But That Is Theory and Has No Relation to Realities

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The basic premise of this comment is that the present striving for a more efficient alternative form of dispute resolution is an illusory goal, and that those espousing procedural "quick fixes" such as alternative dispute resolution (ADR) are not only forgetful of legal history but are also unaware of the fiscal and educational realities of the legal profession.In recent memory we have tried to ensure speedy, efficient justice and sound jurisprudence by such devices as specialization of the judiciary,[1] by increasing the numbers of decision-makers,[2] by attempts to simplify legal procedures,[3] and by establishing diverse forums for the resolution of disagreements.[4] Yet all of these are merely plagiarisms of the efforts of Henry II in the 12th century and of the medieval Chancellors directed toward the same end.[5] In the last ten years we have had two reports recommending more courts for the province of Ontario[6] and, with regard to the latest, already we have had academic reaction.[7] However, to the informed reader, Yogi Berra's malapropism defies improvement: "It's deja vu all over again."

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[1] For example, the establishment of the Divisional Court in Ontario as a division of the High Court of Justice for Ontario: *Courts of Justice Act*, S.O. 1984, c. 11, hearing, *inter alia*, applications for judicial review pursuant of the *Judicial Review Act*, R.S.O. 1980, c. 224.

[2] As a consequence of very regular aggregation, by 1987 we have sixty-five judges in New Brunswick for a population of approximately 710,000. The device of super-numerary judicial appointment has aggravated the position.

[3] *The Judicature Act*, R.S.N.B. 1973, c. J-2, s. 77 embodies the *New Brunswick Rules of Court*, 1981.

[4] See for example the *Industrial Relations Act*, R.S.N.B. 1973, c. I-4 whose exclusive regime was recognized in *St. Anne-Nackawic Pulp & Paper Co. Ltd.* v. *Can. Paperworkers Union Local 219*, [1986] 1 S.C.R. 704; also *International Commercial Arbitration Act*, N.B.A. 1986, c. I-12.2 .

[5] P.D. Carrington, "Civil Procedure and Alternative Dispute Resolution" (1984) 34 *J. Legal Ed.* 298.

[6] *Report of the Attorney General's Committee on the Appellate Jurisdiction of the Supreme Court of Ontario* (Toronto: Ontario Ministry of the Attorney-General, 1977) (Chair: A. Kelly); *Report of the Courts Inquiry* (Toronto: Ontario Ministry of the Attorney-General, 1987) (Chair: T.G. Zuber).

[7] T. Cromwell, "'Neither Out Far Nor in Deep' — The Zuber Commission and the Problems of Civil Justice Reform" in this issue at 94.

No one can deny that a profession such as law has an enormous investment in its past knowledge and present practice. Anyone who believes that the legal establishment — professors, lawyers, administrators and judges — can easily or will quickly be persuaded to give up the habits of a lifetime in favour of some temporary vogue for "speedy justice" surely requires treatment. Indeed, the social trend since the Second World War militates against such notions. An increasingly educated general populace has an even greater awareness of individual rights. This is magnified by a contemporary morality which emphasizes the vindication of rights rather than balance and compromise. The experience of most law firms confirms academic presumptions of the increasing litigiousness of the people; any reader of the law reports can attest to the explosion of seemingly "unnecessary" litigation. It is not, however, the purpose of these remarks to address the sociological, economic, behavioural, or even anthropological reasons for the readiness of the citizenry to pursue their interests before the courts. Rather the goal is to elucidate the obstacles to change in the legal system and to decide whether these reforms are merely abbreviations of current procedures or the attempted replacement of the traditional forums of decision-making.

The Bare Bones of the Argument

As a law student I never understood why Dr. Seuss did not uncover the myriad fairy-tales contained in the reports of the advices of Her Majesty's Privy Council. One of the more unreal statements, which forms the title of these remarks, was uttered by Viscount Sankey in 1935. The Lord Chancellor in his day was renowned not only as an authority on the rules of polo but also as being less than secure on the law of the constitution. In the petition of the *British Coal Corporation* v. *The King* he suggested that the Imperial Parliament, by repealing the Statute of Westminister of 1931, could extend to Canada any legislation it thought fit. He concluded, no doubt mindful of the crisis of 1926 precipitated by that most unlikely of revolutionaries — Prime Minister MacKenzie King — "But that is theory and has no relation to realities."[8] His *obiter dictum* rings false since a theory is of value only if it encompasses all factors and realities, which failing, it is nothing more than an incomplete thought. It seems to me that recent writing on more efficient litigation procedures and, more so, those on alternative dispute resolution suffer that same defect. The finely crafted articles on ADR in the American reviews[9] not only left me unconvinced but also reminded me of my dissatisfaction with Lord Sankey's dictum.

My purpose then is to consider at least three of the realities which have not been adequately accounted for in the writing so far: these are the economics of the law industry, the past and present training of legal professionals, and the resultant attitudes of lawyers and judges at this time.

However before attacking these three facets of the practice of law, of legal education and of professional attitudes, it is proper for me to characterize my own appreciation of ADR. On a first reading, it appears quite schizophrenic. On the one hand, there

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[8] [1935] A.C. 500 at 520 (P.C.), Sankey L.C.

[9] "Developments in ADR" (1987) 37 *J. Legal Ed.* 26-57; "Developments in ADR" (1984) *34 J. Legal Ed.* 229, 237 & 277.

appears to be a desire to deprofessionalize disputes, to deprofessionalize the institutions for dispute resolution and so to obtain some new machinery for a quick and inexpensive resolution of disagreements. The hallmark of such devices would be balance and compromise, rather than vindication by winning. In short, the goal appears to be to eliminate the adversarial approach, to do without the rule of law as well as to dispense with the judicial forum. As has been cruelly suggested, it resembles a job creation programme for marriage counsellors and retired judges.[10] It should also be said that a former colleague has shown convincingly that expectations that lay-decision makers will "delegalize" decisions will be disappointed.[11] Conversely, another vision of ADR envisages elaborate schemes for mediation, conciliation, and arbitration, all of which recognize the need for highly skilled legal personnel. Such schemes appear to include recourse to the traditional forums staffed by judicial officers.

For the neophyte reader this dichotomy of ambitions within the single concept of ADR encourages a notion of gradations in the quality of decision-making. The "Chevette" variety is for the less fortunate, while the "Cadillac" version remains for the more successful in society. For the practicing lawyer such a characterization is a restatement of the obvious since many "successful" law firms would happily give up to ADR (a) the routine domestic disputes, (b) the low level landlord and tenant fracas, and (c) the disappointed expectations of consumers. All of these are at best "loss leaders" and more often the dross of the files. On the other hand, no law firm would willingly surrender the ultra-lucrative labour and insurance work. Thus while the former is seen as the acme of one form of ADR, the latter could only be given up to ADR if a similar mechanism were put in place. In short, the attraction of ADR for the pragmatic lawyer varies with the nature of the work, its relative profitability and the degree of involvement of lawyers in the revised model of dispute resolution.

The Economics of the Law Industry

Lawyers today still like to characterize their profession as a caring and helping one comparable to the priesthood or nursing. Nothing could be further from the truth. We are now part of an industry which has more in common with the doctors and dentists, whose primary concerns of late seem to be operating overhead and income parity. Twenty-five years ago a frugal law firm could hold its overhead below 30 %. Today it is not unusual to hear of firms struggling to hold the line at 60 %. The two-fold increase is caused by the need to own or lease highly visible downtown accommodation, to purchase the latest computerized equipment, to hire appropriately talented staff, and to invest and re-invest in that triply expensive essential, the law library.[12] The costs of doing business in the manner we think appropriate, which expectation is shared by at least some clients, are very high.

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[10]Carrington, *supra*, note 5 at 298.

[11]D.R. Miers, *Responses to Victimization* (Abingdon, U.K.: Professional Book, 1978), in which the author illustrates, in chs 1 & 2, the development of legalistic notions and prejudices in the operation of victims of crime compensation schemes in Ontario and the United Kingdom.

[12]Triply expensive because it takes up very costly space, requires staff for its maintenance, and investment in books.

To the costs of operation of the office we must add the expectations of the lawyers themselves — a certain size of home, often a cottage, sometimes a boat and always several motor vehicles. This is not intended to castigate lawyers for their expectations nor to suggest that they do not earn their life-style. On the contrary, the business life of the lawyer contains too many eighteen hour days and far too many seven day weeks. The point to be made concerns the content of that horrendous work load.

The truth is that much of that time is spent in preparation of the resolution of disputes. Everyone knows that less than 10 % of all files in a law office require the intervention of a judicial officer or other external decision-maker, yet the preparation for settlement of a dispute often resembles the lead up to a superpower disarmament conference. Once all of the weaponry has been assembled, we sit down to discuss peaceful co-operation. The law firms, like the armaments industry, derive their incomes from the preliminary procedures. Interviewing of the client, gathering of material facts, preparation of evidence, discussions with experts and examinations for discovery account for most of the billable time on a file. Appearances before a court do not contribute significantly to the overall account, with the result that lawyers might happily waive the judicial tribunal and appear before a panel of brass monkeys provided they retain control over the preparatory stages.

In light of the costs of doing business and the expectations of the profession it must be obvious that lawyers will always favour more efficient justice but rarely support cheaper justice. They will favour any scheme which guarantees the same money for less work, but they must oppose any system which envisages less money for the same or more work. Indeed, as a distinguished colleague has suggested, "you cannot expect the foxes to reform the henhouse."

The Past and Present Nature of Legal Education

From the very first day in law school students are imbued with the notion that dispute resolution is the result of trial by adversaries under conditions akin to the controlled violence of a C.F.L. game. The adversarial mode is inculcated in almost every classroom while doctrinal analysis is dunned into their heads as they are exhorted to "think like a lawyer" and to leave no avenue unexplored to give your client the edge. In their three years in law school the nascent lawyers are dragged through instruction on the importance of facts, techniques of adducing evidence, mastery of the procedural rules and, all the while, urged to assimilate the finest analysis of substantive law. The students comply, with scarcely disguised cupidity, comfortable in the knowledge that they are preparing to become well-paid, modern-age knights and champions of their potential clients.

This has been the mode of modern legal education in our country with the result that it cannot be surprising that persons so trained look askance at, and ultimately ignore innovations aimed at the early settlement of disputes; such as the pre-trial conference,

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[13]Respectively these are: *Supra* at note 3, *New Brunswick Rules of Court*, R. 50, 77, 6 & 49.

the quick ruling, the consolidation of actions and fiscal encouragements to encourage settlement. These notions run entirely counter to the formal and practical training of the legal professional, and to its long ingrained attitudes and practices.

The Attitudes of the Profession

Anyone involved in the continuing legal education of the Bar today is readily aware of the volume of complaints from both lawyers and laypersons regarding unprofessional conduct and the concomitant requests from members of the Bar for programmes on ethical standards, unprofessional behaviour, professional discourtesy and criminal wrongdoing. Lawyers today are no longer revered as independent advocates who advance the interests of their clients with due regard to their roles as officers of the court and upholders of the canons of their profession, rather, they are cast in the role of the "gunslinger" or "hired-gun" operating with the bloody-mindedness of a Clint Eastwood, hoping to "make their day" with a smashing success for their respective clients.

Roger Cramton, in a forthcoming book on professional responsibility, offers some trenchant observations.[14] He begins by listing the recurrent complaints of today's older lawyers: (1) there is too much pushing for business, (2) smaller firms are resorting to vulgar advertising, (3) there are too many young and inexperienced lawyers, and (4) discourtesy and sharp practice are the rule rather than the exception. Cramton explains such responses in terms of the breakdown of the former club-like camaraderie of a racially and sexually homogeneous profession enjoying shared values. Thus the sharp increase in the size of the profession in the last twenty years with the entrance into the profession of women and minorities and of persons allied to individual rather than collective values has rent asunder the "broderbund" of old. This observation is proven by the virtual paralysis of the governing bodies of the legal profession as they stumble and grope for consensus on approaches to the problems besetting the profession.

Cramton is right when he says that the challenge for the governing bodies is to mould a new attitude for lawyers in which the lawyer-professional regains the position of a member of a helping and caring profession. This can be assisted by programmes of continuing legal education but surely the instilling of the desired attitude must be engendered at an earlier stage. If we are to rid ourselves of the image of the "gun-slinger" then the process of re-education must begin in the law schools. However, we must admit that the addition of a couple of ADR courses will not suffice. What is required is a concerted effort on the part of the law schools and the law societies in the manner of a cultural revolution. It will mean a commitment of funds by the profession and the cleansing of the law schools of the habits of a lifetime. It is only by such a revolution that we can hope to alter the traditions of the Bench and Bar over the longterm. On the other hand, a reading of history suggests that such thrashing around may be all right in theory but has little relation to reality.

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[14] Professor Cramton outlined the thrust of his forthcoming volume at a section meeting of the C.A.L.T. annual meeting in Hamilton, Ontario in June 1987.