

Progress in Models of Justice: From Adjudication/Arbitration through Mediation to Restorative Conferencing (and Back)

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I. INTRODUCTION

The title “Doing Justice: Dispute Resolution in the Courts and Beyond,” encapsulates an important post-modern theme which needs to be put in broader context before embarking upon discussion of the place of arbitration, mediation and restorative conferencing among alternatives to court adjudication which have emerged of late. Canada has become a sophisticated deliberative democracy exhibiting classic characteristics of the “supervisory state” as described by the German social theorist Jurgen Habermas in his exhilarating tome *Between Facts and Norms*.¹ As such, this country is charting a somewhat unstable course between the shoals of stifling welfare state-ism on the one hand and unbridled laissez-faire capitalism on the other. It does so in a regulatory environment which attempts to liberate individual and group entrepreneurial capacities, while ideally protecting the most vulnerable by ensuring compliance with basic public standards elaborated through participatory processes.² In this situation, prominent Canadian observers like Charles Taylor³ and Will Kymlicka⁴ have theorized a political necessity and public willingness to recognize diverse communities in state structures which reflect multi-cultural elements. The state establishes purportedly universal norms through differing levels of democratic public institutions: federal parliamentary ones, provincial legislative ones, local municipal ones, and yet to be determined aboriginal and community ones. Linkages between the state and the unregulated and sometimes chaotic private sphere are mediated through institutions of civil society which have varying degrees

¹ Jurgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Democracy* (Cambridge: MIT Press, 1998).

² See B. Archibald, “Let My People Go: Human Capital Investment and Community Capacity Building via Meta/Regulation in a Deliberative Democracy – A Modest Contribution for Criminal Law and Restorative Justice” (2008) 16 *Cardozo J. Int’l & Comp. L.* 1 [Archibald, “Let My People Go”].

³ Charles Taylor, *Modern Social Imaginaries* (Durham: Duke University Press, 2004).

⁴ W. Kymlicka, *Politics in the Vernacular: Nationalism, Multiculturalism and Citizenship* (Oxford: Oxford U. Press, 2001).

of democratic participation: corporations, cooperatives, unions, charitable societies, churches, service organizations, lobby groups and the like. This secular vision of deliberative democracy in a supervisory state contrasts markedly with that of Al-Qaeda's non-democratic and hierarchical theocratic polity based on a narrow Islamist interpretation of *Shari'a* law, or perhaps even the individualist neo-conservatism of the fundamentalist Christian democracy in the minds of some George W. Bush (and McCain/Palin) Republicans.

The legal system becomes a regulatory keystone in this complex deliberative architecture, enabling the vaulted centre to hold while encouraging individuals, groups, regions and communities to instantiate and radiate their unique and polycentric economic, social, religious and cultural charms in a protected democratic space. This broader socio-economic, political and legal context arguably has important implications for the evolution of approaches to dispute resolution in post-modern circumstances, where there is significant ideological fragmentation, polarization and loss of a universal, collective vision of fundamental values (if that ever existed).⁵ Dominant substantive and procedural norms must be negotiated on a societal basis, often through a provocative mass media, rather than imbibed through the nurturing traditions of broadly accepted and monolithic social, cultural and religious institutions.⁶ Minority racial, ethnic, religious and cultural groups, of course, have long grasped the nature of this shattered social construction of reality, while the dawn of such understanding breaks slowly into the consciousness of those in power who inhabit the world of relative privilege.⁷ The energy in post-modern dispute resolution systems crackles between polarities of universality and culturally specificity. Yet changing patterns emerge from the flow between the communality of our experience as human beings and the intense particularity of our individual and collective situational experiences in multi-cultural deliberative democracy. That this seems true for evolution of processes of dispute resolution as well as for the institutional elaboration of substantive norms is of significant interest. There is a recent observable movement from adjudication (of varying types), to multiple forms of mediation, and to culturally specific modes of

⁵ Barbara Hudson, *Justice in the Risk Society: Challenging and Re-affirming Justice in Late Modernity* (London: Sage Publications, 2003).

⁶ J. Habermas, *The Inclusion of the Other* (Cambridge: MIT Press, 1996); see also Mathieu Deflem, *Habermas, Modernity and Law* (London: Sage Publications, 1996).

⁷ C. Aylward, *Canadian Critical Race Theory: Racism and the Law* (Halifax: Fernwood Press, 1999).

community or restorative conferencing.⁸ This transformation in forms of dispute resolution is the object of reflection here, with a focus on the intermediary phenomenon of arbitration. The main point is that diversity in forms of dispute resolution can enhance the capacity of our communities to liberate cooperative potential, rather than waste resources in forms of dispute resolution which exacerbate individual conflict and reinforce social tension.

The plan of this paper is first to explore the strengths and weaknesses of adjudication by sketching the paradigmatic features of adversarial trials and standard forms of arbitration. Secondly, I wish to map out certain developments which can be seen as attempts to reform adversarial trials and standard arbitration through incremental use of streamlining techniques and resort to mediation. Then I propose to make some observations about restorative or community conferencing as an emerging approach to problem solving and dispute resolution based on alternative assumptions about the nature of justice. Finally, I will conclude with some remarks about how these varying approaches, which will surely continue to co-exist, can be coordinated in a deliberative democracy to enhance not only just dispute resolution but also to contribute to human capital investment and social capacity building.⁹ In an attempt to adhere to the adage that one should only speak about things one knows (or with which one is familiar, at the very least), I will draw examples primarily from the fields of criminal justice and unionized labour relations. I will not touch upon parallel developments in the areas of civil justice or commercial arbitration. But I do rely on the precept that it is always essential to get a sense of the big picture, otherwise you don't know how or where any of the apparently interesting details fit in: hence my desire to commence with the preceding brief disquisition on multi-cultural deliberative democracy in the post-modern supervisory state.

⁸ J. Braithwaite, *Restorative Justice and Responsive Regulation* (New York: Oxford University Press, 2002).

⁹ See Law Commission of Canada, *Transforming Relationships through Participatory Justice* (Ottawa: Minister of Public Works and Government Services, 2003); and Archibald, "Let My People Go," *supra* note 2.

II. ADVERSARIAL TRIALS AND RIGHTS ARBITRATION: PARALLEL PATHS TO FORMALISTIC ADJUDICATION

In the common law tradition, the adversarial trial is often lauded as the final bastion of dispute resolution—the rightful and sole preserver of the rule of law: it is that which separates civilized and orderly democracy from a chaotic law of the jungle.¹⁰ This caricature, like many, contains important grains of truth. The state authorized adversarial trial is a worthy historical substitute for medieval trial by battle, and an important bulwark against the ever present possibilities of vigilante justice or gang warfare. The essence of adjudication is that it is a process based on individual rights in which a neutral adjudicator will apply pre-existing and democratically established rules to facts as found by a neutral fact finder in order to achieve a fair or just outcome—one which will then be deemed authoritative and legitimate by all right-thinking persons.¹¹ From this generic perspective there is really no difference in principle between a criminal trial, a civil trial or a labour arbitration: they are simply slightly different types of adjudication as a form of dispute resolution. (The reference here, of course, is to *rights arbitration* which adjudicates disputes under collective agreements and not *interest arbitration* which establishes new terms of a collective agreement between union and employer where the parties have been unable to agree).

Yes, of course, there are differences between a criminal trial and a labour arbitration. A criminal trial, which can deprive a citizen of liberty, is governed through the substantive law of crimes established by Parliament in the public interest and set in the *Criminal Code*.¹² Fundamental principles of criminal procedure, such as the presumption of innocence, the right to a jury trial for serious offences or provision of fair rules of evidence, are constitutionally entrenched in the *Charter of Rights and Freedoms*, indicating their signal importance. The judge is appointed by the state with security of tenure to protect his or her impartiality and independence. The criminal trial can often be a long and drawn out affair with elaborate disclosure requirements, preliminary inquiries, *voir dire*s and rights of appeal, as might be thought fitting where the issues at stake

¹⁰ See H. Hart & J. McNaughton, “Evidence and Inference in the Law” in D. Lerner, ed., *Evidence and Inference* (Glencoe, Ill.: Free Press, 1959) as excerpted in S. A. Schiff, *Evidence in the Litigation Process*, 4th ed. (Toronto: Carswell, 1993).

¹¹ O. Fiss & J. Resnik, *Adjudication and Its Alternatives: An Introduction to Procedure* (New York: Foundation Press, 2003).

¹² See D. Stuart, *Charter Justice in Canadian Criminal Law*, 2nd ed. (Toronto: Carswell, 2005).

can be momentous.¹³ By contrast, a labour arbitration is largely governed by the private substantive law negotiated between employer and trade union for the benefit of employees as found in their collective agreement.¹⁴ The decision as to whether an employer can dismiss an employee, depriving him or her of a livelihood (also momentous), normally can only be reviewed by an arbitrator appointed by agreement of the parties, whose process is largely governed by rules set out in the collective agreement, where the formal rules of evidence established for an adversarial trial will not apply, and where rights to judicial review may be limited. All this despite the fact that the jurisdiction of arbitrators has been expanded to allow them to apply general employment related statutes, human rights legislation and even the *Charter of Rights and Freedoms*, where applicable.¹⁵ However, the arbitration is intended to be a quick, informal and cost effective means by which to resolve disputes in the workplace. But despite these and other differences, the adversarial criminal trial and the arbitration are simply different forms of the same basic process: rights adjudication in the context of a dispute where the decision maker applies the law (public or private) to the evidence to reach a purportedly just and authoritative result.

It interesting is that both the criminal trial and the labour arbitration in this country seem subject to the iron rule of bureaucratic behaviour enunciated long ago by Max Weber.¹⁶ Weber observed that rule-based, hierarchical administrative systems have an inevitable tendency to become increasingly complex as decision-makers elaborate ever more detailed rules to respond to patterns of problems or issues which they encounter on a regular basis. While this makes the system more consistent in the way it handles many individual cases, it prohibits lower level decision makers, who lack discretionary authority, from responding flexibly to the nuances of unique situations which may not be well served by a general rule elaborated in slightly different

¹³ See generally Tim Quigley, *Procedure in Canadian Criminal Law*, 2nd ed. (Toronto: Thomson Carswell, 2005); and Stephen Coughlan, *Criminal Procedure* (Toronto: Irwin Law, 2008).

¹⁴ The standard practitioner's text on rights arbitration in Canada is Donald J.M. Brown & David M. Beatty (with Christine E. Deacon), *Canadian Labour Arbitration*, 4th ed., looseleaf (Aurora, Ont.: Canada Law Book, 2006).

¹⁵ See Labour Law Casebook Group, *Labour and Employment Law: Cases and Materials* (Toronto: Irwin Law, 2004).

¹⁶ Stansilav Andreski, ed., *Max Weber on Capitalism, Bureaucracy and Religion: A Selection of Texts* (London: Allen & Unwin, 1983).

circumstances. As the number of rules increases and discretionary scope for front-line decision-makers decreases, the time needed for decision making and the potential for arbitrary outcomes both expand. An aging bureaucratic system becomes more rigid and slows down as sclerosis sets in. The following discussion is intended to demonstrate how this phenomenon can now be observed in relation to both criminal trials and labour arbitrations.

The Canadian *Criminal Code* of 1892 once had a simple distinction between indictable and summary conviction offences which had straightforward and predictable consequences for jurisdiction of courts, modes of trial, procedure on appeal etc. But a desire for more speedy trials in indictable offences led to amendments which shattered the elegance of the original scheme and have spawned a bewildering set of exceptions (like indictable offences in the absolute jurisdiction of provincial courts and complex election procedures) which are incomprehensible to anyone but a criminal law specialist.¹⁷ Similarly, the rules of evidence have evolved to a stage of such Byzantine complexity that they become a snare for the non-specialist judge and a boon for the litigant (and lawyer) who can afford to take the matter on appeal, all the while seemingly beyond the capacity of law reform commissions, inter-provincial task forces, Canadian legislatures and even law professors (!) to render comprehensible.¹⁸ Charter litigation has added to the weight of new rule-making as virtually every aspect of Canadian criminal law and procedure has been put through the sieve of constitutional review and adjusted in some manner to reflect more precise *Charter* requirements.¹⁹ Drafters of legislation, seeking to enunciate *Charter*-proof rules, respond by generating criminal code sections of ever-increasing specificity—a phenomenon to which any reader of the *Criminal Code's* provisions on

¹⁷ See Law Reform Commission of Canada, *Classification of Offences*, Working Paper 54 (Ottawa: Queen's Printer, 1986) for a critical assessment of this phenomenon and proposals for reform which have never been adopted.

¹⁸ The first comprehensive attempt at evidence law reform for Canada can be found in the Report of the Law Reform Commission of Canada, *Evidence* (Ottawa: Information Canada, 1975). This was followed by the Uniform Law Conference of Canada's *Report of the Federal/Provincial Task Force on the Law of Evidence* (Toronto: Carswell, 1982). Shortly thereafter, Bill S-33 was introduced as the final attempt by Parliament to bring some degree of order to the law of criminal evidence, but this valiant effort sputtered out under attacks from various prominent members of the legal profession and lukewarm support, if not outright hostility, from some provincial Attorneys General. Myopia won the day.

¹⁹ See Stuart, *Charter Justice in Canadian Criminal Law*, *supra* note 12.

telewarrants, wiretaps or a whole host of other police powers can attest.²⁰ Politicians persist in the belief that by criminalizing more conduct of various forms one can improve social behaviour and/or enhance public safety across the board. The commitment of the then Law Reform Commission of Canada in the 1970's and 80's to clarity, simplicity and restraint in criminal legislation seems a dim memory in the minds of hopeless idealists from a previous era.²¹ In theory, and to some considerable degree in practice, this bureaucratized criminal justice system can render justice accurately and consistently in any individual case. But increased length, complexity and cost of criminal trials have been the result, despite constant refrain that "justice delayed (or rendered inaccessible due to cost) is justice denied." The pressures to plead guilty, and one fears these exist even where there may be a defence case to be made, continue and perhaps with increased intensity, with the attendant spectre of bureaucratically generated injustice. Weber seems vindicated.

It has taken far less time for Canadian labour arbitration to become sclerotic than Canadian criminal law and procedure. Labour arbitration as we know it is the product of the American *Wagner Act* regime of industrial relations which was adopted throughout Canada in the late 1940s in the wake of the repeal of federal wartime labour regulations.²² The essence of the system is the certification of exclusive bargaining agents for units of employees with whom employers have a legal duty to bargain. Strikes are forbidden during the term of collective agreements and are replaced by mandatory dispute resolution through arbitration—these are consensually appointed arbitrators by preference, but ministerially appointed arbitrators where the parties cannot agree. Thus, since the 1950's the institution of mandatory rights arbitration under collective agreements has grown and matured.²³ The initial idea was that enforcement of rights under collective agreements was to be in the hands of arbitrators who were familiar with labour relations and available on short notice (unlike judges), who would hold relatively informal hearings (unlike courts), who would render short decisions quickly and in simple

²⁰ See, for example, *Criminal Code*, R.S.C. 1985, c. C-46, Part XV "Special Powers and Procedures" (on search warrants) and Part VI "Invasion of Privacy" (on wiretaps).

²¹ See for example, Law Reform Commission of Canada, *Recodifying Criminal Procedure*, Report No 33 (Ottawa, 1991).

²² See George Adams, *Canadian Labour Law*, 2nd ed., looseleaf (Aurora, Ont.: Canada Law Book, 1993); or D. Carter *et al.*, *Labour Law in Canada* (Toronto: Butterworths, 2002).

²³ See Brown & Beatty, *supra* note 14.

language which could be understood by employees, unions and employers alike (unlike judicial legalese), and whose awards would be imbued with “practical labour relations sense” appealing to the parties (unlike many judges who had historically, or perhaps stereotypically, displayed a lack of understanding of or hostility to labour relations matters).

This purportedly speedy, friendly and efficient system of labour adjudication soon began to replicate many of the characteristics of courts which it was meant to avoid. Specialized employer and union-side lawyers, rather than lay union and employer representatives, began to predominate in the presentation of cases to arbitrators.²⁴ Complex substantive and procedural legal arguments came to be advanced rather than concentrating on the facts of the dispute to be resolved as initially intended by the originators of the post war labour relations system. Arbitrators were forced in response to write longer awards addressing these legally complex arguments. Arbitration awards came to be circulated and cited in subsequent arbitrations which dealt with analogous collective agreement provisions or similar fact situations.²⁵ Publishers saw a market: arbitration awards are now collected and published in specialized legal report series.²⁶ Textbooks were written by law professors, who were often part-time arbitrators, organizing the emerging body of arbitral jurisprudence into what came to be described as the common law of the unionized shop floor.²⁷ This “common law of the shop floor” was then seen as the background against which collective agreements were assumed to be negotiated by labour relations specialists and labour lawyers representing the parties in collective bargaining. Evidentiary rules emerged in the arbitral jurisprudence dealing with use of negotiating history, and doctrines such as the common law of estoppel were adapted for use in the labour relations context. By the 1980’s,

²⁴ Lawyers for the opposing sides have now formed themselves into associations to promote their interests and those of their predominant client groups.

²⁵ See Brown & Beatty, *supra* note 14. Under most labour relations legislation in Canada, arbitration awards must be filed with the minister of labour and thus become available to the public upon request.

²⁶ The *Labour Arbitration Cases* published by Canada Law Book since 1948 are now in their 4th series.

²⁷ In addition to Brown & Beatty, *supra* note 14, see M. Mitchnick & B. Etherington, *Labour Arbitration in Canada* (Toronto: Lancaster House, 2006); M. Mitchnick & B. Etherington, *Leading Cases on Labour Arbitration* (Toronto: Lancaster House, 2002); and Jeffrey Sack, *Winning Cases at Grievance Arbitration* (Toronto: Lancaster House, 1994). For an earlier work, see E. Palmer, *Collective Agreement Arbitration in Canada* (Toronto: Butterworths, 1981).

labour arbitrations were often drawn out complex legal affairs with many of the traditional substantive and procedural trappings of civil court proceedings, but without standardized pre-hearing rules of procedure. In 50 short years Weberian bureaucratic inevitabilities have seemingly overtaken the adjudicative processes of labour arbitration in a process which resembled strangely what had occurred over the course of a century of criminal litigation. In very important ways, labour arbitration now fails to live up to its original expectations of being a simple, quick and cost effective way to attain justice in the unionized workplace.

III. INCREMENTAL ADJUDICATIVE SYSTEM REFORMS: STREAMLINING, CRIMINAL VICTIM-OFFENDER MEDIATION AND LABOUR MEDIATION/ARBITRATION

As both adversarial criminal trials and the system of labour arbitration groan under the weight of increased volume and increased complexity, there have been similar proposals for reform in relation to each system of adjudication. Each has incorporated improvements which have attempted to streamline the adjudicative process without altering its fundamental character. Each has had to respond to problems caused by the fact that there are underlying tripartite pressures destabilizing the essentially dyadic traditional adjudicative paradigm. And finally, each has moved to incorporate mediation as an adjunct to its adjudicative system, even though the paradigm of mediation is based on fundamentally different principles than adjudication. These parallel developments will be the subject of brief comment.

There have been a number of attempts to streamline the nature of the criminal trial through various forms of rule improvement and case management.²⁸ Early on there were the ill fated “speedy trial” amendments described above. But pre-trial disclosure of the Crown’s case to the defence, adopted on a spotty ad-hoc basis in many jurisdictions and then imposed upon all as a matter of constitutional fiat from the Supreme Court of Canada,²⁹ is the cornerstone of the streamlining effort if seen primarily as a matter of due process. Once the defence is in possession of the key elements of the prosecution evidence, both sides can

²⁸ See Quigley, *supra* note 13.

²⁹ *R. v. Stinchcombe*, [1991] 3 S.C.R. 326.

engage in rational plea negotiation and avoid trials altogether.³⁰ Moreover, once disclosure has occurred, an optional pre-trial conference, which is judicial mechanism for making the trial more efficient, can confirm admissions, clarify other evidential issues, plan for the orderly presentation of the evidence, and generally make rulings which will ensure a more efficient hearing. Judicially supervised deadlines in this context, reinforced by rules of court, can also make this process flow more smoothly. However, these reforms are meant to render the adjudicative process of the adversarial trial more efficient, and are not in any way intended to change its fundamental, bi-partisan adjudicative nature.

Interestingly enough, the purported informality of the labour arbitration system has inhibited the development of this sort of streamlining process which has occurred in relation to criminal trials. There is a sense in which passive arbitrators and/or intractable counsel, particularly those being instructed by uncooperative parties, can render the labour arbitration one of the last arenas of “trial by ambush.” With no rules of court to require pre-arbitration discovery and no constitutional basis for pre-arbitration disclosure (with its impetus to pre-hearing discussion), streamlining in the hands of cooperative counsel can only be aided by interventionist arbitrators through aggressive use of scheduling and subpoena *duces tecum* powers which can be used to prod pre-hearing disclosure or encourage the parties to confer. The problem requires more than just improving scheduling of hearings via web-based arbitration calendars³¹ and having arbitrator and parties turn up when the date arrives. It requires pre-hearing conferences convened by arbitrators who are willing to force sometimes reluctant counsel to prepare their cases in advance; however, such pre-arbitration conferences appear to be far from the norm in many jurisdictions. This has meant that internal and external “expedited arbitration” schemes have been the primary focus in the labour relations field for making traditional arbitration a more timely process.³²

³⁰ Report of the Ontario Attorney General’s Advisory Committee, *Charge Screening, Disclosure and Resolution Discussions* (Toronto: Queen’s Printer, 1993) [“Martin Committee”]. In Nova Scotia, there is currently an “early resolution project” in Halifax where the Public Prosecution Service is experimenting with means to expedite plea negotiations.

³¹ Many arbitrators now put their available dates on the internet at co-ordinated labour arbitration web-sites, see online: <www.arbdates.com>.

³² See J. Sanderson, “The Arbitration Process: Problems and Solutions an Arbitrator’s Perspective” (2001–2002) *Labour Arbitration Year Book* 155.

By “internal expedited arbitration,” I mean schemes which have been negotiated by the parties and voluntarily introduced into collective agreements as alternatives to standard arbitration clauses.³³ These typically have shortened deadlines for bringing the matter to hearing and a requirement for the arbitrator to deliver an immediate oral award or a brief written award within a short period, neither of which is to be cited as a precedent in subsequent arbitrations. This process seems designed to obtain an old-fashioned award from the arbitrator, but is oriented to the needs of the parties rather than for publication in the arbitration yearbook or for the eyes of a potential court sitting in judicial review.³⁴

By “external expedited arbitration,” I mean that which is prompted by legislative procedures which allow a minister or other official to appoint an arbitrator on *ex parte* application where there has been delay in such appointment or delay by a consensual arbitrator in holding a hearing or issuing an award in a timely manner.³⁵ These processes are premised in part on the assumption that delays are occasioned by tardiness on the part of arbitrators rather than the crowded schedules of labour counsel, which are often heavily booked months in advance. In any event, anecdotal data from across the country seems to indicate that introduction of either form of expedited arbitration does not dramatically improve the timeliness of arbitration awards for participants in the administration of collective agreements. Neither, of course, does expedited arbitration in any way alter the classic, bi-partisan nature of the adjudicative process.

Both the criminal trial and the labour arbitration have traditionally been conceived of as dyadic or two-sided adversarial processes: the criminal trial between the accused and the state, and the labour arbitration between the union and the employer. Both have been subjected to pressures to develop more sophisticated understanding of the nature of crimes or workplace disputes, and to treat complainants and grievors in a more friendly and responsive fashion, thus recognizing the essentially tripartite nature of the interests underlying both types of proceeding in

³³ This was once fashionable, particularly among public sector unions in the 1990’s, but did not really seem to work.

³⁴ This brings to mind the observation by one judge that jury instructions on criminal self-defence describe a law so complex and incoherent that they are primarily oriented to fending off appellate review rather than assisting jurors in a putative state of confusion: see *R. v. Pintar* (1996), 110 C.C.C. (3d) 402 (Ont. C.A.).

³⁵ A variant of this was recently introduced in Nova Scotia, see *Trade Union Act*, R.S.N.S., c. 475, as am. by S.N.S. 2005, c. 47.

many circumstances. Each set of circumstances is worthy of a moment's reflection.

The famous Hart-Devlin debate of the 1960's was premised on the now contested notion that crimes such as drug abuse or prostitution are "victimless" in the sense that those who bring criminal censure and sanctions upon themselves are the authors of their own misfortune.³⁶ Whatever one's views about the criminalization of such so-called victimless crimes, the 1970's and 1980's shifted focus to the plight of complainants of violence to the person or to property.³⁷ These clear crime victims had heretofore been primarily seen, and sometimes abused by the system, as mere witnesses. Based on a welfare state model, crime victim legislation was passed in all Canadian jurisdiction to provide some measure of compensation from administrative tribunals for victims who had suffered loss from criminal harms and for whom civil tort compensation was deemed ineffective.³⁸ By the 1990's such efforts were seen as insufficient. Victims "bills of rights" were enacted at provincial and federal levels exhorting governmental officials to take victims interests seriously in all aspects of the justice system.³⁹ Measures were taken to give victims a more prominent place at all junctures in the formal criminal process: police and Crown protocols require consultation with victims prior to the exercise of discretion with impacts upon them; trial procedure and evidentiary rules were altered to protect vulnerable victims from unpleasant and unfair aspects of the criminal trial; victim impact statements, written and then oral, were introduced at criminal sentencing hearings; victims interests were integrated into the process of parole release and victims are now encouraged to participate in "faint hope hearings" which deal with possible shortening of periods of parole

³⁶ Patrick Devlin, *The Enforcement of Morals* (Oxford: OUP, 1965); H.L.A. Hart, *Law, Liberty and Morality* (New York: Random House, 1968).

³⁷ See Kent Roach, *Due Process and Victims' Rights: The New Law and Politics of Criminal Justice* (Toronto: University of Toronto Press, 1999); and Bruce P. Archibald, "Citizen Participation in Canadian Criminal Justice: The Emergence of 'Inclusionary Adversarial' and 'Restorative' Models" in S. G. Coughlin and D. Russell, eds., *Citizenship and Citizen Participation in the Administration of Justice*, (Montreal: Canadian Institute for the Administration of Justice/Thémis, 2001); or Bruce P. Archibald, "Coordinating Canada's Restorative and Inclusionary Models of Justice: The Legal Profession and the Exercise of Discretion under a Reflexive Rule of Law" (2005) 9 Can. Crim. L. Rev 215-260.

³⁸ P. Burns, *Criminal Injuries Compensation* (Toronto: Butterworths, 1992).

³⁹ See J. Barrett, *Balancing Charter Interests: Victims' Rights and Third Party Remedies*, looseleaf (Toronto: Carswell, 2001).

eligibility for those convicted of very serious offences.⁴⁰ There is a sense in which the criminal trial has become a three-cornered affair with the accused, the state and the victim as participants.⁴¹ This has not reached the point of recognizing victims as formal parties to the trial, but it is interesting to note that at least one court has allowed the admissions exception to the hearsay rule, normally reserved to admit out of court statements by parties against their interest, to be invoked against a victim!⁴² This advance in victim participation is arguably a significant shift in the nature of the dyadic, adversarial criminal trial, even if it has not reached the state as in continental European systems of according victims “civil party” status.⁴³ Nor have victims in Canada been given the formal right to challenge the exercise of prosecutorial discretion, and in particular not the Crown’s right to stay proceedings.

The path to the protection of third party status in labour arbitration took a different, external turn.⁴⁴ Grievances which lead to rights arbitration under collective agreements can be initiated either by the union or by individual grievors. Union policy grievances usually deal with an issue of interpretation of the collective agreement which may affect many members of a bargaining unit. By contrast, individual grievances, which sometimes may have policy significance, more often relate to singular complaints which turn on their own facts and have little precedential value, for example an unjust dismissal. While individual employees are third party beneficiaries of the collective agreement between employer and union, they are not formal parties to it. Thus, it is the union which carries the grievance forward and can decide that it is not a proper case to do so. The union is entitled to make such a decision, if it reasonably considers it in the interests of all of the members of the bargaining unit, not to advance the grievor’s case. So while grievors have the right to attend their arbitration hearing with the assistance of counsel if they wish, they do not have carriage of the proceedings or a veto power over it. Given the union’s monopoly position as bargaining agent, the law has

⁴⁰ *Ibid.*

⁴¹ See for example, “Spousal/Partner Violence Policy” in Nova Scotia Public Prosecution Service, *Crown Attorney Manual: Prosecution and Administrative Policies for the PPS* (2000); Minister of Justice, *Federal Prosecution Service Deskbook* (Ottawa, 2000) at c. 20. Final decisions rest with the prosecutor; the victim has no veto.

⁴² *R. v. Grant* (1989), 49 C.C.C. (3d) 410 (Man. C.A.).

⁴³ S. Guinchard & J. Buisson, *Procédure pénale* (Paris: Litec, 2000).

⁴⁴ See generally, Brown & Beatty, *supra* note 14.

long been that this discretionary authority must be exercised without discrimination. The union therefore has a duty of fair representation with respect to individual grievors or those in a political minority in its bargaining unit. But there has been no expansion of grievors' rights to challenge the fairness of union decisions within the arbitration proceeding itself. A dissatisfied grievor must challenge the fairness of the union's decision either by civil suit in the ordinary courts or, as is the predominant situation in most jurisdictions of late, through a streamlined and inexpensive duty of fair representation complaint procedure before labour relations boards.⁴⁵ By analogy to the criminal trial, it might be said that while the grievor has not been given the procedural rights accorded a crime victim, the grievor can externally challenge the union's equivalent of a Crown stay of proceedings in ways that a criminal complainant cannot.

Given the increasingly dysfunctional complexity of both criminal trials and labour arbitrations, it is interesting that both have turned to mediation as a way out of their problems. Mediation, of course, is conceptually and in practice very different from adjudication.⁴⁶ The classical purpose of mediation is to achieve a result which is acceptable to the (usually two) parties involved. Widely adopted mediation theory stresses that the mediator should assist the parties to identify common *interests* which can lead to a mutually acceptable outcome, rather than start with *positions* which may rest on the divisive assertion of rights.⁴⁷ The role of the mediator is not to impose a rights-based decision, but rather to assist the parties to come to their own agreement which each can recognize as meeting their particular needs. This process should provide a mutually satisfactory resolution of the dispute, allowing the parties to move on with their lives. Mediation, often thought best fitted to civil litigation where there is no explicit public interest at stake, can also achieve a broad range of compensatory outcomes responding to the perceived needs of those most affected by both criminal and labour disputes.

⁴⁵ Nova Scotia is the most recent province to introduce this process, and one of the last; see *Trade Union Act*, *supra* note 35, ss.54A, 56A.

⁴⁶ Julie MacFarlane, ed., *Dispute Resolution: Readings and Case Studies* (Toronto: Emond Montgomery, 2003).

⁴⁷ See R. Fisher & W. Ury (with Bruce Patton), *Getting to Yes: Negotiating an Agreement without Giving In*, 2nd ed. (London: Random House, 1992).

In the criminal context, a victim/offender mediation movement emerged in the 1980's to respond to the pervasive sense of victim dissatisfaction with a lack of control over the formal criminal process, an absence of adequate participatory voice and inadequate compensation for criminal harms.⁴⁸ These deficiencies seem to transcend the criminal justice system improvements described above which attempted to give victims a great participatory role in the formal criminal justice process. This is evidenced by the consistent lack of uptake by victims in the use of victim impact statements.⁴⁹ Parliament responded in both the adult system governed by the *Criminal Code* and the youth system governed by the *Young Offenders Act* and then the *Youth Criminal Justice Act* by legislating for the possible adoption of alternative measures which at the outset were generally either simple diversion or victim offender mediation.⁵⁰ Statutory minimum standards ensure voluntary participation by accused persons who take responsibility for their actions after having been given an opportunity to consult counsel, and under circumstances where the Crown must be assured that it has sufficient evidence for a conviction which is not barred at law. Mediation in this context has distinct advantages over a criminal trial for both offender and victim. Victims can face the offender, directly and cathartically describing the harm which they suffered without the intermediary of Crown counsel asking the questions in a formal setting. Offenders who have taken responsibility may apologize to victims and offer to make amends, setting the stage for effective reintegration into the community. Mediators can help the offender and victim achieve an outcome agreement which is satisfactory to both parties. In the criminal context, however, victim offender mediation is often criticized for failing to provide assurances that the public interest will be represented in the outcomes, that agreements will reflect proportionality between the harm caused and outcome for the offender, and that power imbalances between victim and offender can be

⁴⁸ M. S. Umbreit, R.B.Coates & B. Vos, "Victim Impact of Meeting with Young Offenders: Two Decades of Victim Offender Mediation and Practice and Research" in A. Morris & G. Maxwell, eds., *Restorative Justice for Juveniles: Conferencing, Mediation and Circles* (Oxford: Hart, 2001).

⁴⁹ Edna Erez, Leigh Roger & Michael O'Connell, "Victim Impact Statements in South Australia" in C. Summer *et al.*, eds., *International Victimology: Selected Papers the 8th International Symposium* (Canberra: Australian Institute of Criminology, 1996); see also Robert C. Davis & Barbara Smith, "Victim Impact Statements and Victim Satisfaction: An Unfulfilled Promise?" (1994) 22 *J. of Crim. Justice* 1.

⁵⁰ See *Criminal Code*, *supra* note 20, s. 717(2) and *Youth Criminal Justice Act*, S.C. 2002, c. 1, s. 10(3).

managed (particularly in the context of domestic violence or sexual assault).⁵¹ It is perhaps not surprising that mediation theory, developed largely in the context of civil dispute resolution, might have difficulty in addressing public interest concerns in its practical application. The main point for this discussion, though, is that the criminal justice has systematically turned to mediation as a response to crime rather than insisting that judges determine outcomes based on rights-based adjudication. The process is less complex than a trial or sentencing hearing, can be conducted by mediators who are not necessarily legally trained (such training may indeed be a handicap), can be very cost effective, and is generally seen to be highly satisfactory to victims and offenders alike.⁵²

For institutional reasons, the adoption of mediation in the context of Canadian labour relations has been largely a move toward a procedural synthesis described as mediation/arbitration and commonly called “med/arb.”⁵³ Arbitration is institutionally embedded in legislatively mandated provisions in virtually all collective agreements in the country.⁵⁴ However, as this mandatory system of arbitration showed signs of becoming overburdened, some adventuresome arbitrators offered to mediate disputes sent to them for arbitration where the parties would agree.⁵⁵ The process usually involves an arbitrator hearing opening statements from the union and employer, or soliciting basic information about the dispute less formally, and then asking whether the parties are amenable to his or her attempting to mediate the dispute, with an understanding that if mediation fails he or she will resume his or her role as arbitrator and adjudicate the matter. From a Canadian labour relations perspective, this approach was pioneered in Ontario, quickly spread to

⁵¹ T. Grillo, “The Mediation Alternative: Process Dangers for Women” (1991) 100 *Yale L.J.* 1545; and L.G. Lerman, “Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women” (1984) 7 *Harvard Women’s L.J.* 57.

⁵² See Umbreit, Coates & Vos, *supra* note 48.

⁵³ See George Adams, *Mediating Justice: Legal Dispute Negotiations* (Toronto: CCH Publishing, 2003); D. Elliott, “Med/Arb: Fraught with Danger or Ripe with Opportunity?” (1995) 34 *Alta. L. Rev.* 163.

⁵⁴ S. 42 of the *Nova Scotia Trade Union Act*, *supra* note 35, is typical: it provides an arbitration clause which shall be deemed to be part of any collective agreement where the parties have failed to provide an article for arbitration of their own accord.

⁵⁵ R. McLaren & J. Sanderson, *Innovative Dispute Resolution: The Alternative* (Scarborough: Carswell, 1994).

western Canada and has latterly gathered momentum in eastern Canada.⁵⁶ Some arbitrators are uncomfortable with the dual role and stick to adjudication as formally authorized by collective agreements—and one must recognize that mediation involves different skills than adjudication. Some arbitrators rationalize their reluctance to participate in med/arb on the grounds that if parties with the advice of competent counsel have explored settlement as an option, then precious time is likely to be lost in fruitless efforts to mediate before getting down to the real business of deciding the matter. But counsel and arbitrators who use med/arb regularly report high success rates and high levels of satisfaction from both employer and union clients. At least two reasons may account for this: firstly, skilful mediation may avoid the aggravation of hostility between parties that sometimes results from aggressive cross-examination and polarized argument; and secondly, mediation may reveal and address underlying causes for disputes which may remain hidden when concentrating on the admissible evidence in relation to a narrowly cast individual grievance. However, the process is not without its pitfalls. There is concern over perceptions that unfairness may arise where arbitrators may be thought tempted to decide matters in relation to facts asserted in mediation which would not have been deemed admissible in a straight arbitration proceeding. This concern may be heightened if the med/arb practitioner were to use the standard mediation device of caucusing separately with the parties to explore privately interests which may advance resolution of the dispute, but which one party might feel reluctant to express unguardedly, if at all, in the presence of the other party. The fear that such issues may give unnecessary grounds for judicial review has led some jurisdictions to amend labour legislation to explicitly authorize labour arbitrators to employ mediation, but to exclude that fact alone as a basis for judicial review if a party wishes to challenge a resulting arbitration award.⁵⁷

⁵⁶ See Elliott, *supra* note 53.

⁵⁷ See the British Columbia *Labour Relations Code*, R.S.B.C. 1996, c. 244 which states in s. 105:

(1) Despite any grievance or arbitration provision in a collective agreement or deemed to be included in a collective agreement under section 84 (3), the parties to the collective agreement may, at any time, agree to refer one or more grievances under the collective agreement to a single mediator-arbitrator for the purpose of resolving the grievances in an expeditious and informal manner.

(2) The parties must not refer a grievance to a mediator-arbitrator unless they have agreed on the nature of any issues in dispute.

The comparative observation of significance at this point is that unlike the use of mediation in the criminal context, where the roles of adjudicator and mediator generally remain separated, in the labour relations context they tend to be combined in a system where the arbitrator can switch hats in mid-proceeding if the parties have previously agreed to this. However, it is significant that both systems have gravitated toward the use of interest-based mediation as an alternative to rights-based adjudication where attempts to merely streamline the adjudicative mechanism have turned out to be insufficient. In both cases, however, there are grounds for concern as to how straight dyadic adjudication or mediation can respond to public and community interests or to those of multiple stakeholders.

IV. INFORMAL RECONCILIATION OF MULTIPLE INTERESTS: RESTORATIVE JUSTICE AND WORKPLACE CONFERENCING

The causal roots of many problems are multifaceted and many disputes have multiple parties interested in the outcome. To the extent that adjudication and mediation are forms of dispute resolution which assume that outcomes will address the interests of formally identified and directly affected parties dealing with autonomous subjects with individual

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- (3) The parties may jointly request the director to appoint a mediator-arbitrator if they are unable to agree on one, and the director may make the appointment.
 - (4) Subject to subsection (5), a mediator-arbitrator appointed by the director must begin proceedings within 28 days after being appointed.
 - (5) The director may direct a mediator-arbitrator to begin proceedings on such date as the parties jointly request.
 - (6) The mediator-arbitrator must endeavour to assist the parties to settle the grievance by mediation.
 - (7) If the parties are unable to settle the grievance by mediation, the mediator-arbitrator must endeavour to assist the parties to agree on the material facts in dispute and then must determine the grievance by arbitration.
 - (8) When determining the grievance by arbitration, the mediator-arbitrator may limit the nature and extent of evidence and submissions and may impose such conditions as he or she considers appropriate.
 - (9) The mediator-arbitrator must give a succinct decision within 21 days after completing proceedings on the grievance submitted to arbitration.
 - (10) Sections 89 to 102 apply in respect of a mediator-arbitrator and a settlement, determination or decision under this section.

rights and interests, these forms of dispute resolution may tend, both as a matter of principle and practice, to exclude concerns of those indirectly or collectively affected by the dispute or harm. Restorative justice, in a variety of contexts, appears capable of responding to these broader concerns.

Restorative justice is premised on the notion that when harm occurs or disputes arise they are inevitably located in a web of relationships which are disturbed by a controversial issue. Just resolution must be premised on restoring or establishing relationships based on values of equality, human dignity, mutual concern and respect.⁵⁸ Community conferencing is the technique which in practice best responds to the broader vision of justice as conceived in this manner. Community conferencing is the process of bringing together under a trained facilitator the key persons directly or indirectly affected by an occurrence of harm or dispute, as well as persons from the relevant community identified in pre-conference preparation as having resources or capacities which may be relevant to developing a restorative resolution or transformative outcome.⁵⁹ Thus, while mediation is clearly a restoratively oriented dispute resolution process, it is not as comprehensive from a restorative justice perspective as full conferencing which typically brings a wider range of interests and capacities to the table. Community conferencing based on principles of restorative justice has emerged as a mechanism of problem solving and dispute resolution in connection with both criminal justice and labour relations. There are interesting parallels and contrasts between each situation which bear analysis.

The form of restorative justice most widely associated with Canadian criminal procedure on the international scene is circle sentencing.⁶⁰ This adaptation of aboriginal healing circles, adopted first in western Canada for both young offenders and adults but now used elsewhere, is remarkable for a number of reasons. Firstly, it is a flexible method operating differently under the guidance of different practitioners: for example, Judge Barry Stuart presided over sentencing circles

⁵⁸ Jennifer J. Llewellyn & Robert Howse, *Restorative Justice: A Conceptual Framework* (Ottawa: Law Commission of Canada, 1998).

⁵⁹ H. Stran & J. Braithwaite, eds., *Restorative Justice: Philosophy to Practice* (Aldershot: Dartmouth Press, 2000).

⁶⁰ See Rupert Ross, *Returning to the Teachings: Exploring Aboriginal Justice* (London: Penguin Books, 1996); Mylène Jaccoud, "Restoring Justice in Native Communities in Canada" in Lode Walgrave, ed., *Restorative Justice for Juveniles: Potentialities, Risks and Problems for Research* (Leuven: Leuven University Press, 1997).

convened in court,⁶¹ while Judge Heino Lillies referred cases to elder panels to hold circles in the community and make sentencing recommendations back to the court.⁶² Secondly, the sentencing circle represents a fully restorative process which brings together offenders, victims, their respective families and/or supporters and diverse members of the community and the justice system who have varying perspectives, interests and resources to bring to the deliberations. Thirdly, this form of restorative conferencing links the informal insights of local culture to the formal, rule based-processes of sentencing to identify outcomes which can meet needs of offenders, victims, community members and the broader public. Sentencing circles have on occasion been used in conjunction with community healing circles to tackle serious and widespread problems of addiction and sexual abuse which have emerged from criminal prosecutions involving multiple victims and perpetrators and undermining whole communities. The lessons of such culturally specific forms of restorative justice, including not only Canadian sentencing circles but analogous processes in the Maori communities of New Zealand, have been theorized through global research and experimentation and have been honed and reinvented in criminal and youth restorative justice programs across Canada and elsewhere.⁶³

One of the most comprehensive youth restorative justice programs of any international jurisdiction is to be found in Nova Scotia.⁶⁴ Initially authorized as a pilot program in 1997, the community based Nova Scotia Restorative Justice Program (NSRJ) has become a core aspect of province-wide youth justice, handling over 1,500 cases a year with a significant annual budget. Referrals to restorative conferencing facilitated by nine community agencies are initiated at four entry points in the criminal justice system: police, prosecutors, judges and correctional officials. Thus NSRJ operates a diversion program in the hands of police and Crowns, and as an aspect of sentencing and correctional policy at post-conviction levels. The ambitious goals of this program include not only reducing recidivism and increasing victim satisfaction, but also

⁶¹ B. Stuart, "Circle Sentencing in Canada: A Partnership of the Community and the Criminal Justice System" (1996) 20 Int'l J. Comp. & Applied Crim. J. 291.

⁶² H. Lillies, "Circle Sentencing: Part of the Restorative Justice Continuum" in Morris & Maxwell, *supra* note 48.

⁶³ An excellent research sampler is Morris & Maxwell, *supra* note 48; see also D. Van Ness & K. Heetdirks Strong, *Restoring Justice* (Cincinnati: Anderson, 2002).

⁶⁴ B. Archibald & J. Llewellyn "The Challenges of Institutionalizing Comprehensive Restorative Justice: Theory and Practice in Nova Scotia" (2006) 29 Dal. L.J. 297.

strengthening communities and increasing public confidence in the justice system. While measurable progress has been made in relation to the first two goals, attaining and measuring success in relation to the latter is more difficult. However, restorative conferencing through this program does enable the coordination of community resources around the occurrence of criminal harms which can not only reintegrate offenders into communities and compensate victims but also identify and attend to the needs of families affected by marshalling community responses to the underlying causes of anti-social behaviour. Restorative conferencing thus holds out the prospect for breaking down local silos among education, health, social service and justice programs so as to provide coordinated responses to individuals, families and communities in crisis. The capacity of community agencies facilitating restorative processes to accomplish such broad goals has been enhanced by the elaboration of model practice standards in a cooperative and deliberative process involving the agencies themselves and representatives of the provincial department of justice. A fundamental characteristic of restorative conferencing in the criminal justice context is thus a capacity to move beyond the individual dispute resolution typical of adversarial criminal trials or even victim offender mediation, to grapple with underlying social issues which affect multiple parties.⁶⁵

Restorative conferencing has been slow to emerge in the Canadian workplace. The *Wagner Act* model posits, and in some measure encourages, an antagonistic stance as between employers and unions which is antithetical to relational restorative justice concepts.⁶⁶ Arbitration, as the historically and legally preferred method of resolving disputes in the unionized workplace, can exacerbate tensions in its adversarial form. The standard steps in the grievance process under most collective agreements are: 1. have the employee discuss the matter with the supervisor; 2. have a union representative and the aggrieved employee meet with supervisors and employer representatives; and 3. appoint an arbitrator if the matter cannot be settled at steps 1 and 2. This process, while meant to be informal, is explicitly oppositional in orientation.

⁶⁵ See G. Bazemore & M. Schiff, eds., *Restorative Community Justice: Repairing Harm and Transforming Communities* (Cincinnati: Anderson, 2001).

⁶⁶ Under virtually all Canadian labour relations statutes, managers and those dealing with confidential information on labour-management issues must be excluded from bargaining units to be represented by unions. Similarly, it is an unfair labour practice for management to be involved in the establishment of a labour union in its firm, since this would undermine the independence of the union and potentially compromise its capacity to stand up to management.

However, workplace conferencing based on restorative principles has been effective in changing workplace environments poisoned by cultures of hostility or sexual harassment and by dealing with more prosaic problems which involve issues which embroil managers and groups of employees in dysfunctional work patterns.⁶⁷ Conferencing techniques allow experienced facilitators to uncover hidden assumptions underlying problematic patterns of workplace behaviour and encourage the development of solutions through group deliberation. Some might argue that this approach is more consistent with team production methods and flat management structures that are more common in non-unionized rather than hierarchically organized unionized workplaces. But there are some high profile counter-examples in Canadian unionized facilities, and highly successful Japanese approaches to personnel management are arguably rooted in what might be thought to be restorative approaches to problem solving.⁶⁸ The point is that workplace conferencing as a dispute resolution technique assumes that problems typically arise in relational settings affecting multiple individuals who have inter-locking issues. From this perspective, resolving workplace disputes can often be most effectively achieved by moving beyond the scope that adversarial, individual grievance arbitration or even union-employer mediation can provide. In some considerable measure, workplace conferencing based on restorative principles involves a different mindset from dispute resolution through adjudication or mediation.⁶⁹ However, such conferencing alternatives seem to be emerging with greater frequency, although there is no cookie cutter format and such processes have to be adapted to the unique circumstances of individual workplaces.

⁶⁷ M. Thorsborne, "Beyond Punishment – Workplace Conferencing: An Effective Organizational Response to Transforming Workplace Conflict" (Paper presented to the Beyond Bullying Association's Responding to Professional Abuse Conference, Brisbane, July 1999, and again to the Anzela Conference Adelaide, 2000, online: Margaret Thorsborne & Associates <<http://www.thorsborne.com.au/papers.htm>>).

⁶⁸ B. Donais, *Workplaces that Work: A Guide to Conflict Management in Union and Non-Union Work Environments* (Aurora, Ont.: Canada Law Book, 2006).

⁶⁹ J. MacDonald & D. Moore, "Community Conferencing as a Special Case of Conflict Transformation" in H. Strang & J. Braithwaite, eds., *Restorative Justice and Civil Society* (Cambridge: Cambridge University Press, 2001).

V. REGULATING DISPUTE RESOLUTION FOR HUMAN CAPITAL INVESTMENT AND SOCIAL CAPACITY BUILDING: INFORMAL AND FLEXIBLE ALTERNATIVES WITH A FORMAL ADJUDICATIVE BACKSTOP

Constitutional democracy rightly promotes consultation and participation in decision making. This is true for both “norm elaboration,” that is, making the rules, and procedures for “norm application,” that is, dispute resolution. The opportunity for citizens to participate in deliberative legal institutions regulating our conduct reinforces equality, human dignity, mutual concern and mutual respect—values which have been recognized by the Supreme Court of Canada as fundamental to our constitution.⁷⁰ But there is increasing concern about the need to recognize the utilitarian benefits of participatory processes of dispute resolution as an aspect of human capital investment and social capacity building. This need exists both in relation to criminal justice processes and dispute resolution in the workplace.⁷¹ Canadians live in a highly competitive global economic environment and we have for fifty years or more enjoyed the standard of living derived from a productive, high wage economy. In a world where capital and technology are extremely mobile, our greatest competitive resource must come from harnessing the creative potential of our people.⁷² Human capital investment is the label that some economists use to describe this, and to be successful it must occur in the context of wider social capacity building.⁷³ Individuals cannot deploy their talents and abilities unless the social and economic circumstances in which they live enhance these opportunities. Dispute resolution systems are part of this picture: they can either contribute to or inhibit human capital investment and social capacity building. This is increasingly important in the current demographic circumstances where baby-boomers are aging and the active workforce is shrinking as a percentage of the total Canadian population. We are entering a period of acute labour shortage in structural terms, even if this phenomenon can be masked in the short term by recession. We need to be concerned about how we regulate dispute resolution processes not only as matters of human rights, human dignity and due process but

⁷⁰ *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145.

⁷¹ See Archibald, “Let My People Go,” *supra* note 2.

⁷² See T. J. Courchene, “Human Capital in an Information Era” (2002) 28 Can. Pub. Pol’y 73.

⁷³ T. J. Courchene, *A State of Minds: Toward a Human Capital Future for Canadians* (Montreal: Institute for Research on Public Policy, 2002).

also as matters of effective human capital investment and social capacity building.

There is an important sense in which the criminal justice system is a massive mechanism encouraging human capital de-investment and social capacity limitation. Social science research is generally in accord that general deterrence as sentencing strategy simply does not work.⁷⁴ Incarceration without rehabilitative programs increases rather than decreases recidivism. Community sentences without community support and adequate social programs do not effectively reduce offending. Adversarial criminal trials, to the extent that they are alienating experiences for offenders, victims and their families alike, tend to reinforce these negative aspects of the criminal justice system. Victim-offender mediation is a restoratively oriented step in the right direction since it creates a locus for the encouragement of pro-social attitudes as between victims and offenders, provides compensation for victims, and by comparison to incarceration may enable rather than disable social re-integration for the offender. Full restorative conferencing can identify and address the causes of anti-social behaviour and enlist diverse communities to pool resources for capacity building while dealing with the needs of both offenders and victims. Thus mediation and restorative conferencing are better than adversarial criminal trials at human capital investment and social capacity building and in ways that can be sensitive to the unique character of different communities. But one cannot be naïve about all of this. The adversarial criminal trial remains an essential bulwark against injustice in a constitutional democracy—though not the sole or necessarily the best means for doing justice. Some offenders simply need to be incapacitated or removed from society and are not amenable to mediation or restorative justice methods. Some offenders may, for their own reasons, reject mediation or restorative conference and demand their day in court or the right to serve out their sentence free from what they may regard as officious, inter-meddling do-gooders. A formal criminal trial, and particularly a trial by jury, with a relatively standard sentence may ensure that justice is not only done but seen to be done in such circumstances. However, we ought not to allow our traditional allegiance to adversarial trials and the principle of justice they may embody in these circumstances to blind us to their cost in terms of human capital de-investment, and social capacity limitation in many other

⁷⁴ Anthony N. Doob & Cheryl Marie Webster, "Sentence severity and crime: Accepting the null hypothesis" in Michael Tonry, ed., *Crime and Justice: A Review of Research*, vol. 30 (Chicago: University of Chicago Press, 2003) at 143.

circumstances. Luckily the *Youth Criminal Justice Act* and the *Criminal Code* have given us the tools to integrate and coordinate the use of multiple criminal justice models to achieve just results which can contribute creatively to individual and community development.⁷⁵ As those involved in the administration of justice, we all have a professional responsibility to see that productive choices are made among these varying alternatives to ensure that criminal justice is done with an eye to the big picture.

Parallel comments to the above are apposite to dispute resolution in the context of the unionized workplace. Arbitration as a form of adjudicative dispute resolution has often been the hand-maiden of what is known in labour relations circles as “progressive discipline.” Using their authority under trade union legislation to substitute lesser penalties for those which may have been imposed by employers for workplace infractions, particularly in unjust dismissal cases, arbitrators helped to develop notions of proportionality in workplace discipline in an *ex post facto* manner. But while progressive discipline is associated with maintaining employment and improving the performance of employees, the operative intellectual framework in the adversarial arbitration context is an almost Foucaultian “discipline and punish.”⁷⁶ Meanwhile, enlightened human resource managers are now trained to see employees as human capital for the firm in which there may have been considerable investment in terms of on and off the job training and education.⁷⁷ From a human capital investment perspective as well as from that of maintaining the productive capacity of the employer’s operation as a whole, mediation and workplace conferencing often offer superior results to arbitration in terms of dispute resolution. It is therefore of some considerable interest that the regulatory framework for dispute resolution in the unionized workplace seems to have lagged behind the development of alternative measures in the criminal justice context. At first blush, this seems counter intuitive. There is a strong tradition of analyzing collective bargaining in North America as advancing economic citizenship or industrial

⁷⁵ See B. Archibald, “Coordinating Canada’s Restorative and Inclusionary Models of Justice: The Legal Profession and the Exercise of Discretion under a Reflexive Rule of Law” (2005) 9 Can. Crim. L. Rev. 215.

⁷⁶ Michel Foucault, *Discipline and Punish: The Birth of the Prison* (New York: Random House, 1995).

⁷⁷ See D. Taras, “What are the Implications of the New Employment Paradigm for a Human Capital Strategy?” (2002) 28 Can Pub. Pol’y 105.

democracy in the workplace.⁷⁸ Indeed, the union through its collective voice can improve employee influence over terms and conditions of employment and introduce grievance procedures that inhibit arbitrary actions by employers in relation to heretofore vulnerable non-unionized employees. But it may be the structured antagonisms of the *Wagner Act* model (the bright line between managers and employers, the rules prohibiting employer influence in the establishment of trade unions, etc.) have inhibited alternative dispute resolution in the workplace.⁷⁹ Though the legislative requirement that all collective agreements contain arbitration as the mechanism for dispute resolution (to prevent illegal work stoppages during the term of the agreement) has now been amended to encourage mediation by arbitrators in some jurisdictions, there is no legislative encouragement to workplace conferencing. While there are may be technical change committees and other union-management consultation mechanisms in some collective agreements, there seems to be no widespread move to insert workplace conferencing processes in collective agreements. This may result from a lack of familiarity with the idea, or from a culture which is uncomfortable about letting go of some of the adversarial attitudes engrained in the *Wagner Act* model and the trade union movement. But here again, one cannot be naïve. While mediation and workplace conferencing may be helpful in many circumstances, there will be others where both parties to a collective agreement, and indeed a grievor too, simply need an arbitrator to decide a matter where reasonable people, or sometimes unreasonable ones, simply cannot agree on a mediated or conferenced solution. As with criminal law, so to in the labour dispute resolution process, adjudication is a necessary backstop or default paradigm. However, a loosening up of adversarial culture and an openness to the benefits of mediation and workplace conference may hold considerable attractions from the perspectives of human capital investment and social capacity building in the workplace—context where one might have hoped that these concerns can predominate to the advantage of us all.⁸⁰ In the end, while we must efficiently regulate

⁷⁸ R. Adams, *Industrial Relations under Liberal Democracy: North America in Comparative Perspective* (Columbia: University of South Carolina Press, 1995).

⁷⁹ See generally A. Eaton & J. Keefe, eds., *Employment Dispute Resolution and Worker Rights in the Changing Workplace* (Champaign-Urbana: Industrial Relations Research Association, 1999).

⁸⁰ J. Braithwaite, “Emancipation and Hope” in V. Braithwaite, ed., *Hope, Power and Governance* (2004) 592 *Annals of the American Academy of Political and Social Science* (Special Issue) 79–98.

progress from adjudication to mediation to conferencing in the right cases, it is not a one way trajectory. Where informal processes of dispute resolution are inappropriate, we must, as a last resort, end back with formal adjudication and the rule of law.