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The Practices of Alternative Dispute Resolution (ADR)

Article 1

Introduction: The Practices of Alternative Dispute Resolution

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INTRODUCTION©

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The practices of alternative dispute resolution (ADR)[1] are increasingly displacing, infiltrating, and transforming conventional models of legal dispute resolution. Critical scholarship, arguably, has not kept up with the pace of change. As such, the idea of devoting a special issue of the *Osgoode Hall Law Journal* to the growing and changing field of ADR makes good sense. All six articles published here represent important contributions to both the theory and the practice of ADR. By definition, ADR scholarship challenges conventional thinking about the appropriateness and effectiveness of litigation to resolve disputes. These articles share that general orientation, and carry their analyses further by challenging conventional wisdom within the ADR field itself.

The articles reflect the scope and diversity of this broad subject area. Some of the contributions to this issue have a practical focus, such as Randy Pepper's exploration of the favourable legal climate that now exists in Ontario for the practice of commercial arbitration,[2] and Owen Gray's important and timely piece on the confidentiality of communications in mediation.[3] Pepper demonstrates that Ontario legislators and judges have fashioned legal rules that strongly support parties' ability to define arbitration rules and procedures to suit their needs with minimal judicial interference. He suggests that greater awareness of Ontario's supportive legal framework ought to make Ontario a leading jurisdiction for the conduct of international commercial arbitration. Gray recognizes that, in order to foster ADR, it is imperative that the system protect mediation communications from voluntary or compelled disclosure. He proposes that, since parties and

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1 I resist the temptation to debate the appropriateness of the word "alternative"; although there is clearly much about the word that demonstrates the legal community's scepticism of processes other than traditional adjudication.

2 See R.A. Pepper, "Why Arbitrate?: Ontario's Recent Experience With Commercial Arbitration" (1998) 36 Osgoode Hall L.J. 807.

3 See O.V. Gray, "Protecting the Confidentiality of Communications in Mediation" (1998) 36 Osgoode Hall L.J. 667.

mediators have different interests in confidentiality, any efforts at reform should balance these interests by making a distinction between circumstances in which parties could be required to disclose mediation communications, and those in which the mediator could be required to do so.

Others raise theoretical challenges, such as Pam Marshall's review of the claims made on behalf of ADR, and her admonition to lawyers to critically evaluate their roles in dispute resolution processes.[4] She urges us to reflect on the limitations of ADR within the framework of one of literature's best-known disputes, that of the Capulets and the Montagues. France Houle and Daniel Mockle turn their attention to a neglected area of scholarship, namely, the role of ADR in public law.[5] Focusing on federal administrative law, they review and catalogue the various forms of dispute resolution employed in that area, and examine the ways in which ADR is related to, and helps facilitate, changing regulatory strategies. Michael Coyle challenges mediators to think seriously about redressing power imbalances and fighting unfairness.[6] To those who assume that mediation can overcome the disparities inherent in disputes involving Aboriginal peoples, Coyle offers a thoughtful examination of the challenges and obstacles that mediators face and must overcome. In his contribution, Gary Smith tackles the current vogue for mandatory mediation of disputes.[7] With a few exceptions, most lawyers, many judges, and almost all politicians have applauded Ontario's new mandatory mediation experiment.[8] If mediation is a "good" process, let's mandate it for all—or so goes the conventional thinking. But what happens when a process is mandated as part of the civil justice system? What happens to the process once it is institutionalized, and what happens to the parties, their counsel, and their disputes? Can mediation continue to offer a creative, flexible, party-driven alternative once it becomes part of an established process? As Smith persuasively demonstrates, the premises and goals of

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[4] See P. Marshall, "Would ADR Have Saved Romeo and Juliet?" (1998) 36 Osgoode Hall L.J. 771.

[5] See F. Houle & D. Mockle, "Conciliation des litiges et formes alternatives de régulation en droit administratif fédéral" (1998) 36 Osgoode Hall L.J. 703.

[6] See M. Coyle, "Defending the Weak and Fighting Unfairness: Can Mediators Respond to the Challenge?" (1998) 36 Osgoode Hall L.J. 625.

[7] See G. Smith, "Unwilling Actors: Why Voluntary Mediation Works, Why Mandatory Mediation Might Not" (1998) 36 Osgoode Hall L.J. 847.

[8] See Ontario, *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as am. by O. Reg. 453/98, r. 24.1.

mediation are not likely to be met by mandating its extension to unwilling and reluctant actors.

For too long, law teachers, lawyers, and judges have assumed that disputes are best resolved by one of two principal processes: private negotiation among disputants (often with the assistance of legal counsel) or litigation. The assumption that one's best (or indeed only) alternative to unsuccessful negotiation is litigation has a dramatic impact on how, and over what issues, disputants negotiate. This limited view of dispute resolution means that litigation casts a long and somewhat restrictive shadow over the negotiations. Typically, lawyers negotiate in the shadow of the court and their parties' legal rights. The result is that litigation and the legal process dominate and shape the dispute resolution process, even though relatively few disputes ever proceed to trial. One task the authors in this volume take up, and a theme that ADR scholars need to continue to explore, is the examination of the rather fertile—and more or less untilled—ground that lies between negotiation and litigation. What happens, for example, when a third-party mediator intervenes to structure the negotiations and assist the parties to communicate more effectively? What happens to the dispute? To the parties? And ultimately to the outcome? What differences do different mediator orientations make to the outcome? Are some mediation approaches and strategies more successful than others? Does success depend on the type of dispute? or on the predisposition of the parties and their counsel? Is success somehow dependent on fitting the process and the dispute resolution strategy to the parties and their dispute? And what happens when neutral fact-finding or law-finding or an ombud's process is engrafted on to negotiation or mediation processes? How is the process changed? How are the results changed? What are the implications of combining processes that are structured around quite different organizing principles?

Questions also arise at that end of the dispute resolution spectrum closest to litigation, namely, arbitration. The arbitration process employs the same general principles as litigation (*i.e.*, both seek to adjudicate disputes); but, unlike civil litigation, the possibilities for innovation and experimentation are vast. ADR invites counsel to reflect on questions of timing, the appropriate size and composition of the arbitral panel, the procedure, and the structure of the process; to consider structuring the process to insert both formal negotiation and mediation into certain stages of the process; and to imagine the implications on the process and the result of limiting the arbitrator's decision to the proposals last advanced by the parties—so-called "final offer arbitration." Scholars and practitioners of ADR need to

continuously grapple with the question of what happens when you combine or modify processes (especially traditional processes) in novel and unusual ways.

What role does law play in these ADR processes? It provides a backdrop of legal rights and entitlements against which the parties will attempt to find a satisfactory resolution. Law is, therefore, both a starting point from which initial claims are often made and a standard against which the final resolution will be evaluated. But law is not necessarily determinative. It is a point of departure and it is a standard, but it is not the only standard that will be relevant to the parties. While ADR accepts the relevance of law, it does not assume that legal rights can, or should, be the sole basis upon which a dispute is resolved. What then is ADR's contribution to law and the legal process? ADR demonstrates that other factors—business, personal, psychological, and social—are relevant to the resolution of disputes. ADR promotes the adoption of a very broad definition of relevance. ADR also emphasizes the value of a problem-solving perspective in addition to a rights perspective. ADR accepts the value of a structure, while recognizing the value of flexibility and experimentation. ADR encourages lawyers to continually look for new ways to understand an issue, to adopt new approaches to resolving disputes. ADR encourages lawyers to be future focussed and to assume a future that is informed, but not bound, by the rules and structures of the past.

To the extent that ADR processes are used to address disputes within the civil justice system, judicial oversight of some aspects of the process is inevitable and, in some respects, desirable. The extent to which things said or documents produced in mediation can be used in subsequent judicial proceedings (should the dispute not be resolved prior to litigation) is an important question for legal counsel, as well as for scholars who are concerned about the ability of a "dominant" process to shape and possibly distort an "alternative" process. Some other relevant issues for scholars, the judiciary, and the practising bar are mediator qualifications and competence (can we really know what competence is? and does it really make a difference?); process structure (what happens, for example, when time-frames and deadlines are introduced into a negotiation or mediation process?); third party neutrality (if there is such a thing as a truly neutral mediator, is this person really worth looking for?); and power imbalances and cultural differences (are some processes better able to achieve "good" results, or at least "better" results, when cultural difference is an issue?). And so the list of research issues grows.

This special issue coincides with the graduation of the third cohort of students from Osgoode Hall Law School's part-time Master of Laws (LL.M.) program in ADR. The graduate law program in ADR was launched in 1995 and will, this spring, celebrate the "transformation" from "traditional lawyers" to "ADR lawyers" of more than seventy-five graduates. The lawyers in the program have generated an extraordinary amount of fine research and writing on disputes, including four of the six articles in this issue.

The masters program is unique in North America. It is designed around three principles. The first principle relates to student self-direction. After the introductory course, students are required to create a plan of study that describes the student's educational and professional objectives, and how they propose to achieve these objectives within the framework of, and utilizing the resources available to them in, the program. The second principle is one that is characteristic of many ADR courses and programs, namely, the desirability of a heavy infusion of "other" perspectives into the legal process and the dispute resolution field. The program encourages students to broaden their understanding of disputes and dispute resolution processes by examining issues through the lenses provided by such diverse disciplines as history, philosophy, psychology, social anthropology, sociology, and organizational theory. The third principle is one that encourages students to test theoretical hypotheses in real-world practical settings, and to postulate new theories based on observation and reflection of dispute analysis and resolution practice. The four month "practicum" component of the program has been instrumental in reorienting student approaches to learning by encouraging them to "abandon" case analysis and rights evaluation in favour of problem-based experiential learning.

These three principles have influenced both students and faculty in rather profound ways. For the students, it has expanded the meaning of "good lawyering." In addition to legal analysis and effective advocacy, good lawyering also means developing a better understanding of the clients' objectives, counselling clients about options and planning for their future, negotiating outcomes, and drafting results. The program has also demonstrated the exciting possibilities of practising reflectively, that too-rare brand of lawyering which continually incorporates the insights of the past into the plans for the future. And the program has challenged students to be as creative as they are critical. Critical analysis comes naturally to good lawyers; creative problem-solving and, particularly, unbounded creativity come much less quickly, if at all.

The program continually reinforces the faculty's predisposition toward creating a multidisciplinary, multi-sensory learning environment.

Lawyers and law teachers have much to learn from what psychologists and social anthropologists have to say, and much to learn from how their message is communicated; role playing, video demonstrations, simulated exercises, and in-class "experiments" are all effective pedagogical tools, and all very much a part of the program. The lecture, it seems, is antithetical to the ADR learning environment. The program also demonstrates the students' extraordinary capacity for self-motivation and self-direction. Students learn that their life experiences (including pre-law study) are an important part of their preparation for a master's program in ADR, and the faculty is continually surprised (and delighted) by research that integrates virtually every aspect of the human condition and knowledge into research papers and projects on dispute resolution.

The program's challenge is to take what traditionally has been thought of as "alternative," and to make it mainstream; to demonstrate that insight and empathy are as essential to good lawyering as the traditional skills of case and statute analysis and effective cross-examination. The program's challenge is also to broaden perspectives and create a new breed of lawyer—the "ADR lawyer."

This is a particularly important challenge. ADR seems to be confirming what many have suspected (or feared)—perhaps law is less important than we lawyers and law teachers once thought. Perhaps the traditional legal process is indeed flawed; not only because it adds to the cost and time of resolution, but also because it might exacerbate, rather than resolve, the issues that litigants take to the legal process. Perhaps learning to "think like a lawyer" blinds lawyers to the real issues in dispute or the real possibilities for resolution. Simply put, perhaps ADR will incite lawyers to become better lawyers by questioning and embracing both "traditional" and "alternative" methods of dispute resolution. As the articles in this issue demonstrate, ADR is about employing the best lawyering skills, and then pushing those skills a little further. ADR encourages lawyers to ask: What are the *real* issues in the dispute and how are they best resolved? However, identifying the issues is seldom enough. ADR practitioners also ask important questions: Why is this a problem? What are my clients' real interests? What are the other parties' *real* interests? Effective questioning and active listening are two of the hallmarks of the ADR lawyer. Having understood (as well as one can) the issues in dispute and the interests that lie behind the issues, the ADR lawyer then asks: How is this dispute best resolved? What are the possibilities for a negotiated resolution? With the assistance of a third party? If a third party might be of assistance, what type of third party is likely to be of the greatest assistance? Are there some issues in the case that cannot be negotiated and, hence, are more amenable to

resolution through either binding or non-binding adjudication? From proposing a process, to negotiating the ground rules of that process, to encouraging other counsel to retain a suitable third party, the opportunities for the ADR lawyer to contribute to the planning and design stage of the ADR process are substantial. Ultimately, however, most disputes are resolved with a large dose of those old-fashioned legal skills of analyzing, proposing, persuading, and ultimately achieving commitment to a resolution. ADR lawyers practise using the full range of legal skills.

The perspective of the ADR lawyer is, in many ways, the perspective of the reflective lawyer. Ideally, ADR lawyers are problem solvers who challenge assumptions about what works and what does not work; they are keen students of the human condition, who are continually looking for new insights into what ails their clients and how those ails might best be resolved. The ideal ADR lawyer asks questions and then listens, probes with more questions, and then listens some more. Such a lawyer should be alert to legal rights, and quick to insist that the law is relevant, but equally quick to recognize that their client may need an outcome that does not turn on an adjudication of legal rights. The ADR lawyer should be an effective problem solver, first and foremost.

This issue of the *Journal* challenges students, scholars, and lawyers to think deeply and critically about legal practice, the nature of disputes, and how they are best resolved. The articles open new horizons in scholarly investigation of law and the legal process, and will provide readers with a taste of the critical and creative research that lies ahead.