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# Consumer Redress Through Alternative Dispute Resolution and Small Claims Court: Theory and Practice

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# CONSUMER REDRESS THROUGH ALTERNATIVE DISPUTE RESOLUTION AND SMALL CLAIMS COURT: THEORY AND PRACTICE\*

by  
Peter Finkle and David Cohen\*\*

*There are significant difficulties in providing consumers with redress because dispute resolution costs are high relative to the sums being sought. Consumers also manifest a reluctance to enter legal processes for other reasons. This prompted the creation of user-friendly small claims courts and encouraged the discussion and sometimes the use of non-judicial, alternative dispute resolution forums for addressing consumer redress. This paper explores the theoretical and practical distinction between these two types of dispute resolution forums. The practical differences are examined on the basis of observation of both types of forums and discussions with practitioners of alternative dispute resolution.*

*The paper concludes that while there are significant theoretical differences between the two forums, few of these are inherent. In fact, there is evidence that small claims courts have begun to adopt a number of alternative dispute resolution techniques and could adopt more. Nonetheless, some alternative dispute resolution techniques which are not susceptible to adoption by courts are, based on evidence generated through field research for this paper, clearly more efficient for resolving particular types of disputes than analogous techniques used in courts. It is probable as well, though the evidence collected in field observation is not conclusive, that some types of disputes are better resolved by small claims courts.*

*A more effective consumer redress system might be achieved if the forum and techniques were more appropriately fitted to the particular fuss. The paper offers guidance on how this might be achieved, and the benefits and costs to governments, business and consumers associated with obtaining more effective consumer redress.*

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## Le recours du consommateur, le cour des petites créances, et les techniques de recharge du règlement des différends: théorie et réalité

*Il est difficile d'offrir des recours aux consommateurs, parce que les coûts relatifs au règlement des différends sont élevés comparativement aux sommes qui sont réclamées. Les consommateurs sont réticents pour d'autres motifs encore à intenter des poursuites judiciaires. Cet état de choses a été à l'origine de la création des cours des petites créances, d'accès plus facile, et a favorisé la recherche de tribunes non judiciaires de règlement des différends ainsi que, parfois, le recours à ces tribunes. Le présent document examine la distinction théorique et concrète entre ces deux genres de tribunes de règlement des différends. Les différences concrètes sont étudiées sur la base de l'observation des deux genres de tribunes et de discussions avec les spécialistes d'autres formules de règlement des différends.*

*Le document conclut que les différences théoriques considérables entre les deux tribunes rarement leur sont inhérentes. En fait, il a été constaté que les cours des petites créances ont commencé à adopter un certain nombre de techniques de recharge en ce qui concerne le règlement des différends et qu'elles pourraient en adopter davantage. Néanmoins, d'après les témoignages recueillis au cours de la recherche effectuée sur le terrain aux fins du présent document, certaines autres formules de règlement des différends, qui ne sauraient être adoptées par les tribunaux, permettent beaucoup mieux de résoudre certaines catégories de différends que les techniques analogues utilisées par les tribunaux. Bien que les témoignages recueillis ne soient pas concluants, il est aussi probable que les cours des petites créances sont mieux placées pour résoudre certains genres de différends.*

*Un système plus efficace de redressement des différends pourrait être mis en place si la tribune et les techniques étaient mieux adaptées au problème particulier. Le document offre des conseils sur la façon d'y parvenir ainsi que sur les avantages et les coûts que nécessiterait, pour les gouvernements, les entreprises et les consommateurs, la mise en place de mécanismes de redressement plus efficaces.*

*"Let the forum fit the fuss."*

Prof. Frank E.A. Sander, Harvard Law School

### 1. Introduction

One of the most frequently mentioned complaints made by consumers is their perceived difficulty in obtaining redress when their expectations in relation to purchases or other acquisitions of goods or services are disappointed. Problems may relate to delivery dates, product design or performance, durability or a range of associated product defects.<sup>1</sup> These concerns were repeatedly raised by consumers during

<sup>1</sup> For the most part, our analysis focuses on losses associated with defects which have not generated personal injuries, or which do not present risks to personal health or safety. Product liability risks, given the existence of public health insurance, social attitudes towards loss and risk spreading in the case of personal injuries, and the litigation incentives associated with large claims, present very

recent informal consultations undertaken by officials from Consumer and Corporate Affairs Canada on the development of a new consumer framework policy.<sup>2</sup> Consumer dissatisfaction with redress mechanisms is understandable and in many cases well-founded.

The vast majority of consumer disputes involves relatively low-priced goods, services or credit, where the costs associated with redress<sup>3</sup> substantially exceed the expected benefits associated with recovery. Moreover, because the benefits will be received, if at all, at some point in the future, the value of that recovery must be discounted to its present value. This asymmetry between the investment costs of redress and the value of expected recovery is exacerbated if one assumes that consumers engaged in redress are risk averse. Indeed, it is often economically irrational from the perspective of an individual consumer (depending on the value he or she puts on time) even to complain to the seller as a means of seeking redress, especially if there is a significant risk that such an action may be futile.<sup>4</sup>

The problem of redress for consumers, reduced to its simplest dimensions, is how to lower the actual and perceived time, stress and money necessary to participate effectively in redress mechanisms.<sup>5</sup> This is a difficult task for our legal system for historical reasons. Traditionally, the common law has separated the process of determining the existence of a valid legal claim through a trial from the process of forcing the defendant who has lost to pay the judgement. In most situations, then, a consumer seeking redress from a defendant-seller must anticipate the costs and risks of two legal procedures. First, the consumer has to sustain the costs of bringing the case to trial and, second, there are often additional expenses associated with suing on a judgement if payment is not voluntarily made.<sup>6</sup> The consumer must

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different public policy issues than do consumer product quality risks which generate either economic losses, psychic losses, or both.

<sup>2</sup> As reported by officials in *Consumer and Corporate Affairs Canada* after informal consultations in five major Canadian cities, October 1991.

<sup>3</sup> These will include time, personal investigative costs, the costs of professional or para-legal services, and the stress associated with participation in an institution which is likely to be unfamiliar to many consumers.

<sup>4</sup> It is clear that the most effective institutional mechanism to reduce consumer dissatisfaction with the quality of consumer goods and services is a highly competitive market place in which information about product and service quality is available to consumers at a relatively low marginal cost. In this case, where substitute goods or services are readily available, where consumer transactions occur relatively frequently, where reputation effects are extremely salient to sellers and manufacturers, the threat of "exit" is likely to have dramatic and salutary effects on product and service quality. As well, this regulatory mechanism does not need public institutions (other than those necessary to ensure competitive and efficient market places) to produce the behaviour we are attempting to generate.

<sup>5</sup> Of course, we assume that recovery is justified according to applicable substantive legal rules. This paper does not address redress problems associated with inadequacies in the substantive consumer law which defines the legal entitlements of the parties to the transaction.

<sup>6</sup> The additional expenses and added risks of suing on a judgement are most significant where the defendant-seller is resident outside the jurisdiction where

consider the possibility of incurring legal expenses for advice both at the trial stage and in the legal process of forcing recovery on the judgement.<sup>7</sup>

Besides this basic structural problem, other concerns and costs face consumers seeking legal redress.<sup>8</sup> Court and other costs associated with law suits can be significant, though these are usually payable by the defendant to the consumer as part of a court awarded recovery to the victorious consumer. In addition, significant delays are often associated with legal procedures. Perhaps the most formidable obstacle for some consumers is their perception that courts are an alien, esoteric and unfriendly environment.<sup>9</sup> The procedural rules and symbolic overtones of the courts, which may increase the legitimacy and majesty of the institution, contribute to this view. For these reasons, many have sought to reform the consumer redress process both by replacing traditional legal institutions with a simplified, more user friendly, small claims court and by encouraging the use of non-legal, alternative dispute resolution mechanisms.<sup>10</sup>

Those who propose the reform of legal redress procedures through these alternative dispute resolution mechanisms have several distinct but related objectives.<sup>11</sup> One objective is to reduce the government

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the original trial takes place. Where the defendant resides in the same province as the consumer-plaintiff, forcing payment on a judgement is more certain and much less expensive.

- 7 The case of, *Morguard v. Savoie*, [1990] 3 S.C.R. 1077, has reduced the risks associated with suing on a judgement obtained in one province in another. This new legal doctrine may not, however, extend to small claims judgements. According to Uniform Law Conference, *The Enforcement of Judgements between Canadian Provinces*, (no. 64) 1989, and the work of the Law Reform Commission of British Columbia, *The Report on the Uniform Enforcement of Canadian Judgements Act*, 1992, small claims judgements need not have the same force and effect as judgements from other courts in inter-provincial circumstances.
- 8 See P.D. Emond, ed., *Commercial Dispute Resolution - Alternatives to Litigation*, (Aurora: Canada Law Book Inc., 1989).
- 9 This view of courts is based on anecdotal evidence, systematic studies of attitudes towards courts by their users have sometimes shown quite different results. See, for example, E. Allen Lind et. al., "In the Eyes of the Beholder: Tort Litigants' Evaluation of their Experience in the Civil Justice System" (1990) 24 *L. & Soc. Rev.* 953, which suggests that litigants in the courts in selected counties in Virginia, Maryland and Delaware had quite positive experiences with their legal system.
- 10 These may include mediation, arbitration, "rent-a-judge" programs, summary jury trials and judicially administered mini-trials. See J.R. Allison, "Five Ways to Keep Disputes Out of Court" (1990) *Harv. Bus. Rev.* 166.
- 11 For example, three associated organizations working to bring nonprofit alternative dispute resolution methods to Ottawa-Carleton have similar motives. These are, The Canadian Institute for Conflict Resolution, Without Prejudice, and The Dispute Resolution Centre of Ottawa-Carleton. For a discussion of their views see G. Easton, "What, No Lawyers?" (Jan-Feb 1988) *Ottawa Business Life*, 6. See also J.R. Allison, *supra* note 10 at 167. Allison argues that the alternative dispute resolution mechanisms share two characteristics: they are all attempts to save legal and managerial time and money, and they all try to take at least some of the edge off the adversarial attitude encouraged by courts. The theory behind alternative dispute resolution pursued by these organisations is that settling

costs associated with the public subsidization of the court system. Alternative dispute settlement techniques used **within** the court system probably achieve greater efficiency and might be expected to reduce the cost to government. It is not clear, however, if this type of reform of the courts actually reduces costs because, even if cases are disposed of more efficiently, greater use of the courts may be induced with associated higher costs. The details of this point are pursued further below.

Another objective sought by proponents of alternative dispute resolution mechanisms is the reduction of the **private** costs of litigation faced by consumers and businesses. A reduction in the private costs of litigation helps to make redress more practical since the expenses associated with redress are reduced relative to the gain being sought. But there are other effects as well. The reduction in private costs associated with undertaking redress should contribute, albeit in a small way, to what economists call transactional efficiency. This may contribute to national competitiveness by improving market efficiency. There is also the more immediate gain in marginally lower prices because lower litigation costs can be factored into the price of various goods and services.

Finally, alternative dispute resolution mechanisms are attractive because many perceive them to be less adversarial and more likely to result in voluntary settlements and reconciliation than traditional legal adjudication of disputes.<sup>12</sup> The most important potential gain for many proponents of alternative dispute resolution is this hoped-for reduction in the intensity of private conflict. It is, perhaps, for this reason that many proponents of alternative dispute resolution feel very strongly about this approach to resolving disputes. Likewise, strong negative feelings towards the legal system of dispute resolution may be encountered in proponents of alternative dispute resolution because of that system's alleged propensity to create or engender adversarial relationships.<sup>13</sup>

With such optimistic objectives, and in the face of the often striking unsuitability of ordinary courts for resolving small claims, it is not surprising that alternative dispute resolution has enjoyed considerable support among academics, government officials, some business lead-

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disputes as painlessly as possible requires good communication, that good communication requires some degree of trust, and that the adversary system of dispute resolution nurtures distrust, distortion, and animosity. *Id.*

<sup>12</sup> See, for example, C.A. McEwen & R.J. Maiman, "Small Claims mediation in Maine: An Empirical Assessment" (1981) 33 *Maine L.Rev.* 237 at 238 and 239.

<sup>13</sup> Most writers offer four discernible goals of alternative dispute resolution. First, alternative dispute resolution may relieve court congestion and undue cost and delay. Second, it may enhance community involvement in dispute resolution processes. Third, non-adjudicative processes, may, depending on the particular process under consideration, facilitate access to justice. Finally, alternative dispute resolution may provide more "effective" dispute resolution; "effectiveness" being defined as inexpensive, speedy, procedurally fair, and satisfying to both parties by leading to a final resolution of the dispute. See, S.B. Goldberg, E.D. Green & F.E.A. Sander, *Dispute Resolution*, (Toronto: Little, Brown and Company, 1985) at 5.

ers, and consumer activists. On the other hand, there are very few **essential** characteristics of courts which make them unsuitable for resolving consumer disputes. The utility of any dispute resolution forum (whether it is legal in nature or not) for resolving disputes is a product of a relatively limited number of variables such as standing rules, the ability to bring collective or class actions, costs, the production of information, and so on. All are identifiable characteristics and many might be adopted to any dispute resolution system, including the courts. It is, therefore, possible to be a proponent of alternative dispute resolution techniques for resolving disputes and apply those approaches to dispute resolution through the courts.

While alternative dispute resolution is usually viewed as conceptually distinct from traditional legal processes, even a cursory review of the operations of some courts suggests that the techniques and sometimes the ideas which characterize alternative dispute resolution have frequently been adopted in small claims court rules and procedures.<sup>14</sup> As well, informal transference of the alternative dispute resolution culture may be changing actual courtroom behaviour even without formal modification of court procedures and rules. There may, in fact, now be considerable overlap in practice between the way disputes are resolved in non-legal, alternative dispute resolution fora and in small claims courts. There is, however, relatively little evidence about whether, or to what extent, courtroom practice may have begun to converge with alternative dispute resolution processes.<sup>15</sup> If the courts have begun to resemble something like alternative dispute resolution fora, the implications may be significant not only for the resolution of consumer complaints, but for understanding the development and future of the law at least in this context. As well, if the courts have begun to use alternative dispute resolution techniques, then it is worth considering in what situations non-judicial dispute resolution might offer advantages, or conceivably disadvantages, in comparison to small claims courts.<sup>16</sup>

Accordingly, one objective of this paper is to explore the practice of dispute resolution and settlement in consumer cases as it unfolds in

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<sup>14</sup> Small claims courts often provide an opportunity (and sometimes require) litigants to mediate their dispute before a formal trial is begun with varying results. See, C.A. McEwen & R.J. Maiman, "Mediation in Small Claims Courts: Achieving Mediation through Consent" (1984) 18 *Law & Society* 11, which explores how the tendency to compliance is affected by the use of mediation as a technique in small claims courts and N. Vidmar, "An Assessment of Mediation in Small Claims Courts" (1985) 41 *J. of Social Issues* 127.

<sup>15</sup> There is, however, a considerable literature on the operation and attitudes of users towards small claims courts. For example, see G.W. Adams, "The Small Claims Court and the Adversary Process More Problems of Function and Forum" (1973) 51 *Can. Bar Rev.* 583; K. Hildebrandt et. al., "The Windsor Small Claims Court: An Empirical Study of Plaintiffs and their Attitudes" (1982) 2 *Windsor Y.B. Access Just.* 87, and N. Vidmar, "Small Claims Court: A Reconceptualization of Disputes and an Empirical Examination" (1984) 18 *Law & Society Rev.* 515.

<sup>16</sup> This issue is explored, though from a somewhat different perspective, by N. Vidmar, "Assessing the Effects of Case Characteristics and Settlement Forum on Dispute Outcomes and Compliance" (1987) 21 *Law & Society Rev.* at 155.

small claims court and in various types of non-legal alternative dispute resolution fora. By necessity, this exploration is based upon selected and limited observations of both types of fora. These observations are supplemented by discussions with small claims court judges and private (non-lawyer) practitioners of alternative dispute resolution. These observations and discussions provide some initial indication of the degree to which, and perhaps how, convergence in behaviour in the two types of fora may have begun to take place. The second objective of the paper is to use the insights gained about the actual practices used in small claims court and in alternative dispute resolution fora as the basis for refining consumer redress processes in each forum.

The paper is organised to facilitate these twin objectives. In Section 2, we briefly outline and review various theories and approaches to mediation, arbitration and judicial dispute adjudication which have been articulated in the literature on dispute resolution with a focus on consumer transactions. In Section 3, we discuss the approach taken to field observations including discussions with practitioners, observations of non-judicial alternative dispute resolution in several fora and observations of small claims courts. Section 4 provides a discussion of this field research that is organised to compare theories and assumptions with observed practice of dispute resolution in small claims court and in several alternative dispute resolution fora. Finally, in Section 5, the salient conclusions are discussed. This last section also offers a number of recommendations aimed at improving the efficiency, availability and fairness of consumer redress in **both** non-judicial alternative dispute resolution and small claims court procedures.

## 2. Theory

The popular image of court adjudication is both narrow and extremely critical. The courts are seen to be confined to a formal and adversarial presentation of evidence and argument before an imposed third party (a judge), who interferes very little with the way in which the disputants choose to present their case. There are further significant concerns with regard to costs, delays, and the exacerbation of the already existing disputes by the adversary system. Access to justice is limited by a legal system which demands time, money and knowledge; resources that many people do not have.<sup>17</sup> Critics argue that the courts have become overburdened as the public has turned to them in increasing numbers to resolve disputes that were long considered non-justiciable. Indeed, courts have been expected to fill the void left by the decline of other dispute-resolving bodies, such as the church, the family and the community.<sup>18</sup> It is no wonder that many seek an alternative to the law.

The phrase "alternative dispute resolution" is sometimes used to refer simply to the use of mechanisms for resolving disputes that do not involve recourse to the formal legal system, through institutions such as the church, family hierarchy, and informal community sanctions. These alternatives to the formal legal system have a long and

<sup>17</sup> L. Nader, "Disputing Without the Force of Law" (1979) 88 *Yale L.J.* 998 at 999.

<sup>18</sup> Chief Justice W. Burger, "Isn't There a Better Way?" (1982) 68 *Am. Bar Assoc. J.* 274.



ancient heritage. Indeed, there is no recourse to formal, state-sanctioned legal systems in most customary law situations. For example, in many traditional societies, elders, religious leaders or others resolve disputes without the use of law or law courts as we understand them.<sup>19</sup> Similarly, non-legal forms of dispute adjudication are encountered in many aspects of life in our society which are considered "private" and thus inappropriate for the publicity associated with state legality.<sup>20</sup> Modern alternative dispute resolution theorists, however, approach the idea of non-legal dispute resolution from quite a different perspective.

Modern alternative dispute resolution theories are often characterized by a self-conscious criticism of the legal system and by a deliberate determination to overcome many of its manifest problems.<sup>21</sup> Most proponents of alternative dispute resolution believe that institutional characteristics of the legal system in the late twentieth century serve to exacerbate misunderstandings that arise in the normal course of commerce and day-to-day living.<sup>22</sup> These critics of the law usually make an implicit assumption that the offensive characteristics of the legal system are either inherent or structural. Consequently, most seek to circumvent the legal approach almost in its entirety rather than to change it.

One needs to compare and contrast the characteristics of alternative dispute resolution and court adjudication in order to uncover the basis for the criticism levied by these critics of the legal system. It is difficult to define these two processes precisely, but there are several characteristics which are commonly accepted as representing significant contrasting positions of the two systems. First, while disputant participation in adjudication is involuntary and the outcome is binding though subject to appeal, participation in the majority of alternative dispute resolution processes is voluntary. Participation in alternative

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<sup>19</sup> Many primitive societies had legal systems which operated without adjudication or formal sanctions. In fact, many rules in our own society are upheld without recourse to ordinary legal machinery or the use of sanctions. International law, too, often operates without recourse to formal adjudication and sometimes without sanctions. See S. Roberts, *Order and Dispute* (Oxford: Martin Robertson, 1979) at 80-99 and 115-136 on dispute resolution in primitive societies and R.C. Ellickson, *Order Without Law* (Cambridge: Harvard Univ. Press, 1991) at 40-64 on modern dispute resolution without law or any formal processes whatever.

<sup>20</sup> See generally, G.A. Weissmann & C.M. Lieck, "Mediation and Other Creative Alternatives to Litigating Family Law Issues" (1985) 61 *N. Dak. L. Rev.* 263; I.R. Scott, "The Reform of Matrimonial Causes Procedure" (1986) 5 *Civ. Justice Qly.* 8, and L.E. Teitelbaum & L. DuPaix, "Alternative Dispute Resolution and Divorce: Natural Experimentation in Family Law" (1988) 40 *Rutgers L. Rev.* 1093.

<sup>21</sup> See E.G. Tannis, *Alternate Dispute Resolution That Works* (North York: Captus Press, 1989); J.R. Allison, *supra* note 10; G. Easton, *supra* note 11.

<sup>22</sup> Since most of the theorists are American, it may be fair to suggest that their view of law is based on a common law model of adjudication. This suggestion is strengthened by the fact that many of the legal approaches which draw the harshest of criticism from these authors — such as the requirement for consideration in contract — are common law approaches derived from a philosophical premise that in many cases carefully limits enforceable legal relationships.

dispute resolution is compulsory when the parties bind themselves to engage in this form of dispute resolution as part of a valid contract. The outcome of alternative dispute resolution may or may not be binding, depending on the process used, but where it is binding, as in commercial arbitration, enforcement of the award may have to be sought through a separate action based on contract law.<sup>23</sup>

Second, decision-makers in adjudicative processes are usually both neutral third parties and generalists — that is, they will not have any expertise in the subject matter of the dispute. The decision-maker renders a principled decision, supported by reasoned opinion, which usually represents a zero-sum outcome. In contrast, alternative dispute resolution processes allow the disputants to select a decision-maker acceptable to both sides, permitting a decision made by one who may well have expertise in the area and, thus, be more suitable to the dispute than a state-imposed judge. The decision rendered by such a third party may allow for compromise and balance the interests of both parties thus assisting them to reach a mutually acceptable solution.

Third, the format in adjudication is usually formalized and highly structured, and rules of evidence and fact-finding may present a particular and restricted set of facts on which decisions are based. On the other hand, procedural rules in alternative dispute resolution may be set by the parties and are usually informal and flexible. This allows for presentation of any arguments, evidence or interests that assist in designing a solution to conflict, within the framework agreed upon by the disputants.

Finally, the range of possible decisions or resolutions for a dispute is usually more limited in small claims court or other courts of law than in alternative dispute resolution fora. Small claims courts do, however, sometimes exercise some imagination in fashioning outcomes but they are often limited by formal legal requirements or expectations.

Because of the differences between the two processes, theorists have articulated several criteria for choosing which process is more suited to the dispute.<sup>24</sup> Choosing between adjudication and alternative dispute resolution involves a close examination of the relationship between the disputants. An on-going relationship may suggest a proc-

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<sup>23</sup> Many systems of arbitration depend for enforcement on a pre-existing legal contract binding the participants to the results of the arbitration. Failure to pay the arbitration award is a breach of contract which then can be sued on in an ordinary law court. Some jurisdictions have also passed legislation that makes the result of a formal arbitration immediately convertible to a judgement. See for, example, in Quebec Art. 946 C.C.P. While this is effective within the jurisdiction that passed the legislation, it raises questions about how other jurisdictions will treat the award if it were necessary to seek satisfaction outside the jurisdiction where the award was made. In other words, it is not clear whether full, faith and credit extends to such awards. In Canada, it is likely that consumer arbitration awards may not be legally effective outside the jurisdiction where they are made because there is even some doubt whether small claims judgements from courts will be recognised by sister provincial courts. See P. Finkle & C. Labrecque, "Low Cost Legal Remedies and Market Efficiency: Looking Beyond Morguard" (1993) 22 *Can. Bus. L.J.* 58, and the Proceedings of the National Consumer and Commercial Law Conference, 1992.

<sup>24</sup> See S.B. Goldberg, E.D. Green & F.E.A. Sander, *supra* note 13 at 11.

ess which is conciliatory and a solution that is mutually acceptable, rather than allowing one party to obtain all of the benefits of a "winner take all" outcome usually associated with traditional legal adjudication. A significant imbalance in the power of the disputants may require a forum where principle, not power, determines the outcome; in such circumstances a court may be the most appropriate forum. But the assured access to courts for parties of unequal power could itself shape opportunities for satisfactory settlement without the exercise of legal authority.<sup>25</sup>

The nature of the dispute is also an important aspect of choosing between adjudication and alternative processes. Alternative dispute resolution tends to suit "polycentric" problems involving resource allocation issues presenting no clear governing guidelines. Adjudication can provide needed authority for critical life-and-death problems where precedent may be important. Recurring, simpler problems that do not need a definitive precedent set by the courts may be more easily solved by alternative dispute resolution. In practice, however, it is often difficult to categorise disputes by their nature.

Finally, time and cost may play a role in deciding whether to resort to the courts or some other method of resolving the dispute. While the data (including information generated for this study) is inconclusive, most writers take the position that alternative dispute resolution is likely to involve less time, although private costs may, in fact, be higher than in state subsidized adjudication.

The central premise for many theorists is that the most important barrier to resolving disputes is a failure of communication between the parties.<sup>26</sup> This failure arises from a lack of trust that is partly a consequence of the nature of the economic system and partly a result of the acculturation of the legal system. Accordingly, alternative dispute resolution is premised on the hypothesis that if the parties could overcome this distrust, they could voluntarily reach a settlement which would be perceived to be as legitimate as a court imposed decision. In most situations, a voluntary resolution or settlement of a dispute is usually seen as the most desirable result for the parties and as a success for the third party, mediator. Indeed, voluntary settlement is the goal to which alternative dispute resolution aspires.<sup>27</sup> Nevertheless, arbitration, which is an involuntary non-legal resolving of a dispute, remains a part of most models of alternative dispute resolution.

Assuming that an increase in voluntary settlements can be obtained as communication and trust is generated or regenerated between the

<sup>25</sup> L. Nader, *supra* note 17 at 1020.

<sup>26</sup> E.G. Tannis, *supra* note 21.

<sup>27</sup> This particular aspect of alternative dispute resolution theory is described by J.K. Lieberman & J.F. Henry, in "Lessons from the Alternative Dispute Resolution Movement" (1986) 53 *U. Chicago L. Rev.* 424 at 427. In our observations of alternative dispute resolution practice at the Better Business Bureaus of Toronto and Buffalo, we noted that the most important question asked by supervising administrators from the Bureaus after a mediation/arbitration hearing was: "Did the parties agree?" That was clearly the test of a successful hearing, though if the hearing went to arbitration that outcome was also considered legitimate, albeit unfortunate.

parties, it follows that the most condemnatory aspects of the legal adjudication of disputes are those which inhibit communication. Criticism of the legal system must, however, focus at and after that point in time when a consumer perceives that the expected benefits of a transaction are not present. That is where a problem is first noted and that is where the legal system begins to interfere with communications.<sup>28</sup> Typical judicial processes may inhibit communication and trust because they provide virtually no rules for negotiating a voluntary settlement prior to formal adjudication (which is, ordinarily, very carefully structured).<sup>29</sup> This lacunae in the legal system can result in extremely costly and often unproductive strategic bargaining by the parties or their advisors. In fact, often the parties engage in no communications at all.<sup>30</sup> The prospect of facing litigation can also poison communications. Litigation has been described as “accentuating hostility, not trust”.<sup>31</sup> It is said to support competitive aggression to the exclusion of reciprocity and empathy and may encourage hiding the truth by dissembling. In sum, “The adversary process is expensive ... time-consuming [and it] often leaves a trail of stress and frustration.”<sup>32</sup>

Alternative dispute resolution techniques and processes are far more systematic in their approach to enhancing communication and thus in resolving disputes prior to formal hearings than are conventional legal settlement negotiations. These alternative dispute resolution processes may permit realistic assessments of whether offers and counter offers are made in good faith and can enhance communications between the parties.<sup>33</sup>

As well, communication-induced settlements are discouraged in a legal adjudicative system which is characterized by a “winner-take-all” approach.<sup>34</sup> Legal liability is most often resolved by deciding the case either for the plaintiff or the defendant. Many models of alterna-

<sup>28</sup> *Id.* at 429.

<sup>29</sup> P.D. Emond, *supra* note 8.

<sup>30</sup> Bargaining in the litigation context can be conceived of as negotiating in a bilaterally monopolistic setting. There is considerable evidence that bargaining between monopolists and monopsonists — typified by negotiations in the labour relations context — is very costly. In the typical consumer litigation setting the parties are bargaining over “the right to sue for breach of contract”. The consumer owns this right and is in effect offering to sell it to the supplier at a price (the settlement figure). The bargaining is problematical because the consumer need not disclose his reservation price, and there is no “market” in this entitlement to which the parties can refer to ascertain either the fair or efficient price. As well, the consumer can only sell the right to the seller. Similarly, the seller can only buy the right from this particular consumer, need not disclose the highest price he is willing to pay, and again there is no market to turn to for independent assessment for the value of the right. In this context, both parties will simply begin the negotiations by declaring extreme starting positions, and spend valuable time and energy coming to a position somewhere in the middle.

<sup>31</sup> J. Auerbach, *Justice Without Law?* (New York: Oxford Univ. Press, 1983) at 14-15.

<sup>32</sup> Chief Justice Warren Burger, *supra* note 18 at 275.

<sup>33</sup> J.K. Lieberman & J.F. Henry, *supra* note 27 at 429.

<sup>34</sup> See C. Menkel-Meadow, “Toward Another View of Legal Negotiation: The Structure of Problem Solving” (1984) 31 *UCLA L. Rev.* 754 at 783-89.

tive dispute resolution, by contrast, are not committed to the zero-sum game of adjudication. The parties have an incentive to negotiate openly in a search of wealth-creating rather than wealth-redistributing solutions. Those solutions may be far more novel and productive than the usual damage or injunctive remedies typically provided by judges.

Another aspect of the law that alternative dispute resolution theorists believe militates against effective dispute resolution is the fact-finding system used by the courts.<sup>35</sup> Judges are unlikely to be experts in the area under adjudication. Indeed, the common law system, with a few exceptions, is designed to be a system for generalists. This has certain dysfunctional consequences for legal dispute resolution. The generalist-judge must be educated to the complexities of the case by appropriate testimony introduced through an adversarial process with all of the costs concomitant to that system. Rules of evidence and traditional procedures may interfere with the ability of judges to gain an understanding of the crucial facts of a case, and may inhibit the parties from discussing matters that the law defines as irrelevant. If central questions of fact leading to the dispute are not raised by the parties or are considered to be legally irrelevant, the traditional passive role of the judge may leave them wholly unaddressed.

These typical institutional characteristics of courts that determine how judges act can be contrasted with the expected behaviour of the neutral third party in many alternative dispute resolution processes. The parties, themselves, may select a mutually acceptable neutral third party, sometimes choosing one with expertise in the subject area that is the focus of the dispute. This reduces the public and private costs of educating the fact-finder and may reduce the risk of a "wrong" finding of fact. Moreover, if the parties have personally and directly participated in selecting the neutral third party, they may be psychologically disposed to accept that person's binding determination of the outcome of the dispute; more easily accede to non-binding settlement proposals, or agree to implement advisory opinions.<sup>36</sup> In some sense, it is not surprising that many alternative dispute resolution methodologies would appear to be functionally superior to the legal system in promoting voluntary settlement; that above all is their *raison d'être*.

Nevertheless, even knowledgeable disputants often choose to go to court instead of engaging in alternative dispute resolution. Judicial procedures, with all of their attendant costs, may be perceived as fairer. The parties may want rule articulation, not just a solution to their immediate problem.<sup>37</sup> Critics of alternative dispute resolution, led by Owen Fiss, believe that it should be seen as a highly problematic technique for streamlining dockets: "Like plea bargaining, settlement is a capitulation to the conditions of mass society and should be neither

<sup>35</sup> See Bureau of National Affairs, *Resolving Disputes Without Litigation* (Washington: Bureau of National Affairs Inc., 1985).

<sup>36</sup> J.K. Lieberman & J.R. Henry, *supra* note 27 at 430-431.

<sup>37</sup> However, it has been argued that this function is in lawyers' professional interests, rather than in the interest of the litigants. See O. Fiss, "Against Settlement" (1984) 93 *Yale L.J.* 1073 at 1084.

encouraged nor praised".<sup>38</sup> Extra-judicial settlements may be especially problematic where the parties' relationships are characterized by significant power imbalances.

In consumer disputes, it is rare to find an equality of bargaining power between the disputants. One, usually the consumer, has fewer resources (or less incentive to deploy adequate resources) and may be forced to accept a settlement from the more powerful party that would be less than an award made by a court. Indeed, there is a concern over the possibility of the development of a "two-track" justice system that "dispenses informal justice to poor people with 'small' claims, who cannot afford legal services and who are denied access to the courts",<sup>39</sup> while allowing formal justice to be used to address the problems of those wealthy disputants who can afford to litigate. It is possible that alternative dispute resolution may make judicial involvement, which might otherwise be used to address these systemic biases, extremely problematic. Finally, alternative processes may inhibit courts from taking adequate account of the problems posed by small claimants in the interpretation of legislation and the development of the common law.

The law, in many cases, has the function not only of resolving disputes between the parties but also of creating rules for all of society and resolving disputes in ways that reinforce certain societal values for everyone. Regardless of how alternative dispute mechanisms are strengthened, "their case-by case approach cannot remedy all the harms ... it does not contribute to the identification of widespread problems or to the prevention of future disputes."<sup>40</sup> All courts, including those that are only concerned with small claims, play an important role in affirming vital societal values such as equality before the law and procedural fairness. All courts also have a role in educating society about substantive societal rules. Appellate courts are often engaged in producing rules which affect all of society, not just the parties, while trial courts give meaning to those rules through their decisions in particular cases immediately before them.

Certainly, alternative dispute resolution may reduce private costs and the publicity and delay of a public trial. However, it also ends the symbolic drama of a trial and eliminates the educational impact of a public proceeding which raises fundamental public policy issues. Crucial public policy issues related to the dispute itself, and the reasoning which lead to a determination of the outcome, are almost never publicly aired in a non-judicial forum using alternative dispute resolution techniques. This is, in part, because such deliberations are always restricted to the parties and, in part, because the forum permits the parties to restrict themselves to maximizing their private interests.

Since the parties to a dispute are usually concerned solely with their immediate costs and outcomes, they usually have little or no interest in the societal functions performed by the legal system. Courts, when addressing individual cases, often publicly address important legal and

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<sup>38</sup> *Id.* at 1075.

<sup>39</sup> *Id.* at 1076.

<sup>40</sup> L. Nader, *supra* note 17 at 1020.

policy issues, and practical lessons for society are learned from the experience of the litigants. When acting in this way, the courts and law create the background environment or ultimate default rules which provide the context and, perhaps, the threat which can prompt settlement through alternative dispute resolution or other mechanisms. The law is, in effect, concerned with producing certain public goods — legal rules and information about products and services — which are by definition valuable for all, but which, in practice, are under-produced by the immediate disputants in alternative dispute resolution processes.<sup>41</sup>

While non-judicial dispute resolution expresses and embodies certain general values, these are usually unrelated to the outcome of the dispute. They involve, instead, the value of non-confrontational reconciliation and open communications. It would be almost impossible for these non-judicial procedures to address public issues because one or both of the parties probably selected alternative dispute resolution precisely to avoid setting public precedents, to reduce adverse reputational effects, or to inhibit public and governmental discussion of an issue.

Critics of alternative dispute resolution generally emphasize the public functions of the law when they suggest that settlement between the parties on terms they think appropriate may not be the best outcome for society as a whole. Proponents of non-judicial dispute resolution, on the other hand, often focus on cost savings to the parties and the promotion of general values associated with that system. Both critics and proponents of alternative dispute resolution, like critics and supporters of the law, generally write from a fairly abstract and theoretical perspective. In practice, the legal system, often led by small claims courts, have adopted many of the techniques and assumptions of alternative dispute resolution while retaining a formal legal structure and methodology. There may also be increased recognition by proponents of alternative dispute resolution that it can only operate against a “background” of cultural values, including law, which provide meaning to notions of right and wrong and that define, so to speak, when a dispute exists.

In summary, many lawyers and judges have given, perhaps, inadequate attention to the practical difficulties involved in obtaining legal redress, especially of small claims. Similarly, the legal system has probably given insufficient attention to the value to the parties (if not always to society) of voluntary settlement. Predictably, when the costs and time associated with redress in the courts is perceived as too burdensome in comparison with the expected gains from redress, a demand for an improved system of dispute resolution is created that may be fulfilled outside that institution. Part of the response to that demand is the growth of and interest in non-judicial alternative dispute resolution. On the other hand, many proponents of non-judicial alternative dispute resolution may have overlooked the capacity and willingness of the legal system to “compete” by embracing alternative dispute

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<sup>41</sup> A public good is similar to a public property resource and, as such, is not usually valued by individuals. See, for example, J. Crutchfield, “Common Property Resources and Factor Allocation” (1956) 22 *Can. J. Econ. & Pol. Sc.* 292.

resolution techniques and, to a lesser extent, by adopting its goal of voluntarily settlement to dispute adjudication in the courts.

The result is the development of what initially appears to be two quite separate dispute resolution systems — one with its venue in the courts and the other located in the private sector. The question we address in the following sections is the degree to which these systems are in reality distinct. Our concern is that a false dichotomy between alternative dispute resolution and traditional judicial institutions may be depicted in the literature which is not only inaccurate but may retard the development of both dispute resolution approaches. To verify this impression, we attempted to observe several elements of the institutional behaviour of both systems in operation, in order to draw comparisons between and among them. But making useful and meaningful comparative observations of alternative dispute resolution systems and the courts is much easier said than done.

### 3. Field Research: Methods and Objectives

In this and the following sections we attempt to determine how the abstract theories about legal and alternative dispute resolution processes outlined above manifest themselves in typical consumer dispute resolution processes now operating in Canada and the United States.<sup>42</sup> This section is focused on methods, objectives and, unfortunately, limitations. An initial problem in attempting to understand current practices is that it is extremely difficult to observe more than a very limited number of situations which may or may not accurately reflect a much wider current reality. It is possible, in theory, and sometimes in practice, to overcome this limitation by the careful selection of a representative sample of reality. But it was not possible in making these types of observations of alternative dispute resolution in the context of consumer complaints, to even know what a representative sample might consist of.

Because our field observations are not statistically significant and because there were only a limited number of observations compared to the actual number of situations which might have been investigated, this research can do no more than be suggestive of the nature of current

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<sup>42</sup> For the purposes of this study, we employed terminology developed and defined by Professor Andrew Pirie of the Dispute Resolution Centre, Faculty of Law, University of Victoria, Victoria, B.C. Professor Pirie defines "mediation" as the intervention of an impartial and neutral third party, who has no decision making power, into a dispute or negotiation to assist and facilitate contending parties in voluntarily arriving at a mutually acceptable settlement of issues in dispute. See A.J. Pirie, *Dispute Resolution in Canada: Present State, Future Direction* (Victoria: Law Reform Commission of Canada, 1987) at 6-7. He defines "arbitration" as a dispute resolution process in which the disputants present evidence and arguments to a neutral third party who has the contractual or statutory authority to make a decision which is binding on the parties. In general, an arbitrator's decision is based on the application of rules to a set of facts. Finally, the Small Claims Court is defined as a dispute resolution process in an adversarial setting in which a legally binding decision is rendered by a judge based on consideration of evidence and application of law to facts. See also, for other somewhat different definitions, J.R. Allison, *supra* note 10.



practices. The research can, however, provide a focus for a further, more statistically valid, analysis of judicial and alternative dispute resolution processes in the consumer context. It can also provide some suggestion of the nature of the reality which we are seeking to understand, even though our conclusions must be taken as heuristic and unproven. The field research on which this study is based involved observing dispute resolution in small claims courts,<sup>43</sup> and in a number of alternative dispute resolution fora.<sup>44</sup>

While there was no possibility of being statistically rigorous, an attempt was made to make observations which were comparatively meaningful by focusing on a limited number of questions which the literature suggested would be relevant in determining the effective character of proceedings in legal and alternative dispute resolution processes. These questions helped to structure observations of the three classical dispute resolution processes (mediation, non-judicial arbitration, and legal decision-making in the courts). They also helped in posing questions to officials where observations were limited. No attempt was made to quantify or statistically validate observations since they were too few in numbers and not selective enough to warrant that effort.

The results of our observations are presented in the following section in an impressionistic form in order to avoid artificially lending them more quantitative meaning than they warrant. Whatever rigor

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<sup>43</sup> Research assistants undertook some 100 observations in the small claims courts of Ottawa, Ontario and Hull, Quebec. Field research was limited to these courts because they were easily accessible and resource constraints prevented us from observing courts in more distant or diverse locales. We should note that the typical small claims court, though clearly not a totally "consumer friendly" environment, does differ from superior courts. The "people's court" as it is often described, provides an effective opportunity for individuals to represent themselves and tell their story in a formal court of law often without legal representation. In fact, in Quebec, procedural rules prevent the use of counsel. See in Quebec Art. 955 C.C.P. Evidentiary rules in Ontario are in theory less restrictive than in superior court. In practice, such rules are even less restrictive than they appear on paper though oaths are used and legal relevancy, albeit relaxed, still defines what evidence or testimony may be heard. See, in Ontario, *Courts of Justice Act*, R.S.O. 1990, c.43, s.27; in Quebec, Art. 973 C.C.P. and in British Columbia, *Small Claims Court Act*, S.B.C. 1989, c.38, s.16. The formal definition of the jurisdiction of small claims courts necessarily includes a monetary sum which sets a limit on the amount of money a plaintiff may claim in small claims court proceedings. See *infra* note 72.

<sup>44</sup> Non-judicial alternative dispute resolution "hearings" undertaken by the Better Business Bureaus of Toronto and Buffalo and by the Ontario Motor Vehicle Arbitration Plan (OMVAP) in Ottawa were studied partially through observation but mainly by discussions with officials of those organisations. The alternative dispute resolution procedures used by Consumer and Corporate Affairs Canada to resolve disputes over gas and electric bills caused by inaccurate meters or variances in prices were examined through discussions with officials. Direct observation of alternative dispute resolution in action is difficult because the parties often choose a non-judicial forum in order to gain privacy and because in some locations quite few consumer cases are brought to formal mediation or arbitration.

there is in our field research results from carefully asking the same questions to facilitate comparisons and to structure our observations. These questions address eight variables:

1. the formal designation of dispute resolution process;
2. the formal legal categorisation of the claim (even if it were brought in a non-legal forum);
3. the substantive nature of the dispute (that is, whether the consumer complaint involved inadequate product or service quality or performance; or involved the interpretation of legal rights in light of contractual terms or legislative standards);
4. the degree and nature of third party intervention in resolving the dispute;
5. the manner in which facts were ascertained in the dispute resolution process;
6. the allocations of legal burdens of proof, if applicable;
7. the remedial order or other outcome of the dispute; and
8. the private and social costs of the dispute resolution process.

Disputes were classified according to the formal designation of the dispute resolution process,<sup>45</sup> the formal legal categorization of the claim,<sup>46</sup> and the substantive nature of the dispute. In the last case, the question attempted to determine if the consumer complaint involved technical information about product or service performance or quality or, alternatively, whether the dispute involved disagreement about the way negotiations were conducted or the terms of the contract.<sup>47</sup> These criteria allowed us to make a determination of the type of claims and disputes that are being heard in the various dispute resolution fora. The amount of redress sought was ignored except that it was in every case small enough to allow use of small claims courts.

Several questions were helpful in considering differences in the process of dispute resolution. An important question which we attempted to investigate in this study was the degree to which the judge or third

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<sup>45</sup> This is referred to as "Approach Taken". Here we simply described which dispute mechanism the plaintiff decided to use. If small claims court was chosen, we then assessed whether the particular small claims court employed traditional superior court processes; and if a pre-trial or diversion mediation or arbitration service was offered. If there was an arbitration or mediation hearing, we then assessed whether the arbitration/mediation was a claim-specific service operated by a non-governmental organization; a general service operated by a non-governmental organization; or a general service provided by the state.

<sup>46</sup> This was referred to as "Type of Claim". In general, consumer disputes will be framed as contractual disputes, disputes involving tort claims, or as disputes arising from the contravention of a legislatively imposed duty.

<sup>47</sup> This we labelled "What is the Dispute About?". Experience with consumer complaints suggest that many consumer disputes involve differing interpretations of the contractual obligations of the parties. Another large set involve disagreements as to whether the seller, in fact, supplied goods or services in compliance with those contractual obligations. Finally, a number of disputes initiated by commercial interests, as well as counter-claims, involve allegations of non-payment by the consumer.

party intervened in the dispute resolution process, and the nature of that intervention. To assess this, we considered the degree to which the third party controlled or influenced the evidence being presented, engaged in questioning witnesses, and assisted the parties in understanding each other.

An associated issue which we attempted to explore involved how facts are determined in various alternative dispute resolution processes. Here we attempted to ascertain how evidence is introduced by the parties, including the use of hearsay evidence and the swearing or affirming of witnesses. In particular, we attempted to ascertain whether the process required each party to prove the facts he/she alleged; or alternatively, whether the decision-maker played an active role in ascertaining the factual background of the dispute.<sup>48</sup>

A further important variable which we attempted to explore was the manner in which disputes were finally resolved. Our major concern here was to try to ascertain whether the resolution was framed in authoritative or consensual terms. We also tried to determine how the third party purported to explain his or her decision. In this context, we were curious about whether reconciliation between the parties was an aspect of the resolution of a dispute, and we tried to determine if "awards" resulting from a process were actually transferred from one person to another.

Finally, we were concerned about the costs (including time) of the different processes. This prompted us to gather information on the time which had elapsed from the date of the consumer's claim to the actual hearing date, and subsequently to the ultimate disposition of the dispute. We also tried to ascertain the cost of redress measured by court costs, and professional fees if legal or para-legal assistance was retained.<sup>49</sup>

There are inevitable methodological problems in studying the concrete reality associated with legal and non-legal dispute resolution. Indeed, such studies could not be carried forward if researchers are constrained by a requirement to use only the best methodology. In this case, as in many others, too much dedication to the best can be the enemy of attaining the good.<sup>50</sup>

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<sup>48</sup> A related question involved the burdens of proof required in the different dispute resolution processes. In this context, we were surprised to note that it was sometimes difficult to determine what that burden was or who carried it.

<sup>49</sup> The use of these eight variables not only helped to structure observations of the actual behaviour of small claims court and the practice of alternative dispute resolution in the private sector, but allowed others to understand the perspective which we brought to this field research. It may also encourage others to undertake similar work using the same or comparable points of reference so that the resulting finds might be compared. Finally, we are deliberately open about our methods because despite its methodological limitations, this study is an attempt to meld often abstract legal research with the study of practical reality.

<sup>50</sup> This paraphrases Voltaire's famous quotation, "The best is the enemy of the good". See J. Bartlett, *Familiar Quotations*, 15th ed., (Toronto: Little, Brown and Company, 1980) at 343.

#### 4. Field Observations

##### i) Typologies of Consumer Disputes Legal:

Two distinct types of breach of contract cases were observed. In one, the goods or services which a buyer received failed to meet the explicit terms described in a sales or service agreement. For example, the seller may have expressly warranted that the goods would function adequately for six months and, subsequently, the goods proved defective in some way before that time. Or, to take another example, the delivered goods were supposed to be white and, when received, were yellow.

A second type of observed breach of contract was much less clear. This involves situations where the written agreement allegedly did not encompass all the terms which the consumer believed comprised the terms of the sale or service agreement. A common problem we observed consisted of disputes about terms which were not explicitly written into a sales agreement but which were allegedly agreed to orally during negotiations prior to the sale. Sometimes there was no written agreement at all. Another unclear situation is where terms were assumed to be part of the agreement but were not expressly mentioned by either party. For example, holes appeared in fabric after six months of light use. Holes are not mentioned in the original sales agreement and were not discussed explicitly by the parties.

In order to avoid disagreements about such implicit assumptions, courts or the legislatures often make certain assumptions a part of all contracts by imposing a few specific terms on all sales agreements whether the buyer or seller mention them or not.<sup>51</sup> Often these terms may not be avoided and apply even if the parties purport to agree that they shall not apply. Many of these unclear contract disputes involve the applicability and specifications of these legally imposed terms of contract.

##### Evidentiary:

Aside from classifying disputes into legal categories, most could also be further (and more usefully classified) on the basis of the type of evidentiary issues raised. In other words, it is possible to classify the disputes we observed on the basis of the central question of fact at issue in the dispute. One type of dispute involved questions of fact related to the product (or service) itself. In these situations, the dispute between the parties turned on a disagreement about the state of the product or service. In many of these type of cases, if the parties could agree about what was wrong with the product or service and/or why the problem occurred, then they could rapidly resolve their dispute. In these situations, which we call **technical cases**, the terms of the contract are not in dispute. The issue is whether the problem complained of by the consumer actually occurred; why it occurred; and what can be done about it. Technical cases focus on the product or the results of the service and can often be relatively easily resolved if the parties

<sup>51</sup> See generally, M.G. Bridge, *Sale of Goods* (Toronto: Butterworths, 1988).

could come to agreement about what went wrong. In one case we observed, for example, three months after installation, a linoleum floor began to develop small pin holes over a wide section of its surface. The seller believed the flooring was subject to abuse. The buyer believed the flooring or its installation was defective. The resolution of this dispute was facilitated by an arbitration process in which a single expert, agreeable to both sides, provided an answer to the technical problem at issue.

A second evidentiary type of consumer dispute which we observed was composed of situations where the parties disagreed as to the legal obligations associated with the transaction. The central evidentiary issue in these disputes is the existence and definition of the contractual or statutory obligations entered into by buyer and seller. Disputes of this sort, which we term **legal cases**, involve questions of agency to determine the authority of employees to bind the firm; the admissibility and relevance of informal communications; determinations of contractual intention and interpretation in the face of ambiguous contractual language; consent where unusual terms are not particularly disclosed by the firm to the consumer; the existence and applicability of legislation imposing tort liability; special terms of contract and trade practices on the parties; issues of privity of contract in the case of manufacturer/consumer disputes, and so on. Here, the resolution of the dispute depends on the existence and definition of one or more legal obligations.

The two types of evidentiary disputes sometimes seem intimately related especially in situations where reduced payment or no payment is made by the buyer **because** the product did not meet expectations. But, in fact, in these situations the original terms of payment are not really in dispute, rather the aggrieved consumer is saying, in effect: If I had known that the product or service would have been delivered in this way, then I would only have agreed to pay this lesser amount or would not have entered into the sales agreement at all.

In sum, observed cases could be classified in legal terms or on the basis of the evidentiary issue that would resolve the dispute.

## ii) Fitting the Forum to the Fuss

Both legal and technical types of disputes found their way into the courts and into alternative dispute resolution institutions and, in most circumstances, judicial and non-judicial methods were used with approximately equal facility to resolve both types of disputes. It appeared to us, however, that what we have described as technical cases were handled significantly more efficiently by a particular form of non-judicial arbitration. Our observations suggest that where the central issue is a disagreement about the existence of, or the precise reasons for, a manifest defect in a product (or service) and there is no disagreement about the terms of the agreement,<sup>52</sup> the arbitration procedure used by

<sup>52</sup> The process of resolving this type of dispute was observed in small claims courts in Ontario and Quebec, in a Better Business Bureau arbitration in Toronto, and was discussed with officials in the Better Business Bureau of Buffalo.

the Better Business Bureau seems particularly effective compared to dispute resolution in court.<sup>53</sup>

This process usually resolves these disputes on the basis of the opinion of a single mutually agreed upon expert retained by the Bureau who examines the product, or the output of the service. Usually the expert examines the product or service directly in front of the parties to the dispute, even if the examination takes place outside the setting in which the arbitration or mediation is held. The independent expert can and does take the initiative to ask questions of the parties to assist in the examination of the product defect or unsatisfactory service.

Fact finding in this type of situation in court would traditionally be based upon the opinion of a non-expert judge evaluating the conflicting testimony of *separate* experts and the testimony of the parties or others with information. In the Better Business Bureau procedure, in contrast, no formal testimony is taken, though the expert may pose questions of the firm and the consumer about the product. The result of the Better Business Bureau process will depend on the opinion of an expert. In fact, in most situations the parties can and sometimes do voluntarily resolve the dispute themselves on the basis of the expert's opinion. In courts, this type of dispute is resolved by a judge on the basis of conflicting testimony. Rarely is the product itself brought into court as this is usually not feasible.

This aspect of alternative dispute resolution appears to offer substantial advantages both to governments and to the private sector as an alternative to traditional dispute resolution process. There are obvious advantages in avoiding the costs of educating judges as to the particular product or service in dispute; in avoiding a process in which at least two experts are involved in an adversarial fact-determination process; and in developing systems which reduce fixed costs by bring the decision-maker to the dispute rather than the converse. It appears to us that for appropriate technical cases, alternative dispute resolution simply offers a better way that cannot easily be adopted by the courts.<sup>54</sup>

On the other hand, it seemed to us that the judicial system would probably be the more appropriate venue to resolve the cases involving disputes about the *terms* of an agreement. In these types of legal disputes, the most salient issues include credibility, and the existence and content of legal rules that impose terms on the parties. Courts have long experience with such legal aspects of contract and have created rules to resolve ambiguities and define implicit contract terms.<sup>55</sup> It is

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<sup>53</sup> The Better Business Bureaus are voluntary, local associations of retail business which individual firms may join for a fee that provide their members with a wide variety of services. Some of these involve advocacy in local or other political fora, others involve the development of improved relations with customers, and included in the last category is the provision of mediation and arbitration services between retailers and consumers. Better Business Bureaus are, however, organisations run for, by and with the support of business firms.

<sup>54</sup> Our preliminary research indicated that there is a substantial subset of cases which fall within this category. However, further research is required to confirm these data.

<sup>55</sup> M.G. Bridge, *supra* note 51 at 427-546.

also probable that judges have considerable experience with the problem of credibility, and have developed some expertise in evaluating conflicting testimony. Hence, courts should probably be better equipped than alternative dispute institutions to deal with this problem. We could not, however, on the basis of our observations, claim that alternative dispute resolution institutions were any better or worse than courts in assessing credibility. We were not able to gather sufficient evidence to evaluate which of the two processes — traditional legal or alternative dispute resolution using experts — is best designed to manage disputes which require assessment of the veracity of information provided by consumers or firms.

### iii) In Small Claims Courts

Small claims courts, no matter how informal their procedures, feel like courts of law. Even the Quebec small claims courts, which exclude counsel, retain the look and feel of a courtroom. While the intent of the legislatures in Ontario and Quebec was probably to create a user-friendly, informal court — a people's court so to speak — the net result is, on first impression, the creation of just another court, little different from other courts. This is, in part, the unavoidable consequence of the fact that small claims courts are modifications of ordinary courts. Like ordinary courts, they must, for example, be public and manifest sufficient symbolic majesty to demonstrate their power and independence from the State. Beneath the first impression there are, however, significant differences between small claims and other courts.

The judges in the small claims courts we observed acted differently from those in superior courts in several ways. They, assisted by their clerks, were quite careful to explain court procedures to the parties and guide them through the process. The judges almost always played a much more active role in soliciting evidence than did their colleagues in superior court. This was a clear and necessary adoption of an alternative dispute resolution technique. On the other hand, we saw no instances where they initiated and undertook extensive, independent questioning which, in theory, would be an acceptable practice in mediation and arbitration. While we did not observe arbitrators and mediators undertaking such questioning, we understand from interviews that it can and does occur. Small claims court judges, like their counterparts in superior courts, always explained the reasons for their findings so that their decisions did not seem arbitrary. The nature of their decisions were, however, sometimes different from what is expected in ordinary legal decisions.

We observed, for example, that in several situations, judges seemed to act like mediators sometimes do in that they "split the difference" in their award even though they formally found for the plaintiff and should, perhaps, have made their award on a winner-take-all basis. In one case, for example, a mover provided a supposedly binding estimate to the consumer but, after the move, charged a considerably higher fee. The judge found for the plaintiff but split the difference between the charges imposed and the mover's estimate. This type of splitting the difference to reach an accommodating solution is more

like what one would have expected to have occurred in alternative dispute resolution than in court.<sup>56</sup>

The procedural rules in small claims courts frequently seem to have been adopted from alternative dispute settlement methodology.<sup>57</sup> For example, the two courts we observed had pre-trial procedures designed to allow and encourage the parties to settle before the formal hearing. It seemed to us that these procedures were relatively ineffective because they occur at the point of trial and the parties may already be committed to fighting it out. Moreover, the mediation procedures seemed an add-on rather than a salient feature of these small claims courts. We were not able, however, to confirm from observation the effects of these rules.

However, recent amendments to the British Columbia *Small Claims Act*,<sup>58</sup> proclaimed in early 1991, expand the jurisdiction of the court, and are designed to allow people who bring claims to the Provincial Court to have them resolved and to have enforcement proceedings concluded in a speedy, inexpensive and simple manner. The Rules and public information booklets provide a sequential guide for parties who are involved in the Small Claims process, from filing an initial claim to enforcing an order. While parties may be legally represented, the program is designed for lay litigants and the information relating to all small claims procedures is written in plain language. **Mandatory** settlement conferences are presided over by Provincial Court Judges and are intended to encourage settlement of cases, and if settlement is not possible, narrow the issues under dispute and help the parties prepare their cases for trial. Settlement conferences take place in an informal setting, in "settlement conference rooms", and generally require 20 to 30 minutes to complete. A number of Provincial Court Judges have been trained in mediation. However, the settlement conference differs from the practice of mediation in two key respects. First, the conference is mandatory, and a basic tenet of mediation is that parties voluntarily agree to mediate. Second, the conference focuses on identifying legal issues and achieving settlement, rather than on the process of fully discussing all issues and attempting to reach agreement through compromise and mutual agreement.<sup>59</sup>

<sup>56</sup> While mediation in alternative dispute resolution is often thought of as a means to split the difference between conflicting claims there is some evidence that this occurs much less frequently than is suggested by anecdotal evidence. See, Vidmar, *supra* note 14 at 136.

<sup>57</sup> See, for example, in Quebec, Art. 975 C.C.P.; in Ontario, Rules of Civil Procedure, r. 50.01; and in British Columbia, Small Claims Rules r. 7(14). All of these rules suggest that the judge act like a mediator in order to settle a dispute prior to, or while undertaking, legal adjudication.

<sup>58</sup> S.B.C., 1989, c.38. Section 3 of the *Act* identifies the scope of the program. Specifically, the *Act* and Rules apply to claims for debt or damages, recovery of personal property, or performance of services where the amount claimed is \$10,000 or less. Monetary jurisdiction was increased from \$3,000 to \$10,000 in 1991.

<sup>59</sup> As a matter of public policy, the reforms in 1991 were introduced within the context of a court and judicial process. Even at settlement conferences, judges have the authority to make legally binding orders.



Prior to the reforms, there were approximately 35,000 claims filed in British Columbia each year. After the reforms, almost 50,000 claims are filed each year. This translates to a 43% increase in the numbers of filings since February, 1991. Prior to the reforms, 24% of total claims were scheduled for trial. After the reforms, 34% of total claims are scheduled for settlement conferences, and 8% of total claims are scheduled for trials after settlement conferences.<sup>60</sup>

The evidentiary rules used in small claims court were in design and in operation much more relaxed than those used in superior court. Hearsay was often permitted, as was what might seem to be legally irrelevant testimony. On the other hand, the judges did **not** seek out hearsay or legally irrelevant testimony. In the arbitration we observed in Buffalo's Better Business Bureau, the arbitrator sought out legally irrelevant testimony in order to get to the roots of the dispute before her because by getting into the background of the dispute (however legally irrelevant it might be) the arbitrator hoped to encourage voluntary settlement. She was unsuccessful in attaining that goal in the case observed. We understand from interviews that it is common practice for arbitrators to seek out the roots of a dispute even if the testimony involved is legally irrelevant to the case. Judges do not in theory act in this way and were not observed to have done so.

Based upon our observations and interviews, small claims courts have adopted some alternative dispute resolution techniques and are considerably more user-friendly than superior courts. This is not surprising since judicial procedures are not, in the main, **inherently** in opposition to most traditional alternative dispute resolution approaches and techniques. Small claims court processes can in theory, and were in fact observed to, converge with alternative dispute resolution processes. For example, small claims courts can and have lowered fees; reduced waiting times; limited or excluded legal advisors; relaxed evidentiary rules, and even used mediation procedures to induce pre-trial settlement. But there appear to be inherent limits to convergence.

Small claims courts need to remain open to the public if they are to remain courts within a Western legal tradition. This necessarily limits the adoption of some alternative dispute resolution techniques. Small claims courts are also limited by the need to treat the judge in a manner which symbolically demonstrates his or her independence, power and status. This aspect of the operation of small claim courts cannot be compromised because the legitimacy of the court depends on its demonstrated independence from the State. Activist judges, willing to probe to the roots of disputes in order to achieve voluntary settlement, are theoretically possible, though they are unlikely to emerge from the current Canadian legal culture. Finally, even the most informal small claims court cannot match the accessibility and comfort afforded by a small private arbitration or mediation session held in a small room with an accessible third party.<sup>61</sup>

<sup>60</sup> Discussion with Mr. Bruce Heayn, Director, Policy, Planning and Evaluation, Ministry of the Attorney-General, British Columbia, January 1993.

<sup>61</sup> Indeed, some jurisdictions in the United States and Canada have decided to make

Based on our observations, small claims court have tended to converge with non-judicial alternative dispute resolution and there is, perhaps, room for more reform. Nevertheless, there are inherent limits to the ability of courts to imitate non-legal institutions.

#### iv) Alternative Dispute Resolution in Action

Alternative dispute resolution can take so many forms that it is quite misleading to characterize it in any one way. The Better Business Bureaus, for example, attempt quite informal mediation when they first receive a complaint — usually by telephone. This is undoubtedly a form of alternative dispute resolution. Later the Better Business Bureau may undertake an arbitration which looks more like a formal hearing and this, too, is alternative dispute resolution. There are alternative dispute resolution processes in Ontario to resolve disputes about vehicles which are not meeting consumer quality and performance expectations, and there is even alternative dispute resolution for disputes about the price and quantity of gas or electricity delivered to people's homes or businesses. Our observations focused on the processes used by the Better Business Bureaus because they were most adoptable for extensive use in a wide variety of situations.

The Better Business Bureau dispute resolution approach involves a complicated mix of information dissemination and transfer, mediation and formal arbitration.<sup>62</sup> Initially, most consumer complaints to the Better Business Bureau of Buffalo, and most other Bureaus in the United States and Canada, are received by telephone.<sup>63</sup> Mediation is rarely attempted at this first stage. Rather information is obtained and consumers are urged to discuss their problem with the firm, if they have not already done so. The consumer is also informed of the dispute resolution services of the Bureau and the need to gather certain types of information so that their complaint can be processed. At this stage the consumer is, in effect, being educated.

If the consumer and firm are unable to resolve a dispute and the consumer is willing to proceed outside of the court system, a more structured mediation process will then be instituted by the Bureau. At this stage, the Bureau generally pursues an informal approach to mediation in which it acts as a conduit for information and dialogue between the firm and the consumer. Relatively few disputes proceed beyond this stage to more formal structured mediation and arbitration in the form of a stylized case where the parties confront each other with testimony and evidence. An informally mediated solution be-

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their courts more attractive to users through the addition of alternative dispute resolution techniques and have done relatively little to encourage non-judicial dispute resolution. In New York State, however, the clear thrust is to reduce the use of government funded courts and expand the role of private sector adjudication. This is clear in the procedures that are encouraged under new consumer legislation. See *infra* note 74.

<sup>62</sup> This typical approach was discussed with officials of the Better Business Bureau of Buffalo and observed in action at the Better Business Bureau of Toronto.

<sup>63</sup> In virtually all large Better Business Bureau offices there is a bank of phones staffed by employees who receive and record initial consumer complaints.

tween the consumer and member-firm is always preferred and a formal mediation and arbitration hearing is considered to be a last resort.<sup>64</sup>

In theory, most consumer disputes involving member-firms should be subject to this Bureau process and resolved through it. In fact, individual Bureaus in concert with their members can choose to what degree they will encourage more formal mediation and arbitration procedures. This decision is not, however, made unilaterally since the consumer complainant must agree to that process. All consumers should, in theory, enter the Better Business Bureau process since they do not give up any legal rights by doing so. In practice, however, consumers are more likely to agree to arbitration or mediation with a well known and respected Better Business Bureau.<sup>65</sup>

Some Bureaus have few or no formal mediation\arbitration hearings, though all are active in informal mediation. The differences between individual Bureaus can be substantial with some, such as the Better Business Bureau of Buffalo, undertaking anywhere from 60 to 100 formal mediation\arbitration hearings per year and with others in cities of a similar size doing much fewer or none. The difference may come about because some Bureaus either do not have the necessary funds to support a programme or local consumers and/or firms have no knowledge nor interest in such undertakings.<sup>66</sup>

There are several interesting aspects of the "formal" mediation and arbitration process used by the Better Business Bureau. While details vary depending on the arbitrator\mediator and source of the dispute,<sup>67</sup> some aspects of the process are consistent. In general, rules of evidence and articulated burdens of proof are extremely relaxed even compared to small claims court. The mediator\arbitrator provided for a case by the Better Business Bureau, subject to the agreement of the parties, is usually an unpaid volunteer trained, at his or her own expense, in programs arranged by the Better Business Bureau. In some programs and in some Bureaus, however, the mediator\arbitrator is paid a relatively small sum for his or her services. The parties can tell

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<sup>64</sup> Member-businesses have a tendency to settle through an informal mediatory process because they cannot decline to enter more formal mediation and arbitration procedures. Consumer complainants can enter this initial informal process and if it is, from their perspective unsuccessful, proceed to more formal mediation and arbitration or they may, at any point, simply go to court.

<sup>65</sup> The Better Business Bureau of Buffalo has a particularly active programme of formal mediation\arbitration in part because the presence of other, often higher profile, arbitration programmes such as those in support of special consumer legislation encourage consumers and businesses to trust and use their services.

<sup>66</sup> Our initial observation was that the fiscal explanation for the small number of formal mediation or arbitration proceedings in some Bureaus is not persuasive. For example, in the Better Business Bureau of Buffalo, and in many other Bureaus, the arbitrators are volunteers, and the cost of arbitration is extremely low.

<sup>67</sup> That is, variations will occur in the source of consumer disputes subject to arbitration. In some cases, the dispute will have arisen in the ordinary Bureau process; in other cases it will have emerged from legislatively mandated consumer dispute resolution procedures; in still other cases, it may have come from some other source.

the stories including background details as they please subject only to constraints — which are usually gentle or absent — imposed by the arbitrator\mediator.

In one way, a typical Bureau arbitration hearing — as compared to the more informal mediation process — may be somewhat frustrating for the parties as compared to a typical legal hearing. In most arbitration situations, the decision of the arbitrator does not immediately follow the hearing but may be delayed for some days.<sup>68</sup> While this enables the arbitrator to consider the various issues which are to be decided quite carefully, it is somewhat disquieting for the parties. In most consumer litigation resolved in small claims court proceedings, the judge will render a verdict immediately.<sup>69</sup>

The most distinguishing general feature of all the alternative dispute resolution institutions we reviewed is that they were always private, involving only the parties to the dispute and a third party. This is usually a decided advantage from the perspective of resolving the dispute and also permits the parties a degree of comfort that is unattainable in court. But privacy can be a disadvantage. For example, our limited observations of the Ontario motor vehicle arbitration process provide some interesting insights into the paradox caused by the desire by the typical consumer-disputant for a “comfortable” forum. The Ontario Motor Vehicle Arbitration Program (often called OMVAP) is a non-legislated program administered by the Better Business Bureau and paid for by vehicle manufacturers and sellers. Use of the program by a consumer is free but ordinary requires giving up further pursuit of the case in court.

Our observations of this arbitration program suggest that the privacy (and consequent greater comfort) offered by this alternative dispute forum may work against the interest of the aggrieved consumer. The complainants in this process were, of course, always different and had little or no acquaintance with the procedures and had no knowledge of how cases similar to theirs were resolved. The arbitrators, while familiar with the process, served only irregularly since they were rotated frequently. The representatives of the car companies, however, were virtually always the same and had extensive experience unavailable to the other participants. Privacy and informality in these circumstances may have worked against the interests of the complainants, though it was impossible for us to ascertain this with any degree of accuracy since we could not determine whether outcomes in small claims court would have been better or worse for consumers than the results obtained in this forum.<sup>70</sup>

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<sup>68</sup> This delay occurred in all of the situations which we observed.

<sup>69</sup> This is not, of course, a necessary difference in procedure since it is possible for judges to delay their decision and for arbitrators to provide an immediate determination. It may reflect, however, the position of a judge who, once one moves beyond questions of law and credibility, may have little to contribute to the dispute resolution process. The expert arbitrator may have substantial independent information and experience which he or she must integrate into the decision-making process.

<sup>70</sup> The comfort level of complainants is certainly greater in the Ontario Motor Vehicle Arbitration process (and likely in all alternative dispute resolution fora),

A second general feature of the alternative dispute resolution institutions we observed is their diversity. It is clearly possible to tailor alternative dispute resolution mechanism to particular situations. The Better Business Bureaus used at least three different forms of alternative dispute resolution procedures to "fit" different types of situations.<sup>71</sup> The federal Department of Consumer and Corporate Affairs designed a process specifically to resolve disputes about the costs and amounts of gas and electricity delivered to firms and individuals. The ability to design the "forum to fit the fuss" is one of the most important general characteristics of alternative dispute resolution.

A final significant feature of alternative dispute resolution which we observed is its vulnerability to individual local circumstances. In some communities, alternative dispute resolution institutions flourished and provided a lively, well known alternative to the courts. In others, few or no alternative dispute resolution institutions exist. Judging by our observations, two problems confront those who would like to have more institutions doing alternative dispute resolution. There is, first, a need to generate cases to be resolved and, second, a need to develop a means to pay for the cost associated with processing the cases generated.

#### v) Generation of Cases

Small claims courts have few difficulties generating cases. If an aggrieved consumer suffers a loss below the statutory amount that permits the use of small claims courts<sup>72</sup> and believes that it is worth seeking redress, he or she will usually think first about the courts. The generation of cases for courts is determined largely by the calculation people make when deciding whether their potential gain is worth the time and money necessary to take legal action. Courts can rather easily affect this calculation by charging less for access, simplifying procedures or taking any number of other steps (including the use of alternative dispute resolution techniques) to change the calculation of potential users.

Generation of cases is far less straightforward for alternative dispute settlement institutions. Our observations suggest that the key to generating cases for these institutions, both in Canada and the United States, is the presence of sophisticated ancillary systems and institutions which direct disputes to these non-judicial institutions. Our observations suggest that alternative dispute settlement cases were **not**

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as compared to a courtroom. But the public and rule-oriented court environment was designed, in part, to even the playing field between disputants of differing power and experience. Nevertheless, it is typically the weaker party that often demands a more informal, private forum.

<sup>71</sup> The three different forms of alternative dispute resolution used by the Better Business Bureaus include, what we would describe as informal mediation, formal mediation and expert-centred arbitration. The Better Business Bureaus would not, perhaps, use these precise terms.

<sup>72</sup> The maximum amount of a claim in small claims court in Quebec is \$3,000 (see Art. 953 C.C.P.); in Ontario, \$6,000 (see R.R.O. 1992, Reg. 335); and in British Columbia, \$10,000 (see Small Claims Court Act, S.B.C. 1989, c.38, s.3).

generated by references or transfers from small claims courts. The crucial decision about whether a case would go to court or to alternative dispute resolution is usually made by consumers almost accidentally without any evaluation of whether the dispute might be more efficiently dealt with in or outside of the legal system.

Disputes which were generated for non-judicial settlement emerged from a wide variety of sources. Those generated by the Better Business Bureaus came from two basic streams. The "traditional" pool of disputes handled by Better Business Bureaus in Canada and the United States results from complaints to that organisation by consumers about member-firms in the Bureau. In Canada as well as in the United States, a firm which joins a Better Business Bureau usually agrees to permit the Bureau of which it is a member to mediate and, if necessary, arbitrate disputes which arise with consumers. This aspect of membership in a Better Business Bureau has the potential to create a flow of mediation and arbitration cases for the Bureau to resolve. However, in practice, the actual number of cases mediated or arbitrated by different Better Business Bureaus varies quite widely.<sup>73</sup>

Aside from this traditional source for cases to be mediated or arbitrated, consumer legislation in some jurisdictions has created a separate pool of cases which might not otherwise have been susceptible to mediation and arbitration. Typically, these laws create both special rights or warranties for consumers of particular goods and services and alternative non-judicial processes to adjudicate those rights.<sup>74</sup> The mediation and arbitration associated with these consumer laws is often managed by neutral, non-governmental agencies with experience in resolving consumer disputes such as the Better Business Bureau.<sup>75</sup>

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<sup>73</sup> The Better Business Bureau of Buffalo, because it is strongly supported by the business community and is very well known for its work in dispute resolution by the people of Buffalo and the surrounding communities, receives many consumer complaints for resolution. Other Better Business Bureaus that are less well known or those which give little emphasis to the role of "dispute resolver" or whose members do not encourage the intervention of their Bureau in disputes would have fewer requests from consumers for mediation or arbitration. As well, in any particular community, the rate of membership in the local Bureau will vary depending on many circumstances. If there are fewer businesses that are members, there will be fewer opportunities to resolve disputes.

<sup>74</sup> In New York State, laws of this type include "lemon" laws for new car buyers, see 15 CLS New York Statutes (amended to 1992), General Business Law, Section 198-a and those providing special warranties for purchasers of manufactured (usually mobile) homes (creating a so called "bill of rights" for mobile home residents), see 28 CLS New York Statutes (amended to 1992), Real Property Law, Section 233. In Ontario, a non-legislative approach was taken to creating a consumer arbitration programme to address automobile disputes arising between consumers, retailers and manufacturers. See News Release/Communique dated November 9, 1987 of the Ministry of Consumer and Commercial Relations, Ontario, 1.

<sup>75</sup> For present purposes, the most interesting aspect of these consumer laws is that each piece of legislation is deliberately designed to induce those subject to the law, car manufacturers for example, to create and to fund a non-judicial means for settling dispute based on the rights-creating part of the law. Consumers retain the right to use the courts, if they wish. Ontario has done much the same thing

These laws have four different types of effects on alternative dispute resolution programmes. First and most obviously, this legislation has created a stream of cases which is funded by the private sector and often resolved through Better Business Bureau programmes (or other similar organisations in the private sector). Second, this legislation assists in supporting the traditional Bureau mediation and arbitration programmes by providing overhead financing to the Bureau which helps support its more traditional alternative dispute resolution programme. Third, this type of legislation provides status and legitimacy to non-judicial dispute resolution which can encourage consumers and firms to use alternative dispute resolution rather than the courts. Finally, this legislatively sanctioned role for the Better Business Bureau encourages firms to join their local Bureau and further strengthens the organisation's ability to support its dispute resolution programmes.

Firms, consumers and governments face a complex series of calculations which determines the number and kinds of disputes which will be subject to alternative dispute resolution and which will be decided in traditional court systems. Firms are sometimes motivated to choose non-judicial dispute resolution by the high costs associated with courts or by the expectation that a non-judicial approach might maintain the goodwill of the customer. But the goodwill of the customer may already have been compromised by the dispute, and many firms pay a fixed retainer to legal counsel that covers most legal expenses related to minor disputes. As well, a traditional legal forum might reduce the number of disputes which are resolved against the firm because the perceived high cost of legal adjudication may discourage claimants.<sup>76</sup> In general, firms probably prefer informal mediation followed, if necessary, by legal adjudication to an alternative dispute resolution process which includes non-judicial arbitration.

Consumers with sufficient information to make an informed choice often select non-judicial dispute resolution procedures over courts because these procedures commonly resolve disputes with less delay and, in most cases, do not generate any out of pocket costs to the complainant. As well, in some jurisdictions non-judicial approaches are well known, respected and are thought to be legitimate. The vast majority of consumers do not, however, have sufficient information to make an informed choice and simply go to court. In most jurisdictions, this will involve additional expense and delays compared to non-judicial dispute resolution. Our research suggests that consumers rarely, if ever, choose between courts or alternative dispute resolution on the basis of the **type of dispute** they are involved in, though this should be a critical aspect of the choice of venue.

Governments have both fiscal and ideological motives that determine whether and how alternative dispute resolution techniques will

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with its automobile arbitration plan without the creation of special new rights for consumers.

<sup>76</sup> In New York State, businesses have had to be encouraged by legislation to support and use non-judicial fora for dispute resolution and some Bureaus do not receive encouragement for their members to make mediation and arbitration a high profile programme.

be used.<sup>77</sup> Governments often take an interest in alternative dispute resolution as a means to save government resources. Courts are expensive and paid for by government. When **non-judicial** alternative dispute resolution is undertaken and paid for in the private sector, no financial costs accrue to government. It may also reduce the pressure to spend more on the courts because it reduces the number of cases in the judicial system.

Governments also believe that if courts are made more efficient, there should be a savings in resources. This often prompts government to use alternative dispute settlement techniques **within the judiciary**, usually in small claims courts. When governments make mediation procedures or other alternative dispute resolution techniques a regular part of the legal process in small claims or other courts, it can, however, result in somewhat **higher** court costs because of the additional steps in the judicial process. Moreover, a more efficient, user-friendly court will probably encourage greater use of the courts with an associated increase in costs to government.

Some governments are ideologically motivated to use non-judicial dispute resolution because it is thought to be non-confrontational and voluntary compared to traditional legal adjudication. Governments motivated in this way face choices: they can encourage the use of these techniques in court; they can induce the use of non-judicial alternative dispute resolution in the private sector; or they can develop policies which are directed at both ends. While there is no obvious right choice, it appears that the only route to assured **fiscal** savings is to encourage dispute resolution in non-governmental institutions.

While there are several effective means for government and firms to generate cases for non-judicial alternative dispute resolution, few of these procedures are actively pursued. It would be possible, for example, to provide more information to potential complainants about the choices which they have for obtaining redress and the advantages and disadvantages of each. This information could be provided either at the time that a complaint is made to the merchant or at the time when a case is first brought to small claims court or both. Our observations suggest that this type of information is only provided by some Better Business Bureaus.

Finally, governments can generate cases for non-judicial dispute resolution through legislation, like that in place in the New York State,<sup>78</sup> which encourages non-judicial redress of particular classes of consumer disputes. This strategy might encourage non-judicial redress indirectly, through the legitimation of the private institutions which perform this function in any number of ways.

#### vi) Financing Alternative Dispute Resolution

A key aspect of encouraging non-judicial alternative dispute reso-

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<sup>77</sup> These background comments about governments and alternative dispute resolution are based on our research, including field trips to Toronto and Buffalo and take into account discussions with government officials in Alberta and in British Columbia.

<sup>78</sup> See *supra* note 74.



lution is the development of methods to finance the operating costs of the mediation/arbitration process. The court dispute resolution is subsidized by taxpayers though some marginal costs are borne by the litigants. Unless financing issues are addressed, it can be anticipated that non-judicial dispute resolution will operate at a competitive disadvantage to the publicly subsidized system of courts. The problem is that the cost of redress through non-judicial institutions cannot be passed to the consumer. If the cost were to be borne by consumers, then the non-judicial fora would become too expensive relative to the potential gains from redress. Virtually all non-judicial institutions offering alternative dispute resolution confront the same problem: how to finance their system.

In the case of most Better Business Bureau dispute resolution processes, individual consumer complainants do **not** generally pay for the dispute resolution services provided by the Bureau. Virtually all costs, other than the opportunity costs of the consumers' time, are borne through the membership fees of firms which belong to the Bureau.<sup>79</sup> For Better Business Bureaus, and to an extent for their member-firms, dispute resolution may be seen, at least in the short term, as a losing proposition since costs are not recoverable and some disputes which are addressed by the local Bureau might not have been brought to court by the consumer because of the time and money involved in that form of dispute resolution. On the other hand, in many circumstances, firms obtain a long term gain in good will and lower legal fees from Bureau dispute resolution.<sup>80</sup>

Non-judicial alternative dispute resolution can also be financed by the sellers or manufacturers of particular goods or services. It is unlikely, however, that seller/manufacturers will subsidize non-judicial dispute resolution when judicial dispute resolution is available for free. In fact, it is not at all clear that it is in the self-interest of such firms to have any formal adjudicatory process available to buyers. Hence, alternative dispute resolution is financed by firms mainly when collateral benefits are associated with providing dispute resolution, as in the Better Business Bureau model, or when legislation induces firms to support alternative dispute resolution, as in the case of New York State mobile home legislation.<sup>81</sup> While governments can, and in some instances have, induced firms to pay for non-judicial dispute resolution as a service to consumers, there are problems associated with this approach.

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<sup>79</sup> Some Better Business Bureaus, such as those in New York City, do levy a minimal charge for certain alternate dispute resolution services.

<sup>80</sup> As well, arbitration costs are reduced through the use of extensive and active volunteer participation in the dispute resolution process.

<sup>81</sup> In New York State, owners of mobile home parks containing three or more units must register annually with the state Division of Housing and Community Revitalization (DHCR). In addition, DHCR is responsible for enforcing s.233 of the Real Property Law, also known as the "Bill of Rights for Mobile Home Tenants". To assist in discharging this responsibility, DHCR has signed a contract with the New York State Association of Community Dispute Resolution Centres to provide mediation of certain landlord/tenant disputes under s.233.

Research and our observations suggest that alternative dispute resolution mechanisms which are paid for by sellers may result in processes which "tilt" towards the interests providing financial support. There has been considerable criticism of American "lemon" laws which generally induce manufacturers to provide alternative dispute resolution. The problems cited include arbitration processes which favour manufacturers and weak oversight by state governments.<sup>82</sup> Our own observations of the Ontario motor vehicle arbitration process, which is paid for by manufacturers, were inconclusive in ascertaining whether that process may be subject to similar criticism.

It is possible to design a process which is paid for by sellers and that appears to be even-handed, indeed the Better Business Bureaus seem to have done just that. But the financial support for the Bureau processes are spread throughout the business community. If alternative dispute resolution paid for by sellers is to be even-handed, it appears necessary either to obtain funds from a wide base of support in the business community or to assure substantial distance between those providing the support and the actual operation of the program.

Governments must, if they continue to subsidize small claims courts procedures, determine if gains might be achieved by shifting some resources to the subsidization of private alternative dispute resolution processes. Our research suggests that there should be substantial savings associated with a shift of judicial resources to private sector adjudication. These gains would be associated with less expensive adjudicators, lower per case marginal cost where expert volunteer arbitrators are involved, and lower fixed costs as compared to the operation of traditional courts. Most important, private enterprise will, if the system is designed properly, be engaged in ongoing improvement and development of its alternative dispute resolution process, where it faces competition from other operations. The evidence suggests, however, that governments will probably need to retain some type of at least minimal oversight role to assure that adjudication, outside the judiciary, is reasonably fair.<sup>83</sup>

The role of the government in inducing alternative dispute resolution institution might be limited to the introduction of legislation — at a modest cost to the state — which provides a secure source of consumer complaints for the private alternative dispute resolution operation. In addition, governments can, through publicity and consumer education programs, inform consumers and increase public awareness of private alternatives to traditional legal consumer redress mechanisms. A particularly useful step might be to increase the legitimacy and authority of the private alternative dispute resolution process through education and publicity campaigns. Finally, governments can,

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<sup>82</sup> See "The Sour Truth About Lemon Laws", author not noted, (Jan. 1993) *Consumer Reports* at 40.

<sup>83</sup> The devil is, as usual, in the details. It is clear that the oversight role of government could and should vary with the circumstances. Relevant factors which might be considered in determining the appropriate degree and type of oversight include: the nature of the forum, the type of disputes being resolved, the number of users, the stakes, and the capability of the parties to protect themselves.

through relatively minor selective funding, bear some of the fixed costs of private alternative dispute resolution processes.

## 5. Conclusions and Recommendations

Several interesting and sometimes surprising conclusions flow from our observations, research and analysis.

First, there are few essential or inherent aspects of the judicial process which constrain the design and operation of traditional courts. Hence, it is possible to make small claims and other courts more efficient and user-friendly by adopting many alternative dispute resolution techniques for use in the courts. There is considerable evidence that steps in this direction have already begun, but more is possible. In particular, court rules could be changed to encourage judges to be somewhat more "activist" in eliciting evidence and more creative (within the bounds of the law) in designing awards. There is also considerable potential to make better use of pre-trial mediation as has been done in British Columbia.

It should be noted, however, that it appears that there will likely be very small or no savings when governments introduce alternative dispute resolution techniques into court procedures, though this may be desirable for other reasons. It is possible, in fact, that there may be an **increase** in costs to government associated with reforms that make courts more user friendly. This could occur because further steps are created in the judicial process and because reforms may increase the numbers of users.

Second, increasing the use of non-governmental alternative dispute resolution can result in considerable saving for government and has the potential to provide better redress than that afforded by the courts in certain situations. The most effective models for increasing the use of non-judicial alternative dispute resolution seems to be offered by the Better Business Bureaus observed in Toronto and Buffalo (though other non-governmental organisations might, of course, adopt these same techniques and procedures). New York State encourages alternative dispute resolution by providing funding to the Better Business Bureaus for several tasks which assists the organisation both in gaining prestige in the community which encourages membership, and in off-setting fixed costs and thus allowing funds to be available for commercial/consumer dispute resolution. State legislation also encourages selected manufacturers and sellers to provide alternative dispute resolution through independent agencies, including the Better Business Bureaus.

Third, the success of alternative dispute resolution systems depends, to a significant degree, on associated processes to generate cases. The experience in New York State demonstrates that governments can encourage the use of alternative dispute resolution in the consumer context by imaginative legislative drafting directed to that end.

Fourth, alternative dispute resolution, as practised by the Better Business Bureau in what we have termed technical consumer cases (where a decision on the reasons for the physical characteristics of a product would resolve the dispute), appears to be an extremely effective means of dispute resolution relative to traditional adjudication in the courts. This approach to alternative dispute resolution is probably

not transferable to courts except with substantial, and probably impractical, modifications of traditional judicial processes.

### Recommendations

With regard to the **generation and streaming of cases for both small claims courts and alternative dispute resolution** we recommend that:

1. Small claims courts provide potential plaintiffs with information about available alternative dispute resolution processes at the point where small claims are first filed;<sup>84</sup>
2. The information provided to consumers by the small claims courts include the advantages and disadvantages of small claims courts and alternative dispute resolution procedures in different situations;
3. Firms and business organisations make available to the public similar information about small claims courts and alternative dispute resolution when and where consumers initially register serious complaints;
4. Small claims courts make provisions facilitating the transfer of cases begun in that forum within a reasonable time after the plaintiff has filed a complaint, if both parties agree to pursue the claim by means of alternative dispute resolution. If alternative dispute is chosen, then the court would transfer the case to one of perhaps a number of organisations undertaking alternative dispute resolution, and
5. All information provided consumers seeking redress should suggest that technical type cases be streamed to alternative dispute resolution and legal type cases be streamed to small claims courts.<sup>85</sup>

With regard to the operation of **small claims courts** we recommend that:

6. Governments introduce changes to small claims court procedures to allow and encourage judges to take a somewhat more active role in eliciting evidence and to encourage more imaginative awards (this may require legislative change) and
7. Special steps or procedures in small claims courts designed to

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<sup>84</sup> This may and probably will involve government in some kind of evaluative role to determine which kinds of non-judicial alternative dispute resolution forums or programs are to be listed. This may involve the eventual development of some type of licensing function or at least the development of certain criteria to define acceptable alternative dispute resolution.

<sup>85</sup> It may sometimes be difficult to classify cases and, conceivably complainant-consumers may need or want to seek help from small claims court officials in determining the type of dispute which they are involved in. These officials already play a similar "guiding" role in helping people to determine whether or not they should bring a case and how to their draft complaint. Of course, consumers-complainants always have the right to bring their case in whichever forum they prefer.

achieve a voluntary settlement be accompanied by the use of judges or other highly trained personnel to undertake court sanctioned or mandated mediation.

With regard to **alternative dispute resolution** we recommend that:

8. Legislation be passed, where it is absent, to assure that decisions produced in alternative dispute resolution fora have the same force and effect as those from small claims courts with possible review by superior or appellate courts restricted to procedural fairness and jurisdictional issues;
9. Innovative legislation be used to encourage alternative dispute resolution as an alternative to legal adjudication and to induce firms in the private sector to pay for such dispute resolution;<sup>86</sup>
10. Better Business Bureaus and other similar organisations should be encouraged to seek cases for their alternative dispute resolution programs by offering them tasks paid for by government which will provide a financial and reputational base for their dispute resolution services;
11. Where alternative dispute resolution for a particular business sector is supported entirely or substantially by that sector, the resulting processes should automatically be considered to be in need of special procedural safeguards. These might include, for example, publication and provision to consumers of typical awards made by the forum in common situations and periodic and stringent public reviews of the institution to assess both substantive and procedural fairness in the operation of the program.

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<sup>86</sup> It would be best, if firms from a variety of sectors could be induced to support alternative dispute resolution through cross sectoral association like the Better Business Bureaus, Chambers of Commerce, or the Retail Council. Where single industry support is unavoidable, then appropriate oversight is necessary.