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**Law Reform and ADR:
Pulling Strands in the
Civil Justice Web**

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by Margaret A. Shone, Q.C.

A. The Civil Justice Web

[1] Justice systems the world over are in pursuit of improved methods of resolving disputes.¹ At this juncture in history, civil justice systems rooted in the English common law tradition are in a particularly active state of flux. The traditional approach to dispute resolution is seen by many as problematic: litigation is too adversarial, takes too long and is too costly. Some observers consider the extent of the change occurring during the current transition as equal in magnitude to changes that were occurring during the time period leading up to the merging of law and equity under the *Judicature Acts* of 1873 and 1875.²

[2] The responses to the criticisms have taken a variety of directions. One response has been to encourage dispute resolution out of the courts. This approach has the potential to reduce the court caseload.³ Another response has been to widen the range of dispute resolution processes available in the courts, thereby enlarging the sphere of civil justice associated with the courts. Yet another response has been to increase the involvement of judges in managing the litigation process, including promoting dispute resolution by means other than trial. In some jurisdictions, judges not only promote dispute resolution using processes other than trial but also offer their services to facilitate dispute resolution by agreement between the parties.

[3] Unquestionably, a major transformation is under way. The traditional ways of doing business are changing.⁴ It quickly becomes apparent that ADR – three simple letters that have come to symbolize a vast change in approach to dispute resolution – looms large in connection with the current reform activity.

[4] In recent remarks, the Right Honourable Beverley McLachlin, P.C., Chief Justice of the Supreme Court of Canada, drew on the image of a spider's web put forward by her predecessor, the Right Honourable Antonio Lamer, P.C.:⁵

I sometimes think of these sorts of cases as being somewhat like a spider's web. If you pull on one strand of the web, the entire structure moves, but not necessarily all in the same direction. The implications are widespread and, at times, hard to foresee.

The Chief Justices were talking about changes in the duties of judges (from resolving disputes to developing law to deciding complex social policy questions) whereas I am talking about changes in the processes used to resolve disputes. Nevertheless, I am drawn to this imagery and think it apt in the context of a discussion of law reform, alternative dispute resolution and the changing role of lawyers and judges in common law systems of civil justice. Pull one strand in the intricately interconnected web, and the other strands reposition themselves, sometimes in unanticipated ways.

[5] With this imagery in focus, I will explore what I consider to be two examples of unanticipated reshaping of the spider's web that have occurred when ADR has pulled on the strands of civil justice. The first example is the evolution of ADR from a movement whose proponents sought to resolve disputes outside the courts to a procedure offered by judges of the court (JDR). The second example is the evolution, in Alberta, of the concept of JDR from a structured mini-trial based on a model developed for private use in commercial law disputes to judge as omnipotent manager of litigation, facilitator of party agreement and trier of dispute.

[6] I have painted my examples with broad brush strokes, and as sequential developments. It may be closer to the truth to see the influences as contemporaneous rather than sequential. On either analysis, the trends are apparent. My intention is to use these examples as "jumping off points" for raising questions and inviting discussion about law reform, alternative dispute resolution and the role of professional law reform agencies in pulling strands in the civil justice web.

B. ADR Strands

[7] Much has been written about ADR, its origins, its scope, its contribution to dispute resolution, its potential. I make no attempt to replicate or summarize those writings. Instead, I offer my own selective account. ADR may signify a dispute resolution process that occurs in the private sector and is independent of the courts – litigation in court may or may not have been commenced when the private sector process is attempted. It may embrace a dispute resolution process that is offered in a program or service connected to the courts (court-annexed ADR), as in mandatory mediation initiatives or court-appointed dispute resolution officers. It may embrace dispute resolution processes alternative to traditional litigation conducted with the assistance, or under the authority, of a judge of the court (JDR).

1. Origins of ADR: A Reaction to Adversarial Litigation

[8] The modern ADR movement is usually viewed as having originated in the United States during the 1960s or 1970s in a climate of criticism of the adversarial nature of litigation,⁶ and, perhaps, loss of faith in adjudication⁷ or a “decline in confidence ... in the competence and professionalism of lawyers.”⁸ The criticisms have been articulated many times, in many ways. Traditionally, in the common law civil litigation system:⁹

... a state-empowered authoritative figure, the judge, hears the evidence presented by the parties (usually through their legal counsel) and makes the decision. The issues are framed in the language of legal specialists, which does not always fit well with the understanding (and lived reality) of the parties to the dispute. The parties are often distanced from the process which is dominated by lawyers and judges.

At worst, some would say, the system emphasized “argument, debate, threats, hidden information, deception, lies, persuasion, declarations, and toughness.”¹⁰ The rules of civil procedure which structured the litigation process served as “agreed rules of combat” in the “march toward the courthouse.”¹¹ Generally, the judge kept out of the arena of the dispute and let the parties, with the advice of their legal counsel, decide when and how to proceed.

[9] Those who first promoted ADR sought processes which would place the disputants in control of the choice of process, identification of the issues and determination of the solution as well as encourage a more cooperative approach to dispute resolution by parties desiring to reach a mutually satisfactory outcome. An era of experimentation with creative new methods of dispute resolution sprang to life in the private sector.¹² The acronym ADR, for “alternative dispute resolution,” signified a process for dispute resolution that stood in contrast to litigation in the courts. Often the consensual resolution would be achieved with the assistance of a neutral outsider to the dispute who, typically (unlike a judge), would not have authority to impose a decision. Appendix A to this paper contains a chart comparing characteristics of the traditional litigation process with those of innovative ADR.

[10] ADR does not describe any single style of dispute resolution process. Instead, it embraces a wide spectrum of dispute resolution processes based on the well-known concepts of negotiation, mediation and arbitration but characterized by imagination and innovation. The interpretation of ADR is as flexible as the processes it envisages.

New forms of ADR are constantly appearing. Globally available online dispute resolution is one example.¹³ The practice, by lawyers, of collaborative law is another.

[11] Many benefits have been claimed by proponents of ADR. ADR may provide more satisfactory results than court adjudication because ADR need not be restricted to consideration of legal issues and remedies; other interests at stake in the dispute can be accommodated by taking an “interest-based” (rather than “rights-based”) approach to problem-solving.¹⁴ More satisfactory results are likely to enhance compliance with the agreement reached. ADR may be more efficient and affordable than litigation. By choosing their own process, the parties can tailor the process to the dispute. They can also choose the time when they will engage in ADR. ADR, it is claimed, may help to preserve a continuing relationship between the disputants or restore a relationship that has broken down. ADR processes are ordinarily held in private, thereby preserving the confidentiality of the proceedings and resolution. The participants search for solutions that are mutually beneficial. What is more, participation in the process provides the disputants with a positive experience, regardless of the outcome.¹⁵

[12] The early proponents of ADR held idealistic hopes for a shift in societal attitudes toward harmonious approaches to dispute resolution. They advocated development of educational programs on problem-solving skills and techniques in elementary, secondary and post-secondary schools and in the community. As Landerkin and Pirie put it, ADR (in the form of mediation) “purports to be transformative, empowering the individual, the community, and even the global village by changing the dispute and the views and attitudes of the disputants.”¹⁶ As an aside, the article by Landerkin and Pirie is timely, extensively researched and thought-provoking. As this paper progresses, I will be drawing from it more and more.

[13] Evidence of the impact of ADR on dispute resolution practices is provided by the appearance in the workforce of persons who make a living by helping others resolve disputes (*e.g.*, mediators, arbitrators and other persons with similar skills).¹⁷

[14] In summary, the legacy of the initial ADR movement is active participation by the disputants in the dispute resolution process, a cooperative attitude toward dispute resolution and a host of new methods of dispute resolution offered in the private sector as alternatives to adversarial litigation.

2. Mainstream co-option of ADR processes

[15] The seeds of ADR were sown in the private sector. But major institutional players (“under-siege legal institutions, deficit-stricken governments, and profit-conscious businesses”¹⁸) soon saw the promise of ADR to reduce the cost of disputing. Governments were and continue to be pressured to respond to the public need for greater access to justice and to fund the courts or other state-offered dispute resolution programs and services. Today, standard form contracts in government and big business routinely require dispute resolution using ADR methods. As well, government-appointed administrative tribunals have introduced ADR into their processes.

[16] More or less contemporaneously with the appearance of the ADR movement, the courts were becoming burdened by large caseloads (the consequence, perhaps, of an increasingly litigious society) that impeded the speed of litigation, added to costs and aggravated other inefficiencies. At the same time, governments began to question the extent to which the state should be involved in private disputes.¹⁹

[17] One solution to the large caseloads would be to encourage disputants to resolve their differences out of court. Governments, courts and professional associations began to promote a shift in attitude away from adversarial litigation and toward self-resolution using cooperative problem-solving approaches and dispute resolution resources offered in the private sector. Courts and professional associations urged lawyers to make greater use of ADR techniques, actively promoting the resolution of disputes by party agreement instead of court adjudication.²⁰

[18] For cases that came to court, a multi-option vision of the civil justice system proposed by scholars found favour among governments, professional organizations and the courts.²¹ In the 1980s and more so in the 1990s, governments and professional associations were setting up commissions, committees and task forces to explore models of ADR for use in the civil justice system.²² By way of example, in 1996, the Canadian Bar Association (CBA) *Report of the Task Force on Systems of Civil Justice* called for dispute resolution techniques to be promoted “not as alternatives to the civil justice system but as integral components of it.”²³ In the CBA’s multi-option vision, the civil justice system in the twenty-first century:²⁴

- is responsive to the needs of users and encourages and values public involvement,
- provides many options to litigants for dispute resolution,
- rests within a framework managed by the courts, and
- provides an incentive structure that rewards early settlement and results in trials being a mechanism of valued but last resort for determining disputes.

According to the CBA, opportunities to use non-binding dispute resolution as early as possible in the litigation process should be available as part of the civil justice system.²⁵ The change “begins with a new focus on dispute resolution as the goal and a corresponding reduction in the antagonistic nature of the litigation process.”²⁶ Some lawyers will have to fundamentally reorient themselves away from “fighting the other side to solving a common problem.”²⁷

[19] A significant cultural shift is taking place and the promotion of dispute resolution by agreement of the parties is a major component of that shift. Existing civil justice systems offer a range of measures that promote settlement, and new measures continue to be introduced. Programs and services formerly provided only in the private sector are now being annexed to the court as part of its service. The practices and expectations of litigants, lawyers, judges and court staff with respect to the civil justice system are changing.

[20] True to ADR’s essential characteristics of innovation, creativity and experimentation, ADR in the courts involves continuing adaptation and evolution of ADR processes. But as governments, tribunals, and courts borrow, co-opt and adapt ADR methods, an ironic shift becomes apparent. Control over the dispute resolution processes moves to the institution. Processes that were open to negotiation become structured and subject to rules that operate systemically. Voluntary participation in an ADR process becomes mandatory participation. Self-resolution loses ground to professional representation. Processes that began informally are formalized, what was elective becomes directive. In short, rather than be designed to meet the specific needs and exigencies of the parties to the particular dispute, ADR techniques are adapted to fit the goals of the institution or system. Even pre-action behaviour may be caught in the net. In England and Wales, the Civil Practice Rules allow the court to consider compliance with pre-action protocols when assessing costs or making case management decisions.²⁸ In Canada, the CBA Task Force on Systems of Civil Justice

raised the possibility of (but did not recommend) making participation in mediation mandatory prior to the commencement of court action.²⁹ In short, with co-option, the element of choice is diminished, the conversation constricted.

[21] An aspect of this diminishment is in the scope for disputants to consider the kinds of factors that affect the choice of ADR method. In the private sector, such factors include:³⁰ matching a dispute with a process;³¹ the strength of the “interpersonal” dimension of the dispute (*i.e.*, interpersonal or impersonal relationship between the disputants); the nature of the dispute; the amount at stake; alternative methods; the speed of resolution; the cost involved; the relative power of the disputants; the relative knowledge of the disputants; the relative financial resources of the disputants; the mechanisms for steering disputants and intermediaries to the right choice; the relationship between dispute resolution methods (*i.e.*, linear, hierarchical model, or integrated); the incentives for use of alternative methods; and the attitudes of lawyers and judges.

[22] In summary, ADR is so enticing that governments, courts and other public institutions are claiming and reshaping it to their purposes. ADR which once symbolized dispute resolution outside the courts now embraces any method of resolving a dispute that is alternative to court adjudication, whether provided within or outside the court.

3. Use of ADR by judges

[23] The emphasis on resolving disputes through party agreement coincided with another development in response to increased caseloads and the pressure on courts to reduce delay and costs: judges were becoming increasingly managerial.³² The coincidence of interest in ADR promotion and judicial management of litigation led to an enhanced role for judges in relation to settlement efforts.

[24] The link between the managerial role and ADR by judges is found in the expansion of the pre-trial conference rules. At first, the purpose of the pre-trial conference was the assessment of the preparation and readiness of the parties for trial so as to “[improve] the quality of the upcoming trial.”³³ In 1983, however, in the United States, the pre-trial conference rule in the Federal Rules of Civil Procedure was amended to permit judges to “consider and take action with respect to ... the

possibility of settlement or the use of extra-judicial procedures to resolve the dispute.”³⁴ Needless to say, as a matter of practice, the “heightened emphasis on the judicial production of settlements” had begun much earlier.³⁵ Before long (and as so often happens), Canadian jurisdictions and, I daresay, jurisdictions elsewhere in the English common law world, followed suit.

[25] The historical connection may explain the tendency toward procedural compulsion when courts become involved in ADR. The pre-trial conference opens up the exercise of court authority to bring the parties together. Where requested, or on their own initiative, judges now hold conferences with the litigants (pre-trial, case management, settlement) at any stage of the litigation. The promotion of settlement is a component of such conferences. During the conference, the judge may suggest to the parties that they try an ADR process or the judge may use ADR techniques in an effort to resolve the litigation by party agreement achieved then and there. Rules in some jurisdictions specifically recognize settlement as the purpose of a conference through separate designation as a “settlement conference” or by making settlement the primary purpose of a pre-trial conference.

[26] “Settlement conference” is one term used to identify a separately scheduled meeting with a judge that has the goal of resolving the dispute, or issues in the dispute, through agreement between parties. Other terms include “judicial dispute resolution,” “judicial mini-trial” or “early neutral evaluation.” In the words of one judge, the terminology is “all over the map.”³⁶ The terms are intended to signal the use of different ADR processes; however, the terms and practice associated with the terms vary widely from jurisdiction to jurisdiction.

[27] The adoption of ADR processes by judges, or the use of JDR for “judicial dispute resolution” as it has become known in Alberta, is a fascinating development and one which merits careful attention. The popularity of JDR is spreading in Canada and, I daresay, in other common law jurisdictions as well. Judges offer their JDR services at the front-end of litigation (at the close of pleadings),³⁷ at the back-end of litigation (in a final effort to facilitate settlement before the parties go to trial), and any time in between. Judges offer their JDR services in trial courts having “inferior” (meaning less than full) jurisdiction (courts handling, *e.g.*, small claims, family matters), in trial courts having “superior” (meaning comprehensive inherent)

jurisdiction and, surprisingly, in appellate courts.³⁸ In some jurisdictions, the opportunity to use JDR is offered to the disputing parties as a voluntary choice. In other jurisdictions, the Rules of Court permit a judge to order the parties to attend a dispute resolution or settlement conference conducted by a judge.³⁹ Ordinarily, a judge who has taken part in a settlement process does not conduct the trial.

[28] Galanter tells us that today in many instances the negotiations leading to party agreement “are encouraged, brokered, or actively mediated by the judge” and it is possible to assert that “this has become a respectable, even esteemed, feature of judicial work.”⁴⁰ One jurisdiction’s experience with JDR – that of my home jurisdiction, Alberta – provides my second example which follows under heading C.

4. Evolution in meaning of the ADR acronym

[29] There can be no doubt that ADR has infiltrated our language and approach to dispute resolution. Today, disputants may resolve their differences before litigation has been commenced or while litigation is under way. Their agreement may be the result of:⁴¹

- independent initiative taken by the parties, perhaps making use of dispute resolution processes available outside the civil justice system, in the private sector;
- advice given by counsel, who may negotiate an agreement with counsel for the other party or parties to the dispute, or propose the use of a settlement process alternative to litigation;
- the discussion of settlement possibilities, including the possibility of using a process or processes other than court adjudication, at a meeting with a judge (judicial conference);
- the use, voluntary or mandatory, of a court-annexed ADR process; or
- the facilitation of settlement by a judge, stepping out of the authoritative role associated with adjudication and using methods of the sort ordinarily offered in the private sector to assist the parties to come to an agreement.

[30] The acronym ADR has journeyed through its own transition in meaning. Initially, ADR signified dispute resolution alternative to the traditional means of resolving disputes through litigation. In order to gain greater acceptance for the new processes, some spoke of “assisted dispute resolution” meaning dispute resolution

with the help of others. For a time in Canada, other acronyms were promoted: BDR for “better dispute resolution” or IDR for “innovative dispute resolution.”⁴² The modern court offers a range of dispute resolution options from which, in theory, a method appropriate to the circumstances of the particular dispute is chosen. The shift in the understanding of ADR from a process alternative to litigation to a process alternative to court adjudication has given rise to the redefinition of the acronym ADR to mean “appropriate dispute resolution.” Defined as “appropriate dispute resolution,” ADR options would range from out-of-court negotiation to in-court adjudication. Today, ADR has flourished to the point that some persons suggest dropping the adjective altogether and speaking simply of “dispute resolution” to describe the modern range of dispute resolution methods and choices.

C. JDR Strands: an Alberta Story

[31] As has been seen, enthusiasm for ADR and the perceived need for greater management of litigation by judges had led judges to play a growing role in dispute resolution. Like ADR, the role of the judge in ADR, or JDR as it is labelled in Alberta, is continually evolving. In my second example, JDR has evolved in three stages: from a tightly-structured judicial mini-trial to a free-flowing settlement conference in which the judge utilizes mediative ADR techniques and, from there, to the concept of judge as omnipotent manager of litigation, facilitator of settlement and adjudicator of the dispute.

1. Judicial mini-trial

[32] Alberta’s Court of Queen’s Bench first offered JDR to litigants in Alberta in the late 1980s. Initially, the process took the form of a judicial mini-trial, described in 1992 as “an expanded pre-trial settlement conference.”⁴³ In 1993,⁴⁴ the Alberta Law Reform Institute (ALRI) explained that the Alberta judicial mini-trial was modelled on a process that had been introduced in British Columbia⁴⁵ – a process which, in turn, had been developed from a dispute resolution process that had proven effective to resolve commercial disputes in the private sector.⁴⁶ In Alberta, the early mini-trial involved a structured presentation of the agreed facts and argument by counsel with parties present that concluded with the delivery by the judge of a non-binding opinion on the likely outcome were the case to proceed to trial. ALRI described the mini-trial as a discrete technique that may be used to produce a settlement, and observed that although a pre-trial conference may lead to a mini-trial, the mini-trial is not a

continuation of the pre-trial conference, but is an event scheduled separately at the request of the parties.⁴⁷ In 1996, the CBA Task Force identified two key features of the Alberta mini-trial: “voluntary participation” (although as early as 1993 there was talk of a “binding mini-trial”); and, as in the commercial mini-trial, “flexible design of procedure tailored to the dispute”⁴⁸ at an advance meeting of the judge and parties (or, more commonly, counsel on their behalf). Usually, the mini-trial is held in a conference room at the courthouse.⁴⁹ The mini-trial has been credited with having “been used successfully to facilitate the settlement of complex cases that would have taken months to litigate.”⁵⁰

2. Facilitative judge

[33] The judicial mini-trial initiated judges and lawyers to the idea of a judicial role in settlement. Before long, influenced by developments in the United States and the requirement in Alberta’s pre-trial conference rule to explore settlement possibilities, judges in Alberta’s Court of Queen’s Bench (the trial court having comprehensive inherent jurisdiction) began to experiment with the use of other ADR techniques.

[34] No doubt, judges are adept in the art of persuasion at pre-trial conferences and may exert an element of judicious coercion in the name of the management of litigation. However, in Alberta, JDRs (as the more recent emanations of the judicial mini-trial came to be known) have remained separately scheduled, and so distinct from the pre-trial conference.⁵¹ Like the judicial mini-trial that preceded them, they are an event initiated at the request of the parties who have some say in the choice of the judge. The JDR is held in a conference room in the courthouse, the process is relatively informal, the discussions are privileged, and no record is kept. It is in this context that the experimentation with ADR techniques has expanded. The procedural flexibility has led judges to develop their own individual “styles” of JDR. JDR today ranges from the tightly-structured mini-trial to a loosely-structured conference in which a judge may mediate, meet with the parties individually (caucus), give an opinion on the strengths and weakness of each party’s case, predict the outcome at trial, and press the parties to reach and sign of an agreement before the session is over. The process followed by judges engaged in JDR is wide open. The judge may begin using one ADR process, then flip to another and another, sometimes in a seemingly random way. The judge may mediate (including caucus) after giving an opinion, or move from mediation to an opinion and so forth.

[35] Frequently, but not universally, judges adopt a managerial stance by commanding the process they will follow (compare “closed” rather than “open” mediation). Some judges send a letter to the parties in advance to tell them what the process will be, what materials must be provided, and what time lines must be complied with.

[36] A spin on the JDR process in Alberta, usually stated to be voluntarily undertaken and non-binding (leaving the parties in control of the decision whether to settle or not) is the phenomenon of the “binding JDR.” A binding JDR is much like an arbitration, but without the protections afforded by arbitration statutes. The parties voluntarily agree in advance of the JDR to be bound by the judge’s opinion on the issues. It has been known, however, for a judge to require the parties to agree to be bound and give up the right to appeal as a condition of holding a JDR.

[37] As evidenced by the wide variety of JDR styles, judges differ considerably in their understandings and conceptions of the JDR role. The wide variation in practice is attributable in part to the fact that neither Rules of Court nor Practice Notes provide for JDR. In the early days, the Chief Justice of the Court of Queen’s Bench issued a province-wide Guideline for the conduct of judicial mini-trials, but that was prior to the expansion of JDR styles. Currently, no standardized Guidelines govern JDR practices in Alberta. The Edmonton judges (one of Alberta’s two major population centres) have worked on a JDR protocol but its terms are not accepted by judges in other centres in the province. Until recently, the process for booking a JDR (and selecting the judge who will conduct it) also differed from one centre to another.

[38] Although no firm models of JDR have been established, certain designations tend to describe processes that share a core of features in common. Justice J.A. Agrios describes three such classifications in his *Handbook on Judicial Dispute Resolution*: judicial mini-trials, settlement conferences and early neutral evaluation (a non-binding judicial opinion given prior to discoveries).⁵² His descriptions are reproduced in Appendix B to this paper.⁵³

[39] Because the rules of court and practice notes do not identify JDR, knowledge about JDR is uneven. Lawyers who spend a lot of time litigating may be familiar with

its availability and how to obtain a JDR, but it remains obscure to many members of the bar. Lawyers preparing for a pre-trial or case management conference with a judge may not share the judge's view of the purpose of the meeting so may not prepare appropriately. Separate scheduling helps to distinguish the judge's role in managing litigation from the judge's role in facilitating settlement.

[40] One further note. In Canada, some jurisdictions offer JDR at the appellate court level. Quebec is the leading example of a province that has adopted this practice. There the process is called "judicial mediation."⁵⁴ Appendix C sets out the characteristics, as described by the Honourable J.J. Michel Robert, Chief Justice of Quebec. Alberta's Court of Appeal also offers this option.

[41] JDRs in general, and the binding JDR in particular, invite conceptually difficult questions about the role being performed and about the relationship between adjudication, JDR and resolution of the dispute by the party agreement.⁵⁵

3. Omnipotent judge

[42] The next step in the evolution of JDR in Alberta is the merging of the judicial roles of managing litigation, facilitating settlement and adjudicating disputes. This is the height in co-option of ADR by the courts, a kind of "judge as all things to all people" stance.⁵⁶

[43] This role for the judge appears to be favoured by Landerkin and Pirie. They understand JDR as embracing the non-adjudicative procedures used by judges to assist settlements within our public justice system."⁵⁷ To them, "JDR would include judges acting as third party intervenors, *i.e.* mediators, and participating in case management, settlement or pre-trial conferences, mini-trials and the like."⁵⁸ To them, given their references to judicial history, "the modern emergence of judicial dispute resolution is not an entirely new or surprising phenomenon."⁵⁹ The "non-adjudicative tasks supporting settlement are what underpin JDR's meaning".⁶⁰

There is the case management role which includes judicial decisions on interlocutory issues. There is the obvious facilitator or mediator role that judges play in settlement-oriented pre-trial conferences or in chambers meetings. There is the hybrid role of mediator/fact finder/advisor that judges can take on in a mini-trial where parties present a summary of the case to the judge, who may then render an advisory opinion to assist negotiations among the principals.

Landerkin and Pirie go a step further to suggest that the settlement and adjudicative roles might live together in the trial context:⁶¹

There may even be scope to view JDR, in much the way ADR is now seen, as less separate from the actual adjudicative process. Just as the gap between ADR and the courts has been bridged, JDR may also be understood as an expression of the judiciary's continuing commitment to justice, both inside and outside the formal trial. Judicial interventions in the trial process of one sort or the other to encourage just, speedy and inexpensive results could fall under the JDR definitional umbrella.

[44] This version of JDR best captures the direction Alberta's Provincial Court (a trial court with less than full jurisdiction) seems to be heading in its handling of family matters. In that court, proceedings commence with a judicial conference in which the judge explores settlement possibilities, may use ADR skills to mediate a settlement, or if the parties fail to reach agreement, manage the proceeding through to trial. All that needs to be added is the authority of the same judge to hear the case formally and adjudicate the result.

[45] The "omnipotent judge" version of JDR requires parties and their counsel to place tremendous faith in the ability of the judge to run the litigation and bring about resolution. They must give over their full (perhaps, blind) trust to the judge's ADR or process skills as well as the judge's adjudicative wisdom based on a sound understanding of the substantive law. The "omnipotent judge" version of JDR constitutes the ultimate co-option by the civil justice system of ADR. Not only is prediction of the substantive result difficult; prediction of the process leading to the result is confounded.

4. Growth in JDR popularity

Like ADR, JDR (by any definition) has quickly gained popularity. JDR is now an integral part of dispute resolution in the Alberta civil justice system. It is available in a wide variety of circumstances and is generally popular with lawyers and litigants. Factors that count among the reasons for this popularity include:

- judges are skilled at analyzing and interpreting legal issues

- “the judge’s adjudicative experience in seeing the strengths and weaknesses in parties’ positions would be utilized to help the disputants resolve their differences expeditiously and fairly”⁶²
- litigants want to tell their story to a judge;
- the JDR judge provides litigants with authoritative opinion;⁶³
- the judge’s views may carry more weight than the lawyer’s views with parties who are reluctant to settle;
- “the judge can be most effective in acting as the catalytic agent to bring the two parties together” and “in a great majority of the cases reasonable men, after all the facts are on the table, can arrive at an area of agreement”;⁶⁴
- JDR is a free service (*i.e.*, the JDR judge is available without cost to the litigants whereas disputants would have to pay for ADR assistance in the private sector); and
- lawyers like being able to choose the judge based on a judge’s particular area of knowledge and style of JDR.

[46] Although Alberta has no formal system for keeping statistics on the outcomes of JDRs, the anecdotal evidence attests to their success in aiding parties to reach settlement⁶⁵ and thereby reducing the court time that otherwise would be spent in litigation management, trial and adjudication. Moreover, the judges who conduct JDRs are enthusiastic about the good they feel is being achieved for the parties, for the overall efficiency of the civil justice system and for public confidence in the courts.

[47] This popularity notwithstanding, the growth in the popularity of ADR and JDR and the patterns of change do not come without questions and concerns. It is to these that we turn in the next section of this paper.

[48] Before moving on, one observation comes to mind. Legally-trained persons have a tendency to solve problems by “taking charge.” In traditional litigation, lawyers took

charge of the management of the dispute from clients. In modern courts, judges take charge of the management of the dispute from lawyers. Like so many phenomena, the paternalism can cut two or more ways. Clients may appreciate having the problem taken out of their hands. At times, Alberta judges perceive that lawyers may appreciate turning the problem over to a judge for resolution. Hence, in his *Handbook on Judicial Dispute Resolution*, Justice Agrios' admonishes JDR judges to "let the lawyers do the work."

[49] Chris Guthrie observes that mediation is unlikely to be purely facilitative, as purists say it should be, as long as lawyers serve as mediators.⁶⁶ This is due to the fact that lawyers are inherently evaluative, leading to non-neutrality. As all judges are first lawyers, the behavioural tendency continues, and is, perhaps reinforced when the primary function of a person instilled with the traits of a lawyer becomes judging.

D. Pulling on the Strands

[50] ADR, once the antithesis of adjudication in the courts, is now the harbinger of the new direction in civil justice as offered by the courts.⁶⁷ But the changes do not come without problems and concerns. The civil justice web is fraught with what have been variously referred to as tensions, polarities⁶⁸ or dialectical relations.⁶⁹

[51] In this section, I will comment on a few of the pulls and tugs on the strands of the civil justice web relating to the evolution of ADR. As Landerkin and Pirie comment, "[t]he essence of the debate is how can and should ADR and adjudication work, both together and apart."

1. Relationship between ADR and the courts

[52] Not only has ADR been instrumental in effecting change to civil justice in the courts, but also the incorporation of ADR as a component of civil justice in the courts is recasting the characteristics which were originally viewed as the strengths of ADR. The relationship between ADR and the courts has been conceptualized in different ways: competitive; complementary; and co-mingled.

a. Competitive

[53] One point of view is to see ADR and litigation in court as competitive approaches to dispute resolution. This perspective adheres to the grass-roots origins of

ADR processes, with “self-autonomy of the parties as its foundational underpinning”⁷⁰ and reactive to the adversarial approach to dispute resolution and to lawyer and judge domination in the process. Its adherents would like to replace or supplant the adversarial approach. Judith Resnick adopt this view.⁷¹ Landerkin and Pirie call it the “pessimistic” view.

[54] Those who adopt this point of view place weight on the interest of the parties in maintaining control over both the process adopted in attempting to reach agreement and the predictability of the result – in short, in avoiding litigation where possible. At the same time, it is necessary to acknowledge the importance of the fact that the discussions (problem-solving, solution-seeking) take place in the “shadow of the law,” even where no legal action has been commenced.⁷²

b. Complementary

[55] Another point of view sees ADR as complementary to adversarial litigation, or supplementary when it is swept into the civil justice system. Carrie Menkel-Meadow remarks on the change from ADR as an alternative to ADR as a supplement: the “adjudication system has co-opted the ADR system, assuming increased efficiency, reducing dockets, but not achieving any necessary improvements for better justice.”⁷³ However, the “transformative promise of mediation is lost in the legal culture.” ADR now supplements adjudication; it does not supplant it.

[56] This perspective is reflected in ALRI’s Consultation Memorandum 12.6 on *Promoting Early Resolution of Disputes by Settlement* (CM 12.6) which sees the ADR processes (JDR, court-annexed ADR, court-appointed dispute resolution officer) within the court as operating to one side of the litigation track.

c. Co-mingled

[57] A third point of view sees ADR processes as co-mingled with traditional litigation. This perspective is consistent with the concept of the omnipotent judge. It conceptualizes JDR as a blended function which places the dispute under the control of the judge who may manage the litigation, facilitate dispute resolution and adjudicate the result. Under this conceptualization, the role of the judge in common law justice systems moves closer to the role of the judge in the civil law justice systems. Stempel takes this view.⁷⁴ It is the view put forward by Landerkin and Pirie.

d. Fundamental questions

[58] Whatever view one takes, important questions cry out. Landerkin and Pirie identify “three critical points of inquiry.”⁷⁵

First, on fundamental justice policy grounds, should judges be doing JDR? Second, do judges have the jurisdiction to engage in JDR? Third, do judges have the necessary skills to competently practise JDR?

Stempel’s questions cast a wider net.⁷⁶

(a) what types of ADR mechanisms or approaches are appropriate for judicial incorporation? (b) what ADR techniques are best left to privatization? (c) what degree of supervision should courts exercise over private ADR? (d) what ADR methods should be tightly regulated, discouraged or even prohibited by the court?

Carrie Menkel-Meadow’s fundamental questions are reproduced in Appendix D.

2. Effect on the court’s traditional functions

[59] The focus of ADR is on dispute resolution. However, dispute resolution is not the only function performed by the courts. Other goals include maintaining order in society, setting standards for behaviour and upholding rights.⁷⁷ Fiss speaks of the job of the courts “to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes; to interpret those values and to bring reality into accord with them.”⁷⁸ Landerkin and Pirie describe “the traditional orthodox system [as] an institutional one in that the court is visible and accountable, operating with predetermined rules of procedure that apply equally to all.”⁷⁹ They add that “[c]ourts also generate guidelines for future behaviour out of past occurrences.”⁸⁰

[60] Is the court’s effectiveness unduly compromised when disputes are resolved in private, rather than in public, in accordance with the personal interests of the parties but without public ascertainment of rights? Is there a need to establish criteria for determining which cases should be adjudicated in public (whether using traditional litigation processes or new methods) and which cases are best suited for private resolution by the parties (using what methods)? As ALRI stated in CM 12.6:⁸¹

Promoting the resolution of a case by settlement [agreement] between the parties may not be appropriate for every case. One of the challenges for lawyers and judges lies in distinguishing between those cases that are suitable for settlement and those that appropriately should proceed to adjudication. Decisions about the diversion of cases away from the

litigation track leading to trial and into measures designed to promote settlement should be guided by an understanding of the varying roles of the court.

3. Quality of justice

[61] ADR as supplementary to civil litigation and adjudication raises the spectre of two-tiered justice – one justice for those who can afford to go to trial and another justice for those who cannot. Fiss sees a risk that the “individualization, informalization, and privatization of justice under ADR” may further disadvantage the least powerful groups or individuals in society.⁸² ADR leaves open the potential to satisfy individual demands “in order to forestall their aggregation”⁸³ and to pay more attention to interests than rights.⁸⁴ To Sabatino, “ADR mechanisms often resemble, at least in certain respects, ‘litigation lite’ where disputants go to avoid the high costs, in terms of time, money, and stress, of the orthodox model of litigation.”⁸⁵

[62] Talk of the possibility of a lower tier of justice for those using ADR raises questions about the quality of justice obtained. Do legally-based results provide a better quality of justice than interest-based results in individual cases? What role, if any, should the public interest in the communication and reinforcement of values play in decisions about how a dispute should be resolved? Is justice less well served when time-honoured procedural and evidentiary rules are compromised – when the information upon which decisions are based is unsworn, unrecorded and unchecked by rules of evidence or public scrutiny? What is the impact of lack of procedural clarity on the quality of justice? What is the potential for abuse of process where one party has no desire to resolve the dispute by agreement? If the public interest is a factor in determining what process to use, who should decide whether resolution by adjudication or by the parties is most appropriate? What should happen when parties whose case raises issues of public interest cannot afford adjudication?

4. Functions performed by judges

[63] In the co-mingled conception of ADR and the courts, the distinctions that might otherwise exist are blurred. In the complementary conception, “[b]eing clear about the differences in function [would] assist preparation by counsel and the parties who need predictability about why they are going to meet with a judge.”⁸⁶

[64] In CM 12.6, ALRI proposed a distinction between managing litigation and facilitating settlement. Encouraging the parties to consider settlement or to make use of ADR processes was seen as an aspect of managing litigation. In contrast, facilitating settlement involves the active use of ADR methods in an effort to bring about agreement between the parties. In effect, the judge steps outside the authoritative role required to manage litigation and decide cases, and into a role more akin to that performed by an outside facilitator in a private sector ADR process. Writing in 1986, Galanter, viewed the interaction between conciliation (ALRI's "facilitation") and judicial administration, including the exercise of a trial court's "coercive power" (ALRI's "encouragement as a facet of managing litigation") to lie at the heart of the debate about whether or not judges should participate in settlement processes.⁸⁷ The debate continues.

[65] The practice of facilitating settlement in a "binding JDR" suggests a similar need to define the boundary between facilitating settlement and adjudicating. Litigants may be confused about the capacity in which the judge is involved in a JDR, compared the judge's traditional adjudicative authority at trial.

5. Cost and delay

[66] ADR is thought to be faster and cheaper than litigation. However, if the dispute is not resolved, time spent in ADR becomes an added step and cost. Moreover, loading the civil justice system with processes at the front-end may create unnecessary costs in cases where settlement could be reached without the procedural steps that are imposed.

6. Disputant v. institutional motivations

[67] As has been seen, significant shifts in emphasis follow the co-option of ADR by government, the courts and big business. Whose objectives are being met by the incorporation of ADR into the civil justice system? Are the right values being applied, the right ends being served?

7. Public confidence in the civil justice system

[68] An important weather vane is the impact of the co-option of ADR by the courts on public confidence in the civil justice system. Public confidence is difficult to gauge. In England, Jacobs attributes the momentum for change in the civil justice

system to an overarching decline in confidence in externally imposed solutions and in the professionalism of lawyers.⁸⁸ In Canada, Chief Justice McLachlin argues that the increase in litigation attests to the continuing confidence the public has in the courts.⁸⁹ Landerkin & Pirie argue that JDR may “be understood as an expression of the judiciary’s continuing commitment to justice, both inside and outside the formal trial.”⁹⁰ As such, it “could be used as a way to regain or strengthen support for, and confidence in, the justice system.”⁹¹

E. Role of Professional Law Reform Agencies

[69] One could not leave this topic at a conference of this nature without adding a word about the role of professional law reform agencies.

1. Current involvement

[70] I could discern no distinct pattern in the involvement of professional law reform agencies in ADR. Some agencies such as the Australian Law Reform Commission,⁹² the Law Reform Commission of Western Australia,⁹³ and the Law Commission in New Zealand⁹⁴ have conducted major civil justice system reform projects. In other jurisdictions, major studies have been conducted by government-appointed commissions, task forces or committees.⁹⁵ The Alberta Law Reform Institute has passed into the land of law reform and ADR through the back door in its project to recommend a complete revision of the Alberta Rules of Court.⁹⁶ Several agencies have undertaken studies of lesser scope that relate to particular aspects of ADR.⁹⁷ Decisions about how to proceed with issues relating to reform of the civil justice system and the use of ADR likely have to do with political exigencies (*legitimacy*) and pragmatic choices (*capacity*) within individual jurisdictions. By legitimacy, I refer to factors such as: the agency’s mandate; the respect or esteem which the law reform agency enjoys (how it is perceived by government, the courts and the community); and the priorities and personalities of the key players. By capacity, I refer mainly to the agency’s resources (money, expertise, other program commitments).

2. Potential contribution of professional law reform agencies

[71] One thing is certain. Law reform agencies can achieve little on their own. The topic of law reform and ADR is closely tied to civil justice system reform. The web is complex. Collaboration among many players is required to achieve significant change (*e.g.*, government, the judiciary, the legal profession, court administrators, ADR

professionals, community service providers, the public). What is more, innovations in ADR tend to be practice-driven.

[72] Given this environment and these complexities, I have tried to identify some of the skills, attitudes and perspectives that professional law reform agencies can contribute to the current wave of activity bent on improving dispute resolution. The attributes I have focussed on are by no means unique to the topic of law reform and ADR. They identify what we (and, no doubt, others) strive to do whenever law reform is under consideration.

a. Open mind

[73] Law reformers need to keep an open, inquiring mind – a mind that is steeped in philosophical foundations, attuned to fundamental principles and values (justice, order, respect, accessibility), alert to shifting societal behaviours, and skilled at identifying options and weighing choices..

b. Wide angle lens

[74] Law reformers are able to view the relationship between ADR and the civil justice system through a wide-angle lens. We are well-positioned to step back and regard the spider's web from a distanced perspective: to see relationships; to identify similarities and differences in approach; to gauge the strengths and weaknesses of the strands, the elasticity; to predict effects (what happens when the strands are pulled) that might be less obvious to persons who are immersed in the immediacy of political exigencies or the disputes before them (demands for service and results); and to knit theory and practice.

c. Long-term view

[75] Law reformers should take a long-term view. We should not fall prey to the attraction of a strand simply because it carries the trend of the day. Instead, we should continually bear in mind the fundamental purpose and responsibilities of courts, the persons they serve (individually and collectively), and the importance of their endurance over time. It is essential to maintain public confidence in the courts by holding high the core values of society.⁹⁸

d. Informed foundation for decision

[76] Law reformers must do their utmost to ensure that decisions about ADR and civil justice system reforms are well-informed. We can seek out, or urge the collection of, relevant statistical data or other empirical information to assist our understanding of patterns of use of ADR services and the courts, gaps in service, user satisfaction, areas of frustration.⁹⁹ We can make use of knowledge gleaned from other disciplines (the behavioural sciences, organizational and managerial expertise, communications technology). Landerkin and Pirie speak of Roscoe Pound's "optimistic outlook" on law "constantly enriched through the wellspring of ideas and theories of other disciplines."¹⁰⁰ For Pound:¹⁰¹

This multi-disciplinary weaving of knowledge, from fields such as economics, political science, philosophy, psychology, sociology and religion into the social fabric of the law, created a new synthesis whereby law adapted to a new, modern, complex world.

We can familiarize ourselves with the experiences in other jurisdictions while keeping an eye on cultural differences that may pull differently on the strands of the civil justice web in our jurisdiction.

e. Communication

[77] Law reformers may carry out a role in facilitating communication and promoting collaboration among the institutions (government, court) and sectors of the community (legal profession, ADR professionals, public interest groups) that share the goal of improving dispute resolution. We may also perform an educational function by drawing attention to questions that ought to be addressed.

f. Measured response

[78] Law reformers should contribute a balanced judgment, a measured response, to the law reform conversation. Where the zeal for reform becomes unbounded, we can temper the passion with reality. Where the need for change is obscured by immediate demands, we can sow the seeds of change, nourish them and wait patiently for their growth.

F. Conclusion

[79] The civil justice system is rapidly changing and ADR has exerted a major influence on the changes. The civil justice system, traditionally signifying a process of adversarial litigation leading to adjudication, is now comprised of a range of dispute

resolution options offered with a view to helping the persons in dispute resolve their differences without going to trial.

[80] I have given examples of how pulling on the strands of the civil justice web has brought about unanticipated changes. A movement wishing to resolve disputes out of court meets up with expanding case loads in the courts and is co-opted to relieve the pressure. The annexation of ADR to the courts coincides with the tendency of judges to become more active in directing proceedings and ADR becomes a tool managed by the court. Judges who begin by promoting the use of ADR to resolve disputes take on the practice of ADR as part of their function. What began as a tightly structured ADR technique used by judges becomes an tangle of variant ADR practices. Those practices may be carried out in a way that is conceived of as complementary to traditional litigation leading to adjudication, or co-mingled (perhaps integrated to the extent of being blended) with it.

[81] Paradoxically, the unanticipated is to be expected when imagination is unleashed, innovation and experimentation encouraged. Controversy is likewise to be expected from the tension between polarities and dialectical relations as the strands on the web are tugged and pulled.

[82] The civil justice web is large and complex. Much more could be discussed. I have not touched on the impact the changes have had on the practice of law, including the modification of professional codes of ethics to place greater emphasis on the lawyer's duty to seek settlement. I have not opened up the issue of the training of judges for the new roles. I have spoken little about ways in which the civil justice system could discourage court action and encourage dispute resolution outside the court.

[83] Without a doubt, the web is baited and fertile for the contribution of law reformers working in collaboration with others. We have much material to work with when examining the relationship between law reform and ADR and facing the questions: what is society gaining from the current changes? what are we losing? where should we be going from here?

APPENDIX A: CHARACTERISTICS OF ADR AS INITIALLY CONCEIVED

Reproduced from ALRI CM 12.6, pp. 11-12

With the multi-option vision of the civil justice system gaining favour today, the characteristics of the *litigation (court) and non-litigation (non-court) dispute resolution processes*, identified in the chart below for discussion purposes, *no longer operate in sharp contrast to each other*. The second column, headed “non-litigation (non-court) process” describes interest-based processes such a negotiation, mediation or collaborative law. In contrast, as noted in chapter 4, arbitration is essentially a form of adjudication, although “non-binding” arbitration is an option. Arbitration therefore straddles both columns.

LITIGATION (COURT) PROCESS	NON-LITIGATION (NON-COURT) PROCESS
Process is adversarial (win-lose)	Process is non-adversarial (cooperative, collaborative) (win-win)
Process is court-controlled	Process is party-controlled
System is publicly provided	Assistance is privately engaged
Process fairly structured (although flexible within institutionally-fixed limits)	Wide open choice of process from limitless possibilities, able to accommodate wishes of parties
One party sues, the other <i>must</i> respond or stand in default	Voluntarily undertaken by both parties
Time limits imposed	Pace up to the parties
Result often uncertain, not readily predictable	Result (usually) rests with parties
Progresses on a more or less lock-step continuum	More an integration than a continuum – allows for seamless movement among ADR processes on a single occasion, or simultaneous application of various ADR processes with respect to particular elements of the dispute
Issues are framed in legal terms, using legal concepts; the discussion is “rights-based”	Issues reflect the interests of the parties; the discussion is “interest-based”
Remedies are limited to legal remedies	Remedies respond creatively to parties interests
The record and proceedings (generally) are open to members of the public	Proceedings (generally) are conducted in private; shared information is confidential

APPENDIX B: THREE JDR FORMS

Reproduced from the Honourable John A. Agrios, Court of Queen's Bench of Alberta, *A Handbook on Judicial Dispute Resolution for Canadian Lawyers*, with additional commentary by Janice A. Agrios, available at <http://www.cba.org/alberta/PDF/JDR%20Handbook.pdf>.

Basic Approaches: Models of JDR

I have constructed two models of JDR conferences and a third model for the future. The two current models are not mutually exclusive and my current personal practice is to, in a fashion, use both. But I digress – the models are:

1. The Alberta Mini Trial

In the literature, you will find two very good discussions on what I call the Alberta Mini Trial. As Justice Belzil has pointed out, having returned from a North Americawide conference on JDR, the terminology in this area is all over the map. What Americans call a mini trial is quite different from our version, so these comments relate to only an Alberta mini trial. The Alberta Law Reform Institute in August 1993 published a discussion paper "The Judicial Mini Trial", which is very accurate. The former Chief Justice, Kenneth Moore, did an equally good job in a discussion paper reproduced by C.C.H. Your librarian should be able to find these if you get really interested.

The Alberta Mini Trial is really a summary hearing where all the essential facts are principally agreed and a judge provides a non-binding opinion as to what likely would happen in a formal trial. It is usually held in a conference room rather than in a courtroom. All parties are present, including the clients. In advance, an Agreed Statement of Facts, briefs, expert reports and authorities (tabbed and highlighted) have been exchanged and provided to the presiding judge. Usually the issues have been agreed to in advance. Both the Plaintiff's and Defendant's lawyers are given an opportunity to present their positions in a summary fashion. Some judges prefer to let them introduce their cases and make their comments. I prefer to outline the pertinent facts and the issues as I see them. I then make specific directions to the lawyers as to the points I want dealt with. The parties are given an opportunity to address the judge if they so wish. In the traditional model, the judge then provides a non-binding opinion as to the judgment they would render if the matter went to trial. Many commentators think that it is quite wise to provide short but considered criteria for the non-binding opinion, making reference to specific cases if this is appropriate. The Alberta mini trial is to be distinguished from the formal summary trial process as set out in the Alberta Rules of Court.

At this point any number of things can happen. Some lawyers thank the judge and politely ask that he or she excuse themselves and they will continue the discussion between the lawyers and the parties. Some judges leave the meeting voluntarily to permit the parties to discuss the non-binding opinion with the comment that if they can be of further help, call, and they will return to the conference room. Other judges stay and try to see if, based on the non-binding opinion, a settlement can be reached. Some lawyers will immediately ask the judge if they can caucus to

discuss the non-binding opinion. One is best to take a pragmatic approach and go with whatever works.

2. Settlement Conferences

Once again, briefs have been exchanged and provided to the judge. There may not be the same agreement on facts. Liability may be in issue and settlement conferences are often utilized when there is a strong possibility of contributory negligence. The technique employed by some judges is risk assessment. This is an attempt, with the assistance of counsel, to, based on the best available information, make a determination of a percentage on the likely outcome of trial. This is an art, not a science. The parties are invited to set out the strengths and weaknesses of the case and the judge hopefully facilitates a frank and open discussion, hopefully to arrive at a meritorious settlement. The clients may or may not contribute to discussions, depending on the circumstances. There is no reason why a settlement conference cannot be held even where there is general agreement on the facts. However, in my models, what distinguishes a settlement conference from a mini trial is that without general agreement on facts, a judge will not usually be in a position to provide a non-binding opinion at a settlement conference. There will clearly be exceptions and in a settlement conference a judge may well forecast the likely outcome of a trial in percentage terms. For example, "I think the Plaintiff's chances of winning are about 75%." If appropriate, caucusing may also be used during settlement conferences.

These models are my personal creations and are presented in an attempt to analyze the different practices that have arisen by different judges in what will always be a developing field of non-traditional judicial approaches. The anecdotal evidence suggests that mini trials are more favoured in Edmonton while settlement conferences are more favoured in Calgary. I have no idea why.

Some lawyers have a preference for one or the other of these models. The pre-JDR meeting can assist these lawyers. They should ask and reach agreement with the judge as to what is to happen at the JDR. One of the few areas of unhappiness is lawyers who think they are getting a mini trial and instead get a settlement conference. Make your needs known to the judge.

3. Early Neutral Evaluation

This model has been used in other countries with considerable success. The literature indicates it has much appeal to non-adversarial lawyers. It usually arises in jurisdictions which have structured case management procedures and involves a judge meeting at an early stage with the lawyers. It will occur before discoveries and before expert reports and clearly requires an attitude of open disclosure based on "will-say" statements. One of the objects is to avoid selection of "hired gun" experts who are known clearly as either Plaintiff or Defence experts. An attempt is made to agree on one expert, e.g. an orthopedic surgeon or a psychiatrist who will provide the same information to both sides, thereby giving a shared basis for future settlement discussions. In some cases frivolous matters can be disposed of quickly and, in others, issues can be delineated and a settlement conference held once the agreed experts' reports have been received.

I suspect that most of the litigation bar would be hesitant to use something as unconventional as E.N.E. So many of the Bar seem to think that they have to go through the entire process of lengthy discoveries, selection of experts and getting all of their ducks in order before they can even consider settlement. Pity!

APPENDIX C: CHARACTERISTICS OF JUDICIAL MEDIATION IN QUEBEC'S COURT OF APPEAL

Excerpted from:

The Honourable J.J. Michel Robert, Chief Justice of Quebec, "The New Extended Role of the Courts in Canada," a presentation delivered at the Association of Canadian Court Administrators Spring Learning Conference on *Public Confidence in Fair and Impartial Courts*, March 29-31, 2004.

1. Consensual Process
 - Mediation is not imposed
 - may be suggested by the court
 - but must be accepted by all parties

2. Active role of the parties
 - The parties are not passive
 - they play an active role
 - in defining the solution suitable for them

3. Mediator is a judge
 - but he does not act as a judge
 - he does not impose his solution
 - he does not state the law except at the request of the parties
 - may give non binding opinions and may make suggestions

4. Role of the Judge Mediator
 - principal role: facilitator
 - bring the parties to an acceptable solution
 - defined by them and
 - acceptable to them
 - in other words bring the parties together

5. Rights of the parties accepting the judicial mediation
 - If mediation fails
 - the parties do not lose their right to have their conflict resolved by adjudication in the usual delay (no loss of time)
 - by another judge than the mediator judge

6. The parties themselves must be present with or without their lawyers at their choice

7. Confidentiality

- the procedure is confidential
- no recording of what is being said
- no statement can be used in court, if process fails

8. Flexibility and simplicity

- summary record of the essential proceedings
- no brief or written arguments
- the parties choose their own rules
- the mediator may meet all the parties together or meet them separately if they so agree
- no formal testimony or sworn statement

9. Duration

- usually, one session of 3 hours will determine if an amicable settlement is possible
- if after one session, there is a beginning of understanding between the parties, a second or a third meeting may be useful
- if the dispute is technical, the parties may bring their experts

10. Judge Mediator = Director of an orchestra

- in a subtle and non authoritative manner, he tries to keep the discussion on central issues while maintaining a certain degree of serenity in the debate (sometimes though ... a session to let off steam) may have some therapeutic value

APPENDIX D: FUNDAMENTAL QUESTIONS ABOUT THE RELATIONSHIP BETWEEN ADR AND THE COURTS

Excerpted from:

Carrie Menkel-Meadow, "Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or the Law of ADR" (1991), 19 Fl. St. U.L.Rev. 1, at 4-5.

1. What are the values of settlement and of adjudication?
2. When is a court not a court? What makes a court a "special" institution and what should it be doing? Related to these concerns are issues of legal authority for the variations on court adjudication – when a court can "order" someone to settle, require a juror to serve a non-juror function, or exclude the public from a proceedings?
3. What values should a court institutionalized ADR device serve? Who should pay? Who should have access? What are the consequences of using ADR devices for the rest of the system? When should a "public system" subsidize "private agreements"?
4. What are the politics of ADR? Are there patterns of usage? Do particular kinds of clients choose different processes? Are there differences between big cases and small cases, or in the choices of wealthy clients and poorer clients?
5. What should be the system or values implicated in case allocation – should it be a fair market? Should there be restrictions or regulations of case types? Should these programs be voluntary or mandatory?
6. How can we measure the effects of different allocations or assignments to particular processes? How should we measure the "quality" of justice?
7. What processes are appropriate within our system of dispute resolution? When is adversarialness appropriate, and when is it not? What other processes can be used while preserving our long tradition of process-fairness and rights protection?
8. On what basis should cases be settled, decided, or tried – by considering only legal rules, personal needs, or economic expediency?

ENDNOTES

[Incomplete]

- 1 Joseph M. Jacob *Civil Litigation: Practice and Procedure in a Shifting Culture* (Welwyn Garden City, Hertfordshire, England: EMIS Professional Publishing Ltd., 2001), at 26. states: “The entire history of the common law can be seen as a search for the most appropriate method of dispute disposal. This is probably true of all other legal systems.”
- 2 *Ibid.*
- 3 The “search to find dispute settlement techniques outside the ordinary courts” is not new, witness the precedent early in the 20th century of specialized tribunals created to handle public law disputes, and the enactment of the *Arbitration Act* in England in 1889: *ibid.*, at 26.
- 4 Canadian Bar Association, Task Force on Systems of Civil Justice, *Systems of Civil Justice Task Force Report* (Ottawa: Canadian Bar Association, 1996) [CBA Task Force Report].
- 5 Remarks of the Right Honourable Beverley McLachlin, P.C., “The Role of Judges in Modern Society” (May 5, 2001), online: http://www.scc-csc.gc.ca/about_court/judges/speeches/role-of-judges_e.asp, quoting the Right Honourable Antonio Lamer, Chief Justice McLachlin’s predecessor as Chief Justice of the Supreme Court of Canada
- 6 During the last three decades of the 20th century, concurrently with the rise of ADR, other characteristics of the American legal system were being challenged. Some scholars questioned the extreme focus on individual rights and asked whether there was a place for recognition of group or community rights. Another scholar, Carol Gilligan, conceptualized an “ethic of care” as a groundbreaking alternative to the “ethic of reason” in which the law and legal system are fundamentally rooted: *In A Different Voice* [get publishing info.]. Think of it – not only a “just” but also a “caring” legal system. Are the concepts mutually exclusive, or might they sit together?
- 7 According to Joseph M. Jacob, *supra* note ??, at 4: “The loss of faith in adjudication is one reason that explains the modern emphasis on the avoidance of litigation (but not disputes or the insistence on private rights) and ADR ...”
- 8 Jacob, at 4: “Overarching all of this, there has been, I suggest, a decline in confidence in adjudication and in the competence and professionalism of those who ran th system (the lawyers but not the judges).”
- 9 ALRI CM 12.6, at ??.
- 10 Carrie J. Menkel-Meadow, “When Winning Isn’t Everything: The Lawyer as Problem Solver” (1999-2000) 28 Hofstra L. Rev. 905 at 908.
- 11 Pauline Tesler, “Collaborative Law: What It Is, and Why Lawyers Need to Know About It” (1999) 13 Am. J. Fam. L. 215 at 218 (online: The Law School Consortium <<http://www.lawschoolconsortium.net/teslerarticle.htm>>).
- 12 For a fuller account of the ADR movement, *see* Alberta Law Reform Institute, *Dispute Resolution: A Directory of Methods, Projects and Resources* (Research Paper No. 19) (Edmonton: Alberta Law Reform Institute, 1990) at 7-9 [ALRI RP 19]. Significant in the move

toward more consensual dispute resolution was the publication of Roger Fisher and William Ury's book, *Getting to Yes: Negotiating Agreement Without Giving In* (New York: Penguin Books, 1983), which has become a classic text.

- 13 The growth of international trade has led to the search for improved methods of resolving disputes that cross political boundaries. Technology has been a major force not only in the globalization of trade but also in the development of on-line dispute resolution sites and methods.
- 14 ALRI CM 12.6, at 53.
- 15 The Honourable Hugh F. Landerkin, Q.C. and Andrew J. Pirie, "Judges as Mediators: What's the Problem with Judicial Dispute Resolution in Canada?" (2003) 82 Can. Bar Rev. 259 , at 255, citing E. Lind & T. Tyler, *The Social Psychology of Procedural Justice* (New York: Plenum Press, 1988) and N. Welsh, "Making Deals in Court-Connected Mediation: What's Justice Got To Do With It?" (2001), 79 Wash. U.L.Q. 787.
- 16 Landerkin & Pirie, at 257.
- 17 CM 12.6, at ...
- 18 Landerkin & Pirie, at 257, quoting A. Pirie, *Alternative ... etc.*
- 19 Jacob, at 4: "A second reason [for the growth of ADR] is a financially driven recognition that it is not the business of the State to be involved in private quarrels."
- 20 The 1989 Canadian Bar Association Task Force on Alternative Dispute Resolution urged lawyers to see ADR "as a strong expression of the legal profession's continuing commitment to fair and effective dispute resolution": Landerkin & Pirie, at 274-275, citing *Supra* note 49 at 4.
- 21 This "multi-option" vision was first proposed by Professor Frank Sander of Harvard in a paper presented at the 1976 Pound Conference: Landerkin & Pirie, at 273.
- 22 *E.g.*,
- 23 Landerkin & Pirie, at 274, citing Canadian Bar Association Task Force on Systems of Civil Justice, *Report of the Task Force on Systems of Civil Justice* (Ottawa: Canadian Bar Association, 1996) at 18.
- 24 *Ibid.* at 23.
- 25 CBA Task Force Report on Civil Justice ..., *ibid.* at 33. Recommendation 1.
- 26 *Ibid.*, at 63.
- 27 *Ibid.*
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- 30 ALRI RP 19, ... at 20.
- 31 In 1987, we lacked empirical evidence to show that a particular process is most effective for a particular dispute: Canada, Law Reform Commission, *Dispute Resolution in Canada: Present State, Future Direction* (Consultation Paper) by Andrew J. Pirie (Ottawa: Law Reform Commission of Canada, 1987) at 18. I am not aware of any significant advancements in empirical evidence since then.
- 32 Jacob, at 4: “It is the lack of confidence in the professionalism of our lawyers that explains the introduction of judicial case management where litigation does take place.”
- 33 Landerkin & Pirie, at 265.
- 34 *Ibid.* citing Fed. R. Civ. Pro. 16.
- 35 Landerkin and Pirie, at 264, citing Nims, Galanter ..., who in turn cites Nims, “Pre-Trial in the United States” (1947), 25 Can. B. Rev. 702 at 720 and McIvaine, “The Value of Effective Pre-Trial” (1961), 28 F.R.D. 162.
- 36 Agrios, quoting Belzil ...
- 37 *E.g.*, Alberta Prov. Ct.
- 38 In the province of Quebec, JDR was introduced in the appellate court and later instituted in the trial court: [\[cite articles on JDR in Quebec\]](#). In Alberta, JDR in the Court of Appeal is an even better kept secret than JDR in the Court of Queen’s Bench (*i.e.*, superior court trial level)
- 39 Landerkin & Pirie, at 266: “Only recently would it be fair to say that mediation has become a part of the judges’ role in Canada through rule changes permitting mediation-type activities in specific cases or courts. For example, in British Columbia the Provincial Court now conducts mandatory settlement conferences in which the judge “may mediate any issues being disputed.” British Columbia, *Small Claims Rules*, r. 7(14).
- 40 Landerkin & Pirie, at 264, citing M. Galanter, “The Emergence of the Judge as a Mediator in Civil Cases” (1986) 69 *Judicature* 257.
- 41 CM12.6, at 6.
- 42 Landerkin & Pirie, at 274.
- 43 *Bencher’s Advisory* article ... [get from CM 12.9?]
- 44 Alberta Law Reform Institute, *Civil Litigation: The Judicial Mini-Trial*, (Discussion Paper No. 1, Dispute Resolution–Special Series) (Edmonton: Alberta Law Reform Institute, 1993) [ALRI DP1].

- 45 Rule 35 of the British Columbia Supreme Court Civil Rules. R. 35 has since been amended, but it is still of similar effect. The current British Columbia Supreme Court Civil Rules are online: <www.qp.gov.bc.ca/statreg/reg/C/CourtRules/>.
- 46 The "private mini-trial" was created in 1977 to settle a bitter and complex patent infringement case but its use has since been extended to other private disputes, particularly in the commercial area, and to disputes with government: ALRI DP1, *supra* note ? at 2, citing Eric D. Green, "Growth of the mini-trial" (1982) 9 Litig. 12 at 12.
- 47 ALRI DP1, *ibid.* at 8, footnote 30. This notion is in keeping with recommendation of the Ontario Civil Justice Review, as described in the CBA Task Force Report, *supra* note ? at 34, that:
- ... pre-trial conferences and settlement conferences be seen as separate steps in the litigation process, because each has a distinct purpose. [The Ontario Civil Justice Review suggests] that in a settlement conference, the sole focus should be on trying to resolve the dispute, or at least parts of the dispute. By contrast, in their view, a pre-trial conference should focus on ensuring that the case is prepared for trial from the court's perspective.
- 48 CBA Task Force Report, *ibid.*
- 49 For a fuller description of judicial mini-trials as they are held today, *see* Agrios, *supra* note ?? at 17-18. Justice Agrios' description of the judicial mini-trial, settlement conference and early neutral evaluation are reproduced in Appendix B to this paper. Note the directive role judges now assume in setting the procedure:
- 50 CBA Task Force Report, *supra* note ?, at 34.
- 51 In several jurisdictions, settlement conferences are associated with pre-trial conferences. Prince Edward Island and Saskatchewan specify that settlement is the primary purpose of the pre-trial conference: Prince Edward Island, *Rules of Civil Procedure*, r. 50.01 [Prince Edward Island]; Saskatchewan, *Queen's Bench Rules*, r. 191(8) [Saskatchewan]. In contrast, the rules or practice directions in British Columbia, Manitoba, New Brunswick and Newfoundland make it clear that settlement conferences and pre-trial conferences are separate events: British Columbia, r. 35; Manitoba, *Court of Queen's Bench Rules*, r. 50.01 [Manitoba]; New Brunswick, *Rules of Court*, rr. 50.01, 50.08 [New Brunswick]; Newfoundland, *Rules of the Supreme Court, 1986*, r. 39.02(5)(i) [Newfoundland].
- 52 Manitoba and the Federal Court include ENE in their rules or practice directions: *Federal Court Rules, 1998*, r. 387(b) [Federal]; Manitoba, r. 50.01; Karen Busby, *Manitoba Queen's Bench Rules Annotated*, looseleaf (Scarborough, Ont.: Carswell, 1992) at 9-10 entitled Notice to the Professions (January 1998) Judicially Assisted Dispute Resolution.
- 53 John A. Agrios, *A Handbook on Judicial Dispute Resolution for Canadian Judges* (Version 2.5, September 2002) is an excellent source of information about current practices, and the variety of theoretical and practical issues involved. Justice Agrios cautions that the models he describes are his "attempt to analyze the different practices that have arisen by different judges in what will always be a developing field of non-traditional judicial approaches" at 19. See also: Paul R. Belzil, "Negotiating the Future: Court-annexed Mediation in our Courts,"

(Paper presented to the Negotiating the Future Conference, Calgary, November 14-16, 2001) [unpublished].

- 54 Alberta judges studiously avoid calling their process “mediation” because of s. 57 of the federal *Judges Act*.
- 55 JDR practices are now the subject of much discussion among judges. At a recent judicial education session, two judges who hold very different views on the appropriateness of conducting “binding JDRs” – *i.e.*, JDRs which bind the parties to the opinion expressed by the judge in the JDR – participated in what was billed as “The Great Debate.” A lively discussion followed, with a wide range of views being expressed. No common conclusion was reached but the issues are now out in the open whereas previously individual judges seemed to know little about the practices adopted by other judges.
- 56 Whereas in Alberta this appears to be a sequential development, in other jurisdictions it may have developed as the norm, without distinction between settlement facilitation and litigation management. As long as twenty years ago, Judith Resnick reached the conclusion that judges had become “mediators, negotiators, and planners – as well as adjudicators: Judith Resnick, ?? at 379.
- 57 Landerkin & Pirie, at 271.
- 58 *Ibid.*
- 59 *Ibid.*
- 60 *Ibid.*, at 276. According to Landerkin and Pirie
 The idea that JDR can include settlement initiatives involving a judge during trial is supportable. If JDR’s ideology is essentially about promoting speedy and inexpensive “justice,” the responsibilities of a judge sitting in the trial process could include facilitating appropriate settlement discussions without jeopardizing litigation rights. Disputants often settle during trial and careful help from the judge would appear possible without the judge relinquishing the ability to still be an adjudicator if necessary. The closer JDR activities come to the adjudicative function, the more JDR can begin to resemble elements of an inquisitorial system. Indeed, this may be the direction that JDR will eventually go.
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- 62 Landerkin & Pirie, at 261.
- 63 Landerkin & Pirie, *ibid.*, caution that this need not be “*muscle mediation*” where a judge unfairly pressures parties to settle, give up rights, or grudgingly compromise.
- 64 *Ibid.* at 264, citing McIvaine, “The Value of Effective Pre-Trial” (1961), 28 F.R.D. 162.

- 65 CM 12.6 at ??: In 1996, the CBA Task Force was informed that “the success rate of mini-trials in the Alberta Court of Queen’s Bench was between 80 and 90 percent, resulting in substantial savings in sitting days.” In 1999-2000, according to Alberta Justice, an estimated 75 to 80 per cent of cases that went through the judicial dispute resolution process in the Court of Queen’s Bench reached settlement at some point prior to trial: AJ AR 2000-2001, *supra* note ?? at 42.
- 66 Chris Guthrie, “The Lawyer’s Philosophical Map and the Disputant’s Perceptual Map: Impediments to Facilitate Mediation and Lawyering,” (2002-2003) 6 Harv. Negot. L. Rev. 145.
- 67 Landerkin and Pirie note that once ADR held connotations that traditionalists in the court resisted, so acronyms like BDR “better dispute resolution:” or IDR “independent dispute resolution” (???) were substituted. No such linguistic bridges are needed any more.
- 68 R. Tomasic & M. Feeley, “Introduction,” in *Neighbourhood Justice: Assessment of an Emerging Idea* (New York: Longman Inc., 1982) at x, quoted in Landerkin & Pirie at 269:
 ... historically we have seen the pendulum of legal change swing from poles such as formality and informality, complexity and simplicity, professionalism and lay decision making, adversary and inquisitorial approaches, and the poles of greater and lesser concern for individualization. Indeed these fluctuations reflect tensions inherent in the law itself, expressing as it does a multiplicity of conflicting and competing goals.
- 69 C. Menkel-Meadow, “Pursuing Settlement in an Adversary Culture in an Adversary Culture: A Tale of Innovation Co-opted or the Law of ADR” (1991), 19 Fl. St. U.L.Rev. 1 at 129-30:
 In my own view, ADR (in all its own variable forms) and adjudication, come to effect, supplement, and challenge each other. Thus as we encounter many dialectical relations in law (rule and discretion, common law and statute, public and private, federal and state systems), we can now add a dialogue and dynamic dimension between and amongst dispute process and systems.
- See also: C. Menkel-Meadow, “The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms, and Practices” (1995) 11 Neg. J. 217; and “When Dispute Resolution Begets Disputes of Its Own: Conflicts Among Dispute Professionals” (1997) 44 U.C.L.A. L. Rev. 1871.
- 70 C. Menkel-Meadow, *ibid.*
- 71 Landerkin & Pirie, citing Judith Resnick.
- 72 In ALRI RP 19, *supra* note ?? at 19, ALRI observed: “It is highly likely that settlements are strongly influenced by the adversarial characteristics of the current adjudicative process rather than a true application of negotiation or mediation.” In the Rules Project consultation with the legal community, lawyers commented that “Unless a person is able to access the court system, there is no reasonable assurance that she or he will get justice in a mediation – the prospect of a trial and having to accept its outcome is often the main motivation for settlement” Alberta Law Reform Institute, *Report on Legal Community Consultation* (Alberta Rules of Court Project) (Edmonton: Alberta Law Reform Institute, 2002) at 4 (online: Alberta Law Reform Institute <<http://www.law.ualberta.ca/alri/>>) [Legal Community Consultation Report].

- 73 Landerkin & Pirie, at 276.
- 74 J. Stempel, “Reflections on Judicial ADR and the Multi-Door Court House at Twenty: Fait Accompli, Failed Overture or Fledgling Adulthood?” (1996) 11 Ohio St. J. Dis. Res. 297.
- 75 Landerkin & Pirie, at 281.
- 76 Landerkin & Pirie, at 279, quoting Stempel, *supra* note ??, at 302. [“Reflections ...]
- 77 Canadian Bar Association, Task Force on Court Reform in Canada, *Court Reform in Canada* (Ottawa: Canadian Bar Association, 1991) at 42-43 [CBA 1991], identifies other goals, which include: (1) as an essential part of government, playing an important part in “maintaining order, upholding the rule of law and preserving public confidence in society’s institutions”; (2) the provision of “authoritative statements about the law” which “contribute to the formulation of “background norms” necessary for private ordering” and which “actually form part of the basis upon which individuals plan their affairs and conduct their businesses”; and (3) rights vindication which is “concerned with compliance with legal rules rather than the adjudication of a particular dispute.”
- 78 O.M. Fiss, “Against Settlement” (1984) 93 Yale L.J. 1073 at 1085.
- 79 Landerkin and Pirie, at 278.
- 80 *Ibid.*
- 81 CM 12.6, at 3.
- 82 Landerkin & Pirie, at 277-278, citing Fiss, ...
- 83 R.L. Abel, ed., *The Politics of Informal Justice*, vol. 2 (New York: Academic Press, 1982) at 3-4.
- 84 See R. Fisher, W. Ury, *Getting to Yes: Negotiating Agreement Without Giving In* (Boston: Houghton Mifflin Co., 1981). (This critique argues that ADR has shifted the emphasis from legal rights and rights benefits to individual interests and a psychological, economic, or other way of analyzing what motivates people in dispute. The operating system for this shift comes from the work of Roger Fisher and William Ury who popularized an interest-based approach to negotiation (principled negotiation win-win, integrative bargaining, focus on interests no positions, etc.)
- 85 Landerkin & Pirie, at 278, citing J.M. Sabatino, “ADR as ‘Litigation Lite’: Procedural and Evidentiary Norms Embedded Within Alternative Dispute Resolution” (1998) 47 Emory L.J. 1289, at 1292.
- 86 CM12.6, p. 15.
- 87 M. Galanter, “The Emergence of the Judge as a Mediator in Civil Cases” (1986) 69 *Judicature* 257, cited in Landerkin & Pirie, at 263-264.

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- 88 Jacobs, at 4.
- 89 McLachlin, ...
- 90 Landerkin & Pirie, at 276.
- 91 Landerkin & Pirie at 261.
- 92 Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System. Report 89* (Australia: 2000).
- 93 Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System*, Final Report 1999.
- 94 Law Commission, Report 85, *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (Wellington, New Zealand, March 2004),
- 95 See e.g.: The Right Honourable H.S. Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (London: Lord Chancellor's Department, 1995) and The Right Honourable H.S. Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (London: HMSO, 1996) [Woolf Report]; Ontario Civil Justice Review, *Civil Justice Review, First Report* (Toronto: Ontario Civil Justice Review, 1995) and *Civil Justice Review: Supplemental and Final Report* (Toronto: Ontario Civil Justice Review, 1996); British Columbia Justice Reform Committee, *Access to Justice: The Report of The Justice Reform Committee - 1988* (British Columbia: Research and Development Directorate, Department of Justice, November 1988).
- 96 Publications relating to this study are posted on the ALRI website at www.law.ualberta.ca/alri/.
- 97
- 98 Arguments about the impact, on confidence in the courts and respect for the administration of justice, of the increasing use of ADR in the courts cut both ways. public. For some, it is courts responding appropriately to changing societal needs and demands. For others, it is courts meddling where they do not belong, compromising rather than clarifying rights, creating functional confusion.
- 99 All too often sound statistical data is lacking and law reform proceeds from anecdotal accounts of problems, impressions, hunches (e.g., a dirth of information about why so few cases that are commenced go through to trial followed by unverified assumption that the cases have been resolved through agreement by the parties, that settlement has occurred).
- 100 Landerkin and Pirie, at 273.
- 101 *Ibid.*