

NOTE TO USERS

This reproduction is the best copy available.

UMI[®]

ADR and the Law: A Search for Participation or Control

Derek F. Neil

A Thesis

in

The Department

of

Sociology and Anthropology

Presented in Partial Fulfilment of the Requirements
For the Degree of Master of Arts (Sociology) at
Concordia University
Montréal, Québec, Canada

April 2004

©Derek F. Neil



National Library
of Canada

Bibliothèque nationale
du Canada

Acquisitions and
Bibliographic Services

Acquisitons et
services bibliographiques

395 Wellington Street
Ottawa ON K1A 0N4
Canada

395, rue Wellington
Ottawa ON K1A 0N4
Canada

Your file Votre référence

ISBN: 0-612-91094-6

Our file Notre référence

ISBN: 0-612-91094-6

The author has granted a non-exclusive licence allowing the National Library of Canada to reproduce, loan, distribute or sell copies of this thesis in microform, paper or electronic formats.

L'auteur a accordé une licence non exclusive permettant à la Bibliothèque nationale du Canada de reproduire, prêter, distribuer ou vendre des copies de cette thèse sous la forme de microfiche/film, de reproduction sur papier ou sur format électronique.

The author retains ownership of the copyright in this thesis. Neither the thesis nor substantial extracts from it may be printed or otherwise reproduced without the author's permission.

L'auteur conserve la propriété du droit d'auteur qui protège cette thèse. Ni la thèse ni des extraits substantiels de celle-ci ne doivent être imprimés ou autrement reproduits sans son autorisation.

In compliance with the Canadian Privacy Act some supporting forms may have been removed from this dissertation.

Conformément à la loi canadienne sur la protection de la vie privée, quelques formulaires secondaires ont été enlevés de ce manuscrit.

While these forms may be included in the document page count, their removal does not represent any loss of content from the dissertation.

Bien que ces formulaires aient inclus dans la pagination, il n'y aura aucun contenu manquant.

Canada

Acknowledgement

I would like to thank the Department of Sociology and Anthropology for the opportunity to work on this project. Thanks go to Prof. Neil Gerlach for his advice at the beginning of this project. Thanks also to Jim Yaraskavitch. Special thanks are reserved for Prof. Lori Beaman who kindly and bravely agreed to work with me after the departure of Professor Gerlach. I would also like to acknowledge Sharon Norris whose course on ADR so intrigued me. Very Special thanks go to D.Zack.

Abstract

ADR and the Law: A Search for Participation or Control

Derek F. Neil

This project argues that the growth of Alternative Dispute Resolution (ADR) may be more fully explained by the needs of both the social (i.e. the emergence of a social market for ADR skills for individuals); and the economic market (i.e. the emergence of private ADR corporations). The evidence shows ADR should be regarded as a mechanism of 'control'. The research relies on the use of the works of three thinkers, Emile Durkheim, Max Weber and Michel Foucault to examine the phenomenon of Alternative Dispute Resolution (ADR). The research used both sociological text and Law Journal articles to conduct this research. The research includes an extensive literature review from the fields of law and sociology. It draws on 2 case studies to show the close relationship between the growth of ADR within law schools starting with single courses to multi-faceted ADR programs and its emergence under the tutelage of the legal profession.

Table of Contents

Introduction:

Chapter 1: Background Setting for a New Idea

Theory Old and New	11
ADR's Rapid Rise to Prominence	27
The Problem Solving Idea	34
Participation: A Decade and a Demand	36
The Pound Conference: Facing the Demand	39
The Pound Conference: Playing with Reform	44
Acceptance: Business and Politics Helps	50
Institutionalization: A Law of ADR	52
ADR in Canada	56

Chapter 2: Literature Review

General Background Information	61
New Vision and Values	61
Community and Participation	62
Informalism	65
Self Expression	69
Control and Conflict	70
Ideology	74
Techniques or Process	76

Chapter 3: Findings of Case Studies 79

Findings Part II, ADR Training	93
--------------------------------	----

Chapter 4: Concluding Remarks 97

Bibliography 102

Introduction:

This work examines the emergence over the last few decades of Alternative Dispute Resolution (ADR). Not so long ago, the letters A-D-R and the idea that there was a better way to deal with conflict would have been doubted by most people but today associations of collaborative family law lawyers; best selling books and international conferences; as well as working alliances between lawyers and mediators using ADR make that much less likely. In this thesis I will provide a review of the growth of ADR and outline the intellectual, academic and political ideas that underpin ADR and that help explain its appearance and growth. I will present a comparative study of law schools' curricula in order to track the appearance and growth in importance of ADR courses and programmes in two important law schools in Canada and compare that to two other universities' ADR courses using the Internet. I will show that ADR developed two distinct strands, one social, the other a business/legal strand. This division (which now also includes an education strand) will also require a discussion about the issues related to its continuing growth. Using concepts taken from Emile Durkheim and Max Weber as well as the observations of Michel Foucault as my tools I will discuss these developments. I will present a two-part literature review and discussion of some common issues found in the ADR literature. This will inform some conclusions I will present evidence to explain the rise of ADR and to decide whether ADR is about participation or control.

As its name indicates ADR is for its supporters about trying to find new and creative

ways for individuals, peer groups, corporations, and even nations to settle their conflicts. The story of ADR is a fascinating and perplexing one. Indeed, it is now taken for granted in the sense that litigants can opt out of court in favour of a mediation session; employees can take their disputes to their company's newly designed dispute settlement system; or turn to computer-assisted mediation to settle a complaint about the quality or lack of quality of the goods they ordered last week on the Net; and school children can learn to prevent violence in the schoolyard after a few hours of ADR 'training'. We can see in this statement reference to the law, business, the Internet and social issues. The project began with many expectations.

I first became aware of ADR in the early 1990s when I enrolled in a course about the law at a community college. One of the lectures was on ADR and I was fascinated by the idea that people could learn techniques that would allow them to solve their conflicts without 'going to a lawyer' or resorting to the court system. When I decided to return to school on a part-time basis and complete a long dormant undergraduate degree and subsequently to sign on to a graduate program I returned to ADR to provide me with my thesis topic. My studies in sociology also provided me with another reason to examine ADR- a belief that the role played by disputes and the methods that society employ to deal with them can enhance our overall understanding of society. Disputes are fundamentally about social relations, (Caplan (ed.) 1995:2) even if they are relations that have 'gone bad'. According to Comoroff and Roberts, "...the dispute process may provide an essential key to the disclosure of the socio-cultural order at large"(Comoroff

and Roberts in Caplan 1995:249).

In the real world, Alternative Dispute Resolution has also become part of debates about such a fundamental issue as the legitimacy of our legal system and whether or not ADR might help improve that system. In the intervening years since those debates began in the 1960s, ADR has become an essential 'tool' in the lawyers' toolbox (Stone, 2001: iii). Some proponents believe strongly in the transformative potential of ADR to change people (by empowering them) because it returns the resolution of disputes to the people involved in them. Other supporters have had even greater goals in mind -- to transform society or at least change the legal culture. For critics of ADR, however, this is a threat to due process and therefore highly suspect. My research showed me that ADR supporters and detractors had a different idea of the law, the role of disputants, the nature of conflict, and the role of lawyers and judges in the resolution or settlement of disputes in our society. I wanted to discover what factors explain ADR's growth in North American society and indeed across the world in just over 35 years. It is a growth that seems to me to be all the more remarkable in the light of some of the criticisms levelled against it. In other words, it continues to serve a function that to some of its critics seems to defy logic. Could it be that idealism is still alive and at work? Is ADR about a new search for social solidarity? Is ADR about participation or control? Ironies aside, are there winners and losers in the ADR 'experiment'? Just as Durkheim noted that the law is a way to understand a society, so it is that how a society settles its disputes, formally as well as informally, may tell us something about a society as a whole. Not unlike ADR

supporters, Durkheim views conflict in society as pathological and temporary (Lukes et.al. 1983:6). Conflict is linked with anomie (Nader, 1990: 318-19). According to Gunnarsson the forms of mediation available in a society "must be seen in relation to other kinds of social structures and roles in that society, especially those which support it and give it shape" (Gunnarsson, 1997:204). Indeed, some have speculated that the appearance of ADR is part of a bureaucratic adjustment and the explanation for the appearance of ADR is best found by examining organizational theory. The application of business concepts to the whole of society is another perspective on ADR, "there is a need for an explicit alternative model or paradigm [of conflict management] which incorporates normative reasoning and which can be tested against the rational economic assumptions" (Rahim, 1989:267). Still others believe we must examine the sociology of professions to find answers. Abbott (1988) for example, remarks that the competition that characterizes entry into this (law or medicine) group is also present in a rivalry over professional boundaries that are 'perpetually' in dispute (Abbott 1988:2). An examination of ADR is therefore warranted.

I decided that the thesis would proceed by examining those fault-lines in the ADR system with the goal of understanding the ADR phenomenon. By fault-lines I mean the competing claims surrounding ADR and the ambiguities that two groups closely identified with ADR community-based social reformers and lawyers have exhibited toward ADR. In the process, I will use the literature to also examine the efforts of lawyers and social reformers to influence and control the future of ADR.

A look at the literature on ADR, for example, indicates just how it has become, as one opponent has called it, 'the ADR industry'. (Brigham, 1996:78). The last twenty years has seen a proliferation in the number of articles and discussions about ADR in scholarly journals, law reviews, books, and law reform commissions, as well as from university 'think tanks' looking at ADR. Many of the authors writing about alternative ways to settle conflict in society have adopted a behaviorist analysis of law. That is to say the law is to be judged by its results. This idea was expressed by a lawyer who attended a 1976 conference on the law during which he claimed the problem of court backlog could be attributed to the "success" of the court as final arbitrator of all manner of social problems. Therefore, I feel a more useful approach to understanding the emergence of ADR will be to discuss some of the underlying issues that regularly appear in the writings about conflict and ADR. These include the concepts of ideology; the legitimacy of law and legal reform in society; informalism, participation, and the processes of privatization and 'professionalization' of disputes and dispute settlement.

Questions around ideology and legitimacy in the ADR debate may in the end come down to motive. ADR proponents believe the court system is out of touch with the ordinary citizen --some believe it is so out of touch as to be no longer worthy of our support. Critics like to point out that many disputes in the lives of ordinary people don't even "qualify" for court! Others say the introduction of ADR processes as an adjunct to the formal court represents a minor concession to critics. A concession designed to conserve the legal structure. Another point of view says ADR is progressive and a fundamental

improvement that turns participants away from adversarial truth finding. It should be no surprise then that two important ADR proponents, Menkel-Meadow (1986) and Pirie (1996, 2000) have lobbied for lawyers to abandon an adversarial approach to the law. (More about the views of these two supporters in the literature review).

The issues of participation and reform center around the question of to what degree can society change its legal structures in order to remain relevant. Lawyers who support the formal legal system like to point out that their clients do participate through their lawyer. ADR proponents believe it is time for clients to speak for themselves. The privatization of disputes has developed quickly and refers to the trend of disputants who are opting to forgo the courts completely in favour of private-for-profit ADR corporations that market their dispute settlement centres and neutrals to well-heeled, paying clients. The danger in this development arises because traditionally the courts signal to society what is acceptable and what is not. Thus court rulings often communicate to us, for example, what are henceforth to be viewed as discriminatory practices. Private ADR settlements, on the other hand, are often bound by confidentiality agreements that undermine this important function of the courts.

There is no doubt that the growth of ADR has been impressive. In the United States and Canada today, ADR practitioners now have their own national associations. ADR specialists, in much the same way as a Law Society or the Bar Association, are seeking to establish entry rules and codes of conduct for ADR practitioners and in so doing establish

their own `turf'. These developments along with the growth of ADR use in government, business, and the workplace, to say nothing of the classroom and schoolyard, only re-enforce for the observer that ADR merits investigation.

I chose to employ the ideas of the classical theorists Emile Durkheim and Max Weber and those of the modern thinker Michel Foucault to provide the theoretical foundation for this study of ADR. My motivation behind this choice has been to employ classical theory to the examination of a recent phenomenon, as well as provide the work with sufficient theoretical contrast. I didn't feel that relying on one theorist alone would provide a coherent answer to the questions surrounding ADR's success. The use of the works of Emile Durkheim and Max Weber to discuss Alternative Dispute Resolution (ADR) also emerges from the observation that both theorists placed a great deal of importance on the role of the law but neither of the two theorists on their own adequately explains the emergence of ADR. Durkheim's interest in social solidarity and a moral basis of the law may help to explain ADR as a social phenomenon. Weber, on the other hand, may help to explain why business, possibly in pursuit of greater efficiencies (and rationalization) has embraced ADR. He does not, however, help to explain the social strand of ADR. Foucault can help us to understand whether ADR should be viewed as a new approach to legal processing that is more suited to the current age or a process of subtle control based on a new philosophy of government. It may be possible using Foucault to see a link between ADR's concept of participation and speaking for oneself as part of a tactic of government

The use of Foucault comes about because Foucault is also concerned with power relations and the power of the law. The legal discourse from a Foucauldian perspective is part of a law system defined and maintained by those most intimately involved in it. Disputes are its raw material; its formality is a kind of etiquette. He observes how the juridical system in place for such a long time seems unable to deal with a central idea of post-modernity, namely the invention and re-creation of the self (Dumm, 2002:130). At the same time, he also believes law is an instrument of power, placing him in the conflict perspective on law and reflecting to some degree the post-modern thinking in line with critics like Nicholas Rose.¹ Before embarking on the literature review let me say a few words on the comparative research involving the cases studies.

The thesis uses both a textual analysis as well as a comparative study of the law faculties at the University of Ottawa and McGill University in Montreal. The findings of the comparative study are presented in Chapter 3. McGill University and the University of Ottawa were chosen because they are relatively close to my home base but also because I had hoped that the reputation of these two institutions would mean it was more likely they would have embraced ADR in some fashion in order that they remain innovative and to provide their graduates with the training they needed to prosper.

The literature review, in chapter 2 of the thesis relied on law journal articles on ADR and law school ADR texts, sociology journals, dispute resolution journals and journals and

¹ N. Rose "Government and Control" British Journal of Criminology 40, 321-339

texts on the sociology of law and legal anthropology as well as reports and conference papers. I felt this would expose me to debates about ADR both within law schools and faculties as well as among sociologists and legal theorists. Some of these articles outlined some basic disagreements about the nature and role of ADR as well as some debates about its future prospects. I should note that the study was based on a recognition of the common law origins and unique developments of the legal systems of the US and Canada. Before any presentation of the research results, however, chapter 1 presents background on ADR with an historical focus.

Chapter 1 Background Setting for a New Idea

The chapter is subdivided into eight sections that bring together definitions, concepts and important turning points in the development of ADR. I discuss how ADR has many progenitors and a close connection with law and government. These are designed to inform the discussions and observations we will present in Chapters 2, and 3. I begin with some observations about disputes.

(a) Theory Old and New

In the realm of theory the foundational principle is that disputes are universal in time and space (Gadacz, 1982:14, 16). Following Durkheim, disputes are at once functional in the sense that they appear when dysfunction exists. There is also the notion that society inevitably moves in the direction of harmony and all persons involved in conflict are interested in resolving it. Next there is the idea that people in conflict can be rational in the pursuit of a solution to the conflict. “At the heart of conflict resolution theory of which ADR is inspired is the concept of rationality. In the theory, calm rational, and logical...are person predicates”(Avruch, et. al. 1991:6). Disputants can put aside their emotions and search for a solution benefiting all sides. People in conflict know or at least can readily identify what all their interests may be and also identify their true best interests (rational choice theory). From this point of view, the role of the ADR practitioner is to ‘lead’ disputants to a solution or settlement. To be fair, it should be

pointed out that lawyers in Ontario, for example, involved in family or divorce mediation using ADR are obliged to make sure both parties are prepared to proceed. Although not all ADR supporters seem concerned about these foundational 'givens', it should be noted that some theorists such as anthropologist Peter H. Gulliver have concerns.

Gulliver has pointed out that a settlement to a conflict is often a situation far short of a solution. Such a state of affairs is likely to cause resentment on the part of disputants that may lead to compliance problems. Gulliver explains that disagreements can be resolved within a relationship while a dispute "is a sign of willingness (of two people in a relationship) to resolve their disagreement." (Gulliver, 1979:80). Finally, within ADR circles there is a perspective that believes there is a need or duty to get rid of conflict, "...the strongest theme or motif [is] the desirability of consensual agreement and an eschewal of overt conflict" (Gunnarsson, 1997:207). Cain and Kulsar add, "most dispute theorists and analysts operate implicitly from the stand-point of dispute treatment as if the need to get rid of disputes is obvious" (Cain and Kulsar 1981-82:378).

Disputes may be seen as either normal or abnormal with correspondingly either positive or negative effects on the social system. Moore (1978) claims that dispute settlement is far from being about harmony and sharing (Moore in Gadacz, 1978:17). Brigham (1996) has offered the view that ADR is based on a desire to cure or heal conflict (Brigham, 1996:78). Organization and management theory might understand that conflict is an indicator of general dissatisfaction or low morale or productivity (Rahim (ed.), 1989:5).

Still another view says ADR may also be understood in terms of a 'spontaneous emergence', as 'market driven' or as part of a process of social selection (Knight, 1992:5).

This work will regard conflict and dispute as interchangeable,²

The difference in terminology seems to be a product of different disciplinary interests in the subject, with sociology, anthropology and law favouring dispute and psychology and economics preferring conflict, rather than any important or practical differences *inter se*" (Pirie, 2000:38).

ADR is a form of mediation as diverse as the people turning to it and this may be its saving grace and source of problems (especially when it comes to the issue of the professionalization of dispute practitioners). Problems may also arise because the style and tone adopted by ADR mediators is often unique to the mediator involved. Some aspects of the mediator's role include the skill to retell information of disputants in order to affirm it; identify with disputants some or all of the issues in dispute with the view to advancing the process. The parallel to psychotherapy is striking. But ADR did not grow in a vacuum.

The roots of what is now referred to as Alternative Dispute Resolution, especially its intellectual foundations, are themselves in dispute (Menkel-Meadow, 1986:300). ADR has been called by some 'delegalization'³ and 'the implementation of more informal proceedings' in certain cases before the courts (Scimecca, 1999:211). ADR also has

² John Burton is one theorist who maintains conflicts are about values and needs while disputes are about interests (Tidwell, 1998:153).

³ Both Roach (2000: 131,133) and Wolf and Yang (1996:52) fear delegalization will lead to a two-tier legal system.

intellectual and practical links to previous current in legal thought, training and education. It has been observed that "models of mediation are... evolving in parallel to the intellectual climate of their time." (Alberstein, 2002:321). The intellectual roots of ADR can be linked to a number of movements going back to the early years of the 20th century. These include the legal realism movement active in America in the 50 years prior to World War II. These Realists sought to correct the disparity they saw between legal theory and legal reality. Legal Realists, while promoting reform in law schools in America, regarded law as an 'empirical phenomenon' and 'amenable to study by methods of social science' (Aubert, 1983:14, 15). The important note here for ADR supporters is that the law reformers' goals share something in common with the goals of ADR to "substitute another body of scientific rules and normative principles for the failure of legal principles to easily predict behaviour and guide decisions" (Menkel-Meadow 1991:104).

A second movement linked to ADR is the Process School in jurisprudence that emphasized the importance of processes in law. This legal pragmatism shared with ADR a forward-looking perspective because pragmatism tried not to be as closely tied to previous decisions as the formal system and it also tried to look at the global consequences of decisions.

Two other movements that have influenced ADR are the Critical Legal Studies (CLS) movement in America that sought to expose the defects and hidden aspects of the legal

system and in a broader sociological context within the CLS framework, the Women's Movement can also be said to inspire some but certainly not all ADR supporters⁴.

The success of ADR makes it very important to understand or if one likes 'to get a handle on' just what is the phenomenon called ADR. As I will show this is not a simple task. It is a task I believe that is made more difficult because of the ongoing struggle to control ADR. Both the legal and non-legal strands of ADR have quite an investment in that definition even though they may sometimes intersect. Some initial points from the literature are of note at this early point of this thesis. First, ADR is not confined solely to a single technique or process. Second, I also note the features that would unite both the 'legal' and 'non-legal' strands in the ADR discourse are the features of a 'non-adversarial' approach to disputes and a 'collaborative' negotiating stance. Of the two ADR strands community-based dispute resolution is often less about money than about the cause. A 1992 newsletter of the Dispute Resolution Centre of Ottawa-Carleton reports that it relies for some of its funding on profits from bingo nights. In an article in this same newsletter entitled "The Community-Based Vision" author Carole Eldridge describes the establishment of a school mediation program as a major achievement, "Schools are an integral part of the community: we hope that all students complete their classes with the skills needed to coexist in the community at large." (Newsletter, September 1992:2). She also points out that the public misunderstands another community-based program called

⁴ Many observers like Martha Bailey express doubts about the ability of women to safeguard their interests in family mediation. See *Unpacking the Rational Alternative: A Critical Review of Family Mediation Movement Claims* Canadian Journal of Family Law vol.8 1989.

the Criminal Pre-trial Mediation Program,

"Sometimes when I say this to people they appear to question my statement. They see the criminal courts as a totally separate entity, not really representative of the community at large. Why, because in their view only criminals frequent those hallowed halls of justice" (ibid. 1992:2).

It is within the justice system, however, that ADR has undergone institutionalization in a relatively short time.

One way this can be seen is in the extensive case law presented in the law school ADR texts that have been published in both the United States and Canada over the last few decades. This development is one part of ADR's process of institutionalization. In another way the observation of ADR critic Owen Fiss in the 1970s that ADR relies on the formal courts to act as a fallback system also seems to be true.

Keeping in mind the struggle for control of ADR mentioned in the Introduction, let me turn to definitions: one law school text defines ADR as "encompassing all legally permitted processes of dispute resolution other than litigation" (Ware, 2001:2). Another observer says ADR is "one of the most influential moves within the legal culture in the United States" (B.Yngvesson, 1983: 1703). Another text lists as many as 13 or 14 dispute resolution processes under the ADR umbrella. They include mediation, mediation-arbitration, court-mandated settlement conferences, and court-mandated

arbitration and mediation, group facilitation, dialogue circles and facilitation among others (Stone, 2000: Menkel-Meadow, 2001: xxx). Another definition that also points to ADR's features says ADR is,

"those non-coercive processes which are alternatives to the formal legal or court system, in particular, multi-door courthouse programs, neighbourhood justice centres or community justice centres" (Scimeca in Sandole et.al.1993: 212).

This definition creates a small problem for the so-called court-appointed or imposed mediation that began in the 1970s because voluntary participation, another cornerstone of ADR, cannot be court mandated and voluntary at the same time. Dalhousie Law School professor Robert Trackman provides the most straightforward definition of ADR: "ADR involves every legal method of dispute resolution outside of litigation before courts of law" (Trackman, 1992:231). Trackman's definition, however, may be regarded as a sort of pre-emptive strike in the battle to control ADR and its future direction. In other words, he may be asserting the legal profession's stake in the developing field of dispute resolution by using a definition that links it with litigation in order that lawyers find it easier to lay claim to its use and development. The definition may also serve the purpose of downplaying the "transformative" or if you like the social side or strand of ADR. A more recent text, which reflects the non-legal social side of ADR and recognizes ADR's growth in this area, adds "healer", "buffer" and "penalyser" to the list of monikers by which someone acting as a dispute practitioner might call herself (Barsky, 1999:14).

These descriptors and the concept of sentencing and dialogue circles show a strong therapeutic influence often identified with the social strand of ADR. Another writer expands on the definition of ADR to include "collaborative problem solving, joint fact-finding, (and) facilitation" (Manring 1998:276). These descriptors and others do show a strong therapeutic influence that is strongly linked to the social strand of ADR.

The definition controversy also exists for another reason. ADR has generated a great deal of lively discussion as to whether or not it should be understood as something more than a process or technique, or whether it is an actual movement with an ideology of its own. But the counter argument is the view ADR is simply a shift in emphasis away from the competitive approach to fact-finding and negotiations (Menkel-Meadow 2000:5; Pirie 2000).

Once again we see a divide. Ironically, the literature shows that both supporters and detractors alike see and talk as if ADR is a movement. For those involved in the social strand of ADR the explanation is simple, they are more likely to exhibit faith in its potential to change people and society and therefore consciously or unconsciously regard ADR as a movement. For those closer to the legal structure, movement is sometimes a term of skepticism and derision.

So we may be best served if we confine our definition to the statement that ADR is a non-adversarial form of informal mediation based on collaboration and problem-solving.

If one was to hold a narrower view, however, that ADR is simply an alternative to the law or more properly to the formal justice systems (that are themselves designed to settle disputes), then it would be fair to say ADR precursors go back a long way.

The conciliation approach to dispute resolution was used by some immigrants to America at the turn of the 20th century. Often this search for alternatives was due in part to a mistrust of 'authority' among the new arrivals. In other cases, ethnic or religious groups, seeking to solve a dispute, often preferred to turn to their own community. They relied on a respected older member to help them find a solution to their disagreements. Group members resorted to the 'internal' option because they shared a belief in a 'coherent community vision' reflecting common norms and values (Nolan-Haley, 2001:5). The Jewish Conciliation Board that operated in New York during the 1920s was one such community-based dispute settlement mechanism (Abel, 1981:208; Irving et.al.1987: 46). Stone has observed the link to participation and new norms, "We could identify ADR as one aspect of the rich multi-dimensional associational life in which we participate [and] expressing...our desire to be governed by our own self-generating norms" (Stone, 2000:12).

Another precursor that occurred before today's apparent wholesale adoption of the ADR option by many governments involved the development of skilled mediators by the American government. These men were employed by the US federal government to handle labour strife and operated from the turn of the 20th century into the 1930s and 1940s. Michel Foucault provides some insight here in his analysis of American labour

law as set out in the Wagner Act and the National Labour Relations Administration. Like some ADR critics, he points out that the law raises arbitration and arbitrators to lofty heights within a bureaucratic monolith. (Caputo et. al., 1993:167). Foucault, in language that reflects the ADR discourse, observes that the Act creates arbitrators/experts with the power to order 'therapeutic intervention when harmony is disrupted' (ibid.1993: 167). This is also the language of ADR critics such as Laura Nader and John Brigham.

Although it is beyond the scope of this thesis any further discussion of ADR would not be complete without stating that there is a strong link between ADR and legal anthropology,

Much of the work of the anthropology of law and critical legal theory has been concerned to demystify law; to show how rules are not and cannot always be, obeyed, how laws are self-contradictory, how the practice of law differs from the ideal" (Harris, 1996:4).

Recognizing ADR's links to academia is also important on a number of levels. On the first level, much of the available material on ADR can be found in the law reviews and journals of Canadian and US law schools (in which the merits of ADR are often discussed). And second, as already noted, there are connections with legal realism, as well as the process school, critical legal studies as well as legal anthropology. In this vein, it is important to mention the work of Richard Danzig.

Danzig published a paper in the Stanford Law Review in 1973, supporting the

establishment of a decentralized community-based system of criminal justice (Wolf and Yang, 1996:50). This is often called restorative justice and is very much part of ADR. Its central feature is to view crime as a transgression against the whole community.

Durkheim of course is important here because he regarded prisons as part of an evolutionary change in emphasis “prison conditions improved as the focus of criminal sanction came increasingly to be the management of social harmony rather than anthematisation” (op. cit. 2001:286). Durkheim also posits that penal law, in simple mechanical societies, holds sway with its members and penal law seeks to severely punish wrong doers who have outraged their community's moral expectations. These expectations are embodied in society's social morals and norms. "The operation of a normative structure is strongly evinced in the work of Durkheim. The normative structure supports and sustains social life" (Wilkinson 1978:239).

Danzig's work was one of the first examples of an anthropological view of disputes that adds a new element so important to those hoping to use ADR to change the law and how we see disputes,

"It (the transformative perspective) came about when some reformers from within the legal profession read ethnography and thought they had found the perfect template for their reform: dispute resolution in tribal societies" (Wolf and Yang, 1996:50).

Legal anthropology's focus on understanding how the law works on a micro-level allows it to make a contribution to our overall understanding of legal systems and the changes which may occur within them, “anthropologists seek to discover why some societies have

developed certain dispute resolution mechanisms and others not, and why they work in some contexts and not in others"(Gadacz, 1982:16). At the same time, it is also useful to understand changes within today's legal system like ADR in the light of anthropological knowledge. "Processional changes in modern law are postulated to occur in two possible ways. One is an evolutionary transformation to a new type of law, as yet unknown, and the other, interestingly enough, calls for an evolutionary 'regression' to premodern forms of law" (Gadacz, 1982:4). This idea brings us to Max Weber.

Weber, has made the point that small-scale justice never really disappears and that we as actors within the present day formal legal system have links to justice or a sense of justice closer to ADR and that Weber says was once understood by all. It is a concept that has modern day supporters. I should also add here that not everyone is enamored by ADR's links to anthropology. (For a different view of ADR and anthropology please see the Literature Review).

There is another important ADR link to the university besides Richard Danzig. In 1981, two Harvard professors Roger Fisher and William Ury published the best selling, Getting to Yes. The book subtitled "Negotiating Without Giving In" advocated a collaborative approach to negotiations. The publication of Getting to Yes marked the 'birth' of ADR for some adherents. Authors Fisher and Ury said they set out to answer the question "What is the best way for people to deal with their differences?"(Fisher and Ury 1981:vi). The book begins with the statement: "Like it or not you are a negotiator. Negotiation is a

fact of life (ibid, 1981:i). The two authors contend, "the basic elements [of negotiation] do not change" (ibid: xiii). They draw on their specialties in anthropology and international law to observe that today people are not willing to sit on the sidelines,

More and more occasions require negotiation; conflict is a growth industry. Everyone wants to participate in decisions that affect them; fewer and fewer people will accept decisions dictated by someone else"(ibid: xi).

Fisher and Ury set out to change common notions about negotiation and find a new approach,

"There is a third way to negotiate, a way neither hard nor soft, but rather both hard and soft. The method of principled negotiation...is to decide issues on their own merits rather than through a haggling process focused on what each side says it will do or won't do. It suggests that you look or negotiation shows you how decent. It enables you to be to obtain what you are entitled to and still be fair while protecting you against those who would take advantage of your fairness "(Fisher and Ury, 1981: xii).

This third way of negotiating offered some basic tenets: Don't bargain over position; separate people from the problem; focus on interests not positions; invent options for mutual gain; and insist on objective criteria. Fisher and Ury also offered suggestions to deal with some common problems that arise in negotiation. The authors propose a collaborative approach to negotiations and rejected a major criticism of ADR: power determines outcome. On the contrary, the authors hold that context not resources equals power; there are many sources of negotiation power; and negotiators need to make the most of their potential power (Fisher & Ury 1991(2nd ed.) p.178, 179-86). They recommended negotiators develop BATNA or the best alternative to a negotiated

agreement.

“Apply knowledge, time, money, people, connections and wits into devising the best solution for you independent of the other sides assent. Developing your BATNA (raises that minimum” (Fisher and Ury, 1981:111).

If the other side is not willing to engage in negotiations, the recommendation of the authors is "negotiation jujitsu", “avoid pitting your strength against theirs directly; instead, use your skill to step aside and turn their strength to your ends... channel it into exploring interests, inventing options for mutual gain...”(ibid. 1981:114). The authors emphasize the need to recast negotiations by using new ideas such as ‘enlarging the pie’; negotiating interests not position; and moving toward your adversary during negotiation. All emerge in a coherent and organized text. "Unlike almost all other strategies, if the other side learns this one, it does not become more difficult to use; it becomes easier" (ibid, 1981: xiii). On the issue of conflicting standards of fairness Fisher and Ury advised using "external standards" to improve haggling, and relevance in terms of time, place and circumstance (Fisher and Ury, 1983:153,154). The book became a best seller and was updated in a new edition in 1991. This approach is at the center of a number of texts that have been published in recent years including: Beyond Machiavelli, (1994) Conflicts (1985). One critic of Fisher and Ury of note is Gordon Sloan who describes himself as a mediator and trainer. Sloan advocates negotiations about interests (*italics added*) “I think Fisher and Ury ...can be read very theoretically and it’s dangerous to do so. What Fisher and Ury do not do is offer a procedural operational model to bring about interest-based negotiations” (Proceedings, 1996:177).

(b.) ADR's Rapid Rise to Prominence

Beyond the halls of academia the substantial growth during the last 25 years of the use of alternative dispute resolution (ADR) methods and collaborative processes to solve conflicts should not be too surprising, if we look at its various supporters not the least of which are governments and businesses. ADR's most visible presence today is within the legal and governmental systems of Canada, the United States and other countries. By the early years of the 1990s, the Alternative Dispute Resolution Journal estimated that in the United States, 46 states have established ADR programs involving 1200 courts. The American Bar Association now includes 2800 lawyers among its members regularly using ADR. In a report entitled Blueprint for Improving the Civil Justice System in February of 1992 the American Bar Association reported that 94% of law schools offer dispute resolution courses; more than half of the local and state bars have dispute resolution committees; more than 2000 schools have peer mediation programs and 450 community mediation programs are operating in the US (ABA Report 1992:31). During the same period a new legal practitioner called 'ADR Specialist' has grown to over 1500 (Dick 1994:50). These practitioners are involved in dispute resolution settlements in a wide range of areas including family law⁵, trade and business, community groups, employer and employee disputes, as well as government. ADR has managed to penetrate the legal mainstream in a very short time. Now its place in 'the law' is an issue of vigorous debate and speculation. Its place in business seems clearer. One highlight of

⁵ Today there are Associations of Collaborative Family Law with their own guidebook: Collaborative Family Law Another Way to Resolve Family Disputes

ADR's development is the fact that today most business contracts include ADR clauses (Dick 1994:53). ADR mediation may soon become the preferred way to settle contractual disagreements because of its efficiency, lower costs, perceived fairness, and long-lasting agreements.

As early as 1979, the potential of ADR in the business world was recognized even before the legal establishment. The Centre for Public Resources' (CPR) created its own Institute for Dispute Resolution with a special focus on the resolution of business and public disputes (Goldberg et. al. 1995 (supp.): 3) The motivation for the large corporations involved in this project was to find ways to decrease the cost of litigation (Menkel-Meadow 1986:300; 1991:8). Ironically, another reason for the embrace of ADR on the part of these corporate executives was uneasiness over the unpredictable and large court settlements awarded by juries that they considered not competent to understand many of the issues on which they were asked to pass judgment (ibid. 1986:300). The research shows that ADR's growth light of Weber's observations not only about legitimacy but also by his insight into rationality and the needs of the business class for greater predictability in legal affairs. In contrast to the formal court system, for example, if the parties to a contract agree to settle any disagreements arising out of that contract with an ADR dispute settlement mechanism then the sides avoid both the costs of formal courts, to say nothing of the long delays so identified with the formal courts. Weber also saw a need for the informal in business dealing,

"Thus while the basic interests of the business class require a rigorous formality, that fact

is that the law has at the same time become informal for the sake of business goodwill where this is required by the logical interpretation of the intention of the parties or of the good usage of business intercourse interpreted as some 'ethical minimum' (Economy and Society, 1978:893).

ADR has also enjoyed steady growth in all common law countries in the 1970s and 1980s and by 1989 has gone global. International Dispute Resolution (IDR) Europe is established and Richard Rubenstein has also noted the missionary zeal of ADR experts working in central Europe since the fall of communism. (Rubenstein, 1992, Moore, 1993).

Some observers believe the success of ADR in Europe may be linked to the inquisitorial approach of the civil law system (Strier, 1994). Nevertheless, the ADR option for settling international business disputes, and as part of international contracts is now well entrenched. The use of ADR has also expanded in the areas of consumer services industries and employment cases that testifies to its new reach. (Dick 1994).

Globalization and the growth of international business and trade, along with the Internet, have spawned the stepchildren Computer Assisted Mediation and Online Dispute Resolution (ODR) providers such as eResolution.com. Other online mediation services include Cybersettle.com, and Clicksettle.com. In 1999, Mediator.com launched Onlinemediator.com "to bring dispute resolution in its full integrity to the Internet"(www.nedl.com/images/library/85.html). The advantages for Internet businesses include the fact that ODR is outside national legal systems and may not even require

legal counsel (Rule, 2002:2). "A computer facilitates the dispute process by working with many more variables than can the individual mind. It can help with problems involving, predicting, choosing, allocating, and "what if" analysis..." (Mills, 1990:197). These ADR developments demonstrate market forces at work as well as provide an example of ADR as one form of rationalization. Rationalization is at the heart of Weber's sociology and as you will see provides the basis for part of the explanation for the rise of ADR. Let us look at formal rationality.

Formal rationality is institutionalized in society's structures like the law and bureaucracy. Formal rationality permits the calculation of what we like to call "costs and benefits". Formal rationality allows business to know with greater certainty what their inputs will cost or at the very least they should be more manageable costs. Weber understood fully the necessity business has for a rational law or by implication a rational contract that increased predictability. In contrast to the formal court system, if the parties to a contract agree to settle any disagreements arising out of that contract with an ADR dispute settlement mechanism then the sides increase predictability of costs arising from non-compliance.

So what we see is that formal and informal laws are not always at cross-purposes. In fact, they rely on one another for important reasons. Together they create one law system. While this link may not be sufficient for some observers, others are satisfied, "...informal law is really the substantive-rational law of Weber's four-fold scheme" (Sheleff,

1997:37). But in the modern world, the issue does not end there and may not be that simple. In a world of many laws and law systems, the world of the Common Law and the world of Civil Law to name just two, unpredictability in the calculation of means and ends, costs and benefits, increases dramatically. It is not surprising then that predictability must be present in all areas, including the law. If law's predictability is not possible then a way to make it so is preferable and even necessary, otherwise, in line with Weber's view the legal process is not completely rational and if it is no longer useful it will be reshaped.

But it is doubtful those within the legal structure are interested in popularity and for good reason. Foucault's analysis of revolutionary law is also helpful here. Fitzpatrick points to Foucault's use of the table to critique revolutionary popular justice Foucault states, "The table is an effective symbol importing the myth of law into the process of popular justice. It serves to subordinate competing claims and shared standards of general applicability" (Foucault in Fitzpatrick, 1992:179).

Weber also noted both how those with economic power had the advantage in the formal legal system and he noted the need for business to maintain these formal systems. But the early involvement of business in ADR may have been motivated by a desire to decrease the cost of disputes by opting out of a jury system that they saw as giving plaintiffs very expensive awards. Another aspect of ADR development seems appropriate here and requires our attention.

Understanding ADR also requires us to see that it is also part of the larger field of conflict resolution studies and to recognize how ADR became linked to the individual.

"During the 1950s, there was an upsurge of hope that a new social science would redeem the promise of an older generation to explore reasons and remedies for the apparent isolation of the legal order" (Nonet, et. al. 1978:1). The study of conflict and conflict resolution as it applies to nation-states grew rapidly in a post-war environment.

The idea of applying conflict theory to interpersonal or group conflict within society began in the 1960s and benefited from the work of Vilhelm Aubert. His article "Competition and Descensus: Two Types of Conflict" discussed conflict at the individual level as a problem or as something natural or "inevitable eruptions in the social fabric"(Aubert, 1963:26). "Conflict becomes a building block for a new theory of social control incorporating the perception that disputes are natural" (ibid. 1963:26). This development explained how it is that the study of Alternative Dispute Resolution was so often seen in either descriptive or prescriptive terms (Folberg et. al., 1984:121; Cleary et. al., 1995:121). While the individual disputant is part of the equation of ADR, it is important to restate that it is the law school and the law student who will give it respectability.

But in the mind of the public, and as noted, because of the intervention of the legal establishment, it often appears that ADR is entirely connected with law and law-schools. So, law students are now advised that ADR 'will help you to be a better lawyer' (Nolan-

Haley, 2001:3). Under the Divorce Act of Canada lawyers are required to inform their clients about the availability of mediation services. But many reformers also see ADR as part of an important critique of traditional legal processes, the legal profession, law schools and its adversarial culture. Others see ADR as an effort to build a problem-solving culture (Nolan-Haley, J.M., 2001: 10). It is an idea that goes beyond law and law schools and requires some attention.

(c.) The Problem-Solving Idea:

The problem-solving concept is not only in dispute between the supporters of the two strands of ADR, the growth of ADR can be understood to be a part of the growth of the use of the social sciences in the fields of law, family mediation, social work, criminal justice (e.g. sentencing conferences) and education. It is a growth that can be easily linked to Roscoe Pound in the 1920s and 1930s to Aubert in the 1960s and Fisher and Ury in the 1980s. This problem solving thrust in Alternative Dispute Resolution is an important part of the transformative perspective in ADR that seeks to transform the dispute and by implication society. In fact, at the 1976 Pound Conference Justice Berger urged lawyers to change their ways and become problem-solvers. There are of course some basic tenets of this problem-solving view in ADR,

“...all of them call for a non-adversarial approach, a problem-solving orientation, direct participation by the parties in conflict in jointly shaping a solution, and facilitation by a third party trained in the process of conflict resolution” (Sandole, 1993:ix).

In direct opposition of most of the lawyers at that meeting, the hope of some socially orientated supporters is to see ADR used as a tool to achieve important societal objectives,

"[Social transformation is] a goal involving community participation, developing social networks and empowering them to handle local conflicts and...moving away from the idea justice imposed by the state on the citizenry" (Harrington & Merry 1988 in Garth et. al.,1998).

The extent to which these supporters believe in the power of ADR has also been duly noted,

"They derive their ideas from a variety of sources, such as law, psychotherapy, management theories, group dynamics, peace research, decision theory, and the study of conflict resolution in traditional societies, and theoretical models based on the entire range of social-science disciplines (Sandole, et. al., 1993: ix).

They hope ADR will empower and transform. "It is a movement based on high ideals and visions. Success or failure is not based on a single conflict or interaction but fundamental changes in society" (Bush and Folger, in Barsky, 1999:89). In order to change or transform, people must be willing to participate in the dispute settling process. Participation is therefore another important foundational idea in ADR.

(d) Participation: A Decade and a Demand:

Participation was an idea that was first seen in an article published in the Journal of the American Institute of Planners in 1969 by Sherry R. Arenstien, called "A Ladder of Citizen Participation". It is considered important because as the title of the article

suggests, Arenstien promoted the idea that people as a group rather than as individuals could voice their concerns about environmental issues by using problem-solving techniques during negotiations with a powerful corporation. In language that predates Fisher and Ury the article counselled people to choose to participate by banding together in a collaborative effort to ensure mutual gains. Arenstien wrote about the experience of citizen groups who used problem-solving techniques instead of simple bargaining. She observed how participants become aware that they had a range of positive possible outcomes to their disputes (Wondolleck, et.al. 1989:253). The process had benefits for the individual or for groups of citizens seeking to be heard. The decision to participate in the alternative collaborative process, for example, could allow for the negotiation of any ground rules and help both sides decide what it is they really want (Bush et.al.1994; Wondolleck, et. al. 1994). Participation, the discovery of a voice, is seen as empowering "A well-structured collaborative process can remedy imbalances and other stumbling blocks inherent in traditional forums" (Wondolleck et. al., 1994:253). ADR may also help people see and understand complicated issues and to solve them based on the actual substance of those disputes. Groups involved in this process find that success is more likely if participants can develop the skills that enable them to clarify their goals and concerns. There is also the empowering process involved in 'learning by doing' that its supporters say is an important part of ADR. Leaders often emerge from within nascent citizen groups. Often this collaborative approach creates an atmosphere in which disputants begin to 'like' those on the other side. This improves communications and in turn makes an impasse less acceptable to both sides (Wondolleck, 1989:257).

This call for participation can be traced to the turbulent politics of the 1960s and 1970s. As I have already noted, Alternative Dispute Resolution (ADR) as a dispute settlement mechanism also has roots in this background of dissatisfaction with the institutions of law. The Civil Rights Act adopted by the US Congress in 1974 established the Federal Mediation and Conciliation Service (FMCS). The hope was that trained members would work with people to solve ethnic or racially motivated conflicts in local communities. It is during this period when many marginalized citizens and activists lawyers in the United States are energized by both the civil rights struggle and the impact of new social legislation to use the law help change society. People wanted their 'rights' and voices heard, but instead they encountered frustration with a legal process remote from their lives in which disputes move too slowly through the formal and increasingly complex system. (Nolan-Haley, 2001:5).

It is also not surprising then that a corollary to this development is that the law and the legal profession also lose public esteem during these decades, spawning critics from the left and right, from women and minorities. Menkel-Meadow has noted another feature of this period –anti-professionalism (Menkel-Meadow, 1986:300) and a desire to demystify professional work. (Yngvesson, 1998:1703). The crisis of confidence is reflected in books and articles on the place of law in turbulent times. One such book review article bears the title "The Crisis of Liberal Legalism" discussing Eugene Rostow's book, *Is Law Dead?* (1971) and Robert Wolf's book *The Rule of Law* (1971). Rostow writes that law faces two fundamental issues, "the citizen's moral relation to the law in an age of consent

and the capacity of the American legal and political order to meet the needs of our people for social justice" (Mazor, 1972: 1032, 1035). Rostow's characterization of the crisis brings us back to Durkheim's search for law's moral foundation. Consent can be linked to participation and social justice can be linked to legitimacy and the expansion of what is 'relevant' to the legal process. Critics are shouting from the courthouse steps. "Radical jurisprudence... shared hostility to the established legal order, but also [had] a shared search for a new communitarian counter-order"(O'Hagen 1984:5).

There is little sign of a response from the legal establishment in the United States until the Pound Conference.

(e.) The Pound Conference: Facing the Demand

By the early years of the 1970s, arbitrators used a non-binding process in place of litigation applied their skills to local conflicts (Goldberg, et. al., 1992:7). There were also some court-imposed mediation and settlement projects (ibid. 1992:7). The Society of Professionals in Dispute Resolution is established in 1973. Also in 1973, one of the first uses of the dispute resolution/collaboration approach to negotiations was used to resolve local questions raised by a proposed dam in Washington State. (E.Weber, in Soden and Steel, 1999:1240).

The US Justice Department's Community Relations Service started to employ mediators

to handle civil rights cases (Goldberg, op.cit.1992: 7). By 1976, the legal profession noted the public dissatisfaction with the legal system and feared a diminution in respect for the law and their status in society. The American Bar Association (ABA) came to grips with the problem at a national meeting. The Pound Conference of the American Bar Association that year was titled "National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice". It became an important event to everyone interested in reforming the legal system. It is seen as "a way of thinking about the structural problems of inequality, about social relations more generally and about solutions to these problems by cultural means was dramatized"(Nader, in Chew, 2001:42). Reformers included a former U.S Supreme Court Justice Warren Berger. He discussed not only the need for reform of the legal process but enjoined the lawyers and law school professors at the conference to come up with more effective ways of using the courts in the hope of reducing the backlog.

At the same gathering Harvard Professor Frank Sander presented a paper entitled "Varieties of Processing" and advocated the creation of Dispute Resolution Centres or a multi-door courthouse concept for the efficient settlement of disputes "based on rational criteria for allocating various types of disputes to different dispute resolution processes" (70 Federal Rules Decision 79,113). Professor Sander described his vision, to look at court in a new way. "That is the idea behind the multi-door courthouse-a comprehensive justice centre where cases are analyzed so that they can be referred to that process or sequence of processes that's best suited to provide an effective and responsive

resolution." (Sander, 2000:5). In one sense, however, Sander's idea was not so new.

In 1787, England's Court of Requests, staffed by volunteers, adjudicated "virtually without cost" cases of a value between 2£ or 5£. They brought to most ordinary people the only kind of civil justice they would ever receive"(Arthurs, 1980:2). Although these people's courts vanished in the 19th century largely because of opposition from lawyers, it is interesting to see this assessment by H.W. Arthurs,

"The local courts were mandated to decide cases according to 'equity and good conscience' and appear to have often been influenced by a spirit of mediation, situation equity and responsiveness to local community expectations and relationships. The formal system identified winners and losers but contributed nothing to maintenance of the social fabric" (Arthurs, 1980:3).

The parallel to Sander's proposal was clear. His proposal also echoed Lon Fuller's observation that "polycentric problems which...do not easily lend themselves to resolution through the 'all-or-nothing' approach of adjudication"(Nolan-Haley, 2001:6). Sander saw adjudication as a form of social ordering. "It is submitted that there are two basic forms of social ordering: organization by common aims and organization by reciprocity. Without one or the other of these nothing resembling a society can exist." (Fuller, 1978:357).

The multi-door courthouse proposal at its most basic sought to direct some court cases to a court clerk, or other court official or mediators instead of judges for resolution, "the central quality of mediation [is] its capacity to reorient the parties toward each other, not

by imposing rules, but helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions to one another" (Fuller, in Sander, 1976:115).

The goal was to reduce the backlogs slowing courts down but it is also to turn courts into a place where people turn to solve a wider range of disagreements, "[it]...will make available those processes for grievances that are presently not being aired at all" (70 Federal Rules Decision 79,113). In the wake of the Pound Conference, three neighborhood pilot projects were set up with the objective to increase fairness, rationality and efficiency in the court system by replacing it. The experiments received financial assistance from the Ford Foundation and the U.S. Justice Department's Law Enforcement Assistance Administration (LEAA). The Neighborhood Justice Centers' (NJC) staff focused their mediation efforts on neighborhood conflicts and the resolution of disputes between individuals with ongoing relationships. (Stone, 2000:7). In an assessment of the Community Boards of San Francisco DuBow has noted the pressure on the disputants to take responsibility for the conflict in an environment in which neighbourhood building is 'a central goal'. He described a practice of minimal intervention to ensure the authenticity of the process (DuBow 1987 in Fitzpatrick, 1992:171). These pilot projects managed only a limited success record and government backing. The privatization of dispute settlement, however, was about to take a giant step that may also take 'the public' out of dispute settlement.

In the same year, the Honourable H. Warren Knight, a former US Marine and Orange County Superior Court and Municipal Court Judge, left the bench and established JAMS--Judicial Arbitration and Mediation Services, This was a private company that offered ADR mediation services, private judging, neutral fact-finding, mini-trials, arbitration and ADR training (Burns, 2000:20). By 2003, it boasted 20 locations in the United States and brags about the quality of its practitioners as 'the best neutrals' who allow clients to take full advantage of ADR practices. It reports a 90% resolution rate (www.jamsadr.com). Some critics have referred to the phenomenon as "rent-a-judge". Rubenstein took note of this shift, "much Alternative Dispute Resolution practice represents the privatization of formerly public decision-making processes" (Rubenstein in Jeong 1999:178). In 1982, Justice Berger published the article, "Isn't There a Better Way", in the ABA Journal signaling his support for the alternative process (Strier, 1994:193). During the 1980s, ADR gradually became 'a part of the legal process' (Brigham, et. al., 1996:89).

(f.) The Pound Conference: Playing with Reform:

The acceptance of ADR by the legal profession was not immediate nor was it always in the fashion envisioned by Frank Sander in 1976 (Sander, 2000:4). One reason for this was that the participants of the 1976 Pound Conference framed the problem, as a breakdown in the delivery of legal services rather than as an erosion of legitimacy. Weber saw legitimacy as coming from legality and regarded it as very important. "All relations of privilege and inequality between different groupings require doctrines or

myths which serve to justify their existence and continuation (P. Lassman in Turner, 2000:90)

To underline this view, he also called legitimacy "a precarious political achievement"(Turner, 2000:88). According to Weber, this 'legitimate validity' is "ascribed to the legal order by those who participate in it"(ibid, 2000:225). These two notions or requirements for a legal system alluded to by Weber, i.e. a doctrine of justification and the presence of social space for participation in the legal structure, also seemed to point then to the necessity for a legal system to re-affirm its place in society. ADR supporters could rightfully claim its informalism and agency (i.e. disputants speaking for themselves) met those requirements and showed that ADR was an important part of a renewal of the legal structure in a post-modern society. But the lawyers attending the Pound Conference, may have, in their own minds, perceived ADR as a response to the first crisis and appeared not to be concerned with the second crisis-the legitimacy issue. This might not be too surprising. Weber noted that a departure from tradition to something new "requires special kinds of assertions of authority, either prophecies or a call for a return to supposedly earlier and more valid traditions (Weber 1978:37). He also stated that the formal legal process favours the 'propertied classes' (ibid. 1978:812). Weber also described legal system's need to be a "systematized, unambiguous and specialized" rational formal legal system.

There are several problems with this response by the ABA to the public dissatisfaction of

this period. Simon Rifkin as previously mentioned offered the delegates his observation that the dissatisfaction with the system was due to its success. The courts, he said were being called on to solve all manner of dispute that properly belonged in the lap of the legislature or the executive, "our courts have become the handyman of our society" (70 FRD 101). Although he also echoed Weber's observation about the consequences of uncertainty, "When law is so unpredictable that it ceases to function as a guide to behaviour, it is no longer law "(ibid, 110). At what point is an alternative approach justified?

Walter Schaefer attempted to place the blame for the system's problems elsewhere. He noted that the jury system had caused disenchantment among professional groups "who felt their cases involve technical questions which are beyond the competence of a lay jury". (ibid. FRD 162). But this criticism may have been an attempt to claim professional rights that may also run counter to notions of equal citizenship. Finally, I have a concern with the inability of the conference members to seriously entertain an examination of non-adversarial dispute processes, except in the most minor of situations, "Our task is not to determine whether the adversary system is the best possible method of arriving at the truth rather it is to determine what changes what adaptation with the broad outlines of the adversary system may improve its performance" (70 FRD 160).

The report of the follow-up task force on this dissatisfaction is revealing for its narrow focus by calling for a review of excessive appeals and the decriminalization of 'victimless crime' as well as an expanded small claims courts. The report also offers

support for Neighborhood Justice Center's pilot projects (74 FRD 174). It is interesting to note that the report of the committee includes mention of an offer by a school of social work to help design the NJC pilot program. This is a sort of cross-pollination between the therapeutic approach of social work and the informal law discourse.

Durkheim, was also very concerned with legitimacy or as he might describe it--authority. "The problem [is] not of 'order' in a generic sense but of authority appropriate to a modern industrial state" (Giddens, 1977:238). As I have already stated, the participants attending the Pound Conference, however, framed the problem, broadly speaking and perhaps not surprisingly, as a breakdown in the delivery of legal services and not as an issue of an erosion of legitimacy. At the height of the legitimacy crisis in the 1960s and 1970s, the Left, women and the critical legal studies (CLS) movements were calling attention to the law resting on what Emile Durkheim called "habit,"

"The transformation that occurred within the analytical jurisprudence was expressed in utilitarianism which asserted that legitimacy resided in the extent to which the system was capable of satisfying and competing of the claims disparate citizens" (Hunt, 1978:135)

Let us remind ourselves that their backers saw some of the early experiments in court appointed informalism as court revitalization. The Ford Foundation's support for early informal legal processes in the 1970s has already been noted. The Foundation's Centre for the Study of Law and Society recognized how the profound nature of the crisis of liberal legalism during the 1960s, "...the crisis of law and authority ...were...eroding the

foundations of all our institutions” (Nonet, et. al, 1978: v). To reiterate, the crisis came about based on two assumptions about the legal system that are seen to be invalid: “that the written law represents the actual legal order; and that “the state provides a value neutral framework to settle conflict” (Siedman in Campbell, 1971:149). ADR provides a way for the legal system to improve, to be more responsive to the changing needs of marginalized groups such as women. The informalism of ADR allows women to incorporate their experience into the legal discourse by expanding the definition of what is relevant, seeks to empower individuals in dispute and perhaps make traditional notions of power less important.

I believe it is important to point out that the legitimacy crisis of the 1960s and 1970s, however, does not mean that the critics wanted to turn away from the system entirely. “Loss of faith in the operational integrity of legal institutions is often found in combination with a firm residual commitment to legal ideals” (Scheingold, 1974:63). In other words, ADR may be rightfully seen as an appropriate response to some of the legal system’s shortcomings. An important question then becomes whether or not ADR should function at the periphery of the legal system. But recognition of ADR at least on the part of many lawyers would have to wait a little longer.

Let us be reminded that the viewpoint that legal system was underachieving was also the view of the Realist critics in the early 20th century. From their perspective the law should no longer automatically be granted its vaunted position within the social structure. This

earlier crisis as well as the 1960s version both doubted what we often take for granted about the legal system: “that the written law represents the actual legal order and the state, “provides a value neutral framework to settle conflict” (Siedman in Campbell, 1971:149). Max Weber also felt the notion of equality before the law was problematic and alien to substantive justice (Weber, 1978: 980). The answer as to why the lawyers at the Pound Conference saw things the way they did can also be found in the work of Weber. He stated that a departure from tradition to something new “requires special kinds of assertion of authority, either prophecies or a call to a return to supposedly earlier and more valid traditions (op.cit. 1978:37).

(g) Acceptance: Business and Politics Helps

As late as 1985, *Trial*, the Journal of Trial Lawyers in the United States, contained a short article on ADR entitled “Alternative Dispute Resolution: Threat or Invitation” cautioning trial attorneys not to dismiss ADR as “an unacceptable threat to their customary way of doing business” and predicted “ADR will be a part of the[ir] future”(Coulson, 1985:21). In 1986, a survey reported that business programs in the US are offering 334 conflict resolution courses (Wehr, 1986 in Strier, 1994:194). At this point, business appeared to be ahead of the law in recognizing dispute resolution’s potential. The reasons behind this support may be understandable, “the theoretical analysis of informal order is based on the rational actor model of human behaviour that underlies most work in economics and games theory” (Ellickson, 1991:8).

A national survey of businesses in the US showed ADR procedures were available for non-union staff in 52% of 'large' private (General Accounting Office 1995 in Eaton et.al. 1999:100). While another study showed that 90% of 92 of the Fortune 500 surveyed felt "ADR was an attractive organizational policy" (McDermott, 1995 in Eaton et.al. 1999:100).

It is interesting to note that in the 1990s, the obvious growth in the ADR usage, there was a renewed concern about the safeguarding of due process. This concern had been one of the first stated objections of ADR expressed by Lon Fuller in the 1970s. In response, the Due Process Protocol Task Force was set up with representatives from seven organisations such as the American Arbitration (AAA), American Civil Liberties Union and the Society of Professionals in Dispute Resolution (SPIDR⁶) to develop guidelines for protecting due process, selecting third party neutrals and setting ethics rules for those involved in disputes resolution (Eaton et. al. 1999: 78-9).

This emphasis on getting the job done is pragmatic and had links to the process school in jurisprudence that was popular with some academics in the 1950s. This perspective holds the process above substantive results (Alberstein, 2002:250-52). It is called 'pragmatic legalism' and is restated in the approach found in the courses offered by the Program on Negotiation (PON) at Harvard in the 1980s (from which was published Getting to Yes)

⁶ In 2001 SPIDR merged with the Academy of Family Mediators and the Conflict Resolution Education Network to create the Association for Conflict Resolution (ACR), "a unified voice for the field of dispute Resolution" (ACR.com)

(ibid. 2002:251).

The Program leader Roger Fisher says Alberstein “infiltrates the optimistic self-righteous pragmatism of the 1950s onto contemporary studies in social science by producing a new activist mode of negotiations”(Alberstein op.cit. 2002:251). Observer Michal Alberstein says of this ‘scientific’ approach to dispute resolution is about mutual gain and controlling emotions, ‘Acknowledging the futility of the competitive game enables the drafting of new rules from a higher level of perception is ironically a process in which private interests replace the social interest and is described as private ordering (Aberstein, 2002 257). In addition to this private ordering ADR also found new favour with governments.

(h) Institutionalization: A Law of ADR:

ADR was also making some progress at this time of time on the political front. In the United States, The Dispute Resolution Act of 1980 included provisions for a Dispute Resolution Centre within the Office of Improvement in the Administration of Justice within the Department of Justice (R. Hofrichter in Abel 1981:210-11). The stated objective seemed to be a bit overreaching, “...to assist the states and other interested parties in providing to all persons convenient access to dispute resolution mechanisms which are effective, fair inexpensive and expeditious” (ibid. 1981:210). In 1981, the Federal Government in the US established the National Institute for Dispute Resolution.

In the mid-eighties and nineties, the use of ADR also underwent an acceptance and consolidation process within the American legal profession. At the same time, ADR achieved greater legislative recognition by becoming part of several new federal laws. The US Congress also got into the act by mandating that executive agencies establish their own ADR policies (Fry, 2003: xxiv). An ADR option was now available in most of the states and judicial districts. “The ADR movement focused attention on these (dispute) processes, thereby creating more interest in alternatives to litigation. Rather than viewing each dispute resolution process in isolation these began to be thought of as part of an array of processes. A party could map out a dispute resolution strategy (ibid, 2003:xxxiii). ADR got another boost with the publication of Getting Disputes Resolved: Designing Systems to Cut the Cost of Conflict that outlined the six principles of dispute systems design. One idea contained in the book called for the creation of what is called loop-back procedures as “ways of encouraging disputants to turn back from right or power contests when disputes are not resolved in the first round of negotiations” (Westbrook, 1989:310).

In 1986, the State of California adopted the Dispute Resolution Program Act. This Act set up neighbourhood resolution centres in 20 counties and quickly handled 7,100 cases (Strier, 1994:194). Elsewhere in the 1990s, ADR became part of Michigan’s schools’ core curriculum (Goldberg, et. al. 1992:9, 10). In 1987, George Mason University convened an international conference to discuss conflict and conflict management systems in the workplace. These systems were deemed necessary because ‘the threat of

conflict' had the potential to undermine the workplace (Rahim, 1989:267).

In the legal field, the American College of Trial Lawyers expressed support for ADR. In a handbook on ADR the College stated its commitment to 'the trial of disputed matters' and the preservation and improvement of our legal system. It told their readers "to regard ADR techniques as additional tools to accomplish the client's goal of "expeditious, cost effective and fair" resolution of legal disputes. "These tools do not constitute an alternative system, but instead offer additional techniques for solving clients' problems within the time honoured system of the trial bar (Handbook on Dispute Resolution, 1991 p.1).

The legal establishment integrated the notion of lawyer as problem solver first outlined at the Pound Conference by Justice Berger. In effect it pronounced ADR to be a technique and affirms once again their self-professed vision as uniquely qualified to use ADR effectively. Leonard also provides us with an explanation for the legal professions interest in controlling the development of ADR by re-claiming the friendly label of "problem solvers".

"The law is positioned precisely in order to produce the discourse of its own legitimacies... [and] must exploit this very discourse in the name of the Law's lofty promises of justice' (Leonard, 1995:140).

In 1990, the US Congress passed the Civil Justice Reform Act. "The Act constitutes a blueprint for the future of dispute resolution in the Federal Court" (Strier, 1994:1950).

The Congress also adopted the Administrative Dispute Resolution Act as well as the Negotiated Rulemaking Act that strengthened the position of ADR within the government sector. “[Negotiated rulemaking] allocates costs and benefits of government action to a societal level. The law called for the identification of interested parties and an assessment of their interests, as well as, a determination of the issues at large” (Mills, 1990:xiii). In the 1990s the Institute for Civil Justice in the US published a manual to “assist those undertaking evaluations of Federal Agency ADR programs” (Rolph and Miller, 1995). By 1996, the General Accounting Office found 49% of federal agencies had ADR processes in place to handle employee complaints (US GAO, 1997 in Eaton et. al. (eds) 1999:101). It was also during the 1990s that the number of ADR practitioners in the United States grew enough so that they established their own national association following the merger of three smaller organizations. The association sought to establish entry rules, a code of conduct and to build membership. In so doing it loosened the legal profession’s grip on ADR and the law. There were now about 550 community mediation centres in the US staffed with thousands of volunteers. This institutionalization and professionalization of ADR and mediators outside the legal structure represented an important evolution. This is not to say that the legal sector is standing still.

In 2002, the CPR⁷-Georgetown Commission on Ethics and Standards of Practice in ADR released the text of Principles for ADR Provider Organisations. It is an attempt to deal with the due process issues first expressed in the 1970s. The Commission also released a Proposed Model Rule of Professional Conduct for Lawyers as Third Party Neutral that

⁷ The Center for Public Resources

addressed the lawyers' expanded role as 'ADR neutral and problem-solver'. In California, ethics standards for arbitrators took effect and the American Bar Association Dispute Resolution Section Mediator Credentialing Task Force issued its report.

(i) ADR in Canada:

The Development of ADR in the United States has cast an influential shadow over ADR's development in Canada. As in the US, Court sponsored conciliation first began to appear in Canada in the 1970s. One demonstration project was set up under Judge Marjorie Bowker in 1972 in the family court in Edmonton (Irving and Benjamin, 1987: 47). Projects in other provinces during this period have been described as "ad hoc pilot projects" of family mediation. There have been other pilot projects that reflect Sander's multi-door proposal. Since 1994, in the Toronto area, new civil cases and cases on the Commercial list may be referred to the ADR Centre. Masters can also deal with construction lien matters under this pilot program. (Noble et. al. 1998:145). Like the US, there has been a longstanding concern about the cost of justice in Canada.

In 1979, the Canadian Institute for the Administration of Justice (CIAJ) convened a conference on the topic. Harry Arthurs, from Osgood Hall Law School, in a paper entitled "Alternatives to the Justice System: Reminiscing about the Future" offered that there was little chance of tackling the problem of overloaded courts without expanding "the repertoire of dispute-settling agencies in our society" (Arthurs, 1980:2). Arthurs

stated, “We can never hope to resolve all disputes so long as we rely on adjudication as the only authoritative method of disposition” (ibid, 1980: 2). He also declared that people wanted to be more involved in the process and suggested community courts might be tried here in Canada. Arthurs pointed out such courts have been a part of England’s past and were also found in underdeveloped countries. Arthurs added, without reference to Durkheim, “it is possible that community courts might themselves promote local solidarity” (ibid, 1980: 7). ADR had also developed in the non-legal sector in this country.

In 1987, a peer mediation program to help kids deal with their conflicts was set up in a high school in Ottawa and it was copied elsewhere in the country. The program drew some inspiration from peace groups and teaches young people listening skills, co-operation and collaboration to settle disputes (Picard, 1990 in Goldberg et. al. 1992:68). During the 1980s, the Conflict Resolution Network came into being with the help of the Trillium and Hewitt Foundation, the Federal Ministry of Justice and the Department of Human Resources Development. The Network described itself as a community of 1000 individuals and organisations with the stated goal to “explore and promote better ways to work through conflict and make conflict resolution strategies available to more and more Canadians” The Network focused its attention on education, ‘empowerment’ improving practice and influencing public policy ([www. crnetwork.ca](http://www.crnetwork.ca)). By 1991, Carleton University had already sponsored annual symposia to discuss all aspects of dispute resolution. The number of books and text on mediation also increased steadily in the

1990s. The sentencing circle⁸ also began to appear in Canada. First implemented by Yukon Judge Barry Stuart, these circles allowed Native communities to decide the appropriate punishment for Native offenders. In this setting, crimes are considered an offence against the whole community. The concept linked the circle with Richard Danzig's conciliatory approach to crime and punishment that he first articulated in the 1970s.

In 1988, the Canadian Bar Association took note of the growth of ADR in the US and decided to set up a task force on ADR. The Task Force report underscored the Association's self-perception as guardians of legal knowledge with a priori right to monitor and respond to ADR developments. The stated goal was to "ensure that the development of ADR as an alternative to our justice system occurs in an orderly responsible manner ...with the necessary input of the legal profession" (Canadian Bar Association, 1989:2).

By 1994 the new status of ADR in Canada was reflected by the convening of a two-day Conference in Vancouver by the Canadian Bar Association called "Dispute Resolution in Action" in Vancouver. In 1996, a report also sponsored by the Canadian Bar Association called for a turning away from the "pre-occupation with gaining advantage through the adversarial approach and proposed that ADR become an 'integral component' of the civil justice structure. (Report of the Task Force on Civil Justice 1996:18, 9 in Pirie,

⁸ The sentencing circle has become common currency among many Natives but some Natives like Diane LeResche of the Navajo Nation doubts the sentencing circle is aboriginal. (Proceedings, 1996:135).

2000:389).

In 1999, the Financial Post reported on the emergence of “alliances that are bringing together ADR practitioners and lawyers under one corporate structure (Financial Post June 28, 1999). Another law firm adopted an ‘ADR case evaluation work sheet’ to decide the best legal options for their clients (Freedman and Wardle, 1997:33). Elsewhere, the Canadian Foundation for Dispute Resolution adopted a corporate and community Dispute Resolution Protocol, “to encourage a resolution of business disputes through negotiations or dispute resolution procedures.” The Dispute Resolution Institute of Canada published a ten-point Code of Ethics for its members. It also adopted national standards for dispute resolution courses, trainers and instructors (www.amic.org). A survey in 2000 noted ADR references in federal and provincial laws in agriculture, labour, environmental assessment, social services, the administration of justice, employment and the professions. (Pirie, 2000:401-28).

Chapter 3 Literature Review

(a) General Background Information:

In this chapter, a review of some the ADR issues found in the literature will be discussed. This review of the literature helps to improve our knowledge of the kinds of debates ADR has set in motion both inside and outside the law. It is important to note that the critics and critiques of ADR within academic circles and the legal profession in particular have been present from the very beginning of what we now refer to as ADR. The literature on ADR is seen to be focused on questions relating to the motives and objectives (i.e. ideology) of the two strands of ADR which themselves originate in two fundamentally different worldviews. These worldviews are played out in the debates over aspects of ADR. There is a legal side in favour of control through competitive bargaining with due process and the social side bent on change through efficiency and collaboration and participation through informalism. Let us begin with one reformer's vision.

(b.) New Vision and Values

In 1976, Professor Frank Sander's vision of a multi-door courthouse in which disputes are channeled to different types of adjudicators has a wider social goal. In his view the courts should be a place for "the articulation of public values." (Sander, 2000:4). Courts that handled the needs of ordinary people of the type envisioned by Sander's multi-door courts were not without another important antecedent.

But critics see this as dangerous because it places 'efficiency above function'. The choice to emphasize efficiency is threatening to rights and indicates a misunderstanding of how and why the formal court system operates the way it does. "It is impossible to formulate adequate criteria for prospectively sorting cases" (Fiss, 1984:1088). The formal courts' authoritativeness, as well as, its 'qualitative perspective' is not matched by community-based ADR programs which are criticized for relying on 'situation-sensitive ad hoc standards (Brigham, 1996:88). "Like plea bargaining, settlement is a capitulation to the conditions of mass society and should be neither encouraged nor praised"(Fiss, 1984:1075). The types of cases usually found in the alternative dispute process are also a point of criticism. This suggests that ADR was not understood to be a serious alternative to the formal law courts. The recommendation was for ADR to 'take on' more serious cases or be irrelevant (ibid, 1076). At the same time, ADR was seen to rely on litigation as a default process--a sort of 'legal backstop' that undermines the ADR option (Ware, 1999:6). "[I]t privileges litigation by giving the impression that litigation is the normal and standard process...while alternative processes are aberrant or deviant." (Ibid. 1999:6).

Many years later, ADR pioneer Frank Sander called the Fiss critique 'misguided' in part because of its 'proceduralist focus' (Sander, 2000:4). This begs the question of ADR's growing presence in a legal system that remained wedded to winner-takes-all mentality. In the 1980s, ADR was derided by some as a movement with larger social goals, and continued to be faulted for its focus on efficiency "without regard for substantive results reached" (Edwards, 1986 in Stone, 2000:22). ADR's approach to conflict resolution was

often described as collaborative and focused on problem solving. But countering this argument was the observation that collaboration can often be part of the formal court setting, especially when disputants and court officials are well known to each other (Yngvesson, 1998). Modern day ADR mediators, on the other hand, involved in the Centre's (NJC), may not have any ties to communities in which they serve (Yngvesson, 1998:1705, 1706-7). This made appeals to social solidarity dubious. But other critics did not view the formal court as all bad. There is for example, nothing to prevent judges from showing patience with disputants representing themselves in lower courts such as Small Claims. This also suggests adjustments under the control of the courts (and lawyers) are possible. Other critics had pointed out that ADR's use of laypersons to act as mediators or judges was also not new. As far back as 17th century New England, lay judges were part of process of re-shaping of disputes from private to public (Yngvesson, 1998:1696-7). ADR mediators, like lawyers may also foster a dependency which may undermine the participatory benefits to disputants often encouraged in ADR's informal setting. The structure of the dispute resolution profession...defines the mediator's duty as an obligation to help the immediate parties settle their dispute" (Rubenstein in Yeong, 1999:177).

(c) Community and Participation:

The ADR literature also had something to say on the issues surrounding participation, voice and community. In contrast to the competitive perspective of Kennedy and

Williams, the literature showed that the ADR paradigm recalled the sense of obligation to the group of earlier times in contrast to the formal process keyed to safeguarding the rights of the individual (Kidder, 1980-81:720). The macro-sociological perspective is reflected in the significant role ADR allots to the community and its role in a restoration process is also recognized to be part of a functionalist perspective found in Durkheim, "The ideology of community celebrates a Durkheimian notion of social solidarity that treats harmony, co-operation and compromise as morally superior to any substantive claims derived from rights"(Garth, et. al. (ed) 1998:19). Community is also linked with building toward a better democracy. "Alternative dispute resolution is also seen as essential to democracy because the parties are afforded the opportunity to deal with real issues rather than to be entrapped in lawyers' rhetoric" (Nader, in Chew, 2001:43).

The communitarian vision of some other liberal law critics was faulted for its lack a detailed discussion of its own alternate vision (Bauman, 1988:300). "The ideal, which includes at its core the overriding concern for the...social good is supposed to release us from liberalism's predatory and vicious conception of politics"(ibid, 1988:303).

(d.) Informalism

The informalism of ADR was also not something new or unique. The thrust of legal anthropology is in part the examination of the informal dispute settling mechanisms found in many tribal-based legal systems. The Zatopec of Mexico, for example, had a

legal system which uses lay people; deals with many small issues; and showed latitude in its conception of evidence (Nader, 1984:953), "the (lay) judges operate within the same set of norms as are the folk...the users operate in the courts with a high degree of know-how and familiarity and are not likely to be repeat players" (ibid, 1984:955). This know-how contrasts with our court that seems to discourage use by the ordinary person who is often intimidated by rules and legal procedure. The Zatopec legal system is said to reflect the needs of its users (op.cit. 1984:952).

One other observer who would not be uncomfortable with a legal system that reflects needs as represented by ADR is author and anthropologist R.C Ellickson. In the preface to his book Order Without Law (1991) he states, "This book seeks to demonstrate that people frequently resolve their disputes in a cooperative fashion without paying any attention to the laws that apply to those disputes" (Ellickson, 1991:vii). This anthropology of law, when applied to a range of different societies over both place and over time, (as in the case of Durkheim himself) also allows us to look at the notion of legal pluralism and "to know what actually takes place on the level of the individual behaviour in the course of some legal interaction (disputing, bargaining, carrying out various legally ordered transactions, etc.)," (Von Benda-Beckman & F. Strijbosch 1986:12) and to recognize "the multiplicity and discursiveness of law and law-related systems"(Menkel-Meadow 1991:116).

But Laura Nader has asked why it is that "anthropologists have sometimes insisted that

disputing among non-Western peoples aims to restore harmony to social relations, that harmony is either functional in face-to-face societies or the product of their social organization" (Nader, 1990:10). She has proposed that the harmony model often attributed to small-scale societies is a retelling of the Christian ethic taught by early missionaries (Nader, 1990). Chanock has also spoken of the vision of disputing so common with early anthropologists and writers, who idealized African dispute processes, "In the traditional African community there was no polarization of needs, of taste, or of values, and once the facts were established the same solutions will appeal to all and ways to achieve them obvious"(Chanock, 1985:6 in Nader, 1990:298).

She also noted ADR has a link to management techniques (Avruch, 1991:8; Rahim 1989). Ironically, the emphasis on harmony may also aid a neo-liberal ideology. "Harmony... causes the country to be more productive, more innovative and more entrepreneurial (Nader op. cit: 43). This economic model of the law, in common with ADR, also envisions the settlement of disputes outside a formal system based on rational actors, "laws that serve to distribute power more broadly and equally are more likely to bolster informal control systems." (Ellickson, 1991:8, 286). Nader has also suspected ADR's international growth, "(valorization) is all too frequently linked to imbalance in power or in other words, now that the primitives have courts, we move to international negotiations or ADR" (Nader in Caplan ed. 1995:42).

ADR also received criticism for its 'formulaic language' and its apparent emphasis on

values over facts. Nader calls this 'the harmony model' of dispute settlement. "The theory of harmony that under girds the alternative dispute resolution conceptualizes harmony behaviour as the keystone to the community." (Nader, in Chew 2001:43).

The increase in the use of informal controls represented by ADR systems has a definite goal. It allows the state to redefine its role and down load responsibilities for those roles previously associated with state functions (Garland, 1996:454,455). The capitalist state uses the dispute-processing model of conflict resolution to conceal continuing legal domination (Abel 1982; Santos 1980; Brigham, 1996). Informalism is an import part of the ADR discourse that runs counter to the liberal truth finding process for a reason. "Informalism thus reproduces within intraclass conflict the same structure that formal institutions impose on interclass conflict." (Abel, 1981:252)

At the same time, Richard Abel noted the alternatives approach was conservative. "The conservatism of this reform was evident in the social relations it constructs. Alternatives are proposed as a solution to political and economic demands...which threaten a traditional definition of court capacity (Harrington, 1985:34). One of the most important observers of ADR attacked its 'ideology of informalism' (Abel, 1981:246). Abel also attacked informalism as vague, inadequate, ambiguous, ambivalent and even hypocritical (ibid, 1981: 248). Abel counselled supporters of approaches like ADR to look elsewhere (Abel 1982:249). He also observed the coming of 'a new breed of professionals who are exercising control over disputes (Abel, 1982:248). Interestingly, ADR had also started to

replace the traditional grievance and arbitration system in the US, especially for non-union employees, which has been losing favour with many of those involved. "[It is] ensnared by procedures that have institutionalized hostility and failed to provide adequate solutions, remedies or deterrence" (Eaton, et. al. (eds) 1999:1). From the perspective of the corporations and government departments who opt for the informal ADR process the benefits include a reduction in potential costs that may be awarded by a jury in the formal court and avoiding public scrutiny or negative publicity.

(e.) Self-Expression:

In the mainstream legal system change is slower. "The more complex and thorough the manner in which the legal process is constructed in the name of the rule of law, the more pronounced this inequality may become" (Aubert, 1983:45). On the other hand, there was concern that self-expression masks some danger. ADR seems to be suited only for the most articulate in our society. "It [ADR] is not a culturally neutral process, and cannot simply be imposed upon or integrated into other cultures. It is primarily the product of an educated, verbally skilled (and predominately male) Western society (Tillett, 1999:212). Communication between parties is also described as 'manipulated and controlled' with the objective to reduce 'hostility' and prevent 'misjudgment' (Burton, in Tidewell, 1998:155).

(f.) Control and Conflict:

On the macro-sociological level, conflict and control are part of one of the basic dichotomies found in the ADR discourse. The debate centered on those who view the informalism of ADR as a method of increasing participation and agency or the view of those who see it as a more subtle control mechanism. Three authors, Richard Abel, C.B. Harrington and Santos illustrate how criticisms of ADR are found at different places on the political spectrum. As a control system, ADR's informalism was seen to act in support of the status quo power structure with lawyers at the centre "efforts to bring the law to the people which do not fundamentally question the legal system will be mostly organisational alterations which will not result in significant change" (Bankowski and Mumgham, 1976:74).

Within the conflict perspective of the law, Santos characterized ADR as simply 'legal processing,' which does not represent true reform of the court system (Santos, 1980:379-397). Instead he offered the view that the state in late capitalism is seeking to use reform to stabilize the existing relations of power. He pointed out that the state "revealing itself in specific structural relations which develop and change in concrete historical structures and processes" (Santos, 1980:380). Santos saw the new processing reforms as a turn away from coercive power in which the reforms absorb any loss of legitimacy of the capitalist state; and helping to reduce its 'fiscal crisis' (Ibid. 1980:388) creating, "a mode of juridical production dominated by rhetoric" (ibid.1980: 386). Then he observed that

where rhetoric dominates, legal discourse is based on commonsense knowledge and expressed in ordinary language (ibid.1980: 386). This change in emphasis characteristic of ADR and represented its consensus building approach allows Santos to speculate on the reforms 'positive function.' He stated that it "may have an impact on the mode of juridical production" in the future and in the type of discourse generated in the informal setting of community justice and "thus on the nature of state power" (ibid. 1980:384). Richard Rubenstein also mirrored Santos and borrowed a Foucaultian concept (and a Nader critique) in his analysis of conflict resolution such as ADR, "...Conflict resolution as a field of power/ knowledge has been called into existence by the desires of national and global elite for a more acceptable and efficient means of managing, not necessarily resolving serious social conflict" (Rubenstein in Jeong 1999:176). Foucault, accepted the notion of persistent political and power struggle that implies a perspective close to Santos,

"This understanding of political struggle as conquest, displacement, reversal, reconquest etc. can of course be situated in the context of judicial struggles over rules of right by recalling the legal apparatus as a massive field of discursive productions involved in producing, namely the truths of legitimacy"(Leonard, 1995: 143).

Like Durkheim's organism metaphor Foucault saw society in terms of a social body, "His approach is very much concerned with the specific avenues whereby the dominant norms, values and beliefs of society are normalized" (Caputo et. al. 1993:107). At the same time, there is the view that [Foucault] ...is arguing that this internalization of these norms is not without implications for power relations" (Moore in Caputo et. al.

1993:187) rather than social cohesion. "By focusing on the multiple points where power touches the social body, he nevertheless underscores some basic Durkheimian notions such as collective consciousness and the internalization of law as social norms" (Moore in Caputo et. al. 1993:187). The critics of the formal legal structures who have embraced ADR may be said to have the effect by forcing legalists to become aware of the legal structure as a "massive network of the dominant judicial apparatus with certain shortcomings. The response to the critique however is "producing ever more cultural legitimacy" (Leonard, 1995:145).

Durkheim also noted the link between law and an expanding legal structure, "restitutive law creates organs which are more and more specialized: consular tribunals, councils of arbitration, administrative tribunals of all sort" which creates "wholly negative integration" (Durkheim, in Campbell 1979:81-2). Durkheim also saw the growth of administrative law, the "law of management, organisation and co-ordination of social and economic life" (Cotterall, 1999:111). It should be noted that many of these administrative tribunals are in the hands of appointed experts or experts and lay persons (Roach et. al., 2000:128). Many years later, it is Michel Foucault who wrote, "the juridical power of the law is completely overwhelmed by scientific-administrative norms" (Simmons, 1995:83). Foucault linked the shortcomings of the law to the way power is applied in society. He then conceives of the notion that the microphysics of power is actually a strategy,

"As power is diffuse at every level of society, domination is based on a normalized structure maintained not only through institutions but also through social practices designed to fulfill the need for organised, controlled and predictable behaviour"(Ho-Won

Jeong, 1999:29).

For Foucault, the ADR approach to managing conflict would likely have serious implications for governance,

“...we are witness to a vast, newly articulated set of techniques and tactics that do the work of government and has implications for how we understand ourselves as governed and governors”(Barry et. al., 1996:212-13).

(g) Ideology:

Ideology is another question or issue linked with debates about ADR. In fact, one of the earliest and most persistent critiques of ADR alleges that it is ideological. It is said to have an ideology of 'informalism' or of 'community' that promotes 'normative values of legalism' or seeks to 'cure' conflict. ADR's philosophy is also said to be one that naively rejects the idea that power is a decisive factor in negotiation. "The ideology of mediation builds upon revulsion to and a rejection of the asymmetries of power that such processes realize..."(Gunnarsson, 1997:205).

But the counter argument is the view that ADR as simply a shift in emphasis away from the competitive approach to fact-finding and negotiations. "The ideology of ADR depends on whether some goals oversaw others, whether and to what degree the context of disputes matters and which disciplines contribute and how to ADR's expression" (Pirie, 2000:32).

Nevertheless, the urge 'to make things right' has its appeal for ADR enthusiasts (Brigham, 1996:77-102). "A desire for peace, for conciliation, a remedial urge--this is the social consequences of informalism, the alternative to law that has such a preoccupation around the legal profession since it surfaced in the 1970s" (ibid, 1996:77). But whether ADR is a real alternative to the formal legal processes operating in our liberal democracy or a starting point for a discussion of the shortcomings of liberal legalism remains to be seen. "There can be little doubt that the philosophical underpinnings of democratic liberalism serve as basis on which much conflict resolution rests" (Tidewell, 1998:149). The idea that mediation could serve other goals, such as changing society, evokes caution, because "transformative mediation" should not lose sight of what is possible in the real world (Menkel-Meadow, 2000:133). On the other hand, others have noted how both harmony ideology and adversarial ideology can be used for freedom or control" (Schweitzer, in Wolf and Yang, 1996:119). Still ADR seems not to represent real change, "As a profession dispute resolution reflects deep-rooted propensity of American bourgeois culture to make conflict between social classes invisible, or reduce it to conflict between interest groups" (Rubenstein, in Jeong 1999:178).

(h) Technique or Process:

Finally, there is what I call the practical critics. The critics in this group are most likely to be those who regard ADR as a technique and reject any notion ADR is about societal change. This group is most likely to come from a business as opposed to a law reform or

social science background. They do not concern themselves with the sociological issues related to the appearance or the growth in the popularity of ADR. Instead their criticism of ADR is simply limited to it as a technique. One such critic is Gavin Kennedy. His book The New Negotiating Edge (1998) is subtitled "The Behavioral Approach for Results and Relationships" takes a cynical view of human motivation and is in my view "anti-transformative". One of his criticisms is that the bargaining approach characteristic of ADR in which one moves toward one's opponent deserves low grades for an apparent lack of realism. A tough bargaining stance is seen as natural. In fact, the pursuit of one's own interests is what has made our society into a self-sustaining social system based on trade (Kennedy, 1998:9).

A second critic in this same vein is Williams who concurred with the Kennedy critique (Williams, 1983:48, 49). He pointed out that both a competitive and co-operative approaches are used by lawyers "and that neither pattern has a monopoly on effectiveness" (ibid, 1983:47). He also observed that toughness and unilateral commitment lead to litigation more often than not "...creating the appearance of more disagreement and being further apart than actually exists"(Williams, 1983:50). On the other hand, the negotiator's ability to deliver 'best results' if the ADR negotiator adopted a co-operative mindset and feels a high commitment to fairness was also questioned, "the co-operative attorney has an alarming tendency to ignore the lack of co-operation and pursue his co-operative strategy unilaterally (Williams, 1983:53, 54).

In contrast to these views there remained others who saw a coming together of the two such as Arrow who believed the hard-nosed competitive bargaining often associated with lawyers was reasonably counter balanced by those who favoured the collaborative approach of ADR dispute settlement systems "lawyers and their capacity to establish credible reputations for co-operation have profound implications for dispute resolution...to dampen conflict, reduce transaction costs and facilitate resolution"(Arrow et. al. 1995:209).

Still others who expressed concern about the mindset of those who embraced the ADR approach. In the early years, according to Neil Sipe environmental disputes dominated the mediation literature. Sipe went so far as to say that those who wrote about their experiences negotiating environmental agreements were predisposed to following the rules, and by implication more willing to settle, "those with a strong normative commitment to environmental mediation dominate it" (Sipe, 1998:276). In a study of mediated and non-mediated environmental cases in Florida, Sipe noted mediated cases settled more often than traditional legal methods. Compliance, the fulfillment of the agreed-to terms by the parties to the negotiations within an agreed time, was another issue, "the claim that mediated disputes result in higher rates of compliance and implementation are not supported by the data" (Sipe 1998:284). The role of the mediator in ADR and his/her ability to fill two roles was also doubted. The ADR specialist's job was to show the disputants their common ground. It is not certain, however, if the ADR specialist can help disputants define their interests and mediate at the same time (Brienza,

1998:19). This literature review sets the scene for a summary of the research findings that compared law schools' curricula and the status of ADR at these schools during the last twenty years. They revealed some interesting trends.

Chapter 3 Findings of Case Studies:

I chose to study the emergence of ADR in law schools by examining the calendars of the law faculty of the University of Ottawa and McGill University between 1985-1986 and 2003-2004. As we have shown in chapter 1, law schools have been closely linked with many legal reform movements including ADR. The findings are presented in two parts. One of the most significant of these findings was the discovery of a measure of ambivalence within the legal structure about ADR. ADR courses available to practicing lawyers show it to be a technique to improve competitive bargaining skills while the establishment of full-fledged ADR programmes within law faculties was a tacit recognition that ADR is or could be more than a skill but rather it could be a new approach to the law in general. The state of the social strand of ADR was harder to measure. While efforts continue to be made consolidating the social strand of ADR, course content risks the credibility of this sector. The growth of ADR on the Net may undermine the role of the lawyer as problem solver.

McGill is one of Canada's oldest and internationally recognized universities. The University of Ottawa, although younger, is a bilingual institution and the walls of its law faculty contain the photographs of graduates who have reached the top level of the federal government and the federal civil service.

The research began and almost didn't get off the ground during a trip in the driving rain

last November to the University of Ottawa. My initial efforts to get my hands on the law school faculty's calendars were met with blank stares from everyone I approached, including a librarian! Before admitting defeat, however, I entered one last administrative office and explained one more time what I was looking for in order, I explained, to track course changes in the law school curriculum during previous years. A minute later an official emerged from an office to tell me she had copies of the calendars that she kept "for myself". She agreed to let me look at them but not to take them out of her sight. I was ushered to an empty corner desk and handed the calendars, two or three at a time.

At McGill University, I first approached the librarian at the Law Library on Peel Street and once again explained my need for calendars. This time I was directed to another building, then another and then before heading to the third, I detoured and tried a librarian at the McLennan Library who easily directed me to the sixth floor where I found copies of all the faculties' calendars bound together for each year going back to the 19th century. The comparative portion of the study could go ahead after all.

Once the comparative data was collected I turned to the Internet and selected some websites in order to examine the availability of ADR courses and ADR programs at other Canadian universities including the University of Windsor and the University of British Columbia in order to broaden the comparison. Next, in order to determine the availability of such courses or training for those lawyers already practicing law in Canada, I also examined the availability of ADR or ADR-inspired courses by accessing

the websites of Le Barreau du Québec and the Law Society of Upper Canada. I then examined ADR training outside the legal milieu by accessing the websites of what I termed ‘civilian’ ADR organisations. These are ADR organisations that invite anyone interested to join and spread the word about ADR with a zeal and commitment of an evangelical revival meeting. These organisations are closely linked with what has been called the social economy. This market includes a steady supply of newly minted ADR trained people. Often these true believers are inspired by the latest popular ADR text or workbook⁹. But just as former judges and court officials dominate private ADR corporations, social service veterans seem to have embraced ADR (Menkel-Meadow, 1986:304). The search for new recruits is ongoing and ADR believers have even begun to specialize in certain sectors. It is likely that Durkheim’s musings on social solidarity are especially useful here in explaining the rise of this strand of ADR. One such example of further specialization is The National Association for Mediation in Education (NAME) that sees its mandate as “the development, implementation and institutionalization of school and university based conflict resolution programs and curricula”. This part of the comparative study is presented in part II of chapter 3.

I had expected that the two case studies presented here of the curricula of the law faculties at McGill University and the University of Ottawa would show little recognition of ADR by the schools’ officials. This is based on the belief that because the law schools are an integral part of the legal structure, they would likely be as cautious about ADR as

⁹ One such workbook called Getting Ready to Negotiate: The Getting to Yes Workbook by R. Fisher and D.Ertel published in 1995. 71

lawyers in Canada in general.¹⁰ In line with the observations about institutional change these faculties would change on their own terms and ADR courses are examined together with those of the universities. At the same time, it can be said that the creation of full-fledged ADR programmes at the Universities represents at least a 'stamp of approval' of ADR as well as signalling its further institutionalization.

The growth of civilian ADR organisations is probably the most intriguing. As we showed they have a life of their own and a strong social (solidarity) perspective or orientation in general especially with supporters within this strand of ADR. Although these civilian ADR organisations reinforce the legal/business and social strand split within ADR outlined in Chapter 2. The list of courses offered to the law students in our case study as well as the creation of ADR programmes are interesting because they show a strengthening of the links between law schools, ADR and the social sciences. In part II, the research shows the courses offered by civilian ADR groups such as Personal Mastery smack too much of a self-help fad. The courses offered to the public risk the credibility of ADR. Finally, Québec's Maison de Justice, besides angering local lawyers, who see it as a threat to business, looks and sounds like it has the potential to become Sander's multi-door courthouse.

The biggest change to occur during the selected years involved the establishment and growth in the law schools across Canada of comprehensive ADR programs. There is also

¹⁰ As late as 1989, Lawyers' Weekly published highly critical comments about ADR proponents by a BC judge. (Pirie, 2000:149-150).

growth in the number of ADR courses being offered to practicing lawyers as well as an increase in the number of non-legal based ADR organizations that offer ADR seminars or workshops to the public. The research showed that these “civilian” organizations are more likely to promote ADR as a way to change society by changing people than either law schools or law societies. This perspective is in line with what Laura Nader described as the “harmony model” of the ADR movement. The case studies also showed that ADR law school programmes, however, do not significantly challenge the overall adversarial ethic. This development is not entirely unexpected and is one that has been observed and lamented by ADR proponents Carrie Menkel-Meadow and Andrew Pirie. Menkel-Meadow has observed that a seminar for lawyers called “winning at ADR” misses the point of the collaborative approach to conflict resolution. But the research also indicates that to some extent some ADR law school programs do offer the most potential to create a more collaborative approach to legal conflicts by exposing students to the non-adversarial approach particularly if the ADR program adopts a multi-disciplinary approach. This represents important change and should hearten the reformers. Many early ADR courses often tended to be simple survey courses “descriptive of ADR practice and proscriptive as to how to negotiate” (Sander et.al. 2001:29). In the early days, one was likely to find that ADR, outside courses on litigation, were limited to labour arbitration (ibid: 29). General negotiation courses in which we might speculate ADR might find a home did not make an appearance until the most recent years of the time frame examined, often because of the notion that “negotiators are born not made” (ibid: 31). ADR supporters, however, hoped law schools would teach creative problem

solving (ibid: 31).

As one of the leading Canadian proponent of the creative approach to ADR, Andrew Pirie, provided this study with an earlier assessment of some of the other Canadian Universities taking their initial steps into ADR. He noted, in a 1994 speech, that despite some modest progress, ADR had “a very marginal existence in Canadian law schools” (Pirie, 1994:5). Pirie also expressed concern at that time with the direction of ADR education and observed that “what the student needed to know and to do would come from ADR writings in many disciplines outside the law including psychology, anthropology, history, political science, communications and more” (ibid: 4). He also pointed out that an additional problem was that ADR was too often limited to a very small percentage of total classroom hours instead of being present throughout or ‘omnipresent’ in the curriculum. (ibid: 4). While recognizing that there was a lack of consensus about what people wanted ADR to achieve, Pirie attributed some of the problem not only to ‘the normal pace of change’ but a propensity to view ADR not as “an attitude to dispute resolution” but as ‘new procedures’, “the cheaper and faster goals are beginning to dominate ADR discourse in law. Qualitative justice goals such as community empowerment increased client responsibility ...and holistic treatment of disputes-are largely ignored” (Pirie, 1994:6).

In 2003-2004, the situation has markedly improved. Two universities that Pirie surveyed in 1994, for example, the University of British Columbia and the University of Ottawa

have established ADR Programs in the intervening years. McGill University, beginning in 2002, can also be added to the list. The most significant finding about these ADR programs is their evolution into a multidisciplinary structure. This is the context of the comparison of McGill University and the University of Ottawa.

University of Ottawa Law School offers both a Common Law and a Civil Law Program. The first mention of alternative law processes occurs in the Common Law Program with a reference to “alternative legal techniques” in the description of a Law and Society seminar in 1977-1978. This seminar also included the topics of government regulation of business, combines legislation and foreign investment review (Calendar, 1985-1996 p.31) and “alternatives to litigation as a means of resolving family conflicts” (Calendar, 1985-1986 p.30). Although it is not possible to ascertain the exact content of that seminar, a review of the Calendar between the years 1985-2003 shows an awareness of changing times by the University of which ADR can be seen to be a part. In 1985-1986 the Common Law Program offered a seminar entitled Family Conflict Resolution (CML3366) that followed on the heels of the establishment of the Unified Family Court experiment by the Ontario provincial government. In this case we see the University reacting to legislative reform of the legal structure by establishing this course. There is no comparable event in Québec for McGill University. The course description stated as its objective to “undertake a critical analysis of the use of the adversary process in the resolution of family problems” while also examining “the use of conciliation and arbitration procedures”. In 1986-1987, for example, the Common Law Program offered

a seminar on Aboriginal Peoples and the Law (CML2301) that examined Aboriginal self-government as well as customary law and administrative arrangements (Calendar 1986-1987 p.33). Then in 1992-1993 the Common Law Program offered a seminar in Lesbian and Gay Legal Issues (CML3393). During the period in question however, ADR has alternately been the subject of study in the Common Law Program's Law and Society seminar (CML3374) as a 3-credit optional course for second and third year students. ADR was the course topic in 1989-1990, 1992-1993, 1993-94, and 1994-1995. In 1985-1986 this same seminar's topic was Extraterritoriality and in 1988-1989 the topics were Feminist Theory and Contract Tort Theory. In 1989-1990 the seminar's topics also included both Law and Poverty and ADR.

A review of the calendars of the Faculty of Law of McGill University in Montreal is interesting on a number of levels. Between the years 1985-1986 and 2003-2004, what is striking is the lack of formal recognition of Alternative Dispute Resolution. Like its sister faculty at the University of Ottawa, there is also recognition of changing times in the McGill Law Faculty. Like its counter part in Ottawa, its undergraduate program has included courses in both Aboriginal Peoples and the Law 389-500 beginning in 1986-1987 and the Law and Feminist Legal Theory 389-504 in 1990-1991. In other years the McGill Law Faculty has included courses in Law and Poverty 495-482 that examines "alternative organizational models of legal services" (Calendar, 1999-2000 p.12) and Social Diversity and the Law 389-511 that examined "legal pluralism' and individualistic and communitarian" legal perspectives as well as "formal accommodation between

customary and state law” (Calendar, 1994-1995 p.14). It is safe to say that if this Law and Poverty 495-482 course designed to examine alternate ways to deliver legal services had been put to a vote at the Pound Conference in 1976 it probably would have received overwhelming support.

In 2002-2003 and 2003-2004, there seems to be a major shift. The McGill Law School calendar outlines the requirements for a Law/ Major Concentration Programme. In this Programme there are three Major Concentrations: Commercial Negotiation, International Governance and Development, and Dispute Resolution. Students are expected to amass 18 credits over and above the 105 needed to receive their undergraduate law degree. The complimentary courses for a concentration in Dispute Resolution are divided into two groups. Group 1 is a Term Essay written on a subject related to Dispute Resolution. Group 2 is taken from a list of law and non-law courses. Students are expected to complete 27 law credits and 6 non-law credits for a total of 33 credits. What are of particular interest from the list of choices are the non-law credits. These include EDPC501 Helping Relations and EDPC 502 Group Processes and Individuals from Educational and Counselling Psychology; Managerial Negotiations ORGB 633 from Management; and International Conflict, War POLI 677 from Political Science; and Community Development/Social Action SWRK 374 from Social Work. Other available courses can include a Dispute Resolution Internship WRIT300D or the Resolution of International Disputes COMPL533 that states as one of its objective the examination of “arbitration between parties to international contracts with particular reference to

international convention” (Calendar 2003-2004 p.43). Trade Regulation COMPL521 states one of its objectives the “assessment of the interface between multilateral trade dispute resolution and domestic regulatory action in distinct public policy domains”. (Ibid: 2003-2004 p.43). At this point I felt information on other university ADR programs using the Internet in lieu of calendars would be informative.

At the University of Windsor Law Faculty, like McGill and the University of Ottawa, we see a widening of the legal studies spectrum. Students in their second or third year of study are required to select from what is called the ‘Legal Perspectives group’ one course which is intended to give “a broader perspective of the legal process than is possible in a normal substantive course” (www.cronus.uwindsor.ca). One of those courses is entitled “Access to Justice: ADR”. The University also offers 3 credits to students taking part in the University’s Mediation Clinic. The website describes it as “significantly more skills based and focuses exclusively on mediation rather than the full spectrum of ADR processes” (ibid. cronus.uwindsor.ca).

The University of British Columbia Law Faculty, unlike its counterparts is another Canadian University has embraced ADR with both arms. Perhaps this is because the University has big plans. Students can take seminars in Dispute Resolution Theory that “examines how disputes are constructed, enacted and processed through diverse cultural and worldview perspectives” and examine “the interplay of power, privilege and unmarked assumptions in shaping orthodoxy in Canadian dispute resolution interventions

and programs is considered”. Other optional courses include: Mediation Advocacy, Mediation Moot, Intercultural Dispute Resolution and a Mediation Practicum. Its Dispute Resolution Program describes its mission “to become a world class centre for the interdisciplinary research in conflict prevention, management and conflict resolution (www.law.ubc.ca) that is led by “an interdisciplinary team working together with community partners to develop a better understanding of the dispute resolution process”. This description incorporates two of Pirie’s 1994 suggestions for the effective teaching of ADR: interdisciplinary study and community involvement.

Law Societies across Canada have also grappled with ADR. The Law Society of Upper Canada includes ADR training as part of its Continuing Legal Education (CLE) service for its members. One such 2002 course, “Effective Negotiations and Mediation of Personal Injury Claims” states, “Negotiations and Mediations are increasingly the preferred method of resolving long-term disability and accident benefits.” The course promises, “Registrants will learn how to maximize their effectiveness in personal injury negotiations and mediations.” What is interesting about this course is that its presenter, Frank K. Gomberg, is a graduate of the Harvard University Mediation Workshop and an Advanced Mediation Workshop sponsored by the Advocates Society (www.lsuc.ca). The course is also available on video for \$30.00. This seems to imply a “technical skills’ perspective on mediation. A review of the December 2003 seminars offered by the LSUC reveals an awareness of ADR. The listings include one and two day workshops in Collaborative Family Law, Conflict Management Group Negotiations Workshop,

Advanced Negotiation Skills Workshop and an ADR Workshop.

Le Barreau du Québec also supports continuing education and mediation. It has established a Mediation Committee and encourages its members to work to demystify the law. A 1996 communiqué pointed out that 235 lawyers had obtained or are about to attain accreditation as mediators. While recognizing the need for alternatives ways to resolve conflict and encouraging members to be 'up to date', the Barreau in the 1990s supported compulsory information sessions in family mediation. (www.lebarreaudubuébec.qc.ca). This is not to say the situation in Québec is lagging behind other jurisdictions. Family mediation is now compulsory and the Barreau maintains a province-wide list of qualified mediators. The Québec Institute for Mediation and Arbitration was created in 1977 as a non-profit organization to encourage the non-judicial resolution of conflict. Its most recent campaign has been to encourage the inclusion of mediation and arbitration clauses in new contracts (www.iamq.qc.ca). As part of its strategic plan Québec has established its first "Maison de Justice". Impetus for the Maison was contained in The Report of the Committee on the Revision of the Civil Procedure released in 2001 entitled Une Nouvelle Culture Juridicaire. Modeled after a similar one in France¹¹, the pilot project is designed to "re-enforce public trust and give priority to the individual"; combat a "sense of disenchantment with the administration of justice"; as well as "the impression that people feel left out" and "have lost control of their disputes". Situated in a neighbourhood close to the main courthouse in Québec City and staffed with volunteers the Maison is characterized by "a courteous welcome, empathy and active listening...so

¹¹ In France the centres are called Maison de Justice et Droits in France

as to understand the nature of the need expressed by the citizen and direct him to appropriate resources”(www. justice.gouv.qc.ca/english/ministiere/ dossiers/ maison.htm). The Maison steering committee includes representatives from La Barreau and two representatives drawn from the neighbourhood.

(b.) Findings Part II - ADR Training:

The increasing use of court-ordered mediation and new state and provincial ADR programs has also increased the demand for ADR skills training of neutrals. This demand has not gone unnoticed. The ADR Institute of Canada administers on behalf of the Canadian Foundation for Dispute Resolution a set of Dispute Resolution Protocols that a corporate policy statement describes as committing signatories “to willingly consider and suggest alternative dispute resolution processes in appropriate situations prior to turning to the courts”. The Institute also promotes “our disciplinary procedures,” a Code of Conduct, a Code of Ethics and offers professional certification for chartered mediators and arbitrators as well as a National Correspondence Course in Arbitration. (www.amic.org)

This need for mediators has also become evident in the United States. In 1999, Cornell University School of Industrial and Labour Relations formed an alliance with MIT and five other organizations to create the National Alliance for Education in Dispute Resolution (NAEDR). Its purpose is to train mediators, arbitrators, advocates and fact

finders. Initial emphasis will be to educate neutrals on employment issues such as health and safety, pension, and retirement workers' compensation (News Release, Jan.7, 1999). The Conflict Resolution Network of Canada that describes itself as "Canada's largest broad-based conflict resolution organization" is a 20-year-old group that has also promoted conflict resolution and encourages people to join, "Our vision is a society where all citizens are engaged in building safe and healthy families, workplaces and communities"(crnetwork.ca). The crnetwork also conducts courses and conferences across the country. These courses are offered in conjunction with the Institute for Peace and Conflict Studies at the University of Waterloo. The Certificate Program in Conflict Management offers a 119-hour program that includes two required core workshops and 4 elective workshops. The list of seminars reveals a strong social or societal orientation. They include not only a workshop on Advanced Mediation but also a seminar on "Transformative Mediation: Skills for Community Mediators". This 30-hour workshop claims it "builds on a transformative model which emphasizes the importance of empowerment and recognition in enabling the disputants themselves to craft their own responses to their conflict." Another one-day workshop is entitled "Personal Mastery" that is described as "a journey of awareness, discovery, accountability and expansion." (www.grebel.waterloo.ca). Participants in this workshop will be expected to learn the "4 levels of mastery", "identify barriers to goals" and "the disciplines that will enable your growth and success."(www.grebel.waterloo.ca). Dispute Resolution in the Workplace, Understanding Conflict and Managing Conflict with Angry Clients are some of the other seminars available. The website of the crnetwork also lists an upcoming conference in

India on Peace Education for Contemporary Concerns (cnetwork.ca).

This enthusiasm for a socially orientated ADR contrasts sharply with those who had embraced ADR in the 1970s as a way of fixing an overwhelmed justice system. At that time, pilot projects, whether in courtrooms or neighbourhoods received some limited public funding. We have also learned that there is a blurring of the line between ADR and motivational courses. This may attract new workshop customers but in the process discredit the ADR training available from these groups. As with Owen Fiss, a perception that ADR is suited for minor cases is also reinforced once again.

The presentation of the Background, Literature Review and the Findings sets the stage for concluding remarks with the following observations in mind. At the heart of the ADR discourse is the notion that conflict is bad. ADR has roots in both legal and social reform movements. Two strands of ADR have emerged from the mid-1970, one legal and business strand and one social strand. The privatization movement in the legal and business strand has fuelled the growth of ADR, while serving governmental quest for efficiency. ADR support within law schools began as single courses and has developed into full ADR programs that include a range of such as political science and social work. Growth within the social strand of ADR also grew from a desire to participate in court processes to embrace mediation, social change and self-help.

Chapter 5: Concluding Remarks

The problem presented in the Introduction of this thesis was how best to explain the emergence and rapid growth of ADR within a macro-sociological framework, using the ideas of our three theorists. We had proposed to answer the question by examining the development of ADR through those ideas closely linked to ADR. A second question we asked in the title is whether or not ADR should be understood to be about societal participation or about societal control.

The sociology of Weber showed that government-supported ADR was implemented in pursuit of the neo-conservative concern for cost-effectiveness and efficiency within a context of rationalization. The informalism of ADR shows that it was in part a response to what Weber had noted would be the increasing bureaucratization of the law. Weber also showed that formal law and informal processes like ADR are not at cross-purposes. In fact, they rely on one another for an important reason. Together they create one law system. While this link may not be sufficient for some observers, others are satisfied, "...informal law is really the substantive-rational law of Weber's four-fold scheme" (Sheleff, 1997:37).

Both Durkheim and Weber expressed the view that legitimacy was very important to the law and I have shown that ADR has contributed to the law's legitimacy claims. ADR is also properly seen to be a return to a notion of popular justice of an earlier era. Weber

stated the ideal of popular justice would be overtaken by the rationalization of the law but would not completely disappear Weber's observation that the legal system is often compelled to return to an earlier form popular justice also strengthens the explanation for the rise of ADR. Richard Abel and Barbara Yngvesson and others have referred to the notion of popular justice in their examination of ADR. "It [popular justice] is concerned with the whole person and no case is specifically at the outset in its social relations. Being so unconfined, popular justice can make its characteristic claims to reflect or strengthen or even create a holistic 'community'." (Fitzpatrick, 1992:170).

. I would add that ADR is best characterized as a cry for "better" justice. Weber predicted that the legal system would most likely be challenged "during periods when the inherent inequalities of social existence become visible, legitimating ideas are questioned with intense possibly violent struggles as a consequence" (Weber in Turner, 2000:90-91).

Durkheim's sociology posits that societal processes must contribute to the social system. For Durkheim the law must be "workable" or it will not correspond to the "state of existing society". I showed that ADR emerged in the 1960s and 1970s when the law was deemed by its detractors to be both illegitimate and unworkable. Durkheim also observed the expansion of administrative tribunals that I outlined is another area in which ADR processes are increasingly being used and promoted especially by governments and institutions. I demonstrated that Durkheim and ADR supporters shared common concerns for the social. The research also demonstrated that both Durkheim and ADR supporters

have democratic impulses. Although the research shows that the growth of ADR in business and commerce is best understood by a reference to Weber, Durkheim is not completely out of the picture, "Contract law especially is the essence of co-operative and complimentary relations, for the exchange implied, presupposes some division of labour more or less developed but commercial, procedural and other forms of restitutive law also promotes cooperation (Wilkinson, 1978:58). In the search for the moral foundation of restitutive law, Durkheim ventures into concepts such as moral individualism, authority, cooperation and community. Durkheim's work examined the effects of relationships between normlessness, egoism, and individualism (Giddens, 1977:238). His definition of individualism, however, incorporates a desire for equality and for justice (ibid, 1977:239). These are the concerns of ADR supporters.

I have shown that to ADR proponents it is integrative and humane because it promotes interpersonal contact and long lasting agreements achieved in the informal setting. This provides an explanation for early support of informal mediation by judges.

Durkheim's concern for the importance of social solidarity in society allowed for speculation about whether or not ADR could be understood to be contributing to social solidarity and I concluded that ADR supporters, especially those within the social strand, have themselves created a modern "community". Although this may be more obvious within the social strand of ADR, it may not be far behind within the legal strand with the development of collaborative family law associations and other business/legal alliances.

ADR supporters wish that ADR became a bigger part of the normative legal system. ADR needs to be "weav[ed] into the dispute resolution fabric so that ADR options are considered at various points along the life of a dispute..." (Sander, 2000:5). In chapter 3 I showed how the development of ADR programs within some Canadian law schools make this development more likely in the future.

It is possible to see how the transformative and practical side of ADR is the basis of a new social practice based on a new paradigm of collaboration rather than competition.

I found evidence to show the legitimacy crisis of the liberal legal system has not been given sufficient attention as an explanation for ADR's success. Transformative objectives have played some part in ADR's success and these objectives continue to receive attention in a new therapeutic discourse within the social strand of ADR. This discourse is most often played out in family counselling, community based dispute resolution and alternative sentencing projects and fuels a social market for ADR skills. ADR represents an example of the convergence of law and the social sciences. But market forces are most responsible for the growth of the ADR industry, as we now understand it. This can be seen most readily in the rise of dispute settlement corporations that began in the late 1970s. This corporate ADR continues to grow largely as the result of business demand. The latest venue for ADR growth is the developing working alliances between law firms and ADR specialist. But now the Internet is the engine for new growth of ADR systems and it remains to be seen whether the computer will eliminate the need for mediators

altogether. Future research of ADR remains to be directed at impact of Net based ADR as well as the impact of culturally diverse groups on ADR processes.

Bibliography:

ABA Blueprint for Improving the Civil Justice System
1992 American Bar Association

R.L. Abel "Conservative Conflict and the
1981 Reproduction of Capitalism: The Role of the Informal Judge" International
Journal of the Sociology of Law 9,245-267, 1981.

-----(ed.)The Politics of Informal Justice
1981 vol.1 The American Experience; vol.2 Comparative
Studies; (Studies in Law and Social Control. Donald Black, Series Editor)
Academic Press New York NY

Alberstien, Michal Pragmatism and Law Dartmouth
2002 Publishing Co. Hampshire, England.

American College of Trial Lawyers Handbook on Alternatives
1991 for Dispute Resolution

Arrow, K.J., R.H. Mnookin L. Ross, Atversky, R.B. Wilson
1995 (eds.) Barriers to Conflict Resolution
W. W. Norton Co. New York, NY.

Arthurs, H.W. "Alternatives to the Formal System: Reminiscing About
the Future" in Cost of Justice Pp.1-14

Arthurs, H.W., Cost of Justice Carswell,
1980 Toronto, ON.

Avruch, Kevin, P.W. Black, J.A. Scimecca
1991 Conflict Resolution: Cross-Cultural Perspectives
Greenwood Press, New York N.Y.

Avruch, K., " Culture and Conflict Resolution".
1991 pp. 1-18 in Avruch et. al.,

Baert, Patrick Social Theory in the Twentieth Century
1998 New York University Press Washington Square, N .Y.

- Bankowski, Z. and G. Mumgham Images of Law
Routledge Direct Editions Routledge and Kegan Paul
London, England.
- Barrett, Michel, The Politics of Truth Stanford University
1991 Press Stanford, CA.
- Barry, A. T. Osborne, N. Rose, Foucault and Political Reason:
1996 Liberalism, Neo-liberalism and Rationalities of Government
UCL Press London, England.
- Barsky, Allen, Edward., Conflict Resolution for the Helping
1999 Professions Brooks/Cole Thompson Learning Toronto, ON.
- Bush, R.A., J.P. Folger, The Promise of Mediation
1994 Jossey-Bass Publishers San Francisco.
- Bauman, Zygmunt "Issues of Law and Order" British Journal of Criminology 2000, 40,
pp.205-221.
- Brienza, Julie, "ADR Doing Two Things at Once Can be
1998 Problematic" Trial v.34 n.5 19-22.
- Brigham, J. and C.B. Harrington "Realism and Its
1986 Consequences: An Inquiry into Contemporary Research."
International Journal of the Sociology of Law
- Broome, Benjamin, J. "Managing Differences in Conflict
1993 Resolution: The Role of Relational Empathy" in
Sandole, et.al. pp.25-42.
- Burns, Stacy, Lee Making Settlement Work: An Examination
2000 Work of Judicial Mediators Ashgate Burlington, VT.
- Burrell, Gibson, G. Morgan Sociological Paradigms and Organisational 1985
Analysis Grower Publishing Co. Aldershot, England.
- Bush, Robert, A. Baruch "Dispute Resolution Alternatives and
the Goals of Civil Justice: Jurisdictional Principles for Process Choice"
Wisconsin Law Review 4:893-1034
- Cain, Maureen and Kalman Kulsar, "Thinking Disputes: Essay on the Origin of the
Dispute Industry" 16 Law and Society 3 (1981-82) 375.
- Caplan, Pat, Understanding Disputes: The Politics of
1995 Argument Berg, Providence RI.

Caputo, John and Mark Yount (eds). Foucault and the Critique of Institutions Pennsylvania State University Press, University Park, PA
1993

Chambliss W.J. and R.B. Seidman Law, Order, and Power
1977 Addison Wesley Publishing Co. Reading, MA.

Chew, P.K., The Conflict and Culture Reader New York
2001 University Press New York, NY.

Clark, M., "Durkheim's Sociology of Law" in Cotterall
2001

Costantino, Cathy, Designing Conflict Management Systems: A Guide to Creating Productive and Healthy Organisations Jossey-Bass Inc. San Francisco, CA.
1996

Cotterall, R., Emile Durkheim: Law in a Moral Domain
1999 Stanford University Press Stanford CA. (Jurists Profiles in Legal Theory Series, W. Twining & N. MacCormick Eds.)

Cotterall, R., (ed.) Sociological Perspectives in Law vol.1
2001 (The International Library of Essays in law and Legal Theory, Second Series, Editor, Tom D. Campbell). Ashgate Publishing Co. Burlington, VT.

Dick, Gale, S "ADR at the Crossroads", Dispute Resolution
1994 Journal v.49 no.1.

Dukes, Franklin, E., "Structural Forces in Conflict and
1999 Conflict Resolution in Democratic Society" in Jeong.

Dumm, Thomas, L. Michele Foucault and the Politics of Freedom (Modernity and Political Thought Series M. Schoolman (ed.))
2002 Rowman and Littlefield Publishers Inc.

Dunlop, T.T., Dispute Resolution Negotiation and Consensus Building. Auburn House Publishing Co. Dover, MA.
1984

Dunlop, John, T. and A.M. Zack Mediation and Arbitration of Employment Disputes (Jossey-Bass Conflict Resolution Series) Jossey-Bass Publishers San Francisco, CA
1997

Eaton, Adrienne E., J.H. Keefe (eds.) Employment Dispute Resolution and Workplace Rights in the Changing Workplace Industrial Relations Research Association, Champagne IL.

Elliot, Philip The Sociology of Professions Macmillan Press
1972 Ltd. London England.

Ewald, F., "Norms, Discipline and the Law" in Post (ed.)
1991

Fine, Bob Democracy and the Rule of Law Pluto Press
1984 London, England.

Fisher, R. and William Ury Getting to Yes: Negotiating
Agreement Without Giving In Houghton Mifflin Co
Boston MA.

----- and Bruce Patton Getting to Yes: Negotiating
1991 Agreement Without Giving In (2nd. Edition) Penguin. Books New York, NY.

Fiss, Owen M., "Against Settlement" The Yale Law Journal
1984 93:1073,1984.

Folberg, J., and A. Taylor, Mediation: A Comprehensive
to Resolving Conflicts without Litigation
Jossey-Bass Inc. San Francisco CA.

Friedman, L. M., The Legal System A Sociological
1975 Perspective Russell Sage Foundation
New York, NY.

Frey, Martin, A., Alternative Methods of Dispute Resolution
2003 Thomson/Delmar Learning Clifton Park, NY.

Folberg, Jay and Allison Taylor, Mediation: A Comprehensive
1984 Guide to Resolving Conflict Jossey-Boss
Publishers San Francisco, CA.

Gadacz, R.R., Towards Anthropology of Law in Complex
1982 Society: An Analysis of Critical Concepts. Western Publishers
Calgary AB.

Garth, Bryant G., and Austin Sarat How Does Law Matter?
1998 Northwestern University Press Evanston IL.
Giddens, Anthony., Emile Durkheim Selected Writings
Cambridge University Press London, England.

----- Studies in Social and Political Theory Hutchinson
1977 and Co. Publishers Ltd.

Gilson, Ronald, J., and R.H. Mnookin "Cooperation and Competition in Litigation: Can Lawyers Dampen Conflict?" in Arrow et.al

Goldberg, Sanders, Rogers Dispute Resolution
1995 Negotiation, Mediation and Other Processes
Little, Brown and Co. Boston.

Gunnarsson, Britt-Louise, P. Linell, B. Nordberg (eds.)
1997 The Construction of Professional Discourse
Addison Wesley Ltd.

Gulliver, P.H. Disputes and Negotiations A Cross-Cultural Perspectives
1979 Academic Press Toronto ON.

Gulliver, P. Explorations in Anthropology in Caplan (ed.)
1995

Harrington, C.B. Shadow Justice Greenwood
1985 Press Westport, CT.

Hunt, Alan The Sociological Movement in Law
1978 The MacMillan Press Ltd London

Jaffe, Sanford. Dispute Resolution: A Complimentary
1984 Approach to Justice-Issues for the Future. No.7 Dispute Processing Research
Program University of Wisconsin, Madison Law School Madison, Wisconsin.

Jeong Ho Won (ed.) Dynamics, Process, and Structure
1999 Ashgate Publishing Brookfield VT.

Kennedy, G, The New Negotiating Edge
1998 Nicholas Brealey Publishing Company,
Sonoma CA. USA.

Kidder, L., Robert "The End of the Road? Problems in the
1980 Analysis of Disputes" Law and Society Review
v.15 No.3-4 (1980-81)

Kivisto, Peter (ed.) Illuminating Social Life (2nd. Ed.)
2001 Pine Forge Press Thousand Oaks, CA.
Knight, J. Institutions and Social Conflict

1993 Cambridge University Press,
Cambridge, England.

Leonard, Jerry, D., (ed.) Legal Studies as Culture Studies
1995 State University of New York Press Albany, NY.

Lewicki, Roy, J. and J.A. Litterer,
1985 "Converting Win/Lose to Win/Win: The Tactics of
Conflict Resolution", in Mediation Richard D. Irwin Inc. Homewood, IL.
Pp. 280-299.

Lewicki, Roy, J. and J.A. Litterer, Negotiation
1985 Richard D. Irwin Homewood, ILL.

Lukes, S. and A. Scull Durkheim and the Law
1983 Martin Robinson and Co. Oxford England.

Manring, Nancy, J. "Collaborative Resource Management:
1998 Organizational Benefits and Individual Costs."
Administration and Society 30:3 pp.274-87.

Mazor, L., "The Crisis of Liberal Legalism" Yale Law Journal
81:1032-1053.

McFarlane, Julie Dispute Resolution: Readings and Case
1999 Studies Emond Montgomery, Toronto ON.

Menkow-Meadow, C., (ed.) Mediation Ashgate Publishing
2001 Co., Burlington, VT

----- "Durkheimian, Epiphanies: The Importance of Engaged Social Science in Legal
Studies" FLA ST. University Law Review 91(1991) vol.18 Summer 1990.

----- "Why ADR Now?" 69 Judicature 300 (1986).

----- "Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or
the Law of ADR" 19 Fla. St. Law Review 1(1991).

----- "Toward Another View of Legal Negotiations"
31 UCLA Law Review 754.

Mills, Miriam, K., Conflict Resolution and Public Policy
1990 Greenwood Press New York, NY.

Moore, Sally Falk Law as Process

1987 Routledge and Kagen Paul Ltd.
London, England.

Minow, M. Making All the Difference: Inclusion, Exclusion
1990 and American Law Cornell University Press
Ithica, New York.

Nader, Laura "A User Theory of Law" Southwestern Law
1984 Journal v.38 pp. 951-963.

Nader, Laura. "Harmony Models and the Construction of
Law"pp.41-60 in Chew

Nader, Laura, "The Globalization of Law: ADR as 'Soft' Technology" 1999 Association
for the Study of International Law
Proceedings London, England

Nolan-Haley, Jacqueline M., Alternative Dispute Resolution
2001 in a Nutshell (2nd ed.) Nutshell Series 86.

Nonet, Philippe and Phillip Selnick Law and Society in
1978 Transition: Toward Responsive Law Harper Colophon Books
Harper and RowNew York. NY.

O'Hagan, Timothy The End of Law
1984 Basil Blackwell Oxford, England.

Palmer, M., and S. Roberts Dispute Processes Butterworths
1997 London, England (law in Context Series W. Twining
and C. McCrudden, eds.)

Picard, Cheryl, A., "Teaching Children To Deal with Conflict
1990 Peacefully" Vis a Vis, Summer1990, vol.8 (2) in
Pickering,

Pickering, W.S.F. Durkheim Today Berghorn Books
2001 New York NY

Pirie, Andrew, J., Alternative Dispute Resolution Irwin Law
2000 Inc. Toronto, ON.

Post, R. (ed.) Law and the Order of Culture
1991 University of California Press, Berkeley and Los Angeles,
Westgroup Publishing St. Paul MN.

Proceedings, "Making Peace and Sharing Power: A National

Gathering on Aboriginal Peoples and Dispute Resolution”
Vancouver BC. 1996.

Rahim, M. Afzalur Managing Conflict An Interdisciplinary
1989 Approach Praeger Publishing New York NY

Roach Anley, Sharyn L., Law and Social Change Sage
2000 Publications London, England.

Roberts, S., Order and Dispute: An to Legal
1979 Anthropology St. Martin's Press New York

Rolph, E. and Eric Miller Evaluating Agency: Alternative
1995 Dispute Resolution Programs Rand Santa Monica, CA.

Rose, N. "Government and Control" British Journal of
Criminology (2000), 40, pp.321-339.

Rubenstein, Richard, E., "Conflict Resolution and the
1996 Structural Sources of Conflict" in Jeong
Rule, Colin Online Dispute Resolution for Business
1990 Jossey-Bass San Francisco CA.

Sander, Frank, E., "The Future of ADR", Journal of Dispute
2000 Resolution vol.2000 no.1.

Sanderson, John, P. "The Slippery Slope of Confrontation",
1992 Manuscript, Law Partners Sanderson, Laing.
Ottawa. ON. Pp.221-228.

Sandole, Dennis J.D. and Hugo van der Merwe (ed.)
1992 Conflict Resolution Practice Integration and Application
Manchester University Press. Pp.97-107.

Sandole, Dennis, J.D. and Hugo van der Merve Conflict
1993 Resolution Theory and Practice: Integration and Application Manchester
University Press Manchester, England.

Santos, B.de S. "Law and Community: The Changing Nature of
1980 State Power in Late Capitalism" International Journal of the
Sociology of Law 8, 379-397,

Schur, Edwin M. The Law and Society: A Sociological View
1968 Random House Toronto (Studies in Sociology Series Charles
Page Consulting Editor).

- Scheingold, Stuart A., The Politics of Rights, Lawyers,
1974 Public Policy and Social Change
The Colonial Press Clinton, MA.
- Scimecca, Joseph, A. "Conflict Resolution in the United States
1991 The Emergence of a Profession?"Pp.19-40 in Avruch et.al.
- Scimecca, Joseph. "Theory and alternative dispute resolution:
1993 A contradiction in terms?"Pp.211-221 in Sandole et.al.
- Simmons, Jon. Foucault and the Political Routledge London
1995 (Thinking the Political Series) K.Ansell-
Pearson and S. Critchley General Editors.
- Sipe, Neil, G., "An Empirical Analysis of Environmental
1998 Mediation" Journal of the American Planning
Association 64:3 275-87.
- Soden, Dennis, L. and Brent S. Steel (eds) Handbook of
1998 Global Environmental Policy and Administration
Marcel Dekker Inc. New York
- Soper, Philip, A Theory of Law Harvard University
1984 Press Cambridge MA.
- Stallings, Robert, A. "Conflict in Natural Disasters: A
1986 Codification of Consensus and Conflict Theory" Social Science
Quarterly 15:3 pp.269-58
- Starr, June and Jane Collier (eds) History and Power in the
1989 Study of Law Cornell University Press Ithica, NY
- Stedman-Jones, Sue "Reflections on the Interpretations of Durkheim in the Closer to
Neo-Functionalism Sociological Tradition" in Pickering
- Stone, Katherine V.W. Private Justice: The Law of
2000 Alternative Dispute Resolution
Foundation Press New York
- Strier, Franklin, Reconstructioning Justice Guorum Books
1994 Westport CT.
- Schweiter, Mary "Harmony Ideology Works at the Mill" in
1996 Wolf and Yang (eds.)

Tamanaha, Brian Z. Realistic Socio-Legal Theory Clarendon
1997 Press Oxford, England.

Tillett, G., Resolving Conflict: A Practical Approach
1998 2nd ed.) Oxford University Press,
South Melbourne, Australia.

Trackman, Leon E. "Alternative Dispute Resolution: The
1989 Case for Commercial Arbitration." Manuscript, Dalhousie Law School.

Turner, Stephen (ed.) The Cambridge Companion to Weber
2000 Cambridge University Press (Cambridge Companion Series)
Cambridge, England.

Von-Benda-Beckmann, K. and F. Strijbosch, (eds.)
1996 Anthropology of Law in the Netherlands
Foris Publications Cinnaminson, USA.

Ware, Stephen J. Alternative Dispute Resolution
Hornbook Series Westgroup St. Paul, MI
Weber, Edward, P. "The Theory and Practice of Collaborative
Policy and Dispute Resolution Mechanisms"
in Soden and Steel.

Westbrook, J.E., Book Review Essay, "The Problem with Process Bias" Journal of
Dispute Resolution Vol.1989

Williams, Gerald, R.
1983 Legal Negotiation and Settlement West Publishing
Co. St. Paul, MN.

Wilkinson, Clive, Grace and Paul; Sociological Inquiry
1978 and Legal Phenomenon St. Martin's Press
New York, NY.

Wolf, Alvin, W. and Hoggang Yang Anthropological
Contributions to Conflict Resolution The University of Georgia Press
Athens, GA.

Wondollock, J.M.; N. Manring and J.Crowfoot,
1996 "Teetering at the Top of the Ladder: The Experience of Citizen Group
Participants in Alternative Dispute Resolution Processes." Sociological Perspectives
v..39,2 Summer, pp. 249-266.

Yngvesson, Barbara "Conceptualizing the Court:

1990 Comments on the Cultural Study of Litigation" Law and Society Review v.24 n.2 (1990) pp.45

.-----"Inventing Law in Local Settings"
The Yale Law Journal vol. 98:1663

WEBSITES:

www.acr.com Association for Conflict Resolution
www.amic.org The Dispute Resolution Institute of Canada
www.acresolution.org Association for Conflict Resolution
www.barreau.qc.ca/communiqués Le Barreau du Québec
www.barreau.qc.ca/éducation Le Barreau du Québec
www.cpradr.org Centre for Public Resources Program for Dispute Resolution
www.news.cornell.edu/business/may97/adrstudy.html Cornell University
www.news.cornell.edu/Jan99/ILR.NAEDR.alliance2.html Cornell University
www.crnetwork.ca Conflict Resolution Network of Canada
www.cronus.uwindsor.ca University of Windsor Faculty of Law
www.iamq.org Institute pour Arbitration et Médiation de Québec
www.law.ubc.ca University of British Columbia Law Faculty
Program on Dispute Resolution
www.lsuc.ca Law Society of Upper Canada