

**INDUSTRY SPECIFIC PREFERENCES AND APPROACHES**

To realize in practice these general ADR preferences, clients are increasingly demanding that the contracts by which they conduct their business affairs include some form of dispute resolution clause. As we saw earlier with the lawyers surveyed for this project, including dispute resolution clauses in commercial contracts has become a widespread practice. As an AAA commentary noted, “Every year, millions of business contracts provide for mediation and arbitration as ways of resolving disputes.”⁸⁸ Notably, within the

---

⁸⁶ ADR Institute of Canada, Rules & Pledges, “Dispute Resolution Pledge: A Corporate Policy Statement”, online: ADR Institute of Canada <http://www.amic.org/>. For a list of signatory corporations and law firms, see ibid, at About Us, ADR Leaders, “Pledge Signatories”.

⁸⁷ ADR Institute of Canada, Rules & Pledges, “Dispute Resolution Pledge: A Corporate Policy Statement”, online: ADR Institute of Canada <http://www.amic.org/>. For a list of signatory corporations and law firms, see ibid, at About Us, ADR Leaders, “Pledge Signatories”.

pool of general client ADR preferences, numerous industry-specific ADR preferences have emerged. Some industry sectors, particularly the financial services sector, have developed wide-ranging collective ombud and ADR services.\footnote{89} Additionally, industry-specific practices have developed with respect to specialized dispute resolution contractual clauses. Others, like the labour sector, often primarily use arbitration processes as provided for under wide-ranging collective bargaining regimes. Two leading examples of these specific industry sectors are the construction and consumer industries.

Given the complex regulatory and contractual nature of the construction industry, a sophisticated construction contract practice has developed, particularly with respect to construction dispute resolution clauses. For example, in the Canadian construction industry, the Canadian Construction Documents Committee (CCDC) has developed standard contractual documents that contain mandatory dispute resolution clauses that are specifically tailored to the Canadian construction industry.\footnote{90} Similarly, the AAA has developed significant resources specifically devoted to drafting ADR clauses in construction contracts.\footnote{91}

\footnote{89} See supra c. 4.


216
Similarly in the consumer industry, arbitration and other forms of non-court-based dispute resolution processes have been and continue to be used in many consumer contracts, which now – as was the case in *Dell* – also often include online contracts for the provision of goods and services. The consumer sector is singled out here largely because of its significant use of dispute resolution clauses as well as the significant number of people who are parties to consumer contracts. A typical example of a current mandatory dispute resolution provision in a Canadian consumer contract is the mandatory arbitration clause found in Shaw’s joint terms of service provisions, which provides:

Any disputes or claims (“claims”) whatsoever between Shaw and you will be referred to and determined by arbitration to the exclusion of the courts.... You agree to waive any right you may have to commence or participate in any class action against Shaw related to any claim where such waiver is permitted, where applicable. You also agree to opt out of any class proceedings against Shaw....

---


94 Shaw, “Joint Terms of Service” at s. 14 (“Disputes and Governing Law”) (last updated: 8 December 2008), online: Shaw <http://www.shaw.ca/en-ca/AboutShaw/TermsofUse/JointTermsofService.htm#q1> (emphasis omitted).
Other examples of current mandatory dispute resolution clauses in familiar Canadian consumer contracts include clauses for Rogers,\textsuperscript{95} Shaw Direct (formerly Star Choice),\textsuperscript{96} Amazon ca,\textsuperscript{97} Direct Energy\textsuperscript{98} and Telus\textsuperscript{99} It was also this kind of mandatory arbitration clause that was at issue in the Dealership case\textsuperscript{100}

\textsuperscript{95} Rogers, “Rogers Terms of Service” at s 34 (“Arbitration”), online Rogers <https://your.rogers.com/about/legaldisclaimer/tos_eng.pdf>, which provides

To the extent permitted by applicable law, unless we agree otherwise, any claim, dispute or controversy, whether in contract or tort, pursuant to statute or regulation, or otherwise, and whether pre-existing, present or future, arising out of or relating to the following items will be determined by final and binding arbitration to the exclusion of the courts

- the Service Agreement,
- the Services or Equipment,
- oral or written statements, advertisements or promotions relating to the Service Agreement, the Services or Equipment, or
- the relationships that result from the Service Agreement (emphasis omitted)

\textsuperscript{96} Shaw Direct (formerly Star Choice), “Shaw Direct Terms of Service – Residential Customer Agreement” at s 29 (“Arbitration/No Class Action”) (last updated 27 April 2009), online Star Choice/Shaw Direct <http://www.starchoice.com/enghsh/TermsofService.pdf>, which provides

Any claim or dispute (whether in contract or tort) arising out of or relating to these Terms of Service (collectively a “Claim”) will be referred to and determined by a sole arbitrator (to the exclusion of the courts) whose decision will be final and binding. Unless prohibited by law, Customer agrees to waive any right Customer may have to commence or participate in any class action suit or proceeding against Shaw Direct arising out of or relating to any Claim and you also agree to opt out of any class proceedings against us. Any arbitration of a Claim will be pursuant to such rules as you and we agree and failing agreement will be conducted by a single arbitrator pursuant to the laws and rules relating to commercial arbitration in the province in which you reside that are in effect on the date of the notice to arbitrate.

\textsuperscript{97} Amazon.com.ca, Inc., “Conditions of Use” at “Disputes”, online Amazon ca <http://www.amazon.ca/gp/help/customer/display.html?nodeId=918816>, which provides

Any dispute relating in any way to your visit to the Amazon.ca site or to products you purchase through Amazon.ca shall be submitted to confidential arbitration in Seattle, Washington, United States, except that, to the extent that you have in any manner violated or threatened to violate the intellectual property rights of Amazon.ca or its affiliates, Amazon.ca or its affiliates may seek injunctive or other appropriate relief in any state or federal court in the state of Washington, and you consent to exclusive jurisdiction and venue in such courts. Arbitration under this agreement shall be conducted under the rules then prevailing of the American
Arbitration Association. The arbitrator’s award shall be binding and may be entered as a judgment in any court of competent jurisdiction. To the fullest extent permitted by applicable law, no arbitration under this Agreement shall be joined to an arbitration involving any other party subject to this Agreement, whether through class arbitration proceedings or otherwise.

98 Direct Energy, “Web Site Terms of Use” at “Jurisdiction and Arbitration” (last amended: 9 May 2005), online: Direct Energy <http://www.directenergy.com/EN/Pages/TermsOfUse.aspx>, which provides:

Access to this web site is governed by all applicable federal, state, provincial and local laws, and, in the case of users resident outside of Canada or the United States, you may also be subject to additional laws of the country where you reside. You are responsible for compliance with the laws of your jurisdiction and other applicable law.

The laws of the Province of Ontario, Canada shall govern any dispute arising out of the use of this web site or these Terms of Use. You also agree to submit to the exclusive jurisdiction and venue of the courts located therein. In the event of any dispute with Direct Energy arising out of or related to these Terms of Use or your use of the Site you agree to submit such dispute to binding arbitration under the procedure provided by the Arbitration Act (Ontario).

99 Telus Communications Company, “Telus standard mobility Service Terms & Conditions” at s. 15 (“Arbitration”), online: Telus <http://www.telusmobility.com/about/mike_pcs_pt_policy.shtml>, which provides:

Any claim, dispute or controversy (whether in contract or tort, pursuant to statute or regulation, or otherwise...) arising out of or relating to: (a) this agreement; (b) a phone or the service; (c) oral or written statements, or advertisements or promotions relating to this agreement or to a product or service; or (d) the relationships which result from this agreement (including relationships with third parties who are not parties to this agreement), (each, a “Claim”) will be referred to and determined by private and confidential mediation before a single mediator chosen by the parties and at their joint cost. Should the parties after mediation in good faith fail to reach a settlement, the issue between them shall then be determined by private, confidential and binding arbitration by the same person originally chosen as mediator. Either party may commence court proceedings to enforce the arbitration result when an arbitration decision shall have been rendered.... By so agreeing, you waive any right you may have to commence or participate in any class action against TELUS related to any Claim and, where applicable, you hereby agree to opt out of any class proceeding against TELUS otherwise commenced.... Mediation and arbitration of Claims will be conducted in such forum and pursuant to such rules as you and we agree upon, and failing agreement will be conducted by one mediator-arbitrator pursuant to the laws and rules relating to commercial arbitration in the province in which you reside that are in effect on the date of the notice to mediate and arbitrate. Some jurisdictions may not allow the use of compulsory mediation or arbitration or the waiver of rights to participate in a class action. If applicable law renders clauses requiring mandatory mediation or arbitration or the exclusion of the right to participate in a class action void, the provisions of this section shall be subject to severance...
However, recent legislative initiatives in Canada have limited the use of *mandatory* dispute resolution clauses in consumer contracts. As I discuss further in chapters 7 and 8, these are significant initiatives that go against the otherwise overwhelming tendency to favour privatized dispute resolution processes and opportunities. For example, according to Québec’s recently amended *Consumer Protection Act*, consumer contracts that mandate arbitration by purporting to prohibit consumers from accessing public court processes are now prohibited.\(^{101}\)

The relevant 2006 amendments to the legislation provide:

> Any stipulation that obliges the consumer to refer a dispute to arbitration, that restricts the consumer’s right to go before a court, in particular by prohibiting the consumer from bringing a class action, or that deprives the consumer of the right to be a member of a group bringing a class action is prohibited.... If a dispute arises after a contract has been entered into, the consumer may then agree to refer the dispute to arbitration.\(^{102}\)

Because the facts that triggered the arbitration clause at issue in the *Dell* case (discussed further in chapter 4) occurred prior to the coming into force of Québec’s legislative amendments, they did not apply to the arbitration clause in that case. Similar legislative amendments were also made several years earlier to Ontario’s *Consumer Protection Act*, the relevant provisions of which provide that:

> 7(2) ...any term ... in a consumer agreement ... that requires ... that disputes arising out of the consumer agreement be submitted to arbitration is invalid insofar as it prevents a consumer from exercising

---

\(^{100}\) See *supra* c. 1.


\(^{102}\) *Ibid.* at s. 11.1. For a further discussion of the new Québec regime and its application, see *e.g.* *Dell Computer Corp. v. Union des consommateurs*, *supra* note 93.
a right to commence an action in the Superior Court of Justice given under this Act….

(3) …after a dispute over which a consumer may commence an action in the Superior Court of Justice arises, the consumer, the supplier and any other person involved in the dispute may agree to resolve the dispute using any procedure that is available in law….

(5) Subsection 7(1) of the Arbitration Act, 1991 does not apply in respect of any proceeding to which subsection (2) applies unless, after the dispute arises, the consumer agrees to submit the dispute to arbitration….

As a result of these provisions, mandatory consumer arbitration clauses will no longer be permitted in jurisdictions in which either companies deem it not to be in their best interests and/or in which legislation prohibits such provisions. In such cases, mandatory clauses are severed and deemed to be of no force and effect; alternatively, companies may choose to include voluntary dispute resolution clauses in their consumer contracts. An example of a current voluntary dispute resolution clause in a Canadian consumer contract is the permissive mediation or arbitration clause found in National Money Mart’s B.C. contract for Fast Cash Advance customers for its “Payday Loans” services, which provides:

If you have a dispute regarding your Fast Cash Advance from us:

---

103 See Consumer Protection Act, 2002, S.O. 2002, c. 30, sched. A at s. 7. See further ibid. at s. 100(1), which provides that: “If a consumer has a right to commence an action under this Act, the consumer may commence the action in the Superior Court of Justice.”

104 See e.g. Telus Communications Company, “Telus standard mobility Service Terms & Conditions” at s. 15 (“Arbitration”), supra note 99, the relevant provision of which provides: “If applicable law renders clauses requiring mandatory mediation or arbitration or the exclusion of the right to participate in a class action void, the provisions of this section shall be subject to severance…”.

i) you *may* mediate or arbitrate your dispute with us at no cost to you; and

ii) as part of the mediation or arbitration we will provide you with a summary of your Fast Cash Advance transactions with us at no cost to you.\(^{106}\)

Customers who choose to mediate or arbitrate then are directed to complete a “Customer Application to Mediate or Arbitrate”, which provides, among other things,

> I understand, acknowledge and agree that any mediation or arbitration will be conducted privately and confidentially using rules to be mutually agreed upon by Money Mart and myself and that the results of any mediation or arbitration will also be private and confidential and will not be disclosed to any person who is not a party to the mediation or arbitration.\(^{107}\)

Overall, based on anecdotal and empirical evidence, as well as a review of various client practices with respect to dispute resolution contractual clauses, there is no doubt that clients, in line with earlier findings with respect to their lawyers, are demonstrating a strong preference for the use of ADR in the context of resolving their civil disputes. Put simply, along with other dispute resolution participants discussed in this chapter, they are a significant source of momentum for the privatization movement that is at issue in this project. As mentioned earlier, the *justifications* underlying these preferences will be discussed in chapter 6.


\(^{107}\) National Money Mart Company, British Columbia, “Customer Application to Mediate or Arbitrate”, online: Money Mart <http://www.moneymart.ca/ADRFORM.pdf> at s. 4.11.
PRIVATIZING PREFERENCES AND INFLUENCES

4. LAW SCHOOLS

Final sources of current (and future) privatizing preferences and influences are law schools. The legal academy, like other justice system stakeholders, has dramatically changed over the past number of years. A big part of this change includes a move toward actively embracing and promoting what have traditionally been thought of as practice-oriented subjects, including clinical education, legal writing, ethics and professionalism, and – most relevant for this project – dispute resolution.\(^{108}\) The shift toward ADR has been extremely noticeable in American law schools over the past several decades: according to one report, in U.S. law schools in 1976, “there was no subject category for ADR or mediation”\(^{109}\) while in 1992, more than 94 percent of those schools provided students with dispute resolution course offerings.\(^{110}\) This upward trend of ADR interest and offerings

---


\(^{109}\) Lela Porter Love, “Twenty-Five Years Later with Promises to Keep: Legal Education in Dispute Resolution and Training Mediators” (2002) 17 Ohio St. J. Disp. Resol. 597 at 598 [citation omitted].

\(^{110}\) American Bar Association (ABA), Report of the ABA Working Group on Civil Justice System Proposals, ABA Blueprint for Improving the Civil Justice System (Chicago: ABA, 1992) at 31 [ABA Blueprint]. See further ABA, Just Solutions: Seeking Innovation and Change in the American Justice System, by Stephen P. Johnson (Chicago: ABA, 1994). For further foundational materials, see ABA, Section on Legal Education and Admissions to the Bar, Legal Education and
has continued. Since 1999, "the level of interest in dispute resolution – and in particular in the teaching of dispute resolution – has risen exponentially."\(^{111}\) A 2002 American commentary indicated that "more than 500 law professors identify themselves as teaching ADR."\(^{112}\)

A similar "exponential[]" rise in dispute resolution teaching and learning has occurred in Canadian law schools over the past number of years.\(^{113}\) A 2000 statement by Justice Austin of the Court of Appeal for Ontario noted that, "until very recently, lawyers and judges in Canada were not generally trained in negotiation, mediation or arbitration. Only in the last 10 years has instruction in alternative dispute resolution become a necessity amongst lawyers and judges across Canada."\(^{114}\) This point was consistent with research from a CBA survey.


conducted around the same time, which stated that: “it is clear that there is increased interest in and emphasis on [A]DR in all law schools.”\textsuperscript{115}

A significant driving force behind the increased interest in ADR at Canadian law schools came from the 1996 “CBA Task Force Report”.\textsuperscript{116} As part of its research and recommendations, the CBA Task Force specifically looked at ADR and its teaching in Canadian law schools. In its report, while commenting favourably on what had already been accomplished, the CBA Task Force found a need for significant further work in the area of ADR and legal education. Put simply, it suggested “revolutionizing” legal education in Canada.\textsuperscript{117} Specifically, it pointed to a need to review current ADR course offerings by law schools, bar admission courses and continuing legal education providers to ensure that ADR “training and educational opportunities are widely available.”\textsuperscript{118} Further, the CBA Task Force recommended that “law schools ... offer education and training on dispute resolution options and on the means by which they can be integrated into legal practice, and ... [that] such courses [should] be mandatory in Canadian


\textsuperscript{116}\textit{Supra} note 54. See further \textit{supra} c. 3.

\textsuperscript{117}“CBA Task Force Report”, \textit{ibid.} at 72.

\textsuperscript{118}\textit{Ibid.} at 64.
CHAPTER 5

law schools and Bar admission course programs.” 119  Similar recommendations were also made by the Law Commission of Canada several years later. 120

Certainly not all of these reform proposals were implemented by Canadian law schools. In 2005, I conducted a survey of law school and related ADR programs, particularly in Canada but also in other selected, leading law and related programs in the U.S., U.K., Australia and New Zealand. 121 What I found, for purposes of this project, were essentially two things. First, in line with (although slightly behind) U.S. law schools, a significant amount of ADR research and teaching was going on at Canadian law schools. Many Canadian schools had developed at least some kind of ADR program, with many schools having more than one stand alone ADR course for example. Second, while strides had been made to introduce the topic, more was clearly needed and was going to be done. Some specific examples of areas of opportunity for further focus included the research and teaching of ADR and ethics, culture, power, poverty and access to justice, industry differences, etc. Further, focused clinical

119 Ibid. at 65, rec. 39.

120 In 2003, the Law Commission of Canada looked at the broad issue of dispute resolution in Canada in the context of restorative justice initiatives. See Law Commission of Canada, Transforming Relationships Through Participatory Justice, supra note 24. With a specific focus on the resolution of disputes and ADR, the Law Commission of Canada recommended that universities and colleges, “and law schools in particular”, should “continue to expand the quality of teaching in alternative dispute resolution offered to law students...”. Ibid. at xxiv.

121 For a description of this research, which included an expansive literature review, on-line research and survey, see Farrow, “Dispute Resolution, Access to Civil Justice and Legal Education”, supra note 37 at 743-744, nn. 12-14. For a discussion of an earlier survey of Canadian law schools, see CBA, Attitudes – Skills – Knowledge, supra note 115 at 20-25.
experiences in ADR were only just developing.\textsuperscript{122} Since that 2005 research, many of these issues are being taken up and more is being done.

Underlying all of these ADR developments at law schools are numerous preferences and influences. In addition to financial, reputational, research and pedagogical interests of universities and their faculties,\textsuperscript{123} several other preferences and influences are worthy of note. The first is a clear civil justice reform agenda that can be located, among other places, in the “CBA Task Force Report”. What law professors teach law students bears on what students do (or want to do) as lawyers.\textsuperscript{124} In the context of civil dispute resolution, “the link is clear between what students are exposed to at law school and what new and future lawyers are inclined to develop and accomplish with their clients and through institutional reform at the Bar.”\textsuperscript{125} This link, between teaching ADR at law school and promoting civil justice law reform generally, was a driving influence behind much of the modern ADR movement at U.S. law schools. According to the ABA, for example, “continued public and professional education about ADR is

\textsuperscript{122} See \textit{e.g.} Farrow, “Dispute Resolution, Access to Civil Justice and Legal Education”, \textit{supra} note 37 at 781-801.

\textsuperscript{123} For two very recent and influential studies on legal education and curriculum reform, both of which strongly recommend a strengthened focus on skills-based training at law schools, see William M. Sullivan \textit{et al.,} \textit{Educating Lawyers: Preparation for the Profession of Law} (San Francisco: Jossey-Bass, 2007); Roy Stuckey \textit{et al.,} \textit{Best Practices for Legal Education: A Vision and A Road Map} (New York: Clinical Legal Education Association, 2007) \textit{[Stuckey Report]. For specific commentary on ADR, see \textit{e.g.} Stuckey Report} at 77-79.

\textsuperscript{124} See \textit{e.g.} Farrow, “Sustainable Professionalism”, \textit{supra} note 80; Henderson and Farrow, “The Ethical Development of Law Students: An Empirical Study”, \textit{supra} note 108.

\textsuperscript{125} Farrow, “Dispute Resolution, Access to Civil Justice and Legal Education”, \textit{supra} note 37 at 781-782.
necessary to aid in the transformation of a legal system now centered around litigation into a system that includes non-adversarial ADR mechanisms."

Similarly, there is no doubt that the modern Canadian civil justice reform agenda has had, and continues to have, a major impact on the development of ADR programs at law schools. And while much of the impetus for that reform agenda is practice-related and efficiency-based, and has therefore not – at least at the outset – been particularly pedagogically-driven, what has now developed is the beginnings of a very interesting and critical mass of university-based research and teaching that is starting to move beyond its practice-based roots and define itself in terms of its own research and teaching agendas.

Further influential factors, as I have commented elsewhere, have included the preferences of law students. Law students are actively and increasingly pursuing and promoting practical courses at law schools, including courses in ADR. These preferences are driven by a perception, which is often justified, that these kinds of courses will help students to be more prepared and accomplished lawyers once they graduate and start practicing law. As one report has indicated, the growth of clinical legal education in the U.S. and subsequently in Canada stemmed, at least in part, from "student demands for relevance in the law school curriculum." This demand for practical, "relevan[t]", courses includes courses

126 ABA Blueprint, supra note 110 at 39.

127 Farrow, "Dispute Resolution, Access to Civil Justice and Legal Education", supra note 37 at 755.

128 Margaret Martin Barry et al., "Clinical Education for this Millennium: The Third Wave" (2000) 7 Clinical L. Rev. 1 at 16.
As Catherine Morris noted, "dispute resolution education is in hot demand by law students." A number of years ago, I recall seeing a poster for the "Student Arbitration and Mediation Society", which was, at least in 2003, one of the most recently formed student groups at the University of Alberta. The catch phrase on the poster was a question: "ADR, the fastest growing trend in the practice of law, are you prepared?" More recently, at my current faculty, a student-led ADR organization, the "ADR Project", has successfully spearheaded, together with significant faculty support and interest, the creation of a new mediation clinic at Osgoode Hall Law School (which was in 2009 awarded a start-up grant of $170,000 by the Ontario Law Foundation). Clearly there is a strong support at the student level for ADR-related course and clinical initiatives.

This strong student interest, which is resonating with increasing faculty and administrative support throughout the law school community, is part of what we are seeing as an overall collective of privatizing preferences and influences from a wide range of justice system stakeholders. Taken together, the expression of this

---


131 University of Alberta, Student Arbitration and Mediation Society (Lecture Poster, 24 March 2003) [archived with author], cited in Farrow, "Dispute Resolution, Access to Civil Justice and Legal Education", supra note 37 at 755, n. 79 and accompanying text.

132 For information on Osgoode Hall Law School's new mediation clinic, together with other ADR initiatives at Osgoode, see e.g. York University, "Helliwell Foundation gift supports a new dispute resolution centre" Y File (31 March 2009), online: York University <http://www.yorku.ca/yfile/archive/index.asp?Article=12327>.
CHAPTER 5

reform-oriented ethos from these key justice system participants – governments, judges and lawyers, bar associations, lawyers and clients, and law schools – has been a significant motivating force behind the unmistakable wave of dispute resolution privatization that is increasingly occurring throughout this country. There really is no corner of the civil justice landscape that is exempted from this active privatizing activity. Remarkably, it is occurring with very little public knowledge or understanding let alone active public engagement (except, of course, by those who are engaged themselves in a civil dispute resolution process, but even then, not in a way that adequately notices the collective of voices that are increasingly singing from the same song sheet as it were). Before getting to my concerns about the potential negative ramifications of this widespread privatization activity and the lack of public awareness or understanding of it, I now turn, in the next chapter, to look at the primary justifications that are typically provided for these privatization preferences and influences.

133 See infra cc. 7-8.
There are several different justifications that can be identified as animating the preferences and influences of the various justice system stakeholders that I discussed in the previous chapter, which, taken together, militate in favour of the modern movement to privatize our systems of civil dispute resolution. These various contributing justifications include, for example: market optimality and efficiency; preferences for process flexibility, party autonomy, ownership and choice; desires for increased individual and group participation (which, on some readings, increases legitimacy); privacy; accessibility; and others. However, to my mind, there are two overriding justifications for a widespread privatization of dispute resolution in Canada that are most compelling in terms of the regulatory discussions at issue in this project (both of which draw on many of the various factors mentioned above). The first is what I call the “business case for privatization”. The central animating force of the business case for privatization is efficiency. According to this argument, private justice, like privatization generally (as I discussed earlier\(^1\)), is more efficient than public justice, both for the provider and for the consumer. Key indicators of efficiency include speed, cost, autonomy, flexibility, and so on. And to be clear, even though I use the phrase “business case” (because of what has come to be seen as a generally shared understanding of the efficiency-based premises behind such arguments), this first

\(^1\) See *supra* c. 3.
overriding justification, as will be seen, obtains equally in the context of the preferences of both private and public stakeholders in the justice community.

The second overriding justification for privatization is what I call the “access to justice case for privatization”. According to this argument, by aggressively pursuing privatizing alternatives through active civil justice system reforms, more members of the citizenry who have been previously excluded by the increasingly inaccessible public system will have greater access to much needed legal services. Simply put, the second justification of privatization is that it purports to provide greater access to justice.

Given the common factor of efficiency, there is no doubt that these two overriding justificatory cases are not mutually exclusive; rather, they are in fact mutually supportive. Many of the factors that make the system more attractive from a business case perspective also make it more viable from an access to justice perspective. The more efficient a dispute resolution system is, faster, cheaper, understandable, etc., typically the more accessible the system is. However, although clearly recognizing and acknowledging this overlap, there are also – at least for some stakeholders – distinct underlying motivations, which militate in favour of keeping separate my discussion of these two related justifications. For example, governments are typically interested in both saving money by reforming and, at times, outsourcing services (business case justifications) as well as making services more available (access justifications). Private clients, on the other hand, are typically motivated by self-interest
(business case justifications), and are less interested – at least in this context – in the collective wellbeing of society (access justifications). And as I discuss later in this chapter, while I strongly believe that lawyers, like governments, should be interested in both justifications (given the bargain they have struck with society, in return for self-regulation, to help facilitate access to justice for the members of the communities they serve), there is certainly a fairly strong public sentiment that the preferences of lawyers are driven, at least in large measure, by the self-interests of their clients (I’ll leave the lawyer jokes to others at this stage). So while sharing the significant animating factor of efficiency, I think of these two overriding justifications for privatization as conceptually distinct.

1. THE BUSINESS CASE FOR PRIVATIZATION

Many, if not all, users of and participants in the civil justice system have long been lamenting the glacial pace at which it tends to operate; its crushing individual costs (including financial, emotional, reputational and sometimes physical costs); its systemic costs; its general inaccessibility (often in terms of complexity and comprehension, sometimes in terms of physical availability and openness, sometimes in terms of cultural, racial, language and other barriers, and very often – again – financially); and its relative inflexibility (in terms of the kinds of remedies that might be available for dealing with litigants’ actual interests, broadly put, rather than simply their stated or perceived rights).
CHAPTER 6

To take an important example, on this last criticism of inflexibility, courts can deal, as we have seen,² with essentially any right that is at stake in a given case. To the extent that a tort, a contract, a property matter or an estate issue is raised in a piece of litigation, the courts can understand the claim and craft an appropriate remedy. What courts do not do, and often cannot do, is help parties with issues that are less about legal “rights” and more about what their underlying core “interests” are. For example, when a news organization is sued by a businessperson over allegedly defamatory statements made about that person in the newspaper, often what is at stake is less about the person’s actual financial loss and more about their business or personal reputational loss. An apology, properly placed in the newspaper, is often what is ultimately at stake in those kinds of cases. While not entitled to it, as a “right”, it is often what the aggrieved party wants (i.e. it is what he or she is really “interested” in). Courts are good at assessing a reasonable amount of “damages” (money) that the newspaper should pay. A solution amounting to forced speech is not typically within courts’ jurisdiction as far as remedies are concerned. They can’t order the newspaper reporters and editor to look the aggrieved party in the eye and simply say (if this is the case): “we made a mistake, we are very sorry, and we will print a retraction right away”. That apology (or similar result), however, is what often gets civil disputes settled by private processes. That is the difference between a remedy based on legal rights and a remedy that is extremely attentive to the disputants’

² See supra c. 2.
interests. ADR processes often provide the informal, flexible and sometimes supportive environments in which such exchanges can occur and remedies can be crafted. They are good at finding space for peoples’ interests. That is what I mean, in this context, by the relative flexibility of ADR processes and the relative inflexibility of traditional litigation processes.³

As to criticisms of the traditional system’s overall inaccessibility and inflexibility, when looking at alternatives, there is certainly no lack of support for the merits of private justice, from a variety of different stakeholders, especially regarding various forms of mediation and arbitration. For example, when writing about the benefits of mediation, Gary Furlong recently commented that “litigation, as a process, is often opaque, rigid and lacking ‘common sense.’”⁴ Mediation, on the other hand, delivers a “‘just’ and fair process” marked by “transparency, respect, justification, accuracy, and ... a meaningful voice and input into the process’” for participants.⁵ According to George Pavlich, in the context of his research into community-based mediation programs in B.C., some informal mediation alternatives provide the potential to let “silenced voices speak” through “contextually sensitive (informal) dispute resolution settings” and flexible processes “that allow disputants to develop their own settlements”

³ For a discussion of rights and interests in the context of ADR, see Julie Macfarlane, The New Lawyer: How Settlement is Transforming the Practice of Law (Vancouver: UBC Press, 2008) at 49-54. See also ibid. at 178-181.

⁴ Gary Furlong, “Mediation excels in delivering sense of justice to participants” 28:7 The Lawyers Weekly (13 June 2008) 8 at 8.

⁵ Ibid. at 8.
through “local” justice. Further glowing support is often marshaled in favour of arbitration. For example, one recent report stated that a:

widely touted advantage of arbitration is that, unlike in civil litigation where dueling parties are stuck with the judge they’re given, parties agreeing to arbitrate can pick the arbitrator or arbitrators who will determine their fate.... “People see how you can get an expert arbitrator deciding your case rather than some random judge who may or may not know anything about the issues in dispute.”

As such, according to Allan Stitt (speaking specifically about arbitration):

“[p]eople are beginning to see the real benefits of arbitration over the court system.”

In addition to anecdotal evidence, there is a growing body of primary and secondary research supporting the merits of ADR (as broadly defined). Specifically, there continues to be a general perception, supported by several empirical studies, that arbitration, mediation and/or other privatizing processes can be faster, cheaper, and simpler than traditional court processes. For


8 Allan Stitt, quoted in ibid. at 54.

9 Recall my discussion on the general terminology of ADR in c. 3.

instance, according to a 2005 study of approximately 600 individuals in the U.S.,
arbitration was “widely” seen as faster (74%), cheaper (51%), and simpler (63%)

lawsuits” (29 April 2003) 23 Insurance Times, online Insurance J
and Ronald L. Seeber, “The Appropriate Resolution of Corporate Disputes: A Report on the
Growing Use of ADR by U.S. Corporations” (Cornell/PERC Institute on Conflict Resolution,
Summer 1998) at 17, online Cornell University ILR School
<https://www.ilr.cornell.edu/alliance/resources/Articles/approp_resol_corp_disputes.html>,
Margaret A. Shone, “Civil Justice Reform in Canada 1996 to 2006 and Beyond” (December
Mediation Program (Rule 24.1) Executive Summary and Recommendations” (Ontario Queen’s
Printer, 12 March 2001), online Government of Ontario

11 See e.g., Carson, Graham and Carson, “Arbitration: The Proof of the Pudding, Results of the
Carson / Graham Commercial Arbitration Survey, 1993”, supra note 10, Thomas J. Stipanowich,
“ADR and the ‘Vanishing Trial’ The Growth and Impact of ‘Alternative Dispute Resolution’”
Conceptions of Philosophy, Process and Power”, supra note 10 at 828. See further Jackson
Williams, “The Costs of Arbitration” (April 2002), online Public Citizen
Resolution of Corporate Disputes: A Report on the Growing Use of ADR by U.S. Corporations”,
supra note 10 at 17, Harris Interactive, “Arbitration Simpler, Cheaper, and Faster Than
Litigation”, supra note 10 at 5, Shone, “Civil Justice Reform in Canada 1996 to 2006 and
Beyond”, supra note 10 at 167, Hann et al., “Evaluation of the Ontario Mandatory Mediation
Program (Rule 24.1) Executive Summary and Recommendations”, supra note 10. For a recent
review of literature relating to the cost of civil justice, see CFCJ, “What does it cost to access
justice in Canada? How much is ‘too much’? And how do we know?” (Literature Review) (31
August 2009) [unpublished, archived with author]. As I argue further below, more research on the
topic of the cost of justice is clearly needed.

12 See e.g., Susan Lott, Marie Helene Beaulieu and Jannick Desforges, “Mandatory Arbitration and
Consumer Contracts” (Public Interest Advocacy Centre (PIAC) and Option consommateurs,
November 2004), online PIAC
<http://www.piac.ca/consumers/mandatory_arbitration_and_consumer_contracts/>, Harris
Interactive, “Arbitration Simpler, Cheaper, and Faster Than Litigation”, supra note 10 at 5,
Stipanowich, “ADR and the ‘Vanishing Trial’ The Growth and Impact of ‘Alternative Dispute
Resolution’”, supra note 11, Hanycz, “Through the Looking Glass Mediator Conceptions of
Philosophy, Process and Power”, supra note 10 at 828

13 For a recent overview and critique of empirical studies and ADR, see Carrie Menkel-Meadow,
“Empirical Studies of ADR: The Baseline Problem of What ADR is and What It is Compared To”
(2009) in Peter Crane and Herbert Kritzer, eds., Oxford Handbook of Empirical Legal Studies
(Oxford: Oxford University Press, forthcoming), draft available online SSRN
Further reports indicate a general satisfaction with arbitration and other ADR processes and results. Additionally, several other benefits are also cited, including: the ability to tailor flexible outcomes (discussed above); increased voluntary compliance with results; freedom to choose laws and processes (all of which typically increases flexibility and predictability); and, of course, protection from public scrutiny through rules of confidentiality. Finally,

14 See e.g. Harris Interactive, “Arbitration: Simpler, Cheaper, and Faster Than Litigation”, supra note 10 at 5.


JUSTIFYING PRIVATIZATION

particularly from the systemic, supply side, the reduction of backlogs and costs, together with increased access for consumers of the system (discussed again further below) are also cited as benefits of ADR processes.17 For example, in a recent discussion, George Adams commented:

Fortunately, courts resolve only a small fraction of the disputes that are brought to their attention.... In North America, only 3% to 5% of all civil cases filed proceed to trial. The vast majority are withdrawn or resolved through negotiated settlements or as a result of other settlement procedures. If this activity is to be considered private, there is clearly a public interest in it taking place.18

In addition to these various generic advantages, there is also evidence of sector specific benefits. For example, again when looking at the area of consumer law (as discussed above19), arbitration and other forms of non-court-based dispute resolution processes have been and continue to be used in many consumer contracts.20 The reason, according to one Alberta legislator in the context of reforms to that province’s fair trading regime, is familiar: “Both business and consumers told us that the court system for resolving disputes is crowded,


18 George W. Adams, “The Privatization of Justice: Where are we going?” in Murphy and Molinari, eds., Doing Justice: Dispute Resolution in the Courts and Beyond, supra note 16 at 163.

19 See supra c. 5.

cumbersome, and expensive.\textsuperscript{21} By including dispute resolution in contracts, parties can in effect contract out of the public court system and into a fully private, predictable and often much more efficient system of ADR.

In chapter 5, I discussed the privatizing preferences and influences of various justice system stakeholders, including governments, judges and lawyers, clients and law schools. Clearly those stakeholders come at disputes and dispute resolution from different perspectives and for different reasons. However, there is a common thread that generally links the various justifications set out above with these various stakeholders, which is the "business case" justification of privatization. Put simply and very roughly: people typically want an efficient process that is (at least relatively) simple, cheap and fast. That sensibility was certainly the case in the context of the legislative debates, just mentioned, which animated Alberta's reforms to its fair trading regime.\textsuperscript{22} Other examples from legislative debates, along these lines, are discussed below, which provide additional evidence that it is largely a business case analysis that, at least in large measure (in addition to the "access to justice" case that I discuss further below) animates much of the government justifications for pursuing privatized initiatives in the civil justice and related sectors.\textsuperscript{23} Further, in addition to public sector

\textsuperscript{21} Alberta, Legislative Assembly, \textit{Official Report of Debates (Hansard)} (2 March 1998) at 634 (Hon. Mr. Ducharme).

\textsuperscript{22} Ibid.

preferences, there are clearly significant private interests at stake here as well, as I also discussed in chapter 5 (which are at least in part driving those government choices). For example, it has become very clear that clients and their lawyers, engaged in all sorts of different aspects of the civil justice system, are increasingly leaning toward private process initiatives. To help understand the justifications underlying some of these litigation preferences, in addition to other empirical studies discussed in this chapter, I conducted my own study of ADR practices and preferences of Canadian litigation lawyers.

**LAWYER SURVEY**

In chapter 5, I described the litigation lawyer survey that I conducted for purposes of this project, including its main goals and methodology. In chapter 5, I also discussed some of the basic ADR preferences of the lawyers who were surveyed (see e.g. Tables 5.1-5.3). However, one of the key additional goals of the survey, for purposes of this chapter, was to examine some of the underlying justifications for those generalized ADR preferences.

The views of the lawyers surveyed with respect to the justifications for why they recommend (or do not recommend) ADR are largely in-line with much of the earlier available anecdotal evidence and research. For example, in the context of considering whether or not to recommend arbitration to their clients, Table 6.1 sets out the percentages of litigation lawyers who found the justificatory factors

---

24 See *e.g.* *supra* notes 10-17 and accompanying text.

25 See *e.g.* *ibid.*
canvassed in the survey to be of moderate (3) to critical (5) importance (on a 1 – 5 scale).²⁶

**TABLE 6.1**

**MODERATE TO CRITICAL FACTORS FOR RECOMMENDING ARBITRATION**

<table>
<thead>
<tr>
<th>FACTOR</th>
<th>LAWYERS (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Expertise of the arbitrator</td>
<td>90.91</td>
</tr>
<tr>
<td>Privacy</td>
<td>88.89</td>
</tr>
<tr>
<td>Reduces time</td>
<td>83.97</td>
</tr>
<tr>
<td>Greater control over procedure (simplification)</td>
<td>82.58</td>
</tr>
<tr>
<td>Fairness of the result</td>
<td>71.05</td>
</tr>
<tr>
<td>Finality of the decision</td>
<td>65.14</td>
</tr>
<tr>
<td>Reduces cost</td>
<td>62.83</td>
</tr>
<tr>
<td>Allows for a more amiable resolution</td>
<td>53.89</td>
</tr>
<tr>
<td>Avoids discovery</td>
<td>47.37</td>
</tr>
<tr>
<td>Encourages settlement</td>
<td>46.75</td>
</tr>
<tr>
<td>Allows parties to choose applicable law</td>
<td>37.50</td>
</tr>
</tbody>
</table>

In the responses, by far the two most important factors were seen as arbitrator expertise (90.91) and privacy (88.89). Interestingly, although a significant percentage of lawyers certainly saw a reduction in time as of moderate to critical importance (83.97), other factors – including arbitrator expertise (90.91), privacy (88.89), control (82.58), fairness (71.05) and finality (65.14) – were of more importance than a reduction in cost (62.83). My sense of the primary reason for the relative “unimportance” of cost (it was obviously still important, just not as important as the other factors) is that of the lawyers who responded to the survey, many of them, based on their various stated practice areas, appear to act for larger, institutional clients or clients who, again as a

²⁶ The specific survey question (question 4) was: “Please rate the following factors on their importance to you when recommending whether to use arbitration to resolve a dispute.” For survey responses to the reverse question (question 6) – “when you refrain from recommending arbitration to resolve a dispute, how important are the following factors?” – see Appendix 2.
JUSTIFYING PRIVATIZATION

relative matter, are able to finance the various dispute resolution processes at issue.

In the context of considering whether or not to recommend mediation to their clients, Table 6.2 sets out the percentages of respondents who found the justificatory factors canvassed in the survey to be of moderate (3) to critical (5) importance (again on a 1 – 5 scale).27

<table>
<thead>
<tr>
<th>FACTOR</th>
<th>LAWYERS (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Encourages settlement</td>
<td>96.95</td>
</tr>
<tr>
<td>Allows the parties to resolve the dispute</td>
<td>95.12</td>
</tr>
<tr>
<td>Reduces cost</td>
<td>93.37</td>
</tr>
<tr>
<td>Allows for a more amiable resolution</td>
<td>90.91</td>
</tr>
<tr>
<td>Reduces time</td>
<td>90.42</td>
</tr>
<tr>
<td>Expertise of the mediator</td>
<td>81.82</td>
</tr>
<tr>
<td>Privacy</td>
<td>79.27</td>
</tr>
<tr>
<td>Greater control over procedure (simplification)</td>
<td>78.89</td>
</tr>
<tr>
<td>Fairness of the result</td>
<td>71.16</td>
</tr>
<tr>
<td>Avoids discovery</td>
<td>55.21</td>
</tr>
</tbody>
</table>

It is here, with mediation, where the more typical and oft-cited general ADR justifications really played out. The most important factors were: encourages settlement (96.95); allows parties to resolve the dispute (facilitate consensus-style

27 The specific survey question (question 10) was: “Please rate the following factors on their importance to you when recommending whether to use mediation to resolve a dispute.” For survey responses to the reverse question (question 12) – “when you refrain from recommending mediation to resolve a dispute, how important are the following factors?” – see Appendix 2.
rather than command-style dispute resolution\textsuperscript{28}) (95.12); reduces cost (93.37); allows for more amiable resolutions (90.91); and reduces time (90.42).

While the responses set out in Tables 6.1-6.2 give us a very good overall sense of the relative importance of various factors that motivate arbitration and mediation procedural advice and preferences among Canadian litigation lawyers, there is no doubt, based on the survey results, that specific dispute contexts are also important factors. Put simply: it matters in what business or other sector(s) a client operates; whether there is an underlying regulatory or other relevant external context; who the parties are; and what particular process is involved. For example, in the context of this discussion and according to the lawyers who responded to the survey, various factors that are often external to a dispute – including: legislation; client needs; contractual requirements; court mandates; suggestions by opposing parties; client policies; and other ad hoc factors – all have different degrees of influence in terms of how often the various factors prompt lawyers to recommend arbitration.\textsuperscript{29} Similar external factors influenced the lawyers’ thinking in terms of how often they prompt the lawyers to recommend mediation.\textsuperscript{30}


\textsuperscript{29} See question 3.

\textsuperscript{30} See question 9.
JUSTIFYING PRIVATIZATION

Equally important, again according to the survey results, is the nature of the particular conflict.\textsuperscript{31} For example, as set out in Table 6.3, the percentages of lawyers who would either “sometimes” or “always” recommend arbitration differed depending on the type of dispute in issue.\textsuperscript{32}

\begin{table}
\centering
\caption{Lawyers Recommending Arbitration “Sometimes or Always”}
\begin{tabular}{|l|c|}
\hline
Type of Dispute & Lawyers (\%) \\
\hline
Company working with client (e.g. supplier) & 89.26 \\
Competitor & 80.95 \\
Other & 72.98 \\
Employee & 66.66 \\
Consumer & 59.59 \\
\hline
\end{tabular}
\end{table}

Lawyers are much more likely to recommend arbitration for a dispute with a supplier (89.26) or a competitor (80.95) than they are for a dispute with an employee (66.66) or a consumer (59.59).

In the context of employee relations, this makes sense, for example, when one thinks of the kinds of ongoing relationships that are typically at stake with employers and employees. It is often easier to face an employee on Monday morning after a dispute has been resolved if the parties were somehow able to come to some kind of private resolution, rather than having a court impose a remedy on the situation only after a protracted public litigation battle. Again, having been involved – as a litigator – in both scenarios, I can say with first-hand

\textsuperscript{31} For a very brief note on conflict theory, together with some selected sources, see supra c. 1, n. 15.

\textsuperscript{32} See question 5.
experience that an ADR process in the employment law context can often make a significant difference in terms of salvaging some kind of ongoing relationship.

The results with respect to disputes with consumers are less intuitive. There is often a preference among consumer industry providers to avoid significant lawsuits, including class action law suits, by employing ADR provisions and no-class action provisions in pre-dispute contractual arrangements. The Dell case is an example of such a situation. In order to avoid major consumer tort claims, including class action proceedings, producers and service providers in the consumer sector have been actively using ADR clauses for some time. As I discuss elsewhere, however, recent amendments to various Canadian consumer protection statutes have impacted the ability of goods and service providers to control suits against them by consumers in this way.

Similarly, according to Table 6.4, the percentages of lawyers who would either “sometimes” or “always” recommend mediation differed depending on the type of dispute in issue.

---

33 See Dell Computer Corp. v. Union des consommateurs, [2007] 2 S.C.R. 801, discussed further supra in cc. 4-5.


35 See further c. 7.

36 See question 11.
Although all categories scored fairly highly, lawyers are more likely to recommend mediation for a dispute involving a supplier (89.31) than they are for a dispute involving a competitor (80.63) or a consumer (80.63). Again, ongoing relationships often play a significant factor here.

As is clear from Table 6.5, the types of parties at issue similarly have a significant impact on the percentage of lawyers who “sometimes” or “always” recommend (various kinds of\(^{37}\)) dispute resolution clauses.\(^{38}\)

<table>
<thead>
<tr>
<th>TYPES OF PARTIES</th>
<th>LAWYERS (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Business</td>
<td>70.70</td>
</tr>
<tr>
<td>Employee</td>
<td>57.05</td>
</tr>
<tr>
<td>Consumer</td>
<td>52.35</td>
</tr>
<tr>
<td>Other</td>
<td>47.92</td>
</tr>
</tbody>
</table>

Notwithstanding the important factor of the type of dispute at issue, the survey results for both arbitration and mediation confirm significant support for

\(^{37}\) See question 15.

\(^{38}\) See question 14.
the proposition that lawyers, on behalf of their clients, are actively recommending ADR processes in various disputing contexts (see Tables 6.3-6.4). Similarly, they are also actively recommending that clients include dispute resolution clauses in their contractual arrangements in order to ensure that those arrangements can be governed by, if disputed, the merits of private justice (see Table 6.5).

In addition to providing a very current window onto the ADR preferences of Canadian litigation lawyers, which – in addition to assisting with this study – I hope will be useful for future conflict and conflict resolution thinking, this survey strengthens our understanding of the underlying justifications that animate the business case for privatization. Certainly efficiency plays a factor, particularly when we look at responses that favour the cost and time savings of ADR processes. Additionally, other factors that militate in favour of a client’s “business” interests – privacy, flexibility, choice, etc. – are all present in the justifications that were articulated by the lawyers who responded to the survey.

Further, as will become clear with my arguments in chapter 8, the fact that ADR preferences and choices differ depending on the nature and context of the dispute as well as the parties involved (as evidenced by the survey results in Tables 6.3-6.5) opens further possibilities for potentially being more nuanced in the way we think about how we resolve those disputes. Finally, by way of a cautionary conclusion to the discussion of the survey here, it is important to recognize, as I also discuss further in chapter 7, that while many people accept the benefits of ADR – as evidenced here in the survey results as well as in the context
of other ADR research discussed in this project\textsuperscript{39} (often, although certainly not in
the case of my survey, without any empirical basis or understanding of the
underlying context) – not all commentators or practitioners see the benefits, nor
do all studies support the merits of ADR (at least not in all circumstances).\textsuperscript{40}

**EFFICIENCY**

A central underlying theme of many of the benefits of ADR – identified, for
example, in the research and literature discussed earlier in this chapter as well as
in many aspects of the lawyer survey – sounds in the principle of efficiency,
which has come essentially to define the modern discourse surrounding our civil
justice systems and their reform. It also is, as we saw earlier and as I discuss
again below, the siren call for modern trends toward privatization of all flavours,
including the privatization of the civil justice system.\textsuperscript{41} Recently, according to
Marcel Storme (who in turns cites Mirjan Damaška), efforts to make civil
procedure more “efficient” are “everywhere”.\textsuperscript{42} More fully, according to Héctor
Fix-Fierro:

> [E]fficiency … has penetrated the legal and judicial systems at all
levels and dimensions, from the level of society as a whole to the day-
to-day operation of the judicial process, from the institutional role

\textsuperscript{39}See e.g. *supra* nn.10-17 and accompanying text.

\textsuperscript{40}See e.g. Daryl-Lynn Carlson, “Arbitrations versus court” *Law Times* (20 April 2009), online:

\textsuperscript{41}See *supra* c. 3.

\textsuperscript{42}Marcel Storme, “Le Common Law / Civil Law Divide: An Introduction” in Janet Walker &
Oscar G. Chase, eds., *Common Law, Civil Law and the Future of Categories* (Canada: LexisNexis,
2010) 23 at 25.
performed by adjudication in society to the organisational context of judicial decisions.... In other words: far from being an alien value with respect to the legal and judicial process, efficiency has simply become an inseparable part of the structure of expectations we address to the legal system.43

This efficiency-based argument, in the context of civil dispute resolution processes, essentially provides that dispute resolution is really no different than any other good or service. To the extent that we need a good or a service, all things being equal, we are typically willing to pay for it, at least on a basis that fits with our economic and other capacities and preferences. To the extent that there are options available (a factor that typically increases choice and decreases price), then so much the better. And when access to, and bargaining power within a given market are of relative parity, possibilities for optimal – or at least relatively acceptable – outcomes or solutions typically obtain. As far as dispute resolution is concerned, again as the argument goes, why should there not be a private market, and further, why should such a market operate significantly differently from any other market?44 As I have summarized this basic efficiency argument elsewhere:

When a dispute involves the private rights of A v. B, and further, when two “consenting adults” (including corporations) have chosen to

43 Héctor Fix-Fierro, Courts, Justice and Efficiency: A Socio-Legal Study of Economic Rationality in Adjudication (Oxford and Portland, OR: Hart Publishing, 2003) at 235 (footnote omitted). Note, however, that Fix-Fierro further comments that “economic rationality is not, and should not necessarily be, the prevalent value or the overriding concern in the context of legal decision-making.” Ibid.

move their dispute off the busy docket of our public court system and into the private boardroom of an arbitrator or mediator, current views suggest that justice is being served. The argument is that the resolution of disputes – like other goods and services – should not be deprived of the benefits of freedom of movement and contract in an efficiency-seeking, innovative and expanding market economy.\footnote{See Farrow, “Privatizing our Public Civil Justice System”, \textit{supra} note 16 at 16. For a further discussion of ADR’s purported efficiencies, see Fix-Fierro, \textit{Courts, Justice and Efficiency, supra} note 43 at 123-125, 131-135. See also Colleen M. Hanyecz, “More Access to Less Justice: Efficiency, Proportionality and Costs in Canadian Civil Justice Reform” (2008) 27 C.J.Q. 98.}

In addition to the various policy-based, empirical and practical justifications developed so far, there is also academic support for the justification of privatization, which essentially lines up with the business case for privatizing civil justice. For example, strong support for this efficiency-seeking argument comes from Gillian Hadfield, who is a leading and forceful advocate for the privatization of law – particularly commercial law – in the overall spirit of “significantly decreasing the cost of law.”\footnote{Gillian K. Hadfield, “Privatizing Commercial Law” (2001) 42:1 Regulation 40 at 40, online: Cato Institute <http://www.cato.org/pubs/regulation/regv24n1/hadfield.pdf>. See also e.g. Gillian K. Hadfield and Eric Talley, “On Public versus Private Provision of Corporate Law” (2006) 22:2 J.L. Econ. & Org. 414; Gillian K. Hadfield, “Exploring Economic and Democratic Theories of Litigation: Differences between Individual and Organizational Litigants in the Disposition of Federal Civil Cases” (2005) 57 Stan. L. Rev. 1275. For other efficiency-based arguments, see e.g. Richard Posner and William Landes, “Adjudication as a Private Good” (1979) 8 J. Legal Stud. 235; Maurits Barendrecht and Berend R. de Vries, “Fitting the Forum to the Fuss with Sticky Defaults: Failure in the Market for Dispute Resolution Services?” (2005) 7 Cardozo J. Confli. Resol. 83. For further comments, see Richard A. Posner, \textit{The Federal Courts: Challenge and Reform} (Cambridge, MA: Harvard University Press, 1985) c. 7.} Hadfield – although recognizing that the justice system plays several important public roles in our modern democracies, including protecting “individual rights” – argues that when it comes to commercial law, the state should download, privatize, much of its dispute resolution functions. According to Hadfield:
The legal system ... performs important economic functions such as providing the structure and regulation necessary for the operation of efficient markets. The economic sphere of law regularly deals with relationships that involve only corporate entities. Private legal regimes could provide this law without raising legitimacy concerns.\textsuperscript{47}

Hadfield summarizes the basis for her argument as follows:

The rules we want in these interactions [involving corporate entities] are the rules that promote and facilitate efficient market relationships between corporations. In this setting, we are not interested in what is fair or just between two corporations; we are interested in what makes their economic relationship as productive and valuable as possible. That goal suggests the need to look for ways to increase the role of markets in the process of developing and administering the legal regimes that govern the relationships between corporate entities.\textsuperscript{48}

Put simply, Hadfield’s argument set out above rests essentially on four points: corporate relationships are different than relationships involving “individual rights”; we need not be interested in the fairness of corporate relationships; cost reduction can be achieved through efficiency-seeking private dispute resolution mechanisms; and we should ultimately be guided by principles of efficiency – not what is “fair or just” – when making fundamental procedural policy choices in the context of commercial dispute resolution.\textsuperscript{49}

To sustain this elegant, although ultimately problematic argument (as I discuss later\textsuperscript{50}), Hadfield is guided by a fundamental process of categorization or

\textsuperscript{47} Hadfield, “Privatizing Commercial Law”, \textit{supra} note 46 at 40.

\textsuperscript{48} \textit{Ibid.} [emphasis added]. Not only does Hadfield contemplate the privatization of the procedural aspects of corporate dispute resolution, she also advocates for the privatization of substantive corporate law development. See \textit{ibid.} at 41.

\textsuperscript{49} \textit{Ibid.} at 40.

\textsuperscript{50} See \textit{infra} cc. 7-8.
distinction-making. In order to make her case for the privatization of commercial law, Hadfield distinguishes between what she calls the “democratic function” of law and its “market function”. The “democratic function” of law “protects rights, structures the institutions of democratic governance, redistributes wealth, promotes social objectives such as equality or clean air, and resolves disputes among citizens.” The “market function” of law “provides the structure of markets – determining property rights, providing a means of commitment through contract to support cooperative activity – and regulation to correct market failures in the achievement of efficiency.” For Hadfield, the “democratic function” of law “is one that must be accomplished through public institutions, accountable to the polity in order to preserve democratic legitimacy.” The “market function” of law “is a service – an input into the organization of transactions in markets” and, according to Hadfield, “is not so clearly a function that cannot be privatized.” The ultimate arbiter, for Hadfield, about whether the “democratic” or “market” function of law obtains in a given situation is which aspect of the “public interest” a given situation engages. Put simply, the distinction between the functions of law “rests not in the substance of a law per se, but rather more fundamentally in


52 Ibid.

53 Ibid.

54 Ibid.

55 Ibid.
the public interest at stake in a given instance of law.” Law in its “market function” invokes “only a public interest in efficiency – creating wealth and maximizing the value of resources.” Law in its “democratic function” engages “any other value – redistribution, equality, autonomy, environmental preservation, public safety, human flourishing, participation, and so on.” To the extent that the functions of law, particularly in the context of dispute resolution, can be categorized and compartmentalized according to market or democratic aspects, then Hadfield’s approach offers an intriguing way of sorting through what situations require the investment of the state’s public system and what situations could be dealt with, more efficiently, through some form of private alternative. The problem, as I argue more fully in chapter 8, is that there are very few functions of law that engage only a “public interest in efficiency”. Almost all efficiency seeking situations, stereotypically (although not exclusively) involving corporate and commercial transactions, also engage issues of “redistribution”, “autonomy”, “participation”, and so on. I will come back to this point in chapter 8.

Similar calls for privatizing the state’s provision of public civil justice services come from Bryan Caplan and Edward Stringham. Citing examples and

---

56 Ibid.
57 Ibid. [emphasis omitted].
58 Ibid. [emphasis omitted].
JUSTIFYING PRIVATIZATION

studies that highlight high civil settlement rates and corporate preferences for arbitration, Caplan and Stringham ask: “Could private legal systems expand so that they continue to dismantle the near-monopoly of law that most governments possess?” In response to their own question, the authors argue, with a particular focus on the adjudication of disputes, that “privatization of this area could occur with little difficulty.” The authors further argue that “if the government stopped interfering with people’s voluntarily [chosen] ... [dispute resolution] contracts, a system of de facto privatization could come about. Even if the public courts continue to be subsidized with tax dollars..., deregulated arbitrators might be in a position to outcompete public courts.”

The tool by which the authors criticize the public court system and advocate for a private system is “economics”. Many of the economic benefits cited for private courts include: more “efficiently ration[ed] judicial services”; flexibility that is responsive to the “different needs” of consumers; and finally, what the authors call the “most impressive arguments for privatizing dispute resolution”, which they acknowledge involve “the standard arguments for the prima facie superiority of private over public supply”. Those arguments include the authors’ views that: “public bodies have no incentive to be efficient, and private ones do”; and “public bodies usually do not know what is efficient, while private bodies ... know better.”

\[^{60}\] Ibid. at 508.

\[^{61}\] Ibid.

\[^{62}\] Ibid. at 510.

\[^{63}\] Ibid. at 518-519.
All of these accounts are also in-line with Richard Susskind’s new and widely-read account of lawyers and the legal system. Susskind, who draws “heavily” on “information economists”, essentially sees the future of legal services as a series of systems, information packages and commodities. According to Susskind’s blunt and purposely provocative account, “the court system can be regarded, in large part, as a huge information system – an entity that receives, processes, stores, creates, monitors, and disseminates large quantities of documents and information.” It is his instrumental view of the judicial system that allows Susskind to muse about the possibility of “computers replacing judges” for non-“hard cases”: those that do not involve “complex issues of principle, policy, and morality”. Beyond debt collection cases, nuisance cases and the like, I wonder what those non-“hard cases” would actually look like. Many important policy issues lurk behind the façade of fights over contracts and property. More on this point later. Susskind’s account is driven, in the end, by

---


65 Ibid. at 37.

66 Ibid. at cc. 2 and 6 (see e.g. p. 270).

67 Ibid. at 201.

68 Ibid. at 217. But see ibid. at 274, where Susskind acknowledges that with respect to the work of barristers, which is “highly bespoke”, it is “hard to see how oral advocacy and the dispensing of expert advice can be standardized or computerized.”

69 I acknowledge that Susskind’s thesis is not simply about replacing legal work with computers, and that his musings about computers and judging must be put in the context of his overall arguments about “standardization, commoditization, and the transfer of many legal tasks from lawyers to non-lawyers.” See ibid. at 274.
JUSTIFYING PRIVATIZATION

notions of “market ... efficiencies.” Like Hadfield and others, he sees the provision of law and legal services primarily in terms of systems, commodities and opportunities for increased efficiencies. He also thinks of the court more as a “service” than a “place”.

In chapter 3, in the context of my discussion of the basic underpinnings of the current privatization movement that forms an underlying context for essentially all of the issues raised in this project, I made the following points on the issue of privatization and its connection with efficiency:

There are several primary objectives that typically drive the widespread trend of modern privatization, including a strengthened private sector, improved financial health of the public sector, freedom to reallocate public resources, and – “fundamental[ly]” ... – efficiency. According to Megginson and Netter, for example, “the goal of government is to promote efficiency”... “[t]o a large extent we ignore the arguments concerning the importance of equitable concerns.... The effect[] of privatization on productive efficiency ... is the focus of most of the empirical literature we review”.

Although other factors are relevant, efficiency is clearly the anchor of the privatization movement. In light of my earlier comments (which are more fully developed in chapter 8), the arguments made by Hadfield, as well as those made by Caplan, Stringham and Susskind, provide quintessential examples of the business case for privatization. Efficiency is the key criterion by which a dispute

---

70 See infra cc. 7-8.

71 See e.g. Susskind, The End of Lawyers?, supra note 64 at 270. See also ibid. at 237.

72 Ibid. at 218.

73 See supra c. 3, notes 34-42 and accompanying text (citations omitted).
resolution system is judged.\(^74\) Again put simply, according to Hadfield, efficiency trumps essentially all else, including what is “fair or just” as between two disputing corporate entities. On this reading, efficiency trumps justice – an argument to which I will return later on.\(^75\)

Additional support for this kind of very strong, efficiency-based argument, particularly for corporations, comes from the legislative context. For example, the arguments made by the Honourable Gord Mackintosh leading up to amendments to Manitoba’s arbitration legislation resonate strongly with the arguments advanced by Hadfield, Caplan and Stringham.\(^76\) According to Mackintosh, whose views, which I briefly discussed earlier,\(^77\) are again excerpted below, arbitration should be mandated in certain circumstances:

We on this side acknowledge the value of arbitration as a way to resolve disputes. Arbitration usually costs less to the disputing parties. At least, we recognize that it can cut down on some costly legal costs and pretrial procedures. It certainly costs less to the taxpaying public, because the expensive judicial system is not called on to resolve the disputes. Arbitration is often, although not always – but usually faster than litigation. It is also informal, accessible and flexible, which meet the needs of the parties to a greater extent than formal litigation. Of course, arbitration also allows privacy. It is confidential, as long as one of the parties does not pursue an appeal.

---

\(^74\) As I will discuss further in chapter 8, efficiency considerations are key underlying components (along with access to justice concerns) that animate the proportionality considerations that are increasingly taking hold in civil justice reform initiatives.

\(^75\) See infra c. 8.

\(^76\) See Manitoba, Legislative Assembly, Official Report of Debates (Hansard), 36th Leg., 3d sess., No. 59, Orders of the Day (11 June 1997) at 1520 (Hon. Gord Mackintosh).

\(^77\) See supra c. 4.
JUSTIFYING PRIVATIZATION

It is clear that arbitration does have a very important role in our society and, indeed, it is my firm belief that we should rely more on alternative dispute resolution. We should be looking for not only a greater reliance on arbitration but other ways of resolving disputes outside of the courts.

I think one of the greatest arguments to support my belief is that when there are limited resources to deal with conflicts between individuals and limited resources to deal with Criminal Code infractions, we have to think why are we putting so many resources into the resolution of disputes between, for example, two large corporations that may have extensive resources and, yet, are going head to head in a battle over many years.... We really, I think, have to think in larger terms about how we are using public resources to solve disputes between certain kinds of parties and, in that regard, I wonder if we should not be looking toward a more affirmative statement or a more effective way of getting parties to use arbitration as an alternative to civil litigation, including requiring arbitration clauses in certain commercial contracts.

Central to what Mackintosh is articulating is an understanding of ADR’s potential impact on reducing costs for both the private user and the public provider. He also points to other key elements of the business case justification: speed, informality, flexibility, accessibility and privacy (all of which were raised in my lawyer survey). Based on these merits, Mackintosh argues for increased use, as well as in some cases mandating the use of arbitration (and potentially other alternatives), all, in the end, in the name of the efficient use of limited public resources.

A further public policy-based example of an argument that preferences the business case for privatization comes from the 1988 discussions surrounding the proposals for a then-new arbitration statute in Alberta (which are representative of

---

the discussions that preceded the enactment of many Canadian arbitration statutes). According to the report of the Institute of Law Research and Reform (ILRR) (now the Alberta Law Reform Institute (ALRI)):

Occasionally, someone may want an arbitral tribunal which does not have to follow the law. The Model Law accommodates such wishes by providing that an arbitral tribunal “shall decide *ex aequo et bono*[^60] or as *amiable compositeur*[^81] only if the parties have expressly authorized it to do so,” which makes it clear that they can so authorize it. Section 28 is not one of the provisions listed in section 4(1) of the draft Act, so that section 4(2) would apply and the parties could agree that a dispute is to be decided on principles other than law.

Whether parties would ever be wise to dispense with law is doubtful. If an arbitrator’s sense of fairness proves capricious or wrong-headed, there will be little that can be done about it if he is not obliged to follow the law, and an arbitrator might well feel uncomfortable about undertaking to adjudicate by anything so vague as his own subjective feelings. However, there does not seem to be any public interest which will be injured if parties agree to dispense with law.[^82]

The ILRR made clear its skepticism about the merits of dispensing with law. But because a number of major preferences and influences that drove the enactment of most, if not all, of these provincial arbitration statutes sounded in arguments of efficiency, flexibility, predictability and overall market efficiency,[^83]

[^60]: For general discussions of these arbitral regimes, together with examples of preceding legislative debates, see *supra* c. 4.

[^80]: This phrase, deriving from civil law, has been translated as “according to what is just and good”. *Black’s Law Dictionary*, 6th ed., s.v. “*ex aequo et bono*”.

[^81]: This phrase has been defined by reference to the phrase “amicable compounders”, which in turn has been defined as “arbitrators authorized to abate something of the strictness of the law in favor of natural equity.” *Ibid.*, s.v. “*amiable compositeur*”.


[^83]: See e.g. the *Hansard* debates cited in c. 4.
it is clear from this statement that, according to the ILRR, flexibility and choice, in the end, should prevail, even if it allows parties to dispense with law. The reason the ILRR could say this, however, in addition to its clear preference for encouraging the efficiency aspects of arbitration legislation, was because it held the view that: “there does not seem to be any public interest which will be injured if parties agree to dispense with law.” If adjudication were exclusively about dispute resolution, then, particularly in the confines of some private commercial or other cases, this statement might be justifiable. However, as I discussed in chapter 2, adjudication is about much more than simply dispute resolution. I will come back to this point below, and again in chapter 7.

There is no doubt, generally, that saving time, money, relationships and reputations, while at the same time increasing flexibility, choice and market efficiencies, are all typically good things – for both consumers and providers. And if one-off dispute resolution statistics and results were the only relevant factors by which to measure a dispute resolution regime, particularly involving private corporate entities, the discussion in this project would essentially be over. Unfortunately, this narrow, often litigant-based perspective is what currently drives much of our dispute resolution reform thinking and choices. For example, when debating the addition of ADR into the B.C. Administrative Tribunals Act, B.C.'s then Attorney General argued that:

84 ILRR, Proposals for a New Alberta Arbitration Act, supra note 82.

85 S.B.C. 2004, c. 45, discussed further supra c. 4.
What citizens want more often than not is an outcome and a result rather than a process. They want their problems solved. They want the relationship improved, they want the benefit they believe they’re entitled to, and they want government to stop doing what it is that is harming them.86

As such, according to the same B.C. Attorney General,

Anything we can do to move forward dispute resolution so that it happens sooner is, in my view, a step in the right direction, and we are doing a lot as government to try to encourage alternative dispute resolution not just in the administrative justice system but across the justice system as a whole. In fact, part of rethinking justice involves rethinking the idea of alternative dispute resolution so that it is no longer alternative but, rather, so that mediation, settlement, conciliation and settlement conferences are all part of the basic tools of all dispute resolution....87

The problem, however, is that while individuals and corporate citizens do typically care about the specific outcomes of their cases rather (or at least typically more) than about the processes involved, when we think about the system as a whole (which I did, for example, in chapter 2), process is fundamental to a viable and democratic public justice system. Arguments that focus purely on efficiency or purely on individual, one-off interests and results lose this overall societal perspective. There is clearly more going on in dispute resolution regimes (including at the commercial level) than simply the resolution of one-off disputes. As we have seen, the fundamental and just regulation of society is also at stake.


87 Ibid.
JUSTIFYING PRIVATIZATION

For this reason, unlike Caplan, Stringham and Hadfield, I am strongly of the view that the state should maintain not only a strong interest in the resolution of disputes involving "the lives and relationships of its citizens", it should also do so in the context of resolving (at least some) disputes involving "corporate-to-corporate commercial dealings." While the state may not need to be involved in the resolution of every dispute, I am much slower to concede that the collective does not have a strong interest in the outcome of many dispute resolution processes. Because, unlike the ILRR’s statements set out above, I do think – particularly in a common law system – that some aspect of the public interest is engaged by essentially all disputes in society, including ones under arbitral regimes that are often (although clearly not always) limited to issues of a corporate or commercial nature. I have more to say on this point of efficiency preoccupation in light of my expansive vision of the purpose of dispute resolution, which I will get to in chapter 8. However, before I do, I now look at the second overriding justification for privatizing our dispute resolution systems: access to justice.

2. THE ACCESS TO JUSTICE CASE FOR PRIVATIZATION

Access to justice means many things to many people. In its narrow sense, the phrase often is collapsed with the notion of access to courts and/or access to lawyers. Arguments in favour, for example, of reducing legal fees, increasing small claims courts’ monetary jurisdictional limits, or reforming civil justice

88 “Privatizing Commercial Law”, supra note 46 at 45.
procedural rules often sound in these kinds of immediate, narrow, access to justice justifications. The notion of justice, here, is typically equated with the justice (dispute resolution) system. And there is clearly an access to justice basis for these discussions, however narrow. In its broader sense, access to justice has been discussed in much wider and more aspirational terms. These kinds of terms essentially frame the notion of justice as including much more of what are considered to be the basic tools of living and operating in a modern democratic society (including, for example, healthcare, food and housing, access to information and education, voting rights, and so on). My own view is that thinking about access to justice in broadly, rather than in narrowly-defined terms allows us to consider wider-ranging and possibly more creative solutions to the

everyday problems facing many Canadians today. As such, as I discuss further in chapter 8, I am clearly a fan of thinking about justice, and access to it, broadly.90

The purpose of this chapter, however, is to articulate the leading justifications for privatization. And the access to justice case that is typically made in support of the privatization trends discussed in this project largely equates access to justice with access to courts and legal services. Specifically, what I am looking at here is what is widely seen as a primary justification for why the various stakeholders identified in the previous chapter – governments, judges and the legal community, the public, the legal academy, and others – are embracing privatization trends in our systems of civil justice.

Accessing the civil justice system, as well as any kind of tools of civil dispute resolution, particularly on a more affordable basis, has been one of the key reasons for the development and expansion of the modern ADR movement. Early American proponents of ADR championed it as an accessible alternative to the costly, cumbersome court process. It was; and it still is. The “access to justice” basis for ADR, as it can be called here, is an extremely powerful justification for supporting privatized dispute resolution initiatives. It has also become a strong driving force behind the modern civil justice ethos of reform, most notably at the government, bar association and judicial levels. Most, if not all reforms to our modern systems of civil justice (more fully discussed earlier in chapter 3) have been largely based, and justified to the public, on the basis that they will improve

90 For some earlier comments, see e.g. Farrow, “Sustainable Professionalism”, supra note 89 at 96; Farrow, “Dispute Resolution, Access to Civil Justice and Legal Education”, supra note 89 at 798.
access to justice. For example, the “CBA Task Force Report” contemplated increased “speed”, “affordability” and “public understanding” as central factors to increasing access to civil justice.91 In line with these early formulations, some of the public materials from the Ontario Government supporting the recent privatization reforms in Ontario sound largely in access to justice language:

Ontario’s new civil justice reforms will make it less expensive to access justice and easier to use the courts to quickly resolve disputes.

The province is increasing the monetary limit of the Small Claims Court from $10,000 to $25,000 effective January 1, 2010. This will provide a faster and more affordable option to Ontarians and businesses who are unable to resolve their own disputes.

Additional civil justice reforms arising from 25 significant changes to the rules of Ontario’s civil courts will simplify, speed up, and lower the costs of resolving disputes, including:

- Making it easier and more affordable to resolve civil cases by raising the monetary limit for Simplified Procedure from $50,000 to $100,000, effective January 1, 2010.

- Reducing pre-trial costs and delays by requiring advance timelines for sharing information between parties to a dispute and limiting pre-trial Examinations for Discovery to one day, unless the parties or the court decide that more time is needed.

- Lowering litigation costs and reducing the need for lengthy trials by making it easier to resolve cases earlier.

---

JUSTIFYING PRIVATIZATION

The civil courts will now also be subject to the general principle of proportionality. This means the time and expense devoted to any case must reflect what is at stake in the proceedings.92

When discussing these various reforms, Ontario’s Attorney General Chris Bentley stated that: “[c]ivil justice needs to be accessible and affordable if it is to work for all Ontarians” and that “[e]ach of these changes – and particularly the Small Claims or ‘people’s court’ reform – will help everyday Ontarians to fairly resolve disputes that they can’t resolve on their own.”93 Similarly, former Associate Chief Justice Coulter Osborne stated that by “acting on my recommendations, the Attorney General is reducing cost and delay for individuals and businesses who use our civil courts,” and further, that the “reforms reflect the need for proportionality in our civil justice, which means that straightforward, lower value cases should not take as long or cost as much as large, complex cases.”94

Similarly, most of the justifications for pursuing alternatives that animate judicial calls for reform in this area rely on access to justice arguments. For example, as discussed earlier in chapter 2, the current Chief Justice of Canada, when discussing reforms and civil justice options, recently acknowledged that “many Canadian men and women find themselves unable, mainly for financial


93 Ibid.

94 Ibid.
reasons, to access the Canadian justice system." Former Chief Justice of Canada Brian Dickson commented in 1989 that “[i]t is an unfortunate fact that legal proceedings in the civil ... courts ... have become increasingly lengthy and protracted.” As such, again according to former Chief Justice Dickson, “if ADR is handled carefully, then it holds the potential for substantial improvements to the manner in which justice is delivered in Canada.” Similarly, according to former Justice George Adams and Naomi Bussin:

The problems afflicting the traditional court system stem from its total dependence on one dispute resolution mechanism. A more comprehensive dispute resolution response is required. Today many Canadians cannot afford a trial which means they cannot afford to have a dispute! ADR provides a necessary supplement to the traditional litigation process and builds on both previous court initiatives and the strengths of the legal profession. Most important, for the 21st century, ADR can restore the role of our courts as community centres for conflict resolution and thereby foster values fundamental to the well-being of contemporary Canadian society.

We can see from these statements, which are representative of the kinds of judicial statements made in support of the wide-ranging civil justice reforms that are now playing out across the country, that a – if not the – key argument justifying these forms of privatization and other initiatives is that they promote

---


access to justice. Many similar justifications animate preferences from law societies, charged with a “duty” to “facilitate access to justice” for the citizens of the various provinces;\textsuperscript{99} as well as from law schools.\textsuperscript{100} This argument is also consistent with arguments that I and others have also made elsewhere:

There are a number of reasons cited for this ADR “explosion.” Speed, efficiency, cost, privacy, flexibility, choice of decision-maker, increased comfort with the processes, etc. are all familiar benefits. However, the primary basis for the development of ADR ... stems from the view that providing alternatives – through both court and non-court-based ADR initiatives – will provide civil justice system consumers with various cost-effective options that, ultimately, will increase overall access to the civil justice system.\textsuperscript{101}

As can be seen, increasing “access to justice” is therefore a key justification behind many, if not most, of the wide-spread privatization initiatives that are discussed in this project. As I discuss further in chapter 8, it is also, in my view, likely the most legitimate justification for ongoing and widespread civil justice reform. Put simply, it is clearly an important and compelling argument. It also, as can be seen, draws support largely from the foundations and arguments that

\textsuperscript{99} See e.g. Law Society Act, R.S.O. 1990, c. L.8, s. 4.2, which provides that:

In carrying out its functions, duties and powers under this Act, the Society shall have regard to the following principles:

1. The Society has a duty to maintain and advance the cause of justice and the rule of law.

2. The Society has a duty to act so as to facilitate access to justice for the people of Ontario.

3. The Society has a duty to protect the public interest....

\textsuperscript{100} See my earlier discussion of these preferences, \textit{supra} c. 5.

\textsuperscript{101} Farrow, “Dispute Resolution, Access to Civil Justice and Legal Education”, \textit{supra} note 89 at 746 (citation omitted).
ultimately drive what I have called, earlier in this chapter, the business case for privatization. And these foundations and arguments, of course, draw support in turn from the general privatization literature and discussions that I outlined earlier.\textsuperscript{102} These new privatized processes typically cost the state (and in turn tax payers) less in terms of time, space, human and ultimately financial resources. They cost users of the system less on the same bases. Recent Canadian and international socio-legal studies also indicate that facilitating access to the civil justice system, and thereby allowing more of the traditionally unmet legal needs and disputes that exist in society to be addressed and resolved, will likely create further savings for the public collectively, and for private citizens individually, in terms of lost opportunities and other social and economic resources. Further, to the extent that disputes, resolved or unresolved, typically create huge amounts of stress and other physical and emotional impacts on users of the civil justice system, having a system that is more accessible for resolving disputes will also assist in reducing those other individual health-related costs, which in turn, ultimately, will save money in terms of public health care and other budgets.\textsuperscript{103}

\textsuperscript{102} See \textit{e.g. supra} c. 3.

Finally, there is clearly an argument to be made for recognizing the benefits of increases to social and communal harmony that likely flow from accessible and affordable justice systems: systems of civil justice that not only promote the resolution of as many disputes as possible, but hopefully, through transparency, contextual sensitivity, and (potentially) increased use, the avoidance of disputes through more proactive and effective dialogue and societal communication. This is certainly a significant part of Susskind’s vision for the future of legal services, which recognizes that “what clients actually want is … to avoid legal problems, difficulties, and disputes.” Or put bluntly, “Clients prefer to have a fence at the top of a cliff rather than an ambulance at the bottom.” Access to justice, on this account, is “as much about dispute avoidance as it is about dispute resolution.”

Together, the two central justifications for privatization, the business case and the access to justice case, are found – to varying to degrees – at the core of the various preferences and influences discussed in chapter 5. From a systemic perspective, we saw them, for example, underpinning the B.C. Government’s widespread efforts to promote ADR including, for example, the creation of its Dispute Resolution Office, which in turn “develops and promotes non-adversarial dispute resolution options within the justice system and government” that are

---

104 See e.g. Pavlich, *Justice Fragmented: Mediating community disputes under postmodern conditions*, supra note 6 at 41 [citation omitted].

105 Susskind, *The End of Lawyers?*, supra note 64 at 224 [emphasis omitted].


107 *Ibid.* at 231 [emphasis omitted].
“less expensive than processes used in the formal court system.”108 Underlying these efforts is the government’s desire to help “improve existing processes to make them more efficient and effective.”109 Systemic efficiency and access to justice considerations also clearly underlie judicial support for ADR. They were key factors, for example, animating the comments made by former Ontario Chief Justice Roy McMurtry when he commented that “our civil justice system is in a crisis” and that “[s]ignificant initiatives are absolutely essential if our court is to be able to provide timely and affordable justice to the citizens of this province.”110 Further, when recognizing the “laudatory” and “long … recognized” objective of “encouraging pre-trial settlement of civil cases”, Justice Cronk of the Court of Appeal for Ontario included in the merits of pre-trial settlement the reduction of legal costs and the “efficient use of judicial and court resources.”111

In terms of individual lawyer and client preferences, the survey of litigation lawyers that I conducted for the purpose of this project, together with other studies and commentaries, support the proposition that business case and access arguments are central justifications for why ADR processes are being so actively promoted by lawyers on behalf of their clients. And in terms of the legal


JUSTIFYING PRIVATIZATION

academy, there is no doubt that both systemic as well as individual client interests are significant animating forces behind the modern shift by law schools toward an openness to ADR and related course offerings. Systemic inefficiencies and access to justice challenges are demanding new and creative solutions. Clients are demanding that new lawyers be able to provide legal services more flexibly, efficiently and cost-effectively (the business case). New lawyers must also, at the same time, play a part in making the provision of those legal services more accessible to more people (the access to justice case).¹¹² There are obvious merits to all of these factors and arguments, which I fully acknowledge both here and in my final analysis of privatization in chapter 8. Before getting there, however, I now turn to what I see as the five primary concerns about the privatization of civil justice.

¹¹² For further recent discussions of the role of law schools in these discussions, see e.g. Macfarlane, The New Lawyer: How Settlement is Transforming the Practice of Law, supra note 3 at 224-232; Farrow, "Sustainable Professionalism", supra note 89 at 100-102. See also generally Farrow, "Dispute Resolution, Access to Civil Justice and Legal Education", supra note 89.
CHAPTER 7
FIVE CONCERNS ABOUT PRIVATIZATION

1. OVERSTATING ADR’S BENEFITS

Having now set the well-documented and compelling case for privatization at its highest, I now turn, in this chapter, to look at five specific areas of concern with respect to privatization that are, in my view, equally compelling but much less well-documented. My first concern with privatization – which is, in the end, my least concern – is that, as a threshold matter, even the many stated efficiency-related benefits of ADR (which I extensively discussed earlier in this project\(^1\)) certainly have their doubters.\(^2\)

ARBITRATION

Some critics are of the view that, notwithstanding the legions of lawyers and clients lining up behind the arbitral process, arbitration is not all that it’s cracked up to be, and certainly not in all cases, particularly major commercial cases. Mary Swanton, for example, has stated that “the speed and efficiency of arbitration has been oversold.”\(^3\) Several reports support her view. For example, according to a

---

\(^1\) See e.g. *supra* cc. 5-6.

\(^2\) For earlier reference to some of these concerns, see *e.g. supra* c. 6.

2007 *Economist* report, arbitration “often proves no cheaper, fairer or even quicker.” According to another report:

A[...] commonly held fallacy is that arbitration is always faster and cheaper than the courts.... Arbitration is faster to schedule in places where the courts are slow because parties don’t have to wait around for an available judge. But parties pay arbitrators an hourly rate, and businesses with a tactical reason to delay arbitration still attempt to derail the process the same way they do in the courts.5

Similarly, again according to Mary Swanton:

Grumblings from in-house counsel about the cost and speed of domestic commercial arbitration are growing louder. Anecdotal evidence suggests that efficiency is highly variable, depending on arbitrators and the parties involved, and statistical proof of time and cost savings compared to litigation is scant.6

These reports are consistent with the views of numerous arbitration practitioners. For example, Larry Schaner, a partner at the U.S. firm of Jenner & Block LLP, stated that in “some cases arbitration will be faster and cheaper, but in major commercial disputes that will not necessarily be the case.”7 Kathy Bryan, former head of litigation at Motorola who subsequently moved to lead the International Institute for Conflict Prevention and Resolution, acknowledges that there is:

---


7 Larry Schaner, quoted in *ibid.* at 51.
CHAPTER 7

tremendous dissatisfaction with domestic arbitration.... It’s too expensive, too process oriented, not responsive enough and the quality of arbitrators is all over the map. General counsel after general counsel gets burned, and litigation lawyer after litigation lawyer gets burned. They are turning away from arbitration in droves.  

Gerald Ranking, chair of the Canadian firm Fasken Martineau DuMoulin LLP’s litigation department and former head of the firm’s ADR group acknowledges that, depending on the nature of the case, arbitration can be a costly process. Ranking, who certainly recognizes the potential effectiveness of arbitration (particularly if “adverse parties genuinely want to resolve their disputes”), concedes that “arbitration can be almost like another form of court.”

Eric Liebeler, chief litigation counsel at Honeywell International Inc., argues that the lack of speed in some commercial arbitration proceedings is the fault of arbitrators. According to Liebeler, because (at least some) arbitrators are paid by the hour and, as a result, fail to impose time limits on proceedings, there is “an incentive for them to spread it out.” Similarly, although clearly supportive of ADR, Claude Thomson, an arbitrator and ADR practitioner, recently stated that:

Over the last two or three months, I’ve had a number of meetings with lawyers who are prominent in both arbitration and litigation in order to explore with them why there aren’t more commercial cases that are being resolved in arbitration rather than litigation and what I’ve been learning is that too often, arbitration becomes an expensive form of litigation conducted before an arbitrator because the arbitrator tends to

---

8 Kathy Bryan, quoted in ibid. at 51.


allow parties to manage the case without any particular kind of supervision.  

In addition to arbitrators, counsel also can be the cause of costs and delays in the process. According to Rick Jeydel, general counsel of Kanematsu USA Inc., the “inside counsel who are complaining about arbitration are people whose outside counsel have imported into the arbitration process all the bells and whistles that accompany a federal or state court litigation.” Claude Thomson has also indicated that “counsel themselves are somewhat to blame if they complain proceedings take too long.”

OTHER ADR PROCESSES

Similarly, with respect to court-annexed and other ADR processes, some studies argue that purported reductions in cost and increases in speed and efficiency are not always present in those court-annexed ADR and related processes, and in any event, do not always militate in favour of increased efficiency of courts to which those ADR processes are annexed. Some


anecdotal experiences support the findings of these cautionary reports. For example, according to Martin Teplitsky (a mediator and litigator at the Toronto firm of Teplitsky Colson LLP), because most cases settle anyway, mediation does not significantly increase settlement rates, and further, in some cases it delays settlement.\footnote{Teplitsky, reported in Mucalov, “Mediation: like it or not”, supra note 15 at 27.} According to Teplitsky, who argues that “only 15% of cases settle more quickly as a result of mandatory mediation”,\footnote{Teplitsky, reported in ibid. at 28. See further Martin Teplitsky, “Universal mandatory mediation: A critical analysis of the evaluations of the Ontario mandatory mediation program” (December 2001) Advocates’ Soc. J. 10 at 10; Martin Teplitsky, “Excessive cost and delay: Is there a solution?” (December 2000) Advocates’ Soc. J. 5 at 6-10.} lawyers “stop settling cases once a third party is available.”\footnote{Ibid., at 28. See also Teplitsky, “Universal mandatory mediation: A critical analysis of the evaluations of the Ontario mandatory mediation program”, supra note 16 at 10-11.} Further, also according to Teplitsky, reported cost savings for mandatory mediation are not always present. For cases that are already going to settle, “mandatory mediation just costs money…. It’s just an extra hoop you have to jump through that adds to the total cost of the litigation process.”\footnote{Ibid., at 28. See further Martin Teplitsky, reported in Janice Mucalov, “Mediation: like it or not” National (January/February 2003) 26 at 27.}

So while the primary and secondary research presented earlier in this project primarily and very strongly endorses the benefits of arbitration, mediation and other court-annexed and related privatizing processes, support for these processes

\footnote{Martin Teplitsky, reported in Janice Mucalov, “Mediation: like it or not” National (January/February 2003) 26 at 27.}


\footnote{Ibid., at 28. See also Teplitsky, “Universal mandatory mediation: A critical analysis of the evaluations of the Ontario mandatory mediation program”, supra note 16 at 10-11.}
is not universal. Discussing the merits of ADR requires a more nuanced approach
than is sometimes present in reports of the most ardent ADR supporters. Failing
to fairly and critically assess the strengths and weaknesses of ADR risks
undermining the accuracy and legitimacy of reform-oriented policy debates and
thinking that are required for meaningful current and future reform efforts. But
even if we assume all of ADR’s efficiency benefits to obtain – and it is the case
that they often (although certainly not always) do\textsuperscript{19} – there are more fundamental
concerns with the privatization movement, as set out below, that need to be
seriously considered and discussed.

2. IMPOVERISHED DEVELOPMENT OF THE COMMON LAW

A second concern I have about the privatization of the civil justice system is
its potential long-term negative impact on the development of the common law.
Put simply: the more we privatize our justice system, the less law we produce.
Various critics of ADR and privatization have over the years pointed to the
potential slow decline in the number of precedents created and the resulting
erosion of the overall corpus of the common law as a result of ADR’s popularity.
An early but still authoritative example of this critique comes from Owen Fiss,
who raised the concern that widespread settlement strategies would negatively
impact the ability of courts, particularly appellate courts in public interest

\textsuperscript{19} See \textit{e.g.} McPhee, “Arbitration becoming the ‘new’ civil litigation”, \textit{supra} note 5 at 55
(paraphrasing Allan Stitt).
CHAPTER 7

litigation, to develop the common law.²⁰ Tracy Walters McCormack has more recently raised similar concerns,²¹ as has Peter Murray, who commented that the “high rate of settlement … coupled with the wholesale pre-litigation diversion of disputes into private arbitration, means that public judgments are becoming a rarity.”²² Similarly, former B.C. Attorney General Wally Oppal, who is a key proponent of the ongoing B.C. civil court reforms, recently commented on the increase in mediation and arbitration that has led to a “gigantic reduction in the number of civil trials.”²³ According to Oppal, that reduction “is a very bad thing…. We need to have more trials so we advance law to meet the needs of a changing society.”²⁴

Not everyone views ADR’s eroding effect on the common law as a critical problem. For example, according to the B.C. Justice Review Task Force, we need to keep in mind that, in the context of only a small handful of cases going to trial, “the setting of legal precedents occurs naturally as necessary to fill existing

---


²¹ Tracy Walters McCormack, “Privatizing the Justice System” (2006) 25 Rev. Litig. 735 at pt vi


²³ Hon. Wally Oppal, quoted in Christopher Guly, “Storm erupts over B.C ’s proposed civil reforms” 28.7 The Lawyers Weekly (13 June 2008) 1 at 18

²⁴ Ibid.
FIVE CONCERNS ABOUT PRIVATIZATION

gaps.” The Task Force is right, at least on the status quo. However, to the extent that the small handful of cases going to trial gets further and further diminished, then even in that small constellation, the resulting case law will vanish.

If the common law is being eroded by processes of privatization, which it is, that erosion is clearly a concern. As I discussed at length earlier, judge-made law is a central tool of democratic governance. While there certainly is a robust amount of jurisprudence that continues to be produced by our trial and appellate courts every week, the phenomenon of the “vanishing trial” will certainly, in the long run, have an impact on the production of law. For example, if the “fabulous” settlement rates from judge-assisted settlement processes described by Chief Justice François Rolland of the Superior Court of Québec are any indication, trials and trial judgments in Canada do appear to be at least on the decline, if not vanishing. Further, to the extent that certain sectors of litigation lend themselves particularly well to ADR, the death of the common law will not be experienced equally by all sectors. Commercial law, for example, is an area of focused concern, particularly given calls for the privatization of wide swaths of


26 See supra c. 2.

27 Discussed supra at c. 3.

28 Ibid.
commercial law by various academics and policy makers discussed earlier in this project.\textsuperscript{29} Related areas of consumer law, as also discussed earlier,\textsuperscript{30} are other areas of particular focus for privatization.

And let’s be clear: while the lack of the production of precedents is a by-product of settlements, it is not always an unintended by-product. In some cases, it appears to be the primary goal. Take for example recent cases brought against the Ontario Lottery and Gaming Corporation (OLGC), which is a “provincial agency operating and managing province-wide lotteries, casinos and slots facilities at horse racing tracks.”\textsuperscript{31} Those lawsuits, which amounted apparently to approximately fifteen separate cases, alleged losses resulting from the fact that various Ontario casinos allowed gambling addicts to continue using their facilities notwithstanding that the plaintiffs had signed self-exclusion forms.\textsuperscript{32} Far from an isolated problem, there are apparently almost 350,000 problem gamblers in Ontario.\textsuperscript{33} Prior to the hearing of those cases, the Ontario government engaged in an active pattern of settlement, which was widely seen as an effort to avoid the setting of bad precedents that would further magnify OLGC’s potential liability.

\textsuperscript{29} See \textit{e.g. supra} c. 6.

\textsuperscript{30} See \textit{e.g. supra} c. 5.

\textsuperscript{31} OLGC, “Who We Are”, online: OLGC <http://www.olg.ca/about/who_we_are/index.jsp?ref=home_menu>.

\textsuperscript{32} See \textit{e.g. Treyes v. Ontario Lottery and Gaming Corp.}, [2007] O.J. No. 2772 (Ont. Sup. Ct. Just.).

\textsuperscript{33} See William V. Sasso and Jasminka Kalajdzic, “Do Ontario and its Gaming Venues owe a Duty of Care to Problem Gamblers?” (2006) 10 Gaming L. Rev. 552, which was referred to in \textit{Treyes v. Ontario Lottery and Gaming Corp.}, \textit{supra} note 32 at para. 12.
FIVE CONCERNS ABOUT PRIVATIZATION

According to one report in connection with the settlement of the *Treyes* case, OLGC’s lawyer reportedly emphasized that “there is no judicial precedent to our knowledge right now anywhere in North America”. And while the same lawyer commented that these kinds of settlements do not in themselves indicate a pattern of precedent avoidance, he did acknowledge that a court ruling upholding a duty of care “obviously would have an impact on [OLGC’s] ... operations”. A multi-billion dollar class action,

---

34 See *supra* note 32.


36 Chung, “Casinos not taking chances in court”, *supra* note 35.

potentially involving over 10,000 class members, was subsequently filed.\textsuperscript{38} However, certification was denied.\textsuperscript{39}

The OLGC settlements discussed above are confidential. In terms of judicial commentary, probably the most we know about these cases comes from a fortuitous ruling on a related contingency fee motion.\textsuperscript{40} In that ruling, Justice MacDonald discussed one of the controversial cases, some of OLGC’s policies, the fact of the lack of a precedent, as well as the confidential nature of the settlement.\textsuperscript{41} And while there was no ruling on the merits in that case, this costs ruling still provides us with much more than would typically be available in the context of a confidential settlement of a controversial case, which is why it provides a useful example for this study. In sum, the OLGC gambling disputes provide a very instructive window onto the phenomenon of withering case law and purposeful precedent avoidance, all of which is provided for and, in fact actively encouraged, by the privatization of civil justice.

The OLGC gambling settlements are not isolated examples. Other recent high profile settlements reached involving cases against the Ontario Government

\textsuperscript{38} For a copy of the amended statement of claim, see online: Problem Gamblers Lawyer <http://www.problemgamblerslawyer.com/>.


\textsuperscript{40} Treyes v. Ontario Lottery and Gaming Corp., supra note 32.

\textsuperscript{41} Ibid.
and others\textsuperscript{42} follow similar patterns of avoiding negative publicity regarding alleged government, police and other public official misconduct through the use of private court settlements. Those cases include, for example, a settlement reached in the dispute revolving around the high profile termination of Kelly McDougald, former Chief Executive Officer of OLG,\textsuperscript{43} as well as a settlement reached with David Brown and Dana Chatwell, whose home was located in the midst of the February 2006 occupation of the Douglas Creek Estates development in Caledonia, Ontario by members of the Six Nations and/or Haudenosaunee Six Nations Confederacy Council.\textsuperscript{44} As one report commented about the McDougald settlement and its timing, which was announced by the Ontario Government on 24 December 2009,

It’s conceivable that Ms. McDougald’s wrongful-dismissal suit just happened to be settled on Christmas Eve, as officials claim. But if so,

\textsuperscript{42} For a recent report on examples of these cases, see Editorial, “Queen’s Park cash deflects blame: critics” National Post (6 January 2010), online: <http://www.nationalpost.com/related/links/story.html?id=2409526> (date accessed: 3 February 2010).

\textsuperscript{43} For recent reports, see e.g. Adam Radwanski, “A cynical lesson in how to make controversy go away” The Globe and Mail (5 January 2010), online: <http://www.theglobeandmail.com/news/politics/a-cynical-lesson-in-how-to-make-controversy-go-away/article1419012/> (date accessed: 3 February 2010); Editorial, “Queen’s Park cash deflects blame: critics”, supra note 42.

it was one hell of a coincidence.... There was no great urgency [in settling the case and announcing the settlement].... But there was considerable upside for the government in making the announcement while most Ontarians were busy wrapping presents – right before the one day of the year that no major newspapers publish...  

Similarly, according to another report:

Critics of the government of Premier Dalton McGuinty say the timing of the announcements displayed a new level of contempt for the public.... The settlement with Ms. McDougald was likely to prevent potentially embarrassing details from coming out about the government’s role in the ongoing controversies at the lottery corporation....

The recent Brown and Chatwell settlement was in connection with their law suit against the Ontario Government, members of the Ontario Provincial Police (“OPP”) and others, which involved allegations that the OPP “fail[ed]” to enforce court orders and the laws of Canada, the Province of Ontario and the bylaws of

---

45 Radwanski, “A cynical lesson in how to make controversy go away”, supra note 43. The basic issue at stake in the McDougald case has been reported as follows:

The problem in question was that, hot on the heels of the eHealth scandal, another provincial agency was about to come under fire for its expenses. Never mind that some of the expenses were probably defensible in this instance, since OLG is expected to operate largely like a private company. The government had no interest in making that case – which admittedly would have been a tricky one to make – so instead it pre-emptively fired Ms. McDougald before the story had even properly broken.

It also humiliated her, announcing that she had been fired “with cause” without bothering to specify what that cause was. (Ms. McDougald has claimed she was terminated because she refused to summarily fire other OLG executives, though that has not been proven.) All the Liberals did was point to the expenditures of various OLG employees, then subject the former CEO – along with the corporation’s entire board of directors, which resigned the same day – to all manner of conjecture.

See ibid.

46 Editorial, “Queen’s Park cash deflects blame: critics”, supra note 42.
the County of Haldimand in the context of the Caledonia occupation. One recent report – which also highlights the retrospective and prospective functions of courts as well as the reality that individual disputants are typically only (or at least most) concerned about the immediate, dispute resolution function of courts – comments, as follows, on the settlement of the Brown and Chatwell dispute and the negative impact that a private settlement has on the public interest behavior modification and societal regulation aspects of the court process:

From Dave Brown’s and Dana Chatwell’s perspective, settling their lawsuit against the Ontario Provincial Police and provincial government, as they did Wednesday, makes perfect sense. The Caledonia, Ont., couple only ever wanted the means to move out of the Douglas Creek Estates subdivision, which the government essentially ceded to native protesters in 2006. They’ve already bought a new house, and Mr. Brown says he hopes never again to see the old one. (The actual amount of the settlement won’t be disclosed.)

For society at large, however, this is a most unsatisfying outcome. The Liberal government has never been able to argue coherently, in or out of court, against Mr. Brown’s and Ms. Chatwell’s basic version of events: that their family and home were abandoned to … protesters whose … conduct the police refused to … well, to police. This shocking abdication of the government’s most basic responsibilities deserves a stern rebuke from the highest court available: The government cannot decline to enforce the law and protect its citizens simply because it might anger a certain segment of society or create an uncomfortable political situation.

We weren’t going to get that satisfaction from the civil suit, of course, but a humiliating finding against the government and in Mr. Brown’s and Ms. Chatwell’s favour would have been gratifying. Now we won’t get it. And we won’t hear allegedly damning testimony from OPP officers that they had indeed been given orders to stand back and let events unfold as they may. That testimony, which was to be heard

---

47 See e.g. the Brown and Chatwell Amended Statement of Claim (Court file no. 172/2006, 18 July 2007) [on file with author].
next week, is the best explanation available as to why the government suddenly decided to settle.\textsuperscript{48}

Similar sentiments were raised in a letter to the editorial board of the \textit{Toronto Star}:

While I am pleased for David Brown and his family, it is unfortunate that we may never find out who directed the OPP to stand down in Caledonia and abandon the rule of law in the face of … criminal acts.

The timing of the settlement was curious, coming just before police officers were to testify. Did the Premier or his minister responsible for the OPP interfere in an operational policing matter contrary to the Police Services Act?

We may never know. Money has been thrown at the problem and the truth has been stifled.\textsuperscript{49}

Notwithstanding the immediate concerns of these and other private civil settlements, which involve significant public interest issues, it is the continued production of jurisprudence by our courts that makes this discussion so difficult, and the potential problem so deceptive. Put simply, it is not easy to see the eroding effects of privatization on a weekly (or even yearly) basis. One of the tough things about this discussion is that it is a bit like concerns over climate change. It takes a long time for glaciers to melt or sea levels to rise. It also often takes the diligence and patience of several generations to track, understand and address some of these slow-moving, long-term issues. But when the impacts are seen and felt, they are clearly significant. Having just returned from Tanzania

\textsuperscript{48} Editorial, “It’s simple, really. Enforce the law”, \textit{supra} note 44.

where one of the most famous glaciers in the world – the Furtwängler Glacier on Mount Kilimanjaro – is dramatically disappearing, the comparison seems particularly apposite at the moment. And there are certainly similar examples much closer to home. The Crowfoot Glacier in Banff National Park is a particularly obvious example.

When discussing the risk to the “right to a trial” caused by mandatory court-annexed ADR programs, G. Thomas Eisele, Judge of the U.S. District Court for the Eastern District of Arkansas, recollected an expression from his father: “You know you can be nibbled to death by ducks.” Judge Eisele added that “Of course, once dead it may not be too important to determine the cause of death or whether we lost our life through one fatal blow or by being nibbled to death over a protracted period of time.” Judge Eisele was speaking about the right to trial itself. However, to the extent that trials are vanishing, it follows that judgments from those trials are also vanishing. And like with the trial itself, it likely won’t matter that the death occurred by one “fatal blow” or by “being nibbled to death”. The erosion of publically available judge-made law, which is clearly aggravated by the privatization movement, is an ongoing and troubling concern that needs to be further researched, monitored and addressed. I fear at the moment that it is being nibbled to death.

---

A third concern associated with private civil justice processes involves their procedural protections, or more specifically, their potential lack thereof. Clearly one of the main benefits of ADR, as was expressly recognized, for example, in the 1991 legislative debates surrounding Ontario’s arbitration legislation, is its wide-ranging flexibility through party autonomy, whereby parties are “generally free to set their own rules ... so they have a great deal of flexibility.”\(^5\) However, with flexibility comes a potential significant cost. Specifically, my concern here, as I have argued elsewhere, is that without adequate public scrutiny, primarily through open court processes and the publication of precedents, there is a real danger that parties, particularly including those with power, will use the private system to circumvent public policies, accountability and basic notions of procedural fairness.\(^5^2\)

Notwithstanding arbitration’s long and extensive history,\(^5^3\) concerns about the fairness of private dispute resolution processes have been around for some

---

\(^5^1\) Ontario, Legislative Assembly, *Official Report of Debates (Hansard)* (5 November 1991) at 1550 (Hon. Howard Hampton), discussed *supra* at c. 4.


\(^5^3\) See *e.g.* *supra* c. 4.
time. For example, in the context of arbitration and perceptions of its preferred status in North America over the previous centuries, William Robertson (a commissioned justice in the late 1700s), for example, commented that, although the “Committee or Court of Arbitration” was “very impartial and fair”, in Robertson’s view it was a “local temporary expedient, dictated by extreme necessity” without “coercive authority to carry its judgments into execution...”.

Further, and specifically in terms of fairness, the prevalence of arbitration at that time, which corresponded to significant developments in the industrial relations sectors, did not necessarily reflect a universal belief in its fairness, equity or neutrality. According to Chitty, for example, “[W]e cannot ever anticipate a certain[,] just and correct decision upon any subject, by one or two individuals … and hence, men naturally prefer an open trial by jury … to a private decision by an arbitrator.”

As James Jaffe subsequently commented, “it has been suggested … that systems of arbitration were not neutral; instead, they were the result of struggles for authority in industry.”

The acceptance of arbitral settlements or awards, therefore, was “based less upon an unarticulated equity promise than it

---

54 William R. Riddell, The Bar and the Courts of the Province of Upper Canada, or Ontario (Toronto: Macmillan, 1928) at 56-57, n. 14. The reference to “extreme necessity” appears to result from distances between courts and trading centres in the region and availability of court alternatives, etc. See generally ibid. at c. iv.


was upon an understanding of who was implementing the system and who was writing the ‘rules of the game.’”

These early comments and examples raising concerns about the fairness of private justice do not simply involve quaint reminiscences of early procedural struggles. They reflect concerns that are very much alive today in the context of modern Canadian procedural debates. For example, concerns about power and procedural fairness in the context of ADR were the central issues in the debates surrounding Ontario’s recent amendments to its arbitration legislation in the area of family law. Because I have written elsewhere on this subject, I will only very briefly develop this example of procedural concern further here. In a nutshell,

---

57 Ibid

prior to 2006, parties could use Ontario's *Arbitration Act, 1991* for the resolution of a wide variety of disputes, including family law disputes. In so doing, they could essentially contract out of the application of progressive substantive and procedural family law protections. Relatively recently, the Ontario Government, following significant public debate regarding the use of Ontario's arbitration legislation to sanction faith-based dispute resolution processes that potentially discriminated against women and children, sought to limit those opportunities through amendments to its arbitration legislation contained in the *Family Statute Law Amendment Act, 2006*. The result of the amendments essentially was to exclude family disputes from the benefits of arbitration legislation unless the process employed by the parties complied with “the law of Ontario or another Canadian jurisdiction....”

This move by the Ontario Government was clearly made given the obvious public interest issues engaged in family law disputes, and in particular, gender, religious, child-welfare and community-welfare interests. As such, there is at least a relatively clear argument for why Ontario decided to privilege substantive equality rights, through robust procedural protections, over the promotion of

---


---

59 S.O. 2006, c. 1.

60 Ibid. at s. 2.2(1).
choice, diversity and religious freedom in the context of the Sharia arbitration debate. However, in cases outside of the family law context, do concerns for procedural protections and potential power imbalances still obtain? In my view: absolutely. One only needs to look as far as the *Dell* case\(^{61}\) and its progeny,\(^{62}\) for example, as well as recent amendments to various provincial consumer protection statutes,\(^{63}\) for procedural protection discussions in a different context. And the reason why we should care about protecting parties in these kinds of cases is bound up in my argument that all sorts of cases, not simply family law cases, engage issues of strong interest to the public.

To develop my procedural protection concern further, I start with an example: the Dealership case.\(^{64}\) I do so for two reasons. First, because, on its face, the Dealership case arguably engages issues that are more in-line with what Hadfield refers to as the “market function” of law, rather than its “democratic function”.\(^{65}\) Recall that, according to Hadfield, the “democratic function” of law


\(^{63}\) See e.g. Québec’s *Consumer Protection Act*, R.S.Q., c. P-40.1 at s. 11.1; Ontario’s *Consumer Protection Act*, 2002, S.O. 2002, c. 30, sched. A at s. 7, mentioned further *supra* at cc. 4-5.

\(^{64}\) See further *supra* c. 1.

FIVE CONCERNS ABOUT PRIVATIZATION

"protects rights, structures the institutions of democratic governance, redistributes wealth, promotes social objectives such as equality or clean air, and resolves disputes among citizens"; whereas the "market function" of law "provides the structure of markets – determining property rights, providing a means of commitment through contract to support cooperative activity – and regulation to correct market failures in the achievement of efficiency."  

As such, again on its face, the Dealership case is the toughest case for my procedural protection concern in that it is the kind of case that, if we need to make choices based on Hadfield’s calculus, we would probably be less concerned about the fairness of the proceeding than one involving, for example, individual equality rights. Again recall Hadfield’s argument:

The rules we want in these interactions [involving corporate entities] are the rules that promote and facilitate efficient market relationships between corporations. In this setting, we are not interested in what is fair or just between two corporations; we are interested in what makes their economic relationship as productive and valuable as possible.

Second, and perhaps more importantly, I use the Dealership case to illustrate my concerns here because in it I experienced, first-hand, numerous violations of basic procedural protections that militated to the significant detriment of John (one of the main players in the case).

---

66 Ibid.

CHAPTER 7

There were numerous extremely problematic (yet illustrative) procedural protection problems that occurred in the Dealership case. I discuss three of them here and a fourth in the next section of this chapter. All three of the examples that I use in this section arose in the context of the discovery phase of the proceeding, which is the primary evidentiary gathering phase of the civil litigation process. Under the U.S. Federal Rules of Civil Procedure, which were the rules that the parties in the Dealership case agreed would primarily govern their arbitral proceeding, discovery evidence is primarily gathered by way of the exchange of documents, as well as through oral examinations for discovery ("depositions" in the U.S.). In addition to the rules of civil procedure that governed the case (by agreement), all lawyers involved in the case were also governed by their various home jurisdictional codes of professional conduct.

The first example arose during one part of the defendant's deposition of one of the officers of the Corporation, after repeated requests for a series of documents and repeated denials by the Corporation's lawyers about their existence or relevance. During the deposition, the officer for the Corporation inadvertently (although properly) disclosed the fact that the documents, with knowledge of their lawyers, were in the trunk of his car that was parked just

---


69 In my case, see Law Society of Upper Canada [LSUC], Rules of Professional Conduct (in effect 1 November 2000), online: LSUC <http://www.lsuc.on.ca/media/rpc.pdf>. To avoid breaching any confidentiality or other obligations (discussed supra at c. 1), I will not identify the home state of the Corporation's lawyers. For relevant professional code obligations, however, see American Bar Association [ABA], Model Rules of Professional Conduct (adopted 1983), online: ABA <http://www.abanet.org/cpr/mrpc/mrpc_toc.html>.
FIVE CONCERNS ABOUT PRIVATIZATION

outside of the office in which the deposition was taking place. After a break to
retrieve the documents (which turned out to be relevant), it became clear that the
lawyers for the Corporation were actively trying to conceal the existence of those
documents, which contained several problematic statements relating to the
corporate structure of the Corporation that undermined their theory of the case.
The non-disclosure by the Corporation’s lawyers was a clear violation of
procedural and ethical rules: they should have been produced.

A second example involved a much more subtle violation of the
Corporation’s ethical rules. Some of the depositions in the Dealership case
occurred in the defendant’s home state; others in the plaintiff’s home state. When
I flew to the home state of the Corporation to take the deposition of one its
officers, we agreed to hold the deposition in the offices of the Corporation’s
lawyers. I arrived alone (the cost of flying more than one lawyer was
prohibitive). I was faced, on the other side of the table, by 6 or 7 people: two or
three lawyers, the deponent (a senior officer of the Corporation), and two or three
other senior officers of the Corporation. The number of people on the other side
of the table, in itself, was not a violation of any rule. Bringing that many people
to the deposition for the sole purpose of intimidation, together with continued
rude treatment and interruptions by various members of the group during the
course of the deposition, clearly was. I quickly realized, like Dorothy in the
*Wizard of Oz*, that I was “not in Kansas anymore”. The lawyers for the
Corporation had orchestrated the deposition process in a way that was obviously
designed to intimidate me and to influence the way in which deposition evidence was given by the Corporation’s own witness. Again, their conduct was a clear violation of their professional obligations.\(^7^0\)

The third example of problematic procedural issues in the Dealership case, which was clearly the most concerning of the three, involved the falsification of evidence later in the same deposition that I just described. Notwithstanding efforts of intimidation, the deposition of the Corporation’s officer continued. I was pursuing a line of questioning with the deponent that went to the heart of both sides’ theory of the case. Specifically, one of the key points in issue in the dispute was whether, and how much, John knew about the corporate re-organization deal that involved the Manufacturer and the newly-created Corporation.\(^7^1\) It appeared that the Corporation (and the Manufacturer) had worked very hard to conceal the fact and extent of the re-organization (to maintain and encourage company and brand loyalty, etc.). An admission by the Corporation that the re-organization was not a matter of public knowledge would have been very problematic for its case. During the deposition of the Corporation’s officer, the following exchange of questions and answers occurred (as recorded in the deposition transcript):\(^7^2\)

\(^7^0\) See e.g. LSUC, Rules of Professional Conduct, supra note 69 at r. 4.01(6) and r. 4.06(1), which provide respectively that a lawyer: “shall be courteous, civil, and act in good faith to the tribunal and with all persons with whom the lawyer has dealings in the course of litigation”; and “shall encourage public respect for and try to improve the administration of justice.” The conduct was also contrary to the spirit of pre-trial ABA rules, which provide, for example, that a “lawyer shall not … unlawfully obstruct another party’s access to evidence…”. ABA, Model Rules of Professional Conduct, supra note 69 at r. 3.4.

\(^7^1\) See supra c. 1.

\(^7^2\) Again, I have made all necessary deletions (which are marked either by “...” or “…”) in order to comply with my professional, ethical and legal obligations under the circumstances of this case.
Q. [By Mr. Farrow, counsel for the Dealership] And so it was a new company set up to buy the ___ division?

A. [By Mr. __, Corporate Officer] Yes.

Q. Were you involved at all with the transition of the division from ___ to ___?

A. Yes.

Q. Tell me about that transition.

A. Well, it was all effective, really, in a day. I believe the day to be ___ ... The existing employees of ___ ... that were ___ "assigned" to the ___ branch that they had worked for, became ___ employees in our company effectively that date. And, really, it was rather a transparent change....

Q. What do you mean by "transparent change"?

Q. [By Mr. __, counsel for the Corporation] Let me talk to my witness a minute.

Q. [By Mr. Farrow] Excuse me for a minute before you go out.

Q. [By Mr. __, counsel for the Corporation] He can talk to me anytime he wants. I want to talk to my witness.

[Brief recess.]

... 

Q. [By Mr. Farrow] ... I do note for the record that the break was as a result of counsel for Mr. ___ asking to speak with him in private after his response just before the break.

Q. [By Mr. __, counsel for the Corporation] Objection....

Q. ...You told me that the transition from ___ to ___ was meant to be transparent....
A. First of all, I want to say, I don’t like being told what I’m supposed to do or not to do by either one of you guys. So if you want this to continue ... then ... both of you need to watch it, because I have about this much left of my patience from either one of you ([Witness] indicates [to Mr. Farrow and to Mr. __, counsel for the Corporation]).... As far as the transparency issue I was talking about, I was talking about from a service standpoint.... And that’s the end of what I have to say about that....

Q. [By Mr. Farrow] I note for the record that this deposition has completely changed since Mr. __’s break with his witness. The tone of the witness has changed. He is nonresponsive and clearly, in my view, has been instructed to change the way he is proceeding at this stage.\(^\text{73}\)

What happened in that deposition was truly remarkable from the standpoint of legal ethics. Essentially, my line of deposition questions was improperly interrupted by counsel for the Corporation, who proceeded to insist on taking a break “to talk to [his] ... witness”. After the break, the witness returned to the room and started to answer my questions with a very different, much less forthcoming demeanour. He then quickly lost his temper, pointed at his own lawyer and at me and said, in a loud, flustered and almost panicked voice, that he was tired of “being told what ... to do or not to do” by either his lawyer or by me in the context of his testimony during the deposition. Notably at that stage: I had not told him to do or not to do anything. As such, what he was really saying, on the transcript, was that his lawyer had been instructing him over the break how to answer my questions so as to tailor the evidentiary process in favour of the Corporation.

\(^{73}\) Dealership Case, confidential Deposition Transcript, pp. 28-31 (on file with author) [emphasis added].
FIVE CONCERNS ABOUT PRIVATIZATION

Never has there been clearer evidence on a deposition transcript of a lawyer being caught having coached a witness during a break to change or tailor the witness’ evidence. That kind of overly zealous lawyering is clearly improper under any rules of professional conduct. According to standards set by the ethical rules that govern lawyers in Ontario, for example, the lawyer for the Corporation clearly acted unprofessionally when he interrupted my line of examination questions. For example, the rule on “communication with witnesses giving evidence”, which “applies with necessary modifications to examinations out of court” (including depositions), provides that: “during cross-examination by an opposing licensee, the witness’s own lawyer ought not to have any conversation with the witness about the witness’s evidence or any issue in the proceeding...”.

Similar rules in Alberta contemplate the deposition scenario in the Dealership case even more directly:

R.25 A lawyer involved in a proceeding:

(a) must not, during a cross-examination, obstruct the cross-examination in any manner; and

(b) must not, during a break in a cross-examination, discuss with the witness the evidence that that witness has given or is about to give.

C.25 The term “cross-examination” as used in Rule #25 means the examination of a witness or party adverse in interest to the client of the lawyer conducting the examination. It therefore includes

---

74 LSUC, Rules of Professional Conduct, supra note 69 at r. 4.04 (commentary).

an examination for discovery.... The rule prohibits obstruction or improper discussion by any lawyer involved in a proceeding and not just by the lawyer whose witness is under cross-examination.

The opportunity to conduct a fully-ranging and uninterrupted cross-examination is fundamental to the adversary system. It is counterbalanced by an opposing advocate’s ability to ensure clarity of testimony through initial briefing, direct examination and re-examination of that lawyer’s witnesses. There is therefore no justification for obstruction of cross-examination by unreasonable interruptions, repeated objection to proper questions, attempts to have the witness change or tailor evidence, or other similar conduct while the examination is ongoing....

Although the Dealership case was not a Canadian case, equally apposite ethical obligations obtain in the United States. For example, the ABA’s *Model Rules of Professional Conduct* provide that:

R. 3.4 A lawyer shall not:

(a) unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law...

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party....

---


77 See e.g. ABA, *Model Rules of Professional Conduct*, supra note 69 at r. 3.4.
The conduct of the lawyer for the Corporation clearly offended against any one of these versions of the ethical obligation not to obstruct the evidentiary process.\footnote{For a general discussion of legal ethics in the context of a lawyer’s role as a civil advocate, see Trevor C. W. Farrow, “Ethics in Advocacy” in Alice Woolley et al., Lawyers’ Ethics and Professional Regulation (Markham: LexisNexis, 2008) c. 5. For my recent views on legal ethics and professionalism generally, see Trevor C. W. Farrow, “Sustainable Professionalism” (2008) 46:1 Osgoode Hall L.J. 51.} As the record made clear, he obviously coached his witness to tailor his evidence in line with the Corporation’s theory of its case.

Because the Dealership case was being dealt with pursuant to a private arbitration regime, the typical procedural safeguards provided for by a court were not immediately present to curb or punish the behavior of the Corporation or its lawyers in the context of any of these problematic procedural occurrences, including the hiding of documents in the witness’ car, the improper intimidation deposition tactics, or the flagrant witness coaching. However, notwithstanding the absence of immediate judicial recourse, pre-hearing procedures to raise the issues with the arbitrator were available, which we pursued. Following written and oral presentations on the various violations, the arbitrator was clearly unmoved to do anything about them. As such, he decided to do nothing. And given the lack of a requirement to provide written reasons (either for any interlocutory rulings or for the final arbitral decisions), it was not clear on what basis he dismissed the complaints. At that point it became patently clear to me what it means that, at least in some arbitral circumstances, there is a real potential
for inadequate procedural protection and abuse that can militate against the realization of fair and just dispute resolution outcomes.

And the Dealership case is certainly not the only arbitral proceeding in which at least some participants have been concerned about the lack of available procedural protections. Another – high profile – illustrative example involves a recent (ongoing) employment termination arbitration. The employer in the case is Washington State-based Vulcan, Inc. Vulcan is a corporation started by Paul G. Allen – co-founder of the Microsoft Corporation – to manage his business and charitable affairs.\(^{79}\) The employees are two investment managers with Vulcan’s private equity group. The dispute is about the employees’ exit compensation. Their compensation agreement included a profit sharing formula, which increased if the employees were not terminated before the disposition of various managed investments. Both employees were terminated prior to the investment disposition date. They were provided with exit compensation under the terms of their compensation package, but were not provided with the full amount as if the investments had been disposed. Whether they are entitled to the difference in compensation – altogether reportedly amounting to approximately $20 million – is the issue in the case.

The Vulcan employment contract included a mandatory arbitration agreement. The rules governing the arbitration were the Commercial Arbitration Rules of the American Arbitration Association (AAA) (the same governing rules

\(^{79}\) Vulcan, Inc., online: <http://www.vulcan.com/>. 
as in the Dealership case). The agreement provided for a 3-person arbitration panel. Each side picked one of the three arbitrators, the two of whom picked the third. The employees selected a Seattle lawyer named Arthur W. Harrigan, Jr. Vulcan did not object (which it could have done). Vulcan selected Judge Robert H. Alsdorf (ret.). James A. Smith, Jr. was selected as the third arbitrator. The arbitration proceeded from 22-25 June 2009, following which the panel substantially found in favour of the employees in its Arbitration Award dated 29 July 2009. After the arbitration, when counsel for Vulcan received the legal bills of the employees in support of their claim for attorneys’ fees, Vulcan learned for the first time that one of the arbitrators, Mr. Harrigan, had issued an invoice to the employees for $3,355 for 5.5 hours of time spent allegedly reviewing pleadings, evidence and arguments with the employees and/or their representatives. The meetings for which the bill was issued occurred prior to the arbitration (apparently nearly two months before he was appointed as an arbitrator). The meetings also apparently occurred approximately two weeks before the employees served their arbitration demand, and prior to the arbitrator declaring that he did not have “any ‘present or past personal or business relationship’” with the employees and prior to declaring that he had no “entanglement with the parties of the subject matter of the case ‘that may give rise to a justifiable doubt as to [his] impartiality or independence.’”

80 See Vulcan’s Motion to Vacate Arbitration Award, filed in the Superior Court for the State of Washington, County of King (8 March 2010), pt. I. For arguments from the employees, see e.g. Petitioners’ Joint Reply in Support of Motion to Confirm Arbitration Awards (18 March 2010).
Under the governing AAA arbitration rules, each side was allowed to meet with potential arbitrators in order to determine the fitness of the arbitrator for the case. Specifically, the rules provide that:

...[A] party, or someone acting on behalf of a party, may communicate ex parte with a candidate for direct appointment ... in order to advise the candidate of the general nature of the controversy and of the anticipated proceedings and to discuss the candidate’s qualifications, availability, or independence in relation to the parties or to discuss the suitability of candidates for selection as a third arbitrator where the parties or party-designated arbitrators are to participate in that selection.\(^{81}\)

However, there is a difference between meeting with an arbitrator to determine whether his or her prior contacts and/or experiences militate in favour or against his or her appointment, and meeting with an arbitrator to discuss the merits of a case, draft court documents, clarification of facts, and so forth. In its motion materials, Vulcan alleged that the employees and Mr. Harrigan crossed that line in this case, that Mr. Harrigan was therefore not “impartial and independent” as required by the AAA rules,\(^{82}\) and that, therefore, the arbitration award should be set aside.\(^{83}\) Without having received and carefully reviewed the legal bills, which were disclosed by the employees for a different purpose, Vulcan would have never learned about those confidential meetings.\(^{84}\)

---

\(^{81}\) AAA, Commercial Arbitration Rules (amended and effective 1 June 2009), r. 18, online: AAA <http://www.adr.org/sp.asp?id=22440#R18>.

\(^{82}\) See *ibid.* at r. 17. See further Vulcan’s Motion to Vacate Arbitration Award, *supra* note 80 at pt. II.B.

\(^{83}\) See Vulcan’s Motion to Vacate Arbitration Award, *ibid.* at pt. II.C.

\(^{84}\) See *ibid.* at pt. II.D.
Notwithstanding its arguments and objections, Vulcan has to-date been unsuccessful at all levels of this matter. Following the various arbitral proceedings, Vulcan appealed to the Washington State courts for relief against both the underlying employment arbitral decision as well as the arbitral decision concerning arbitrator neutrality. Vulcan’s appeals were dismissed. Vulcan’s further appeals, to the Washington State Court of Appeals, are still outstanding. All of these issues are also the subject of high profile media attention.

For purposes of this project, what interests me about the Vulcan and Dealership cases is the fact that, even in the context of extremely sophisticated business parties, potential procedural fairness issues are at play in the context of private arbitration processes. And while the dealership case and the Vulcan case provide just two examples of arbitral proceedings in which significant concerns

85 The arbitration panel’s initial Arbitration Award, finding for the employees, is dated 29 July 2009. Its Final Arbitration Award, largely specifying the monetary amounts in the initial award and the amounts of legal and arbitration fees and costs owed to the employees, is dated 9 February 2010. The arbitral decision on the issue of arbitrator neutrality, issued by Judge Terry Lukens (ret.), arbitrator, in his Decision Regarding Disqualification of Arbitrator (No. 1160017635), is dated 8 January 2010.


87 See e.g. Vulcan’s Notice of Appeal to the Court of Appeals, Division I, No. 10-2-09609-4SEA (3 May 2010).

about procedural protections have been raised, they clearly are not the only cases in which such concerns have been raised. According to one report, people are "turning away" from commercial arbitration "because they believe any benefits of domestic commercial arbitration are outweighed by the risks of forfeiting protections inherent in the … judicial system: rules of evidence, reasoned judgments and the right to appeal." Further, according to David Schlecker, a partner at the U.S. firm of Anderson Kill & Olick, P.C., "Arbitrators don’t have to have reasoned decisions and sometimes the parties are left scratching their heads…. Then you are essentially stuck with the decision because the right of appeal is very limited." In-line with these concerns, according to Vulcan spokesperson David Postman, until the Vulcan matter is resolved, "we don’t have faith in arbitration." Recent reports indicate that Vulcan has removed employment contract clauses that require mandatory arbitration processes to settle disputes.

The point of this discussion is not to say that all arbitration procedures (and arbitrators) fail to ensure adequate procedural protections for the litigants; or, for that matter, to say that all judicial procedures (and judges) always get it right. My point, however, through these examples, is to highlight an important procedural

---

89 Swanton, “System Meltdown: Can Arbitration Be Fixed?”, supra note 3 at 51. See further ibid. at 51-52.

90 David Schlecker, quoted in ibid. at 51.


92 Searcey, “Vulcan Capital Challenges Arbitrator’s Impartiality”, ibid.
FIVE CONCERNS ABOUT PRIVATIZATION

can be attributed to the lack of established procedural protections, which is
degraded by the process’ secrecy and lack of robust appeal routes. Similar
concerns also obtain for other private processes involving third party neutrals.
Mediation, for example, can suffer from many of the same procedural concerns
(although, given the typically more voluntary nature of mediation, the severity of
the consequences can, in some circumstances, be less acute). So it is one thing for
George Adams to claim, as a retired judge and experienced mediator, that
mediation settlements are often, in his experience, “principled”, “professional”
and “elegant”. And often he is right. However, particularly with court-annexed
mediation, Adams’ observation is also dependent on his acknowledgment that:
“Of course, it doesn’t work if there aren’t consequences to not agreeing and these
settlements being driven by very ethical professional courts that are there so if you
don’t settle, you’re going to be visiting the judge and she is going to decide who
wins and who loses and it’s going to be quite costly.”

The problem in the Dealership case, for example, was that there was no easy recourse to a judge; and
further, as it turned out, the arbitrator was not effective at ensuring procedural
fairness.

Finally, in addition to generic procedural fairness issues that can potentially
come up in any privatized procedural process (including evidentiary and
professional issues, and the like), there also exist a host of other procedural


94 Ibid.
fairness issues that can potentially arise in private processes that negatively and
disproportionately impact on certain groups or litigants, including women, young
people, minority groups and other equity-seeking participants. These procedural
concerns can include potential power imbalances resulting from differences in
class, wealth and other resources, gender and age; cultural inequities resulting
from ignorance or system bias; language issues; and a host of other potential
challenges. Admittedly these issues can (and do) also come up in the context of
public judicial proceedings.\footnote{The Supreme Court of Canada has variously discussed some of these issues in the context of the judicial process. See e.g. \textit{Baker v. Canada (Minister of Citizenship and Immigration)}, [1999] 2 S.C.R. 817 (headnote), which provides that “Procedural fairness ... requires that decisions be made free from a reasonable apprehension of bias, by an impartial decision-maker. They require a recognition of diversity, an understanding of others, and an openness to difference.” See further \textit{R. v. S. (R.D.)}, [1997] 3 S.C.R. 484 (headnote), which provides that:}

Judicial inquiry into context provides the requisite background for the interpretation and the application of the law.... This process of enlargement is a precondition of impartiality. A reasonable person, far from being troubled by this process, would see it as an important aid to judicial impartiality.... The reasonable person approaches the question of whether there exists a reasonable apprehension of bias with a complex and contextualized understanding of the issues in the case. He or she understands the impossibility of judicial neutrality but demands judicial impartiality. This person is cognizant of the racial dynamics in the local community, and, as a member of the Canadian community, is supportive of the principles of equality.

Finally, see \textit{R. v. Lavallee}, [1990] 1 S.C.R. 852, sec. 5, Wilson J., which provides – in the context of recognizing both the reality, gravity and ongoing stigma of gendered violence (and in particular the “battered wife syndrome”), and the judicial system’s obligation to recognize and make space for those gendered issues in the judicial decision-making process through an openness to differences and discrimination based on gender – that:

The gravity, indeed, the tragedy of domestic violence can hardly be overstated. Greater media attention to this phenomenon in recent years has revealed both its prevalence and its horrific impact on women from all walks of life. Far from protecting women from it the law historically sanctioned the abuse of women within marriage as an aspect of the husband’s ownership of his wife and his “right” to chastise her.... Laws do not spring out of a social vacuum.... The definition of what is reasonable must be adapted to circumstances which are, by and large, foreign to the world inhabited by the hypothetical “reasonable man”.

310
discussed in chapter 2), an openness to the process that allows for outside scrutiny and critique, as well as a right of appeal. One of the stated benefits of ADR is that, given its flexibility and informality, it can be extremely sensitive to the social context needs of and issues facing the participants. And when ADR processes work, they work well on this front. I fully acknowledge that fact. However, given the secrecy, lack of formal procedural protections and limited rights of appeal discussed above, the concern about these procedural issues can be significantly heightened in the context of private processes. Put simply, the rights and interests of vulnerable people participating in private and informal processes can be very much at risk in the face of inexperienced neutrals and powerful opponents. Because this issue is the focus of a significant body of literature and ongoing debate, which I have touched on (very briefly) elsewhere, I will not


spend much further time on the specific issue here, other than to raise its importance and relevance for this discussion as well as to mentioned that it was exactly these concerns that ultimately governed Ontario’s approach in the Sharia


98 See e.g. Trevor C. W. Farrow, “Dispute Resolution, Access to Civil Justice and Legal Education” (2005) 42 Alta. L. Rev. 741 at 786, nn. 286-289 and accompanying text; Trevor C. W. Farrow, “Public Justice, Private Dispute Resolution and Democracy” in Murphy and Molinari, eds., Doing Justice: Dispute Resolution in the Courts and Beyond, supra note 58 at 301, 343-346; Farrow, “Privatizing our Public Civil Justice System”, supra note 52 at 16; Farrow, “Re-Framing the Sharia Arbitration Debate”, supra note 58.
arbitration debate that I discussed earlier in this chapter. As such, these specific equality and related concerns are clearly part of the overall concern about the potential lack of procedural protections that can be associated with private dispute resolution processes.

4. **NEGATIVE IMPACT ON DEMOCRACY**

My fourth concern, which is the most significant concern that I have regarding the privatization of civil justice, is an issue that relates to the second concern that I raised above (regarding the development of the common law) and is one that weaves its way through this entire project. Specifically, this fourth concern relates to the fundamental purpose of the public dispute resolution process as not only a tool to resolve individual disputes, but also as a norm-creating instrument of societal regulation, and the eroding impact that the privatization of civil dispute resolution has on this foundational democratic function.

Recalling the discussions from chapters 2-4, there are at least three key components to the public adjudicative system. First, public civil justice systems are clearly central actors in the adjudicative process. As S. M. Waddams has summarized, in addition to “statutes”, the “study of law is, to a large extent, the study of ... judicial decisions.”

Second, in our highly complex and regulated democracies, the administrative system plays an equally, if not more important role. Again as Waddams has discussed, in a “highly regulated state ... there are

---

thousands of administrative bodies exercising very important regulatory and adjudicative powers.... [A]s a practical matter, the direct effect of regulatory tribunals is often of more importance than the direct effect of legislation or of judicial decisions."  

Third, in addition to the state-funded civil courts and administrative processes, there is a vast body of “alternative” justice – largely in the form or arbitration, mediation, and so forth – that, as the Supreme Court of Canada recognized in Desputeaux, forms a “fully recognized” part of a state’s overall adjudicative process. The first two of these adjudicative processes: public courts and tribunals, not only resolve individual disputes as well as keep legislation in check through hearings, trials and processes of judicial review, they also create a body of law that directly governs and indirectly guides, through both the full light and the shadow of the common law, much of what we do in our daily lives, including both individual and corporate actors. As such, far from

---

100 Ibid. at 19. For a negative commentary on the importance and role of administrative tribunals, see Ezra Levant, Shake Down: How Our Government is Undermining Democracy in the Name of Human Rights (Toronto: McClelland & Stewart, 2009).


simple mechanical dispute ending tools, civil dispute resolution regimes play a central role in the regulatory processes of modern Western democracies. Given this central role, the move to privatize public civil dispute resolution regimes has profound implications for how we govern ourselves in a free and democratic society. Put simply, to the extent that we are privatizing public civil dispute resolution systems, we are essentially privatizing, and in the process largely eliminating, a significant part of the way democracy is realized.104

To illustrate this concern, I am again going to return to the Dealership case, and in particular, to the fourth procedural problem that occurred in that dispute. Now my reader might ask at this stage: what does the Dealership case have to do with societal regulation and democracy? In my view, as I will now discuss: everything. Because as it turned out, the Dealership case was not at its core an isolated dispute, but rather the result of a pattern of potentially fraudulent conduct on the part of the Corporation. Throughout our retainer with John, we received a relatively steady stream of anecdotal information about similarly-situated dealers in the United States who had found themselves in the same position vis-à-vis the Corporation and its deceptive and aggressive business practices. We also learned,


\[ 104 \text{ For a further discussion of the court's regulatory role and its relationship to the state's legislative function, see W. Kip Viscusi, ed., Regulation through Litigation (Washington, D.C.: AEI-Brookings Joint Center for Regulatory Studies, 2002). See also supra c. 2.} \]
again anecdotally, about a number of similar arbitrations being aggressively pursued by or against the Corporation. Because of the strict confidentiality provisions surrounding those proceedings, however, we were not able to obtain evidence about those other arbitrations, either through informal inquiries or through repeated efforts through the production and deposition stages of the proceeding. Overt denials of other proceedings were all that were forthcoming from the Corporation’s officers and its lawyers.

However, approximately two weeks before our arbitration hearing was set to begin, I received in the mail a list of approximately 30 or 40 similar, active arbitral proceedings in which the Corporation was involved. The list, which was included as part of a report to the Corporation’s auditors, established clearly that the conduct engaged in by the Corporation with John was a pattern of repeated conduct that had led to similar disputes with numerous other dealers across the United States. The only reason we received it was because it was mistakenly sent to me by office staff of the Corporation’s lawyers. In the face of this list, it seemed difficult for the Corporation to continue to voice, in good faith, its denial of the existence of these proceedings or their relevance. Unfortunately, because of professional and evidentiary reasons that prohibited us from leading the evidence in the arbitration, that is exactly what the Corporation did: it proceeded at the arbitration as though those other proceedings did not exist. And the arbitrator’s judgment did not take into account the fact that the conduct about which John was complaining was a course of conduct in which the Corporation was engaging with dozens of other dealers across the United States.
FIVE CONCERNS ABOUT PRIVATIZATION

If we saw the dealership case as simply an A v. B case, or as what Fiss called the typical “dispute resolution story” involving a “quarrel between two neighbors”\(^\text{105}\) that involves only limited private (in this case commercial) interests, there might be no need to concern ourselves with the procedural violations that occurred in that case or even the potentially fraudulent conduct that negatively impacted John and 30 or 40 similarly-situated U.S. dealers. Recall again Hadfield’s argument, for example, that we are not to concern ourselves with the “fair[ness]” of these sorts of commercial cases.\(^\text{106}\) However, if we see the Dealership case, instead, as a potential opportunity not only to shut down the problematic conduct of a significant U.S. goods and service provider but also to send a significant signal to other similarly-situated individual and corporate actors (and lawyers) in society about the negative repercussions of engaging in that sort of conduct, then opinions, policies, resource allocation, overall corporate behaviour and potentially relevant regulatory policies (governing both corporations and lawyers) might be modified or at least influenced. That is the power of the adjudicative aspects of our processes of democratic governance. That is what the Dealership case has to do with the tools of regulation and democracy. Privatizing those tools risks losing those aspects of democracy.

Public policy gets made through civil disputes all the time, including in corporate and commercial matters. And these matters raise issues of public

\(^{105}\) Fiss, “Against Settlement”, *supra* note 20 at 1076.

\(^{106}\) Hadfield, “Privatizing Commercial Law”, *supra* note 67 at 40, discussed further at *supra* c. 6.
interest. If the directors of corporation A conduct its operations in such a way as to oppress the rights of its minority shareholders, then those shareholders typically have a right to the court’s assistance pursuant to provincial or federal business corporations legislation. That court process is designed to resolve that individual dispute. It will also, however, set the ground rules, through public precedent and public scrutiny, for the future actions and expectations of directors, officers, employees, regulators and clients of corporations B, C, D, E and F, etc. And those ground rules will include policies about how to hire and fire employees, whether corporate wage and other policies negatively affect a certain class or group of employees, whether a corporation should reduce short-term share value in order to invest in the long-term sustainability of its production processes, and so on. For example, according to Robert Vischer, when discussing the collapse of Enron following its improper use of off-balance sheet partnership structures to pursue transactions that would not have passed public disclosure scrutiny:

Make no mistake, Enron’s demise is a tale steeped in moral claims. The transactions on which Enron’s skyrocketing share price was built were made possible only by the distinct acts and omissions of the company’s managers, directors, accountants, and lawyers. The creation and treatment of these transactions constituted an unmistakable moral perspective: that profit trumps principle, that public perception of profit is a matter for advocacy and manipulation, that the corporation’s only duty to its shareholders is the maximization of share price, and that it owes no duties to the public at large whatsoever. This perspective is helpfully illustrated by a former Enron employee’s infamous explanation of the company’s approach to the governing rules:

Say you have a dog, but you need to create a duck on the financial statements. Fortunately, there are specific accounting rules for what constitutes a duck: yellow feet, white covering, orange beak. So you take the dog and
paint its feet yellow and its fur white and you paste an orange plastic beak on its nose, and then you say to our accountants, “This is a duck! Don’t you agree that it’s a duck?” And the accountants say, “Yes, according to the rules, this is a duck.” Everybody knows that it’s a dog, not a duck, but that doesn’t matter, because you’ve met the rule for calling it a duck.\footnote{Robert K. Vischer, “Legal Advice as Moral Perspective” (2006) 19:1 Geo. J. Legal Ethics 225 at 244.}

In Canada, one only needs to look as far back as 2008 in the Supreme Court of Canada’s \textit{BCE} judgment to see how significant public interest issues, located exclusively in corporate law contexts, get dealt with by the court in a way that has dramatic impacts not just for the immediate parties but for all of those affected by corporate and commercial activity.\footnote{\textit{BCE Inc. v. 1976 Debentureholders}, [2008] 3 S.C.R. 560. For other relevant cases, see \textit{Peoples Department Stores Inc. (Trustee of) v. Wise}, [2004] 3 S.C.R. 461; \textit{Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.}, 506 A.2d 173 (1986); \textit{Unocal Corp. v. Mesa Petroleum Co.}, 493 A.2d 946 (1985). For a recent discussion of some of the issues raised in these cases, see Ed Waitzer and Johnny Jaswal, “\textit{Peoples, BCE, and the Good Corporate ‘Citizen’}” (2009) 47:3 Osgoode Hall L. J. 439.} The basic dispute in that case was about the value of debentures of a small group of debenture-holders following a planned leveraged buy-out of BCE Inc. On its face, therefore, the case was all about money. From a different perspective, however, the case was all about public policy: policies dealing with the management of corporations; duties of corporate decision-makers to third parties; what it means to act in the “best interests of the corporation” (as opposed to simply acting in the best financial interests of its shareholders); what the “business judgment rule” could mean, including, potentially, for modern, socially conscious directors, etc. A lot was at stake in the \textit{BCE} case that, given the wide swath that corporate activity cuts through the
everyday lives of regular citizens, was of interest – directly or indirectly – to that citizenry.

However, to the extent that the resolution of these disputes gets pushed behind closed doors, which is what we are actively doing, whatever decisions get made, if any, are made by those parties in accordance with their chosen processes as driven by their private interests. As the Supreme Court of Canada has acknowledged, private litigants “are normally presumed to be pursuing their own interests rather than those of the public at large.”\(^{109}\) Settlements get brokered on grounds of business efficiencies and acceptable line-item entries, rather than on the bases of principles that militate in favour of justice and the strong pursuit of the public interest. And even if a decision gets reached, for example in a private commercial arbitration setting, there is no guarantee, from a legitimacy perspective, that the process by which that decision got made accorded with basic public interest values. See the Dealership case for but one example.

And of course the democratic function of civil dispute resolution does not only reside in the world of corporate law. In fact, that is where some may think it does not generally belong.\(^{110}\) Ever since (and of course before) Lord Atkin’s judgment in *Donoghue v. Stevenson*,\(^{111}\) which – basing an assessment of reasonable conduct on the foundation of the “neighbor principle” – essentially founded our modern law of negligence, all sorts of areas of judge made civil law


\(^{110}\) See e.g. c. 6.

FIVE CONCERNS ABOUT PRIVATIZATION

continue to engage critical public interest policies and distributional arrangements. Examples of that law include: cases involving police misconduct,112 employment and pay equity rights,113 same-sex marriage,114 insurance company misconduct,115 defamation,116 and so on. The list could be endless, even without class action cases, which are, by their very nature, designed to modify behaviour “by ensuring that actual and potential wrongdoers modify their behaviour to take full account of the harm they are causing, or might cause, to the public.”117

But I have chosen to focus specifically on more typical corporate cases above to demonstrate that even in what would usually be thought of as cases invoking what Hadfield refers to as the “market function” of law, rather than its “democratic function”,118 major public interest values can be at stake. As such,

112 See e.g. Jane Doe v Board of Commissioners of Police for the Municipality of Metropolitan Toronto (1990), 74 O R (2d) 225 (Div Ct) For a recent discussion of the Jane Doe case, see Trevor C W Farrow, “Five Pleadings Cases Everyone Should Read” (2009) 35 4 Advocates’ Q 466 at 478-480

113 See e.g. Ontario Nurses’ Assn v Ontario (Pay Equity Hearings Tribunal) (1995), 23 O R (3d) 43 (C A ), leave to appeal to S C C refused, Glengarry Memorial Hospital v Ontario (Pay Equity Hearings Tribunal) (S C C), [1995] S C C A. No. 259


115 See e.g. Whiten v Pilot Insurance Co , [2002] 1 S C R 595

116 Hill v Church of Scientology of Toronto, [1995] 2 S C R 1130


118 See Hadfield, “Privatizing Commercial Law Lessons From ICANN” supra note 65 at 263, discussed further supra c 6
our current, almost knee-jerk reaction to privatizing these and other cases all over
the justice system needs to be questioned and re-considered. Sound policy bases,
as I will discuss in the next chapter, need to be identified and considered before
we continue down a road, the end of which sees essentially the death of the
court’s role in framing important public interest policies.

This privatization cycle is equally present within state regulatory agencies.
For example, as also discussed at length earlier,¹¹⁹ various provincial and federal
tribunals now have the mandate to seek to resolve complaints through the use of
private dispute resolution mechanisms before moving to full panel processes. To
the extent that the private resolution of these administrative disputes is successful,
their processes and results – formerly designed to move our administrative law
forward in ways that will better protect human rights and interests and influence
expectations of the rest of us for how societal relationships should and must be
conducted – are now swept under the carpet. So even if there is an immediate and
satisfactory resolution to the dispute at hand (and we cannot always even be
confident of that), we do not get the benefit of publicly scrutinized hearings and
results that fill the increasingly influential space between private affairs and
public legislation. That is a key role for public courts and tribunals, which needs
to be jealously guarded.

¹¹⁹ See supra c. 4.
FIVE CONCERNS ABOUT PRIVATIZATION

5. GLOBALIZATION

The final concern I raise in this chapter about the process of privatizing our systems of civil justice deals not so much with a specific incident or procedural issue, but rather with how the process of privatization, and in particular its problematic implications for democracy, are aggravated by globalization.

As a threshold question, what do I mean by globalization? Because I have discussed the phenomenon of globalization at some length elsewhere, I will be relatively brief here. Globalization means many things to many people. It is a notoriously thorny and elusive concept, or as Brodie and Trimble have stated, its "meaning and implications ... remain elusive and contested." As I have stated elsewhere:

More than simply an historically-contingent event, globalization is a nuanced and expansive process involving a wide range of geographically-relevant political, economic, social and cultural

---


connections and changes that are being created by and visited upon our personal and community affairs. It therefore involves – in this broad sense – much more than what is often seen largely as a process of increased and interconnected trade, technology, and the movement of capital.122

However, for purposes of this project, what I am primarily interested in is only part of this more wide-ranging picture of globalization: international commerce, and in particular, the ability of commercial activity to operate within and move between domestic jurisdictions all over the world. As I have also commented elsewhere, a “defining characteristic of this narrow aspect of globalization has been the internationalization of commercial affairs, largely through the presence of MNCs [multi-national corporations] ... in various jurisdictions around the world.”123 Further, as Andrew Bell has commented,

---


123 Farrow, “Globalization, International Human Rights, and Civil Procedure”, supra note 120 at 675. See further Schneiderman, Constitutionalizing Economic Globalization: Investment Rules and Democracy’s Promise, supra note 122; Stiglitz, Globalization and its Discontents, supra note...
FIVE CONCERNS ABOUT PRIVATIZATION

One feature of economic globalization has been the great diversification of corporate holdings, both in terms of commodity portfolios and geographical spheres of operation, and a company’s plant, equipment, and other assets will frequently be located in a strategic range of countries. Such diversification characterizes the corporate behaviour of vast multinational corporations.... This collective burgeoning of transnational activity is seen most clearly in ... international commerce.\textsuperscript{124}

We live in a world that is significantly dominated by corporate activity, and more specifically, corporate activity that engages or impacts upon the people, resources and norms of more than one jurisdiction. According to Jeffrey Sachs, “We live in revolutionary times, a revolution of global capitalism.”\textsuperscript{125} And the nature of this global revolution, according to Sachs, is “the intertwining and intensification of two profound trends: the globalization of society and the diffusion of capitalism.”\textsuperscript{126} From the perspective of democratic accountability, it is clear that commercial actors, and often and significantly international commercial actors, are playing increasingly powerful roles in the ordering of domestic affairs. As Andrew Canon has argued, the “nation state is consciously giving more power to industry groups. Globalisation has resulted in the concentration of actual power in corporate groups, which are independent of the

\textsuperscript{122} at 8-10; Thomas L. Friedman, \textit{The Lexus and the Olive Tree: Understanding Globalization} (New York: Anchor Books, 2000).


\textsuperscript{125} Jeffrey D. Sachs, “Globalization and the Rule of Law” (remarks to Yale Law School alumni weekend, Yale University, 16 October 1998) [archived with author].

\textsuperscript{126} \textit{Ibid.}
nation state.” Sachs agrees: the spread of capitalism has become “the organizing principle of national economies.” Given this state of affairs, Marx was clearly right about a number of things. He appreciated the “gigantic” power of capitalism. He also clearly appreciated the growing phenomenon of globalization. As he put it:

National differences and antagonisms between peoples are daily more and more vanishing, owing to the development of the bourgeoisie, to freedom of commerce, to the world-market, to uniformity in the mode of production and in the conditions of life corresponding thereto.

With respect to “National differences and antagonisms”, Marx was in essence noticing (with respect to the bourgeois beneficiaries of globalization) what Thomas Friedman – an extremely unlikely bedfellow – called 150 years later his “Golden Arches Theory of Conflict Prevention”: that “No two countries that both had McDonald’s had fought a war against each other since each got its McDonald’s.” And as the recent world economic crisis has demonstrated,


Ibid.


Marx and Engels, Manifesto of the Communist Party, supra note 129 at 488. See also ibid. at 475-477.

Friedman, The Lexus and the Olive Tree, supra note 123 at c. 12, p. 248. Friedman also acknowledges several things: first, he is not the first to notice the effect that commerce and globalization have on the potential to increase peace (see e.g. Montesquieu and Norman Angell); and second, that “globalization does not, and will not, end geopolitics.” Ibid. at 249-250. For Friedman’s further thinking on globalization, see Thomas L. Friedman, The World is Flat: A Brief History of the Twenty-First Century (New York: Farrar, Straus and Giroux, 2005).
FIVE CONCERNS ABOUT PRIVATIZATION

Marx was also largely right (although for different reasons) about the fact that the world capital economy is controlled to a great extent by forces beyond the direct control of the state. According to Marx, modern capitalism ("bourgeois society") is "like the sorcerer, who is no longer able to control the powers of the nether world whom he has called up by his spells." What Marx was obviously not correct about was the "fall" or "d[y]ing off" (which he called "inevitable") of the bourgeois system – the "end of capitalism" through the production "of its own grave-diggers." Put bluntly (and very simply), looking to Friedman again, the "free market" – due to the "Darwinian brutality of ... capitalism" – is the "only ideological alternative left" in the struggle for prominence between "free-market capitalism" and "communism, socialism and fascism". And while the current economic crisis has witnessed an increased role for the state in the way of calls for greater regulatory oversight and greater financial involvement through, for example, massive bailout and other injections, the ongoing and deepening...

133 Marx and Engels, Manifesto of the Communist Party, supra note 129 at 478.

134 Ibid. at 483.


136 Marx and Engels, Manifesto of the Communist Party, supra note 129 at 483.


138 Marx and Engels, Manifesto of the Communist Party, supra note 129 at 483.

139 Friedman, The Lexus and the Olive Tree, supra note 123 at 104.
privatization phenomenon discussed earlier continues to strengthen the power and upward trajectory of the free-market economy.

So what does all of this have to do with the privatization of the civil justice system? We have established that international economic actors have an increasing presence domestically, including through the use of processes and means of production (including information technology, natural and manufactured resources, and human capital), through access to domestic markets (through retailers and consumers, etc.), and so on. And we typically expect that, at least in theory, international actors who operate within our local jurisdictions will play by the rules that we set for ourselves in those jurisdictions. Environmental standards, labour standards, equality and other human rights standards, securities regulations, competition standards, fair advertising requirements, etc., are all examples of the kinds of rules we set for ourselves and for those who operate within our local jurisdictions.

To the extent that violations of those rules occur, we have public dispute resolution processes available to deal with those violations. Given economic globalization, these domestic civil dispute resolution processes have become increasingly populated by foreign actors. As the Supreme Court of Canada has acknowledged, “the business of litigation, like commerce itself, has become increasingly international.” For some time now, however, international

---

140 See e.g. supra c. 3.

141 Amchem Products Inc. v. British Columbia (Workers’ Compensation Board), [1993] 1 S.C.R. 897 at 911, Sopinka J.
commercial actors have been increasingly seeking out ADR proceedings for the resolution of their domestic disputes. These often include arbitration; however, mediation is also increasingly being used as well. As I have commented elsewhere, “[i]n an age where commercial relationships are increasingly complex and globalized ... ADR ... has become an attractive option for almost all types of disputes and disputants. ADR often provides tools that are flexible, cost-effective, private and, generally, preferred by dispute resolution consumers.”

Courts are also encouraging the use of ADR, specifically including, in this context, international commercial arbitration. For example, according to the Supreme Court of Canada:

This Court has often stressed the importance of such clauses ['arbitration clause[s] or ... choice of forum clause[s]'] ... and the need to encourage them, because they provide international commercial relations with the stability and foreseeability required for

---


144 Trevor C. W. Farrow, “The rule of law in developing countries is not just about courts” 26:31 The Lawyers Weekly (15 December 2006).
purposes of the critical components of private international law, namely order and fairness.\footnote{145}

In addition to all of these typical benefits that flow from private ADR processes (that I also discussed at length earlier\footnote{146}), international commercial actors are pursuing ADR for the purpose of actively sidestepping domestic processes and, often, domestic substantive legal rights and obligations. If we are fine with this trend, then privatize away! However, to the extent that we want: (1) to ensure that violations by international actors of domestic laws, customs and regulations are resolved in accordance with those accepted local rules (as well as established international standards); (2) current and future commercial actors – both domestic and international – operating within our borders to know that their activities and affairs will be regulated by principled and consistent legal standards; and (3) those actors to know what those standards are so that they, and others, can govern their arrangements and relationships accordingly, then putting the resolution of disputes behind closed doors, with no resulting body of publicly-available law being produced, will not help us achieve our regulatory objectives. Doing otherwise, or put differently, allowing international actors to side-step local policy arrangements and distributional choices through the promotion and use of private dispute resolution mechanisms, permits private international market


\footnote{146} See supra c. 4.
arrangements facilitated by globalization to trump domestic public democratic processes.

This is what we are currently and actively promoting with domestic ADR processes that allow and encourage international actors to resolve their disputes within domestic borders. And again, if all that was at stake was the resolution of Fiss’ “quarrel between two neighbors”, then we might not be so concerned. However, as we saw earlier, what we are more often talking about are major cases involving environmental issues, employment issues, human rights issues, and so forth. When non-domestic norms and values, particularly ones driven by corporate efficiency-based interests, are driving the litigation strategies of international disputants in cases that can have significant impacts on the current and future lives and distributional arrangements of local citizens and industries, some sense of public scrutiny and awareness of and deliberation about those cases is warranted. Doing otherwise not only loses the benefit of creating important law in a given commercial area (for the benefit of both the immediate parties as well as others who are similarly-situated), it also moves the site of norm-creation and societal regulation one step further up the global ladder and away from the local communities that are, in the end, directly and indirectly affected by the actions and distributional choices of those international actors. It cuts the citizenry out of the deliberative law making potential of the open judicial process, thereby delegitimizing the process and

147 Fiss, “Against Settlement”, supra note 20 at 1076, discussed supra at note 105 and accompanying text.
the result. It also, as Frank Michelman has commented, creates a situation in which the law and norms at play in society “that people would regularly confront” would increasingly be regulatory tools “with whose creation they have had nothing whatsoever to do.”

To illustrate my point I now look at one of the most infamous cases of economic globalization gone wrong: the Bhopal gas leak disaster. As I have discussed more thoroughly elsewhere, the event involved thousands and thousands of residents of the City of Bhopal in central India who suffered injury and death on the night of 2-3 December 1984. The tragedy resulted from a massive leak of the highly toxic methyl isocyanate gas, which was used to make Sevin and Temik pesticides, at the Union Carbide Corporation (UCC) Bhopal chemical plant. When a corporation like UCC, through its transnational holdings, is able to capitalize on the comparative advantages of foreign labour and environmental standards for the benefit of its shareholders and international clientele, one would expect it also to take the burden of remedying negative local impacts like the 1984 environmental and human rights disaster that occurred in Bhopal as a result of that capitalization. That did not happen. As such, litigation, which was largely unsuccessful on a number of fronts, was subsequently brought against UCC and others in the U.S.

---

148 Frank I. Michelman, “W(h)ither the Constitution?” (1999-2000) 21 Cardozo L. Rev. 1063 at 1071 (discussed further supra c. 2). For a further discussion on the connection between privatization and globalization, see generally ibid.

149 Farrow, “Globalization, International Human Rights, and Civil Procedure”, supra note 120.

150 See ibid.
FIVE CONCERNS ABOUT PRIVATIZATION

Despite the disappointing and problematic results of the litigation (and subsequent settlements, treatment of survivors, site cleanup, etc., all of which is still unsatisfactorily continuing 25 years later), there was one positive aspect of the Bhopal litigation: its publicity. This publicity, at least in part, fostered public awareness of the disaster. And through this awareness, increased pressure has been brought, and continues to be brought, upon (and now also from within) the international corporate community in an effort to improve corporate social responsibility in all sorts of areas of commercial activity. Further, important international initiatives also continue to develop in the area. Regardless of the success or failure of the Bhopal case from a dispute

---


CHAPTER 7

resolution perspective, it was, in my view, at least a partial success from a non-party future regulatory perspective, even without a finding of liability on the merits. That, again, is the power of public process. If all of that litigation had occurred behind closed doors pursuant to private arbitration, much of the benefit of that public scrutiny and active international and political engagement surrounding that case would have certainly been lost or greatly reduced.¹⁵⁵

Privatizing these globalized processes further will only magnify the already existing democratic deficit caused by the privatization of dispute resolution processes involving solely domestic parties. Not only does the state lose control of who gets to play in its backyard, it also loses one of its strongest tools to help control how those games get played. And when those games involve the lives and property of local citizens, through employment contracts, the use of resources, activities with major environmental impacts and so on, then we should care whether or not we maintain some degree of oversight, influence and control over, and engagement with the rules and norms by which

those activities are pursued. Privatizing these processes cuts the citizenry out of those deliberative democratic discussions.
CHAPTER 8
CHALLENGES AND THE FUTURE OF REFORM

The focus of this project is the privatization trajectory of modern civil justice practice and reform. Through this focus of attention, the overall goal of this project is to notice, and in turn to unpack, understand, question, and at times argue for the redirection of what has become the largely unwavering nature of that civil justice privatization trajectory. However, by calling for a questioning of the trajectory “at times” (rather than “at all times” or something similarly absolute), I want to make clear, as I stated in the introductory chapter, that the overall goal of this project is not to do away with privatization all together. As I have tried to articulate, there are many sound legal, political and social policy reasons, as supported by the voices of practicing stakeholders from all corners of the dispute resolution system, to support some aspects of current privatization initiatives.

As such, the difficult question for this project, as I earlier acknowledged (in chapter 1), becomes one of balance. If I am right that some privatization is desirable, but that the current trajectory of privatized civil dispute resolution practice and reform is highly problematic in that, in sum, it is at odds with fundamental notions of public democratic governance, then the discussion must move to the question of how to balance the protection of public law making functions (chapter 2) and the preferences and justifications for privatization at all levels of civil and related dispute resolution processes (chapters 3-6) with my concerns about privatization and its potential negative impacts on democracy.
CHALLENGES AND THE FUTURE OF REFORM

(chapter 7). The key to that balancing process, in my view, is a shift in how we understand, evaluate and legitimize the civil dispute resolution process in the first place. What I am talking about here, to avoid further jeopardizing the regulatory power of adjudication, is shifting the ultimate source for how we think about, legitimize, evaluate and practice civil justice away from ground-level preferences based primarily on efficiency, where, as Héctor Fix-Fierro has recognized, the legitimizing source currently lies, and toward ground-level preferences based primarily on justice.

I recognize at this stage that for my argument, which advocates for a shift in the current understanding of the fundamental justifications for civil justice practice and reform to be persuasive, it must address the strongest challenges – the counterarguments that seek to justify privatization – that line up against it. And the strongest of those justifications, as I developed earlier in this project (chapter 6) involve, in a nutshell, privatization’s tendency toward efficiency and its purported (and related) ability to facilitate access to justice. Therefore, I develop my argument in this final chapter not by sidestepping those strong counterarguments but rather by taking this opportunity to frame my argument as a direct response to, as well as a conversation with, those important counterarguments.

CHAPTER 8

1. THE BUSINESS CASE REVISITED

EFFICIENCY AND JUSTICE

As I discussed earlier in chapter 6, one of the two primary justifications for current privatization preferences is premised on a basic business case analysis, which in turn, at its core, sounds in principles of efficiency. According to these policy and practice preferences, privatization is good from a business case perspective largely because it is demonstrably more efficient. Now it is important to concede, right off the bat, that the two premises at play in this discussion – efficiency and justice – are clearly not necessarily or always mutually exclusive. Often when disputes are resolved more efficiently, justice obtains. However, on occasions when they are mutually exclusive, and in any event, justice must be the ultimate source of legitimacy and indicator of success when it comes to making significant policy choices and resource allocations at all levels and regarding all players, individual and collective, within our public systems of civil justice. When the two premises are at odds, justice must trump efficiency. To do otherwise risks one of the very foundational aspects of our processes of democratic governance. So while efficiency is clearly a good thing and must be encouraged, at the end of the day, efficiency cannot be the endgame of the

---

process. Rather, justice must be. Further, to the extent that these principles do collide, justice, and not efficiency, must be the ultimate guiding consideration for how we legitimize, evaluate, practice and reform public civil justice.

**CATEGORIZING CASES**

Here is where my argument runs up against the various policy and practice-related arguments, discussed earlier in chapters 5-6, which support the current and very robust efficiency-driven privatization ethos. Several versions of those counterarguments include, from an academic perspective for example, the arguments made by Hadfield, Caplan and Stringham, and from a public policy-making perspective, for example, from the Honourable Gord Mackintosh of the Manitoba Legislative Assembly (all discussed earlier in chapter 6). For example, recall that, according to Hadfield, the “democratic function” of law “protects rights, structures the institutions of democratic governance, redistributes wealth, promotes social objectives such as equality or clean air, and resolves disputes among citizens”; whereas the “market function” of law “provides the structure of markets – determining property rights, providing a means of commitment through contract to support cooperative activity – and regulation to correct market failures in the achievement of efficiency.”

At this initial point of the discussion, I quickly concede that I agree on one level with Hadfield: the “democratic function” of law, as I essentially articulate in chapter 2, is “one that must be accomplished through public institutions,

---

accountable to the polity in order to preserve democratic legitimacy.”

What I fail to see, however, is how many disputes – specifically including commercial disputes in the context of the arguments, for example, made expressly by Hadfield and, in essence, by Mackintosh – often only engage “a public interest in efficiency” that involves “creating wealth and maximizing the value of resources”, while not at the same time engaging other “democratic” values that include “redistribution, equality, autonomy, environmental preservation, public safety, human flourishing, participation” and the like. While Hadfield does acknowledge the possibility of an economic activity implicating “both efficiency and nonefficiency values”, where we differ is the extent to which that situation of dual implication will obtain. I fail to see how many, if not most, disputes – and again specifically including commercial disputes for purposes of this part of the discussion – do not invoke principles that go beyond the purview of what Hadfield calls the “market function” of law, or what Mackintosh contemplates as its pure “commercial” aspects.

This discussion impacts at two levels. First, at the ground level of individual disputes, the discussion engages the question of what cases should or should not go to court. Second, at a more general and collective level, the

---

4 Ibid.

5 Ibid. [emphasis omitted].

6 Ibid. [emphasis omitted].

discussion engages policy choices about civil justice processes and reform and how much those choices should be influenced by efficiency-driven principles as opposed to justice-driven principles.

**INDIVIDUAL DISPUTES**

As to the first level, the question essentially boils down to this: can we categorize civil justice disputes as ones that should go a private route as opposed to ones that should go to a public hearing? Simply put, what I am talking about here is looking at which of the cases, for example, that the litigators in the survey that I conducted for purposes of this project⁸ are involved in “should” go to court. The current reality, based on my survey and other studies,⁹ is that most civil justice stakeholders think that most cases should go the private route. That is certainly, in fact, what is happening at the moment (see chapters 3-6). And this reality is consistent with the following observation from the Chief Justice of Canada regarding approaches by the courts to this question (which is also consistent with my earlier discussion about court-based preferences in chapters 3 and 5): “Courts have been promoting various forms of out-of-court mediation and arbitration as a more effective way of achieving settlement and dealing with many civil cases. This is good.”¹⁰ However, as the Chief Justice also remarks: “the fact

---

⁸ See *supra* cc. 5-6.

⁹ See *ibid*.

is, some cases should go to court. They raise legal issues that should be considered by the courts for the good of the litigants and the development of the law.”

In light of this statement from the Chief Justice, the categorization question now gets reframed as: what cases are included in those “some cases” that “should go to court”? Or put slightly differently, Carri Menkel-Meadow questions “when and how ... we use adjudication and when ... we use something else.” To address these questions, in light of earlier discussions in this project, we need essentially to think about whether we can reasonably and meaningfully categorize cases, as Hadfield, Mackintosh and others essentially try to do, as ones that involve public interest values that engage the “democratic function” of law as opposed to ones whose public interest values extend only to a “public interest in efficiency” and as such essentially engage only the “market function” of law. The former cases, on this line of thinking, are more likely candidates for proceeding in the public dispute resolution system; whereas the latter are more likely candidates for a private system.

There is clearly an appeal to this bifurcated approach. And in the end, to the extent that I will argue for a retained (and fairly robust) place for efficiency considerations in how we think about civil justice reform going forward, this kind

---

11 Ibid. For a report of these remarks, see Kirk Makin, “Top judge sounds alarm on trial delays” The Globe and Mail (9 March 2007) A1.

of categorization *sensibility* (as opposed to an actual system) may be helpful. But it only gets us so far. Because, as I also argue, it is extremely difficult to see how a bifurcated system would work, either procedurally as a practical matter or, more importantly, from the perspective of the aspects of law that cases, substantively, actually engage. As a threshold practical matter, Owen Fiss, when challenging the ADR movement early on, considered this categorization question as well. In so doing, he rejected this approach of sorting cases into “tracks”, one for (private) settlement and one for (public) judgment.\(^\text{13}\) He essentially questioned whether a procedure could be articulated that could provide a meaningful and workable criteria-based system. According to Fiss, such a system could likely not be “sensibly implemented” because of his view that it is “impossible to formulate adequate criteria for prospectively sorting cases.”\(^\text{14}\) I tend to agree, for some of the reasons articulated immediately above.

However, let us assume that such a system could be objectively articulated. My bigger concern is that even if a criteria-based system were practically formulated, I find it hard to see whether many cases at all, in terms of the legal issues that they engage or the public policy issues that they potentially impact, would clearly involve “market” rather than “democratic” criteria as set up pursuant to a function-of-law analysis envisioned by Hadfield or, for that matter, Mackintosh. Another person who also, in essence, contemplates a bifurcated

---


CHAPTER 8

approach to evaluating cases is Richard Susskind. For Susskind, there is merit in thinking about cases in terms of “hard” cases and non-“hard” cases. “Hard” cases are those that involve “complex issues of principle, policy, and morality”. The others presumably do not. For Susskind, judges are still required for the determination of at least some of these “hard” cases. However, for non-“hard” cases, Susskind paints a scenario that contemplates, albeit provocatively, “computers replacing judges”. This, for Susskind, would be a quintessential on-line version of privatization.

If most disputes really did engage fully private A v. B scenarios, what Susskind categorizes as non-“hard” cases, or what Fiss called the typical “dispute resolution story” that involved a lawsuit as a simple “quarrel between two neighbors” (a “story” told, according to Fiss, by the ADR movement in order to justify its increased prominence), then an exercise in categorization along...

---


16 Susskind, *The End of Lawyers?*, *ibid.* at 217. But see *ibid.* at 274, where Susskind acknowledges that with respect to the work of barristers, which is “highly bespoke”, it is “hard to see how oral advocacy and the dispensing of expert advice can be standardized or computerized.”

17 As I mentioned earlier (*supra* c. 6), I acknowledge that Susskind’s thesis is not simply about replacing legal work with computers, and that his musings about computers and judging must be put in the context of his overall arguments about “standardization, commoditization, and the transfer of many legal tasks from lawyers to non-lawyers.” See *ibid.* at 274.


20 Fiss, “Against Settlement”, *supra* note 13 at 1076.
“hard” vs. non-“hard” cases, or public interest vs. private (or market-based) interest might make significant sense. As I have argued elsewhere, to the extent that

a dispute involves the private rights of A v. B, and further, when two “consenting adults” (including corporations) have chosen to move their dispute off the busy docket of our public court system and into the private boardroom of an arbitrator or mediator, current views suggest that justice is being served. The argument is that the resolution of disputes – like other goods and services – should not be deprived of the benefits of freedom of movement and contract in an efficiency-seeking, innovative and expanding market economy.\(^{21}\)

However, in addition to the “costs”\(^{22}\) associated with this kind of approach that I discussed earlier in this project (see e.g. chapter 7), the concern that I am raising here is that, like Fiss, I think the number of cases that involve more than simply the “market” or non-“hard” aspects of law is likely not negligible. The kinds of cases Fiss was interested in included “those cases in which there are significant distributional inequalities … and those in which justice needs to be done, or to put it more modestly, where there is a genuine social need for an authoritative interpretation of law.” As with Fiss, I agree that “the number of cases that satisfy one of these … criteria is considerable…. [T]hey probably dominate the docket of a modern court system.”\(^{23}\) My position here is based on my view that many cases that might look to be “market”-related cases in fact

\(^{21}\) Farrow, “Privatizing our Public Civil Justice System”, \textit{supra} note 18 at 16.

\(^{22}\) See \textit{ibid}.

\(^{23}\) Fiss, “Against Settlement”, \textit{supra} note 13 at 1087.
CHAPTER 8

engage much more than those efficiency-premised issues. Many important public policy issues lurk behind the façade of fights over private property and contracts.

THE DEALERSHIP CASE

A terrific example that supports this position is the Dealership case. As I argued earlier,24 the Dealership case was a commercial case that, on first blush, very much engaged the “market function” of law as contemplated by Hadfield, or the flavor of “commercial” cases contemplated by Mackintosh for which, in his view, private dispute resolution processes should be “require[d]”.25 On one level, the case was about “determining property rights”, “providing a means of commitment through contract to support cooperative activity” and “correct[ing] market failures in the achievement of efficiency.”26 It also, along these market-oriented lines, engaged what Hadfield identifies as “a public interest in efficiency”, which involves “creating wealth and maximizing the value of resources.”27 On these levels, the Dealership case was very much a case that engaged the non-“hard”, “commercial”, and “market function” of law and therefore should take seriously ways in which its resolution could have maximized the efficient use (or, in fact, non-use) of state resources as well as being efficient in terms of its distributional outcome(s).

24 See supra c. 7.


26 Hadfield, “Privatizing Commercial Law: Lessons From ICANN”, supra note 3 at 263.

27 Ibid. [emphasis omitted].

346
Given the privatized nature of how the case proceeded, that is in fact what did occur. It was treated, in the end, as a non-“hard” case. And in my view, that treatment resulted in a serious miscarriage of justice. Because, on further reflection (as I discussed in chapter 7), the Dealership case also engaged many aspects of what I would identify with Hadfield’s notion of the “democratic function” of law, including issues of “redistribution” (in the context of corporate and consumer affairs), “public safety” (not from a personal security point of view but rather from the point of view of protecting society from fraud, misrepresentation and other unfair and harmful business practices), “human flourishing” (broadly defined to include the business-related interests of consumers and providers), “participation” (again broadly defined to include consumer and provider participation in and protection from meaningful market arrangements), and the like.\(^\text{28}\) It also engaged aspects of what qualify, for Susskind, as “hard” cases: cases that involve issues of “principle, policy, and morality”.\(^\text{29}\) As such, the Dealership case, which on its face looks very much like a non-“hard” case, but on reflection engages many if not most aspects of what would be considered to be “hard” cases that perhaps “should go to court”\(^\text{30}\), very much challenges the notion that cases can be easily categorized as involving only one or another aspect of law.

\(^{28}\) Ibid. [emphasis omitted].

\(^{29}\) Susskind, The End of Lawyers?, supra note 15 at 217.

\(^{30}\) McLachlin, “The Challenges We Face”, supra note 10.
THREE HYPOTHETICAL EXAMPLES

While the Dealership case is a particularly useful case for this discussion, it is not the only case (or kind of case) that engages (and potentially challenges) a bifurcated approach to thinking about ground-level dispute resolution choices. Many examples, real or hypothetical, caricatures or not, and which could support the “business case” for privatization that I discussed earlier in this project, also illustrate the point. For the purpose of further animating this discussion, I have crafted three other civil cases (which specifically do not, in-line with the overall focus of this project, directly involve family law issues). While these examples are all hypothetical cases, they are based on real examples with which I have some direct knowledge or familiarity. And in case it isn’t already clear, the purpose of setting out these cases is, as with the Dealership case, to demonstrate how very “market”, “commercial”, non-“hard” or private-looking cases that many would say should not go to court can, on further reflection or with only slight factual variations, engage some very important, “hard” and public interest values.

The first example contemplates a private commercial law dispute between a supplier and a manufacturer over a supply contract. The supplier supplies parts for a given manufacturing process. Both supplier and manufacturer are of similar size and of similar financial strength. The parts in question are relatively specialized, and are not the subject of many other similar supply contacts for similarly-situated manufacturers. Neither the supplier nor the manufacturer

31 See supra c. 6.
depends, for its financial future or viability, on the outcome of this one contract. As such, while clearly important, financial futures are not at stake. Further, because there are not many (if any) similarly-situated parties with similar relationships or contracts (again, the parts here are specialized), there is less of a need for a well-publicized precedent to guide the resolution of similar future disputes across a broad industry sector (although the result of this dispute could, arguably, be useful for other general supply disputes). Finally, again given the relative uniqueness of this relationship and the small market, there is less of a need for a public process, perhaps reported on by the press, and precedent – including perhaps some significant damage award – to guide (and perhaps deter) future behaviour along similar lines. Based on these facts alone, the case looks very much like a case that would be a good candidate for a privatized dispute resolution process.

My second hypothetical example comes from the franchise sector. One dispute of which I have recently become aware almost crushed an extremely successful small restaurant business. The dispute involved an alleged agreement between the restaurant chain (the “Restaurant”) and one of its franchisees. Specifically, what was in essence at issue was the ownership of a particular location of the Restaurant and its profits. Often, franchisees in Canada, particularly in the restaurant industry, have been seen to be in a less powerful
position than franchisors. However, in this case, the relative size and strength of the two parties was essentially equal. Both were small. Both were private. The type of restaurant at issue was relatively (although not totally) unique. And as such, again, while a precedent would not be irrelevant to other franchise disputes, given the relatively unique circumstances of this case, the need for a precedent was not as great as it might be with a much more run-of-the-mill franchise dispute. The dispute at issue here lasted several years. Both sides retained counsel. Counter-claims were made. Counsel for the Restaurant ultimately got off the file because of a potential negligence claim against him. New counsel was retained. Professional and private insurers were involved. Experts were retained. Many hundreds of thousands of dollars were spent on legal and other fees. The financial impact on the parties was enormous. The emotional and other impacts on the individuals involved and their day-to-day operations was equally if not more significant. After years of litigation, the case was settled for essentially


The fifty plaintiffs in this case are all franchise owners (“franchisees”) who operate Pizza Pizza stores in Ontario. Many of these people have come to Canada as immigrants or refugees, worked hard and saved money scrupulously, and then invested their life savings in the purchase of a Pizza Pizza outlet. Having obtained a franchise, they then work long hours, often in arduous conditions, in an attempt to earn a living from their stores. Anyone who has stood at the counter of a Pizza Pizza store and peered into the kitchen behind, or watched a Pizza Pizza delivery car push through the snow of unploughed streets to beat the advertised 30 minute delivery time (it’s free if it’s late) must know that the operation of a Pizza Pizza franchise is difficult and stressful work indeed.

Because of various pressures, including from court-based precedents, legislative initiatives – like Ontario’s Arthur Wishart Act (Franchise Disclosure), 2000, S.O. 2000, c. 3 – have been pursued in order to address some of these franchise-related working conditions, contractual arrangements and power imbalances.
what the parties first discussed right at the time that the dispute arose. Had an early privatized process been used, much of the financial, emotional, health-related and other business damage would have been avoided. Again, the dispute described here would have been an ideal candidate for early ADR (it ultimately settled in any event using a private mediation process).

A final example involves a very basic, private dispute between two neighbors over the height that one of the neighbors wants to build an adjoining fence (this case is largely in line with what Fiss described as the typical “dispute resolution story” involving a “quarrel between two neighbors”\textsuperscript{33}). Imagine a community that is not governed by uniform appearance codes (for example certain condominiums, cooperative apartments or exclusive housing communities). Unlike those more specialized housing types, this is a regular pair of houses on a regular street in a regular neighborhood. Also imagine that the local building code allows for a fence to be built at the different heights that the two neighbours are proposing. It also happens that the fence separates the neighbours’ backyards, and is not visible to any other person in the neighbourhood. It is a truly private fence. One neighbor wants a ten foot tall, full barrier against which children can play ball. The other neighbor wants an extremely low, chain-linked fence through which climbing shrubs can grow (to give more of a sense of space, light and nature). Clearly this is not a unique dispute, and a precedent could be of use to some similarly-situated neighbours in

\textsuperscript{33} Fiss, “Against Settlement”, \textit{supra} note 13 at 1076 (discussed further \textit{supra} note 20 and accompanying text).
some similarly-situated communities. However, notwithstanding the potential
precedential benefit of a case like this (assuming, for the moment, that a precedent
from a dispute like this, which would likely occur, if at all, in a small claims
court, would get published in the first place), there is a serious question— an over­
ridding question— about whether the cost of such a dispute could ever justify
taking it to court (either in monetary terms, or, even if it were to go to small
claims court, in terms of the time and resources used to pursue it). Again, this
dispute would be a very good candidate to be resolved by a private ADR process:
an ongoing relationship is involved; a relative equality of power exists between
the parties; the monetary value is low; and interests, rather than rights, are likely
what are ultimately driving this dispute.

The common element of these three hypothetical cases is the fact that all of
them would likely be good candidates for a privatized dispute resolution process.
While certainly engaging important issues for the immediate disputants, the
resolution of each of these cases will not likely have a significant impact on
parties other than those immediately involved in the dispute. As such, they are
good candidates for ADR, or put differently, they are cases that perhaps “should
[not] go to court”.

However, if the factual premises of the cases were very slightly altered, they
could equally become cases that are good candidates for a public dispute
resolution process. In the first case, if the supply parts in question were slightly
less specialized, all of a sudden the precedential value of the case becomes
significantly greater. And further, if the conduct of one of the parties in the
dispute involved some kind of ongoing bad faith, fraud or other kind of unfair or
sharp business practice, then the precedential value of the case for similarly-
situated manufacturers or suppliers would be greater still (not to mention the
public protection function of law as well). At its core the case would still involve
the private corporate interests of A v. B. However, once slightly modified as I
have just suggested, the case now also engages significant public interest issues
that go beyond simply the private interests of the immediate corporate disputants.
And like with the Dealership case, these important factual nuances and variances
are not always apparent at the outset of a case. In the Dealership case, for
example, it took months for us to start to understand the full nature and extent of
the misconduct that had been and was still occurring on the other side of the table.

In the second hypothetical case, a similar shift would occur if the type of
restaurant at issue were slightly less unique. All of a sudden, the case, which
potentially involves labour rights, human rights, corporate arrangements and
distributional choices, would be of significant interest to a wide variety of public
and private individuals and entities. Finally, a similar shift would also occur in
the third hypothetical scenario. Even if one fact – the fence’s visibility to
passersby on surrounding public walkways – were to change (i.e. the fence was
slightly more visible), all of a sudden the nature of the case shifts from one that
engages largely individual private interests to one that equally engages other,
more public elements. And all it takes to change this kind of fact, for example, is
for the case to be initiated not during the summer months, but rather during the winter months, when leaves and other foliage no longer shade the fence from public view.

There are several points to make here. The first is to acknowledge that there certainly are cases that are good candidates for privatized processes. These three cases, as initially presented, are such cases. They involve matters that, at their core, are primarily and largely of concern only to the immediate parties. These cases also do not involve significant power imbalances in terms of financial or litigation resources or capacities. The second point, however, is to emphasize that it does not take much at all to change these cases into potentially good candidates for a more public dispute resolution setting. As I have argued above, my sense is that many cases that are seen as good cases for private processes in fact involve facts and issues that make them perhaps equally good (and sometimes better) candidates for a public process. Seeing these three hypothetical cases (as slightly revised as discussed above), as well as the Dealership case, all as cases that could, on one level, fit the “market function” criteria of law and, at the same time, could fit the “democratic function” criteria of law demonstrates how problematic it would be to rely on a criteria or “track”-based system. In particular, the risk is, as we have seen, that such a system would categorize cases at the outset in ways that would arbitrarily classify those cases or, worse, in ways that would risk putting them into a “market”, non-“hard”, “commercial”, or private track instead of a “democratic”, “hard”, or public track (and perhaps vice versa). A simple “track”-
based system for categorizing which cases, at the front-end of the ground-level of individual disputes, “should” go to court and which cases should not go to court does not, therefore, seem to be workable.

**Retained Party Autonomy**

However, by recognizing the difficulty of imposing a track-based system at the dispute resolution level – for example by requiring individual parties to certify at the court clerk’s office that their case involves matters that engage the “democratic function” of law and legal process, or to confirm that their case is of a “hard” nature – I am not suggesting that parties should be deprived absolutely of the choice to proceed by way of public or private processes. First, to do so would be equally unworkable. It would be difficult to imagine a world, at the present time and under present economic circumstances, in which parties were forced to take all (or even most) disputes to court, no matter what or who was involved. For example, forcing the neighbors in my third hypothetical case above to take what could be a totally private dispute to court would not be workable or desirable.

While some societies in which I have worked in the context of civil justice and judicial reform do seem, at least at the moment, to favour taking disputes to court as opposed to trying to settle them by way of ADR and related privatized processes, litigants in those public-process-heavy systems still retain the choice to go the public or the private route. I am thinking here, for example, of work that I have done with several Canadian International Development Agency (“CIDA”)-
funded development projects over the past five or six years in post-war Bosnia and Herzegovina, in the context of which I discovered, first-hand, that parties in that country still largely pursue the resolution of civil disputes in the public court system as opposed to private ADR regimes.

Further, even if it were possible to require all parties to take all cases to court as opposed to pursuing the resolution of their disputes in one of a variety of alternative private processes, doing so would fly in the face of current democratic principles of freedom of choice and contract. Put simply, ADR is one of the beneficiaries of the free market economy. As I have noticed elsewhere (and above) regarding arguments allowing for and favouring private processes, “the resolution of disputes – like other goods and services – should not be deprived of the benefits of freedom of movement and contract in an efficiency-seeking, innovative and expanding market economy.”

Finally, requiring all disputes to go to court would make a mess of the public court docket. Again, I need only reflect on my recent work in Bosnia and Herzegovina to find a case study of that problem. Because of the typical preference of Bosnian citizens for taking their disputes to court as opposed to settling them through private processes, the courts in Bosnia and Herzegovina are saddled with huge and crushing case backlogs. As confirmed by the United States Agency for International Development (“USAID”), “Delays and backlogs have increased drastically since the end of the war. The heavy caseloads of the courts have led to delays in the processing of civil cases resulting in overcrowded courtrooms and long backlogs.”

---

34 Farrow, “Privatizing our Public Civil Justice System”, supra note 18 at 16.
plagued Bosnia and Herzegovina’s courts for years.” According to the Consortium GENIVAR-University of Ottawa (with which I was involved as a consultant for a number of years), there are “approximately 700,000 utility cases backlogged in the Sarajevo Municipal Court” alone. And while it is certainly important to acknowledge that, given the intervention of various Canadian, American and other international donor and development organizations and projects, Bosnia and Herzegovina’s court delays and backlogs are starting to be positively addressed (largely through court administration and technology-based innovations as well as ADR-related initiatives), there is still a long way to go to overcome what is a deep-rooted culture that prefers to litigate rather than to settle.

So where does that leave us? At the ground level of individual civil disputes, it seems to me that it would be: (1) very difficult to contemplate a workable system in which cases are sorted into public or private “tracks” based on how “hard”, “commercial”, “market”-oriented or “democratic”-oriented they are; and (2) equally unworkable and difficult to imagine forcing all parties to engage the public system for all cases. As such, parties who are left to their own devices (which is a significant goal of liberal democratic justice systems) will choose a process that is right and expedient for them and their disputes. However, the


37 See e.g. ibid. See also USAID, “Coordinating the Country’s Court Cases”, supra note 35.
CHAPTER 8

ground level of individual disputes is not the only relevant level of discussion. And in fact, for purposes of this project, it is not the primary level of focus. Because where I do feel that there is significant room for discussion and re-thinking is at the higher level of collective policy choices regarding civil justice process and reform. This level is important on its own. It is also important in that it will often directly influence how parties deal with their cases at the level of individual dispute resolution as well.

CIVIL JUSTICE PROCESS AND REFORM

So while the ground, “retail” level of civil dispute resolution still involves a significant amount of free market choice about how disputes should and do get resolved (i.e. publicly or privately), there is certainly more to be said regarding how we think about civil justice process and reform from a general, system-wide, “wholesale” level of policy.\(^\text{38}\) The discussion here focuses not on individual cases, but rather on collective policy choices about civil justice process and reform and how much those choices should be influenced by efficiency-driven principles as opposed to justice-driven principles. This discussion directly engages some of the institutional stakeholders that were discussed earlier in chapter 5, including governments and policy-making bodies such as law commissions and law reform institutes, courts, law societies, bar associations, law schools, and the like. It is here where I think a fundamental shift does need to be

\(^{38}\) The words “retail” and “wholesale” come, albeit in a different context, from Rob Atkinson, “How the Butler Was Made to Do It: The Perverted Professionalism of the Remains of the Day” (1995) 105 Yale L.J. 177 at 188.

358
made: a shift in the overall ethos of those who work with and think about public civil dispute resolution processes and reform. Put simply, all civil justice policy, reform thinking and implementation needs to start from bottom-line legitimizing and evaluating premises based not on notions of efficiency but rather on robust notions of justice.

As I discussed earlier in chapter 6, the civil justice system, and in particular those who use, provide and reform that system, are preoccupied with efficiency. As Mirjan Damaška has argued,


Similar observations are made by Janice Gross Stein – about society generally – in her observation that recently: “My ear has caught more and more public talk about efficiency, accountability, and choice, and less and less about equity and justice.” I do not think it is an overstatement to say that current civil justice practices and policy thinking have focused their sights largely on efficiency alone, as opposed to the goal of justice that might be obtained in various ways,


including, but not limited to, ways that maximize efficiency. The important
difference is, in-line with the observations of both Damaška and Janice Gross
Stein, that the current ethos of reform looks at efficiency largely and increasingly
for efficiency’s sake, whereas a justice-seeking sensibility looks at efficiency as a
way to help achieve the end goal of justice. However, before pursuing this
discussion further, it is illustrative to recognize that, while I articulated numerous
examples in chapter 6 of how governments, courts, tribunals and the like are
tending to focus on efficiency essentially as an end in itself, there are also helpful
eamples of where these civil justice stakeholders are engaged in policy choices
that go beyond a simple efficiency-based threshold.

Take for example the relatively recent decision by the Ontario Government
to prohibit the application of its *Arbitration Act* to family law arbitrations that do
not proceed in a manner that is consistent with Ontario or Canadian family law
and Charter-related values.\(^{41}\) That decision was clearly made in light of the
obvious public interest issues engaged in family law disputes, and in particular,
gender, religious, child-welfare and community-welfare interests, etc. While
purely efficiency-related considerations might have yielded a different result,
what animated the Government’s decision – which was made in the context of an
extremely lively public deliberative process – was a sense of the underlying
justice issues that were at stake in these sorts of proceedings. Similar balancing

\(^{41}\) For a further discussion of this issue, see *supra* c. 7. See also, in particular, Trevor C. W.
exercises were clearly at play in the context of recent procedurally-based reforms to consumer protection legislation that I also discussed earlier in this project.42

Similarly, in the operation of civil courts, all players – specifically including masters and judges – should not be overly pressured into realizing economic efficiencies as ends in themselves, including, for example, backlog and cost reduction goals and initiatives. While backlog and cost reduction initiatives are important, they are only important if they assist in the furthering of the ultimate business of courts, namely: resolving disputes as well as, more generally, setting society-wide expectations and assisting with the modification of individual and community relationships and distributional arrangements. Public decision-makers need to have the power to make procedural decisions and encourage procedural choices that privilege justice-seeking considerations over purely efficiency-seeking ones. Given that courts are in the business of delivering justice, while at the same time are becoming increasingly active in the promotion of settlements and other private processes, they cannot, as Galanter and Cahill have cautioned, be agnostic to the impact of those private processes, the processes by which those settlements are reached, or the outcomes they produce. With respect to settlement, for example, according to Galanter and Cahill: “Once we apprehend the multiplex connection between court and settlement, ensuring the quality of

---

42 See e.g. supra cc. 5 and 7.
these processes and the settlements they produce is a central task of the
administration of justice.”

I am aware, as I briefly discussed in chapter 7, that judges in class action
cases, because of the public nature of those kinds of proceedings, engage in these
sorts of considerations all the time. Indeed, a key animating aspect of all class
action proceedings is a public, behavior modification component. For example,
as the Supreme Court of Canada stated in Western Canadian Shopping Centres
Inc. v. Dutton,

[Class actions serve efficiency and justice by ensuring that actual and
potential wrongdoers do not ignore their obligations to the public. Without
class actions, those who cause widespread but individually
minimal harm might not take into account the full costs of their
conduct, because for any one plaintiff the expense of bringing suit
would far exceed the likely recovery. Cost-sharing decreases the
expense of pursuing legal recourse and accordingly deters potential
defendants who might otherwise assume that minor wrongs would not
result in litigation....

It is this behavior modification or deterrence aspect of dispute resolution that
plays an underlying role in judicial deliberations regarding whether or not –
through the certification process – to allow a class action to proceed. It is
these kinds of behavior modification considerations that also play an underlying

43 Marc Galanter and Mia Cahill, “Most Cases Settle: Judicial Promotion and Regulation of

44 Western Canadian Shopping Centres Inc. v. Dutton, [2001] 2 S.C.R. 534 at para. 29,
McLachlin C.J. See also Hollick v. Toronto (City), [2001] 3 S.C.R. 158 at para. 15.

45 See e.g. the requirements of Ontario’s Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 5.

46 See e.g. Western Canadian Shopping Centres Inc. v. Dutton, supra note 44; Hollick v. Toronto
(City), supra note 44.
role in whether or not judges will approve particular settlements in class action proceedings\(^{47}\) (a step that is required under various class proceedings statutes\(^{48}\)).

However, in addition to class proceedings, which are relatively specialized in that they are self-consciously designed to take up these collective, public interest aspects of law, I am also clearly aware that masters and judges already have the power to – and do – make decisions that privilege a legitimizing sensibility of justice over that of pure efficiency in contexts involving other procedural aspects of the civil dispute resolution system. An example of such a procedural context – one that particularly resonates with the arguments at issue in this project – involves judicial decisions about whether to promote or not to promote the use of mandatory ADR provisions in the context of a piece of civil litigation. For example, when deciding on whether to exempt a case from mandatory mediation, the court has the power to move a case off a mediation list for several reasons, including where matters of significant public interest are involved. In *O. (G.) v. H. (C.D.)*, Kiteley J. articulated the following considerations in these sorts of circumstances:

> At the risk of generalizing from the few reasons for decision and from the somewhat cryptic explanation made by the local mediation coordinators in the list tracking exemptions, it would appear that the following criteria are relevant to whether an exemption order should be granted:

> • whether the parties have already engaged in a form of dispute resolution, and, in the interests of reducing cost

---


\(^{48}\) See *e.g.* Ontario’s *Class Proceedings Act, 1992*, supra note 45 at s. 29.
CHAPTER 8

and delay, they ought not to be required to repeat the effort; [and]

- whether the issue involves a matter of public interest or importance which requires adjudication in order to establish an authority which will be persuasive if not binding on other cases....

It was the second of these types of considerations – considerations involving matters of public interest – that animated Master Beaudoin’s reasons in the earlier case of Wilson v. Canada (Attorney General). In that case, the applicants challenged s. 25(4) of the Public Services Superannuation Act, R.S.C 1985 c. P-36 – regarding the definition of a “surviving spouse”, which included the words “opposite sex” – as violating s. 15 of the Charter. The moving parties in the particular motion before the Master sought leave to have the proceedings exempted from a mandatory referral to mediation, as, in their view, it would “not be productive given the subject matter of the Application.” Master Beaudoin, when granting the motion, gave the following reasons:

The Ottawa Practice Direction with respect to mandatory referral to mediation contemplates a referral to interest-based mediation. Through the intervention of a third party neutral, the parties are encouraged to consider a resolution of their dispute on terms that consider their broader interests rather than a strict consideration of their rights; often requiring the parties to arrive at a form of compromise. In this instance, the resolution of this application requires the determination of the rights of the individual applicants, not only for themselves but for all others who are similarly situated.


51 Wilson v. Canada (Attorney General), supra note 50 at para. 2.
CHALLENGES AND THE FUTURE OF REFORM

There is no precedent to guide the court in this matter. An article entitled The Adequacy of the Adversarial System in Charter Litigation by Robin S. Sharma in the National Journal of Constitutional Law [3 N.J.C.L.], in my view, correctly sets out the approach to be taken. At p. 119 the author cites two reasons why Alternative Dispute Resolution techniques may not be appropriate in resolving Charter disputes. With regard to the second reason the author states:

...constitutional cases, so often involving issues of paramount societal concern, must have the ability to influence and shape future conduct and to prompt necessary behavioural changes. This requires adjudication within a public forum such as a law court where the public interest is represented and binding, effective decisions are rendered.

While the author goes on to suggest that certain cases exist where compromise/settlement procedures should be considered seriously, this is not one of those cases. The ultimate disposition of this application will have implications for same sex couples throughout the country and accordingly, leave to be exempted from the referral is granted.52

Masters and judges, in line with Master Beaudoin’s approach in Wilson, should base their decisions about the use and encouragement of mediation and other private dispute resolution processes on considerations that are animated primarily by principles of justice, not efficiency. To the extent that the two principles obtain, so much the better. But the first must trump the second in terms of an animating force for public decision-making processes and approaches. Such an approach should clearly be pursued in these sorts of high profile public interest cases. However, what counts as “public interest” should not be viewed so narrowly as only to include the sorts of Charter issues that were at stake in the Wilson case. While those cases are clearly important, they are not the only cases

52 Ibid. at paras. 3-4.
that act to shape the conduct and relationships of day-to-day people on day-to-day issues. As I discussed above, particularly in the context of the Dealership case, almost all cases can be seen as potential candidates to be moved off the privatization track and onto a public track. Current and overwhelming preferences for efficiency, particularly in the moments of a civil case when decisions about case management or court-annexed ADR processes are made, militate against considering, let alone encouraging, the use of public processes for more than the most obvious of public interest cases.

The same shift in sensibility from preferring efficiency over justice as the ultimate source of evaluation and legitimacy needs to obtain at the administrative tribunal level as well. Clearly, to-date, government preferences for including and encouraging ADR at all levels of operation, expressly in pursuit of efficiency-related factors, has resulted in the significant use of ADR throughout the federal and provincial administrative system. As I discussed in chapter 4, according to the settlement rates and statistics of some of those tribunals, the use of ADR is becoming the norm. Like with the court system, the problem is not that tools do not exist for these sorts of justice-based considerations. They do. For example, notwithstanding the Canadian Human Rights Commission’s (“CHRC”) preference and active promotion of ADR when resolving complaints, it still retains the

---

53 See supra c. 4.

jurisdiction to review complaints on a case-by-case basis to determine whether public policy considerations militate against the use of ADR:

The Commission’s focused litigation strategy allows it to support the parties at pre-tribunal mediation, while it concentrates on vigorously pursuing high-impact, public interest cases before the Canadian Human Rights Tribunal. On a case-by-case basis, the Commission determines the scope and nature of its participation before the Tribunal after assessing such factors as whether the case raises broad policy issues, relates to major policy concerns, or raises new points of law. The Commission can also intervene in precedent-setting cases before courts and administrative tribunals dealing with human rights issues.\(^{55}\)

Of course “high-impact” cases that involve the “public interest” and “major policy concerns” should, typically, be subject to the scrutiny and rigour of the public tribunal process. However, as argued above in the context of the Dealership case (although admittedly not an administrative case), there are many instances in which cases that are not self-consciously high impact or high profile (particularly on their face) turn out to be significant in terms of overall societal regulation. Those cases, too, should become candidates for staying on the public track. At the moment, my fear is that the sensibility of privatization at the tribunal level systematically leads these sorts of cases to the private track. Again, the guiding sensibility in these sorts of determinations should be guided by principles of open justice, not private efficiency. Cases going to ADR need to be very carefully considered to ensure that they are not being sent there for reasons of expediency or efficiency, notwithstanding that they engage important democratic


367
functions of law. Further, to the extent cases are sent to ADR, mediators and other neutrals need to ensure that any settlements are consistent with justice-based public interest values, and that those settlements are properly approved by the commission or tribunal in question and published in as clear and informative a way as possible.\footnote{For a useful source and discussion of some of these ideas, see Philip Bryden and William Black, “Mediation as a Tool for Resolving Human Rights Disputes: An Evaluation of the B.C. Human Rights Commission’s Early Mediation Project” (2004) 37 U.B.C. L. Rev. 73 at paras. 33-42 (QL).}

So it is these and other examples of government, court, tribunal and other stakeholder-related initiatives that challenge the current trends of making efficiency the endgame of civil justice practice and reform. Efficiency for efficiency’s sake is not the answer. Efficiency must remain the handmaiden of justice, and not vice versa. We have now seen several examples where this has successfully occurred. We have also now seen why the efficiency-focused, business-case analyses that I developed in this project, on their own, are not able to provide an adequate framework by which to evaluate, practice and reform civil justice. The failure of these analyses to deal with the several faces of the Dealership case, for example, articulates this deficiency. However, before we get to a further discussion of the road ahead, there is the other primary justification for privatization that needs to be addressed, namely: access to justice.

2. ACCESS TO JUSTICE REVISITED

The other major justification for privatization is that it militates in favour of promoting access to justice. And here is where the efficiency argument, coupled
with the realities of the inaccessibility of our current justice system, is at its strongest in my view. Put simply, making the current public system more efficient and affordable, as well as by providing dispute resolution avenues that are alternative to the public system, improves access to the tools of civil dispute resolution, which is certainly a good thing on any account. To the extent that studies, for example, by Ab Currie, Pascoe Pleasence and others\textsuperscript{57} confirm that people with unmet legal needs typically suffer significant legal, social and personal problems (including health-related problems), there is no doubt that making tools that can assist with those problems more accessible will be a good thing for those individuals, as well as for society. So here is where, at a systemic level, I do leave significant room for discussion, debate and continued policy thinking that follow some trajectories of privatization in the name of providing more access to the tools of civil justice for more people.

However, before stopping here, it is extremely important to notice what we are doing by pursuing these trajectories. Choices within the civil justice system that involve efficiency-driven privatization initiatives are designed to increase access to the tools of civil justice (lawyers, judges, small claims and other courts, simplified procedures, etc.). Whether or not these choices increase access to justice depends entirely on whether what has been increased does, in fact, amount to an increase in justice, or, instead, simply a tool of procedure. In chapter 6, I identified many of the current arguments surrounding access to justice initiatives.

\textsuperscript{57} See supra c. 6.
For example, the public materials from the Ontario Government supporting the recent civil justice reforms in that province, some of which are set out again below, sound largely in “access to justice” language:

Ontario’s new civil justice reforms will make it less expensive to access justice and easier to use the courts to quickly resolve disputes.

The province is increasing the monetary limit of the Small Claims Court from $10,000 to $25,000 effective January 1, 2010. This will provide a faster and more affordable option to Ontarians and businesses who are unable to resolve their own disputes.

Additional civil justice reforms arising from 25 significant changes to the rules of Ontario’s civil courts will simplify, speed up, and lower the costs of resolving disputes, including:

- Making it easier and more affordable to resolve civil cases by raising the monetary limit for Simplified Procedure from $50,000 to $100,000, effective January 1, 2010....

- Lowering litigation costs and reducing the need for lengthy trials by making it easier to resolve cases earlier.

The civil courts will now also be subject to the general principle of proportionality. This means the time and expense devoted to any case must reflect what is at stake in the proceedings....

When discussing these various reforms, Ontario’s Attorney General Chris Bentley stated that: “[c]ivil justice needs to be accessible and affordable if it is to work for all Ontarians” and that “[e]ach of these changes – and particularly the Small Claims or ‘people’s court’ reform – will help everyday Ontarians to fairly

resolve disputes that they can’t resolve on their own.”\footnote{Ibid. See also the discussion of these materials at supra c. 6.} It is clear from these and other statements\footnote{See further supra c. 6.} that, in essence, what the Government is calling increased “access to justice” really involves an effort to increase access to the tools of civil dispute resolution. Specifically, these reform initiatives are designed to provide faster, cheaper and more accessible court processes, among other civil justice tools. While these are certainly laudable goals, they do not automatically amount to an increase in access to justice.

If we return to the discussion I started earlier in this project regarding the difference between the narrow and broader senses of access to justice,\footnote{See ibid.} what we certainly are doing in the context of the modern civil justice reform movement is, at best, increasing access to justice in its narrow sense. And my worry here is that by framing current reform movements in the terms we do (i.e. as increasing “access to justice”), I fear that we are obfuscating what are at core much deeper justice-related problems in society. In its broader sense, access to justice has been discussed in much wider and more aspirational terms. These kinds of terms essentially frame the notion of justice as including much more of what are considered to be the basic tools of living and operating in a modern democratic society. These kinds of considerations include the potential for access to the tools of power in society, which can, broadly conceived, include for example
meaningful and representational voting rights; access to the necessities of life, including perhaps food, housing, education and health care; and also the tools of meaningful justice, including not only dispute resolution, but powers of dispute avoidance, relationship building, the ability to understand and engage with rules, laws, policies and legal practices, and the ability to have those rules, laws, policies and practices take into account relevant cultural or other important personal considerations. One vocal proponent of a broad conception of access to justice is Roderick Macdonald, who has argued that:

Experience has shown that true access to justice means more than overcoming the time, cost and complex barriers that limit people's ability to deploy official institutions to help resolve a legal problem. Making dispute-resolution institutions more objectively accessible will not overcome the main failings of official law simply because official law is, in myriad ways, the cause of these failings. Subjective, not objective, barriers bulk largest. Words like disenchantment,
disenfranchisement and disempowerment best capture how many citizens view the justice system.

Our systems of civil justice are not designed to contest or disrupt the existing distributions of social power that stand in the way of broader access. Access to justice will never be achieved through reactive adjudicative institutions that are meant to find justice in relationships by simply restoring an unjust status quo ante. Efficiency in the service of injustice is not a social good. So the core access to justice challenge is:

How do we give as much emphasis to the “justice” component of the phrase “access to justice” as we do to the “access” component so that citizens will actually want to pursue justice in courts?...

[I]t is time to jettison the belief that a lack of access to justice can be remedied principally by systemic reform and by institutional redesign. Law is a precious resource for mediating human relationships. A failure to ask what we expect of our law is a failure to ask what we expect of ourselves. Every day we consciously disengage from the hard work of building a more just society. This disengagement is the greatest barrier to access to justice.

True access to justice requires us to seek and to find meaning in our interactions with others by discovering and nurturing just relationships. In the end, we vindicate the goal of a just and accessible law by making it just and accessible in our own lives.  

Similarly, for Jürgen Habermas, the “interactions with others” of the sort contemplated by Macdonald become, as part of Habermas’ discourse theory of law and democracy, a central element to a meaningful notion of access to justice. Like Macdonald, Habermas also looks at the notion of access to justice in

---


64 For a brief discussion of Habermas’ discourse theory of justice, in the context of this project, see supra c. 2.

373
broad terms, and certainly beyond a simple notion of access to courts and lawyers. For Habermas, access to justice includes access to processes that “involve” clients in “the organized perception, articulation, and assertion of their own interests.”

Interests are not synonymous with narrow legal rights. Rather, what is at stake here, in this broad sense of access to justice, really amounts to access to the tools of meaningful community participation and citizenship. Again according to Habermas,

[A]ffected citizens must experience the organization of legal protection as a political process, and they themselves must be able to take part in the construction of countervailing power and the articulation of social interests. Participation in legal procedures could then be interpreted as collaboration in the process of realizing rights, thus linking positive legal status with the status of active citizenship.

The importance of the participatory aspect of Habermas’ vision of access to justice is also heightened under his discourse theory of law given the pluralism of norms that exist in modern globalized societies (discussed briefly in chapter 7), in what Habermas describes as pluralistic communities in which “comprehensive worldviews and collectively binding ethics have disintegrated”; or in “societies in which the surviving posttraditional morality of conscience no longer supplies a substitute for the natural law that was once grounded in religion or metaphysics.”

Under these pluralistic and globalized social conditions, the “democratic procedure for the production of law ... forms the only


66 *Ibid.* [emphasis omitted].

postmetaphysical source of legitimacy.\textsuperscript{68} Here again, in the context of this discussion of access to justice, we see the connections, as I discussed more fully in chapter 2, between the judicial function, a pluralistic citizenry’s role vis-à-vis that function and the resulting legitimacy of law in the form of legal decisions. As such, meaningful access to justice, and in particular access to the tools of law broadly defined – as a form of participatory norm creation in globalized communities – provides a legitimating force for modern notions of participatory and pluralistic community membership.

My own view of these issues, as partly developed elsewhere,\textsuperscript{69} is that thinking about access to justice in broadly, rather than in narrowly defined terms allows us to think of broader, wider ranging solutions to the many everyday problems facing many Canadians today. As such, I am clearly in favour of thinking about justice, and access to it, broadly, along the lines that Macdonald and Habermas have articulated. This kind of engaged, broad-based thinking about access to justice can go on at the same time as more narrow and modest efforts to increase access to the tools of civil procedure continue. However, my concern about the current, more narrow initiatives is not what they are trying to do; rather, it is what they are not trying to do. By calling these efforts initiatives to improve access to justice, not only are we misnaming the project and misleading the public in so doing, we also risk failing to engage in the broader, deeper and ultimately

\textsuperscript{68} \textit{Ibid.}

\textsuperscript{69} See \textit{e.g.} Farrow, “Sustainable Professionalism”, \textit{supra} note 62 at 96; Farrow, “Dispute Resolution, Access to Civil Justice and Legal Education”, \textit{supra} note 62 at 798.
more meaningful work that truly will bring more justice—not more efficient processes— to more people. Current “access to justice”-related trajectories fail to do that deeper work. So while I certainly think we should continue to pursue efficiency-based improvements to the way we deliver civil justice processes, if we use these efforts to bandage over much deeper wounds, then I do not think they are worth pursuing. At some point the underlying disease will need to be addressed, and the longer we wait, the worse it is likely to get.\(^70\)

What we are left with, now, is an understanding of the two principal justifications for privatization that, while maintaining some merits on their own, do not—either individually or collectively—amount to adequate ends in themselves as goals of or justifications for the practice or reform of civil justice. As I have argued, these justifications are, in the end, built on arguments that sound in efficiency as an end in itself, as opposed to efficiency as a tool for justice. As I discussed earlier in this project,\(^71\) when thinking about privatization and its promotion in society, we tend to focus on efficiency alone. For example, as Megginson and Netter argue, “[t]o a large extent we ignore the arguments concerning the importance of equitable concerns... The effect[.] of privatization

---


\(^71\) See supra c. 3.
CHALLENGES AND THE FUTURE OF REFORM

on productive efficiency ... is the focus of most of the empirical literature we review...". 72

And it is here were we return to where I started this chapter. What we need in the context of civil justice reform is a shift in how we understand, evaluate and legitimize the civil dispute resolution process in the first place, which involves a shift away from thinking about efficiency as an end in itself and toward a notion of efficiency that is simply one of many tools, or put differently, one of many lenses through which to view the provision of meaningful civil justice. As Andrew Pirie has noticed, “what may be missing in promoting or advocating for settlement is a concern for quality justice.” 73 It is this final discussion to which I now turn.

3. THE FUTURE OF CIVIL JUSTICE REFORM

PROPORTIONALITY AND JUSTICE

One of the most significant developments in the recent civil justice reform movement is the addition of the notion of “proportionality” as a foundational tool for how we practice and reform civil justice. While efficiency is part of proportionality, the latter has become the new lens through which to view and evaluate processes and proceedings. One of the key reforms coming out of Lord Woolf’s seminal reform proposals in England and Wales was the simple but


powerful proposition that the “cost of litigation will be more affordable, more predictable, and more proportionate to the value and complexity of individual cases.”\textsuperscript{74} The reform essentially provides that all aspects of a civil proceeding, including each step as well as the overall proceeding itself, must be justifiable essentially on a cost-benefit – efficiency-based – calculus. The time, money and effort spent on steps in a proceeding, as well as on overall cases, must be proportionate to the ends that they are designed to achieve.

In a nutshell, the reform proposal provides us with a slight variation of the typical utilitarian calculus of the means must be justified by the ends. As I discussed further in chapter 3, subsequent civil justice reforms have adopted this proportionality approach. For example, the reforms to Ontario’s \textit{Rules of Civil Procedure}, which just recently came into force on 1 January 2010, provide that when applying the Ontario rules, “the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the

amount involved, in the proceeding.\textsuperscript{75} Similar reforms occurred in Québec several years earlier,\textsuperscript{76} and now more recently in B.C.\textsuperscript{77}

Proportionality provisions on their own leave room for significant conversations to occur about what kind of process should be dispensed for what kind of issue. On their face, therefore, there is certainly room for optimism that a robust discussion about just results, and not simply efficient means, can obtain. We saw this in a different context in the \textit{Wilson} case.\textsuperscript{78} Proportionality discussions leave room for these kinds of conversations and thinking at all levels of the practice and reform of civil justice. However, to the extent that proportionality discussions collapse simply into means-ends evaluations of economic expenditures based on an assessment of the damages claimed in a given proceeding, without also looking at the underlying law-making and societal regulation functions and possibilities of a given case, then we are back to current tendencies to fetishize efficiency above all else. And while proportionality assessments might be relatively straightforward when viewing cases in light of the “market function” of law, they may become much more difficult when looking at


\textsuperscript{76} See \textit{supra} c. 3.

\textsuperscript{77} \textit{Ibid}.

\textsuperscript{78} See \textit{supra} n. 50 and accompanying text.
cases in light of the “democratic function” of law. Given that, at least in Ontario, the rule has just come into force, it remains to be seen how this calculus will play out in particular cases in that province. And British Columbia and Alberta, for example, in light of their recent reforms, will be watching closely as well (and vice versa).

However, we do have some anecdotal evidence from Québec that both makes the case for proportionality thinking as well as justifies my concern. As I discussed earlier in chapter 3, Québec’s new proportionality and related judicial dispute resolution (JDR) initiatives have been very successful in that province in terms of moving cases off the trial list and onto the settlement list. According to François Rolland, Chief Justice of the Superior Court of Québec:

This system is fabulous and facilitates access to justice. It has received an overwhelming reception from both the parties and their attorneys.

However, in some ways, the Superior Court is now a victim of its own success.

In fact, the problem is that we cannot keep up with the demand.

Between 2001 and 2004, 1,295 settlement conferences were held throughout Québec. Last year, in the District of Montreal alone, we held close to 700 conferences. The delay to obtain a date was three weeks two years ago, and now it is seven months.

Five judges are allocated full-time to preside over these conferences, plus judges who accept on a volunteer basis to preside over conferences. The success rate of these conferences is very impressive: 80% in civil matters and close to 70% in family matters.

---

Obviously, the parties and the attorneys are extremely satisfied with these conferences because they have access to judges on an informal basis to explain their case and to settle their dispute. Normally, this is done quickly in the process.\footnote{Rolland, “Access to Justice: 3 Years After the Reform of the Code of Civil Procedure”, \textit{supra} note 75. Notwithstanding this positive support for judicial dispute resolution, perceptions of the overall results of the Québécois reforms have been mixed. See \textit{e.g.} \textit{ibid.} at 5-6. For earlier discussions of these comments, see \textit{supra} c. 3.}

To be clear, what Chief Justice Rolland is talking about is the increased amount of settlement activity that is resulting from several reform initiatives in Québécois, including proportionality, and even more importantly, JDR. However, the sensibility of proportionality is certainly an underlying factor that drives much of the reform trajectories and “success” in Québécois.

So it is clear that proportionality and related initiatives have been effective in Québécois in terms of reducing the number of trials. That is an efficiency-based calculus. What we don’t know is whether reducing the number of cases proceeding along the trial list is militating in favour of increased justice. That is my concern. In line with Damaška’s earlier caution, efficiency for the sake of efficiency, or indeed proportionality for the sake of proportionality (or efficiency), is “a countless ideal.”\footnote{Damaška, “Residual Truth of a Misleading Distinction”, \textit{supra} note 39 at 13 (citation omitted).} And it is here, among other places, where I think the importance of the shift in preferences from efficiency to justice, called for by this project, comes into sharp relief. When masters or judges are looking at the relative proportionality of a given step or a given proceeding, it is my view that robust notions of justice should in the end form the ultimate justifying and
legitimizing source for those sorts of assessments. Of course efficiency, among other factors, will play a role. But the ultimate assessment must be justice-based. And because proportionality looks like it will become a significant principle across the modern civil justice reform movement, this shift in focus – from efficiency to justice – must take on an increased importance.

**PROCEDURAL JUSTICE**

Of course just saying that “justice should obtain” does not mean that it will automatically happen. First, as a threshold matter, we need to think about what we mean when referring to “justice” in this context. Many of the foundational democratic premises that help realize meaningful opportunities for justice were discussed earlier in chapter 2. But what I am talking about here, in the context of individual disputes (as opposed to the broader discussion of access to justice that I developed earlier), is a procedural notion of justice that ensures that opportunities and protections provided for by rules of civil procedure operate in ways that assist parties to realize upon the substantive rights and remedies to which they are entitled.

There are two central benefits to this aspect of justice. First, it resonates with the “retrospective” function of law, which I developed when discussing the purpose of courts in chapter 2, by providing a just framework in which disputes can be fairly, predictably and efficiently resolved. Second, and equally if not more important, procedural justice also allows for cases to be resolved in ways that actively and self-consciously recognize that their results will speak to
similarly situated individuals and collectives beyond the confines of the immediate dispute at hand. This aspect of justice resonates with the "prospective" function of law that I also developed in chapter 2.

To the extent that compromises or trade-offs need to be made in terms of procedural choices or availabilities, they need to be made in ways that, in the end, are defensible on more than a simple efficiency calculus (whether guised in language of proportionality or not). For example, whether or not a person or organization is allowed to be added to a proceeding as a party in order to make sure that public interest issues at stake in a case litigated otherwise by parties with private interest standing form part of the court's evidentiary record, or alternatively, are added as an intervener so that those public interest issues are at least argued before a judge;\(^82\) whether a party is allowed to discover another party for more than the minimum amount of time;\(^83\) whether a party is entitled to move a case in or out of a private stream;\(^84\) whether one or more lay or expert witnesses is required for the proof of a given issue;\(^85\) whether a plaintiff is allowed to pursue a novel cause of action with significant evidentiary burdens\(^86\) all will be the kinds

\(^{82}\) See e.g. Ontario Rules of Civil Procedure, supra note 75 at r. 13. See also e.g. Canadian Council of Churches v The Queen, [1992] 1 S.C.R. 236; Canadian Blood Services v Freeman, [2004] O J No 4519 (Master).

\(^{83}\) See e.g. Ontario Rules of Civil Procedure, supra note 75 at r. 31.

\(^{84}\) See e.g. Wilson v Canada (Attorney General), supra note 50.

\(^{85}\) See e.g. Ontario Rules of Civil Procedure, supra note 75 at r. 53.

\(^{86}\) See e.g. Jane Doe v Board of Commissioners of Police for the Municipality of Metropolitan Toronto (1990), 74 O.R. (2d) 225 (Div. Ct.).
of questions and determinations that can be looked at through different lenses. And while decisions should be made on reasonable grounds, which can certainly include considerations of efficiency and proportionality, at the end of the day decisions need to be made that accord with fundamental notions of just procedural dealings.

Further, at the collective level of civil justice reform thinking, all choices that governments, law reform commissions, rules committees, and the like make with respect to civil procedure reform must be made in the spirit of the arguments I am advancing in this project. To do otherwise would jeopardize the significant, forward-looking, societal-regulating aspects of law and legal process that are so fundamental to our democratic systems of governance. This larger landscape must be kept in view. Civil justice is a precious good that we need to cherish. And the important roles of our judges and courts, as ambassadors of justice and key sites of the democratic regulatory process, need also to be cherished and nurtured. Courts, as we have seen, play a foundational role in how we regulate our affairs in society, either through the direct light of precedent or through the long shadow it casts on similarly situated members of a community.\(^7\) Relegating (and cheapening) these processes to a simple utilitarian calculus of efficiency very much puts that foundational role in jeopardy.

\(^7\) For the article that articulated the notion of the “shadow” of the law in terms of the modern ADR movement, see Robert H. Mnookin and L. Kornhauser, “Bargaining in the Shadow of the Law: The Case of Divorce” (1979) 88 Yale L.J. 950.
Another point that should be made at this juncture is that what I am talking about does not necessarily need to be seen as threatening to all current preferences and stakeholders. On many occasions, frontline decisions will not change. I am certainly not advocating for an unsustainable approach to civil procedure. Having worked and taught in the area for almost 20 years, I am certainly aware of the practical, economic and access challenges that face modern civil courts and litigants. Law reform commissions, rules committees, and the like have spent a lot of time, in good faith, trying to make the tools of the system more accessible to more people. And we need to harness much of that good work. But we are at a juncture where we need to make a decision. Is the civil justice system going to continue to play a meaningful role in our modern systems of democratic governance; or are we going to let it die a relatively slow death in the face of current and future preferences for efficiency-based private processes? I clearly am of the view that we need to maintain and increase our public dispute resolution capacity. But, as I discussed in chapters 3-6, our current trajectories and preferences paint a very different picture. A move to proportionality-based thinking across the civil justice system is going to force us to make hard choices about how to preference justice over efficiency when it comes to thinking about the legitimacy and success of a procedural regime. As of January and July, 2010 Ontario and B.C. are, respectively, facing exactly that choice. And other jurisdictions are in the same boat. Now is the time to make those decisions.
But to be clear, preferences for justice over efficiency, as the ultimate indicator of a system’s legitimacy or success, do not require the elimination of private procedural options. As I argued above, such a scenario – even if desirable, which it is not – would be unworkable. As we have seen, there are incredibly important and positive aspects to the ADR movement. And like with my discussion earlier in the project about mixed public and private partnerships generally, there will of course be ongoing and meaningful space for creative private solutions in the context of the public civil justice system. Again, not everything will or should change. However, we do need to take serious stock of what our current voracious appetite for privatization will mean for civil justice and democracy in 5, 10, 15 or 20 years. Again, my climate change analogy obtains. I worry, as discussed earlier, that while the efficient use of resources will occur, not much will be left of the public civil justice system. As the former Chief Justice of Ontario stated, “We should not attempt to create a justice system where efficiency is our No. 1 priority … When you are dealing with human factors, you are never going to achieve a particularly high level of efficiency.” While we can (and should) always strive for efficient justice, it must be justice that prevails as the ultimate source of a system’s legitimacy as well as the ultimate metric by which to judge a system’s success.

88 See e.g. supra c. 3.

89 Se supra c. 7.

CHALLENGES AND THE FUTURE OF REFORM

Further, even within current preferences for ADR, the survey that I conducted for the purpose of this project confirmed that not all sectors and stakeholders view and use ADR in the same way. The survey confirmed that some issues and some parties are more suited to different private processes.\(^91\) What this highlights, for the purpose of this discussion, is that judges, parties and rules committees need to be more nuanced in their thinking about when and if to recommend, deploy or mandate the use of privatized processes. Further, given that, at least according to some parts of the survey, confidentiality was not as important as other factors, it may be that reform initiates at the court and tribunal level that increase transparency and publicity, including, for example, more detailed and far-reaching public settlement lists at tribunals,\(^92\) would not be as difficult to implement as some might have thought.

PUBLIC FUNDING AND ACCESS TO JUSTICE

A further systemic concern that I only briefly touch on here is the concern that if we are serious about maintaining a meaningful civil justice system, then we need, as a society, to appropriately budget for it. One of the most significant reasons for the growth of private justice is the lack of public commitment, primarily financial, that is made in this sector. We need to encourage meaningful investment in the public civil justice system, which has traditionally not been a popular topic amongst voters, and therefore not a line item high up on government

\(^91\) See *supra* c. 6. See also further Appendix 2.

\(^92\) See *e.g.* *supra* c. 4.
CHAPTER 8

budgets. Susskind is probably right to assume that public funding for civil justice will likely at least not increase over the foreseeable future. However, such a situation does not have to be, and should not be, the case.

Now I am certainly aware, based on conversations I have had at the Ministerial and Assistant Deputy Ministerial levels of Attorney Generals’ offices, that money for civil justice, particularly in light of the current economic climate, is not in abundance – quite the opposite. However, practical realities and politically expedient budgetary choices and preferences do not replace principled bases for decision-making when it comes to public resources as important as civil justice. According to Lord Neuberger, given the foundational role that property and contractual rights play in the ongoing development of modern societies, civil justice systems that deal with the resolution of disputes involving those rights should have priority in terms of public funding. And while more money simply for the tools of civil dispute resolution will not directly assist with the broader access to justice discussion raised earlier, it certainly would help with the narrower (but still critically important) project of assisting more people to access the tools of the civil justice system more easily. We could learn from Finland, for example, which instituted significant legal aid reforms in 2002. The purpose of


94 Lord Neuberger (speech at Property Association Dinner, 2 October 2007) [unpublished], cited in Susskind, The End of Lawyers?, supra note 15 at 236, n. 10 and accompanying text.

95 For information on these reforms, see e.g. Ministry of Justice, Finland, “Legal Aid, Legislation”, online: <http://www.oikeus.fi/20630.htm>.
those reforms was reportedly to "transform public legal aid from a right for people with limited means toward a civil right." 96

When I am watching the efforts that development projects are making in countries in which civil justice systems have been compromised by war, corruption or for other reasons, it quickly becomes apparent – while those countries are working hard to move toward versions of our public systems – that we really do have systems that should be cherished and championed. 97 The price for not having a robust public system for resolving civil disputes is too high. Simply put, a country's economic well-being depends on it. It is for this reason, again in the context of my work in Bosnia, that I recall that one of the first justice-related investments in Bosnia and Herzegovina after the recent and devastating war involved the creation and implementation of a new code of civil procedure.

---


97 I recognize that part of the justice development efforts of some of those countries includes developing innovative private processes as well. See e.g. Trevor C. W. Farrow, “The rule of law in developing countries is not just about courts” 26:31 The Lawyers Weekly (15 December 2006) 11. These privatizing efforts are important for all sorts of reasons – many of which resonate with the benefits of ADR discussed earlier in this project (see e.g. c. 3). However, to the extent that countries are concerned about corruption, moving the resolution of disputes further away from public venues and public scrutiny certainly raises potential concerns.
Without dependable and predictable civil justice, there was little chance of stable and active economic activity and investment (domestic and foreign) in that country. And without that economic activity and investment, sustainable growth and development was seen essentially as an impossibility.  

Finally, systemic efforts need to be made beyond the civil justice system itself in terms of making good on promises to make justice, broadly defined, accessible to more people. We cannot continue to think about access to courts and lawyers as proxies for access to the things that make membership and participation in society a meaningful reality. Law is not an end in itself. As the motto of my law school – “Per jus ad justitiam: Through law to justice” – suggests, law is a tool for realizing on other social goods. And as part of law, civil procedure is also a tool for realizing other social goods. Access to law and the tools of law, while sometimes a precondition for justice, does not equate with access to and the delivery of justice.

4. CONCLUSION

Fundamentally changing a central aspect of a democracy’s regulatory structure, one would think, should require significant debate and far-reaching public consultation. To-date, no such wide-ranging and robust debate or consultation, on a fully informed basis, has characterized the modern and wide-ranging tendency to privatize our public systems of civil justice. On my reading

98 For a further discussion on this issue, see ibid.

of the policy thinking and legislative history of this overall trend of privatization, while there has been some significant discussion within the justice system particularly concerning the merits of ADR, there is little or no awareness at the level of the general public about the significance of these issues or their potential concerns as they relate to the overall workings of society. As was recognized during legislative standing committee statements surrounding Ontario’s approach to ADR in 1990, “Because of arbitration being a private matter, most members of the public are unaware of the many matters that are resolved by this technique and this mechanism.”

This statement is still by and large true today, and it could equally apply to the public’s understanding of ADR processes more generally. Put simply, the general public is unaware of the breadth and depth of the privatizing forces at play in the modern civil justice reform movement.

There continues to be ongoing debate about how the common law is created and administered in the public sphere, often through discussions framed in support or critique of “judicial activism”. As Roberto Unger has commented, “The proper extent of revisionary power – the power to declare some portion of received legal opinion mistaken – remains among the most controversial legal topics, as the American debates about judicial ‘activism’ and ‘self-restraint’

---


101 See e.g. Farrow, “Re-Framing the Sharia Arbitration Debate”, supra note 41 at 86, n. 50.
Ironically, however, the public is generally ignorant of a much more prevalent trend away from an accountable form of adjudicative governance (in terms of our public civil justice system, in which 95-98% of cases settle by some alternative, private process).\textsuperscript{103} As I have said elsewhere: “it never ceases to amaze me that the public, while typically up in arms about the ‘activism’ of our public judges, is largely silent (or ignorant) about the significant decisions made every day by private decision-makers behind closed-doors.”\textsuperscript{104}

Fundamentally privatizing our public civil dispute resolution systems merits significantly more public debate, and understanding, than what has to-date occurred. Whether and how we continue actively to privatize our tools of civil justice are questions that will have a dramatic impact not only on how people resolve individual disputes, but also on how we as a collective govern ourselves. The current move to privatize much of what counts as civil justice is being conducted without adequate public debate about, let alone public understanding of, all of the implications – positive and negative – of this clear policy choice.\textsuperscript{105}

We must recognize the potential strengths of private dispute resolution alternatives. However, only through responsible, public participation in the

\begin{flushleft}

\textsuperscript{103} Discussed \textit{supra} c. 3. I recognize that most of these settlements do not involve third-party mediators of decision makers.

\textsuperscript{104} Farrow, “Re-Framing the Sharia Arbitration Debate”, \textit{supra} note 41 at 82 [footnote omitted]. See further Farrow, “Public Justice, Private Dispute Resolution and Democracy”, \textit{supra} note 2 at 357-358.

\textsuperscript{105} See \textit{ibid}.\end{flushleft}
development of these processes will we avoid a silent erosion of our core
democratic values significantly embodied in a strong rule of law system, simply in
the name of efficiency and proportionality. We cannot treat justice simply as an
externality. Again quoting from the Chief Justice of Canada:

In this country, we realize that without justice, we have no rights, no
peace, no prosperity. We realize that, once lost, justice is difficult to
reinstate. We in Canada are the inheritors of a good justice system,
one that is the envy of the world. Let us face our challenges squarely
and thus ensure that our justice system remains strong and effective.\(^\text{106}\)

Ensuring that our justice system remains “strong and effective” does not
mean selling it out to the lowest bidder. Whether we are talking about courts,
tribunals or legislatively-sanctioned private arbitration panels that enjoy the
coercive enforcement powers of the state, justice – not efficiency – must be our
fundamental guide in determining how those bodies operate, how they are
legitimized and evaluated, and how they will be reformed going forward.

Ensuring this result will require allies and what Julie Macfarlane has
described as important “sites of change”.\(^\text{107}\) And it is here where I see an
important series of intersections at play. First, in terms of people and groups, the
shift that is contemplated by this project will require buy-in from a number of the
civil justice stakeholders that were discussed earlier in this project,\(^\text{108}\) including
government officials and policy makers, judges, lawyers and clients, law societies

\(^\text{106}\) McLachlin, “The Challenges We Face”, supra note 10 at “Conclusion”.


\(^\text{108}\) See supra c. 5.
and bar associations, law schools and ultimately the public. Further, there will also be an important intersection created between the practice and reform of civil justice and the fundamental process of lawyering. These intersections will require new partnerships and allies. They will require new ways of thinking about what it means to be a judge and a lawyer. And they will require creative policy and research initiatives and collaborations to explore the possibilities of what, for example, judging and practicing in the spirit of “proportionality” might look like in terms of recognizing efficiency while pursuing justice. These are all relatively new concepts in light of modern civil justice reform initiatives that are being pursued in the context of current and very challenging economic times. In addition, thinking about access to justice in ways that meaningfully address real societal vulnerabilities and weaknesses, as opposed to simply covering them over with the provision of cheaper and faster courts and procedures, will take new and creative ways of thinking.

One important place that provides significant foundational opportunities for thinking about the roles of civil justice and civil justice reform is law school. As I have said elsewhere:

There are many moments within the profession at which the possibility of change can occur, including at law schools, bar admission programs, mentoring initiatives, continuing education courses, judicial speeches and judgments, discipline rulings, bencher directives, and in professional rules and commentaries. Of course external sources for change also obtain, including legislative limits..., public opinion, client demands, and others. However, it is at the initial stage of the professional experience that a sensibility of openness to alternative discourses is most palpable, possible, and important. How we see ourselves individually as lawyers and how we
see ourselves collectively as a profession are foundational questions that must be addressed in legal education.\footnote{Farrow, “Sustainable Professionalism”, supra note 62 at 100-101. Although for different purposes, Julie Macfarlane has similarly noticed the power of law schools and legal education as important “sites of change”. See Macfarlane, The New Lawyer: How Settlement Is Transforming the Practice of Law, supra note 107 at 224-232.}

Law students and new lawyers need to understand not only the nuts and bolts of how the various procedures operate, but more importantly, we need to help our students think further about the purpose, goals and possibilities of the system in the first place. Courses on civil procedure, legal process and indeed ADR do not always encourage such foundational and theoretical thinking. Equally important will be the inclusion of these sorts of conversations in the context of teaching ethics and professionalism. The practice and reform of civil procedure along justice-seeking lines needs to be seen as part of a modern notion of ethical lawyering and sustainable professionalism.\footnote{See Farrow, “Sustainable Professionalism”, supra note 62. See further Joshua J. A. Henderson and Trevor C. W. Farrow, “The Ethical Development of Law Students: An Empirical Study” (2009) 72(1) Sask. L. Rev. 75. See also my earlier discussion of law schools in the context of this project at supra c. 5.}

Additionally, this educational continuum needs to not stop at law school graduation. With increased opportunities and requirements for continuing professional education, these discussions need to animate the life-long learning opportunities\footnote{See e.g. Trevor C. W. Farrow and Stephen G. A. Pitel, guest eds., “Lifelong Learning in Professionalism”, Special Journal Issue, (2010) Can. Legal Educ. Ann. Rev. (forthcoming).} of practicing lawyers\footnote{See e.g. Law Society of British Columbia [“LSBC”], “Continuing Professional Development: Overview”, online: LSBC <http://www.lawsociety.bc.ca/licensing_membership/profdev/overview.html>; Law Society of Upper Canada [“LSUC”], Professional Development & Competence Committee and Paralegal} and sitting judges.\footnote{Further, adequate}
research and support for policy makers will also be necessary as we try to understand and shape the power and purpose of the modern civil justice reform agenda. Again, these will be extremely important “sites of change” as we chart a new course for what it means to practice and reform civil procedure in a proportional, just and progressive way.

Given what is at stake, these are clearly important, challenging and very exciting times. The future of civil justice and civil justice reform, along with what it means to think about and practice civil justice and civil justice reform, is at stake. Further, a central pillar of democracy is currently in question. Given privatization trajectories and preferences, pushing for changes in individual and institutional thinking along the lines proposed in this project will not be easy. It will take hard work, dedication, significant public debate and resources, and – most importantly – imagination and a commitment to the ideals that underlie a robust public civil justice system. However, given what is at stake, this work must be done. In the words of Roberto Unger and Cornel West, we must:

[U]se the tools of institutional experimentalism to rethink and rebuild … the hope that under democracy individual men and women can achieve … [a] largeness of vision and experience…. It is not enough to rebel against the lack of justice unless we also rebel against the lack


396
of imagination. The structure of society matters.... Practices and institutions make this structure what it is.¹⁴

Civil justice involves practices and institutions that contribute to the fundamental structure of society. To the extent that those practices and institutions are challenged by the current privatization movement, which they clearly are, we need to harness "tools of institutional experimentalism" in the spirit of "rethink[ing] and rebuild[ing]" a better, more progressive and ultimately more just system of civil dispute resolution. Why? Because the practices and institutions at issue go to the bedrock of who we are and how we govern ourselves in modern society.

OUTLINE OF BIBLIOGRAPHIC MATERIALS

1. BOOKS, CHAPTERS AND ARTICLES

2. REPORTS, LETTERS, STATEMENTS, PRESENTATIONS, CONFERENCES, ETC.

3. NEWSPAPERS, MAGAZINES, NEWSLETTERS, ETC.

4. STATUTES, RULES, REGULATIONS, CODES, PRACTICE DIRECTIONS, TREATIES, ETC.

5. LEGISLATIVE DEBATES, ETC.

6. JURISPRUDENCE

7. ONLINE SERVICES, INFORMATION, ETC.

1. BOOKS, CHAPTERS AND ARTICLES

Ackerman, Bruce, “Why Dialogue?” (1989) 86 J. Phil. 5


Adams, Hon. George W., “The Privatization of Justice: Where are we going?” in Ronalda Murphy and Patrick A. Molinari, eds., Doing Justice: Dispute Resolution in the Courts and Beyond (Canada: Canadian Institute for the Administration of Justice, 2009) at 163


Archibald, Bruce P., “Progress in Models of Justice: From Adjudication/Arbitration through Mediation to Restorative Conferencing (and Back)” in Ronalda Murphy and Patrick A. Molinari, eds., *Doing Justice: Dispute Resolution in the Courts and Beyond* (Canada: Canadian Institute for the Administration of Justice, 2009) 129

Archibald, Todd *et al.*, *Ontario Superior Court Practice*, 2008 ed. (Markham: LexisNexis, 2008)


BIBLIOGRAPHY


Arthurs, Harry W. and Robert Kreklewich, “Law, Legal Institutions, and the Legal Profession in the New Economy” (1996) 34 Osgoode Hall L.J. 1


Austin, John, *Lectures on Jurisprudence Or the Philosophy of Positive Law*, rev. ed. by Robert Campbell (London: John Murray, 1885)


Bakht, Natasha, “Were Muslim Barbarians Really Knocking at the Gates of Ontario?: The Religious Arbitration Controversy — Another Perspective” in Ronalda Murphy and Patrick A. Molinari, eds., Doing Justice: Dispute Resolution in the Courts and Beyond (Canada: Canadian Institute for the Administration of Justice, 2009) at 227


Barnes, Bruce E., “Conflict Resolution Across Cultures: A Hawaii Perspective and a Pacific Mediation Model” (1994) 12 Mediation Q. 117

BIBLIOGRAPHY

Barry, Margaret Martin et al., “Clinical Education for this Millennium: The Third Wave” (2000) 7 Clinical L. Rev. 1


Bell, Catherine E. and David Kahane, eds., Intercultural Dispute Resolution in Aboriginal Contexts (Vancouver: University of British Columbia Press, 2004)


BIBLIOGRAPHY

2 (Edinburgh: William Tait, 1843) in Online Library of Liberty ed., online: Liberty Fund
<http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=1921&chapter=113487&layout=html&Itemid=27>


Bogart, W., Courts and Country (Toronto: Oxford University Press, 1994)


BIBLIOGRAPHY


Brodie, Janine, “Introduction: Globalization and Citizenship Beyond the National State” (December 2004) 8:4 Citizenship Studies 323


Tribunals: Essays in Administrative Law and Justice (Montréal: Les Éditions Thémis, 2008) at 157


Castels, Francis G., Comparative Public Policy: Patterns of Post-war Transformation (Cheltenham, UK: Edward Elgar, 1998)

Chitty, Joseph, The Practice of Law in all its Departments; with a view of Rights, Injuries, and Remedies, as ameliorated by recent Statutes, Rules, and Decisions (London: Henry Butterworth, 1834)


Coben, James R., “Summer Musings on Curricular Innovations to Change the Lawyer’s Standard Philosophical Map” (1998) 50 Fla. L. Rev. 735


Constant, Benjamin, “Liberty of the Ancients Compared with That of the Moderns” (1819) in Benjamin Constant, Political Writings, trans. and ed. by Biancamaria Fontana (New York: Cambridge University Press, 1988)


BIBLIOGRAPHY

Cronin-Harris, Catherine, Symposium on Business Dispute Resolution, “ADR and Beyond: Mainstreaming: Systematizing Corporate Use of ADR” (1996) 59 Alb. L. Rev. 847


BIBLIOGRAPHY


409
BIBLIOGRAPHY


Falconbridge, John Delatre, “Law and Equity in Upper Canada” (1914) 63:1 U. Penn. L. Rev. 1
BIBLIOGRAPHY

Farrow, Trevor C. W. and Ada Ho, “Administrative Tribunals Using ADR” (May 2007) [unpublished]

Farrow, Trevor C. W. and Ada Ho, “Canadian Federal and Provincial Administrative Legislation Containing ADR Processes” (September 2007) [unpublished]


Farrow, Trevor C. W., “Dispute Resolution and Legal Education: A Bibliography” (2005) 7 Cardozo J. Conflict Resol. 119


Farrow, Trevor C. W., “Ethics in Advocacy” in Alice Woolley et al., eds., Lawyers’ Ethics and Professional Regulation (Markham: LexisNexis, 2008) c. 5

Farrow, Trevor C. W., “Five Pleadings Cases Everyone Should Read” (2009) 35:4 Advocates’ Q. 466


Farrow, Trevor C. W., “Globalizing Approaches to Legal Education and Training: Canada to Japan” (2005) 38 Hosei Riron J. L. & Pol. 144

411
BIBLIOGRAPHY


Farrow, Trevor C. W., “Public Justice, Private Dispute Resolution and Democracy” in Ronalda Murphy and Patrick A. Molinari, eds., Doing Justice: Dispute Resolution in the Courts and Beyond (Canada: Canadian Institute for the Administration of Justice, 2009) 301

Farrow, Trevor C. W., “Re-Framing the Sharia Arbitration Debate” (2006) 15:2 Const. Forum Const. 79

Farrow, Trevor C. W., “Regional Integration and Dispute Resolution in the Free Trade Area of the Americas” in Andy Knight et al. eds., Re-Mapping the Americas: Globalization, Regionalization and the FTAA (Edmonton: University of Alberta Press, forthcoming)

Farrow, Trevor C. W., “Representative Negotiation” in Colleen M. Hanycz, Trevor C. W. Farrow and Frederick H. Zemans, The Theory and Practice of Representative Negotiation (Toronto: Emond Montgomery, 2008) c. 2


412
BIBLIOGRAPHY


Fisher, Ronald J., Interactive Conflict Resolution (Syracuse: Syracuse University Press, 1997)


Fiss, Owen, “The Forms of Justice” (1979) 93 Harv. L. Rev. 1


BIBLIOGRAPHY


Folberg, Jay, “A Mediation Overview: History and Dimensions of Practice” in (1983) 1 Mediation Q., c. 1

Ford, Cynthia, “Including Indian Law in a Traditional Civil Procedure Course: A Reprise, Five Years Later” (2001) 37 Tulsa L. Rev. 485


Fuller, Lon L., “The Forms and Limits of Adjudication” (1978) 92 Harv. L. Rev. 353


Garth, Bryant G., “From Civil Litigation to Private Justice: Legal Practice at War With the Profession and Its Values” (1993-1994) 59 Brook L. Rev. 931


Gerencser, Alison E., “Alternative Dispute Resolution Has Morphed Into Mediation: Standards of Conduct Must Be Changed” (1998) 50 Fla. L. Rev. 843

BIBLIOGRAPHY


Green, L. C., Law and Society (Dobbs Ferry, NY: Oceana Publications, 1975)


BIBLIOGRAPHY


Habermas, Jürgen, “Paradigms of Law” (1996) 17 Cardozo L. Rev. 771


Hadfield, Gillian K., “Privatizing Commercial Law” (2001) 42:1 Regulation 40, online: Cato Institute


Hanyecz, Colleen M., Trevor C. W. Farrow and Frederick H. Zemans, The Theory and Practice of Representative Negotiation (Toronto: Emond Montgomery, 2008)

Hart, Gerald E., The Quebec Act, 1774 (Montreal: Gazette Printing, 1891)


BIBLIOGRAPHY


Holmes, Oliver Wendell, "Law and the Court" (1913) in Oliver Wendell Holmes, Collected Legal Papers (New York: Peter Smith, 1952) 291


Hornblower, William B., "A Century of Judge-Made Law" (1907) 7:7 Colum. L. Rev. 453


BIBLIOGRAPHY


Hutchinson, Allan C., ed., Access to Civil Justice (Toronto: Carswell, 1990)


Joachim, Kaye, “New Models in Administrative Hearings: The Human Rights Tribunal of Ontario” in Ronalda Murphy and Patrick A. Molinari, eds., Doing Justice: Dispute Resolution in the Courts and Beyond (Canada: Canadian Institute for the Administration of Justice, 2009) at 89

Julie Macfarlane, “Faith-Based Dispute Resolution” in Ronalda Murphy and Patrick A. Molinari, eds., Doing Justice: Dispute Resolution in the Courts and Beyond (Canada: Canadian Institute for the Administration of Justice, 2009) at 287

Keet, Michaela & Teresa B. Salamone, “From Litigation to Mediation: Using Advocacy Skills for Success in Mandatory or Court-Connected Mediation” (2001) 64 Sask. L. Rev. 57


420
BIBLIOGRAPHY


Kennedy, David, “Receiving the International” (1994) 10 Conn. J. Int’l L. 1

Kennedy, Duncan, A Critique of Adjudication (fin de siècle) (Cambridge, MA: Harvard University Press, 1997)


LeBaron, L. Michelle and Venashri Pillay, eds. Conflict Across Cultures: A Unique Experience of Bridging Differences (Boston: Intercultural Press, 2006)


LeBaron, Michelle, Bridging Troubled Waters: Conflict Resolution from the Heart (San Francisco: Jossey Bass, 2002)


Llewellyn, Jennifer, “Doing Justice: New Directions in Restorative Justice” in Ronalda Murphy and Patrick A. Molinari, eds., Doing Justice: Dispute Resolution in the Courts and Beyond (Canada: Canadian Institute for the Administration of Justice, 2009) 191


Love, Lela Porter, “Twenty-Five Years Later with Promises to Keep: Legal Education in Dispute Resolution and Training Mediators” (2002) 17 Ohio St. J. Disp. Resol. 597


Macfarlane, Julie, “Faith-Based Dispute Resolution” in Ronalda Murphy and Patrick A. Molinari, eds., Doing Justice: Dispute Resolution in the Courts and Beyond (Canada: Canadian Institute for the Administration of Justice, 2009) 287

Macfarlane, Julie, “Making Mediation Effective: Models for Best Practice” in Ronalda Murphy and Patrick A. Molinari, eds., Doing Justice: Dispute Resolution in the Courts and Beyond (Canada: Canadian Institute for the Administration of Justice, 2009) 111


Macfarlane, Julie, ed., Rethinking Disputes: The Mediation Alternative (Toronto: Emond Montgomery, 1997)


MacNaughton, Heather M., “The Role of Mediation in Human Rights Disputes” in Ronalda Murphy and Patrick A. Molinari, eds., *Doing Justice: Dispute Resolution in the Courts and Beyond* (Canada: Canadian Institute for the Administration of Justice, 2009) 47


BIBLIOGRAPHY


Mark Fellows, “The Same Result As In Court, More Efficiently: Comparing Arbitration And Court Litigation Outcomes” (July 2006) Metropolitan Corporate Counsel 32, online: U.S. Chamber Institute for Legal Reform (USCILR) <http://www.instituteforlegalreform.org/component/ilr_docs/29/issue/ADR/STU.html>


McCormack, Tracy Walters, “Privatizing the Justice System” (2006) 25 Rev. Litig. 735


Michelman, Frank I., “Constitutional Authorship By the People” (1999) 74 Notre Dame L. Rev. 1605


Miller, Sidney T., “The Development of the Canadian Legal System” (1913) 61:9 U. Pa. L. Rev. 625


Murphy, Ronalda and Patrick A. Molinari, eds., Doing Justice: Dispute Resolution in the Courts and Beyond (Canada: Canadian Institute for the Administration of Justice, 2009)

Murphy, Ronalda, “Introduction” in Ronalda Murphy and Patrick A. Molinari, eds., Doing Justice: Dispute Resolution in the Courts and Beyond (Canada: Canadian Institute for the Administration of Justice, 2009) xi


Murray, Peter, “The Privatization of Civil Justice” (May-June 2008) 91 Judicature 272

Murray, Stuart, “Value for Money? Cautionary Lessons about P3s from British Columbia” (Summary), online: Canadian Centre for Policy Alternatives, B.C. Office <http://www.policyalternatives.ca/documents/BC_Office_Pubs/bc_2006/P3_vf_m_summary.pdf>


Ogilvie, M. H., “Recent Developments in Canadian Law: Legal History” (1987) 19 Ottawa L. Rev. 225


Orr, David, “Alternative Dispute Resolution in the Canadian Court System” (1999) 19:2 The Court Manager 36

Pavlich, George, “Critical policy analysis, power and restorative justice” (March 2009) 75 Crim. Just. Matters 24

Pavlich, George, “Restorative Justice and Its Paradoxes” (Winter 2005-2006) 22 Connections 1


Read, David B., Q.C., *The Lives of the Judges of Upper Canada and Ontario, From 1791 to the Present Time* (Toronto: Rowsell & Hutchison, 1888)

Régimbald, Guy, *Canadian Administrative Law* (Markham, Ont.: LexisNexis, 2008)


Riddell, William R., “The First Court of Chancery in Canada” (1922) 2 B.U.L. Rev. 231

Riddell, William R., Some Early Legislation and Legislators in Upper Canada (Toronto: Carswell, 1913)

Riddell, William R., The Bar and the Courts of the Province of Upper Canada, or Ontario (Toronto: Macmillan, 1928)

Riddell, William R., The Court of King’s Bench in Upper Canada, 1824-1827 (Toronto? [specific publication details unknown])

Riddell, William R., The Early Courts of the Province (Toronto?, 1916? [specific publication details unknown])

Riddell, William R.; How the King’s Bench Came to Toronto (Toronto? [specific publication details unknown])


Roach, Kent, The Supreme Court on Trial: Judicial Activism or Democratic Dialogue (Toronto: Irwin Law, 2001)


BIBLIOGRAPHY

Rose, Marc and Roger Suffling, “Alternative dispute resolution and the protection of natural areas in Ontario, Canada” (2001) 56 Landscape and Urb. Plan. 1


Rousseau, Jean-Jacques, Discourse on the Origin and Basis of Inequality Among Men (1754) in The Essential Rousseau, trans. by Lowell Bair (New York: Meridian, 1974) at 125


BIBLIOGRAPHY


Saumier, Genevieve, “Consumer Dispute Resolution: The Evolving Canadian Landscape” (2007) 1 Class Action Def. Q. 52


BIBLIOGRAPHY


Seckel, Allan, “Judicial Models: Can we do better? Proposed Reforms to Civil Procedure in British Columbia” in Ronalda Murphy and Patrick A. Molinari, eds., Doing Justice: Dispute Resolution in the Courts and Beyond (Canada: Canadian Institute for the Administration of Justice, 2009)19


Short, Donald E., “New Approaches to Dispute Resolution in the Construction Sector” (November, 2003), online: Fasken Martineau <http://www.fasken.com/>

Silver, Michael P., Mediation and Negotiation: Representing Your Clients (Toronto, Vancouver: Butterworths, 2001)


BIBLIOGRAPHY


Turpel-Lafond, Mary-Ellen, “Justice for Aboriginal Communities: Sharing the Ways” in Ronalda Murphy and Patrick A. Molinari, eds., *Doing Justice: Dispute Resolution in the Courts and Beyond* (Canada: Canadian Institute for the Administration of Justice, 2009) 211


BIBLIOGRAPHY


BIBLIOGRAPHY


Zuker, Marvin A., Small Claims Court Practice (Toronto: Carswell, 1998)

Zuckerman, Adrian, Civil Justice in Crisis: Comparative Perspectives of Civil Procedure (Oxford: Oxford University Press, 1999)


2. REPORTS, LETTERS, STATEMENTS, PRESENTATIONS, CONFERENCES, ETC.

Adams, Douglas S., “Alternative Dispute Resolution Programs in Law School Curricula – What’s Next?” (A project for the American Bar Association
Section of Dispute Resolution, 24 August 2001, online: ABA <www.abanet.org/dispute/adamspaper.pdf>


Alberta Human Rights Commission, Annual Review, April 1, 2005-March 31, 2006


Alberta Law Reform Institute, Consultation Memorandum No. 12.6, “Promoting Early Resolution of Disputes by Settlement” (Edmonton: ALRI, July 2003), online: ALRI <http://www.law.ualberta.ca/alri/>

BIBLIOGRAPHY

Alberta Provincial Court, “Mediation and the Civil Courts”, online: Alberta Courts
<http://www.albertacourts.ab.ca/go/ProvincialCourt/Civil/Mediation/FrequentQuestions/tabid/156/Default.aspx>

Alberta Provincial Court: “Mediation and the Provincial Court”, online: Alberta Courts
<http://www.albertacourts.ab.ca/pc/civil/publication/mediation_and_the_provincial_court.htm>

American Arbitration Association, “Drafting Dispute Resolution Clauses – A Practical Guide” (1994), online: Cornell University, ILR School
<https://www.ilr.cornell.edu/alliance/resources/Guide/drafting_dispres_clauses.html>

American Bar Association, Law Schools and Professional Education: Report and Recommendations of the Special Committee for a Study of Legal Education of the American Bar Association (1980)


American Bar Association, Section of Dispute Resolution, State and Local Bar Alternative Dispute Resolution Survey, 2001 Edition (Washington: ABA, Section of Dispute Resolution, 2001), online: ABA
<www.abanet.org/statelocal/summaryreport.pdf>

American Bar Association, Section on Legal Education and Admissions to the Bar, Legal Education and Professional Development – An Educational
BIBLIOGRAPHY


American Bar Association, Section on Legal Education and Admissions to the Bar, *Report and Recommendations of the Task Force on Lawyer Competency: The Role of Law Schools* (1979)

Australian Parliament, Senate Standing Committee on Legal and Constitutional Affairs, “Access to Justice” (8 December 2009), online: Government of Australia


  <http://www.bcjusticereview.org/working_groups/civil_justice/cjrwg_report_11_06.pdf>

B.C. Dispute Resolution Office, “Bulletin: Court Mediation Program” (June 2002), online: Government of B.C.

  <http://www.ag.gov.bc.ca/dro/publications/bulletins/general.htm>

  <http://www.bcjusticereviewforum.ca/civilrules/>


BIBLIOGRAPHY


Canadian Forum on Civil Justice, “What does it cost to access justice in Canada? How much is ‘too much’? And how do we know?” (Literature Review) (31 August 2009) [unpublished]


Chadwick, Hon. Mr. Justice James B., “Court-Annexed Mediation in our Civil Courts” (14 November 2001) at 11 in Canadian Forum on Civil Justice et al., eds., “Negotiating the Future: A National Conference on Court-Annexed Mediation” (Calgary, Alberta, 15 November 2001)

Civil Procedure Review Committee, Report, A New Judicial Culture (Summary) (August 2001), online: Justice Québec
BIBLIOGRAPHY


Court of Appeal of Québec, “Mediation”, online: Court of Appeal of Québec <http://www.tribunaux.qc.ca/mjq_en/c-appel/about/conciliation.html>

Court of Queen’s Bench, “Civil Mediation”, online: Alberta Courts <http://www.albertacourts.ab.ca/CourtofQueensBench/CivilMediationProgram/tabid/74/Default.aspx>


BIBLIOGRAPHY


Farrow, Trevor C. W., “ADR in Canada: Courts and Administrative Tribunals” (a report prepared for the British Institute of International and Comparative Law, 2009) [unpublished]


Hancock, Hon. Dave, “Message from Alberta’s Minister of Justice and Attorney General” in Alberta Justice, “Alberta Justice’s Consultation on Court-Annexed Mediation” (Consultation Brochure, Calgary, 16 November 2001)
BIBLIOGRAPHY


Hart, Christine E., “Draft Model Guidelines for Court-Connected Mediation Programs” (Prepared for the CBA Systems of Justice Implementation Committee’s Working Group on Dispute Resolution Standards, 3 September 1998)


International Institute for Conflict Prevention & Resolution (CPR), Frequently Asked Questions, “The ADR Pledge”, online: CPR  
<http://www.cpradr.org/AboutCPR/FAQs/tabid/284/Default.aspx>

International Institute for Conflict Prevention & Resolution (CPR), “Corporate Policy Statement on Alternatives to Litigation”, online: CPR  
<http://www.cpradr.org/AboutCPR/TheCPRADRPlge/AboutthePledge/tabid/161/Default.aspx>

International Institute for Conflict Prevention & Resolution (CPR), “Corporate Pledge Signers”, online: CPR  


Justice Québec, “Reform of Civil Procedure”, online: Justice Québec  

Justice Québec, “Small Claims”, online: Government of Québec  
<http://www.justice.gouv.qc.ca/english/publications/generale/creance-a.htm#note1>


BIBLIOGRAPHY

Law Society of British Columbia, “Continuing Professional Development: Overview”, online: LSBC
<http://www.lawsociety.bc.ca/licensing_membership/profdev/overview.html>

<http://www.lsuc.on.ca/media/convjun08_atj.pdf>


Law Society of Upper Canada, News Release, “Continuing professional development requirement supports professional competence” (25 February 2010), online: LSUC
<http://www.lsuc.on.ca/media/feb10_finalcpdrequirementrelease.pdf>

Law Society of Upper Canada, Professional Development & Competence Committee and Paralegal Standing Committee, Joint Report to Convocation (29 October 2009), online: LSUC
<http://www.lsuc.on.ca/media/convoct09_joint_report.pdf>

<https://www.ilr.cornell.edu/alliance/resources/Articles/approp_resol_corp_disputes.html>


Lott, Susan, Marie Hélène Beaulieu and Jannick Desforges, “Mandatory Arbitration and Consumer Contracts” (Public Interest Advocacy Centre (PIAC) and Option consommateurs, November 2004), online: PIAC
<http://www.piac.ca/consumers/mandatory_arbitration_and_consumer_contracts/>
BIBLIOGRAPHY

Lutfy, Hon. Allan, Swearing-in Ceremony, Associate Chief Justice (as he then was) (7 January 2000), online: Federal Court of Canada <http://cas-ncr-nter03.cas-satj.gc.ca/portal/page/portal/fc Cf_en/Speech>

Macfarlane, Julie and Michaela Keet, Learning from Experience: An Evaluation of the Saskatchewan Queen's Bench Mandatory Mediation Program (Regina: Saskatchewan Justice Dispute Resolution Office, 2003)

Macfarlane, Julie, “Court-Based Mediation for Civil Cases: An Evaluation of the Ontario Court (General Division) ADR Centre” (Toronto: Ontario Ministry of the Attorney General, 1995)

Macfarlane, Julie, “The Theory and Practice of Islamic Dispute Resolution in Family Matters” (panel presentation at Canadian Institute for the Administration of Justice Annual Conference, Halifax, Canada, October 2007) [unpublished]

Maitland, Sir Peregrine (Lieutenant-Governor of the Province of Upper Canada), Dispatch (9 April 1827) cited in John Delatre Falconbridge, “Law and Equity in Upper Canada” (1914) 63:1 U. Pa. L. Rev. 1 at 9


McLachlin, P.C., Rt. Hon. Beverley, “Lawyers’ Professional Obligations, Public Service and Pro Bono Work (remarks made during a question-and-answer session following her presentation at the University of Alberta, Faculty of Law, 19 September 2008), available online: University of Alberta <http://www.law.ualberta.ca/docs/19sep08%20University%20of%20Alberta%20Faculty%20of%20Law%20English.pdf>


Morris, Catherine, “Arbitration of Family Law in British Columbia” (paper presented for the Ministry of Attorney General of British Columbia, 7 July 2004), online: B.C. Justice Review Task Force

457
BIBLIOGRAPHY

<http://www.bcjusticereview.org/working_groups/family_justice/paper_07_07_04.pdf>

Morris, Catherine, “Media’s Mediation and Other Matters: Faith-Based Dispute Resolution in Canada” (speaking notes for a panel presentation, ADR Subsection, B.C. Branch, Canadian Bar Association, Vancouver, Canada, 25 January 2006); online: CBA <http://www.cba.org/CBA/newsletters/pdf/ADR-Morris_presentation.pdf>


Number 10, “Global Plan for Recovery and Reform” (2 April 2009), online: Government of United Kingdom <http://www.number10.gov.uk/Page18926>


<http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjr/>


<http://www.ert.gov.on.ca/files/AnnualR/Annual_Report_07-08.pdf>


Ontario Ministry of the Attorney General, “Small Claims Court Guides to Procedures”, online: Ontario Government
<http://www.attorneygeneral.jus.gov.on.ca/english/courts/guides/>

Ontario Small Claims Court, “What is Small Claims Court?”, online: Government of Ontario
<http://www.attorneygeneral.jus.gov.on.ca/english/courts/guides/WhatsisSCCJa n08EN.pdf>

Ontario, Legislative Assembly, Standing Committee on Administration of Justice, *Alternative Dispute Resolution 1990* (Toronto, June 1990)

Osborne, Hon. Coulter A., *Civil Justice Reform Project* (November 2007), online: Ontario Government
<http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjr/>
BIBLIOGRAPHY


President’s Council on Competitiveness, Agenda for Civil Justice Reform in America (Washington, D.C., 1991)


Sachs, Jeffrey D., “Globalization and the Rule of Law” (remarks to Yale Law School alumni weekend, Yale University, 16 October 1998)


Stuckey, Roy et al., Best Practices for Legal Education: A Vision and A Road Map (New York: Clinical Legal Education Association, 2007)


BIBLIOGRAPHY


University of Alberta, Student Arbitration and Mediation Society (Lecture Poster, 24 March 2003) [unpublished]
BIBLIOGRAPHY

University of Oxford, Faculty of Law, “The Civil Procedure Rules Ten Years On” (a conference organized by the University of Oxford, Faculty of Law, British Academy, London, 1-2 December 2008), online: University of Oxford <http://denning.law.ox.ac.uk/cpr10/home.php>


online: Department for Constitutional Affairs
<http://www.dca.gov.uk/civil/final/index.htm>

York University, “Helliwell Foundation gift supports a new dispute resolution centre” Y File (31 March 2009), online: York University
<http://www.yorku.ca/yfile/archive/index.asp?Article=12327>


3. NEWSPAPERS, MAGAZINES, NEWSLETTERS, ETC.

Atkins, Eric, “Courses on ADR becoming popular in Canada’s law schools” The Lawyers Weekly (3 November 2000) 24

Blatchford, Christie, “For Caledonia couple, the occupation is finally over” The Globe and Mail (31 December 2009) A4

Blatchford, Christie, “In a corner, Crown counters by attacking the plaintiffs” The Globe and Mail (24 November 2009)


Brown, Barbara, “Tab for Caledonia dispute soars; Taxpayers on the hook for more than $64M involving land fight with native protesters” Toronto Star (7 January 2010) A14

Carlson, Daryl-Lynn, “Family lawyers flocking to ADR” Law Times (18 June 2007)


Chase, Steven, “Ottawa considering asset sales, from VIA Rail to Royal Canadian Mint” The Globe and Mail (2 June 2009) A4

Chung, Andrew, “Casinos not taking chances in court; Provincial agency settling cases brought by problem gamblers to avoid setting precedents” Toronto Star (5 August 2007) A1

Dekany, Andrew C., “Judges increasingly mediating in Ontario and Quebec” The Lawyers Weekly (21 January 2005) 14


Editorial, “Entre Nous” (March 2007) 65:2 Advocate 153
BIBLIOGRAPHY


Farrow, Trevor C. W., “The rule of law in developing countries is not just about courts” 26:31 The Lawyers Weekly (15 December 2006)

Furlong, Gary, “Mediation excels in delivering sense of justice to participants” 28:7 The Lawyers Weekly (13 June 2008) 8

Gilliland, Ryder, “Public access trumps confidentiality for filed transcripts” 28:4 The Lawyers Weekly (23 May 2008) 11

Goswami, Nina, “A game of survival: why the bar is embracing arbitration” The Lawyer (12 February 2007) 19

Guly, Christopher, “Alberta leads the way in justice reform” 28:15 The Lawyers Weekly (22 August 2008) 1


Guly, Christopher, “Project set to ‘map’ services in Alberta” 28:15 The Lawyers Weekly (22 August 2008) 15

Guly, Christopher, “Storm erupts over B.C.’s proposed civil reforms” 28:7 The Lawyers Weekly (13 June 2008) 1


Intini, John, “No Justice for the Middle Class” *Maclean’s* (10-17 September 2007) 68


Jaffey, John, “Memo suggests axing case management, mandatory mediation” *The Lawyers Weekly* (1 October 2004) 3


Kari, Shannon, “Judge rejects $3.5B problem gambling class action” *National Post* (20 March 2010) A10


McEwen, Joan I., “JDR: Judicial Dispute Resolution” National 8:7 (November 1999) 36

McPhee, Jennifer, “Arbitration becoming the ‘new’ civil litigation” Canadian Lawyer (January 2008) 53

BIBLIOGRAPHY


Mucalov, Janice, “Mediation: like it or not” National (January/February 2003) 26

Mutton, Valerie, “Provincial pro bono initiatives get a helping hand from firms” 27:32 The Lawyers Weekly (21 December 2007)


News Staff, with a report from Chris Eby, “OLG reaches one settlement in ticket fiasco” CTV News (updated 7 January 2009), online: CTV.ca <http://toronto.ctv.ca/servlet/an/local/CTVNews/20090107/olg_tix_090107?hub=TorontoNewHome>


Staff, “Knocking Heads Together” Economist (3 February 2007)

Swanton, Mary, “System Slowdown: Can arbitration be fixed?” InsideCounsel (May 2007) 50

Teotonio, Isabel, “He’s a winner at long last as lottery settles out of court” Toronto Star (18 March 2005) A18

Weir, Jan, “Mandatory mediation meltdown” The Lawyers Weekly (8 October 2004) 6

BIBLIOGRAPHY


4. STATUTES, RULES, REGULATIONS, CODES, PRACTICE DIRECTIONS, TREATIES, ETC.

Access to Justice (Civil Litigation Reforms) Amendment Bill 2009 (Cth), No. 117, 2009 (assented to 4 December 2009)

Act to Simplify and Abridge the Practice, Pleadings, and Proceedings of the Courts, Laws N.Y. 1848, ch. 379 (“Field Code”)

Administration of Justice Act, 36 Vict. (1873)

Administrative Tribunals Act, S.B.C. 2004, c. 45


Arbitration Act, R.S.A. 2000, c. A-43

Arbitration Act, R.S.N.S. 1989, c. 19
BIBLIOGRAPHY

Arthur Wishart Act (Franchise Disclosure), 2000, S.O. 2000, c. 3


Canadian Human Rights Act, R.S.C. 1985, c. H-6


Class Proceedings Act, 1992, S.O. 1992, c. 6

Code of Civil Procedure, R.S.Q., c. C-25

Commercial Arbitration Act, R.S.C. 1985 (2nd Supp.), c. 17

Commercial Mediation Act, S.N.S. 2005, c. 36
BIBLIOGRAPHY

Constitution Act, 1867, 30 & 31 Victoria, c. 3 (U.K.)


Consumer Protection Act, R.S.Q., c. P-40.1


Court of Queen's Bench Act, R.S.A. 2000, c. C-31

Court of Queen's Bench of Alberta, "Civil Practice Note No. 11: Court Annexed Mediation" (effective 1 September 2004), online: Alberta Courts <http://www.albertacourts.ab.ca/qb/practicenotes/civil/pn11CourtAnnexedMediation.pdf>

Court of Queen's Bench Rules, Man. Reg. 553/88


Courts of Justice Act, R.S.O. 1990, c. C.43

Family Law Rules, O. Reg. 439/07

Family Statute Law Amendment Act, 2006, S.O. 2006, c. 1

Federal Court Rules, SOR/98-106, as amended

Human Rights Code, R.S.O. 1990, c. H.19

Judges Act, R.S.C. 1985, c. J-1

473
BIBLIOGRAPHY


Labour Relations Act, 1995, S.O. 1995, c. 1, sched. A

Law Society Act, R.S.O. 1990, c. L.8


Legal Aid Services Act, 1998, O. Reg. 107/99, as amended by O. Reg. 151/10

Magna Carta, or The Great Charter of King John (15 June 1215)


Nunavut Judicial System Implementation Act, S.N.W.T. 1998, c. 34, Sched. A

Ontario Judicature Act, 44 Vict. (1881)

Ontario New Home Warranties Plan Act, R.S.O. 1990, c. O.31

Ontario Small Claims Court Rules, O. Reg. 258/98, as amended


Provincial Court Act, Mediation Rules of the Provincial Court – Civil Division, Alta. Reg. 271/97

Provincial Court Act, R.S.A. 2000, P-31
BIBLIOGRAPHY

Public Services Superannuation Act, R.S.C 1985 c. P-36


Rules of Court (effective 15 September 2008), pursuant to Judicature Act, R.S.Y. 2002, c. 128, s. 38

Rules of Court, N.B. Reg. 82-73

Rules of the Supreme Court of the Northwest Territories, R-010-96 (in force 1 April 1996, as amended)


Statutory Powers Procedure Act, R.S.O. 1990, c. S.22


Supreme Court of Judicature Act, 1873 (U.K.), 36 & 37 Vict., c. 66

Supreme Court of Judicature Act, 1875 (U.K.), 38 & 39 Vict., c. 77

475
BIBLIOGRAPHY


5. LEGISLATIVE DEBATES, ETC.

Alberta, Legislative Assembly, Alberta Hansard, 23rd Leg. 4th sess. (14 August 1996) at 2146 (Hon. Mr. Dickson)

Alberta, Legislative Assembly, Committee of Supply, Alberta Hansard (30 May 2007) at 1433 (Hon. Mr. Stevens)

Alberta, Legislative Assembly, Designated Supply Committee – Justice and Attorney General, Alberta Hansard (23 February 1998) at DSS14 (Hon. Mr. Havelock)

Alberta, Legislative Assembly, Official Report of Debates (Hansard) (2 March 1998) at 634 (Hon. Mr. Ducharme)

Alberta, Legislative Assembly, Official Report of Debates (Hansard) (24 June 1991) at 1932-1933 (Hon. Mr. Evans)

476
BIBLIOGRAPHY


*Journals of the Legislative Assembly of ... Canada* (1842)

Manitoba, Legislative Assembly, *Official Report of Debates (Hansard)*, 36th Leg., 3d sess., No. 58 (10 June 1997) at 1720 (Hon. Keven Lamoureux)


Ontario, Legislative Assembly, *Official Report of Debates (Hansard)* (27 March 1990) at 1350 (Hon. Ian Scott)


BIBLIOGRAPHY


Ontario, Standing Committee on General Government, Consideration of Bill 27 (16 January 2006), online: Government of Ontario


Saskatchewan, Legislative Assembly, *Hansard* (18 March 1994) at 997 (Hon. R. W. Mitchell)


6. JURISPRUDENCE


*Amchem Products Inc. v. British Columbia (Workers’ Compensation Board),* [1993] 1 S.C.R. 897


*Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 S.C.R. 817

478
BIBLIOGRAPHY


Black v. Canada (Prime Minister) (2001), 54 O.R. (3d) 215


British Columbia v. Imperial Tobacco Canada Ltd., [2005] 2 S.C.R. 473

Cable & Wireless PLC v. IBM United Kingdom Ltd., [2002] EWHC 2059 (Comm)


Canadian Blood Services v. Freeman, [2004] O.J. No. 4519 (Master)


480
BIBLIOGRAPHY


Expedition Helicopters Inc. v. Honeywell Inc. (2010), 100 O.R. (3d) 241 (C.A.)


Grant v. Torstar, 2009 SCC 61


BIBLIOGRAPHY

Hill v. Church of Scientology of Toronto, [1995] 2 S.C.R. 1130

Hollick v. Toronto (City), [2001] 3 S.C.R. 158


Jane Doe v. Board of Commissioners of Police for the Municipality of Metropolitan Toronto (1990), 74 O.R. (2d) 225 (Div. Ct.)

Jean Estate v. Wires Jolley LLP (2009), 96 O.R. (3d) 171 (C.A.)


Manor of London v. Cox (1867), 1 E. & I. App. 239


Named Person v. Vancouver Sun, [2007] 3 S.C.R. 252


Palkowski v. Ivancic (2009), 100 O.R. (3d) 89 (C.A.)

Peoples Department Stores Inc. (Trustee of) v. Wise, [2004] 3 S.C.R. 461

Premium Nafta Products Limited (20th Defendant) and others (Respondents) v. Fili Shipping Company Limited (14th Claimant) and others (Appellants), [2007] UKHL 40


RJR – MacDonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311
BIBLIOGRAPHY


R. v. Conway, 2010 SCC 22


Re Southam Inc. and The Queen (No.1) (1983), 41 O.R. (2d) 113 (C.A.)

Re: Resolution to amend the Constitution, [1981] 1 S.C.R. 753

Reference re Alberta Statutes, [1938] S.C.R. 100

Reference re Amendments to the Residential Tenancies Act (N.S.), [1996] 1 S.C.R. 186


484
BIBLIOGRAPHY


Rogers Wireless Inc. v. Muroff, 2007 SCC 35


Saumur v. City of Quebec, [1953] 2 S.C.R. 299

Scott v. Scott, [1913] A.C. 419 (H.L.)


Sierra Club of Canada v. Canada (Minister of Finance), [2002] 2 S.C.R. 522
BIBLIOGRAPHY


The “Maratha Envoy” [1978] AC 1


Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (1985)


Vancouver Sun (Re), [2004] 2 S.C.R. 332

Western Canadian Shopping Centres Inc. v. Dutton, [2001] 2 S.C.R. 534


486
7. ONLINE SERVICES, INFORMATION, ETC.

ADR Chambers, “Mediation, Fees”, online: ADR Chambers
<http://adrchambers.com/ca/mediation/>

ADR Chambers, online: ADR Chambers <http://adrchambers.com/ca/>


Alberta Courts, Court Services, “Rules of Court”, online: Alberta Courts

Alberta Environmental Appeals Board, “About Mediation: When is Mediation not Appropriate?”, online: Alberta Government
<http://www.eab.gov.ab.ca/mediation_about.htm>

Alberta Environmental Appeals Board, “Welcome”, online: Alberta Government
<http://www.eab.gov.ab.ca/index.htm>

<http://www.albertahumanrights.ab.ca/complaints/complainant_info/guide_for_complainants.asp>

Amazon.com.ca, Inc., “Conditions of Use”, online: Amazon.ca

American Arbitration Association, “Case Filing Fees”, online: AAA
<http://www.adr.org/sp.asp?id=29297>

American Arbitration Association, National Construction Dispute Resolution Committee, “The AAA Guide to Drafting Alternative Dispute Resolution
BIBLIOGRAPHY

Clauses for Construction Contracts”, online: AAA <http://www.adr.org/si.asp?id=4366>

American Arbitration Association, online: AAA <http://www.adr.org/>


B.C. Ministry of Attorney General, Dispute Resolution Office, online: Government of B.C. <http://www.ag.gov.bc.ca/dro/>


Canadian Construction Documents Committee, “Home”, online: CCDC <http://www.ccde.org/>

BIBLIOGRAPHY


Canadian Life and Health Insurance OmbudsService, “Complaints”, online: CLHIO <http://www.clhio.ca/complaints.html>


BIBLIOGRAPHY


Department of Justice, Dispute Prevention and Resolution Services, “Services and Programs”, online: Government of Canada <http://www.justice.gc.ca/eng/pi/dprs-sprd/sp.html>


Electronic Courthouse, online: <http://www.electroniccourthouse.com/>


Ministry of Justice, Finland, “Legal Aid, Legislation”, online: <http://www.oikeus.fi/20630.htm>

Nanaimo Justice Access Centre, online: <http://www.justiceaccesscentre.bc.ca/content/contactNanaimo.asp>

National Judicial Institute, “About the NJI”, online: NJI <http://www.nji-inm.ca/nji/inm/a-propos-about/index.cfm>
BIBLIOGRAPHY


National Money Mart Company, Payday Loans, online: Money Mart <http://www.moneymart.ca/paydayloans.asp>


Ontario Civil Justice Reform Project, online: Government of Ontario <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/>

Ontario Lottery and Gaming Corporation, “Who We Are”, online: OLGC <http://www.olg.ca/about/who_we_are/index.jsp?ref=home_menu>
BIBLIOGRAPHY

Ontario Ministry of the Attorney General, “Family Mediation Services”, online: Ontario Government
<http://www.attorneygeneral.jus.gov.on.ca/english/family/mediation.asp>

Ontario Ministry of the Attorney General, “Family Mediation”, online: Ontario Government
<http://www.attorneygeneral.jus.gov.on.ca/english/family/divorce/mediation/>

Osgoode Hall Law School, York University, “Our Mission”, online: Osgoode
<http://www.osgoode.yorku.ca/about/our_mission.html>

Pro Bono Law Ontario, “LawHelpOntario.org”, online: PBLO
<http://www.lawhelpontario.org/>

Problem Gamblers Lawyer <http://www.problemgamblerslawyer.com/>


Rogers, “Rogers Terms of Service”, online: Rogers
<https://your.rogers.com/about/legaldisclaimer/tos_eng.pdf>

Shaw Direct (formerly Star Choice), “Shaw Direct Terms of Service – Residential Customer Agreement”, online: Star Choice/Shaw Direct

Shaw, “Joint Terms of Service”, online: Shaw <http://www.shaw.ca/english/AboutShaw/TermsOfUse/JointTermsOfService.htm?q1>

Telus Communications Company, “Telus standard mobility Service Terms & Conditions”, online: Telus
<http://www.telusmobility.com/about/mike_pcs_pt_policy.shtml>
BIBLIOGRAPHY

U.N. Global Compact, online: U.N. <http://www.unglobalcompact.org/>


APPENDIX 1

POTENTIAL DISPUTE RESOLUTION PROCESS ALTERNATIVES
(FOR PURPOSES OF THIS PROJECT)

COURTS
- PRE-TRIAL PROCESSES
- COURT-ANNEXED MEDIATION, JDR, ETC.
- TRIAL
- SETTLEMENT (WITH RULES-BASED COST CONSEQUENCES)
- OTHER

ADMINISTRATIVE REGIMES
- INVESTIGATION, ETC.
- TRIBUNAL-ANNEXED ADR PROCESSES (CONCILIATION, MEDIATION, ETC.)
- HEARING
- SETTLEMENT
- OTHER

ARBITRATION (RECOGNIZED BY ARBITRAL LEGISLATION)
- HEARING
- SETTLEMENT

FULLY PRIVATE PROCESSES (NO FORMAL STATUTE-BASED RECOGNITION)
- NEGOTIATION
- MEDIATION
- NON-STATUTE-BASED ARBITRATION
- SOME RELIGIOUS TRIBUNAL PROCESSES
- OTHERS

1 The nature of a dispute, at least as between courts and administrative regimes, will often determine in which dispute resolution process it will proceed. Private dispute resolution contractual clauses also play an increasingly determinative jurisdictional role.

2 See e.g. Nova Scotia Supreme Court, Ontario Superior Court of Justice, Supreme Court of British Columbia, etc. For further discussions of superior courts, see e.g. cc. 2-3.

3 See e.g. Québec Human Rights Tribunal, Alberta Environmental Appeals Board, Commission for Public Complaints Against the RCMP, etc. For a further discussion of administrative regimes, see e.g. c. 4.

4 For a further discussion of state-recognized arbitration regimes, see e.g. c. 4.

5 The processes listed here – negotiation, mediation, etc. – are examples of separate private processes, not steps in a single proceeding. I recognize that fully-private processes can, and often do, occur alongside public processes (e.g. concurrent settlement negotiations, discussed further e.g. in cc. 3, 5).

494
## APPENDIX 2

### NATIONAL ALTERNATIVE DISPUTE RESOLUTION SURVEY

## PRACTICE AREAS

<table>
<thead>
<tr>
<th>Area of Practice</th>
<th>Number</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Aboriginal</td>
<td>2</td>
<td>0.83%</td>
</tr>
<tr>
<td>Bankruptcy / Restructuring / Insolvency</td>
<td>4</td>
<td>1.65%</td>
</tr>
<tr>
<td>Class Actions</td>
<td>1</td>
<td>0.41%</td>
</tr>
<tr>
<td>Competition</td>
<td>1</td>
<td>0.41%</td>
</tr>
<tr>
<td>Corporate</td>
<td>2</td>
<td>0.83%</td>
</tr>
<tr>
<td>Criminal</td>
<td>1</td>
<td>0.41%</td>
</tr>
<tr>
<td>Energy</td>
<td>1</td>
<td>0.41%</td>
</tr>
<tr>
<td>Environmental</td>
<td>0</td>
<td>0.00%</td>
</tr>
<tr>
<td>Governmental</td>
<td>1</td>
<td>0.41%</td>
</tr>
<tr>
<td>Immigration</td>
<td>0</td>
<td>0.00%</td>
</tr>
<tr>
<td>In-house</td>
<td>1</td>
<td>0.41%</td>
</tr>
<tr>
<td>Intellectual Property</td>
<td>5</td>
<td>2.07%</td>
</tr>
<tr>
<td>International</td>
<td>1</td>
<td>0.41%</td>
</tr>
<tr>
<td>Litigation</td>
<td>180</td>
<td>74.38%</td>
</tr>
<tr>
<td>Media</td>
<td>0</td>
<td>0.00%</td>
</tr>
<tr>
<td>Real Estate</td>
<td>3</td>
<td>1.24%</td>
</tr>
<tr>
<td>Securities</td>
<td>0</td>
<td>0.00%</td>
</tr>
<tr>
<td>Tax</td>
<td>5</td>
<td>2.07%</td>
</tr>
<tr>
<td>Torts / Personal Injury / Product Liability</td>
<td>7</td>
<td>2.89%</td>
</tr>
<tr>
<td>Other</td>
<td>27</td>
<td>11.16%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>242</strong></td>
<td></td>
</tr>
</tbody>
</table>

### Other Option

- Commercial and real estate litigation
- Labour and employment (various)
- Family law
- Pension & benefits
- Bank-customer dispute resolution
- Administrative law, labour, human rights, education
- Labour Relations
- General practice
- Commercial Litigation/Privacy/Fisheries/IP

---

1 Practice areas for respondents who chose to further self-identify are included here (repeated areas were deleted)
APPENDIX 2

PART A: ARBITRATION

Arbitration. In this survey, the term “arbitration” means a procedure, outside the court-based process, where an independent third-party makes a binding decision to resolve a dispute.

1. Do you ever recommend to your clients that they resolve a dispute using arbitration?

<table>
<thead>
<tr>
<th></th>
<th>a. Yes</th>
<th>b. No (please go to Question #7)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>206</td>
<td>80.47%</td>
</tr>
<tr>
<td>No</td>
<td>50</td>
<td>19.53%</td>
</tr>
<tr>
<td>Total</td>
<td>256</td>
<td></td>
</tr>
</tbody>
</table>

2. How frequently do you make the recommendation that a client use arbitration?

<table>
<thead>
<tr>
<th></th>
<th>a. Very frequently</th>
<th>b. Frequently</th>
<th>c. On occasion</th>
<th>d. Rarely</th>
</tr>
</thead>
<tbody>
<tr>
<td>Very frequently</td>
<td>12</td>
<td>7.45%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Frequently</td>
<td>37</td>
<td>22.98%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>On occasion</td>
<td>87</td>
<td>54.04%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Rarely</td>
<td>25</td>
<td>15.53%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>161</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Mean 2.78
Standard Dev 0.80
Variance 0.64
3. Please rate the following factors on how often they prompt you to recommend arbitration.

<table>
<thead>
<tr>
<th>Factor</th>
<th>Always</th>
<th>Sometimes</th>
<th>Rarely</th>
<th>Never</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ad-hoc basis depending on the facts of the dispute</td>
<td>5</td>
<td>4</td>
<td>3</td>
<td>2</td>
</tr>
<tr>
<td>Needs of the client</td>
<td>5</td>
<td>4</td>
<td>3</td>
<td>2</td>
</tr>
<tr>
<td>Mandated by contract</td>
<td>5</td>
<td>4</td>
<td>3</td>
<td>2</td>
</tr>
<tr>
<td>Mandated by the court</td>
<td>5</td>
<td>4</td>
<td>3</td>
<td>2</td>
</tr>
<tr>
<td>Suggested by the other party</td>
<td>5</td>
<td>4</td>
<td>3</td>
<td>2</td>
</tr>
<tr>
<td>Policy of your client</td>
<td>5</td>
<td>4</td>
<td>3</td>
<td>2</td>
</tr>
<tr>
<td>Other ________________________</td>
<td>5</td>
<td>4</td>
<td>3</td>
<td>2</td>
</tr>
</tbody>
</table>

**Ad-hoc basis depending on the facts of the dispute**

<table>
<thead>
<tr>
<th></th>
<th>Always</th>
<th>Sometimes</th>
<th>Rarely</th>
<th>Never</th>
<th>Total</th>
<th>Mean</th>
<th>Standard Dev.</th>
<th>Variance</th>
</tr>
</thead>
<tbody>
<tr>
<td>Always</td>
<td>33</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>2.03</td>
<td>0.75</td>
<td>0.56</td>
</tr>
<tr>
<td>Sometimes</td>
<td>88</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Rarely</td>
<td>24</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>15.79</td>
<td></td>
<td>1.18</td>
</tr>
<tr>
<td>Never</td>
<td>7</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>4.61</td>
<td></td>
<td>0.56</td>
</tr>
<tr>
<td>Total</td>
<td>152</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Mandated by Legislation**

<table>
<thead>
<tr>
<th></th>
<th>Always</th>
<th>Sometimes</th>
<th>Rarely</th>
<th>Never</th>
<th>Total</th>
<th>Mean</th>
<th>Standard Dev.</th>
<th>Variance</th>
</tr>
</thead>
<tbody>
<tr>
<td>Always</td>
<td>42</td>
<td></td>
<td></td>
<td></td>
<td>145</td>
<td>2.55</td>
<td>1.18</td>
<td>1.40</td>
</tr>
<tr>
<td>Sometimes</td>
<td>22</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>15.17</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Rarely</td>
<td>40</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>27.59</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Never</td>
<td>41</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>28.28</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>145</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Needs of the client**

<table>
<thead>
<tr>
<th></th>
<th>Always</th>
<th>Sometimes</th>
<th>Rarely</th>
<th>Never</th>
<th>Total</th>
<th>Mean</th>
<th>Standard Dev.</th>
<th>Variance</th>
</tr>
</thead>
<tbody>
<tr>
<td>Always</td>
<td>47</td>
<td></td>
<td></td>
<td></td>
<td>148</td>
<td>31.76</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Sometimes</td>
<td>87</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>58.78</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Rarely</td>
<td>7</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>4.73</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Never</td>
<td>7</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>4.73</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>148</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Mean</td>
<td>Standard Dev</td>
<td>Variance</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>--------------------------</td>
<td>------</td>
<td>--------------</td>
<td>-----------</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mandated by contract</td>
<td>1.82</td>
<td>0.73</td>
<td>0.53</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Always</td>
<td>70</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Sometimes</td>
<td>65</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Rarely</td>
<td>11</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Never</td>
<td>4</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>150</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mandated by the court</td>
<td>1.66</td>
<td>0.73</td>
<td>0.53</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Always</td>
<td>32</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Sometimes</td>
<td>14</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Rarely</td>
<td>23</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Never</td>
<td>73</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>142</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Suggested by the other party</td>
<td>2.39</td>
<td>1.23</td>
<td>1.52</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Always</td>
<td>2</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Sometimes</td>
<td>96</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Rarely</td>
<td>36</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Never</td>
<td>11</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>145</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Policy of your client</td>
<td>2.74</td>
<td>0.96</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Always</td>
<td>11</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Sometimes</td>
<td>54</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Rarely</td>
<td>35</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Never</td>
<td>40</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>140</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
4. Please rate the following factors on their importance to you when recommending whether to use arbitration to resolve a dispute.

<table>
<thead>
<tr>
<th>Factor</th>
<th>Critical</th>
<th>Unimportant</th>
<th>N/A</th>
</tr>
</thead>
<tbody>
<tr>
<td>Reduces cost</td>
<td>5</td>
<td>4</td>
<td>3</td>
</tr>
<tr>
<td>Reduces time</td>
<td>5</td>
<td>4</td>
<td>3</td>
</tr>
<tr>
<td>Privacy</td>
<td>5</td>
<td>4</td>
<td>3</td>
</tr>
<tr>
<td>Expertise of the arbitrator</td>
<td>5</td>
<td>4</td>
<td>3</td>
</tr>
<tr>
<td>Fairness of the result</td>
<td>5</td>
<td>4</td>
<td>3</td>
</tr>
<tr>
<td>Allows for a more amiable resolution</td>
<td>5</td>
<td>4</td>
<td>3</td>
</tr>
<tr>
<td>Greater control over the procedure (simplification)</td>
<td>5</td>
<td>4</td>
<td>3</td>
</tr>
<tr>
<td>Avoids discovery</td>
<td>5</td>
<td>4</td>
<td>3</td>
</tr>
<tr>
<td>Allows parties to choose applicable law</td>
<td>5</td>
<td>4</td>
<td>3</td>
</tr>
<tr>
<td>Encourages settlement</td>
<td>5</td>
<td>4</td>
<td>3</td>
</tr>
<tr>
<td>Finality of the decision</td>
<td>5</td>
<td>4</td>
<td>3</td>
</tr>
<tr>
<td>Other</td>
<td>5</td>
<td>4</td>
<td>3</td>
</tr>
</tbody>
</table>
### APPENDIX 2

<table>
<thead>
<tr>
<th>Reduces cost</th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>5 (Critical)</td>
<td>15</td>
<td>9.62%</td>
<td></td>
</tr>
<tr>
<td>4</td>
<td>46</td>
<td>29.49%</td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>37</td>
<td>23.72%</td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>29</td>
<td>18.59%</td>
<td></td>
</tr>
<tr>
<td>1 (Unimportant)</td>
<td>14</td>
<td>8.97%</td>
<td></td>
</tr>
<tr>
<td>N/A</td>
<td>15</td>
<td>9.62%</td>
<td></td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>156</strong></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Means</th>
<th>Standard Dev</th>
<th>Variance</th>
</tr>
</thead>
<tbody>
<tr>
<td>3.17</td>
<td>1.44</td>
<td>2.08</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Reduces time</th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>5 (Critical)</td>
<td>31</td>
<td>19.87%</td>
<td></td>
</tr>
<tr>
<td>4</td>
<td>72</td>
<td>46.15%</td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>28</td>
<td>17.95%</td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>13</td>
<td>8.33%</td>
<td></td>
</tr>
<tr>
<td>1 (Unimportant)</td>
<td>5</td>
<td>3.21%</td>
<td></td>
</tr>
<tr>
<td>N/A</td>
<td>7</td>
<td>4.49%</td>
<td></td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>156</strong></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Means</th>
<th>Standard Dev</th>
<th>Variance</th>
</tr>
</thead>
<tbody>
<tr>
<td>2.42</td>
<td>1.24</td>
<td>1.55</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Privacy</th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>5 (Critical)</td>
<td>46</td>
<td>30.07%</td>
<td></td>
</tr>
<tr>
<td>4</td>
<td>62</td>
<td>40.52%</td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>28</td>
<td>18.30%</td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>11</td>
<td>7.19%</td>
<td></td>
</tr>
<tr>
<td>1 (Unimportant)</td>
<td>5</td>
<td>3.27%</td>
<td></td>
</tr>
<tr>
<td>N/A</td>
<td>1</td>
<td>0.65%</td>
<td></td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>153</strong></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Means</th>
<th>Standard Dev</th>
<th>Variance</th>
</tr>
</thead>
<tbody>
<tr>
<td>2.15</td>
<td>1.07</td>
<td>1.15</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Expertise of the arbitrator</th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>5 (Critical)</td>
<td>39</td>
<td>25.32%</td>
<td></td>
</tr>
<tr>
<td>4</td>
<td>69</td>
<td>44.81%</td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>32</td>
<td>20.78%</td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>9</td>
<td>5.84%</td>
<td></td>
</tr>
<tr>
<td>1 (Unimportant)</td>
<td>4</td>
<td>2.60%</td>
<td></td>
</tr>
<tr>
<td></td>
<td>N/A</td>
<td></td>
<td></td>
</tr>
<tr>
<td>------------------------------</td>
<td>-----</td>
<td>----------</td>
<td>---------</td>
</tr>
<tr>
<td></td>
<td></td>
<td>1</td>
<td>0.65%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td></td>
<td>154</td>
<td></td>
</tr>
<tr>
<td><strong>Mean</strong></td>
<td></td>
<td>2.18</td>
<td></td>
</tr>
<tr>
<td><strong>Standard Dev</strong></td>
<td></td>
<td>1.00</td>
<td></td>
</tr>
<tr>
<td><strong>Variance</strong></td>
<td></td>
<td>1.01</td>
<td></td>
</tr>
<tr>
<td><strong>Fairness of the result</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>5 (Critical)</td>
<td>14</td>
<td>9.21%</td>
<td></td>
</tr>
<tr>
<td>4</td>
<td>39</td>
<td>25.66%</td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>55</td>
<td>36.18%</td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>23</td>
<td>15.13%</td>
<td></td>
</tr>
<tr>
<td>1 (Unimportant)</td>
<td>14</td>
<td>9.21%</td>
<td></td>
</tr>
<tr>
<td>N/A</td>
<td>7</td>
<td>4.61%</td>
<td></td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td></td>
<td>152</td>
<td></td>
</tr>
<tr>
<td><strong>Mean</strong></td>
<td></td>
<td>3.03</td>
<td></td>
</tr>
<tr>
<td><strong>Standard Dev</strong></td>
<td></td>
<td>1.25</td>
<td></td>
</tr>
<tr>
<td><strong>Variance</strong></td>
<td></td>
<td>1.57</td>
<td></td>
</tr>
<tr>
<td><strong>Allows for a more amiable resolution</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>5 (Critical)</td>
<td>9</td>
<td>5.84%</td>
<td></td>
</tr>
<tr>
<td>4</td>
<td>39</td>
<td>25.32%</td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>35</td>
<td>22.73%</td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>38</td>
<td>24.68%</td>
<td></td>
</tr>
<tr>
<td>1 (Unimportant)</td>
<td>24</td>
<td>15.58%</td>
<td></td>
</tr>
<tr>
<td>N/A</td>
<td>9</td>
<td>5.84%</td>
<td></td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td></td>
<td>154</td>
<td></td>
</tr>
<tr>
<td><strong>Mean</strong></td>
<td></td>
<td>3.36</td>
<td></td>
</tr>
<tr>
<td><strong>Standard Dev</strong></td>
<td></td>
<td>1.33</td>
<td></td>
</tr>
<tr>
<td><strong>Variance</strong></td>
<td></td>
<td>1.76</td>
<td></td>
</tr>
<tr>
<td><strong>Greater control over the procedure (simplification)</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>5 (Critical)</td>
<td>18</td>
<td>11.61%</td>
<td></td>
</tr>
<tr>
<td>4</td>
<td>70</td>
<td>45.16%</td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>40</td>
<td>25.81%</td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>20</td>
<td>12.90%</td>
<td></td>
</tr>
<tr>
<td>1 (Unimportant)</td>
<td>3</td>
<td>1.94%</td>
<td></td>
</tr>
<tr>
<td>N/A</td>
<td>4</td>
<td>2.58%</td>
<td></td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td></td>
<td>155</td>
<td></td>
</tr>
<tr>
<td><strong>Mean</strong></td>
<td></td>
<td>2.56</td>
<td></td>
</tr>
<tr>
<td><strong>Standard Dev</strong></td>
<td></td>
<td>1.08</td>
<td></td>
</tr>
<tr>
<td><strong>Variance</strong></td>
<td></td>
<td>1.17</td>
<td></td>
</tr>
<tr>
<td>Avoids discovery</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>-----------------</td>
<td>---</td>
<td>---</td>
<td></td>
</tr>
<tr>
<td>5 (Critical)</td>
<td>4</td>
<td>2.63%</td>
<td></td>
</tr>
<tr>
<td>4</td>
<td>26</td>
<td>17.11%</td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>42</td>
<td>27.63%</td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>39</td>
<td>25.66%</td>
<td></td>
</tr>
<tr>
<td>1 (Unimportant)</td>
<td>29</td>
<td>19.08%</td>
<td></td>
</tr>
<tr>
<td>N/A</td>
<td>12</td>
<td>7.89%</td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>152</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mean</td>
<td>3.65</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Standard Dev</td>
<td>1.26</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Variance</td>
<td>1.59</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Allows parties to choose applicable law</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>5 (Critical)</td>
<td>1</td>
<td>0.66%</td>
<td></td>
</tr>
<tr>
<td>4</td>
<td>24</td>
<td>15.79%</td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>32</td>
<td>21.05%</td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>34</td>
<td>22.37%</td>
<td></td>
</tr>
<tr>
<td>1 (Unimportant)</td>
<td>46</td>
<td>30.26%</td>
<td></td>
</tr>
<tr>
<td>N/A</td>
<td>15</td>
<td>9.87%</td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>152</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mean</td>
<td>3.95</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Standard Dev</td>
<td>1.27</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Variance</td>
<td>1.61</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Encourages settlement</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>5 (Critical)</td>
<td>8</td>
<td>5.19%</td>
<td></td>
</tr>
<tr>
<td>4</td>
<td>35</td>
<td>22.73%</td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>29</td>
<td>18.83%</td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>42</td>
<td>27.27%</td>
<td></td>
</tr>
<tr>
<td>1 (Unimportant)</td>
<td>27</td>
<td>17.53%</td>
<td></td>
</tr>
<tr>
<td>N/A</td>
<td>13</td>
<td>8.44%</td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>154</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mean</td>
<td>3.55</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Standard Dev</td>
<td>1.37</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Variance</td>
<td>1.88</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Finality of the decision</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>5 (Critical)</td>
<td>7</td>
<td>4.61%</td>
<td></td>
</tr>
<tr>
<td>4</td>
<td>52</td>
<td>34.21%</td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>40</td>
<td>26.32%</td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>37</td>
<td>24.34%</td>
<td></td>
</tr>
<tr>
<td>1 (Unimportant)</td>
<td>9</td>
<td>5.92%</td>
<td></td>
</tr>
<tr>
<td>N/A</td>
<td>7</td>
<td>4.61%</td>
<td></td>
</tr>
</tbody>
</table>
### NATIONAL ALTERNATIVE DISPUTE RESOLUTION SURVEY

<p>| | | | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Total</strong></td>
<td>152</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Mean</strong></td>
<td>3.07</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Standard Dev</strong></td>
<td>1.19</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Variance</strong></td>
<td>1.43</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Other**

<p>| | | | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>5 (Critical)</td>
<td>1</td>
<td>1.52%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>4</td>
<td>5</td>
<td>7.58%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>9</td>
<td>13.64%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>6</td>
<td>9.09%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1 (Unimportant)</td>
<td>7</td>
<td>10.61%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>N/A</td>
<td>38</td>
<td>57.58%</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>66</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Mean</strong></td>
<td>4.92</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Standard Dev</strong></td>
<td>1.47</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Variance</strong></td>
<td>2.16</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

5. Would you recommend arbitration to resolve the following types of disputes?

<table>
<thead>
<tr>
<th></th>
<th>Always</th>
<th>Sometimes</th>
<th>Rarely</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Consumer disputes</strong></td>
<td>5</td>
<td>4</td>
<td>3</td>
</tr>
<tr>
<td><strong>Disputes with a competitor</strong></td>
<td>5</td>
<td>4</td>
<td>3</td>
</tr>
<tr>
<td><strong>Disputes with a company client is working with (e.g. supplier)</strong></td>
<td>5</td>
<td>4</td>
<td>3</td>
</tr>
<tr>
<td><strong>Employee disputes</strong></td>
<td>5</td>
<td>4</td>
<td>3</td>
</tr>
<tr>
<td><strong>Other</strong></td>
<td>5</td>
<td>4</td>
<td>3</td>
</tr>
</tbody>
</table>

#### Consumer disputes

<p>| | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Always</strong></td>
<td>8</td>
<td>54.83%</td>
</tr>
<tr>
<td><strong>Sometimes</strong></td>
<td>79</td>
<td>54.11%</td>
</tr>
<tr>
<td><strong>Rarely</strong></td>
<td>40</td>
<td>27.40%</td>
</tr>
<tr>
<td><strong>Never</strong></td>
<td>19</td>
<td>13.01%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>146</td>
<td></td>
</tr>
<tr>
<td><strong>Mean</strong></td>
<td>2.48</td>
<td></td>
</tr>
<tr>
<td><strong>Standard Dev</strong></td>
<td>0.79</td>
<td></td>
</tr>
<tr>
<td><strong>Variance</strong></td>
<td>0.62</td>
<td></td>
</tr>
</tbody>
</table>
### Disputes with a competitor

<table>
<thead>
<tr>
<th>Frequency</th>
<th>Count</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Always</td>
<td>4</td>
<td>2.72%</td>
</tr>
<tr>
<td>Sometimes</td>
<td>115</td>
<td>78.23%</td>
</tr>
<tr>
<td>Rarely</td>
<td>24</td>
<td>16.33%</td>
</tr>
<tr>
<td>Never</td>
<td>4</td>
<td>2.72%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>147</strong></td>
<td></td>
</tr>
</tbody>
</table>

Mean: 2.19  
Standard Dev: 0.51  
Variance: 0.26

### Disputes with a company client working with (e.g. supplier)

<table>
<thead>
<tr>
<th>Frequency</th>
<th>Count</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Always</td>
<td>13</td>
<td>8.72%</td>
</tr>
<tr>
<td>Sometimes</td>
<td>120</td>
<td>80.54%</td>
</tr>
<tr>
<td>Rarely</td>
<td>11</td>
<td>7.38%</td>
</tr>
<tr>
<td>Never</td>
<td>5</td>
<td>3.36%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>149</strong></td>
<td></td>
</tr>
</tbody>
</table>

Mean: 2.05  
Standard Dev: 0.54  
Variance: 0.29

### Employee disputes

<table>
<thead>
<tr>
<th>Frequency</th>
<th>Count</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Always</td>
<td>13</td>
<td>8.84%</td>
</tr>
<tr>
<td>Sometimes</td>
<td>85</td>
<td>57.82%</td>
</tr>
<tr>
<td>Rarely</td>
<td>38</td>
<td>25.85%</td>
</tr>
<tr>
<td>Never</td>
<td>11</td>
<td>7.48%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>147</strong></td>
<td></td>
</tr>
</tbody>
</table>

Mean: 2.32  
Standard Dev: 0.74  
Variance: 0.55

### Other

<table>
<thead>
<tr>
<th>Frequency</th>
<th>Count</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Always</td>
<td>5</td>
<td>6.76%</td>
</tr>
<tr>
<td>Sometimes</td>
<td>49</td>
<td>66.22%</td>
</tr>
<tr>
<td>Rarely</td>
<td>7</td>
<td>9.46%</td>
</tr>
<tr>
<td>Never</td>
<td>13</td>
<td>17.57%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>74</strong></td>
<td></td>
</tr>
</tbody>
</table>

Mean: 2.38  
Standard Dev: 0.86  
Variance: 0.73
6. When you refrain from recommending arbitration to resolve a dispute, how important are the following factors?

<table>
<thead>
<tr>
<th>Factor</th>
<th>Critical</th>
<th>4</th>
<th>3</th>
<th>2</th>
<th>1</th>
<th>N/A</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cost</td>
<td>5</td>
<td>4</td>
<td>3</td>
<td>2</td>
<td>1</td>
<td>N/A</td>
</tr>
<tr>
<td>Time</td>
<td>5</td>
<td>4</td>
<td>3</td>
<td>2</td>
<td>1</td>
<td>N/A</td>
</tr>
<tr>
<td>Publicity</td>
<td>5</td>
<td>4</td>
<td>3</td>
<td>2</td>
<td>1</td>
<td>N/A</td>
</tr>
<tr>
<td>Expertise (prefer Judge)</td>
<td>5</td>
<td>4</td>
<td>3</td>
<td>2</td>
<td>1</td>
<td>N/A</td>
</tr>
<tr>
<td>Fairness of the result</td>
<td>5</td>
<td>4</td>
<td>3</td>
<td>2</td>
<td>1</td>
<td>N/A</td>
</tr>
<tr>
<td>Protection of legal rules and procedures</td>
<td>5</td>
<td>4</td>
<td>3</td>
<td>2</td>
<td>1</td>
<td>N/A</td>
</tr>
<tr>
<td>Want discovery</td>
<td>5</td>
<td>4</td>
<td>3</td>
<td>2</td>
<td>1</td>
<td>N/A</td>
</tr>
<tr>
<td>Ability to appeal</td>
<td>5</td>
<td>4</td>
<td>3</td>
<td>2</td>
<td>1</td>
<td>N/A</td>
</tr>
<tr>
<td>Litigation encourages settlement</td>
<td>5</td>
<td>4</td>
<td>3</td>
<td>2</td>
<td>1</td>
<td>N/A</td>
</tr>
<tr>
<td>Unwillingness of other party to use arbitration</td>
<td>5</td>
<td>4</td>
<td>3</td>
<td>2</td>
<td>1</td>
<td>N/A</td>
</tr>
<tr>
<td>Other</td>
<td>5</td>
<td>4</td>
<td>3</td>
<td>2</td>
<td>1</td>
<td>N/A</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>Cost</th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Mean</td>
<td>3.20</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Standard Dev</td>
<td>1.44</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Variance</td>
<td>2.07</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>Time</th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Mean</td>
<td>5</td>
<td>2.69%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Standard Dev</td>
<td>0.97%</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Variance</td>
<td>0.25%</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>Cost</th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Total</td>
<td>187</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>Time</th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Total</td>
<td>59</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
## APPENDIX 2

<table>
<thead>
<tr>
<th>Total</th>
<th>186</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mean</td>
<td>3.58</td>
</tr>
<tr>
<td>Standard Dev</td>
<td>1.28</td>
</tr>
<tr>
<td>Variance</td>
<td>1.65</td>
</tr>
</tbody>
</table>

### Publicity

<table>
<thead>
<tr>
<th>Score</th>
<th>N</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>5 (Critical)</td>
<td>4</td>
<td>220%</td>
</tr>
<tr>
<td>4</td>
<td>34</td>
<td>18.68%</td>
</tr>
<tr>
<td>3</td>
<td>40</td>
<td>21.98%</td>
</tr>
<tr>
<td>2</td>
<td>46</td>
<td>25.27%</td>
</tr>
<tr>
<td>1 (Unimportant)</td>
<td>44</td>
<td>24.18%</td>
</tr>
<tr>
<td>N/A</td>
<td>14</td>
<td>7.69%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>182</strong></td>
<td></td>
</tr>
</tbody>
</table>

| Mean  | 3.74|
| Standard Dev | 1.29|
| Variance | 1.65|

### Expertise (prefer Judge)

<table>
<thead>
<tr>
<th>Score</th>
<th>N</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>5 (Critical)</td>
<td>27</td>
<td>14.44%</td>
</tr>
<tr>
<td>4</td>
<td>57</td>
<td>30.48%</td>
</tr>
<tr>
<td>3</td>
<td>32</td>
<td>17.11%</td>
</tr>
<tr>
<td>2</td>
<td>37</td>
<td>19.79%</td>
</tr>
<tr>
<td>1 (Unimportant)</td>
<td>22</td>
<td>11.76%</td>
</tr>
<tr>
<td>N/A</td>
<td>12</td>
<td>6.42%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>187</strong></td>
<td></td>
</tr>
</tbody>
</table>

| Mean  | 3.03|
| Standard Dev | 1.46|
| Variance | 2.14|

### Fairness of the result

<table>
<thead>
<tr>
<th>Score</th>
<th>N</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>5 (Critical)</td>
<td>11</td>
<td>6.08%</td>
</tr>
<tr>
<td>4</td>
<td>41</td>
<td>22.65%</td>
</tr>
<tr>
<td>3</td>
<td>66</td>
<td>36.46%</td>
</tr>
<tr>
<td>2</td>
<td>29</td>
<td>16.02%</td>
</tr>
<tr>
<td>1 (Unimportant)</td>
<td>22</td>
<td>12.15%</td>
</tr>
<tr>
<td>N/A</td>
<td>12</td>
<td>6.63%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>181</strong></td>
<td></td>
</tr>
</tbody>
</table>

<p>| Mean  | 3.25|
| Standard Dev | 1.29|
| Variance | 1.66|</p>
<table>
<thead>
<tr>
<th>Protection of legal rules and procedures</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>5 (Critical)</td>
<td>35</td>
<td>18.82%</td>
</tr>
<tr>
<td>4</td>
<td>73</td>
<td>39.25%</td>
</tr>
<tr>
<td>3</td>
<td>28</td>
<td>15.05%</td>
</tr>
<tr>
<td>2</td>
<td>20</td>
<td>10.75%</td>
</tr>
<tr>
<td>1 (Unimportant)</td>
<td>18</td>
<td>9.66%</td>
</tr>
<tr>
<td>N/A</td>
<td>12</td>
<td>6.45%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>186</td>
<td></td>
</tr>
<tr>
<td><strong>Mean</strong></td>
<td>2.73</td>
<td></td>
</tr>
<tr>
<td><strong>Standard Dev</strong></td>
<td>1.47</td>
<td></td>
</tr>
<tr>
<td><strong>Variance</strong></td>
<td>2.16</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Want automatic discovery</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>5 (Critical)</td>
<td>27</td>
<td>14.67%</td>
</tr>
<tr>
<td>4</td>
<td>68</td>
<td>36.96%</td>
</tr>
<tr>
<td>3</td>
<td>33</td>
<td>17.93%</td>
</tr>
<tr>
<td>2</td>
<td>26</td>
<td>14.13%</td>
</tr>
<tr>
<td>1 (Unimportant)</td>
<td>18</td>
<td>9.78%</td>
</tr>
<tr>
<td>N/A</td>
<td>12</td>
<td>6.52%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>184</td>
<td></td>
</tr>
<tr>
<td><strong>Mean</strong></td>
<td>2.87</td>
<td></td>
</tr>
<tr>
<td><strong>Standard Dev</strong></td>
<td>1.44</td>
<td></td>
</tr>
<tr>
<td><strong>Variance</strong></td>
<td>2.07</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Ability to appeal</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>5 (Critical)</td>
<td>48</td>
<td>25.81%</td>
</tr>
<tr>
<td>4</td>
<td>84</td>
<td>45.16%</td>
</tr>
<tr>
<td>3</td>
<td>19</td>
<td>10.22%</td>
</tr>
<tr>
<td>2</td>
<td>18</td>
<td>9.68%</td>
</tr>
<tr>
<td>1 (Unimportant)</td>
<td>8</td>
<td>4.30%</td>
</tr>
<tr>
<td>N/A</td>
<td>9</td>
<td>4.84%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>186</td>
<td></td>
</tr>
<tr>
<td><strong>Mean</strong></td>
<td>2.36</td>
<td></td>
</tr>
<tr>
<td><strong>Standard Dev</strong></td>
<td>1.34</td>
<td></td>
</tr>
<tr>
<td><strong>Variance</strong></td>
<td>1.79</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Litigation encourages settlement</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>5 (Critical)</td>
<td>11</td>
<td>6.08%</td>
</tr>
<tr>
<td>4</td>
<td>40</td>
<td>22.10%</td>
</tr>
<tr>
<td>3</td>
<td>48</td>
<td>26.52%</td>
</tr>
<tr>
<td>2</td>
<td>44</td>
<td>24.31%</td>
</tr>
<tr>
<td>1 (Unimportant)</td>
<td>26</td>
<td>14.36%</td>
</tr>
</tbody>
</table>
### Unwillingness of other party to use arbitration

<table>
<thead>
<tr>
<th>Level</th>
<th>Total</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>5 (Critical)</td>
<td>28</td>
<td>15.14%</td>
</tr>
<tr>
<td>4</td>
<td>55</td>
<td>29.73%</td>
</tr>
<tr>
<td>3</td>
<td>54</td>
<td>29.19%</td>
</tr>
<tr>
<td>2</td>
<td>22</td>
<td>11.89%</td>
</tr>
<tr>
<td>1 (Unimportant)</td>
<td>13</td>
<td>7.03%</td>
</tr>
<tr>
<td>N/A</td>
<td>13</td>
<td>7.03%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>185</strong></td>
<td><strong>100%</strong></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Level</th>
<th>Total</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>5 (Critical)</td>
<td>11</td>
<td>11.34%</td>
</tr>
<tr>
<td>4</td>
<td>8</td>
<td>8.25%</td>
</tr>
<tr>
<td>3</td>
<td>10</td>
<td>10.31%</td>
</tr>
<tr>
<td>2</td>
<td>6</td>
<td>6.19%</td>
</tr>
<tr>
<td>1 (Unimportant)</td>
<td>10</td>
<td>10.31%</td>
</tr>
<tr>
<td>N/A</td>
<td>52</td>
<td>53.61%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>97</strong></td>
<td><strong>100%</strong></td>
</tr>
</tbody>
</table>
**PART B: MEDIATION**

Mediation. In this survey, the term “mediation” means a procedure where an impartial third-party(s) helps your company and the other disputing party reach a mutually agreeable settlement, without making any binding decisions.

7. Do you ever recommend to your clients that they resolve a dispute using mediation?

<table>
<thead>
<tr>
<th></th>
<th>a. Yes</th>
<th>b. No (please go to Question #13)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>179</td>
<td>91.33%</td>
</tr>
<tr>
<td>No</td>
<td>17</td>
<td>8.67%</td>
</tr>
<tr>
<td>Total</td>
<td>196</td>
<td></td>
</tr>
</tbody>
</table>

8. How frequently do you make the recommendation that a client use mediation?

<table>
<thead>
<tr>
<th></th>
<th>a. Very frequently</th>
<th>b. Frequently</th>
<th>c. On occasion</th>
<th>d. Rarely</th>
</tr>
</thead>
<tbody>
<tr>
<td>Very frequently</td>
<td>54</td>
<td>33.33%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Frequently</td>
<td>53</td>
<td>32.72%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>On occasion</td>
<td>43</td>
<td>26.54%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Rarely</td>
<td>12</td>
<td>7.41%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>162</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mean</td>
<td>2.08</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Standard Dev.</td>
<td>0.95</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Variance</td>
<td>0.89</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

9. Please rate the following factors on how often they prompt you to recommend mediation.

<table>
<thead>
<tr>
<th></th>
<th>Always</th>
<th>Sometimes</th>
<th>Rarely</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ad-hoc basis depending on the facts of the dispute</td>
<td>5</td>
<td>4</td>
<td>3</td>
</tr>
<tr>
<td>Needs of the client</td>
<td>5</td>
<td>4</td>
<td>3</td>
</tr>
</tbody>
</table>

Never
APPENDIX 2

<table>
<thead>
<tr>
<th>Category</th>
<th>5</th>
<th>4</th>
<th>3</th>
<th>2</th>
<th>1</th>
<th>Never</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mandated by contract</td>
<td>5</td>
<td>4</td>
<td>3</td>
<td>2</td>
<td>1</td>
<td>Never</td>
</tr>
<tr>
<td>Mandated by the court</td>
<td>5</td>
<td>4</td>
<td>3</td>
<td>2</td>
<td>1</td>
<td>Never</td>
</tr>
<tr>
<td>Suggested by the other party</td>
<td>5</td>
<td>4</td>
<td>3</td>
<td>2</td>
<td>1</td>
<td>Never</td>
</tr>
<tr>
<td>Policy of your client</td>
<td>5</td>
<td>4</td>
<td>3</td>
<td>2</td>
<td>1</td>
<td>Never</td>
</tr>
<tr>
<td>Other</td>
<td>5</td>
<td>4</td>
<td>3</td>
<td>2</td>
<td>1</td>
<td>Never</td>
</tr>
</tbody>
</table>

**Ad-hoc basis depending on the facts of the dispute**

<table>
<thead>
<tr>
<th>Frequency</th>
<th>56</th>
<th>97</th>
<th>9</th>
<th>4</th>
<th>166</th>
</tr>
</thead>
<tbody>
<tr>
<td>Percentage</td>
<td>33.73%</td>
<td>58.43%</td>
<td>5.42%</td>
<td>2.41%</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Total</th>
<th>166</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mean</td>
<td>1.77</td>
</tr>
<tr>
<td>Standard Dev</td>
<td>0.66</td>
</tr>
<tr>
<td>Variance</td>
<td>0.44</td>
</tr>
</tbody>
</table>

**Needs of the client**

<table>
<thead>
<tr>
<th>Frequency</th>
<th>71</th>
<th>86</th>
<th>8</th>
<th>1</th>
<th>166</th>
</tr>
</thead>
<tbody>
<tr>
<td>Percentage</td>
<td>42.77%</td>
<td>51.81%</td>
<td>4.82%</td>
<td>0.60%</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Total</th>
<th>166</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mean</td>
<td>1.63</td>
</tr>
<tr>
<td>Standard Dev</td>
<td>0.61</td>
</tr>
<tr>
<td>Variance</td>
<td>0.37</td>
</tr>
</tbody>
</table>

**Mandated by contract**

<table>
<thead>
<tr>
<th>Frequency</th>
<th>38</th>
<th>50</th>
<th>53</th>
<th>23</th>
<th>164</th>
</tr>
</thead>
<tbody>
<tr>
<td>Percentage</td>
<td>23.17%</td>
<td>30.49%</td>
<td>32.32%</td>
<td>14.02%</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Total</th>
<th>164</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mean</td>
<td>2.37</td>
</tr>
<tr>
<td>Standard Dev</td>
<td>0.99</td>
</tr>
<tr>
<td>Variance</td>
<td>0.98</td>
</tr>
</tbody>
</table>

**Mandated by the court**

<table>
<thead>
<tr>
<th>Frequency</th>
<th>59</th>
<th>55</th>
<th>26</th>
</tr>
</thead>
<tbody>
<tr>
<td>Percentage</td>
<td>35.98%</td>
<td>33.54%</td>
<td>15.85%</td>
</tr>
</tbody>
</table>

| Total                       |      | 164 |
|-----------------------------|-----|
| Mean                        | 2.37|
| Standard Dev                | 0.99|
| Variance                    | 0.98|
### National Alternative Dispute Resolution Survey

<table>
<thead>
<tr>
<th>Suggested by the other party</th>
<th>Always</th>
<th>Sometimes</th>
<th>Rarely</th>
<th>Never</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>11</td>
<td>130</td>
<td>20</td>
<td>2</td>
<td>163</td>
</tr>
<tr>
<td>Mean</td>
<td>2.08</td>
<td>2.09</td>
<td>2.08</td>
<td>2.09</td>
<td>2.09</td>
</tr>
<tr>
<td>Standard Dev</td>
<td>0.48</td>
<td>1.05</td>
<td>0.48</td>
<td>1.05</td>
<td>0.73</td>
</tr>
<tr>
<td>Variance</td>
<td>0.23</td>
<td>1.10</td>
<td>0.23</td>
<td>1.10</td>
<td>0.94</td>
</tr>
</tbody>
</table>

### Policy of your client

<table>
<thead>
<tr>
<th>Policy of your client</th>
<th>Always</th>
<th>Sometimes</th>
<th>Rarely</th>
<th>Never</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>19</td>
<td>63</td>
<td>51</td>
<td>31</td>
<td>164</td>
</tr>
<tr>
<td>Mean</td>
<td>2.57</td>
<td>2.57</td>
<td>2.57</td>
<td>2.57</td>
<td>2.57</td>
</tr>
<tr>
<td>Standard Dev</td>
<td>0.93</td>
<td>0.93</td>
<td>0.93</td>
<td>0.93</td>
<td>0.93</td>
</tr>
<tr>
<td>Variance</td>
<td>0.86</td>
<td>0.86</td>
<td>0.86</td>
<td>0.86</td>
<td>0.86</td>
</tr>
</tbody>
</table>

### Other

<table>
<thead>
<tr>
<th>Other</th>
<th>Always</th>
<th>Sometimes</th>
<th>Rarely</th>
<th>Never</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>9</td>
<td>27</td>
<td>11</td>
<td>33</td>
<td>80</td>
</tr>
<tr>
<td>Mean</td>
<td>2.85</td>
<td>2.85</td>
<td>2.85</td>
<td>2.85</td>
<td>2.85</td>
</tr>
<tr>
<td>Standard Dev</td>
<td>1.09</td>
<td>1.09</td>
<td>1.09</td>
<td>1.09</td>
<td>1.09</td>
</tr>
<tr>
<td>Variance</td>
<td>1.19</td>
<td>1.19</td>
<td>1.19</td>
<td>1.19</td>
<td>1.19</td>
</tr>
</tbody>
</table>
10. Please rate the following factors on their importance to you when recommending whether to use mediation to resolve a dispute.

<table>
<thead>
<tr>
<th>Factor</th>
<th>Critical</th>
<th>Unimportant</th>
</tr>
</thead>
<tbody>
<tr>
<td>Reduces cost</td>
<td>5</td>
<td>4</td>
</tr>
<tr>
<td>Reduces time</td>
<td>5</td>
<td>4</td>
</tr>
<tr>
<td>Privacy</td>
<td>5</td>
<td>4</td>
</tr>
<tr>
<td>Expertise of the mediator</td>
<td>5</td>
<td>4</td>
</tr>
<tr>
<td>Fairness of the result</td>
<td>5</td>
<td>4</td>
</tr>
<tr>
<td>Allows for a more amiable resolution</td>
<td>5</td>
<td>4</td>
</tr>
<tr>
<td>Greater control over the procedure</td>
<td>5</td>
<td>4</td>
</tr>
<tr>
<td>(simplification)</td>
<td>5</td>
<td>4</td>
</tr>
<tr>
<td>Avoids discovery</td>
<td>5</td>
<td>4</td>
</tr>
<tr>
<td>Encourages settlement</td>
<td>5</td>
<td>4</td>
</tr>
<tr>
<td>Allows the parties to resolve the dispute</td>
<td>5</td>
<td>4</td>
</tr>
<tr>
<td>Other</td>
<td>5</td>
<td>4</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Factor</th>
<th>Critical</th>
<th>Unimportant</th>
</tr>
</thead>
<tbody>
<tr>
<td>Reduces cost</td>
<td></td>
<td></td>
</tr>
<tr>
<td>5 (Critical)</td>
<td>66</td>
<td>39.76%</td>
</tr>
<tr>
<td>4</td>
<td>71</td>
<td>42.77%</td>
</tr>
<tr>
<td>3</td>
<td>18</td>
<td>10.84%</td>
</tr>
<tr>
<td>2</td>
<td>5</td>
<td>3.01%</td>
</tr>
<tr>
<td>1 (Unimportant)</td>
<td>1</td>
<td>0.60%</td>
</tr>
<tr>
<td>N/A</td>
<td>5</td>
<td>3.01%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>166</strong></td>
<td></td>
</tr>
<tr>
<td>Mean</td>
<td>1.91</td>
<td></td>
</tr>
<tr>
<td>Standard Dev</td>
<td>1.08</td>
<td></td>
</tr>
<tr>
<td>Variance</td>
<td>1.16</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Factor</th>
<th>Critical</th>
<th>Unimportant</th>
</tr>
</thead>
<tbody>
<tr>
<td>Reduces time</td>
<td></td>
<td></td>
</tr>
<tr>
<td>5 (Critical)</td>
<td>60</td>
<td>35.93%</td>
</tr>
<tr>
<td>4</td>
<td>71</td>
<td>42.51%</td>
</tr>
<tr>
<td>3</td>
<td>20</td>
<td>11.98%</td>
</tr>
<tr>
<td>2</td>
<td>11</td>
<td>6.59%</td>
</tr>
<tr>
<td>1 (Unimportant)</td>
<td>2</td>
<td>1.20%</td>
</tr>
<tr>
<td>Privacy</td>
<td>5 (Critical)</td>
<td>4</td>
</tr>
<tr>
<td>--------------</td>
<td>--------------</td>
<td>---</td>
</tr>
<tr>
<td></td>
<td>31</td>
<td>53</td>
</tr>
<tr>
<td>Expertise of the mediator</td>
<td>29</td>
<td>63</td>
</tr>
<tr>
<td>Fairness of the result</td>
<td>15</td>
<td>46</td>
</tr>
</tbody>
</table>
### APPENDIX 2

<table>
<thead>
<tr>
<th>Allows for a more amiable resolution</th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>5 (Critical)</td>
<td>39</td>
<td>23.64%</td>
<td></td>
</tr>
<tr>
<td>4</td>
<td>80</td>
<td>48.48%</td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>31</td>
<td>18.79%</td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>12</td>
<td>7.27%</td>
<td></td>
</tr>
<tr>
<td>1 (Unimportant)</td>
<td>2</td>
<td>1.21%</td>
<td></td>
</tr>
<tr>
<td>N/A</td>
<td>1</td>
<td>0.61%</td>
<td></td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td></td>
<td><strong>165</strong></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Greater control over the procedure</th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>5 (Critical)</td>
<td>26</td>
<td>16.15%</td>
<td></td>
</tr>
<tr>
<td>4</td>
<td>60</td>
<td>37.27%</td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>41</td>
<td>25.47%</td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>20</td>
<td>12.42%</td>
<td></td>
</tr>
<tr>
<td>1 (Unimportant)</td>
<td>7</td>
<td>4.35%</td>
<td></td>
</tr>
<tr>
<td>N/A</td>
<td>7</td>
<td>4.35%</td>
<td></td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td></td>
<td><strong>161</strong></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Avoids discovery</th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>5 (Critical)</td>
<td>12</td>
<td>7.36%</td>
<td></td>
</tr>
<tr>
<td>4</td>
<td>43</td>
<td>26.38%</td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>35</td>
<td>21.47%</td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>36</td>
<td>22.09%</td>
<td></td>
</tr>
<tr>
<td>1 (Unimportant)</td>
<td>26</td>
<td>15.95%</td>
<td></td>
</tr>
<tr>
<td>N/A</td>
<td>11</td>
<td>6.75%</td>
<td></td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td></td>
<td><strong>163</strong></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Encourages settlement</th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>5 (Critical)</td>
<td>71</td>
<td>43.29%</td>
<td></td>
</tr>
<tr>
<td>4</td>
<td>75</td>
<td>45.73%</td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>13</td>
<td>7.93%</td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>3</td>
<td>1.83%</td>
<td></td>
</tr>
<tr>
<td>1 (Unimportant)</td>
<td>1</td>
<td>0.61%</td>
<td></td>
</tr>
<tr>
<td>N/A</td>
<td>1</td>
<td>0.61%</td>
<td></td>
</tr>
</tbody>
</table>
11. Would you recommend mediation to resolve the following types of disputes?

<table>
<thead>
<tr>
<th></th>
<th>Always</th>
<th>Sometimes</th>
<th>Rarely</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Consumer disputes</td>
<td>5</td>
<td>4</td>
<td>3</td>
<td>2</td>
</tr>
<tr>
<td>Disputes with a competitor</td>
<td>5</td>
<td>4</td>
<td>3</td>
<td>2</td>
</tr>
<tr>
<td>Disputes with a company client is working with (e.g. supplier)</td>
<td>5</td>
<td>4</td>
<td>3</td>
<td>2</td>
</tr>
</tbody>
</table>
### APPENDIX 2

<table>
<thead>
<tr>
<th></th>
<th>5</th>
<th>4</th>
<th>3</th>
<th>2</th>
<th>1</th>
<th>Never</th>
</tr>
</thead>
<tbody>
<tr>
<td>Employee disputes</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Other</td>
<td>5</td>
<td>4</td>
<td>3</td>
<td>2</td>
<td>1</td>
<td>Never</td>
</tr>
</tbody>
</table>

#### Consumer disputes

<table>
<thead>
<tr>
<th></th>
<th>5</th>
<th>4</th>
<th>3</th>
<th>2</th>
<th>1</th>
<th>Never</th>
</tr>
</thead>
<tbody>
<tr>
<td>Always</td>
<td>35</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>21.88%</td>
</tr>
<tr>
<td>Sometimes</td>
<td>94</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>58.75%</td>
</tr>
<tr>
<td>Rarely</td>
<td>19</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>11.88%</td>
</tr>
<tr>
<td>Never</td>
<td>12</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>7.50%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td></td>
<td>160</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mean</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>2.05</td>
</tr>
<tr>
<td>Standard Dev.</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>0.80</td>
</tr>
<tr>
<td>Variance</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>0.64</td>
</tr>
</tbody>
</table>

#### Disputes with a competitor

<table>
<thead>
<tr>
<th></th>
<th>5</th>
<th>4</th>
<th>3</th>
<th>2</th>
<th>1</th>
<th>Never</th>
</tr>
</thead>
<tbody>
<tr>
<td>Always</td>
<td>22</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>13.75%</td>
</tr>
<tr>
<td>Sometimes</td>
<td>107</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>66.88%</td>
</tr>
<tr>
<td>Rarely</td>
<td>24</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>15.00%</td>
</tr>
<tr>
<td>Never</td>
<td>7</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>4.38%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td></td>
<td>160</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mean</td>
<td></td>
<td>2.10</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Standard Dev.</td>
<td></td>
<td>0.67</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Variance</td>
<td></td>
<td>0.46</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

#### Disputes with a company client is working with (e.g. supplier)

<table>
<thead>
<tr>
<th></th>
<th>5</th>
<th>4</th>
<th>3</th>
<th>2</th>
<th>1</th>
<th>Never</th>
</tr>
</thead>
<tbody>
<tr>
<td>Always</td>
<td>44</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>27.67%</td>
</tr>
<tr>
<td>Sometimes</td>
<td>98</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>61.64%</td>
</tr>
<tr>
<td>Rarely</td>
<td>12</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>7.55%</td>
</tr>
<tr>
<td>Never</td>
<td>5</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>3.14%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td></td>
<td>159</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mean</td>
<td></td>
<td>1.86</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Standard Dev.</td>
<td></td>
<td>0.68</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Variance</td>
<td></td>
<td>0.46</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

#### Employee disputes

<table>
<thead>
<tr>
<th></th>
<th>5</th>
<th>4</th>
<th>3</th>
<th>2</th>
<th>1</th>
<th>Never</th>
</tr>
</thead>
<tbody>
<tr>
<td>Always</td>
<td>40</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>24.84%</td>
</tr>
<tr>
<td>Sometimes</td>
<td>95</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>59.01%</td>
</tr>
<tr>
<td>Rarely</td>
<td>20</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>12.42%</td>
</tr>
<tr>
<td>Never</td>
<td>6</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>3.73%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td></td>
<td>161</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

---

516
12. When you refrain from recommending mediation to resolve a dispute, how important are the following factors?

<table>
<thead>
<tr>
<th>Factor</th>
<th>Critical</th>
<th>Unimportant</th>
<th>N/A</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cost</td>
<td>5</td>
<td>4</td>
<td>3</td>
</tr>
<tr>
<td>Time</td>
<td>5</td>
<td>4</td>
<td>3</td>
</tr>
<tr>
<td>Publicity</td>
<td>5</td>
<td>4</td>
<td>3</td>
</tr>
<tr>
<td>Expertise (prefer Judge)</td>
<td>5</td>
<td>4</td>
<td>3</td>
</tr>
<tr>
<td>Fairness of the result</td>
<td>5</td>
<td>4</td>
<td>3</td>
</tr>
<tr>
<td>Protection of legal rules and procedures</td>
<td>5</td>
<td>4</td>
<td>3</td>
</tr>
<tr>
<td>Want discovery</td>
<td>5</td>
<td>4</td>
<td>3</td>
</tr>
<tr>
<td>Encourages settlement</td>
<td>5</td>
<td>4</td>
<td>3</td>
</tr>
<tr>
<td>Unwillingness of other party to use mediation</td>
<td>5</td>
<td>4</td>
<td>3</td>
</tr>
<tr>
<td>Other</td>
<td>5</td>
<td>4</td>
<td>3</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Cost</th>
<th>Critical</th>
<th>Unimportant</th>
<th>N/A</th>
</tr>
</thead>
<tbody>
<tr>
<td>5</td>
<td>14</td>
<td>8.05%</td>
<td></td>
</tr>
<tr>
<td>4</td>
<td>28</td>
<td>16.09%</td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>29</td>
<td>16.67%</td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>45</td>
<td>25.88%</td>
<td></td>
</tr>
<tr>
<td>Time</td>
<td>5 (Critical)</td>
<td>4</td>
<td>3</td>
</tr>
<tr>
<td>------------</td>
<td>--------------</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td></td>
<td>11</td>
<td>29</td>
<td>29</td>
</tr>
<tr>
<td>Publicity</td>
<td>5 (Critical)</td>
<td>13</td>
<td>29</td>
</tr>
<tr>
<td>Expertise</td>
<td>5 (Critical)</td>
<td>24</td>
<td>39</td>
</tr>
<tr>
<td></td>
<td>47</td>
<td>29</td>
<td>29</td>
</tr>
</tbody>
</table>
### Fairness of the result

<p>| | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>5 (Critical)</td>
<td>13</td>
<td>7.56%</td>
</tr>
<tr>
<td>4</td>
<td>38</td>
<td>22.09%</td>
</tr>
<tr>
<td>3</td>
<td>39</td>
<td>22.67%</td>
</tr>
<tr>
<td>2</td>
<td>34</td>
<td>19.77%</td>
</tr>
<tr>
<td>1 (Unimportant)</td>
<td>32</td>
<td>18.60%</td>
</tr>
<tr>
<td>N/A</td>
<td>16</td>
<td>9.30%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>172</strong></td>
<td></td>
</tr>
</tbody>
</table>

<p>| | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Mean</strong></td>
<td>3.48</td>
<td></td>
</tr>
<tr>
<td><strong>Standard Dev</strong></td>
<td>1.44</td>
<td></td>
</tr>
<tr>
<td><strong>Variance</strong></td>
<td>2.09</td>
<td></td>
</tr>
</tbody>
</table>

### Protection of legal rules and procedures

<p>| | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>5 (Critical)</td>
<td>24</td>
<td>13.95%</td>
</tr>
<tr>
<td>4</td>
<td>38</td>
<td>22.09%</td>
</tr>
<tr>
<td>3</td>
<td>32</td>
<td>18.60%</td>
</tr>
<tr>
<td>2</td>
<td>30</td>
<td>17.44%</td>
</tr>
<tr>
<td>1 (Unimportant)</td>
<td>30</td>
<td>17.44%</td>
</tr>
<tr>
<td>N/A</td>
<td>18</td>
<td>10.47%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>172</strong></td>
<td></td>
</tr>
</tbody>
</table>

<p>| | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Mean</strong></td>
<td>3.34</td>
<td></td>
</tr>
<tr>
<td><strong>Standard Dev</strong></td>
<td>1.58</td>
<td></td>
</tr>
<tr>
<td><strong>Variance</strong></td>
<td>2.49</td>
<td></td>
</tr>
</tbody>
</table>

### Want discovery

<p>| | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>5 (Critical)</td>
<td>26</td>
<td>14.86%</td>
</tr>
<tr>
<td>4</td>
<td>54</td>
<td>30.86%</td>
</tr>
<tr>
<td>3</td>
<td>34</td>
<td>19.43%</td>
</tr>
<tr>
<td>2</td>
<td>28</td>
<td>16.00%</td>
</tr>
<tr>
<td>1 (Unimportant)</td>
<td>21</td>
<td>12.00%</td>
</tr>
<tr>
<td>N/A</td>
<td>12</td>
<td>6.86%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>175</strong></td>
<td></td>
</tr>
</tbody>
</table>

<p>| | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Mean</strong></td>
<td>3.00</td>
<td></td>
</tr>
<tr>
<td><strong>Standard Dev</strong></td>
<td>1.47</td>
<td></td>
</tr>
<tr>
<td><strong>Variance</strong></td>
<td>2.17</td>
<td></td>
</tr>
</tbody>
</table>

### Encourages settlement

<p>| | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>5 (Critical)</td>
<td>8</td>
<td>4.73%</td>
</tr>
<tr>
<td>4</td>
<td>21</td>
<td>12.43%</td>
</tr>
<tr>
<td>3</td>
<td>35</td>
<td>20.71%</td>
</tr>
<tr>
<td>2</td>
<td>43</td>
<td>25.44%</td>
</tr>
<tr>
<td>1 (Unimportant)</td>
<td>42</td>
<td>24.85%</td>
</tr>
</tbody>
</table>
# APPENDIX 2

<table>
<thead>
<tr>
<th></th>
<th>N/A</th>
<th>20</th>
<th>11.83%</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Total</strong></td>
<td></td>
<td>169</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>Mean</th>
<th>3.89</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Standard Dev</strong></td>
<td>1.36</td>
<td></td>
</tr>
<tr>
<td><strong>Variance</strong></td>
<td>1.85</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>Unwillingness of other party to use mediation</strong></th>
<th>46</th>
<th>26.44%</th>
</tr>
</thead>
<tbody>
<tr>
<td>5 (Critical)</td>
<td>4</td>
<td>23.56%</td>
</tr>
<tr>
<td>4</td>
<td>41</td>
<td>24.71%</td>
</tr>
<tr>
<td>3</td>
<td>43</td>
<td>12.07%</td>
</tr>
<tr>
<td>2</td>
<td>21</td>
<td>8.05%</td>
</tr>
<tr>
<td>1 (Unimportant)</td>
<td>14</td>
<td>5.17%</td>
</tr>
<tr>
<td><strong>N/A</strong></td>
<td>9</td>
<td></td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>174</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>Mean</th>
<th>2.67</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Standard Dev</strong></td>
<td>1.45</td>
<td></td>
</tr>
<tr>
<td><strong>Variance</strong></td>
<td>2.11</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>Other</strong></th>
<th>10</th>
<th>10.20%</th>
</tr>
</thead>
<tbody>
<tr>
<td>5 (Critical)</td>
<td>8</td>
<td>8.16%</td>
</tr>
<tr>
<td>4</td>
<td>14</td>
<td>14.29%</td>
</tr>
<tr>
<td>3</td>
<td>13</td>
<td>13.27%</td>
</tr>
<tr>
<td>1 (Unimportant)</td>
<td>14</td>
<td>14.29%</td>
</tr>
<tr>
<td><strong>N/A</strong></td>
<td>39</td>
<td></td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>98</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>Mean</th>
<th>4.33</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Standard Dev</strong></td>
<td>1.75</td>
<td></td>
</tr>
<tr>
<td><strong>Variance</strong></td>
<td>3.05</td>
<td></td>
</tr>
</tbody>
</table>
Dispute Resolution Clause. For the purpose of this survey, a “dispute resolution clause” refers to a contract clause that dictates how the parties will resolve a dispute, including using mediation, arbitration, or other ADR process (e.g. a mandatory arbitration clause).

13. Do you recommend that your clients insert dispute resolution clauses into their contracts?

<table>
<thead>
<tr>
<th>a. Yes</th>
<th>b. No (please ignore remaining questions)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>132</td>
</tr>
<tr>
<td>No</td>
<td>46</td>
</tr>
<tr>
<td>Total</td>
<td>178</td>
</tr>
</tbody>
</table>

14. How often do you recommend the insertion of dispute resolution clauses into contracts with the following parties?

<table>
<thead>
<tr>
<th></th>
<th>Always</th>
<th>Sometimes</th>
<th>Rarely</th>
<th>Never</th>
</tr>
</thead>
<tbody>
<tr>
<td>a. Consumers</td>
<td>5</td>
<td>4</td>
<td>3</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>1</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Never</td>
</tr>
<tr>
<td>b. Businesses</td>
<td>5</td>
<td>4</td>
<td>3</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>1</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Never</td>
</tr>
<tr>
<td>c. Employees</td>
<td>5</td>
<td>4</td>
<td>3</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>1</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Never</td>
</tr>
<tr>
<td>d. Other _____</td>
<td>5</td>
<td>4</td>
<td>3</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>1</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Never</td>
</tr>
</tbody>
</table>

### Consumers

<p>| | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Always</td>
<td>25</td>
<td>16.78%</td>
</tr>
<tr>
<td>Sometimes</td>
<td>53</td>
<td>35.57%</td>
</tr>
<tr>
<td>Rarely</td>
<td>25</td>
<td>16.78%</td>
</tr>
<tr>
<td>Never</td>
<td>46</td>
<td>30.87%</td>
</tr>
<tr>
<td>Total</td>
<td>149</td>
<td></td>
</tr>
</tbody>
</table>

Mean 2.62
Standard Dev 1.09
Variance 1.20

### Businesses

<p>| | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Always</td>
<td>40</td>
<td>25.48%</td>
</tr>
</tbody>
</table>

521
### APPENDIX 2

<table>
<thead>
<tr>
<th></th>
<th>Sometimes</th>
<th>Rarely</th>
<th>Never</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Always</td>
<td>23</td>
<td></td>
<td></td>
<td>157</td>
</tr>
<tr>
<td>Sometimes</td>
<td>62</td>
<td></td>
<td></td>
<td>149</td>
</tr>
<tr>
<td>Rarely</td>
<td>30</td>
<td></td>
<td></td>
<td>149</td>
</tr>
<tr>
<td>Never</td>
<td>34</td>
<td></td>
<td></td>
<td>149</td>
</tr>
</tbody>
</table>

**Employees**

<table>
<thead>
<tr>
<th></th>
<th>Mean</th>
<th>Standard Dev</th>
<th>Variance</th>
</tr>
</thead>
<tbody>
<tr>
<td>Always</td>
<td>2.24</td>
<td>1.04</td>
<td>1.09</td>
</tr>
<tr>
<td>Sometimes</td>
<td>2.50</td>
<td>1.01</td>
<td>1.02</td>
</tr>
<tr>
<td>Never</td>
<td>2.79</td>
<td>1.12</td>
<td>1.26</td>
</tr>
</tbody>
</table>

**Other**

<table>
<thead>
<tr>
<th></th>
<th>Mean</th>
<th>Standard Dev</th>
<th>Variance</th>
</tr>
</thead>
<tbody>
<tr>
<td>Always</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Sometimes</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Rarely</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Never</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

15. What type of dispute resolution clauses do you recommend?

- Mandatory arbitration
- Mandatory mediation
- Step clause (requires mediation followed by arbitration if mediation is unsuccessful)
- Other

<table>
<thead>
<tr>
<th>Clause</th>
<th>Choose</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mandatory arbitration</td>
<td>57</td>
<td>37.50%</td>
</tr>
<tr>
<td>Mandatory mediation</td>
<td>22</td>
<td>14.47%</td>
</tr>
<tr>
<td>Step clause (requires mediation followed by arbitration if mediation is unsuccessful)</td>
<td>46</td>
<td>30.26%</td>
</tr>
</tbody>
</table>
16. Additional Comments

- N/A: I don't deal with contracts so this issue doesn't arise in my practice
- Choice of law/choice of forum
- I generally do not draft agreements, and most of my clients avoid such clauses
- Can mediate or arbitrate or go to court if they choose
- Depends on the nature of the contract and the business relationship
- I do not recommend as I am a Barrister and not a Solicitor (i.e., I don't draft contracts)
- All of the above depending on the case
- Varies in the circumstances of the client's needs, the relationship between the parties, etc.
- Voluntary mediation/arbitration
- I don't draft contracts
- Depends on the circumstances; e.g., mandatory arbitration clauses could be good class action defence
- Varies: step is common.
- Not relevant – my practice involves the CRA – there is only very limited mediation
- Not a commercial lawyer
- Process with election for ADR or court
- Any of the above could be suitable; depends on situation
- Not usually involved in drafting contracts
- This depends on the client, the agreement, etc.
- Not applicable as I do not recommend them
- Submission to jurisdiction of specified court

---

2 Additional comments from respondents are reproduced here (repeated comments have been deleted).
YORK UNIVERSITY

Memo

To: Professor Trevor Farrow, Osgoode Hall Law School, tfarrow/osgoode.yorku.ca

From: Alison M. Collins-Mrakas, Manager, Research Ethics

Date: Friday August 15th, 2008

Re: Ethics Approval

Frequency of Use of Alternative Dispute Resolution (ADR) by Practicing Lawyers

I am writing to inform you that the Human Participants Review Sub-Committee has reviewed and approved the above project.

Should you have any questions, please feel free to contact me at: 416-736-5914 or via email at: acollins@yorku.ca.

Yours sincerely,

Alison M. Collins-Mrakas M.Sc., LLM
Manager, Office of Research Ethics
Subject: Assistance Needed with Research

My name is Trevor Farrow. I am a professor at Osgoode Hall Law School researching the use of ADR (Alternative Dispute Resolution) and the privatization of our systems of civil justice. There is little empirical data available in Canada on this subject. As such, your participation in a brief survey would be invaluable in obtaining a representative sample.

Note: all responses will be kept completely anonymous.

Please click here to fill out the survey, which will take approximately 3-6 minutes.

Thank you very much for your time and input.

Trevor C. W. Farrow
Associate Professor
Osgoode Hall Law School
(416) 736-5240
tfarrow@osgoode.yorku.ca