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ADR and the Public Interest

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Introduction

ADR's benefits are well-known and oft-cited. ADR can reduce the cost of dispute resolution for the parties and the public purse. It leads to more harmonious relations and more varied and responsive settlements than the adversarial, winner-take-all premise of civil litigation. It has added attractions for the parties of confidentiality, flexible procedure, choice of decision-maker, focus on finding workable solutions to problems and fixed timelines for hearings and decisions.[1] As a result of these benefits, it is not difficult to account for the dramatic rise of ADR providers. As Trevor Farrow recently observed:

> Today, ADR has now become part of the mainstream diet of American and Canadian practitioners and academics. As one recent source noted, "there is a growing sense ... that it is time to look beyond adjudication as a single model for dispute resolution, and to consider instead a spectrum of dispute resolution alternatives." Students, lawyers, retired judges and other professionals are increasingly seeking meaningful ADR-related careers. Further, courts at all levels are both sanctioning and at times mandating this trend. As a result, as one U.S. commentator recently noted, the American Bar Association (ABA) "Section on Dispute Resolution Conference, only three years old, is larger than the ABA Litigation Section Conference." Put simply, the face of the legal profession -- and in particular the way modern disputes are thought about and resolved -- has dramatically changed in Canada and around the world over the past decade. [2] (footnotes omitted)

It is less clear that this development serves the public interest. I wish to explore three reasons why ADR may appear at odds with the public interest:

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[1] These benefits are elaborated in Mr. Justice George W. Adams & Naomi L. Bussin, "Alternative Dispute Resolution and Canadian Courts: A Time For Change" (1995) 17 Advocates' Q. 133.

[2] T. Farrow, "SPECIAL ISSUE: CIVIL JUSTICE AND CIVIL JUSTICE REFORM: ARTICLE: Dispute Resolution, Access to Civil Justice and Legal Education" (2005) 42 University of Alberta Law Review 741. See also Trevor Farrow, "Privatizing Our Public Civil Justice System".

1) Justice should be transparent and be a public process;
2) Settlements do not necessarily entail just outcomes; and
3) ADR takes pressure off the civil litigation system to improve access.

1) Justice Should be Transparent

The Court is a public space. It is not only where justice is done but also where justice may be seen to be done. The administration of justice depends as much on public confidence in the courtroom as on any other variable. There are several dimensions to the value of transparency in the justice system.

First, proceedings themselves should be public. This includes claims and defences filed with the Court, as well as the hearings. The exceptions are those aspects of the proceedings specifically contemplating settlement (for example, pre-trial conferences). A process aimed at settlement and dispute resolution need not be public and in many cases will only succeed if it is confidential. Thus, ADR, if it removes dispute resolution from public view, will be contrary to the goal of transparent administration of justice.

Second, the decisions in judicial adjudication must also be public. The very development of the common law presupposes one judge's application of legal principles and doctrines developed through earlier decisions in analogous circumstances. If no record is kept of ADR resolutions, the public is deprived of the development of jurisprudence in key areas of liability.

Third, the decision-makers in judicial contexts are public officials. They derive legitimacy from their public interest mandate as a separate and independent branch of government and are accountable to these ideals. ADR may involve a variety of public and private adjudicators with a wide spectrum of interests and motives.

2) Settlements do not necessarily entail just outcomes

Most if not all of ADR, whether court controlled or outside the court, is undertaken with a view to settling disputes. Adjudication through the courts, however, is about dispute resolution and other values (truth seeking, the search for just outcomes, deterrence, etc) Courts must ensure that a just resolution is reached and that the principles upon which this resolution is founded accord with the law. In his landmark article, "Against Settlement,"[3] Owen Fiss saw settlements through ADR as a kind of civil plea bargaining. He observed:

> I do not believe that settlement as a generic practice is preferable to judgment or should be institutionalized on a wholesale and indiscriminate basis. It should be treated instead as a highly problematic technique for streamlining dockets. Settlement is for me the civil analogue of plea bargaining: Consent is often coerced; the bargain may be struck by someone without authority; the absence of a trial and judgment renders subsequent judicial involvement troublesome; and although dockets are trimmed, justice may not be done. Like plea bargaining, settlement is a capitulation to the conditions of mass society and should be neither encouraged nor praised.

Fiss in particular was concerned with the distortions created by imbalances of power in relation to settlement through ADR. Of course, these same imbalances of power have undermined the effectiveness and inclusiveness of civil litigation long before and since the advent of ADR.[4]

While I would not equate ADR with plea bargaining, Fiss' distinction between dispute resolution and the pursuit of justice does resonate. There is something unsatisfying, however, about the dichotomy and the sense that this is an either/or proposition. Is it not possible for the fair resolution of a dispute through ADR to complement the pursuit of justice as a public interest goal. Court connected ADR may be one such possibility.

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[3] (1984) 93 Yale L.J. 1073.

[4] For a broader discussion of the implications of unequal access to civil litigation, see ; Ian Morrison & Janet Mosher, "Barriers to Access to Civil Justice for Disadvantaged Groups" in Ontario Law Reform Commission, *Rethinking Civil Justice: Research Studies for the Civil Justice Review* (Toronto: Ontario Law Reform Commission, 1996) 637.

Depending on the variant, ADR connected to a court process gives rise to some degree of judicial supervision, some degree of public scrutiny and some degree of broader administration of justice goals beyond simply "trimming" the dockets. In such contexts, the question may well be what the relationship to the Court and the judicial process adds to the effectiveness and legitimacy of ADR. Put differently, if the resources of the Court are devoted to designing, maintaining and/or overseeing ADR, the key accountability metric for such a program ought to be how it advances the public interest and the administration of justice. This aspect of evaluating the effectiveness and value of ADR is relatively undeveloped and merits greater attention.

3) ADR takes pressure off the civil litigation system to improve access.

Access to justice remains a touchstone for the civil justice system. As several recent studies and task forces have reiterated, few potential litigants can afford to take their case to court. Too many are self-represented or under-represented. A key solution to this problem appears to be streaming a significant portion of cases out of the court system and into alternative streams of dispute resolution. While this may clear backlogs and remove some of the litigants who cannot afford lawyers from the dockets, it is not clear that this measurably enhances access to justice. Indeed, a civil court system which exists only to engage the legal disputes of the wealthy is problematic.

The point of departure for proponents of ADR for a generation has been that civil litigation is a lengthy, expensive and inflexible route to an uncertain winner-take-all outcome. Why need this be so? If the civil justice system itself is moving toward stream-lining, greater flexibility, more creative case management, etc, then the benefits of ADR relative to the civil justice system may be diminished. Indeed, it may be seen as a measure of the success of the ADR movement that so many of its strategies and practices now may find their way into the civil litigation process itself.

What remains unclear is the normative aspiration of civil litigation reform in relation to ADR. Should we approach ADR and the civil litigation system and kindred and

complementary aspects of a dispute-resolution framework, including public and private elements working in concert, or should we see ADR as necessary only because of the flaws of civil litigation. If the latter, should the goal of civil justice reform be "containment" of ADR or should we simply assume ADR would remain a desirable feature of the justice system irrespective of how successful access to civil justice may become? These are large questions and the answers may come in shades of gray. Nonetheless, it is important to ask such questions. Whether ADR serves the public interest depends in large part on what we understand the goals of the civil justice system to be.

There is now considerable empirical data which addresses the question of whether ADR works and how best it may respond to the dispute resolution needs of parties. Such data cannot, in and of itself, address how well ADR responds to the public interest. When cases are streamed out of the courts and into ADR, is this a measure of the success or the failure of the justice system? Perhaps the answer is simply that it is both.