

ADR and ESOL : Public Policy Issues Respecting the Two Systems of Private Conflict Resolution Systems and Their Regulation

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I. ADR MECHANISMS AND THE CURRENT JUDICIAL SYSTEM

Interest on the part of judges and reformers of the judicial system in the methods and results of the private sector is growing steadily. And so it should. Disputants are shunning courts, having neither the time nor the resources to deal with them. By contrast, ADR services offered by the private sector are all the rage.

Disputes have become more complex, more costly and more political. To be convinced of this, one need look no further than at the debate surrounding claims of liability flowing from environmental damages or for compensation following the tainted blood scandal.

Large and small business executives want conflicts to be resolved. Lengthy trials suck energy that would be better used developing business. Large scale litigation sullies the corporate image. Discovery before and during the trial can scare off shareholders, jeopardize industrial secrets and publicize long-term development plans. No one likes washing their dirty laundry in public. And in any event, no business can afford to shelve an important project for the three to five years it will take for lawyers to do their thing before the courts.

For individuals, things have got ten even more out of hand. They can't find their way through the judicial maze. Moreover, judges don't like having to deal with parties who show up without counsel and play havoc with the rules of procedure or the law of evidence.

Fortunately, business persons and their clients still speak to one another. Many conflicts are nipped in the bud, be it during a discussion, at a meeting or on the golf course. Oftentimes, a business elder will help the persons involved reach an acceptable compromise.

But, sometimes, negotiations and good offices cannot solve a dispute and a court fight raises more problems than the dispute itself. This is when private dispute resolution services have a role to play.

When speaking of ADR, one now refers to appropriate, not alternative, dispute resolution. This change has occurred because, for some, the use of the word "alternative" conjured an image of second class justice.

II. JUDICIAL REGULATION OF ADR

Extra-judicial conflict resolution is nothing new. Long before civil codes or precedents were ever heard of, feudal lords facilitated conflict resolution among their subjects. Aboriginal justice has always made use of elders and wise persons within the community to achieve peace between parties with a view to reconciliation and healing. Until the end of World War II, members of rural communities first asked a priest, a notary or a mayor to help resolve all sorts of disputes involving family, boundaries, estates and even the payment of accounts at the general store. In these communities, where long-term relationships were so important, it was out of the question to resort to Big City courts that offered solutions that were ill-adapted to the needs of the disputants.

As a result of industrialisation and the exodus to the city, judicial conflict resolution became the norm rather than the exception. As statutes and regulations mushroomed, and with the advent of the Charter, everyone became more rights-conscious and insisted on being heard, irrespective of cost. The judicial boom closely paralleled the economic boom, but rare were those who paid any attention to what would happen "after" the boom. It is now becoming obvious that judicial duelling rarely brings about the results that were hoped for. We have gone full circle : it's back to private dispute resolution systems.

But why would one make use of the private sector? The reasons are many. It's fast. Innovative solutions are available. Processes can be adapted to the means of the client. The persons, professionals and corporations involved have built up their experience, tested and improved their product. The ways in which they offer their services vary greatly, and it is important to differentiate among them.

PERSON OFFERING THE SERVICE	PRODUCT AND SERVICE BEING OFFERED	FORM OF COMPENSATION
Self-employed neutrals Law offices Multidisciplinary professional firms	Intervene directly. Provide all required services. May or may not be accredited. Choice of process is limited to those offered by the person or firm.	Hourly rate or government-determined rate sheet. (<i>e.g.</i> court-ordered mediation).
Community conflict resolution centres	Interview disputants. Assign a neutral, who often are volunteers offering the service in the context of a training program.	Usually free. Service is maintained through grants or community funding.

PERSON OFFERING THE SERVICE	PRODUCT AND SERVICE BEING OFFERED	FORM OF COMPENSATION
"Private Court;" retired judges	Generally similar to the courts. Formal hearings where legal rules are applied. Appeal is available. Parties are looking for the moral suasion associated with judicial experience.	Hourly rates and administrative expenses are those of a private firm. Registry supported through practitioners paying a percentage of their fees.
Ombudsperson Administrative conflict resolution process	Internal service to the business or organization which attempts to resolve conflicts on an amicable basis. Facilitators may or may not have received specialized training.	Free to the parties. The service is deemed cost-effective because of increased client satisfaction, reduced costs and increased productivity.
Convenors Service providers Process consultants	Help disputants in assessing their needs, selecting a process and selecting the appropriate neutral. Take care of logistics. Neutrals are self-employed practitioners, not employed by the convenor, selected on the basis of training and experience.	Set fee for convening, usually based on the number of parties, not the amounts involved. Hourly rate for neutrals. Services are often the result of a contract with a business, government or association but are also available to the public in general.

How does one get to know the types of services that are being offered?

- through experience,
- by word of mouth,
 - by consulting specialized directories (Martindale-Hubbell),
- by looking up preferred areas of practice in professional directories,
 - through non-profit associations,
 - through the referral services of a Law Society or other professional order, or

— through court-connected services.

Among other things, my practice involves acting as convenor and process consultant. This is not a very well-known area of ADR practice, but it is expanding as time goes on. In order to explain what it consists in, it is first necessary to outline the various stages of the mediation process.

MEDIATION PROCESS STAGES					
Assessing the situation	NEGOTIATION				Drafting an agreement
	Pre-mediation	Assessing needs	Creating options	Analysing options	

The linchpin of the process is the assessment and planning, or pre-mediation stage. Whatever process is selected, its outcome will be compromised if the groundwork is not well-done.

Parties who show up in court are at the mercy of the judicial system. They have no control over the selection of the process or the manner in which it unfolds. Everything happens according to predetermined rules. Sanctions for non-compliance are well-known. All of it ends in a decision where one person wins and the other loses. In some jurisdictions, the decision-maker does not read the file until the very last moment.

By contrast, mediation, or any other process in which a convenor gets involved, relies on trust. Pre-mediation allows the parties to make a realistic assessment of their expectations. Since this is a consensual process, disputants have choices to make and need help in making these choices.

In order to ensure that the process will meet the needs of the parties, here are some of the considerations which the convenor will take into account when discussing the matter with the parties :

1. Is this the right time to settle the matter?
2. Are there pending judicial proceedings? If so, will they be suspended during the process?
3. Which ADR process do the parties wish to use? (mediation, neutral evaluation, arbitration, etc.)
4. What are the consequences of selecting one process over another?
5. How many parties are involved?

6. Are parties represented by counsel? Will counsel attend the session?
7. Who should act as neutral third party? (Avoid conflicts of interest)
 8. Does the neutral have the required expertise?
9. What should be the timetable for resolving the conflict?
10. Logistical issues : where and when to hold the session.
11. Any exchange of documents? What about preparing a summary of issues?
12. Should experts be heard?
13. Should witnesses be heard?
14. Drafting of agreement to use the process and of neutral's parameters for intervention.
15. Assessing party satisfaction.

Breaking down the process into a number of discrete elements allows the convenor to defuse emotional issues and to get the parties to look at the conflict in a more rational way. More often than not, parties have an incorrect perception of their interests, an incomplete assessment of the issues involved or a skewed understanding of what is involved in resorting to private conflict resolution. The convenor helps them to get a better handle on the issues involved and the forces at play. This allows cooler heads to prevail and helps the convenor to rebalance forces. The convenor as planner often hears the parties' confidences; this can be done without raising issues of bias or conflict of interest, since the convenor will not be the one to manage the ADR process as such. In effect, the convenor becomes a useful buffer for the ADR practitioner.

III. WHO SHOULD SET THE RULES IF ADR ENDS UP BEING USED MORE FREQUENTLY THAN THE COURTS FOR CONFLICT RESOLUTION?

All will depend on one's point of view and past experiences. If the legal framework for ADR remains relatively loose, market forces will prevail; those who meet their clients' needs, based on a cost-benefit analysis, on reputation or on any other criteria, will have the upper hand.

On the other hand, if ADR becomes mandatory, one can expect consumers to develop certain expectations with regard to the qualifications of practitioners, the cost of the service and other issues. Currently, each program comes with its own baggage of certification rules for neutrals. Here are four examples of requirements applying to "mediators."

In Ontario, where mandatory mediation will soon become the rule for all civil and commercial matters, accreditation is provided by a local committee composed of lawyers and non-lawyers alike. Candidates are assessed according to their training, experience and areas of interest. Non-lawyers can be certified. Parties are allowed to hire neutrals that are not on the roster, in which case the conditions for certification need not be met.

In Quebec, mediation is mandatory in family law matters for couples with children. The certification process is more demanding. It involves 40 hours of basic training by one of the certification agencies, 45 hours of complementary training and 10 mediation sessions supervised by an accredited mediator. Family mediation practice is open only to members of certain professions, and since May 1, 1997, only persons accredited by their professional order or by a youth centre can act as family mediators.

Another interesting example comes from Quebec, and involves mediators on the roster for the Superior Court pilot project in civil and commercial matters. The requirements are much more relaxed. Anyone who has been a member of the Bar for ten years and has attended a 40-hour training program offered by the Bar can apply to be listed on the roster. No prior experience is needed.

Let us turn to the private sector for our last example. The Arbitration and Mediation Institute of Canada has registered the expressions "certified mediator" and "certified arbitrator" (*c. med.*, *c. arb.*) as official marks; as a result, only AMIC can allow a person to use those titles. Becoming a certified mediator requires much more than in the previous three examples : 150 hours of technical training, including 16 within the previous 12 months, 100 hours of practice as a mediator and experience as a trainer in mediation. The application must be forwarded by a provincial committee to the national certification committee, who disposes of it. Those mediators must abide by a code of ethics and accept to be bound by AMIC's disciplinary by-laws.

As you can see, several sources exist from which courts may draw inspiration, depending on the framework they have in mind. Please keep in mind that, in the province of Quebec, all recognized professions are subject to the *Professions Act*.¹ Currently, the fact that many such professions can lay some claim to ADR practice is the source of some debate.

Another issue concerns liability insurance. Practising as a family mediator is considered to be a natural extension of a lawyer's or a notary's general practice : consequently, they are covered by their general liability insurance. Paradoxically, a lawyer whose practice is limited to acting as a family mediator without ever participating in the preparation and filing of the draft agreement could maintain her status as a member of the Bar without having to subscribe to the Bar's liability insurance plan.

By contrast, all lawyers whose name appears on the roster of the Superior Court pilot project must subscribe to the Bar's liability insurance plan.

Interestingly, a lawyer whose sole practice is as an arbitrator in the areas of civil, commercial and employment law is not considered to act as counsel, since there is no client-counsel relationship between an arbitrator and the parties before her. Consequently, any conflict pertaining to honoraria or the conduct of the arbitrator cannot be referred to the Bar Association for adjudication. Again, a lawyer who only acts as arbitrator is not required to subscribe to the Bar's professional liability insurance plan.

1. R.S.Q. c. C-26.

Acting as a mediator or arbitrator is not insured by the professional liability regimes of other professions. Until last January, each practitioner had to shop for his or her own, often tailor-made, E&O regime, usually at a cost of approximately \$1,500 a year. AMIC now offers liability coverage for its members, irrespective of their professional background, for less than \$500. Again, this was a private sector initiative.

IV. TOWARDS A TWO-TIERED JUSTICE SYSTEM?

Anyone who thinks of addressing the issue from the perspective of one justice for the rich and one for the poor is starting on the wrong foot. First of all, let us set aside the very notion of "justice" and, instead, think in terms of rights and interests. The legal system favours rights based on statutes, regulations and, in common law provinces, precedents. The system encourages confrontations. Results are imposed. Usually, one party wins and the other loses.

Private ADR systems focus on parties, "needs and interests" and on a collaborative process of negotiation. Results derive from agreements, except in the case of arbitration. Parties generate the solutions that best meet their needs and interests.

If a decision is made to regulate ADR, then it will be necessary to determine at what stage of the conflict management continuum that intervention will take place.

V. CONFLICT MANAGEMENT AND RESOLUTION APPROACHES CONTINUUM

Private decisions made by the disputants themselves			Private decisions by a neutral		Solutions imposed by courts and other neutrals	
Informal discussions leading to a resolution	Negotiation	Mediation	Administrative Decision	Arbitration	Court decision	Coercive statute

..... Less constraint More constraint

..... More control over results Less control over results

We should remember that disputants resort to private ADR precisely in order to avoid the coercive and constraining aspects of the judicial process. Legislative attempts to frame private dispute resolution will only lead to greater efforts to avoid those constraints and create a parallel system. For disputants, losing control over choices means losing control over results, which runs counter the very essence of private systems. Serious questions must be answered before legislative action is contemplated. What will be achieved by setting up a tighter legal framework for private ADR systems? Is the aim to

appropriate private success stories and make use of them in the public sector? Is cost reduction the objective? Consumer protection? Access to justice? Reducing delays? Changing the role of judges? Controlling neutrals?

Please keep in mind that client satisfaction with the private ADR system currently hovers around 80 per cent. Various studies and programs put the success rate at between 66 and 90 per cent. Furthermore, satisfaction and success rates increase with the degree of voluntariness of the mediation program.

VI. FINALLY, WHAT ABOUT THE COSTS AND SUPPORT REQUIREMENTS FOR ADR?

It is highly improbable that disputants will ever be asked to bear all the costs of the legal system. Nevertheless, it would be appropriate to make them better understand and assume the true costs and consequences of their choices of judicial options. It is the same as having your choice of car. Some go for the basic model, while others travel in comfort and luxury. Engines have four, six or eight cylinders. Which is more appropriate to get us where we are going? If we plan to go through some unchartered territories, maybe a four-by-four should be our choice. So many considerations, so many choices.

We have to go, no more, no less, through the same process as we went through with garbage collection. Ten years ago, there was a single system, involving a weekly or bi-weekly pickup. All our eggs were in the same basket, or should I say all our garbage was thrown into the same bag. Slowly, things changed. Greater concern with environmental issues led us to consider new options which better suited those concerns. In some large cities, recycling became the order of the day. Others set up composting programs. Yet others resorted to cost recovery by charging for every bag being picked up. These are not separate systems but rather, a single, integrated collection system adapted to perceived needs. Internalizing the costs associated with certain practices and discouraging those which can overload the system [providing free recycling boxes, subsidizing composters, charging for each bag] increase the chances of success, even though every one of us remains free to make his or her own choices. No one would even dare to suggest that we go back to the good old days.

In the same spirit, the legal system must think of becoming more "ecological." What do we wish to encourage? Conflict resolution, the use of certain approaches to conflict resolution, cost control? This should be taken into account in determining how the system will be financed. Just as our cities set up vast information programs for their residents in matters of garbage collection and recycling, our legal system must become more accessible to all and allow all to make more enlightened choices. It must stop being the purview of the few and become more consumer-oriented.

VII. SO WHAT IS TO BECOME OF THE LEGAL PROFESSION?

The legal profession will have to change its paradigms. Paradigms are behaviours and attitudes that govern our actions, our judgments and our perceptions : they are the prisms through which we analyse data, thereby preventing us from learning new ways of doing things. Let me give you an illustration of this.

In the early seventies, Switzerland dominated the world market for watches and clocks, controlling 80 per cent of the market. A small R & D team within the world's largest manufacturer developed a more reliable quartz movement. Corporate management did not follow through on this radical development, because it ran counter to the hand-made, jewel-based approach to manufacturing on which the reputation of the whole industry was then based. The R & D team then presented its results at a fair in San Francisco. Seiko and Sony took up the idea. They revolutionized the industry, established their reputation and made a fortune. This was made easier by the fact that the inventors, being completely ignorant of the importance of their discovery, had never patented it. In the eighties, Switzerland's share of the timepiece market had dropped to 10 per cent, and its chances of regaining its control over the industry are very slim indeed.

And so it goes with the legal profession, which will have to change its ways. It must trade its gowns for mountain gear, switch libraries and open its mind. It might even mean (God forbid!) making the fortune of Busch and Folger by buying lots and lots of copies of their highly controversial *The Promise of Mediation*.

Just as disputants need competent private sector agents to help them resolve their conflicts, they also need well informed counsel to inform them of the benefits and consequences of out of court settlements. Experienced mediators and facilitators realize the important role counsel can play during a mediation. Disputants feel more secure; counsel acts as a reality check for their clients' expectations and can keep the focus on what is involved in litigation should ADR fail to bring about a settlement. They can also advise their clients as to what is involved in reaching one form of agreement rather than another. This helps the process unfold in a more serene atmosphere.

It is all a matter of attitude. We should think about changing the glasses through which perceive the world around us.