The British Columbia Ministry of Attorney General's Alternative Dispute Resolution Policy: In Search of Court Reform or Social Transformation?

by

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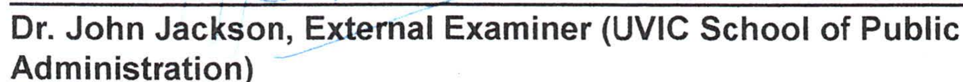

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Abstract

In May, 1995 the B.C. Ministry of Attorney General released an alternative dispute resolution (ADR) policy statement. ADR refers to any non-violent dispute resolution process that does not involve going to court. Well-known ADR processes include mediation, arbitration, and negotiation.

In releasing an ADR policy statement the government placed itself in the centre of a heated debate as those active in the ADR field are deeply divided over several fundamental questions pertaining to its use. This stems primarily from the fact that there are two ADR models: (1) the "court reform model" and (2) the "social transformation" model. (98) The government has not explicitly stated which model its ADR policy is based on.

This thesis is an exploration of the two models, the inherent tension between them, and an analysis of which model is driving the provincial government's ADR agenda.

The methods of analysis are a content analysis of the academic literature on ADR and a series of personal interviews with a representative panel of ADR stakeholders/experts in B.C.

I conclude that the government's ADR policy is primarily based on the court reform ADR model. The implications of a policy based on this model are two-fold. First, due to the inevitable formalization of court reform ADR processes, this policy is not a long-term solution. The ADR system will, most likely, soon be

overcome by regulation, bureaucratization and professionalization, similar to the courts. Second, it is problematic in an immediate sense in that it creates dispute resolution programs that compromise or ignore due process without offering comparable protections to disputants.

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Table of Contents

Abstract......ii

Table of Contents......iv

Acknowledgments......vi

Chapter 1: Introduction......1
 Summary......9

Chapter 2: ADR Processes......11
 Summary......23

Chapter 3: ADR, An Overview......24
 A) Historical Roots......24
  Tribal Groups......24
  Indigenous Groups......25
  Sectarian Religious Orders......26
  Communitarian Groups......28
  Ethnic Enclaves......28
 B) 20th Century ADR in the United States......28
  Industrial Revolution/Labour Relations......28
  The New American ADR Movement......31
 C) 20th Century ADR in Canada......36
  Industrial Revolution/LaborRelations......36
  The New Canadian ADR Movement......40
  Ontario......42
  Saskatchewan......44
  Canadian Bar Association......45
  The Federal Government......47
 D) ADR In British Columbia......48
 Summary......54

Chapter 4: Ministry of Attorney General's ADR Programs and Initiatives
......55
 A) The Ministry of Attorney General's Twelve ADR Objectives......56
 Summary......73

Chapter 5: Two Theories of Empowerment......75

A) The Court Reform Model....76
Professional Conflict Resolvers....79
B) The Transformative Model....82
Critique of the Status Quo--Criminal Matters....83
Framework for Change--Criminal Matters....84
Critique of the Status Quo--Civil Matters....85
Framework for Change--Civil Matters....86
San Francisco Community Boards Program....91
Summary....93

Chapter 6: An Analysis of B.C.'s ADR Policy....95
A) Reconceptualizing the Two Models....96
Definitions of Court Reform Model....96
Definitions of Transformative Model....100
B) Content Analysis....103
C) Insights and Opinions of ADR Stakeholders....105
Brian Gardiner, Canadian Dispute Resolution Corporation....106
David Gustafson, Fraser Region Community Justice Initiatives Association....108
Jerry McHale, Provincial Government Dispute Resolution Office....110
Chief Justice Bryan Williams, Q.C., B.C. Supreme Court....112
Summary....114

Chapter 7: Implications of the Findings....115
A) Court Reform Programs....115
Compromised Legal Rights....119
Privacy vs. the Common Good....122
B) Transformative Programs....123
C) Hybrid Programs....127
Summary....128

Chapter 8: Conclusion and Reccomendtions....130
Reccomendations....135
Works Cited....141

Chapter 1: Introduction

The British Columbia Ministry of Attorney General released its Alternative Dispute Resolution (ADR) policy in May 1995. ADR is a broad term that can best be described by what it is not than what it is. The "alternative" in ADR refers to non-violent dispute resolution mechanisms that do not involve going to court and entering into the adversarial judicial system. Popular forums of ADR include negotiation, mediation, arbitration, and facilitation, yet there are numerous other ADR processes being currently employed, and undoubtedly several others will soon gain prominence.

The use of ADR processes has grown at a rapid pace in Canada since the early-to-mid 1980's and many individuals involved in the justice system believe that ADR will be one of the significant growth industries of the next decade (Mackie 2). Governments throughout North America and Western Europe, seemingly with each new day, are developing, adopting, and implementing official ADR policies. Meanwhile, private ADR practices--most offering mediation services--are opening for business at an equal rate. Many lawyers, judges, therapists, social workers, planners, and community activists are now taking courses on how to practice ADR as they see this as an interesting and potentially lucrative opportunity to diversify from their current career paths.

The ADR field is not without controversy, however, and in releasing an ADR policy the Ministry of Attorney General has placed itself squarely in the middle of a heated debate. While it is agreed that ADR is a growth industry of the future, those active in the field are deeply divided over several fundamental philosophical questions pertaining to its use. This stems mainly from the fact that there are two diverging, some believe mutually exclusive, theoretical models of

how ADR mechanisms should be employed. The models are: (1) the "court reform" model, and (2) the "transformative" model.

Advocates of the court reform model believe that ADR is most useful in eliminating backlogged court dockets while at the same time making the justice system more affordable for individuals who enter into it, and more affordable for the governments who administer it. These proponents also argue that access--or rather, the lack of it-- is the single biggest problem facing the justice system, and that the implementation of ADR processes will make significant improvements in this regard. Although they envision ADR as a tool of legal reform, these proponents do not wish to alter the philosophies, values, and structures that underlie and support the traditional justice system; that is, they believe that ADR should be a government-sanctioned and regulated dispute resolution option *within* the formal legal system. As such they tend to favor court annexed, government controlled, professionally staffed ADR programs.

It is this model's support for certification requirements (either through licensing or accreditation) for those who wish to be ADR practitioners that perhaps best defines it. Governments believe that certification requirements are necessary in order to address potential liability issues, while many court reform advocates see them as an important step in the legitimization of ADR, and an important step in ensuring that ADR practitioners become members of a respected, well-paid, and powerful professional work-place sector.

Conversely, advocates of the transformative model maintain that ADR is in fact a socio-political movement. These ADR proponents can be broadly divided into two sub-camps: the moderates and radicals. The moderates believe that the importance of ADR is in its ability to increase a community's capacity to provide more appropriate and better received dispute resolution mechanisms (than the court system) while empowering individuals to resolve disputes. These

advocates hold the view that disputing individuals should not be coerced--in any way, by any agent, for any reason--when resolving their dispute because disputes resolved through coercion often do not address the underlying problems experienced by the disputants; as a result, coerced resolutions often do not bring absolute closure to the disputed issue. One needs only to consider a court-ordered maintenance order between a divorced couple, and the failure often of one or both parties to comply with its terms, in order to gain understanding of this argument.

In addition, these proponents believe that the key to ADR is its reliance on community-based, non-professional service providers who operate on a low-cost or no-cost basis. They argue that the justice system, in its current embodiment, is over reliant on the professional services of lawyers, judges, social workers, and government bureaucrats. This over reliance, in turn, has negatively affected the emotional, mental, and spiritual health of individuals seeking justice and has fostered a state of learned helplessness among all community members. Ultimately, the transformative argument is that the professionalization of justice has rendered community members incapable of solving their problems.

The radical social transformationalists build on the moderates' themes of empowerment and community regeneration and argue that the use of ADR can play a key role in the restructuring of political power, economic relationships, and social conditions (such as poverty, bad housing, racism, illiteracy, etc.). They believe that ADR, if readily accepted and practiced, can transform existing class, racist, and sexist social and political structures with the implied and stated end result being a more harmonious, cohesive, and just society.

When it released its nine-page ADR policy in 1995, replete with goals, principles, and objectives, the Ministry of Attorney General stated that it "is

committed to a justice and conflict resolution environment which includes a wide range of dispute resolution options" (1). However, the Ministry of Attorney General did not explicitly state whether these options were to be used to promote ADR measures based on the court reform model or ADR measures aimed at achieving a social transformation.

The Ministry of Attorney General did list twelve specific policy objectives it intends to meet, the majority of which appear, at first glance, to clearly adhere to the principles espoused in the court reform model. For example, the Ministry's Fourth Objective is "to establish additional disclosure courts, where conditions warrant" and the Eighth Objective is, "to consult with the Judiciary and the Bar to utilize the existing Rules of Court and to effect changes to the Rules of Court which may incorporate ADR options". Other objectives, including training Ministry lawyers on the advantages of ADR, incorporating ADR options into government contracts, and establishing a government office to coordinate and facilitate ADR growth in the province, also appear to be wedded to the court reform model. In contrast, only two of the twelve objectives appear to be explicitly aligned with the transformative model. The Ministry's fifth objective is to, "Support the establishment of victim-offender reconciliation programs throughout the Province, where conditions warrant" and the tenth objective is to, "recognize and support community-based dispute resolution practices by aboriginal people".

The programs and initiatives that flow from the court reform objectives will, in all likelihood, initially achieve some of the goals of the court reform ADR model; that is, there is a good chance that court congestion will be eased, access improved, and court costs, while not decreased, will at least be better contained. Already there is evidence in B.C. that two large-scale court reform ADR programs, the Residential Tenancy Branch's arbitration program and the

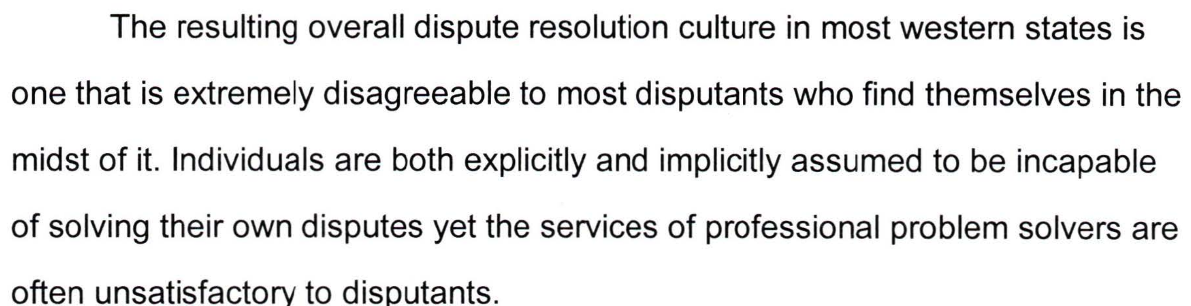
Small Claims Court Program, both implemented by the provincial government prior to the release of the official policy, have diverted thousands of disputes from the court system, thus saving the government hundreds of thousands of dollars.

Yet, despite the high number of disputants diverted from the court system because of these programs, the Ministry of Attorney General's ADR policy displays only a partial understanding of ADR and its potential to radically reform the existing justice system. As a result, while the Ministry of Attorney General's policy promotes the use of alternative dispute resolution *mechanisms*, it is not capitalizing on the entire ADR movement, as represented by *both* ADR models, to reform or change the ineffective dispute resolution *culture* that exists in this province. Thus, it is imposing a short term solution onto a long-term problem. Taken one step further, this criticism of the Ministry's ADR policy raises an important and fundamental concern: How much or what type of an alternative do the twelve objectives listed in the Ministry's policy actually represent to the justice system currently in operation in B.C.?

The distinction between dispute resolution mechanisms and the dispute resolution culture is most significant. Dispute resolution mechanisms refers to specific, non-violent procedures or forums that are used to settle disputes; litigation, mediation, arbitration and various other ADR forums all fit into this category. The forums, however, are only one component of the overall dispute resolution culture. The culture is a more holistic concept and is, essentially, a gauge of the way in which disputes and dispute resolution are framed and approached by the society being analyzed. It is fostered by such things as government policy, societal structures, historical and traditional practices, media reporting, and an extensive host of other factors. In essence, the dispute

resolution culture is an overarching paradigm that governs attitudes and actions pertaining to how disputes are framed and resolved.

British Columbia, like the rest of Canada and most western countries, utilizes a justice system *which places the state in the preeminent role*: the state is both the coercive agent used to bring disputants, or victims and offenders, together, and the state is the final arbitrator in resolving the dispute. While there are important reasons for this, namely the attempt to bring civility and decorum to otherwise intensely personal disputes, the trial-in-court system has in recent years been severely and duly criticized. In short, this is because the proceedings, which are adversarial, impersonal, and usually dressed in incomprehensible legal language, often leave those who enter into them feeling alienated, helpless, and angry. In civil cases, disputants must wade through an expensive, time-consuming, bureaucratic maze before having a legal (but often impractical) settlement imposed on them. In criminal proceedings, these same negative factors exist but perhaps what is more troubling is that the victim is often rendered as a mere witness to his or her own ordeal. Moreover, trials are presided over by professional advocates--lawyers--who may or may not be attuned to their clients' needs and by professional decision-makers--judges--who in civil cases, may not be well informed about the particulars and nuances of the dispute at hand and who, in criminal cases, may not be sufficiently sympathetic to the plight of the victim.



The resulting overall dispute resolution culture in most western states is one that is extremely disagreeable to most disputants who find themselves in the midst of it. Individuals are both explicitly and implicitly assumed to be incapable of solving their own disputes yet the services of professional problem solvers are often unsatisfactory to disputants.

The ADR policy being implemented by the B.C. Ministry of Attorney General advocates new, potentially more agreeable mechanisms for solving disputes--mediation instead of litigation in family disputes, for example--but does not appear to address the dispute resolution culture in which these mechanisms operate. This is evidenced by the Ministry of Attorney General's minimal support of ADR programs based on the transformative model. As such, it is unlikely to be a long-term solution to B.C.'s ineffective court system.

Furthermore, an ADR policy predicated on only of the two competing ADR models may have serious negative ramifications for British Columbians. In order to maximize efficiency and cost effectiveness ADR mechanisms often compromise or suspend some fundamental and time-honoured legal rights: For example, disputants usually are not represented by counsel, the rules of evidence are relaxed (at arbitration hearings it is sometimes permissible to submit hearsay and similar fact evidence), and the right to a juried trial is waved.

In programs that adhere to the transformative model the suspension of these rights may seem reasonable. This is because, programs based on the transformative model are always entered into voluntarily and disputants are allowed to retain control over such important factors as the choice of ADR practitioner, the place, and time of the hearing. In addition, the costs of any services provided are nominal (or free) and the hearing itself is structured in such a way that the disputants' respective needs take priority over all other mitigating factors, such as legal interpretations and bureaucratic regulations.

However, programs based on the court reform model operate under differing guidelines: participation is often compulsory, fees may be charged, the ADR practitioner may be appointed, and the place and time of the hearing may be assigned. Thus, many of the inflexible and formalistic bureaucratic and legal inconveniences associated with the court system may still exist. In the end, court

reform ADR programs may offer disputants the worst of both systems: compromised legal rights yet a high degree of state regulation and control.

In order to support the assertion that the Ministry's ADR policy is primarily based on the court reform model, two measuring techniques will be employed. First, after a thorough assessment of the academic literature on ADR, one can extract the key characteristics of each model and then conduct an analysis of the Ministry's twelve ADR objectives, and the programs and initiatives (or intended programs and initiatives) that flow from them, in relation to these characteristics.

Second, various British Columbian ADR experts/stakeholders will be interviewed and asked them for their assessment of the Ministry's policy and of specific Ministry programs and initiatives. For this paper, the panel will include a representative from the following: the court system; a transformative-based ADR program; a for-profit ADR company; and the provincial government. Once again if there is general agreement among these experts/stakeholders of the nature of the policy or specific programs, some determinative conclusions can be made.

Once these measurements have been taken and the results tabulated, the implications of the results will be discussed. If it is indeed determined that the Ministry's ADR policy has been introduced as a tool of court reform, it is then necessary to analyze how this will effect the use of ADR in this province and how it will effect the overall justice system in B.C. More specifically, it is important to ask: Will an ADR policy based solely on the court reform model substantially improve the legal culture of this province or may it in fact have detrimental effects?

In order to articulate and exam these arguments, this thesis is divided into six additional chapters: Chapter Two lists and defines the sixteen most common

ADR mechanisms in use; Chapter Three is an overview of ADR from its roots in tribal cultures and sectarian communities to its widespread use in the twentieth century, first in labour relations and then, starting in the 1970s, in all forms of disputes; Chapter Four documents the Ministry of Attorney General's ADR policy objectives and includes a detailed list of the ADR programs and initiatives in B.C. that fall under these objectives; Chapter Five is an in-depth discussion of the two ADR models, their respective definitions of empowerment, and the methods that they advocate to achieve their goals; Chapter Six is an analysis of the Ministry of Attorney General's ADR policy using a content analysis of the ADR literature and using the insights gained from interviewing ADR experts and stakeholders in B.C.; Chapter Seven focuses on the implications of the findings in Chapter Six, and how these findings may affect the British Columbians and the overall ADR movement in B.C.; and, Chapter Eight, the conclusion, summarizes the preceding chapters and offers some speculation on why the Ministry of Attorney General has advanced a court reform ADR agenda.

Summary

Through a careful analysis of the Ministry's ADR policy and its specific programs and initiatives, the reader will be left with a better understanding of alternative dispute resolution, the two theoretical models that drive it, and the Ministry of Attorney General's policy which promotes its use.

More specifically, though, this thesis will address a problematic piece of public policy in B.C.: The Ministry of Attorney General's adoption of an ADR policy that is predicated almost entirely on the court reform ADR model. As such, the Ministry has, for the most part, chosen to ignore the transformative ADR model. As a result, it has not taken steps to substantially improve or alter the

ineffective dispute resolution culture of this province. Thus, the policy's ability to meet its intended goals--increasing access to justice--over the long-term will, most likely, be marginal at best. Moreover, these reforms may have immediate serious costs as they may seriously diminish the legal rights of disputants in British Columbia while not offering them comparable benefits in return. In the end, one is left asking: What type of alternative does this ADR policy represent for British Columbians?

Chapter 2: ADR Processes

Before entering further into the critical debate surrounding ADR and the Ministry's ADR policy, it useful to list and detail the ADR mechanisms discussed in this paper.

The number of ADR processes available is literally infinite due the fact that ADR, by definition, can be any non-violent method of resolving a dispute that does not involve going to court. As one academic writes, ADR is essentially an "evolving toolbox of techniques" (Adler "Is ADR..."1987 59). Currently, there are approximately sixteen recognized or legitimate ADR processes that are used, five of which--negotiation, mediation, arbitration, facilitation, and conciliation--have entered into the accepted vernacular of most people.

Conceptually, ADR processes can be placed on a continuum with one end containing forums that are widely accepted and frequently used, such as negotiation, mediation, and arbitration, while the other end would include more controversial and less used procedures such as circle sentencing and victim-offender reconciliation programs. Occupying various points in the middle would be settlement conferences, rent-a-judge programs, mediation-arbitration, facilitation, partnering, conciliation, fact-finding processes, early neutral evaluations (ENE's), special referees, mini-trials, summary jury trials, and diversion processes.

All ADR processes, with the exception of negotiation, involve an independent neutral or intervener--the commonly used terms for ADR practitioners--but the capacity in which the practitioner acts varies significantly

from one process to another. ADR forums, therefore, can also be categorized by examining the neutral's level of involvement. Mediation, conciliation, and victim-offender reconciliation programs rely heavily on the neutral's input yet negotiation does not utilize a neutral at all.

Finally, ADR processes can be categorized into those used exclusively or primarily for criminal proceedings and those used for civil proceedings.

Negotiation is the most common form of dispute resolution and it occurs in a vast array of activities. Negotiation is any form of communication, direct or indirect, where parties who have at least some opposing interests discuss, "the form of any joint action which they might take to manage and ultimately resolve the differences between them" (Adams & Bussin 4). In this forum, third parties are not involved and the disputing parties retain complete control over the process and its outcome. As a result, the success or failure of negotiations starts and ends with the parties themselves (Alberta Arbitration & Mediation Society C7). Negotiation is the least formal ADR process and it is always voluntary. It is most effective when the focus remains on "interests and not positions and the negotiations centre on problem-solving by keeping the discussions focused on interests, options, and criteria" (Flatters 42). During negotiations, discussions may relate to evidence, agreement, proof and interests (Flatters 42).

Mediation is perhaps the second most frequently used ADR forum. It is "preferred by parties who wish to use a process in which they receive the assistance of a skilled neutral to overcome barriers to settlement" (Mead & Newcomer 25). Because mediation is non-adversarial and seeks a solution that satisfies all parties involved--so-called "win-win" outcomes--it is often preferred by disputing parties who are interested in maintaining an ongoing relationship. Mediation is also a popular dispute resolution mechanism because the parties

are empowered to control the outcome, thus making compliance with the result more likely than in an imposed solution (Law & Leading Attorneys 2).

Mediation sessions can be held in any location that is agreeable to the disputing parties. The tone of the mediation can range from informal to highly controlled. In a typical mediation, the mediator meets privately with each side and then brings the disputing parties together for a joint session. During the course of the mediation, it may be necessary for the mediator to meet privately with each party numerous times.

In this process the neutral does not have any decision-making power; instead, he or she "informally assists disputing parties in voluntarily reaching their own mutually acceptable agreement" (Ministry of Attorney General Directory 51). This is done by engaging in fact-finding activities; structuring the negotiations; articulating the parties interests; identifying the issues; translating comments and proposals; maintaining the channels of communication; acting as a "reality-check" on the proposed solutions the parties advance; and, preserving the overall integrity of the procedure. A mediator may also be called upon to "identify additional resources for the parties that could assist in resolving their concerns" (Stulberg 988).

Settlement conferences are a court-annexed process that often includes mediation. Settlement conferences are defined as "an in-camera hearing without witnesses, where all possibilities of settlement of the issues outstanding are explored" (Evans 5). This process can be held at any time before a regular trial and involves a judge, in the role of the neutral, meeting with the disputing parties and their counsel. While some judges use settlement conferences to manage the trial or to express an initial view as to the probable outcome of the trial, many use it to actually facilitate or mediate a settlement between the parties (Evans 5; Mead & Newcomer 26).

Arbitration is another common ADR forum. It is best suited to cases that involve factual conflicts that can be resolved by experts on a particular subject matter (Law & Leading Attorneys 3). In conventional arbitration forums the disputing parties present their cases to the arbitrator(s) and the neutral(s) then renders a decision (sometimes termed "the award") based on the merits of the submissions. Generally, "the rules of evidence do not apply, making the process less formal, less complex, less expensive and faster than court proceedings" (Mead & Newcomer 25). Often, the decision rendered is a compromise between the two claims.

Final-offer arbitration is a type of arbitration designed to avoid the "destructive tendencies inherent in conventional arbitration" (Frederick et al. 31). That is, in conventional arbitration there is a tendency for each side to exaggerate their claims in order to benefit more from a compromise decision. Under final-offer arbitration, "the neutral judge is presented with the final offer of each of the disputants and then chooses one of the offers" (Frederick et al. 31). Theoretically, this approach dissuades each side from exaggerating their claim.

Although conventional arbitration is like litigation in that it is adversarial and final-offer arbitration is adversarial and resolved through a "win-loss" decision, arbitration is favored over litigation because of its efficiency in resolving disputes, its relatively low costs, its use of an expert in the neutral position, and its ability to hold the hearings in private away from the scrutiny of both the media, and, in the case of business disputes, interested competitors (unless a judicial review is ordered). Arbitration is also favored because settlements are not limited by specific legal remedies; the arbitrator(s) has more flexibility in formulating his or her ruling.

Rent-a-Judge programs, a variation on arbitration hearings that originated in California, have recently become popular in the United States.

These programs were first used in 1976 when two lawyers, needing a complex case settled quickly, discovered an 1872 statute that allows individuals the right to a full-court hearing before any referee they choose as long as this person meets the regular requirements for serving on a duty. The legislation states that the disputing parties can choose a referee to "try any or all of the issues in an action or proceeding, whether fact or of law, and to report a finding and judgment thereon" (Benson 223). Armed with this forgotten law the lawyers hired a retired judge who had expert knowledge of the disputed issue to hear the case and render a decision.

There are now mandatory Rent-a-Judge programs in some U.S. jurisdictions where all claims below a certain dollar figure are required by statute to submit to an arbitration by a retired judge or attorney. In these programs, the arbitrator has the authority of an active judge and the hearings may or may not be held in a courtroom (Coulson 23). The decisions are not, however, binding.

Mediation-arbitration combines the mediation and arbitration processes. In this forum, the disputing parties pre-agree to use mediation for a set time-frame; failure to reach a decision within this time-frame results in the process becoming an arbitration (Directory 51). This forum can be binding or non-binding and the mediator and arbitrator can be the same or two different people (Directory 51). While having the same person act as both mediator and arbitrator can save time and money, it can also negatively affect "the integrity of each process" (Adams & Bussin 7). This is because, in order for mediation to be successful, the neutral must have the complete trust of both or all disputing parties, and all parties must confide their concerns freely to the neutral. If the mediation becomes an arbitration, "The perceived impartiality of 'the arbitrator' may suffer if information confided during mediation comes back to prejudice the arbitrated outcome in the eyes of the confiding party" (Adams & Bussin 7-8).

Facilitation is "a process to help a group improve its process for solving problems and making decisions so that it can achieve its goals and increase its overall effectiveness" (Directory 51). Although dealing with conflict is a significant part of facilitation, it is not always its primary focus. A facilitator often works among multiple parties with complex relationships and attempts to anticipate and prevent disputes before they arise (Mead & Newcomer 25). Facilitation is particularly well-suited to proposals for public works or other projects that will potentially affect numerous and diverse interests; examples given include new prisons, landfills, and power plants (Mead & Newcomer 25). A closely related process is developmental facilitation; it seeks to transfer the skills of the facilitator to the group so that the group will be less dependent on the facilitator when future problems arise (Directory 51).

Partnering is a new ADR mechanism used primarily in the construction industry. In this process, the neutral works with the decision-makers on a particular project (Mead & Newcomer 26). It is similar to facilitation in that the partnering neutral tries to foresee and solve problems or disputes before they arise. He or she is retained for the entire length of the project and may use a variety of skills, including mediation and negotiation, to ensure that disruptions are minimized throughout the project's life.

Conciliation is a process whereby the neutral is positioned between the parties to create a channel for communications, usually by conveying messages between parties where it is preferable that they do not meet face-to-face (Directory 51). In particularly acrimonious disputes, the conciliator attempts to identify common ground in order to re-establish direct communications between the parties, thereby possibly achieving settlement (Directory 51). Conciliation is commonly used by nonprofit and public agencies that deal with consumer or citizen complaints (Mead & Newcomer 26).

Fact-finding is a non-binding process common in labor-management negotiations in which the parties retain the services of a neutral who investigates their disagreement over certain facts (Mead & Newcomer 25). The neutral fact-finder considers the positions of each side and may conduct an independent investigation before presenting his or her conclusions (Mead & Newcomer 25). In general, the parties will agree to adopt the neutrals findings as they continue with their negotiations (Mead & Newcomer 25).

Fact-finding is particularly useful in cases involving alleged racial or sexual discrimination within a company or government organization. If the disputing parties are both employees or members of the same company or organization, there may be conflicts of interest that would interfere with a supervisor's or manager's ability to conduct a fair and impartial investigation into the allegations. Thus, the use of a neutral third-party may assist in avoiding the appearance of unfairness (Law & Leading Attorneys 3).

Early neutral evaluations (ENE's) are a variation on neutral fact-finding. Early neutral evaluations "involve a neutral--often a judge or a lawyer who has specialized training in the substantive area in issue--conducting a brief, confidential, non-binding session early in litigation to hear both sides of the case" (Adams & Bussin 6). The neutral is charged with identifying the main issues in dispute, exploring the possibility of settlement, and assessing the merits of the disputing parties positions. If a settlement is not reached, the early neutral evaluator "may recommend a discovery or motion plan and, when thought useful, pursue follow-up meetings" (Adams & Bussin 6).

The narrow purpose of the early neutral evaluation is "to make both the case development and the rights settlement process more efficient" (Adams & Bussin 6). For example, in cases involving simple legal principles, the neutral may be most useful by providing simple dollar evaluations of a claim. In more

complex cases, the neutral may contribute suggestions on discovery strategies or his or her assessments of applicable legal theories. Overall, the early neutral evaluation provides disputing parties with a neutral expert "who can provide neutral standards against which they can measure their positions" (Adams & Bussin 6).

Special referees are court appointed neutrals (although not officers of the court) used in disputes that are highly technical in nature. This could include "cases of fact or law, or of fact and law" (Cohen & Duthie 1056). More specifically, this could include scientific disputes, complex accounting analyses, assessment of damages in construction litigation, and valuation of intangible assets (Justice Reform Committee 139). In scientific and trade disputes, special referees are retained because "it is not cost-effective and not an appropriate utilization of the time of a judge, with presumed commercial expertise, to become acquainted to the necessary degree with the intricacies of the particular science or trade" (Cohen & Duthie 1056). In complex accounting analyses "it is simply impossible to make available a judicial officer to check hundreds, possibly thousands, of disputed invoices, building items, or such like" (Cohen & Duthie 1056).

Special referees can either be used independently to settle a dispute or in conjunction with other ADR processes or litigation. Usually, the disputing parties must agree to the use of a special referee before he or she is retained. In utilizing this process, the court presents the special referee with a question and directs her to issue a report in writing stating her decision and/or opinion and the reasons for it. Often, in carrying out their duties, special referees can conduct hearings similar to court proceedings (i.e. require the attendance of witnesses, subpoena documents, etc.) and in some jurisdictions, they have the same protection and impunity as judges in the Supreme Court (Cohen & Duthie 1056).

One of the most elaborate ADR mechanisms is the **mini-trial**. Mini-trials, essentially an abbreviated simulation of a court trial, are common among corporations and government organizations involved in major disputes. In a mini-trial, the disputing parties create a tribunal in which trial attorneys make legal presentations to a panel comprised of senior, decision-making executives from each organization or corporation (Coulson 21). The hearing is informal, usually with no witnesses, and the rules of evidence and procedure are relaxed. An ADR neutral moderates the one or two day tribunal, and then serves as a mediator or issues an advisory opinion following the hearing.

Post-hearing talks attempt "to capitalize on the [presumed] negotiating skills of the senior executives" and the mini-trial can promote settlement in several ways (Adams & Bussin 6). Theoretically, "The informal hearing crystallizes the case for all sides, and directly exposes clients to the other party's views" (Adams & Bussin 6). This direct exposure can have a "sobering" effect on the senior executives and lead to more productive negotiations. In addition, the disputing parties also enjoy "the services of a neutral advisor, who variously may assist at the hearing; venture opinions on the strengths of each side's case; make settlement suggestions, and mediate the settlement talks" (Adams & Bussin 6).

Summary jury trials are usually, but not always, a court-managed ADR mechanism which take place after a case has been filed but before it reaches trial. A summary jury trial is held in a courtroom and, like a mini-trial, is an abbreviated simulation of a standard court trial. Summary jury trials usually last one to two days and use the services of a six-person jury drawn from the regular panel list. Because this process requires the assembling of a jury, it is best suited to complex cases that would occupy long trials.

A neutral, normally a judge or magistrate, moderates the hearing and the rules of evidence are relaxed; usually no witnesses are called to testify, documentary evidence is precluded, and the proceedings are not recorded. Normally, each counsel has one hour to submit an abbreviated opening argument, a brief overview of his or her client's position, and an abbreviated closing argument. During the submissions, each party is allowed to rebut the evidence of the other. Following the trial, the neutral instructs the jury on the relevant legal issues, and the jury then begins deliberations. After deliberating, the jury renders an advisory option or verdict based on the merits of the case. The jury's verdict is not binding unless the parties agree to it before the proceedings commence.

The theory behind the summary jury trials is that the advisory opinion gives clients and counsel insight into their case, and serves as "a reality check for the disputants--a counter to the natural tendency to see only the strengths of one's own case and the weaknesses in an opponents case" (Adams & Bussin 7). Sometimes, the jury may put a specific monetary figure or finding on the table, thereby providing "a focus and impetus" for negotiations (Adams & Bussin 7). In general, the jury may suggest a fair basis for settlement of the dispute (Law & Leading Attorneys 4).

Summary jury trials are not without drawbacks, however. For instance, if one side has particularly compelling witnesses, the jury will only hear about them from the counsel rather than seeing them and evaluating them first-hand (Casola 2). Also, because the disputing parties reveal the essence of their cases, they may lose some strategic advantage if the case ultimately moves to a full-scale trial (Casola 2).

Diversion, used in criminal cases, is a "pre-court procedure where a Crown counsel uses his or her discretion on a case-by-case basis not to

prosecute an alleged offender" (Ministry of Attorney General ADR Policy 8). Instead of being prosecuted, the alleged offender, in an attempt to make him accept responsibility for his actions, is referred to an individual or agency which assist can him in addressing the root causes of his actions. An example of this would be an agreement between the Crown and the alleged offender that the alleged offender enter into drug or alcohol rehabilitation program in exchange for the charges against him being dropped.

Sentencing circles, **healing circles**, or **community justice circles**, one of the more controversial ADR mechanisms, brings together the offender, the victim, their respective family members and friends, and leaders in the community (often clergy members) to discuss the offense and agree upon an appropriate punishment for the offender. There can be one or several neutrals or "peace-makers" but often a community leader will take on this role. Often the punishment recommended is not incarceration but tasks and actions that will provide restitution to the victim and benefit the community.

Circle sentencing, modeled after traditional aboriginal practices, is based on the principles of restorative justice. Restorative justice "defines crime as a conflict between people which puts them and their relationship at center stage" (Villa-Arce 4). The court system, in contrast, relies on retributive justice and focuses upon the relationship between the offender and the state.

There are many purported benefits of circle sentencing: it improves the victim's ability to participate in the justice process; promotes assistance for the victim as his or her needs are central to the discussions; and, it assists similar victims by acting as a catalyst for community action (Stuart 11-12). Proponents of circle sentencing also believe that healing must also extend into the community where the victim and offender live and where the offense has been committed; thus, the inclusion of family members, friends, and community

leaders. Additionally, some sociologist laud circle sentencing as a manner in which to re-engage the community and to curtail society's over reliance on "professionals". These sociologist argue that communities are too dependent on lawyers, judges, police officers, social workers, among others, who have usurped their problem-solving capabilities. By including community members in the justice process, it is believed community members can once again acquire the necessary skills to independently solve community problems.

Victim-offender reconciliation programs (VORP) are a highly controversial and emotionally charged method of dealing with disputes; they are never compulsory for the disputing parties to participate in. VORP programs deal mainly, but not exclusively, with property crimes and, like circle sentencing, they are based on the principle of restorative justice.

VORPs bring together the victim and the offender and, with the assistance of a highly skilled neutral, they discuss their feelings surrounding the offense. This can benefit the victim, the offender, and the community at-large. In the court system, victims often feel twice victimized; first by the offender and then by a system that is cold, provides them with little information, and is unresponsive to their needs. The VORP process allows the victim to voice his anger and frustration, discuss restitution, be involved in the settlement of the dispute, and where appropriate, offer his forgiveness (Classen 2).

Offenders, in turn, seldom face the persons they have wronged or know their victim's loss, frustration, and anger; offenders seldom take responsibility to "make a situation right" (Classen 2). VORPs helps offenders face the real human and financial costs of their actions, accept responsibility to make restitution, ask for forgiveness, and clarify future intentions toward the victim (Classen 2)

The community also benefits from a VORP program. "It simply makes sense to offer a workable alternative to incarceration for those guilty of only

moderately serious offenses. The taxpayers can save a significant amount of money with reconciliation programs" (Taylor 1189). In essence, VORP allows the offender a chance to become a productive rather than dependent member of the community. For many offenders it helps stop the cycle of crime (Classen 2). Moreover, VORP programs promote "the teaching of non-violent techniques to resolve conflict" (Taylor 1189).

Summary

Because ADR mechanisms are defined as any non-violent process by which to resolve a dispute, the above mentioned list of processes is by no means exhaustive. It is simply a description of the most recognized and most often used ADR processes in contemporary society.

It is also important to note that while the discussed ADR mechanisms are dissimilar in many ways, each mechanism is connected to the others in that it is based upon principles of negotiation. As one scholar has stated, negotiation is "the common denominator and supporting taproot' for all ADR activity (Adler "The Future..." 1993 69).

Chapter 3: ADR, An Overview

A) Historical Roots

The historical roots of modern alternative dispute resolution processes are in all methods of non-violent dispute resolution that existed before the advent of the English common law and the trial-in-court system, or that have continued to exist along side the traditional justice system. As one scholar writes: ADR processes "are old ideas dressed in new clothes and energized by changed economic and social conditions" (Adler "Is ADR..." 1987 65).The dispute resolution mechanisms, therefore, of past and present tribal, indigenous, religious sectarian and communitarian groups, and ethnic enclaves throughout the world are often cited when tracing the roots of modern alternative dispute resolution.

Tribal Groups

One example of a tribal culture that practices a non-violent form of dispute resolution is found in Africa among the Kpelle people of Liberia. The Kpelle operate an informal moot system alongside the adjudicative court system originally imposed on them by the British. James L. Gibbons writes:

> The Kpelle *berei mu meni saa* or 'house palaver', is an informal airing of a dispute which takes place before an assembled group which includes kinsmen of the litigants and neighbors from the quarter where the case is being heard. It is a completely *ad hoc* group, varying in composition from case to case. (279)

Prior to the moot the complainant is required to select a kinsman, usually a quarter chief or town elder, as the mediator (280). Most moots, which are accompanied by religious ceremony, involve domestic problems such as family quarrels or non-payment among kinsman in minor commercial transactions. The proceeding is informal and the disputants speak directly to one another acting as their own investigators. The testimony of spectators who may have been witnesses to the dispute is also important. Importantly, the parameters of discussion are wide during a moot and "hardly anything mentioned is held to be irrelevant"(282-283). This allows all simmering or related issues to be addressed.

Once the dispute has been discussed and all outstanding issues thoroughly explored, it is then the mediators role to "point out the various faults committed by both parties" (281). Then, the mediator "expresses the consensus of their group" in regards to who is primarily in the wrong" (281). The party judged to be mainly at fault is then required to offer his apology, usually through token gifts, to the other disputant. It is customary for the "winning' party to accept this apology, and, in return, to give a smaller token gift to the "losing" party, in order to express his good will (282).

Indigenous Groups

Jonathan Rudin and Dan Russell trace some of the dispute resolution methods employed by North America's indigenous people prior to European

contact. Specifically, the authors focus on the Hopi, the Navajo, and the Pueblos, three aboriginal tribes whose homelands are located in the United States southwest.

Traditionally, these aboriginal communities sought to reconcile disputes in private. For example, when disputes arose among family members in the Hopi tribe, other family members, usually uncles, were called in to mediate in a private, informal manner. If the uncle was unsuccessful in mediating a resolution, tribal leaders or elders were consulted, again behind closed doors. If the dispute was still unresolved, the parties would take their grievances to outside non-family members for public resolution. "This would usually be to the (Governor) who would listen to the disputants and then render her decision. Again the tribal leader would usually seek the counsel of elders and religious leaders before imposing a decision" (25).

The Navajo settled their disputes in a similar fashion. Through use of the clan system, communal pressure was exerted on the disputants pressuring them to seek a resolution in private. "There was no formal structure nor any code of procedural rules to be followed" (Rudin and Russell 25). If this process failed, specific clan members charged with resolving disputes, interceded and brokered a settlement. In making a decision, the clan members "would commonly consider not only what was fair for the affected parties, but also what was in the best interests of the community" (Rudin and Russell 25).

The Pueblo also first tried to settle disputes in private and only when this failed would the dispute be taken to a public forum, presided over by tribal leaders, for resolution (Rudin and Russell 25).

Sectarian Religious Orders

Jerold S. Auerbach details the dispute resolution mechanisms employed by sectarian religious orders, communitarian groups, and ethnic enclaves in colonial America. These groups, such as the Puritans and the Dutch settlers in New Amsterdam, "preferred to live within a communal framework that rendered formal legal institutions superfluous or even dangerous. For them law was a necessary evil or a last resort, not a preferred choice" (20). As a result of these sentiments, the only available dispute resolution option consistent with group harmony, discounting avoidance or expulsion, "was mediation, which turned disputants toward each other in reconciliation, not away from each other in acrimonious pursuit of self-interest"(20).

One such group was the Puritan-founded community of Dedham, located southwest of Boston, which drew no line between state and church. When informal mediation failed to resolve a dispute in this settlement, the congregation/residents, led by the minister, then became the final arbitrator of justice. "Three understanding men" or "two judicious men" were chosen, sometimes by the disputants themselves, to mediate and resolve the dispute (Auerbach 25). The decisions of these panels, "rooted in community consensus" were rarely challenged because, presumably, members of the community were strong believers in the utopian Christian values which structured their lives. Likewise, when disputes arose between Dedham and its neighboring villages, community members used arbitration, mediation, "or any other peaceable way" to bring resolution (Auerbach 25).

The Quakers, like the Puritans, also emphasized social harmony over individual interests. They believed that, "Disagreements should not be resolved by 'hot contests' but with 'love, coolness, gentleness and dear unity"(Auerbach

29). An explicitly defined procedure, known as the 'gospel order' (based on Matthew's prescription in the bible) was used to settle all disputes:

> First, the complainant 'calmly and friendly', spoke to the other party, trying 'by gentle means, in a brotherly and loving manner to obtain his rights'. If he was unsuccessful, he reasserted his claim in the company of one or two other 'discreet, judicious, Friends,' who were expected to act 'justly and expeditiously' to resolve all differences. That failing, they were to 'admonish and persuade' the parties to accept arbitration by disinterested Quakers. Refusal to arbitrate diverted the dispute to the monthly meeting which enforced the norms of the holy community. (Auerbach 29)

Communitarian Groups

Other communal groups also employed non-litigious processes in order to settle disputes. In some colonial villages, such as Sudbury, communal ownership of the land, not religious ideology, was the catalyst behind the community's emphasis on social harmony. When disputes occurred between the residents of Sudbury, "If possible, agreement was secured through discussion; otherwise it was achieved through arbitration"(Auerbach 27). Auerbach noting the success of Sudbury's dispute resolution mechanisms, states that in the village's first eighteen years, only three disputes reached the Middlesex County Court (27).

Ethnic Enclaves

Finally, Auerbach reports that various ethnic enclaves were also known to use alternative dispute resolution processes. Prior to 1664 the residents of New Amsterdam employed the Dutch legal system which was more tolerant of arbitration then English common law. As a result, the leaders of New Amsterdam established an arbitration "Board of Nine Men" (Auerbach 31). This Board of

"good men" or "friendly mediators", drawn from the "upper stratum" of New Amsterdam society, resolved a wide array of disputes through exerting strong pressure for conciliation (Auerbach 31). Moreover, "Recalcitrant disputants who preferred adjudication were persistently returned by the Dutch court to arbitrators, who were urged to 'settle differences to the best of their ability'"(Auerbach 31).

B) Twentieth Century ADR in the United States

Industrial Revolution/Labour Relations

The modern era of alternative dispute resolution in North America began as a result of the industrial revolution and the conflict it brought between owners of capital and the workers they employed. As the new field of labor relations blossomed in the late nineteenth-century, so did the need for quick and inexpensive methods of dispute resolution. In short time, the use of ADR became common-place in industrial disputes and its growth proceeded to parallel the growth of the labor relations field for much of the twentieth-century.

Although the industrial revolution is generally cited as the birth of modern ADR, scholars have documented that ADR processes were institutionalized in North America and Europe before this time. For example, in 1768, the New York Chamber of Commerce implemented the first formal arbitration hearings as a method of settling minor commercial disputes (Auerbach 33). There is also evidence that ADR processes were employed during the American Civil War by the trade associations in England to settle the increasing number of disputes which arose due to the newly created contraband-of-war laws and the English navy's blockade of the American South (Benson 217-218).

By late nineteenth-century, the use of ADR began to become more prominent when mediation and arbitration became a "formal part of the institutional framework of labor relations"(Auerbach 65). The industrial revolution ushered in national unions, collective bargaining and bitter discord between management and workers. Informal, inexpensive, and quick methods of dispute resolution were necessary to keep the wheels of the booming industries from spinning.

The state government of Maryland was the first to introduce institutionalized ADR measures when, following a railroad strike in 1879, it passed legislation implementing ad hoc tribunals to settle strikes or other disruptive job actions.(Kolb 2). New Jersey, Pennsylvania, Ohio, New York, and Massachusetts enacted similar legislation shortly thereafter and by 1913, thirty-two states had authorized the creation of arbitration or mediation agencies or boards to assist with the settling of industrial disputes (Necheles-Jansyn 9).

Like state governments, the U.S. federal government first introduced ADR legislation in response to discord in the railroad industry. In passing the *Erdman Act* in 1898, Congress took two important steps in aiding the development of institutionalized ADR. First, it established the Railway Labor Board and granted it power "to investigate industrial disputes and to recommend settlement terms" (Necheles-Jansyn 10). Second, the legislation legally recognized unions and forced them to post notice and enter into mediation or arbitration before commencing a strike (Necheles-Jansyn 10).

The second significant step taken by Congress in the development of ADR was the creation of the Board of Mediation and Conciliation in 1913. The Board, with four full-time mediators, was located within the newly established Department of Labor (Necheles-Jansyn 10). The legislation enabling the department contained the following provision:

> The Secretary of Labor shall have the power to act as mediator and to appoint commissioners of conciliation in labor disputes whenever in his judgment the interests of industrial peace may require it to be done (qtd. in Kolb 7-8),

In 1917, the Board was re-organized into the United States Conciliation Service (USCS) (Necheles-Jansyn 11). The USCS and the War Labor Boards, another federally established ADR Board, played prominent roles during the First and Second World Wars using mediation and arbitration to settle labor disputes in industries essential to the war effort (Necheles-Jansyn 11; Bognanno and Coleman 3).

In 1935 Congress passed the *Wagner Act* and established the National Labor Relations Board, an independent agency, to administer it. The *Wagner Act* was a pivotal piece of legislation in the development of institutionalized ADR in the U.S. in that it legally granted employees the right to collective bargain (Necheles-Jansyn 11-12).

Following the Second World War, the USCS was dissolved and, through the 1947 Taft-Hartley Amendments to the *National Labor Relations Act* (NLRA), the Family Mediation and Conciliation Service (FMCS) was created as its replacement. Unlike the USCS, the FMCS was an independent federal agency responsible only to the president. Originally charged with facilitating disputes "in industries engaged in interstate commerce and agencies of the federal government, it added private nonprofit health facilities to its jurisdiction in 1974 (Kolb 7-8).

By the 1950s, institutionalized ADR was an entrenched feature on the American labor relations landscape. Subsequently, the energies of those involved in the field shifted as "mediators became concerned with improving their reputation and self-image through membership in professional organizations"

(Necheles-Jansyn 15). Soon organizations such as the Association of State Mediation Agencies (ASMA), an umbrella group created in 1952 by state mediators interested developing professional standards, began to slowly appear on the ADR scene (Necheles-Jansyn 15).

The New ADR Movement

In the 1960s, rapid changes in American society, and specifically its legal culture, launched what has been variously termed "the new American mediation movement", "the contemporary mediation movement", or simply "the mediation movement" (Bush and Folger 1; Becker 113).

Stephen Goldberg, Eric Green, and Frank Sander state that: "The 1960s, it will be recalled, were characterized by considerable strife and conflict. An apparent legacy of those times was a lessened tolerance for grievances and a greater tendency to turn them into lawsuits" (3). While offering no definitive answer as to why these changes occurred the authors believe that the following two factors shoulder most of the blame: (1) the waning role of many of society's traditional mediating institutions such as the family, the church, and the community; and (2) the abundance of new federal and state legislation, most notably the Civil Rights Act of 1964, which substantially expanded the grounds for seeking redress in the courts (3-4).

By the 1970s, the United States was a country "where all personal grievances and social issues seemed to be converted into legal claims" (Auerbach 121). The justice system was overcome by "a tidal wave of litigation"

and many justice professionals were concerned that court congestion, trial delays, and exorbitant legal fees were making the court system (and therefore, justice) inaccessible for most Americans (Auerbach 120-121).

Two responses to this crisis emerged *within* the justice system. One camp of justice professionals argued that more courts and judges were necessary in order to rectify the problem. The other camp, with U.S. Supreme Court Chief Justice Warren Burger, as its unofficial spokesperson, began lobbying for the increased use of ADR mechanisms (Goldberg et al. 4).

The musings of the Burger camp led to a flurry of activity in the ADR field and several prominent ADR umbrella agencies and professional organizations were launched at this time. A partial list includes: the Association of Labor Mediation Agencies (ALMA) in 1972; the Society of Professionals in Dispute Resolution (SPIDR) in 1973; and, the American Bar Association's (ABA's) Standing Committee on Dispute Resolution in 1977.

Academia also began intensive studies on ADR in the 1970s with the Harvard Negotiation Project, established in 1976, leading the way. The Project, under the direction of the Harvard Law School, was given the mandate to "work on negotiation problems and develop and disseminate improved methods of negotiation and mediation" (Fisher and Ury end note).

Two important ADR initiatives arose out the Project's work. First, in 1976, Frank Sander, a law professor involved in the Project, introduced the multi-door courthouse", a concept which called for a, "community-based facility where citizens' complaints could be channeled through a skilled intake specialist who

would direct the complainant to an appropriate 'door' for resolution of the dispute" (ABA 36; Nolan-Haley 5). In Sander's vision only one of these doors would be the traditional court system with the others being various ADR processes such as mediation or arbitration.

The second important ADR initiative to emerge from the Harvard Project was Roger Fisher and William Ury's book, Getting To Yes: Negotiating Agreement Without Giving In. Published in 1981, the text was written as a negotiating handbook for the general public with the premise that everyone is a negotiator in their daily lives and that there a better and poorer ways to conduct negotiations.

The federal and state governments also responded favorably to the ADR camp of justice professionals and began enacting legislation that made use of ADR mechanisms, with the most notable being the *Dispute Resolution Act* passed by Congress in 1980. This act stated that the existing mechanisms for dispute resolution in American society were "largely unavailable, inaccessible, ineffective, expensive, or unfair" and it earmarked, over a five year period, more than a $1 million per annum of federal funding for a central dispute resolution centre (Auerbach 136). Congress also agreed to provide grant funding of over $10 million a year to ADR program developers over a four-year period (ABA 5). However, while the legislation was passed, it has never been funded and, despite the ongoing lobbying of such groups as the ABA, remains nothing more than a "hollow shell" (Auerbach 137).

A second "new ADR movement" emerged in the 1970s *outside* of the traditional justice system, "when community empowerment became a salient theme of political reform" (Auerbach 116). Framing itself as a reform movement

to the court-reform ADR movement, this collection of libertarians, academics, and community activists called for community-based, not professionally-based, ADR processes. Led by Raymond Shonholtz, founder of the San Francisco Community Boards (SFCB) mediation program, they advocated for a justice system that would return "ownership" of disputes to disputants and away from professional dispute resolvers. Basing their arguments on communitarian values and notions of participatory justice, these social reformers called for voluntary, neighborhood mediation programs that would give disputants full control over the dispute resolution process. Ultimately, they believed that through participation in community mediation programs, individuals could be empowered and subsequently transform their communities into more harmonious, cohesive, and equitable places.

The changing economy and restructured labor force provided the backdrop to the emergence of the two modern ADR movements. During the late 1960s and 1970s the labor force shifted from one where the majority of workers were employed in industry to one where the majority of the labor force was concentrated in the public service or service sectors (Necheles-Jansyn 16-17). Previously, a large industrial labor force necessitated a large number of mediators and arbitrators to settle their industrial disputes. However, neither of the new dominant sectors were unionized and reliant on collective bargaining in the early 1970s and, as a result, didn't require the services of ADR practitioners. Though the public sector did eventually become highly organized and the service sector somewhat organized, this economic shift created an initial over-supply of ADR practitioners. The willingness of these unemployed ADR practitioners to identify new areas of dispute in which their skills were needed, and eagerness to promote ADR, cannot be overlooked when considering ADR's rapid growth in the U.S. in the 1970s.

Over the 1980s the ADR field grew dramatically in the U.S., and by 1990 the new ADR movement was firmly entrenched into the American landscape. By 1992, more than half of the local and state bars had dispute resolution committees in place and more than 94% of American law schools offered courses in dispute resolution. By 1995, surveys document that there were more than 485 ADR programs in operation in forty-four U.S. states (Schwerin 14).

C) Twentieth Century ADR in Canada

Industrial Revolution/Labour Relations

The development of the modern ADR movement in Canada is similar to that of the U.S., although its growth in this country has not been as rapid nor widespread, (nor documented to the same extent).

Like the American experience, the roots of institutionalized ADR in Canada are found in labor relations. Trade unions were legalized in Canada in 1872 under the federal *Trade Unions Act*, thereby officially signifying the beginning of the labour relations field in this country (Sanagan 3). The following year, in 1873, Ontario passed legislation providing for local boards of conciliation to be set up on agreement between employers and workers (Jamieson 117). Shortly thereafter Nova Scotia, Quebec and British Columbia followed suit with

similar legislation; however, most of these provincial acts were soon repealed or became inoperative.

In 1900 the federal government enacted the *Conciliation Act* which authorized the Minister of Labour to appoint conciliation boards to help settle disputes when requested to do so by representatives of the employers or workers involved (Jamieson 118). In 1903, faced with growing unrest in the railroad industry, the federal government passed the *Railway Labour Disputes Act*. This act, limited in jurisdiction to railway transportation disputes, "provided for a three-man conciliation board, constituted in a pattern that was to be a familiar feature of subsequent legislation: one nominee chosen by each party to the dispute, and a chairman chosen by these two" (Jamieson 118). The emphasis in the act was upon conciliation but it also allowed for non-binding arbitration if both parties agreed.

In 1906 the provisions of the *Conciliation Act* and the *Railway Labour Disputes Act* were combined by the federal government under the *Conciliation and Labour Act*. This proved inadequate, however, in dealing with coal-mine unrest in western Canada and the federal government was forced to enact the more comprehensive *Industrial Disputes Investigation Act* the following year. The new legislation "required all workers and employees in transportation, resource, and utilities industries to submit their disputes to an ad hoc, three-person board of conciliation before initiating a strike or a lock-out" (Jamieson 117). Again, emphasis was placed upon conciliation under the new act but it also allowed for

the conciliation board to pass judgment on the dispute when conciliatory measures failed (Jamieson 119).

In 1925 the legality of the act was successfully challenged by the provinces in the federal courts and the Privy Council "on the grounds the federal government was acting beyond its proper constitutional jurisdiction" (Jamieson 119). The federal government responded by amending it to make it apply only to disputes coming under its own jurisdiction. However, it also included an amending clause which stated that the provisions of the act could be extended to any provincial jurisdiction subject to it passing its own enabling legislation (Jamieson 120). Between 1925 and 1932 each of the nine provinces, save Prince Edward Island, enacted legislation allowing the provisions--including conciliation boards--of the *Industrial Disputes Investigation Act* to be brought into force in their respective jurisdictions. Alberta and B.C. repealed their enabling legislation shortly thereafter and enacted similar provincial laws of the their own.

The Second World War brought intensified labour strife in Canada and new government ADR measures to counter it. First, under the emergency powers prescribed to it under the *War Measures Act* , the federal government extended the *Industrial Disputes Investigations Act* to all industries deemed essential to the war effort. This legislation proved insufficient, however, and the government was forced to pass a blanket order-in-council, P.C 1003, to effectively manage labour unrest. PC 1003, modeled almost entirely upon the American *Wagner Act*, reaffirmed the compulsory conciliation of disputes; the intervention of a conciliation officer at the first stages of the dispute; and, the

establishment of a tripartite conciliation board if settlement negotiations failed. The order-in-council also included previously unrecognized provisions including the right of labour to organize; the advent of compulsory collective bargaining; the establishment of labour relations boards to investigate and correct unfair labour practices; and, the use of compulsory arbitration proceedings to settle disputes that otherwise could not be settled (Jamieson 123).

Following the War, Parliament passed the *Industrial Relations and Disputes Investigations Act* which retained most of the provisions of order-in-council PC 1003. However, cognizant of the earlier Privy Council ruling, the federal government limited the scope of the act to only matters under its jurisdiction. The provinces once again passed their own labour relations acts, this time modeled almost exclusively on the new federal legislation.

Since this time, the provinces have developed labour relations codes and practices in a less uniform manner; B.C. in particular, has been at the forefront of change. In 1947, the *British Columbia Industrial Conciliation and Arbitration Act* was repealed and superseded, in 1954, by the *Labour Relations Act*; further amendments were made to the act in 1959 and 1961. Under the new legislation the B.C. Minister of Labour "was given discretionary power as to appointment of a conciliation board" if the attempts of the conciliation officer to settle the dispute failed (Jamieson 129). Previously, the disputing parties controlled the appointment to the board. The Minister was also given the power to refer the dispute to an outside mediator providing the mediator was acceptable to both parties.

(It is important to note that while this action, under the Social Credit government, accelerated the growth of institutionalized ADR in British Columbia, it was undertaken, for the most part, to limit the power of organized labour while strengthening the position of the government and their free-enterprise supporters.)

In 1968, the B.C. government revoked the *Labour Relations Act* and replaced it with the *Mediation Commission Act*. This replaced "Conciliation Officers" with "Mediation Officers", and replaced the ad-hoc conciliation boards with a full-time tripartite Mediation Commission (Jamieson 129). The Mediation Commission:

> ...was given the power of deciding whether or not to appoint mediation officers to intervene in disputes even if requested to do so by both or one of the contending parties. In disputes involving a special interest, by contrast, the commission was empowered to intervene unilaterally without prior request and, if agreement could not be reached by the parties in dispute, to impose the final terms of settlement upon them. This involved, in effect, compulsory arbitration in potentially any industry or trade. (Jamieson 129)

More recently, in 1993, the Adjudication Branch of the Labour Relations Board (LRB) launched a major initiative "directed towards improved alternative dispute resolution at the agency" (LRB 51). The impetus for this initiative was two-fold. First, there were concerns voiced in the labour relations community that existing Board processes were "too costly and legalistic, and that there is excessive delay in the rendering of decisions" (LRB 51). Second, "given the board's workload and limited resources, changes were necessary if the tribunal was to effectively carry out its legislative mandate" (LRB 51). Subsequently, the

LRB took several steps to implement more ADR mechanisms to expedite the adjudication process. Most recently, in 1995, the LRB formed an ADR Working Committee to monitor the reforms taken and to identify new areas which might benefit from the increased use of ADR.

The New ADR Movement

Unlike the U.S., the new ADR movement arrived in Canada in the 1970s with little fanfare. As a result, there was only a sprinkling of ADR initiatives outside of the labor relations community in this country during this time. There are several reasons for the early measured growth, especially in comparison to the U.S., of ADR in this country. Supreme Court of B.C. Chief Justice Bryan Williams believes that the primary reason for this early slow growth is that the courts in Canada were not as backlogged as those in the United States; thus the need for ADR programs was not as pressing (personal interview). Williams also believes, however, that it can be attributed to both Canadian conservatism and poor marketing by ADR proponents in this country. He states:

> We don't seem to have accepted it like the States has as an alternate to court, any where near as much....The reason why Canada hasn't caught on as much may be because we seem to be more reluctant to make those kind of changes. In the States they promote something and they really go after it. Here we kind of say, "It's there, do you want it"?. So I don't think we're doing as much promoting as we need to do. (personal interview).

The first documented court-annexed ADR initiative was established by Alberta Family Court Judge Marjorie Bowker when she created a court-related

conciliation service--modeled on the Conciliation Courts in Los Angeles--in Edmonton in 1972 (Canadian Bar Association ADR 13). By 1976, there was enough interest and practice of ADR that The Arbitration and Mediation Institute of Canada (AMIC) was established in Ontario to promote arbitration and mediation (Geddes 11). In 1979 the first neighborhood justice center in Canada was established by the Mennonite Central Committee, which had a long history of organizing and administrating VORP programs and other community-based justice-related programs, in the Waterloo region in the Kitchener-Waterloo area, (Tannis 19). The Canadian Bar Foundation with funding from the Donner Canadian Foundation opened a second neighborhood justice centre, the Windsor-Essex Mediation Center, in Ontario in 1981 (Canadian Bar Foundation 3).

A national voice on ADR became more audible following the First National Dispute Resolution Conference held in Saskatoon in 1981 where, "...people from across the country engaged in dialogue on alternative dispute resolution for the first time on a national scale", and following the establishment of Family Mediation Canada in 1984--a national association of professionals and practitioners committed to the concept of family mediation (Eisler and Kelly 7-8).

By the early 1990s, however, the new ADR movement had become firmly entrenched in Canada as numerous government and private sector ADR initiatives began to appear at this time. Not surprisingly, this coincided with increased levels of congestion in Canadian courts.

In order to illuminate ADR's growth in Canada in the 1990s, the following is brief survey of the ADR initiatives undertaken by the provincial governments in Ontario and Saskatchewan which (along with B.C.) have been ADR pioneers among governments in Canada, and a brief synopsis of ADR initiatives undertaken by both the Canadian Bar Association and the federal government.

Ontario

To date, the Ontario government has implemented the most extensive ADR program in Canada with its substantive focus being on court reform measures. This is not surprising when one considers that the backlog in the Ontario court system, and the reasons for the backlog, are strikingly similar to that experienced in the U.S. in the late 1960s and early 1970s. As one Ontario ADR expert noted in 1992:

> It is acknowledged that the courts have not been able to cope with the number of disputes which society now brings to litigation. The outbursts of litigation has been the function of several aspects of society. There has been rapid growth in the population of Ontario. There has been a pronounced change in the nature of society from
> relatively passive to demonstrably activist. There has been
> legislation increasingly from the 1970s and through the
> 1980s which gave extended and fresh rights to more and more persons
> and elements of society and hence the occasion for asserting
> and determining those rights...These and other factors have
> pressed the flood gates of the court rooms at every level. (Carson 4)

In March 1994 the Ontario Court of Justice and the Ontario Ministry of Attorney General implemented a two-year pilot program in which a group of randomly chosen disputants in the Toronto region had their civil cases referred to an out-of court ADR centre (Adams and Bussin 17-18). The Centre

experimented with taking anywhere from 10% to 80% of the cases from the Ontario Court, General Division before establishing that 40% was an appropriate number by which to effectively utilize the Centre's resources (Fitz-James 14). During the program, disputants were notified through the mail that their case had been selected. At the ADR Centre, Dispute Resolution Officers (DRO's) assessed the disputants' cases and then steered them into the ADR process deemed most appropriate; options included mediation, arbitration, mediation-arbitration, early neutral evaluations, and mini-trials (Adams and Bussin 18). The disputants did not have to pay for the services of the ADR practitioners. Near the conclusion of the program, an evaluation by University of Windsor Law professor Julie Macfarlane gave evidence that the project was an overwhelming success (Fitz-James 14)

Following the positive evaluation of the pilot program, Charles Harnick, Ontario's Attorney General, introduced mandatory referral to mediation for all civil, non-family cases in Ontario beginning January 1, 1997 (Harnick 4). Now, cases are automatically referred to mediation after a statement of defense is delivered. Parties are permitted to opt of meditation only with leave of the master or judge, if their case is inappropriate for the mediation process (Harnick 4).

Saskatchewan

In 1988 the Saskatchewan Department of Justice created a Mediation Services division in response to the agriculture foreclosure crisis that was plaguing Saskatchewan farmers. "When Mediation Services was created, however, it was intended not only to focus its attention on providing farm related mediation, but also to develop dispute resolution services in a broader way"(Saskatchewan Justice). Initially, the division offered "front-line mediation service delivery" but in recent years it has become a more "broadly-based policy

organization, providing a stimulus for the government, non-government organizations and the general public in the development of interest-based approaches to problem solving and policy development" (Saskatchewan Justice).

Mediation Services is now a moderately large division within Saskatchewan's Department of Justice with offices in both Regina and Saskatoon. It has 26 in-house employees, including twelve staff mediators, and retains another sixteen mediators on contract basis. Currently, it provides ADR services in three broad categories: (1) training, facilitation, technical advice and system design; (2) fee-for-service mediation; and (3) court-annexed or legislated services.

The first category includes programs such as fee-for-service mediation, consensus building, and negotiation training for interested organizations, fee-for-service facilitation services, a mentorship-training program in mediation, and technical and ADR system design advice to government departments, Crown corporation, or other organizations in need.

Mediation Services also offers mediation on fee-for-service basis in family disputes (sometimes this service is offered as a result of a court-order under Saskatchewan's Children's Law Act or The Family Maintenance Act), a variety of other civil disputes (including contract/commercial disputes, land use planning disputes and community/neighborhood disputes) and in farm land foreclosures.

Finally, the division offers court-annexed or legislated services. These services have been established in Saskatchewan in legislation and are provided to the parties without charge. The most significant piece of legislation with a mediation component is Section 54 of the Queen's Bench Act. Section 54(1) "requires parties in all family law proceedings attend a mediation screening and orientation session prior to taking further steps in the proceedings" (Saskatchewan Justice). Section 54(2), covers non-family civil litigation and,

"requires that following the close of pleadings in a contested matter, parties shall attend a mediation session prior to taking any further steps" (Saskatchewan Justice).

Canadian Bar Association

On a national scale, the Canadian Bar Association (CBA) has been among the leaders, or the leader, in advancing discussion and initiatives pertaining to the new ADR movement. The CBA first officially embraced ADR in 1987 when it passed a resolution stating that it "supports the study and development of alternative forms of Dispute Resolution" (CBA Report 1989 73). Since this time it has formed a subsection on ADR, released two major reports promoting the use and development of ADR, and organized at least one national conference, in Vancouver in 1994, devoted to the discussion of ADR.

The CBA's first report on ADR, the Report of the Canadian Bar Association Task Force on Alternative Dispute Resolution: A Canadian Perspective was released in 1989. The task force had been formed in October of 1988 "in order to ensure that the Canadian legal profession is fully apprised of developments in this area [ADR], in Canada and elsewhere [and] to ensure that the Canadian legal profession fully participates in these developments in so far as they relate particularly to the administration of justice in Canadian society"(v). After taking submissions from over 200 individuals and organizations, the task force issued a 97-page report which documented the growth of ADR in Canada and then put forth 25 recommendations, each that called for the increased use of ADR in Canadian society.

The CBA's second report, Task Force on Systems of Civil Justice, was released in August 1996. This task force was comprised of ten prominent

Canadian lawyers and justices, with former Supreme Court Chief Justice Brian Dickson as the honorary chair. The report was 100-pages and included 53 recommendations on how to significantly reform the Canadian civil justice system. Presented as a "road map and a catalyst" for existing provincial civil justice systems, it called for a "fundamental shift in how lawyers and judges do their jobs." In the reformed system proposed by the task force, "the nature of the courts will change significantly, marked by a move away from the imposing trial rooms to a more accessible multi-option dispute resolution facility (Bindman and Alden A1-2).

The Federal Government

The federal government has been less vocal than the Canadian Bar Association on ADR at the national level but in recent years has undertaken some measures aimed at advancing its use. In the summer of 1995, Deputy Justice Minister George Thomson, issued a communiqué stating that he was "directing employees to include alternative dispute resolution clauses in contracts [thereby] allowing parties to avoid the courts where there is disagreement over interpretation of a deal" (Middlemiss 10). This was considered a significant step as the federal Crown is named in thousands each year totaling millions of dollars (Middlemiss 10).

In 1996 the Department of Justice formalized Thomson's communiqué by adopting a corporate policy on Dispute Resolution (DR). The policy was released to "address internal Justice activities and to assist in the application of dispute resolution in other federal departments and agencies" (1). Among other things, the policy states:

> The use of DR affirms two principles of the department's mission statement: 'to support the Minister of Justice in working to ensure that Canada is a just and law-abiding society with an accessible efficient and fair system of justice'; and to provide 'high quality legal services and counsel to the government and to client department and agencies (1).

The substantive elements of the policy includes such things as DR training for Justice employees; DR clauses inserted into new legislation; new program initiatives that utilize DR; and a public education campaign promoting the utility of DR.

D) ADR in British Columbia

Like the growth of ADR at a national level, the emergence of the new ADR movement in British Columbia can best be measured by a perfunctionary survey of the various umbrella organizations, professional organizations, private firms, non-profit agencies, training facilities, and academic institutes that began to appear in this province in the 1980s and early 1990s. Some of the more notable were:

In 1980, the first B.C. organization of ADR professionals, the British Columbia Arbitration and Mediation Institute (BCAMI), was created. It was established, and continues to act, as an accrediting, training, and referral agency for ADR service providers (BCAMI). Affiliated with the Arbitration and Mediation Institute of Canada, the Vancouver-based office has now approximately 350 members, each of who have agreed to uphold the Institute's Code of Ethics and each of who have either their chartered mediator (C.Med) or chartered arbitrator (C.Arb.) designation (BCAMI).

In 1982, the Fraser Region Community Justice Initiates Association (CJI) was opened by Mennonite pastor David Gustafson at the behest of his

congregation. The agency, meant to promote Mennonite theology which places a great deal of import on resolving conflict in communities, has a victim-offender reconciliation program (VORP) and victim-offender mediation program (VOMP). A non-profit ADR service provider that receives funding from both the provincial and federal governments, CJI has conducted thousands of VORPs and VOMPs, over 400 of which dealt with serious crimes such as murder and rape (Gustafson personal interview).

In 1984 one of the first ADR umbrella organizations in this province, the Mediation Development Association of British Columbia, was established. The Association was formed to "promote public awareness of mediation as a method of dispute resolution, to establish standards of practice for mediators in B.C., to provide a forum for mediators to network, to communicate with other provincial and national mediation organizations and to promote accessible and affordable mediation services" (Pirie and Stanley 83). The Association is still an active player in the B.C. ADR community and helps maintain its profile with a quarterly publication entitled the Mediator.

In 1986 a major ADR initiative was launched by the B.C. government. The British Columbia International Commercial Arbitration Center (BCICAC) was opened "...as part of the initiative of the public and private sectors to position Vancouver to become a leading centre for international commerce and finance" (BCICAC "The Centre"). It was reported to be the first of its kind in North America and was to rival similar operations in Stockholm, London, Paris, Geneva, Melbourne and Honk Kong (Constantineau F7). Its mandate was to provide an administrative infrastructure and cadre of skilled arbitrators by which both domestic and international disputes could be settled outside of court (BCICAC "The Centre").

(In conjunction with the opening of the BCICAC, the B.C. government also took action to modernize the arbitral laws in the province becoming one of the first jurisdictions in North America to pass a model law created a year previously by the United Nations).

Despite elegant facilities at Canada Place, government funding, and substantial publicity (locally), the Centre had little business in its first year of operation (Gardiner personal interview). In 1987, when Brian Gardiner, a claims manager at ICBC approached the Centre to ascertain if it was interested in administrating ICBC's new personal injury, voluntary mediation program, the Centre jumped at the opportunity. Gardiner states, "They were of course keen as hell because they had no business" (personal interview).

The Centre lost the ICBC contract in 1996 and subsequently suffered serious financial troubles. As a result they have been forced to take serious cost-cutting measures, including moving out of Canada Place and into a modest new office and reducing the core staff to two. The Centre's director, Peter Grove, is now hoping that the provincial government will name it to administer the proposed roster of arbitrators and mediators that the government is close to implementing (Grove/Kiely personal interview). The provincial government has also recently agreed to provide the Centre with $83,000 in funding per year for a three-year period if the Centre can raise an equal amount of funds from the private sector (Grove/Kiely personal interview).

In 1987, the first private, for-profit ADR firm opened in B.C when Brian Gardiner and Ed Alfke opened the Canadian Dispute Resolution Corporation (CRDC) in Vancouver (Vancouver's Business Report "You..." January 1989 17). Gardiner, while working for ICBC, was asked by company officials in the mid-1980s to chair a committee charged with finding a more effective way to settle the high number of personal injury claims ICBC was involved in each year. As a

result of the committee's work, ICBC adopted a voluntary mediation program in 1987. To Gardiner, it was immediately clear that the mediations would have to be handled by an outside agency or otherwise the process would be perceived by claimants as part of the ICBC system. At that time there was no agency in B.C. to fill this role, so Gardiner took the opportunity to change careers, leaving ICBC to form the CRDC with Alfke. In its first year, CRDC, through a sub-contract with the BCICAC, retained the ICBC contract. For unspecified reasons the contract was not renewed for the second year leaving Gardiner and Alfke to focus their energy on building CRDC according to their own vision (Gardiner personal interview).

In April 1988 another prominent non-profit ADR service-provider in B.C., the Dispute Resolution Centre (DRC), opened in Victoria, offering its services "to people who are involved in a dispute of a minor civil nature and wish to pursue a resolution outside of the traditional court system" (Dolan 3). The Centre, operated with funding from the provincial and federal governments and from the B.C. Law Foundation, charged $10 in its first year to mediate a claim and utilized the services of volunteers in the neutral role.

Nineteen-eighty nine was a watershed year in the growth of ADR in B.C. as several significant ADR initiatives were launched at this time. First, the University of Victoria opened its Institute for Dispute Resolution with the mandate to be an "interdisciplinary, university-based research center focused on fair and effective resolution of conflict" (UVIC Institute for Dispute Resolution). In reaching this mandate, the Institute listed five major objectives including: "to conduct theoretical and empirical research in the area of dispute resolution" and "to promote the development of dispute resolution services to the community" (UVIC Institute for Dispute Resolution).

Second, eight prominent B.C. lawyers--Marvin Storrow, Q.C., Thomas Berger, Tom Braiwood, Q.C., Peter Butler, Q.C, Bruce Harvey, Q.C., Nathan Nemetz, and Bryan Williams, Q.C.--established Pacific Private Adjudications Inc. as a private arbitration service based in Vancouver (Vancouver's Business Report "Legal..." July 1989 17-18).

The third, and perhaps most significant event, of 1989 was the release of a major report endorsing ADR processes by a provincially-appointed task force. The Justice Reform Committee (JRC), formed in 1988 at the request of the B.C. Attorney General, tabled Access to Justice: The Report of the Justice Reform Committee in November 1989. The Committee was a seven-person panel chaired by the then Deputy Attorney General, the Honorable E.N. (Ted) Hughes. Under its "Terms of Reference" the Committee's goals were: "To cause the justice system of the Province of British Columbia to be accessible, understandable, relevant, and efficient to all those it seeks to serve"(iv). In achieving these goals the panel was asked to concentrate on four main areas: Civil law; Criminal Law; courts--Their Jurisdiction and Structure; and, Alternate Dispute Resolution.

In the course of a year, the Committee heard from approximately 175 interested individuals and groups and considered written submissions from approximately 200 others. Following two months of consideration the JRC issued a 271-page report with 182 recommendations, eight of which pertained to the increased usage of ADR in the B.C. justice system. Among them were: more Canadian studies of ADR procedures in order to allow policy makers to make their decisions based on Canadian experience and values; increased funding for programs that educate the public on the advantages of ADR; more programs that educate the public on the advantages of ADR; more programs for lawyers that would educate them on the benefits of ADR; implementation of curriculum in

law schools, professional legal training courses, and continuing legal education that cover ADR options; encouragement of community-based projects which provide alternatives to the court system; and, the development of professional standards and certification procedures for ADR practitioners.

In 1990, a second umbrella organization in B.C., the Conflict Resolution Council of B.C., was established with approximately twenty member organizations. A non-profit society, it was established to "promote and encourage greater co-ordination in conflict resolution activities in the province" (Conflict Resolution Council of B.C.). More specifically, its mandate was to:

> ...inform the public about the many options for resolving conflict; encourage proper qualification and training for conflict resolution professionals; and, provide advice and representation to member organizations, the government and private sector on effective and appropriate conflict resolution programs, funding and initiatives. (Conflict Resolution Council of B.C.)

The Council has since been disbanded and replaced by the Joint Committee on Dispute Resolution. Gustafson, the Co-Director of CJI and an original member of the Council, states that the original group succumbed to infighting, particularly surrounding the issue of whether it was to represent non-profit associations or for-profit individual providers. However, while the Council included a broad cross-section of ADR stakeholders--ranging from the Canadian Bar Association to Gustafson's own victim offender reconciliation program--Gustafson believes the agenda of the Joint Committee has been highjacked by lawyers. He states:

> The Conflict Resolution Council [was established] to be a window to government on ADR issues. Across the board. Well, there was a neat end-run done around the Council--and I'd be the first to admit that it became an almost powerless vehicle by virtue of some infighting...So what ended up happening was a few go get-em lawyers decided they were going to start something called the Joint Committee. So the next thing you know there are two or

three lawyers that are doing things and we're hearing little bits and pieces out in the hinterland about what's going on, but we're clearly no longer a power. (personal interview)

With the 1990s coming to a close, it is apparent that the new ADR movement is now well-entrenched in B.C. A survey of the 1997 British Columbia Yellow Pages supports this conclusion as there are 38 group and individual listings under "Mediators" and 27 listings under "Arbitration Services". Moreover, a directory of dispute resolution practitioners compiled and released by the Ministry of Attorney General in 1996 includes 161 group and individual listings for ADR practitioners.

Summary

The records of anthropologists, historians, and other social scientists has established that various ADR processes have been employed since ancient history to resolve disputes. However, it is only in the twentieth-century that ADR processes have become institutionalized, primarily in labour-management relations, and only in the last twenty years that ADR has captured the attention of governments, the judiciary, and the legal profession.

From its modest beginnings in labour relations, ADR is now on the verge of reinventing the traditional means of resolving disputes. Canadian governments, organizations, institutions, and individuals are following their American counterparts and are actively creating and implementing ADR measures and programs.

In British Columbia, the new ADR movement has only actively surfaced in the last ten to fifteen years, and, while there have been some obvious growing pains in the growth of ADR in this province, there is now an infrastructure of

umbrella organizations, for-profit and not-for profit service providers, and academic think-tanks by which to accommodate ADR's future predicted growth. Professional organizations such as the Mediation Development Association of B.C., educational institutes such as the UVIC Institute for Dispute Resolution, and service providers such as the Canadian Dispute Resolution Corporation and the Fraser Region Community Justice Initiatives Association are all fully functional and each will serve as an important resource to new ADR programs and initiatives.

Chapter 4: Ministry of Attorney General's ADR Programs/Initiatives

In response to the increasing number of ADR initiatives in B.C, concerned with issues pertaining to access to justice, and perhaps spurred on by the recommendations of the Hughes report, the B.C Ministry of Attorney General

began actively formulating an ADR policy starting in the early 1990s. In May 1995, one-and-a-half years after a Proposed Alternative Dispute Resolution Program paper was circulated throughout the Ministry of Attorney General, the Ministry, under Attorney General Colin Gabelmann, released its Alternative Dispute Resolution (ADR) Policy Statement. This nine-page paper, complete with goals, principles, objectives, and action plans, became the Ministry of Attorney General's broad guide in its implementation of its ADR programs.

Under the heading "Goals", the paper states the Ministry of Attorney-General "is committed to a justice and conflict resolution environment which includes a wide range of dispute resolution options" (1). These options include: "1) *Established adjudicative methods of dispute resolution such as litigation and arbitration;* 2) *Collaborative methods of dispute resolution such as conciliation, facilitation, negotiation, mediation and other consensus based processes;* 3) *Methods based on traditional practices or tailored to the cultural diversity of the population;* 4) *Conflict management systems and any organizational or administrative method of minimizing or preventing conflict or encouraging efficient resolution of conflict*".

The policy also includes seven overarching principles. These are 1) *Access*--"Appropriate options for preventing conflicts and resolving them at every stage of a dispute be available and easily accessible"; 2) *Community Participation*--where possible, communities are to utilize their existing conflict resolution resources; 3) *Individual Satisfaction*--ADR options are to maximize "individual involvement and satisfaction"; 4) *Equality*--ADR processes are to balance existing power imbalances between the parties; 5) *Quality of Resolutions*--settlements are to be fair and equitable so that parties will honor them; 6) *Efficiency*--options are to be well-matched to the dispute, cost effective,

and minimize delay in reaching a resolution; and 7) *Awareness*--the public is to be educated about ADR as a process and specific ADR options.

Finally, the policy lists twelve specific objectives that the Ministry intends to meet. Importantly, these objectives also provide the most coherent and contained framework by which to list and detail the various Ministry of Attorney General ADR initiatives currently in place in B.C. (taking into consideration that ADR initiatives are not easily categorized by either the processes they employ nor by the goals they are trying to achieve).

A) The Ministry of Attorney General's Twelve ADR Objectives

Objective One: *"to apply a continuum of dispute resolution options to resolve disputes in cases where Ministry counsel act for the Government of B.C. or for a client Ministry"*.

The first action taken under this objective was in February and March of 1996 when the Ministry launched an ADR training program for its staff lawyers. During this two-month period the Ministry hosted three three-day seminars led by prominent British Columbian ADR practitioners Sally Campbell, Gordon Sloan, and Michelle Duryea. Campbell, Sloan and Duryea were assisted by Craig Darling and Linda Michuluk, both of who had worked on the CORE process. The title of these seminars were "Interest Negotiation Training for Public Sector Lawyers."

In a memo circulated to Ministry lawyers informing them of these seminars, the unknown author states that the: "Ministry of Attorney General policy endorses a justice environment which includes a wide range of dispute resolution options. Developing expertise's within the Branch in interest

negotiation and other consensus based processes is consistent with this policy" (Ministry Interest).

Objective Two: "to incorporate ADR options into contracts prepared for Ministry of Attorney General and encourage the use of such options in contracts drafted for client Ministries".

Jerry McHale, formerly a lawyer with the Legal Services Branch and currently the director of the Ministry's Dispute Resolution Office (DRO), states that while currently "a number of contracts entered into by the government contain provisions for ADR processes, there is as of yet no systematic program for inclusion of these provisions in all contracts" (letter to this writer).

However, while not a systematic program, it should be noted that all government general service contracts, such as those usually offered to government consultants, include an ADR stipulation. Clause 23, listed in small print on the back of the standardized form, states: "All disputes arising out of or in connection with this Agreement will be referred to and finally resolved by arbitration under the rules of the British Columbia International Arbitration Center".

Objective Three: "to incorporate uniform ADR options and mechanisms in legislation".

According to Luke Krayenhoff, a senior policy analyst with the Community Justice Branch and one of the Ministry's experts on ADR, there are currently over 50 statutes in B.C. that already contain mediation and/or arbitration clauses (personal interview). Krayenhoff also states the Ministry is in an ongoing process of assessing this legislation and the appropriateness of the particular ADR forum included in each piece of legislation. By this, he means that after assessing a

particular piece of legislation it might become apparent to Ministry officials that a different ADR process would be more effective in dealing with the issues that arise than the ADR process currently included. If this is the case, the Ministry will then seek to amend or alter the legislation.

Objective Four: "to establish additional disclosure courts, where conditions warrant".

Disclosure courts, according to the ADR policy statement, are a formalized process that "requires both the defense and the Crown at the outset of the proceedings to examine issues in the criminal case and account for the decisions they make on the future conduct of that case" (8). In B.C., it is compulsory for all indictable matters to be sent to disclosure court. Theoretically, the purpose of the disclosure court process ensures that the defense is fully aware of the Crown's case, and an attempt to resolve outstanding pertinent issues has been made before the accused makes his or her first court appearance. Krayenhoff states that disclosure courts "are seen as a success", by the Ministry, "and the use of them will be expanded" (personal interview). _

Objective Five: 'to support the establishment of victim-offender reconciliation programs throughout the Province, where conditions warrant".

The Ministry had already introduced a victim-offender reconciliation pilot program (VORP) before it released its ADR policy. The pilot program, implemented in 1994, involved young offenders and their victims from Surrey and Langley in first-time break-and-enter cases. The contract was administrated by the Fraser Region Community Justice Initiatives Association (CJI) and ran from mid-November 1994 to the end of March 1996. In total, 73 cases were referred by the Crown to participate in the program.

Tim Roberts, in a 1996 independent report prepared for the Community Justice Branch, entitled An Evaluation of a Victim Offender Reconciliation Pilot Program Involving Young Offender Assault and Break and Enter Cases, made several positive conclusions concerning the VORP pilot program. Among them were, "Victims and offenders who participated in the pilot project rated almost all aspects highly", and "VORP victims rated their experiences generally more highly than did a comparison sample of court victims" (ix). Roberts also concluded that, given the previous two points, 'the pilot project, despite the dearth of numbers, has demonstrated that it is feasible to process first-time assault and B&Es to the satisfaction of both parties" (ix). Currently, the Province offers partial funding to CJI.

Objective Six: "to increase adult and youth diversion throughout the Province".

According to Krayenhoff, due to the Fall 1996 creation of the Children and Families Ministry, the Ministry of Attorney General is no longer responsible for youth diversion programs. However, the Corrections Branch of the Ministry will continue to supervise adult diversion cases and its target number for the fiscal year 1996/97 was to have over 4400 adults in diversion programs (personal interview).

Objective Seven: "to develop a Ministry organizational structure capable of coordinating: (a) consultation with non-governmental dispute resolution agencies, stakeholders, and the community, (b) participation in interministry and intergovernmental ADR initiatives, (c) program development and funding in consultation with the community, (d) research, analysis and evaluation of ADR issues to inform and prioritize ministry policy, (e) the development of a reporting system which catalogues and reviews ADR processes in government, and (f) the

implementation of organizational and administrative structures within the Ministry for the purposes[of minimizing conflict".

In December 1996, the Ministry established a Dispute Resolution Office (DRO) and McHale was appointed as the director/manager. The Office has a staff of five and is independent of other Ministry offices and branches; McHale reports directly to the deputy minister.

In a paper that was internally circulated in May 1996, the Ministry outlined its proposed DRO, the rationale for establishing it, and the functions it would include. The idea of an office was proposed because there was agreement in the Ministry that while some "individual ADR projects in government are moving ahead, others are stalled. There is need for centralized promotion, coordination and organization of ADR services" (Ministry DRO). Among the proposed functions it would have were to: give advice to government; assist in ADR policy and development planning; provide information and education; promote, organize, and coordinate ADR services; link needs and resources (similar to a secretariat); and liaison with the Bench, Bar, and community as a whole.

Objective Eight: "to consult with the Judiciary and the Bar to utilize the existing Rules of Court and to effect changes to the Rules of Court which may incorporate ADR options".

The Rules of Court for the Supreme Court of British Columbia already have some provisions for the use of ADR options, specifically pre-trial conferences, mini-trials and settlement conferences (mediation sessions).

` Subrule (1) of R. 35 provides that party may request the holding of a pre-trial conference after a notice of trial has been delivered. Subrule (2) authorizes a judge or master, at any stage of an action, to direct the holding of pre-trial conference, mini-trial or settlement conference. And subrule (4) provides that

whether or not applied for, the judge or master conducting a pre-trial conference may order that the parties attend a mini-trial or a settlement conference.
(Lysyk 2)

The Supreme Court of B.C. is also in the process of introducing an expanded ADR program that would contain both an arbitration and mediation element. The Trial Overflow Program will establish a voluntary arbitration program for parties whose cases are bumped from the court docket each Monday morning. Cases are bumped each week because court administrators overbook the courtrooms and judges--by up to 1000%--due to the high number of pre-trial settlements achieved. Due to the uncertain nature of this tactic, however, several cases are always inevitably bumped.

Supreme Court of B.C. Chief Justice Williams is also in the process of implementing a more extensive mediation program into the Court. Although it is preferable to Williams that the disputants enter into mediation voluntarily, he is considering a model which, if only one party wants to mediate, or if the judge believes mediation is the best route, then the judge will be able to order the parties into mediation (Lee F10).

In the future, Williams wants this program to utilize mediators from a government-approved roster, but as an interim measure, he set-up a mediation training program for interested Supreme Court judges. In two three-day workshops held in March and May of 1997, approximately 60 Supreme Court judges attended training sessions conducted by Michael Fogel. Now, if during a trial, the judge feels a mediation session is an appropriate way of settling the case, he or she will provide the parties with the list of trained judges and the parties will have the preference to choose the judge/mediator they desire. (Williams personal interview).

The B.C. Provincial Court has also modified its Rules of Court to include some ADR stipulations. On June 3, 1996 Rule 2 of the provincial Court Rules came into force and it mandates that judicial case conferences for all unresolved child protection cases headed for trial (McHale letter to this writer). There are also reports that B.C Provincial Court Chief judge Robert Metzger intends to expand mandatory mediation in the provincial system in 1998 (Lee F8).

Objective Nine: "to support the use of dispute resolution alternatives to litigation in: (a) family matters, such as s custody, access, maintenance and division of property, (b) motor vehicle personal injury claims, and (c) other civil matters."

One of the most significant steps taken by the Ministry in meeting this objective was the establishment of four Family Justice Centres (FJC's) in select communities throughout the province. The Ministry, in conjunction with the Ministry of Social Services and the Ministry of Women's Equality, opened pilot FJC's in Burnaby/New Westminster, Kamloops, Kitimat, and the Nicola Valley in 1994. According to the Ministry, these areas were chosen as test tests because they are representative of the province's overall diversity. That is, they are "a large, multi-cultural urban centre; a large self-contained urban city; a small fairly remote community; and, an Aboriginal community" (Ministry News May 2, 1994).

The Centres, opened at a combined cost $1.1 million, were designed to meet the particular needs of the community in which they are located. More, specifically, they were implemented in order to assist families in the process of separation or divorce, or "families experiencing difficulties in their family relationship" (Ministry News May 2, 1994). In providing these services, the FJC's rely heavily on community involvement. The Ministry states that "service delivery at each site will be shaped with the input of a community advisory panel of

volunteers who will ensure the centre is meeting local needs" (News May 2, 1994).

Each centre contains a number of government and non-government resources. Some of the services provided include: short-term counseling; information on services that provide alternatives to going to court; assistance in obtaining, changing, and enforcing custody, guardianship, or maintenance orders; legal advocacy for income assistance recipients; and education programs and material about how separation and divorce affects family members. there is no charge for any of these services except a nominal fee for supervised child access if it is sought.

According to a December 1995 report by the consultant firm R.A. Malatest & Associates Ltd.:

> ...it appears the implementation of the Pilot Project has generated a high level of overall satisfaction with services provided, as almost three-quarters (70.0%) of clients indicated that they were satisfied or very satisfied with the services received from Family Justice Centers. (ii).

The report also concluded that the FJC's have been successful in reducing the number of times clients had to explain their case to different government staff; increasing access to educational materials and programs; decreasing clients utilization of courts; securing higher levels of compliance with court orders; coordinating better service delivery; and, increasing satisfaction with the fairness of orders obtained (iii).

Some two years after the pilot project began and seven months after the release of the Malatest & Associates report, the Ministry noted that approximately 1,700 people had used the four FJC's, and that 780 families had

taken advantage of the centre's supervised access program (News July 23, 1996). However, despite these numbers and the generally positive independent evaluation, Attorney General Ujjal Dosanjh has stated, "New family justice centers won't be established" (News July 23, 1996).

Instead, the Ministry has decided to take the two most successful features of the Centres--parent education programs and family mediation counselors--and introduce them into other communities throughout B.C. where family legal aid costs are particularly high. Existing family court counseling offices will manage the new programs (Ministry News July 23, 1996).

Most recently, the Ministry of Attorney General has announced that the Burnaby/New Westminster Family Justice Centre will play host to a pilot project whereby it will be mandatory for separating parents applying for child custody, access, or support orders to attend a government-funded three-hour parenting course. The project, scheduled for implementation on June 1, 1998, is intended to teach parents about ADR options (instead of divorce litigation) as well as the impact family breakdowns have on children (Jiminez A1).

In reference to Objective Nine Sub-section B, the Insurance Corporation of B.C. (ICBC), formerly through a contract with the BCICAC and now through contracts with five ADR service providers, operates a voluntary mediation program for personal injury claims.

The contract was administered by the BCICAC, via a sub-contract with CRDC, from the program's inception in 1987 to January 1997. When BCICAC

ran the program they would select the date, time, and place of the mediation conference after consultation with the parties (often it was at the BCICAC office at Canada Place in Vancouver). In its first year of operation, 146 cases were referred to mediation. Currently, approximately 1500 personal injury claims are mediated each fiscal year and the Ministry is exploring ways in which to increase that number (Krayenhoff personal interview).

In the November 1995 issue of Equity magazine, a recent ICBC-commissioned study comparing the costs of litigating personal injury claims to negotiated or mediated settlements was summarized ("Mediations on Mediation" p.14,19). The study focused on 788 select files taken from around the province and found that the average cost of a negotiated settlement was $5,778. Included in this figure was the claimants costs and disbursements, ICBC's lawyers' fees, and other costs incurred by the adjuster. The average cost of a litigated settlement was $19,025, a 103% increase. The total costs of a mediated settlement were $10,437 (including the costs of hiring the independent mediator).

The Small Claims Court Program, implemented in February 1991, is an ADR initiative which can be placed under Objective Nine, Sub-Section C. As a result of this program, Small Claims litigants now enter into a "compulsory mediated settlement process held in an informal setting" before their case is heard in front of a judge (Adams, Getz et al. 2). These settlement conferences are designed to be "clutter-free pre-trial mechanisms which suit the largely lay

clientele of the court" (Adams, Getz, et al. 31). They are presided over by Small Claims Court judges who have participated in mediation training and each conference last approximately thirty minutes. Evidence shows that currently a settlement or consent order is yielded at the settlement conference in 50% of the cases (Adams, Getz et al. 34).

A second ADR initiative which can be placed under this directive is the Residential Tenancy Branch's mediation and arbitration program. In 1989 the provincial court granted the Branch (then located in the Ministry of Consumer Services and now found in the Ministry of Attorney General) the right to have binding arbitration powers in resolving landlord/tenant disputes. Currently, the Branch has about 40 arbitrators who presided over approximately 24,000 arbitration applications in the 1995/96 fiscal year. The previous year the Branch had presided over approximately 19,500 applications.

A new ADR initiative, a program with a mediation component for people who live in manufactured home parks, was implemented by the Residential Tenancy Branch in December 1994. Previously, residents and owners of home parks, like all other tenants and landlords, were able to resolve their disputes only through arbitration. A mediation alternative was deemed necessary for manufactured home park dwellers because they usually have longer, more permanent tenancies which result in a closer relationship with the landlord, and which result in more complex issues (such as sub-letting and violation of park rules) being disputed. The Branch reasoned that mediation would better suit these situations as it allows the parties to resolve the disputes themselves and

allows for a better understanding of the other party's interest--thus facilitating a better long-term relationship.

In December 1995, the Residential Tenancy Branch modified its dispute resolution program once again, when, following public consultation and in accordance with the findings of the Ombudsman Report #27, it established an Arbitration Review Panel. The Ombudsman Report, which studied the Residential Tenancy Act, stated that "the available remedy for review, a petition under the *Judicial Review Procedures Act*, did not offer the most appropriate remedy for review of residential tenancy arbitration decisions" (Ministry Annual 3). The independent Review Panel cannot alter the original arbitrator's decision but can confirm it or set it aside, opening the door for a new arbitration hearing to take place.

Objective Ten: 'to recognize and support community-based dispute resolution practices by aboriginal people".

One of the most recognized dispute resolution practices used by aboriginal people is the healing circle or community justice circle. This traditional aboriginal practice brings together the victim, the offender, members of their respective families, their respective friends, and community leaders. Together they discuss the offense, its impact on the victim and the community, and then they agree on an appropriate punishment for the offender.

In May 1996 the Policy and Communication Branch of the Ministry of Attorney General circulated a discussion paper on circle sentencing which

addressed the possibility of expanding circle sentencing into non-aboriginal communities. The paper, written by J.A. Villa-Arce, stated in it its preamble that it was drawn up in order to “clarify”, “explore”, and “stimulate”, issues and ideas surrounding circle sentencing. Presently, the feasibility of circle sentencing in non-aboriginal communities is still undetermined. However, through circulation of the memo, it is apparent that the Ministry is recognizing ADR initiatives traditionally found in aboriginal communities.

Objective Eleven: “to support educational processes designed to increase the awareness of ADR options and the circumstances in which they are appropriate for the government, the legal profession, and the public”.

Currently, in B.C. there are a limited number of organizations, agencies, and institutes that focus on ADR education and promotion, and the Ministry of Attorney General is actively involved with some of them. Stephen Owen, the former Deputy Attorney General, and McHale, the director of the Ministry's DRO, are listed in the UVIC Institute for Dispute Resolution as two of its eight directors (UVIC Institute for Dispute Resolution). In the past, the Ministry had also provided financial support to The Conflict Resolution Council of B.C.

Objective Twelve: “to further develop the ADR policy to broaden and encourage the application of dispute resolution options through: (a) continuing consultation with dispute resolution stakeholders and advocates, (b) promoting the use of ADR options among all ministries and agencies of government, (c) promoting the

use of ADR techniques in neighborhood or community disputes, (d) identifying and removing barriers to the understanding and use of alternative dispute resolution options, (e) supporting multi-party ADR processes such as land use planning and aboriginal treaty negotiations, and (f) fostering the discussion and resolution of significant topics in the field of ADR, such as the debates about mandatory vs. consensual ADR and about the qualifications of practitioners".

Under the directive of Sub-Section A, the Ministry is actively involved in the Joint Committee on Dispute Resolution which is comprised of ADR service providers and which meets occasionally to discuss issues important to ADR practitioners and issues of importance in the ADR field. Also, the Ministry, particularly McHale, is in continual informal contact with, among others, Peter Grove from the BCICAC, Gardiner from the CDRC, and Chief Justice Williams (McHale personal interview; Grove and Kiely personal interview; Gardiner personal interview; Williams personal interview).

However, not all stakeholders are satisfied with the Ministry of Attorney General's efforts of consultation. Gustafson, the Co-Director of the CJI states that he feels "out of the loop" noting that he was unaware that the Ministry had established the DRO until he contacted the Ministry regarding another matter (personal interview).

One step taken by the Ministry's Community Justice Branch in 1996 under Sub-Section B was to publish the British Columbia Directory of Dispute Resolution Practitioners. This directory was made available primarily to government lawyers and government program managers although the Ministry stated that it encouraged interested private sector parties to obtain a copy. It

includes the names and addresses of over 150 individual and corporate ADR practitioners and lists their areas of expertise, the number of times they have served as an ADR neutral and in what type of dispute, and any Crown references that they might have. The directory was compiled from the voluntary response the Ministry received from its "practitioner questionnaire" that was mailed out to all known ADR service providers in B.C. in the summer of 1995.

A second step under Sub-Section B is a pilot project initiated by the Ministry of Transportation and Highways in August 1997. Previously, the Ministry resolved expropriation disputes with home-owners or property-owners using an arbitration program. The pilot project, administrated by the CDRC, will introduce a mediation component to expropriation disputes (Gardiner personal interview). It is expected that the pilot project will last six to nine months and that between fifteen to thirty cases will be referred to mediation over the life of the project (Gardiner e-mail).

In reference to Sub-Section C, Norm Brown, the Ministry's director of Crime Prevention for the Community Justice Branch, states that the Ministry has provided funding in years past to various municipalities which, in turn, sponsor initiatives within their jurisdiction that promote ADR in community or neighborhood disputes. One example of this was an approximately $30,000 dollar grant that the Ministry provided to the City of Langley over a three-year period in the early 1990's. The City of Langley used the money to fund the CJI to provide ADR services in neighborhood disputes.

In reference to Sub-section F, the Ministry is currently involved in discussions with ADR stakeholders and service providers concerning the

implementation of practitioner qualifications and industry standards. Specifically, the Ministry is in the process of establishing two rosters, one for government-approved arbitrators, the other for government-certified mediators. It is likely that only arbitrators on the roster would be eligible to act as neutrals in the new Trial Overflow Programme and that only mediators on the roster could act as a neutral in the Supreme Court's voluntary mediation program.

There is speculation that the criteria for being placed on the arbitration roster will be a minimum of ten years at the Bar and at least ten paid arbitrations. (BCICAC Implementation) Meanwhile, a consultation paper released by the DRO in November 1997 proposes that in order to be placed on the mediator roster, practitioners will have to meet the following criteria:

1. Training and Education Requirements

a) 80 hours of core training in interest-based mediation and conflict resolution theory and skills; provided that extensive mediation experience could substitute, in part or in whole, for training time.
b) 20 hours per year of ongoing professional development or continuing education.
c) for non-lawyers, a 40 hour course in civil procedure

2. Experience Pre-requisites

Either:

a) completion of a minimum number of mediations within the last 3 years, being:
* 10 fee-paid private mediations, or
* 10 mediations with an approved mediation organization which provides training or mentorship, or
* 7 mediations in a fully supervised and approved practicum; and
b) relevant work experience being:
* 3 years of work, after an undergraduate degree, in a related field; and
c) client acceptability: demonstrated by 4 positive references; 2 from mediation clients, and 2 from peers or supervisors familiar with the applicant's work; provided that the references must speak

credibly to the applicant's mediation skills, commitment to the mediation process and "collaborative attitude".

Or:

a) proof of qualification or accreditation by an approved mediation organization primarily involved, as a society or corporation for at least 3 years in B.C., in mediating or mediation training. To be approved the organization's criteria must define a standard equal to, or higher than, those defined here, and its qualification process must be at an equal or higher standard (2-3).

In addition, roster members must have adequate liability insurance and must agree to uphold a code of conduct as decided by a "Mediator Roster Society", the roster's governing body. The day-to-day work of the society would be administrated by a secretariat, most likely the BCICAC (DRO 14; Grove/Kiely personal interview).

In discussing Sub-sections D, E, and G, Krayenhoff states that each objective represents a broad, slightly vague idea, and while the Ministry is supportive of such things as the settlement of aboriginal treaty and land claims through the use of ADR, there are no specific programs or initiatives yet in place that can be directly attributed to or correlated with these components of Objective Twelve (personal interview).

Summary

In using the Ministry of Attorney General's Twelve Objectives as a framework, it is possible to produce a broad and fairly complete (but not exhaustive) sampling of action taken, or support given, by the Ministry of Attorney General under the guise of its ADR policy. Like ADR processes themselves, the policy and the programs and initiatives discussed cover a wide range of activities and ideas, some of which pre-date the release of the Ministry of Attorney General's policy statement.

To the Ministry's credit, programs that have already been the subject of independent studies--the Family Justice Centres (FJC's), the VORP program at CJI, the Small Claims Court initiative, and the ICBC mediation program, for example--have all received positive reviews. Individuals who participated in the FJC program or the VORP programs rated their experiences as positive while the Small Claims Court settlement conferences have resulted in consent orders in approximately fifty percent of the cases. Meanwhile, there is evidence that the ICBC program results in considerable savings for the government.

Chapter 5: Two Theories of Empowerment

As discussed previously, there are two central positions or models behind the rebirth of the North American ADR movement and the B.C Ministry of Attorney General, in its ADR policy, has not explicitly stated which one, if either, it supports. The first model envisions ADR as an important tool of court reform in that the increased use of ADR can potentially relieve court congestion as well as undue costs, for the government and the disputing parties (Pirie 14). The primary goal of this model is *to improve access to justice*. The second model advocates ADR as a method by which to enhance both personal growth and community involvement in the justice process. As its primary goal, this model seeks *to return disputes to their owners and provide more effective resolutions* (Pirie 14).

In analyzing the two models it soon becomes evident that they share an overlapping language yet use the same words with diverging meanings. This is most true for the term “empowerment”. Proponents of the court reform model argue that they can empower the individual through improving his access to “professional problem-solvers” and the existing court system (Schwerin 25). Advocates of the transformative model believe that the individual can become empowered when she is allowed to take ownership of her dispute.

These two models also share a commitment to the same ADR processes--mediation, arbitration, etc.--yet disagree on how these processes should be initiated and administrated. Court reformers argue that that ADR options should serve to complement the existing judicial system. As such they favor initiatives that are mandatory for disputants; government regulated and funded; centralized in their administration; staffed by professionals; and, focused primarily on processing a high number of cases in a cost-effective manner (Becker 117).

The community-based transformative model aspires to use ADR processes to create a justice system outside of, or in opposition to, the traditional justice system and to promote peace-making as a way of life. Subsequently, this

model emphasizes disputant control of the processes; grass-roots initiatives; decentralized and low overhead administration; volunteer staff; and, importantly, educating the disputants about the root causes of disputes in order to prevent future disputes from occurring.

A) The Court Reform Model

The court-reform model--also known as the "reformist popular justice model", the "legal self-help movement", or "the agency model"--is associated with court-affiliated ADR processes that seek to provide streamlined resolution services to disputants (Becker 114). These ADR processes are employed primarily to combat court delay and the high costs associated with litigation, but also to make the court system more comprehensible and more suitable for processing minor disputes

The court reform ADR movement is the latest chapter in American legal reform movements. Sally Engle Merry cites two previous periods in American history where the courts were reformed in order to make them more efficient and accessible to the common person. The first was the judicial movement of the late 1880's, "during which decentralized (and I presume uncontrolled) local justices of the peace were replaced with a new unified and specialized court system" (40-41). The second occurred in the Progressive Era in the early part of the twentieth century as, at this time, legal scholars such as Roscoe Pound were alerting those who listen that the "trial track" was plagued with congestion and delay (Adler "The Future..." 1993 74). In response, reforms "dedicated to improving access to justice and efficiency" were implemented based on "concepts of scientific management popular at the same time in the development of factory

production and the assembly line" (Merry 40). The most notable reform of this movement was the creation of the municipal court, with special branches for juveniles, small claims, and domestic problems (Merry 40-41).

The modern court-reform ADR movement was born in response to a "tidal wave" of litigation that had overcome the American court system in the late 1960s and early 1970s. By 1980, court action in the United States had risen to unprecedented levels, and lawsuits were being filed in the fifty state court systems at a rate of approximately five million per year, although one estimate was that this figure was closer to twelve million a year (Becker 112). Meanwhile, American federal courts, a much smaller judicial operation, were receiving nearly 170,00 suits annually as the rate of lawsuits filed in federal court rose by 84 percent between 1965-1975 (Becker 113).

Serving as the unofficial spokespersons of the court-reform ADR movement were former Supreme Court Chief Justice Warren Burger and former U.S. Attorney General Griffin Bell; among its supporters, it counted much of the American legal establishment. It was (and continues to be) "endorsed, originated, coordinated, funded, and evaluated" by prominent organizations such as the U.S. Department of Justice; the American Arbitration Association (AAA); Harvard Law School; the American Bar Association (ABA); and the George Mason University Postgraduate Program in Conflict Management (Becker 116; Schwerin 149).

Given its popularity with the legal establishment, it is not surprising that this model only endeavored "to make the system work better, not to change its underlying principles" (Merry 40). It is this general acceptance of the status quo that most differentiates it from the transformative model.

The court-reform model seeks to improve the system through refining and reworking justice procedures. It does not question the "fundamental organization

of the legal order", "the underlying structures of capitalism and the law", or does it "seek to alter relationships of power" (Merry 40). Moreover, its detractors argue, the court-reform ADR model upholds undesirable values associated with the justice system such as the profit motive, hierarchical institutionalism, professionalism, and elitist politics (Becker 116).

Taken further, these criticisms can allude to an even more sinister agenda. Some critics have suggested that the court-reform ADR model may be a project advanced by the legal establishment in order to maintain social control while appearing to be progressive and responsive. Merry and Neil Milner state that popular justice models operating within the state, rather than outside it, "can become another tool at the state's disposal, a way to exercise state control concealed by the mask of informality" (6-7), while Peter S. Adler asserts that, "Carried to its extreme, ADR would thus appear to be a conservative political strategy masquerading as a reform movement" ("Is ADR..." 1987 67).

At a theoretical level, the court-reform model is best exemplified by the "multi-door courthouse", a concept first articulated by Harvard Law Professor Frank Sander in 1976. Sander's multi-door courthouse was a justice facility with several doors (in a figurative sense) with only one leading to the courtroom. The others would open to various ADR processes such as mediation, arbitration, or even specialized tribunals "such as medical malpractice screening boards or tax courts" (Adams and Bussin 19). The key aspect of the facility was to be at the intake and referral stages; the key player a highly trained intake specialist who, after listening to the specifics of the dispute, would decide upon the most appropriate dispute resolution mechanism, or series of mechanisms, by which to resolve it (Adams and Bussin 19).

In practice, the multi-door courthouse is best exemplified by the Neighborhood Justice Centers (NJC's) opened in the United States in the late

1970s and early 1980s. The first were established with federal funding at the behest of then Attorney General Griffin Bell in Atlanta, Los Angeles, and Kansas City in 1978. Federally funded centers in Honolulu and Dallas followed in 1980 (Adler "The Future..." 1993 73).

Professional Conflict Resolvers

In the 1990s the court-reform model is perhaps best identified by what it has given birth to--a new profession of "of conflict resolvers", and by the agenda they are actively advancing (Becker 115). Organized into powerful professional bodies, such as the Society for Professionals in Dispute Resolution (SPIDR) and the AAA, conflict resolvers are now focused on improving their professional standing and the quality of services they provide. Edwin Schwerin, addressing the mediation field, states:

> This group argues that as mediation grows and matures there must be more emphasis given to the quality of service that is provides and that the courts and other funders of community mediation programs have a right and a responsibility to monitor mediation services and provide accountability to the public and users of mediation services" (144).

The move towards standards and qualifications is fraught with difficulty, however, as there are competing perspectives on what constitutes quality ADR and on what ADR practitioner qualifications should be. In short, there is conflict among professional conflict resolvers.

In assessing quality ADR one can take either an "interest-based" perspective or a "rights-based" perspective; these pertain to how the disputes should be approached and framed by the practitioner. "Interest-based

negotiations are negotiations which focus on the underlying needs and requirements of the parties, whatever form they make take" (Adams and Bussin 3). They also seek to "understand, uncover, and explore the underlying interest" of all parties involved (Adams and Bussin 3).

In contrast, rights-based processes are focused primarily on the legal rights of the parties involved. In rights-based ADR, "the parties attempt to anticipate the outcome in court, and the dispute is approached using that prediction as a benchmark" (Adams and Bussin 3). This approach is criticized because when a dispute is settled in court it is settled legally, yet often the underlying interests of the parties have not been understood or addressed. This usually causes dissatisfaction for the "losing" party and, it is argued, does not actually solve the problem but merely dresses it in a legal verdict.

There is also disagreement between those who favour "reconciliation-orientated" ADR and those who prefer "settlement-orientated" ADR. These are competing viewpoints on how the dispute should be resolved. Reconciliation ADR focuses on resolving the dispute in such a way that the parties are able to re-establish or retain their previous relationship. Settlement-orientated ADR, on the other hand, seeks a solution that satisfies both parties but does not concern itself with the parties' future relationship.

The idea of practitioner qualifications is also contested among conflict resolvers. Some believe that qualifications should be credential-based while others argue for "performance-based" qualifications. In short, it is an "art versus science" argument. Those in favour of credential-based qualifications believe

that ADR practitioners should be evaluated by their training and education levels. This, it is argued, is an "objective" method of determining practitioner expertise as these qualifications are measurable and comparable. Those who advocate performance-based qualifications assert that the only relevant issue is the practitioner's ability to resolve a dispute in an ethical and legal manner, and in a manner that is satisfactory to the parties involved. Consequently, proponents of performance-based qualifications argue that these subjective skills can be learned in nay number of ways and, often, in a relatively short period of time.

Significantly, proponents of both views have labeled the opposing view as exclusionary. Those in favour of credential-based qualifications believe that performance-based qualifications are exclusionary because there is a reluctance among some established ADR practitioners to allow new practitioners to gain the experience required. one author writes: "Apparently existing players are reluctant to let the equivalent of their profession's articling students sit in on or audit their dispute resolution meetings because of concerns about client confidentially and the additional costs" (Huber 40). In addition, another author notes that the performance-based "may serve the self-interest of those professional truing to create and preserve a marketplace for their talents" (Rogers 26). On the other hand, proponents of performance-based qualifications argue that credential-based qualifications are exclusionary because the costs of training courses and schooling can be prohibitive to some interested individuals.

Despite these internal disagreements, governments in most jurisdictions with ADR policies or widespread ADR programs are moving towards, or have

already put in place, standards and practitioner qualification requirements, including the Ministry of Attorney General in B.C.

B) The Transformative Model

The transformative ADR model or theory took root in the United States in the 1970s when community activists “aspired to build a justice system under the authority and normative order of the community rather than that of the state” (Merry and Miner 10). Building on the success of neighborhood policing and neighborhood watch initiatives, and learning lessons from the criminal-justice movements such as bail reform and prisoner self-governance, the community activists ‘sought to reshape society and to give greater power over the handling of their conflicts to relatively powerless people” (Merry and Milner 9-10).

The emergence of the transformative model--also known as “pure community mediation”, “grassroots mediation”, “homegrown mediation”, “participatory justice”, “the transformative orientation”, “the communitarian model” and ”the community model” (Becker 114, 119; Stephens 23; Bush and Folger 81; Schwerin 144)--mirrored a paradigm shift evident in several other fields or disciplines at the same time, as the sentiment, “People whose lives are affected by a decision must be part of the process of arriving at that decision” became popular not only in justice issues but also in other fields, most notably health care (qtd. in Becker 115; Adler “Is ADR...” 1987 65). This broader paradigm shift that occurred (and that is still occurring) has been labeled “the third wave”, “new age politics”, or “the aquarian conspiracy” (Becker 114). One author lists the attributes that she believes characterize this shift:

> (a) change coming by consensus, rather than being imposed by authority; (b) individual help and voluntarism becoming more important than institutional help and services; (c) win-win power relationships instead of win-lose; (d) more feminine, intuitive processes rather than rational, linear, and masculine processes; and (e) more decentralization and diffusion of power instead of more centralization of power" (qtd. in Becker 114).

While another states that the new socio-political order is characterized by: "demassification, heterogeneity, pluralism, decentralization, self-help, participatory democracy, networking, and multiple options" (Stephens 23).

The transformative ADR model can be divided into criminal matters and civil matters and in both scenarios the model is explicitly founded on two components: (1) a critique of the status quo and, (2) a framework for change.

Critique of the Status Quo--Criminal Matters

In their critique of the traditional justice system as it pertains to criminal matters, advocates of the transformative model argue that currently the emphasis of the court system is on retributive not restorative justice. Retributive justice relegates crime to, "a violation of the state, defined by lawbreaking and guilt", and, as a result, "the two most important players [the victim and offender] are often banished to the sidelines feeling frustrated and ill-served" (Gustafson 6; McHugh A18). Moreover, "It is not uncommon for both sides to feel victimized and that is not addressed in court. In court there has to be a victim and an offender (qtd. in McHugh A18).

Framework for Change--Criminal Matters

In their framework for change, advocates of the transformative model argue that justice in criminal matters should be conducted according to the principles of restorative justice. In short, advocates of restorative justice define crime as a, "violation of people and relationships "(Gustafson 6). That is, "any time there is a crime, relationships are broken. The focus then is to restore those relationships and have the wrongdoer take responsibility for what they've done" (Fine A5).

Restorative justice, its advocates argue, repairs torn threads--relationships--in the fabric of communities by empowering both the victim and offender. For the victim, empowerment is gained primarily through finding closure. Programs based on restorative justice--such as VORPs--allow the victim to "get on" with his life. More specifically, "...it provides an opportunity [for victims] to ask questions of the offender [and] it allows them to explain how being victimized has made them feel; to express their feelings of anger, frustration, and disappointment" (McHugh A18). Restorative justice programs may also culminate in more practical benefits for the victim such as restitution paid or other action taken by an offender to "wrong a right".

Offenders, meanwhile, often indicate "...that choosing to face their victims and become aware of the depth of harm their actions had caused entire family systems, has become a powerful internal deterrent to future criminality. (Gustafson 7). As one offender who had been through a restorative justice program attested: "I guess through the VORP program you wake up a little bit" (McHugh A20)

Critique of the Status Quo--Civil Matters

In their critique related to civil matters, advocates of community-based transformative ADR programs argue that the justice system's reliance on professional service providers has rendered individuals incapable of solving their own problems. In other words, the professionalized justice system has engendered a sense of learned-helplessness that is now pervasive in most communities.

John McKnight captures this argument in a broader sense. McKnight believes that there is an increasing sense of social disarray in American society and that it can be traced to "weak communities, made ever more impotent by our strong service system" (viii). Symptoms of social disarray include: "families collapsing, schools failing, violence spreading, medical systems out of control, justice systems overwhelmed, prisons burgeoning, human services degenerating, and surveys and studies everywhere indicating the loss of faith of Americans in their basic institutions" (viii). McKnight theorizes that formerly competent communities--communities that were able to solve their own problems and look after their own members--have become paralyzed by the growing professional sector. Community problems are now addressed by outsiders--state appointed social workers, lawyers, and therapists--and, consequently, individuals feel disempowered and communities have lost their identities.

Yukon Territorial Court Judge Barry D. Stuart, speaking in the Canadian context, echoes the beliefs of McKnight. Focusing specifically on the justice system, Stuart states that, among other problems, violent crime is increasing, rates of recidivism are increasing, and there is "a dramatic over representation in the Courts and especially in our jails of the illiterate, poor, mentally ill and minority groups" (2). Instead of increasing funding to the current system, Stuart argues that, "The community must regain the skills and responsibilities for taking

much greater responsibility for law and order issues" (3-4). In order to regain these skills the community must reduce its "...unrealistic and detrimental excessive dependence upon...professional resources" (3).

Framework for Change--Civil Matters

The second component of the transformative model dealing with civil matters is a framework for change: this involves re-empowering the individual by allowing him to take ownership of his dispute, and then have the empowered individual act as a catalyst in re-engaging his community at large.

Robert A. Baruch Bush and Joseph P. Folger offer perhaps the best summation of the transformative model as it applies to and promotes personal and social change in civil matters. They argue that, "disputes can be viewed *not* as problems but as opportunities for moral growth and transformation" (81). They state:

> In this transformative orientation, a conflict is first and foremost occasion for growth in two critical and interrelated dimensions of human morality. The first dimension involves strengthening the self. This occurs through realizing and strengthening one's inherent human capacity for dealing with difficulties of all kinds by engaging in conscious and deliberate reflection, choice, and action. The second dimension involves reaching beyond the self to relate to others, this occurs through realizing and strengthening one's inherent human capacity for experiencing and expressing concern and consideration for others, especially others whose situation is 'different' from one's own (81).

In unpacking their views of transformative ADR, Bush and Folger focus first on the individual. They state:

> A conflict confronts each party with a challenge, a difficulty or adversity to be grappled with. This challenge presents parties with the opportunity to clarify for themselves their needs and values, what causes them dissatisfaction and satisfaction. It also gives

> them the chance to discover and strengthen their own resources for addressing both substantive concerns and relational issues. In short, conflict affords people the opportunity to develop and exercise both self-determination and self-reliance. (82).

Moreover, Bush and Folger identify five distinct and concrete ways in which participation in mediation can lead to personal growth. First, it can clarify the disputant's goals in resolving the dispute. That is, the disputant may "...realize more clearly what her goals and interest are in the situation at hand, why she holds those goals, and that her goals are important and deserving of consideration"(85).

Second, mediation can make the disputant aware of the various options she has in securing her goals and it allows her to realize that she has control, either entirely or partially, over these options (86).

Third, mediation can be empowering in that it provides the disputant with new skills by which to deal with conflict in her life. She may learn, "...how better to listen, communicate, organize and analyze issues, present arguments, brainstorm and evaluate alternative solutions, and so forth, and then strengthen those skills by using them practically in the mediation" (86).

Fourth, the disputant can become empowered through obtaining a greater realization of the resources available to her in resolving the dispute. This form of empowerment can either be an increased awareness by the disputant of resources already available to her or of resources previously unknown (86-87).

Finally, mediation can be empowering in that it gives the disputant the opportunity to make a carefully considered decision regarding how she chooses

to resolve the issue. She can "reflect, deliberate, and make conscious decisions for herself about what she wants to do--including decisions about what to do in the mediation discussions themselves, and decisions about whether and how to settle the matter or what other steps to take" (87).

Bush and Folger argue that when one, some, or all of these forms of empowerment are experienced by a disputant in mediation, the disputant "experiences a greater sense of self-worth, security, self-determination, and autonomy" (87). In other words, *she is transformed*. Importantly, these feelings of empowerment can be achieved even if the external circumstances of the dispute remain unchanged and regardless of the outcome of the mediation (87). Moreover, personal growth is not limited to the mediation session but can "spillover" into other facets of the disputant's life (88).

The second transformative aspect of mediation, and other forms of ADR, is in its ability to serve as a catalyst in community-building. This, Bush and Folger argue, stems from the mechanisms ability to generate *recognition*. Recognition means "the evocation in individuals of acknowledgment and empathy for the situation and problems of others" (2). More concretely, "parties achieve recognition in mediation when they voluntarily choose to become more open, attentive, sympathetic, and responsive to the situation of the other party, thereby expanding their perspective to include an appreciation for another's situation" (Bush and Folger 89). In describing recognition, the authors are careful to explain that the transformative aspect of recognition "does not mean the experience of validation or satisfaction that a party gets from *receiving*

recognition" but rather the changes that *giving* recognition elicits in the individual (92).

Similar to their description of personal empowerment, Bush and Folger reduce the notion of recognition to five discrete categories or stages. Unlike personal empowerment, theses stages are sequentially ordered. In the first stage, a disputant "...realizes that he feels secure enough to stop thinking exclusively about his own situation and to focus to some degree on what the other party is going through" (89). This is defined as "consideration of giving recognition" (89). In the second stage, recognition can be given when the disputant expresses the desire for giving recognition. That is, "he realizes that he wants to focus his attention on what the other is experiencing and to find some way of acknowledging that experience by his conduct in the session" (90). The third category is "giving recognition in thought". Variously described as "the penny dropping" or the "light bulb going on", the disputant comes to the realization that "...he does not have to view the other so harshly and negatively as he had been doing, and he consciously moves to a new and more sympathetic view" (90). In the fourth stage, the disputant gives recognition in words, either directly to the other party or through the mediator. Often at this stage, the disputant "accompanies a statement of new understanding with an apology of some kind" (91). The last stage is "giving recognition in actions". This is often a concrete accommodation to the other party in terms of how the disputed issues are handled.

The affect of these stages of recognition is that the disputant "realizes and enacts his capacity to acknowledge, consider, and be concerned about others" (91). In other words, he expresses an understanding of community and the necessity to sometimes place the needs and desires of others above his own.

Bush and Folger are careful to note, however, that recognition is not genuine "...unless it is freely given" (93). If it is reached through "...pressure, cajoling, or moralizing, it represents nothing but self-preservation", by the party offering it (93).

The full transformative effect of mediation is achieved when personal empowerment and recognition are combined. Bush and Folger state:

> ...that full moral development involves an *integration* of individual autonomy and concern for others, of strength and compassion. Therefore, bringing out both of these inherent capacities *together* is the essence of human moral maturity. In the transformative view, conflicts are seen as opportunities for developing and exercising both of these capacities, and thus moving toward full moral development (81-82).

Bush and Folger are not alone in their belief that mediation can be empowering and can lead to community re-generation. Schwerin summarizes the works of several scholars and ADR activists who also attest to the empowering potential and community-building effects that participation in mediation and other ADR processes may have (22-25). However, in his analysis, Schwerin emphasizes the empowering effects mediation can have on volunteer mediators. He argues that these volunteers can be empowered in three interrelated categories--the psychological, social, and political spheres--through increasing their feelings of self-worth, acquiring new social skills, and through increasing their political knowledge (135).

Once empowered in these three spheres, Schwerin argues that volunteer mediators can make positive contributions to the community through participating in social and political activities. He states: "...as a result of mediation participation, volunteer mediators may increase their levels of self-esteem, self-efficacy, and knowledge and skills and therefore are willing and able to become involved in other kinds of social and political activities. These activities may in

turn further enhance personal empowerment and contribute to political transformation" (140).

It is his inclusion of political empowerment that elevates Schwerin's discussion of the transformative model beyond that of Bush and Folger. Schwerin argues that mediation may retain the ability to promote large-scale socio-political transformation through challenging and making obsolete existing repressive social and political structures (24). He states:

> ...any mode of conflict resolution that advocates empowerment must be considered to be anti-status quo because 'By introducing empowerment, the conflict manager is offering an education in sociological analysis.'. As a result of this educational process, the underlying structural roots of the individuals problems are revealed, and consequently people can learn how to take 'charge of their own destinies' by transforming the social structures that oppress them (24).

San Francisco Community Boards Program

The most high-profile example of the community-based, transformative ADR model is the San Francisco Community Boards (SFCB) program. Various ADR experts have labeled it: "the major success story of a 'community' project" (Becker 119); "one of the most prominent examples of a form of community mediation deeply rooted in community life" (Merry and Milner 11); and, the most rigorous commitment to popular justice in the U.S." (Fitzpatrick 453).

The SFCB program was established in 1976 by Raymond Shonholz, a lawyer and professor at the San Francisco University Law School, when he became disaffected with the criminal and civil justice systems. Subsequently, Shonholz set up the program to demonstrate:

> ...that urban residents would step forward and, through training, learn a new skill that directly related to assisting their neighbors in the early resolution of conflicts; that neighbors in conflict would accept a forum created by their neighbors to express and resolve their differences; and that dispute-settlement process could be developed that would apply to most neighborhood conflicts. (Shonholz 202).

Until the mid-1980s, SFCB operated entirely on private funding from organizations such as Ford, Public Welfare, Aetena Life and Casualty, Chevron USA, Bank of America and McKeeson (SFCB "Fact Sheet" January 1997). In recent years it has also accepted funding from various levels of government.

With a paid office staff of under ten, the program relies almost entirely on volunteers. Each year interested community members undergo a free 26-hour training course enabling them to become conciliators or peacemakers, the Board's terms for mediators (Smith 49). The volunteers range in age from teenagers to seniors and at any one time there are approximately 200 hundred volunteers in place (SFCB "Overview" March 1997).

The program fields approximately 1300 calls annually regarding disagreements and conflicts; fifty percent of the calls are made by people who contact SFCB directly and the remaining fifty percent are referred to the program from a variety of sources including schools, elected officials, the Department of Human Services, the San Francisco Police Department, and the District Attorney's office (SFCB "Fact Sheet" January 1997).

From the original 1300 calls, the SFCB staff organize approximately 200 free conflict resolution meetings or mediations each year (SFCB "Fact Sheet" January 1997). Held in a variety of donated spaces throughout San Francisco--including churches, neighborhood centers and hospitals--each mediation is presided over by a panel of four to five volunteer conciliators. SFCB staff try to ensure that panelists are similar to the disputants in age, race, and gender and

the sessions can be conducted in English, Cantonese, Spanish, Tagalog, Russian or any other language depending on the make-up of the volunteers enrolled at the time.

In recent years the SFCB program (and by extension the entire community-based transformative model) has been criticized for “not seeking to reduce court’s caseloads, being too expensive, not having professionals hearing cases, requiring too much community-organizing time, and being to inward and intraorganizationally orientated” (Shonholtz 208).

More recently, questions have been raised concerning the program’s ability to effectively empower and transform individuals in San Francisco’s communities. Merry (in accordance with Schwerin’s findings) suggests that SFCB is empowering volunteers, not disputants. She also claims that while it is creating a new community of volunteer mediators, it does little to transform the fragmented existing communities from which the volunteers are drawn (58). Furthermore, Merry and Milner also suggest that in recent years, SFCB has “shifted to a greater emphasis on service delivery” (the court reform model) as evidenced by its acceptance of government funding and agency referrals (11).

Summary

While the court reform and the transformative ADR movements share many similarities--including the ADR processes they employ--it is clear that they are founded on diverging principles: The court reform movement seeks to relieve court congestion through creating multi-door courthouses and through legislating ADR mechanisms for resolving minor disputes or disputes particularly well-suited to non-litigious resolutions. If the court system is viewed as a pyramid with a state’s supreme court at the apex and the subordinate levels of court in

descending order underneath, then it could be suggested that court reform ADR advocates are simply trying to install a new, broader bottom layer in the court system.

The transformative model, on the other hand, opposes state involvement in the resolution of most disputes. This model seeks to step outside the court-system pyramid and establish alternatives to the state-run justice system, not just more options within it. In other words, it is an attempt to transform the entire dispute resolution culture from one that is government-regulated, bureaucratic, coercive, and professionalized to one that is community-focused, non-coercive, flexible, and informal. The transformative model, however, is the poor cousin of the court reform model and ADR programs based on it tend to suffer from lack of funds, media exposure, and organizational capabilities. In recent years, even the most prolific transformative agency in North America, the SFCB program, has been accused of "selling out" as it now receives referrals from government agencies and accepts government funding.

Chapter 6: An Analysis of B.C.'s ADR Policy

The Ministry of Attorney General's ADR policy is an umbrella policy that contains broad guiding principles and a wide array of goals and objectives. The ADR initiatives or programs in British Columbia that fall under it, or that can be associated with it, are equally as diverse. It is uncertain, however, which ADR model the B.C. Ministry of Attorney General was subscribing to when it released its ADR policy. That is, the policy statement does not explicitly mention either the court-reform model or the transformative model. The purpose of this analysis then is to determine which model the Ministry of Attorney General's ADR policy is founded on. The possible answers are: 1) the court-reform model; 2) the transformative model; 3) a hybrid of both models; or 4), neither model.

In answering this question two measuring devices will be employed. The first is a content analysis of the academic literature on ADR as it pertains to the two models. More specifically, the characteristics of each model will be determined by reconceptualizing the two models using definitions found in the academic literature. These characteristics will then be assessed in relation to the Ministry's twelve ADR objectives and the programs and initiatives (or intended programs and initiatives) that flow from them. If the Ministry's ADR objectives favorably compare with the characteristics of the court reform model then it can be concluded that the Ministry of Attorney General's ADR policy is based on the court reform model. Likewise, if the objectives correspond with the transformative

model characteristics then it can be concluded that the Attorney General's policy is premised on the transformative model.

The second measuring device employed will be the opinions and insights of a representative panel of ADR experts and stakeholders in B.C. The narratives of these stakeholders have been attained through interviews that I have conducted over the past year-and-a-half.

When the results of the content analysis and the personal interviews are combined, some conclusions can be offered pertaining to what model, if either, the Ministry of Attorney General has used in formulating its ADR policy.

A) Reconceptualizing The Two Models

Giovanni Sartori, in his 1984 book Social Sciences Concepts, outlines how to reconceptualize a concept, model, or term. He states: "In reconstructing a concept, first collect a representative set of definitions [and] second extract their characteristics (41).

In collecting a representative set of definitions, normally the first step would be to consult with a variety of dictionaries. However, because the focus of this analysis is on two social science models a survey of dictionary definitions would not suffice. Subsequently, one can turn to the academic literature on ADR in order to draw out the key defining terms and phrases for each model as articulated by academics and ADR scholars.

Definitions of Court Reform Model

The following is a representative sampling of definitions found in the academic literature describing the court reform model. Many of these samples will be familiar to the reader as they have appeared elsewhere in this thesis:

1) "*Proponents of agency* [court reform] *programs argued that close ties to courts, prosecutors, police, and administrative agencies were essential for building caseloads and achieving organizational stability*" (Adler "Is ADR..." 1987 62).

2) "*In one model, mediation is closely tied to the formal court system and sometimes done for a fee by professional mediators*" (Schwerin 15).

3) "*The court-affiliated agency models, on the other hand, describe the empowerment of disputants primarily in terms of providing public access to professional problem-solvers for those in conflict*" (Schwerin 25).

4) " *On one hand, the reform group, which consists of many lawyers and other dispute resolution professionals associated with meditation, believes that the primary mission of community mediation should be the provision of high-quality dispute resolution services that supplement the formal court services, relieve court congestion, and provide dispute resolution tools that are appropriate for disputes that should not be handled by the courts. This group argues that as mediation grows and matures there must be emphasis given to the quality of service that is provided and that the courts and other funders of community mediation programs have a right and a responsibility to monitor mediation services and provide accountability to the public and users of mediation services.*

"They argue that in order to ensure quality and uniformity of mediation services it is necessary to develop and apply professional standards fro mediation practice" (Schwerin 144).

5) "*The reformist tradition developed within liberal democratic states and capitalist economies. This type of popular justice endeavors to increase the efficiency of the formal legal system by streamlining it and increasing its accessibility. The goal is to improve its capacity to solve a wide range of problems. In this tradition, popular justice endeavors to make the system work better, not to change its principles. It does not critique the fundamental organization of the legal order or seek to alter relationships of power. Reformist popular justice is culturally constructed as the opposite to an inefficient rather than an unjust system of state law. Failures in the judicial system are attributed to the burdens on the legal system rather*

than to the underlying structures of capitalism or the law. State law is criticized for its inaccessibility for a variety of problems such as consumer grievances [reference omitted] and interpersonal problems. The reformist tradition promises to change society by increasing participation in modern legal institutions and by revising procedures" (Merry 40).

6) "*Just as criticism of American litigation patterns have led to new initiatives in the community and corporate areas, so too have they brought about a wave of ADR experimentation and program development by court systems. Much of this activity aims at wrestling with congestion and delay on the trial track, problems noted by legal and judicial scholars like Roscoe Pound as early as 1906*" (Adler "The Future..." 1993 74).

7) "*The lawyers, judges, and judicial administrators ostensibly saw mediation as a way to help alleviate persistent problems in the legal system*" (Becker 115).

8) "*What they* [advocates of the court reform model] *have in common is their adherence to some of the major values in American society: the profit motive, hierarchical institutionalism, professionalism, and elitist politics*" (Becker 115-116).

9) "*These centers* [neighborhood justice centers] *come in several varieties. The most prominent has been dubbed the 'agency model.' It is called such because, in fact, it is primarily a government agency and usually an arm of the court system. All or most of the funding for this type of center is derived from the court system and the policies of the center, as well as it processes and personnel, are controlled or dominated by judicial authorities and values. Mediation may be practiced therein, but one would be hard pressed to view this arrangement as an 'alternative to the legal system'.*

These 'agencies' are hierarchical in nature and bureaucratic in outlook and style. They are thought and said to be successful by the typical world-view of any bureaucracy--how cost effective is the program? This translates into: (a) the amount of the case-load and (b) the size and disbursement of the budget...

...Resolving disputes is the function of these programs. Setting up a system to process the greatest number of disputes at the convenience of those administrating the program, becomes the major objective. Keeping costs down is another aim, and to this end, utilizing 'volunteer citizen mediators' in these centers is useful. Some centers prefer, however, to pay the extra costs of 'professionalizing' their agency by 'certifying only professional mediators and remunerating them for their services" (Becker 117).

10) "*These areas of professional mediation are an important component in the growth industry, and its practitioners are major advocates for keeping these skills from being dispersed and routinely practiced. To accommodate this they insist that the subject matter (e.g., divorce, environment) is difficult, that mediators in this kind of dispute need special substantive expertise, and that specially structured mediation training and certification is required*" (Becker 118-119).

Following the collection of a representative set of definitions, Sartori then instructs the reader to "extract their characteristics" (41). In this step the reader must determine the salient characteristics as expressed by each of the individual scholars.

Upon examination, it is clear that the following seven characteristics are best associated with the court-reform model:

1) Court-affiliated or court-annexed. The ADR program or initiative is a component of the formal court system. In some cases, the program is actually located within the courthouse.

2) Combat congestion and delay. Congestion and delay within the court system are the two fundamental problems that the court reform model is trying to address.

3) Improve access. Tied to congestion and delay--the goal of the court reform model is to improve disputants' access to professional problem solvers, be it judges or certified ADR practitioners.

4) Reduce costs. Also tied to congestion and delay. Court reform advocates can streamline the justice system thereby saving governments millions of dollars. They also argue that ADR processes will reduce costs incurred by disputants.

5) Government-funded. The programs are taxpayer supported.

6) Reliant on professionals. The ADR practitioner is paid a fee for his or her services and has been certified to work as an ADR practitioner, either by the government or a professional organization.

7) Adherence to traditional institutional values. At a micro-level, this would refer to the values that underlie the formal legal system, ranging from such things as evidentiary rules in court to the bureaucratic values upon which a court system is operationalized. At a macro level, traditional values implies such things as hierarchicalism and capitalism.

Definitions of Transformative Model

The following is a representative sampling of definitions used to characterize the transformative ADR model:

> 1) "*Supporters of community programs, in contrast, believed that mediation programs should be organized at the grassroots level, and should be structurally, functionally, and financially independent*" (Adler "Is ADR..." 1987 62).

> 2) "*Purists argue that in mediation (as opposed to adjudication) disputants are neither coerced to the bargaining table nor directed into specific arrangements. The dispute, and any agreement to end the dispute, must come from within. Neutrals may exert great control on the organization of communication and negotiation processes, but responsibility for outcomes rests with the parties*" (Adler "Is ADR..." 1987 64).

> 3) "*In other cases, community mediation is based on a grass roots community model, or a human services agency model, and mediation is done by citizen volunteer mediators as a community service, usually without financial remuneration*" (Schwerin 15).

4) *"...the community mediation programs emphasize the need for social change and the importance of empowering individuals and the community"* (Schwerin 25).

5) "*This group* [transformative model advocates] *generally favors the ideological projects of social transformation and personal empowerment. They support the development of 'pure' community mediation models, such as the San Francisco Community Boards, as a community-based and community-controlled form of 'popular justice' independent of the formal legal system. They are suspicious of the motives of those they believe are attempting to 'capture', 'colonize', or 'co-opt' community mediation. The transformationalist argue that we must resist the efforts of the formal court system to dominate and subvert 'the processes of informal justice', the efforts of lawyers and other professionals to profit from community mediation, and the efforts of the power elite who seek to maintain the oppressive systems and institutions that are viewed as 'root causes' of much of the societal conflict and violence"* (Schwerin 145).

6) "*This tradition of popular justice emphasizes decentralization: replacing centralized bureaucracy with small, local forums on a more human scale. Community norms rather than the legal rules of the center govern. Lay people are in charge. Those who judge are not people who have training in the core legal ideology of the society but people who know the local norms of the community in which they work. Communitarian popular justice advocates indigenous law as a means of humanizing an impersonal society and its alienating and indifferent legal system. It is postmodern in its focus on small-scale, locally derived systems of order*" (Merry 46).

7) "*A form of popular justice labeled community mediation mushroomed in the United States in the 1970s and 1980s. It aspired to build a justice system under the authority and normative order of the community rather than that of the state. Demands for community mediation grew out community organizing and legal-reform efforts in the early 1970s and crystallized into community-mediation programs by the late 1970s and early 1980s. Community-mediation programs often sprang from neighborhood watch efforts and from criminal-justice reform movements such as bail reform and prisoner self-governance. At the core of this movement was the hope that handling local problems in community-run forums independent of the legal system would strengthen local self-governance and rejuvenate the self-reliant communities of the past. Community-run forums promised to empower ordinary people by giving them control over their conflicts. Community mediation hoped to replace*

the dominance of the legal profession and the courts in the lives of ordinary citizens with the control of neighbors and peers" (Merry and Milner 10).

8) "*Pure 'community mediation centers' and university-based mediation centers linked to 'people empowerment' mediation objectives are more closely attuned to achieving socio-political transformation than are the rapidly proliferating legal system-professional-bureaucratic models. The former, however, are relatively ill-funded, poorly publicized, and have few powerful and wealthy friends*" (Becker 110).

8) "*...the community organizers saw mediation as a method that could help put power to resolve conflict back into the hands and minds or ordinary people, local neighborhoods and communities*" (Becker 115).

10) "*The key to a successful, community-style mediation program, one that is truly non-institutional, non-hierarchical, non-professional, and decidedly democratic in theory and practice, is to educate the disputants, staff, and ordinary citizens who wish to learn the art and science of peacemaking and democratic organization.*

Another essential element in a community mediation program is to help people realize that interpersonal disputes belong to the parties themselves, i.e., the disputes are their own property. The disputants are the ones who are most intimately involved. They understand it best. They can resolve it best. They are the ones who must live with the resolution. They own it. Another major ingredient is to teach the disputants that in many circumstances there are external factors directly responsible for their predicament. These may be economic, social, political, or a combination of all three. Community mediation, properly practiced, can help alert the disputants to the role these factors play in creating the problems. The program can also assist the parties in organizing themselves so as to combat their mutual enemies instead of one another" (Becker 120).

11) "*SFCB* [San Francisco Community Boards] *was designed with a strong belief in citizen power and as a radical departure from the formal justice model. The SFCB concept devolves to the most essential unit of democratic society, the citizen, the full power and ability to effectuate a range of rights and responsibilities without any governmental or intermediary structure. The organizing activity of SFCB was designed to reach citizens and to place them in a context of democratic work within their neighborhoods. Through community organizing and organizational development, the program sought to build new capacity in urban neighborhoods to resolve daily conflict*" (Shonholz 207).

Drawing form these definitions, the following six characteristics best represent the transformative model:

1) Independent of government and court system. ADR programs are not part of the formal court system.

2) Organized at grass-roots level. Programs established as part of a community initiative. Focused more on societal norms than state law.

3) Reliant on volunteers. The ADR practitioner is not paid, or paid only a nominal sum. In addition, the practitioner does not need certification from the government or a professional organization.

4) Disputant controlled. Disputants retain control over the entire dispute resolution process, including whether to participate or not.

5) Concerned with personal growth and empowerment. The transformative model is equally concerned with the process as the result, as the process can impart conflict resolution tools and skills on the disputants. These tools and skills, and other knowledge gained in the process, can empower the disputants and facilitate personal growth.

6) Promote social change. The transformative model is also concerned with social change. It is believed that, following participation in the process, disputants will be motivated and possess the tools required to affect social change, ultimately exhibiting that peace-making is a way of life.

B) Content Analysis

By using Sartori's guidelines and reconceptualizing the two models, it is possible to extract the key representative characteristics of each model. The Ministry's twelve ADR objectives and the corresponding programs and initiatives

(or intended programs or initiatives) that flow from them can then be assessed in relation to these characteristics.

In surveying the Ministry's ADR objectives, it is clear that the majority of them favorably correspond with the characteristics of the court reform model.

For example, to date, the two largest Ministry of Attorney General ADR initiatives in terms of disputants processed, the Small Claims Court Program and the Residential Tenancy Branch's arbitration program, were both established to divert minor cases away from the regular court system. Moreover, both are compulsory for disputants and each utilizes the services of professional ADR practitioners. A third program, the Ministry of Transportation and Highways' arbitration and mediation expropriation program also shares these characteristics.

The two most significant ADR programs soon to be fully implemented by the Attorney General are also clearly wedded to the court reform ADR model. The Trial Overflow Programme and the mediation program in the B.C. Supreme Court are both court-annexed initiatives, established to combat congestion, and each will utilize the services of ADR practitioners from the government-certified roster.

In addition, much of the "administrative" ADR action taken by the Ministry of Attorney General, such as the creation of the DRO; the publication and distribution of the Directory of Dispute Resolution Practitioners; and, the training of Ministry of Attorney General staff lawyers about ADR practices also, it appears, are intended to advance the court reform agenda. The DRO has been

central in both the creation of the two court-annexed B.C. Supreme Court initiatives and the establishment of rosters for qualified mediators and arbitrators, while the directory and staff training were both targeted to promote the ADR agenda *within* the provincial government, as opposed to advancing ADR initiatives within B.C. communities.

However, not all of the Ministry of Attorney General's objectives are based on the court reform model. Objectives Five, Six, and Ten, supporting the creation of VORPs, diversion programs, and traditional aboriginal dispute resolution practices, respectively. Each is based, for the most part, on the transformative model. CJI, one of the province's more prolific VORP agencies is a non-profit organization that utilizes volunteers from the community and acts on the principles of restorative justice. Diversion programs, of which VORPs are one of, also tend to be based on restorative justice principles and also draw heavily on existing community resources found within communities. Aboriginal circle sentencing practices also rely heavily on community participation, are not for-profit, and are independent of state law.

Finally, the Ministry of Attorney General's ADR policy includes some programs and objectives that appear to based on a hybrid of the two models. ICBC's mediation program was established by the provincial government to combat court congestion and it utilizes the services of professional ADR practitioners, yet it remains non-compulsory for disputants. Likewise, the four Family Justice Centres (FJC's) were established by the provincial government and receive government-funding, yet are designed only to educate and assist

separating families. In addition, an advisory panel of volunteers in each community has been appointed to ensure that each FJC is meeting local needs. However, the Ministry of Attorney General has recently announced that it is launching a pilot program in June 1998, whereby it will be mandatory for separating couples in the Burnaby/New Westminster area to attend a taxpayer supported three-hour parenting course.

C) Insights and Opinions of ADR Stakeholders

The second method by which to analyze the Ministry's ADR policy is through the insights and opinions of ADR experts and stakeholders in the province. In alphabetical order the stakeholders interviewed were: 1) Brian Gardiner, the president and co-founder of the Canadian Dispute Resolution Corporation (CDRC); 2) David Gustafson, Co-Director of the Fraser Region Community Justice Initiatives Association (CJI); 3) Jerry McHale, the director of the provincial government's Dispute Resolution Office; and 4) Bryan Williams, the Chief Justice of the Supreme Court of B.C.. Each stakeholder interviewed advanced a perspective unique from the others: Gardiner, a for-profit, ADR service-provider; Gustafson, a non-profit service provider; McHale, the provincial government; and Williams, the court system.

Brian Gardiner, President, Canadian Dispute Resolution Corporation

Brian Gardiner is president and co-founder of the Canadian Dispute Resolution Corporation (CDRC), Canada's largest commercial mediation service company. With offices in eight Canadian cities (including two in B.C.), CDRC

conducted over 800 mediations in 1995. Counted among those who have used CDRC's services are ICBC, the federal Department of Justice, and Royal Insurance. CDRC also offers mediation training courses across Canada, although not in B.C.

In conducting mediations CDRC acts as a liaison between mediators drawn from the community (often lawyers) and parties requiring their services. CDRC handles all of the pre-mediation preparation and administrative details, including arranging the time, the place, and the duration of the mediation, and ensuring that all of the pre-mediation reports have been received by both sides in the dispute.

Gardiner, while not a trained mediator, has been active in the ADR community in B.C. for over ten years, first at ICBC and now with CDRC. He is also a founding member of the Joint Committee on Dispute Resolution and has been consulted with extensively by the Ministry of Attorney General as the government moves towards establishing a panel of certified mediators.

Gardiner explicitly states that the Ministry of Attorney General is promoting ADR "...primarily because of the court problems". He also implicitly states the same conclusion by criticizing the Ministry of Attorney General for not having implemented more ADR pilot programs and initiatives outside of the court system, two-and-a-half years after the release of the ADR policy statement. Dismissing the establishment of the DRO and the publication of the Directory of Dispute Resolution Practitioners as "administrative", Gardiner is particularly critical of the government for not focusing more of its attention on using ADR, particularly mediation, to resolve the thousands of outstanding lawsuits it is directly involved in:

> What I go to--because I'm in the business world out here--I go to the practical side of this: How many disputes does the government have in its current portfolio across all ministries? And how many times have they initiated mediation options on those disputes? That's the test. If the policy isn't clear about those kinds of issues then I don't think it works...How many lawsuits do they have in-house and how many of those cases have they really...if they want to be leaders in this field, they ought to have been doing mediation pilot projects for the last two years and demonstrating that process... (personal interview).

When asked what is driving the growth of ADR in this province, Gardiner responds that it is a combination of "competitive forces, business forces, and a human element". More specifically, he states, "A lot of things really. Fundamentally that very fact that people are awakening to the understanding that adversarial processes don't work very well...Fundamentally, I think our society is ready for a change..." and "...more and more people want to be involved in the decision-making process...sophisticated clients, like insurance companies for example, want to control their lives, their business decisions. Courts don't allow them to do that". At the corporate level, it is "dollars and cents...litigation is just too expensive, nobody can afford it and certainly the businesses that are trying to survive in business can't afford it" (personal interview).

David Gustafson, Co-Director, Fraser Region Community Justice Initiatives Association

David Gustafson is an ordained Mennonite pastor and co-director of the Fraser Region Community Justice Initiatives Association (CJI), based in Langley. CJI is a free-standing, non-profit association that specializes in victim-offender reconciliation programs (VORP's) and victim-offender mediation programs (VOMP's). Gustafson is also a founding member of the Mediation Development

Association of B.C. and an original member of the Conflict Resolution Council of B.C. He also assisted the Ministry of Attorney General in developing its original draft of the ADR policy.

CJI was founded by Gustafson in 1981, at the behest of his Mennonite congregation. It took its first case in 1982 and since then has conducted "thousands" of VORP's and VOMP's, approximately 400 of which have dealt with serious crime cases. (VORP's are most often conducted as diversions, part of an alternative sentence, while VOMP's usually occur while the offender is incarcerated).

CJI policy is set by an elected board of directors, although the agency is also governed by generic provincial laws such as *Freedom of Information and Privacy Act*. It recruits and trains its own ADR practitioners and certifies them through an intensive three-tiered program. Only those with other professional credentials--such as therapists--deal with the serious crime cases. CJI receives partial funding from both the provincial Ministry of Attorney General and the federal government's Serious Crimes Program. However, Gustafson notes that, "we take more cases than we're funded for because we value the work and the peace-making, conflict resolution part of it, and the safe community philosophy issues" (personal interview). Most cases arrive at CJI through a referral from Crown counsel.

Despite that fact that CJI receives government-funding and referrals from Crown counsel, and despite the fact that Gustafson supports mandatory mediation in the court system--"Rather than have everything litigated, make a number of tests so that if something proves not be mediateable then it can go to litigation.. but why not try the least coercive, most collaborative kind of remedy first"--Gustafson states that his program is "clearly" aligned with the transformative model.

When asked what he believes is driving the government's ADR agenda, he states:

> If I was going to be absolutely cynical, I'd say it's driven by dollars, it's driven by economics. I think there is some real philosophical value underneath all that. I don't think Dosanjh is just talking through his hat when he talks about valuing communities, and diversing communities, and empowering communities. How it all breaks out at the end of the day is going to be determined by economics, I think. It's the cost of administering justice in this province and are people getting access to justice...That's kind of my cynical take on it. I know there's people in the reform movement who've had some genuine concern for communitarian values and all the rest of that...But I'm not sure we'd be asking the questions about empowering communities and collaborative conflict resolution processes...it would be business as usual if business as usual didn't cost so much. (personal interview)

Gustafson reinforces these sentiments when he states:

> There are a number of other jurisdictions--Belgian, and on and on--looking at mediation programs on our model. The VORP thing is happening in Germany, about 300 programs, 130 in Finland, there's twenty in Canada and a handful in B.C. Where have all the resources gone? Who's listening? Who cares? But we're falling over ourselves to build court-annexed things with more and more levels of bureaucracy and more and more levels of government. (personal interview)

Gustafson also expresses deep concerns about how the Ministry of Attorney General's court-reform ADR policy, and the general professionalization/legalization of ADR, may affect his program and other transformative programs like his, particularly around the issue of practitioner certification requirements. He states:

> I assume it's going to get more difficult for us to do our jobs. [In regards to] what level of standards and qualifications we need in order to do our work. That if they [the government] muck with that too much, they're going to lose it...I'm cynical enough to believe that before very long if you're not lawyer, or you don't have some law training, you're probably not going to allowed to practice....If its got money or power attached to it, you can bet they're coming for it.

> And I don't think that's my paranoia, quite frankly. I've watched for 27 years and it's not just my take. It's the take of other leading lights in mediation...(personal interview).

Gustafson also expressed surprise that Supreme Court judges in B.C are now acting as mediators, after participating in only a three-day course on mediation skills:

> Maybe you can do it three days. I don't know. I've been at it a lifetime and I just know I've got an awful lot more to learn. And I'm doing it in multiple murders, serial rape cases, on and on and on. Maybe the legal issues are a whole lot simpler and you can knock it off in three days and you don't need to think about therapeutic issues or anything else that's involved. And I take their point and that's probably the case. But the notion that you can make someone into a mediator in three days I find a little difficult. I'll buy that when you can turn me into a lawyer in three days and I can have the same power (personal interview)

Jerry McHale, Director of B.C.'s Dispute Resolution Office

Prior to being appointed as director of the Dispute Resolution Office in December 1996, Jerry McHale was a lawyer with the Family Law Group in the Legal Services Branch of the Ministry of Attorney General. While there, much of his time was devoted to the ADR portfolio. In addition to his position with the provincial government, McHale maintains a private practice as a mediator and he has taught ADR courses at the University of Victoria Law School and for the Continuing Legal Education Society of B.C. He is also a founding member of the Mediation Development Association of B.C. and currently sits on the Board of Directors at the UVIC Institute for Dispute Resolution.

McHale was a key player in the development of the Ministry's ADR policy and thus extremely familiar with it, and with the Ministry's intentions in releasing it. He states that in his professional opinion, "Cost, delay, and complexity are the main problems. If we fix them then we win". In this vein, McHale is actively

involved with several ADR initiatives in B.C. that are associated with the court reform model. He is working with Chief Justice Bryan Williams setting up the Trial Overflow Programme and the B.C. Supreme Court mediation program, and has devoted much of his recent time to consulting with stakeholders so that the government can implement certification requirements for ADR practitioners.

However, McHale, speaking more personally, also believes that ADR programs should be considered a success even if they don't rectify the problems of cost, complexity and delay because ADR programs, "represent an alternative to *adversarial* forms of dispute resolution, not necessarily to bureaucracy and its accompanying problems".

In further articulating his view, McHale points to the example of the Saskatchewan provincial government. He notes that Saskatchewan's Mediation Division, with approximately 40 employees, is already a mid-sized government-office, and as such is at risk of over-regulating and bureaucratizing ADR processes that are meant to combat the regulation and bureaucratization of the court system. McHale, however, is unconcerned: "That's okay, though" because ADR mechanisms are simply "a better process".

In calling ADR a better process, McHale explicitly speaks to the possible transformative effect that participation in ADR processes might have. To support his point, he uses two personal anecdotes. First, he describes how once, while he was attending his son's little league game, he ran into an acquaintance of his that he had not seen for some time, and he noticed that the acquaintance looked more at peace with himself than he had previously. Upon talking to him, McHale learned that the acquaintance had been utilizing mediation to resolve some disputes in his life and that the acquaintance credited mediation with transforming some key aspects of his life, including the manner in which he interacted with other people.

A second personal anecdote that McHale gave was his ability, when in a room full of people, to readily identify those who are mediators or have mediation training. He stated that these people carry themselves differently, are more adept at hearing what others are saying, and look for common ground in their conversations.

In sum, at a professional level and as an employee of the provincial government, McHale states that cost, complexity, and delay are behind the Ministry of Attorney General's ADR policy. At a personal level, McHale states that if the ADR policy does not adequately address these problems, it is still important because it retains the potential "to make civil society more civil".

Bryan Williams, Chief Justice of the B.C. Supreme Court

Bryan Williams, current Chief Justice of the B.C Supreme Court, has served as a judge on the Court of Appeal of British Columbia, as the president of the Canadian Bar Association, and was a senior partner with Swinton and Company law firm. He has also acted as a mediator in several labour-relations disputes, as a neutral in ICBC motor vehicle claims, as an arbitrator in commercial disputes, and, after joining the American Arbitration Association, as an arbitrator in international disputes between the United States and Holland. He has also acted as a Royal Commissioner and was the chief Commissioner on the Cypress Park land use commission. He, and seven partners also opened Pacific Private Adjudications in Vancouver in 1989, B.C.'s first private, for-profit arbitration centre.

When Williams was asked which theoretical model was fueling the growth of ADR in B.C., and which model the Ministry of Attorney General's policy was premised on, his response was:

> I think it's legal reform that's driving it. I think its congestion in the courts and it's the length of time it takes you from issuing the writ to get a judgment. I think that its the costs involved and I think it's the delays that occur, that are driving people away from the court system and into, what they perceive to be at least, a much more expeditious and less costly way of doing it. (personal interview).

Speaking more generally, on why individuals might turn to ADR instead of the courts, Williams states:

> I mean the people who are involved in disputes they want a way to get the dispute resolved and they're used to going to court. They don't philosophically determine that they want to got arbitration because its community-based. They would go there only because somebody would say it's going to cost them less or it's going to get on quicker. (personal interview)

Although Williams identifies the court reform model as the impetus behind ADR's growth in this province, he does not believe that these processes will amount to another layer in the court system under a different name. He states:

> No, I think I'd put it differently than that. I'd say it's injecting a creative, new process into the litigation system which will permit parties to be able to resolve their dispute in a more amicable way at an earlier time. It's a positive thing and it's there not designed to help you prove your case, it's there to help you avoid the case and bring it to a conclusion that you can live with. (personal interview)

Summary

A content analysis of the academic literature on ADR allows one to determine the salient characteristics of each ADR model. When these characteristics are compared to the Ministry's twelve objectives and the ADR programs and initiatives that flow from them, it is apparent that the Ministry's policy is one that is primarily based on the court reform model. However, within

this court reform ADR policy, the Ministry of Attorney General has also included some objectives which promote the transformative model, most notably support for VORPs and aboriginal circle sentencing. The Ministry has also implemented some ADR programs which appear to be based on a hybrid of the two models. The four Family Justice Centres established by the government and ICBC's voluntary mediation program are the best examples this.

The views of the representative group of stakeholders supports these conclusions. Gardiner, Gustafson, McHale and Williams each explicitly state that the defining characteristics of the court reform model--financial considerations and concerns of access--are at the root of the Ministry of Attorney General's ADR policy. The panel members also illuminated government action or inaction that reinforces this finding. Gardiner points to government inaction in most other areas beyond the court-annexed programs, Gustafson speaks of chronic underfunding for his program and being out of the loop, and Williams states that much of the DRO's energy has been spent working with Supreme Court officials setting up the Trial Overflow Programme and the mediation program.

Chapter 7: Implications of the Findings

After assessing the ADR policy vis a vis a content analysis of the academic literature it becomes evident that the Ministry of Attorney General's primary intention in developing the policy was to alleviate pressure on an overburdened court system. Thus, it is predicated on the court reform ADR model. The following examples highlight this conclusion: 1) the largest (in number of participants) ADR programs found under the policy--the Residential

Tenancy Branch's binding arbitration program and the Small Claims Court Program--were both implemented to divert minor disputes away from the courts and; 2) the two most significant new programs--the B.C. Supreme Court's Trial Overflow Programme and its mediation program--will be court annexed ADR programs that utilize the services of government-approved practitioners.

This conclusion is also supported by the opinions of the experts and stakeholders interviewed: Gardiner states the Ministry of Attorney General adopted an ADR policy "primarily because of court problems"; Gustafson states, "I'd say it's driven by dollars, it's driven by economics"; McHale states, "If it is successful in reducing costs, complexity, and delay, it will be successful"; and, Williams adds, "I think it's legal reform that's driving it" (personal interviews).

A) Court Reform Programs

The conclusion that the Ministry of Attorney General's ADR policy is largely based on the court-reform ADR model should come as no surprise to even the most casual of observers of ADR; since the birth of the new ADR movement, the court-reform model has dominated the ADR agenda (Merry 59). In 1986, it was reported that, "...the American conflict resolution movement has been substantially overwhelmed by the force and forces of the legal system, professionalization, bureaucracy, and interest-group politics"; over ten years later, these sentiments ring equally as true (Becker 110).

Why, specifically, has the court-reform model achieved such dominance? The answer to this question can be traced to many factors that converge upon the fact that political and judicial elites and their "powerful allies"--i.e. Harvard University, the American Bar Association (ABA), the American Arbitration Association (AAA), and the Canadian Bar Association (CBA)--immediately

embraced the court-reform model while the transformative model attracted the attention of less mobilized and more localized community activists and so-called radical academics.

To illuminate the disparity in the camps of support for the two models consider that in the U.S. former Supreme Court Chief Justice Warren Burger was one of the court-reform model's earliest advocates and in this province B.C. Supreme Court Chief Justice Bryan Williams has been a long-time proponent of the court-reform ADR model. The transformative model has not yet had a spokesperson with comparable prestige or profile.

The disparity in the size and strength of support for those two models is further exemplified by the number of national organizations that have arisen around each model. The AAA, the ABA Section of Dispute Resolution, the Society for Professionals in Dispute Resolution (SPIDR), and the Center for Public Resources (CPR) are just a few of the several powerful organizations dedicated to advancing the court-reform model. The transformative model, on the other hand, is primarily associated with the National Association for Community Mediation, itself an offshoot of the National Institute for Dispute Resolution (NIDR).

Despite the fact that many jurisdictions have adopted an ADR policy based primarily on the court reform model, this can not be taken as an assurance that these policies will be successful over the long-term in meeting their intended goals (i.e. reducing costs for disputants and governments, relieving congestion, and removing legal complexities). This is because while the court reform ADR model creates alternative dispute resolution mechanisms it does not seek to alter the state-centric, coercive, and professionalized dispute resolution culture. As a result, the same forces that have come close to crippling

the court system remain active; it is only a matter of time, most likely, before these forces make the ADR system equally inefficient and ineffective.

In articulating this argument, it is essential to first spell out a paradox that is starting to characterize the ADR field: As more ADR programs are implemented by governments, there is a push to make the processes more formalized--that is, more regulated, bureaucratized, and professionalized--and thus more like the court system. As Merry notes, "...popular justice established by the state gradually becomes formalized and incorporated into state law" (32).

The inevitable trend towards formalization is attributed to pressures both external and internal to the ADR programs themselves. Externally, governments maintain (rightly so) that they cannot legislate programs that are not satisfactorily regulated and that do not have certified practitioners at the helm. In other words, governments must be attuned to issues of liability and accountability. Internally, ADR program managers, senior bureaucrats, and practitioners often exert pressure to formalize the processes in an attempt to enhance the program's legitimacy and power (Merry 41). Many perceive it to be beneficial to their profession to gradually adopt the language, rituals, and rules of the court process (Merry 41).

In B.C. this move towards formalization has already begun, just two-and-a-half years after the policy was released. As noted previously, the Ministry of Attorney General has opened the Dispute Resolution Office (DRO) to implement and coordinate its ADR policy and it is logical to assume that as new programs are developed that the size of the DRO will expand accordingly. (Recall that in Saskatchewan the provincial government's Mediation Division, opened in 1988, already employs over forty civil servants). Also, the Ministry of Attorney General is on the verge of establishing province-wide referral rosters of *pre-qualified* arbitrators and mediators. In addition, less significant examples of these forces at

work include: the establishment of the Arbitration Review Panel (another layer of bureaucracy) to hear appeals of residential tenancy cases, and a pilot program at the Burnaby/New Westminster Family Justice Centre that will implement mandatory education courses--more regulation--for separated parents.

The cumulative effect of this increasing regulation, bureaucratization, and professionalization is that ADR processes will likely, over time, become as inefficient as the court system is today: more rules will require more administration which, once again, will require more rules and guidelines in order to function. In short, as the Ministry of Attorney General's ADR agenda expands, the supporting administrative infrastructure will grow at an equal rate, eventually rendering the ADR system as cumbersome as the court system. Thus, over time the ability of ADR programs to remain flexible, informal, and quick will be compromised. Kulig, in her article, encapsulates these concerns when she states: "If part of the appeal of ADR is its lack of regulations and the opportunity it provides for creativity in solving disputes, what would controls and standards do to the nature of the work itself? (34).

When reforms made inevitably become formalized, a new reform movement usually appears calling for, once again, a more informal and accessible alternative to the system in place (Merry 41). Recall that the "new ADR movement" in the U.S. is only the latest of a series of attempts to streamline the American court system. Closer to home, there at least two examples where provincial government ADR initiatives have already become cumbersome and unwieldy: First, the B.C. Labor Relations Board, with its long history of institutionalized ADR processes, was forced to launch an initiative in 1993 to reform its arbitration system because members of the labor relations community stated that "its processes [were] too costly and legalistic, and that there is excessive delay in the rendering of decisions" (LRB 51). And second,

the Ministry of Transportation and Highways has recently launched a mediation pilot program to reform its arbitration program used to settle expropriation disputes. Gardiner summarizes the problems that plague the arbitration program:

> Those [expropriation disputes] don't to court, they end up in an arbitration panel. Same problem: it takes them forever, they've got unhappy clients, and here we have a dispute between a home-owner or property-owner and government and they're spending way too much time and money trying to resolve that through their arbitration system. (personal interview)

Compromised Legal Rights

Although it is unlikely that the problems of excessive regulation, bureaucratization, and professionalization will immediately impair the Ministry of Attorney General's ADR programs and initiatives, court reform ADR programs remain problematic and controversial. In short, this is because ADR programs "nullify many of the important protections afforded by the formal legal structure" (Adler "Is ADR..." 1987 66). Due process, representation by counsel, the right to a juried trial, and strict evidentiary rules (at arbitration hearings it is sometimes permissible to submit hearsay and similar fact evidence) are suspended in most ADR processes.

Because traditional legal rights are compromised in most ADR processes, critics are concerned that the weaker party in the dispute, or the party with the weaker bargaining position, will be particularly susceptible to unjust decisions. As one scholar states, "The weaker party, denied opportunity for legal redress, will be at an even greater disadvantage as informality compounds inequality" (Auerbach 120). Another notes, "...court systems that institutionalize negotiated settlement programs run the risk of perpetuating the very injustices they purport to alleviate" (Adler "Is ADR..." 1987 66).

If parties do not enter into the ADR process with equal bargaining power, and if a third party cannot counter this inequality, than any resolution reached will also be inherently unequal. In a court of law, it is assumed that equal and constitutionally entrenched legal rights combined with an impartial and fair adjudicator (the judge) will compensate for any inequities that parties may bring to the table; in ADR these protections do not exist to the same extent. Chief Justice Williams concurs that this is troublesome:

> I think probably there will be a lowering of the perception of the independence and integrity of the decision-maker because arbitrators are busy doing other things [and] they don't have the standard of dignity and propriety and ethics that the judges are supposed to have...So the arbitrator isn't going to have quite the distinction that the judge has, therefore not the clout. (personal interview).

Williams also believes that there is a greater possibility that the weaker party in the dispute may suffer in ADR mechanisms and he states: "Yes, that's a possibility. There isn't going to be quite the same feeling about human rights and civil rights as the court would have". When asked if this is potentially dangerous, Williams replied, "I don't think so. It's just a fact. It means that you don't have quite the same person doing the job. So what? I don't think it's a serious problem" (personal interview).

It is important to note that numerous, if not most, disputes are characterized by an imbalance between the parties. The following five common scenarios point to this. First, unequal bargaining power is evident in disputes where one disputant has legal or negotiating assistance when the other does not. This may promote imbalance either through symbolic intimidation factors or through actual expertise in arguing the dispute at hand (Rogers 5). Because disputants in ADR processes are not financially assisted by programs such as

Legal Aid, situations can arise where one disputing party can afford legal or expert assistance to argue their case while the other cannot.

Second, unequal bargaining power is evident in disputes in which one disputant has a relatively attractive alternative available. In these cases, "The party with the attractive alternative available outside the relationship is said to hold power over the other, for he or she can threaten to leave the relationship or take the dispute to a different forum--such as the court of law--if the settlement does not appear favorable" (Ross 253).

Disputes where there is a history of violence, or psychological or emotional abuse, such as domestic disputes, are a common third example of inherent power differences. Situations involving institutional or systemic abuses would fall under this category.

A fourth situation of inequality is apparent in cases where the given ADR practitioner is more familiar or more frequently retained by one side than the other. In such cases--ICBC mediations, for example--the practitioner can develop "unconscious biases" that favor the party that is perceived to be continuously under attack. This inequality may be accentuated if the ADR practitioner wishes to be retained on an ongoing basis by one of the parties involved.

A fifth and final example of inherent power imbalances can be found in disputes where one of the disputants has previous bargaining experience, as it is believed that an understanding of how the ADR process works empowers the party with this knowledge (Ross 254).

Privacy vs. the Common Good

In addition to not adequately protecting disputants' legal rights and in addition to claims that ADR processes can perpetuate inequalities among

disputants, ADR processes can also be problematic because, for the most part, they are held behind closed doors. This, critics charge, creates two problems: (1) case-law is not created, (2) the public, via the media, is not informed of the dispute.

One of the most appealing aspects of ADR for disputants is that the dispute resolution process is held in private. However, critics assert that this can impede the development of case law, and thus be detrimental to the common good. In 1979, The Law Reform Commission of British Columbia stated: "...litigation produces a score of reported cases, but arbitration (other than in labour matters) does not. This could inhibit the growth of common law in particular fields of business and generally retard the process whereby standard terms in contracts acquire a settled interpretation" (6). In a legal system that relies heavily on precedent, no precedent is being recorded and therefore, "...mediation and arbitration may eventually prevent the codification of important social norms" (Adler "Is ADR..." 1987 67). Finally, even if ADR resolutions became part of the public record, many of the resolutions would be considered flawed, in a legal sense, because of the relaxed evidentiary rules used in ADR.

Because ADR processes are held behind closed doors, media access is also denied. As a result the public is not made aware of potential allegations, the details of the claims, or the terms of the resolution. This is particularly problematic in disputes involving business, as the public then has no way of ensuring that "...the legislative or agency-mandated standards have been followed" by the parties involved (Mills 495). Furthermore, the public is also prohibited from gaining insight into how particular businesses go about their operations when the proceedings go unreported resulting in a lessened public opportunity to be informed as consumers (Mills 495). One ADR critic has even stated: "Seen from some angles, the privacy and confidentiality of ADR forums

can also look like the breeding ground of conspiracies" (Adler "Is ADR..." 1987 67).

B) Transformative Programs

As stated previously, despite developing an ADR policy that is primarily based on the court reform ADR model, the Ministry of Attorney General has included some ADR programs--support for aboriginal circle sentencing and victim-offender reconciliation programs, for example--that follow transformative principles. This begs the question: What is the long-term prognosis for transformative programs operating in what many of their supporters would consider a "hostile environment"? Can these programs and initiatives remain true to their transformative agenda while integrated into a policy that supports their antithesis?

Of those that have considered this point, most agree that "pure" ADR programs have a poor chance of long-term survival when encapsulated in a policy that does not share the same objectives as the transformative model. As one scholar notes:

> In the context of greater adoption by institutions, programs with ambitious communitarian agendas would seem to face a problematic future. Programs like the San Francisco Community Boards will find it harder and harder to wall themselves off from mediation and conciliation programs launched by the courts, administrative agencies, and other dispute-managing institutions in the private sector. (Adler "The Future..." 1993 83)

As documented in the matrix in Chapter Six, transformative programs tend to ideologically oppose court-reform programs; as a result they are, "relatively ill-funded, poorly publicized, and have few powerful and wealthy friends" (Becker

110). The fact that each of these symptoms compounds the others (i.e. lack of funds equals lack of publicity which equals few friends; few friends equals lack of publicity which equals lack of money) only exacerbates the tenuous existence of transformative programs.

To ensure a steady client base (and, ultimately, to stay in operation) transformative programs are often forced to compromise their theoretical underpinnings and align themselves with the court system. Even the San Francisco Community Boards Program, generally agreed to be the most sophisticated transformative program in operation, relies upon the District Attorney's office, the San Francisco police department, and other social agencies for approximately fifty percent of its referrals. Moreover, it receives significant levels of funding from various levels of government.

Once the transformative ideology has been compromised in order to assure a consistent client base or adequate funding, the "slippery slope" adage can be applied and other changes may occur. Decisions once made by consensus are determined by majority vote, statutory laws are applied instead of social norms, and, in general, government-approval becomes necessary in the decision-making process (Merry & Milner 5). In short, transformative programs face a difficult predicament: "A commitment to high caseloads necessitates strong ties to the justice system, while total commitment to those notions of community will necessitate low caseloads and uncertain sources of funding" (qtd. in Becker 118).

In B.C. this scenario is already being played out in at least one transformative program. In order to stay in operation, the CJI agency in Langley accepts funding from both the provincial and federal governments. It also relies on Crown counsel for the majority of its referrals. As a result of these ties to the formal court system, Gustafson admits that the government retains a significant

degree of influence over CJI policy: "I suppose they [the government] could shut us down if they wanted to say for instance that none of these cases are divertable or that their policy didn't allow them to give them to a community agency" (personal interview). Gustafson is more weary, though, that the Ministry of Attorney General will use its influence over his program to impose inappropriate certification requirements on the program's volunteer practitioners (personal interview). Specifically, he expresses concern that these requirements will be heavily weighted in favour of a legal background, not knowledge of therapeutic issues (personal interview).

In addition to problems such as client base and financing, transformative programs also face the much less tangible problem of serving disintegrating or non-existent communities. Like the court-reform model, the transformative model is plagued by a paradox: It claims that it can be instrumental in rebuilding fragmented communities, yet, in theory, these programs require whole communities to successfully operate in the first place.

Transformative ADR programs require a pre-existing cohesive community to supply the volunteers, disputants, and social norms required to be successful. As noted in Chapter Three, the communities that have traditionally been able to support these programs are ones that are culturally, racially, and theologically homogenous--the Amish, First Nations' tribes, and small ethnic enclaves. However, in the new ADR movement, it appears that this criteria has been reversed and, as Auerbach notes, the site-selection process for current transformative programs suggests that community fragmentation, not community cohesion, is the primary criterion (135).

Essentially, the concept of community remains problematic for transformative ADR programs. Commenting on the San Francisco Community Boards experience, Merry writes:

> Although SFCB endeavors to create and foster self-governing neighborhoods and to develop their indigenous systems of legal ordering, San Francisco urban neighborhoods do not seem well suited to these goals. They lack robust indigenous legal orders. My own work in similar neighborhoods in the northeast United States showed that systems of indigenous ordering were fragile in the urban neighborhoods of the region in the 1980s (58).

Although Merry's conclusion does not bode well for most transformative programs in B.C., it does appear that at least one initiative may meet her criteria necessary for long-term success. Circle sentencing programs established on B.C.'s First Nation reserves have the benefit of both a pre-existing indigenous legal system and a small, homogenous community. However, even this does not guarantee the long-term success of a transformative program. Merry states:

> In general this type of popular justice exists only as long as the community that created it continues to exist as a more or less autonomous social group. These communities constantly struggle for autonomy from the larger society, which generally penetrates them in various ways" (46).

In the end, because of theses articulated challenges, transformative programs often find it exceedingly difficult to meet their ideological goals. Merry and Milner summarize this point when they state:

> ...popular justice rarely puts a previously disempowered group in control of its own conflicts or provides a setting in which a community exercises autonomous authority and makes independent, locally determined judgments. Nor does it typically challenge the hegemony of state law. Unless it establishes a base of power outside the state legal system, popular justice is more likely to entrench and reinforce social changes already occurring in other segments of society or to consolidate changes accomplished through other forms of political transformation. A shift in relations of power and a substantially empowered local community seem beyond the possibilities of popular justice. (9).

C) Hybrid Programs

It should be noted that within its court reform ADR policy, the Ministry of Attorney General is also implementing some court reform ADR programs--i.e. Family Justice Centre's and ICBC's voluntary mediation program--that are sympathetic to the principles of the transformative model. There is even speculation that the court-annexed mediation program soon to be implemented in the B.C. Supreme Court will be more aligned with the transformative model then similar programs found in other jurisdictions. This point is illuminated by comparing Ontario's court-annexed mediation program with the program that is proposed for B.C.

In Ontario it is mandatory for disputants in all civil (non-family) claims to have a three-hour mediation session within sixty days of the close of pleadings. Litigants who wish to opt out must petition the court armed with appropriate reasons. In B.C., it appears that the Ministry of Attorney General, in response to stakeholders like Brian Gardiner of the CDRC and Chief Justice Williams, will implement a more flexible, and thus potentially more transformative, court-annexed mediation program. Gardiner states that his recommendations to government were to implement ADR programs:

that

> ...whereby the parties would be obliged to show some evidence they've done their best to solve this case before going to trial, and that means they've gone to mediation, in essence, at some time during the life of the case...And if they can settle it without mediation even better. Because you have to protect that environment so that people don't stop negotiating because they're obliged to go to mediation" (personal interview).

While Chief Justice Williams states:

> I'm opposed to mandatory mediation... I think there are other ways of doing it: for instance in the court system we could have a notice to mediate. One person could serve another with a notice to

> mediate and there will be mediation unless that person has a good reason why not. 'I don't feel like it', isn't quite good enough...Mandatory mediation says that everything has to go before you get a trial date. Well I don't agree with that" (personal interview).

However, voluntary court reform ADR programs are problematic in that they often do not successfully draw sufficient numbers of clients and must eventually resort to more coercive means. Already in B.C. there is one example of the provincial government being forced to modify a voluntary ADR program due to the poor public response. A pilot project, scheduled to be launched on June 1, 1998, will make (formerly voluntary) parenting courses mandatory for separating couples in the Burnaby/New Westminster areas. In justifying this new tactic, the Ministry of Attorney General reported that currently the courses are offered in over fifty B.C. communities but "large numbers [of participants] have not signed up" (Jimenez A2). As the Ministry "explores" ways to increase public participation in ICBC's voluntary mediation program, one can only wonder if participation it will also be made compulsory.

Summary

In sum, ADR programs adopted by the state inevitably become regulated, bureaucratized and professionalized. Thus, over time they no longer represent an efficient and economical alternative to the courts. Moreover, they remain controversial from the outset as critics of court-reform programs assert that disputants' legal rights are unduly compromised in these processes. This is particularly true for the party who holds the weaker bargaining position. Furthermore, government-implemented ADR processes are open to criticism because, some argue, they elevate disputants privacy rights above the public's "right to know".

ADR programs introduced in opposition to state law tend to be co-opted by the state or succumb to a myriad of problems such as an inconsistent client base, insufficient financing, or lack of community support. Thus, they rarely, if ever, achieve their ideological and practical goals which include empowering the disputant and engendering large-scale social and political change.

Finally, programs that exhibit many characteristics of the court reform model yet are designed to be entered into voluntarily, often do not attract sufficient numbers of clients. Subsequently, after a period of time, these programs are often made compulsory by the government.

Chapter 8: Conclusion and Recommendations

Alternative dispute resolution programs represent a complex and potentially revolutionary method of dealing with justice issues. ADR's complexity is inherent in its definition, as ADR is an alternative, or, more precisely, a series of alternatives, to the traditional court system. It cannot, therefore, be easily

conceptualized nor easily compartmentalized. Nor is it easily analyzed or evaluated. It is revolutionary in that it calls for a re-invention of western conceptions of justice, as ADR programs overlook traditional and foundational justice ideals such as due process and representation by legal counsel.

Building first on the informal process of negotiation (in use since time immemorial), and then on the institutionalized ADR processes adopted in the labour/relations community at the turn of the century, the "new ADR movement" is now poised to usher in a significant growth industry in the next millennium. To the chagrin of the lawyers who remain wedded to the court system, we may soon speak of ADR practitioners in the same breath as doctors, teachers, and priests.

However, in the new ADR movement, there is no uniform ADR proponent and, much like the processes themselves, ADR advocates can be placed on a long and diverse continuum. At one pole ADR supporters are characterized as those who are "committed to the values of voluntarism, empowerment of community members, recognition of their expertise, peace-making as a way of life, and the building of a popular peace and justice movement" (Gustafson 7). The other pole contains those individuals who "are highly trained professionals, hoping to make a good livelihood in their chosen careers, who can lay claim to be being driven by values as well: concern for quality control, protection of the consumer and the demonstration by a powerful profession to those in power that ADR is a viable alternative to traditional systems" (Gustafson 7). The existence of this continuum may be the key defining aspect of the ADR field; although all

ADR advocates share a belief in the utility of ADR processes, proponents who sit on opposing poles have little common ground.

Since the rebirth of ADR, in the United States in the 1970s and in this province in the mid-1980s, the agenda of those on one pole--advocates of the court reform model--has dominated (if not completely overwhelmed) the agenda of those located on the other--advocates of the transformative ADR model. This dominance is explained by the fact that the legal and political establishment have, for the most part, embraced the court reform model while the transformative model has only caught the attention of a few community activists and radical academics.

The Ministry of Attorney General's policy statement, released in 1995, is a reflection, and reinforcement, of this dominance. The Ministry is not interested in re-conceptualizing western systems of justice nor does it desire to remove the state from the justice equation. It is interested in using ADR processes to alleviate pressure on the court system, in a complementary role to the existing justice system. In short, efficiency and economics are the main engines driving the Ministry of Attorney General's ADR policy.

The consequences of an ADR policy based primarily on the court reform model are two-fold. First, it is a policy that may severely curtail the legal rights of British Columbians without offering them other comparable benefits in return. In addition, it will impede the development of case-law and limit the public's ability to monitor disputes and dispute settlement terms in B.C. Second, it is a policy that stands only a limited chance of meeting its intended goals over the

long-term. This is because it does not address the state-centric, bureaucratic, and professionalized dispute resolution culture in B.C.

The notion of a justice system that compromises legal rights behind closed doors may be tolerable to British Columbians if comparable benefits are gained in other ways. In the transformative model, dispute resolution processes are framed and conducted in such a way that disputants gain an increased sense of self-efficacy and self-esteem, and are empowered both personally and socially (and perhaps even politically). The model does this by altering the dispute resolution culture from one that is state-centric, formal, and professionalized to one that is disputant focused, driven by the ethos of volunteerism, and flexible. Most importantly, however, it is entirely non-coercive.

However, the court-reform model *does* offer disputants advantages over the court system. In particular, it allows for dispute resolution processes that may well be quicker, cheaper, and less adversarial than the court system. For many, particularly those in the business community, the opportunity to save both time and money would certainly be regarded as valid advantages of ADR, irrespective of ADR's possible transformative potential. Thus, court reform programs could be seen as a fair trade-off for compromised legal rights.

Yet, as discussed in Chapter Seven, the promises of quicker and cheaper processes are uncertain when the ADR field, particularly arbitration, is assessed over a longer time-frame. In as little as ten to fifteen years, the forces of regulation, bureaucratization, and professionalization could render the ADR infrastructure and its processes as unwieldy as the present-day court system.

Bryan Williams adds credence to this point when he states: "I've seen arbitrations that went on for years. I've seen arbitrations that have cost a fortune, more than a court case would cost" (personal interview).

Arbitration, relative to other ADR processes, can be singled out as more likely to be susceptible to the same problems faced by the courts because it is adversarial. Brian Gardiner highlights the unique problems inherent to arbitration when he states, "Lawyers like arbitration. To them ADR...is an opportunity to really start making arbitration a bigger part of their business and...they can think about taking their clients into arbitration hearings which is like going to trial. That's their comfort zone" (personal interview).

Ultimately, the court reform model remains more problematic than the transformative model, however, in that it combines compromised legal rights with a high degree of state coercion. That is, the court reform model advocates compulsory ADR mechanisms, many (perhaps most) of which fail to respect notions of due process in the same way that the court system does. Thus, in the end this model may offer disputants the worst of both worlds: a high degree of state coercion--similar to that found in the court system--*and* reduced legal rights.

Why has the Ministry of Attorney General adopted an ADR policy that is almost exclusively premised on the court reform model? The following four explanations may shed some light on this question: (1) the government's ontology towards justice is incompatible with the transformative model; (2)

pressure from justice system interest groups; (3) the demographics in B.C.; and (4) economic considerations.

In order for a government to adopt an ADR policy based more on the transformative model, it would have to remove itself from the justice equation and allow community organizations, church groups and other existing societal structures to fill the void. Clearly, this would be a radical and extremely controversial shift in justice policy for the provincial government to take. Most democratically elected governments affect change in public policy through incremental measures in less the current system or structure is in complete disarray. In B.C., there are problems in the justice system but not to the extent that drastic action must be taken.

(Those who approach this debate believing that the state is capable of a more conspiratorial agenda would add that the government would be unwilling to alter the current justice system because, in its current embodiment, it is a form of social control. More specifically, it allows the government--the state's elites or tools of the state's elites--to perpetuate their power in society through notions of hierarchical institutionalism, capitalism and professionalism.)

The second explanation is closely linked to the first. It is obvious that the powerful, well-connected, and well-organized legal community would be staunchly opposed to a radical re-structuring of the justice system. Many lawyers and judges are already uncomfortable with court-reform ADR measures and perceive them to be a threat to their livelihood--which is already under attack due to an over supply of lawyers in this country. They would be even more opposed

to justice system based on the transformative model. It would be inconceivable that legal lobby organizations such as the Canadian Bar Association or Law Society of B.C. would sit idly by as the government proposed plans to put their members out of work.

The third explanation is that the demographics of B.C. must be considered in any discussion of a transformative ADR policy. As historical evidence indicates the transformative model has been most successful when utilized in small, heterogeneous communities that have explicit and readily accepted social norms. This clearly does not describe most of B.C., particularly the Lower Mainland and Southern Vancouver Island where the bulk of the population is located. In short, most B.C. communities are too fragmented and thus lack the cohesiveness to successfully apply the transformative model in the traditional sense.

The fourth explanation is that even if the government was willing to embark on such a bold initiative, its hands are tied by the economic realities of the 1990s. Governments, particularly the government of B.C., cannot afford to undertake large, state-led social experiments of any kind, especially one as massive as implementing a province-wide ADR agenda based on the transformative agenda. While in theory, the transformative agenda would result it dramatically decreased costs for the government, the initial action necessary to reach this point would be financially prohibitive.

However, perhaps the best reason for why the Ministry of Attorney General has not adopted an ADR policy premised on the transformative model is one that hinges upon the composition of the model itself. In many ways there is a certain impossibility to the transformative agenda. At a theoretical level, the transformative ADR model (in its pure form) precludes government involvement

as it calls for a justice system to be built outside of, or in opposition to, state law. Consequently, it relegates itself to the continual position of being a "relatively ill-funded and poorly publicized" outsider with few powerful or wealthy friends (Becker 110). If the Ministry were to adopt an ADR policy based on the transformative model, the model, by its very nature, would no longer be in operating in its pure theoretical form.

Is the Ministry of Attorney General's court-reform ADR policy, once fully implemented, destined to be attractive yet controversial in the short-term, and ineffective over the long-term? Based on the previous analyses it appears that the answer to this is, yes. However, in fairness to the Ministry, the policy, in its current format, should not be viewed as a fait d'accompli.

McHale, one of the policy's architects, readily admits that the policy statement, as it stands, is merely a framework by which the Ministry of Attorney General is approaching its ADR agenda. It is, he insists, by no means a finished product and thus will evolve over time, changing and adapting to meet the needs of the public and to appease the demands of those in the ADR community and those in the legal and judicial community.

Recommendations

In what ways could the Ministry then reform its ADR policy? Two members of the representative panel of ADR stakeholders offer their opinions:

Gustafson believes that the Ministry of Attorney General needs to take a serious look, "...at the power of communities and the question of locus of control, locus of power". The government then needs to rebuild a justice system that is characterized by "community-government partnerships". In these partnerships, various levels of government would listen to communities about their specific

needs, and then help put the infrastructures in place to service them (personal interview).

The Ministry may have taken one step in this direction when, in February of this year, Attorney General Dosanjh announced that the government is "...making available a $1 million fund that includes start-up funding, a detailed information kit and a team of experienced advisers for communities to build their own justice programs" (Ministry News February 11, 1998). In making the announcement, Dosanjh stated, "One of the goals of our justice reform program plan is to strengthen community partnerships, and give British Columbians a stronger voice in the delivery of justice. Community accountability programs are an important step to reaching this goal" (Ministry News February 11, 1998). The team of community advisers will include Gustafson and representatives from the Ridge Meadows Youth and Justice Advocacy Association, the Trail Youth Justice Program, the Surrey RCMP detachment, and the North Peace Community Justice Organization. Lola Chapman, the Ridge Meadows' representative reinforced the sentiments of Dosanjh when she noted, "Communities are well-positioned to find solutions that work for them in dealing with low-risk offenders. This initiative will encourage new ideas and approaches to be developed that are appropriate for local needs" (Ministry News February 11, 1998).

Gardiner's advice to the Ministry of Attorney General, meanwhile, centers more on a re-wording of the ADR policy now in place. He states:

> I think if they were to take this and instill it down to a mediation initiative, plain and simple, with no other junk attached to it. ADR...people get all excited about you can design your own process. You can have this neutral evaluation process, you can have med-arb, you can have this that. All of that is junk as far as I'm concerned. It's just a bunch of theory. What this is about is people sitting down and talking to people and solving their own problems. That's what I think society is going through. That's why I think

> mediation is the tool of choice for 99.9% of the clients. This ADR is an academic theory. (personal interview).

While Gustafson calls for more programs like CJI and increased levels of government-funding for these programs, Gardiner's advice, involves rewording the Ministry's ADR policy to make it more attractive to British Columbians.

Gardiner's recommendation is important in that it would eliminate arbitration from the ADR umbrella thereby reducing the policy to only collaborative dispute resolution processes. Not only would this give the policy more focus and clarity, it would also address a practical problem for the provincial government as it appears, given the examples of the Labour Relations Board and the Ministry of Transportation and Highways expropriation panel, that arbitrations are the ADR process most susceptible to the ills that plague the court system. Also, reducing the ADR policy to a "collaborative approach" policy may also minimize the influence of those in the legal profession who see ADR--essentially arbitration--as just another quick-fix, profit-making venue.

Following the same vein as Gardiner's comments, the Ministry of Attorney General would also be well-advised, in a revised policy, to separate criminal ADR processes from civil ADR processes. Again, this would bring clarity and focus to the government's agenda. Currently, in B.C. the ADR movement (as represented by both models) suffers from a lack of publicity; most British Columbians are unaware that government run and non-government run non-court options exist for resolving disputes. If the Ministry were to re-release its ADR policy as a series of more discrete and compact polices--i.e. "Collaborative Approaches to Solving Civil Claims" and "Restorative Justice Approaches to Criminal Matters"--it may find that the message is easier to market, and thus the ends, particularly transformative ends which rely on voluntary public participation, more readily achieved.

Furthermore, a series of compact policies would also be beneficial in that it would be more conducive to statistical analysis, and thus the policies' successes and failures better measured. For example, a "Collaborative Approaches to Solving Civil Claims" policy would encompass only civil suits that end up in mediation instead of court. The effectiveness of the policy could easily be measured and conveyed to the appropriate government decision-makers.

In releasing a series of smaller, more focused ADR policies, the Ministry of Attorney General would also be advised to concentrate on operationalizing only hybrid ADR programs--programs that are attached to, and publicized through, the court system, but that are voluntary for disputants to participate in. If the government remains patient and slowly allows these programs to permeate into the judicial mind-set of British Columbians, these programs have the best chance of reforming B.C.'s ineffective dispute resolution culture, thus affecting long-term change. Instead of using coercion, the Ministry of Attorney General must aggressively market the benefits of ADR allowing disputants to make their own decision based on the facts presented to them. As documented, coercive programs are likely to succumb to the inefficiencies of the court system as they instill resentment in the disputants who are made to enter into them; human nature dictates that disputants will continue to work against a coercive ADR system, instead of using these programs to work towards just resolutions.

In aggressively marketing ADR in B.C., the Ministry of Attorney General must pay particular attention to the legal profession, as it is imperative that the legal profession work with the government to promote the advantages of ADR, as evidenced in both models. That is, not only the advantages of economics and efficiency, but also the opportunities for personal growth available in ADR. While this campaign must target the established legal profession, the Ministry of Attorney General should pay particular attention to the curriculum in this

province's law schools. Law students are presumably more open to innovative ideas and represent the next generation of legal professionals. Proponents of the transformative model, who are not necessarily lawyers, should be brought into the law schools to teach courses on ADR and restorative justice. Students should also be encouraged to volunteer in transformative model programs, and course credit should be given for these for these programs, similar to credit given to students for working on the schools' law journal or in the legal-aid clinic. This would afford students the opportunity to learn about both models of ADR and, most likely, apply the lessons they have learned in their future careers.

In sum, if the Ministry of Attorney General continues to advance an ADR agenda based primarily on the court-reform model, it stands little chance of meeting long-term success in its goal to streamline the court system. Likewise, ADR programs based primarily on transformative model also rarely achieve their stated goals. Thus, the Ministry should incorporate as many transformative model characteristics as possible into its court-reform ADR agenda, market these programs aggressively, and then remain patient. If it does, there is a strong possibility of slowly changing this provinces ineffective dispute resolution culture, and thus its judicial system.

Although the Ministry of Attorney General's ADR policy statement is close to three years old, the ADR debate has not yet fully begun in British Columbia as members of the public are only now becoming aware of the Ministry's ADR agenda. Over time as it further infiltrates the justice system through initiatives like the Trial Overflow Programme and the court annexed mediation program, ADR is a topic that will undoubtedly receive a great deal of media attention and will evoke strong sentiment from the public either in favor of it or in opposition to it. And, while it is evident that British Columbians want significant reforms to the

justice system, it is not clear if they are willing to pay for these programs through a compromise of due process. And ultimately, it is the public who will eventually determine the fate of ADR in this province as the provincial government is elected and defeated upon the policy decisions it makes or does not make.

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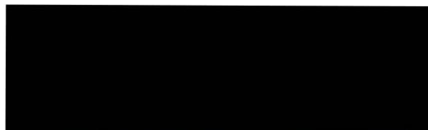
Author 

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