Messages from the Market: What the Public Civil Justice System Can Learn from the Private System

[Speech prepared for Canadian Forum on Civil Justice's *Into the Future* Conference, to be held April 30, 2006 to May 2, 2006 in Montréal, Québec.]

Introduction

I am delighted to have the opportunity to participate in this important Conference. I offer my congratulations to the Co-Chairs – Chief Justice Michel Robert of Québec and my colleague Justice Eleanore Cronk – and the Chair of the organizing Committee, Justice Debra Paulseth as well as the other members of the organizing Committee. They have prepared a truly exceptional program.

While listening to today's discussions, I was struck by the tremendous goodwill that came out of it. It is a goodwill that we all share; to ensure that the civil justice system serves the public interest in the best possible way.

It is my pleasure to contribute to the *Into the Future* conference on civil justice reform and to commemorate with you the 10th anniversary of the Canadian Bar Association's *Systems of Civil Justice* report.[1]

There is no doubt that the provision of civil justice is integral to a viable democratic society. As you know, our system of civil justice is premised on the maintenance of the rule of law, the independence of the judiciary and the openness of the courts, and it can be described as having two overarching objectives: (1) to provide Canadians with a means by which they can resolve their disputes peacefully and in a timely way before an independent and impartial decision-maker; and (2) to ensure that this public dispute resolution "machinery" is accessible to all Canadians, both in terms of cost and complexity.

One of the questions we are asking at this conference is, "How are we doing?" This is a difficult question to answer but one that we must address in order to improve our system and assure the continued confidence of Canadians in it.[2] It is also a question that is particularly appropriate in light of the fact that it has been ten years since the release of the *Systems of Civil Justice* report, as well as a

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[1] See Canadian Bar Association, Task Force on Systems of Civil Justice, *Systems of Civil Justice Task Force Report* (Ottawa: Canadian Bar Association, 1996)[Task Force on Systems of Civil Justice].

[2] *Ibid*. at 3.

number of years since reviews were conducted by many provinces, all of which contained key recommendations for reform.[3]

There are several ways we can attempt to assess how our civil justice system is doing. We can set benchmarks, we can conduct surveys or analyse statistics on issues such as delay or cost, and we can listen to anecdotal evidence. These assessment methods can provide some measure of how we are doing, and a number of the presenters at this conference have provided or will provide us with this sort of information. However, there is another measure, a measure that I am going to speak about tonight – that is the market.

Increasingly today, the potential civil justice litigant, in certain types of cases at least, has a choice to make: pursue his/her claim in the public civil justice system in accordance with the traditional adversarial model or choose from the variety of so-called alternative dispute resolution ("ADR") options, such as negotiation, mediation and arbitration, that are available privately. In effect, what we have today is a private system of civil justice that coexists and is in some senses in competition with our public system. One could even describe this state of affairs as

[3] See *e.g.* Ontario Civil Justice Review, *Civil Justice Review: Supplemental and Final Report* (Toronto: Ontario Civil Justice Review, 1996).

an emerging "two-tier" system of civil justice, to borrow a phrase from the ongoing healthcare debate.

In my view, there is no need to fear or resist the private system. Rather, I see the emergence of a strong and mature private system as a healthy development which provides an opportunity for those of us in the public system to learn from its success. By applying what we learn from the private system, we can help to ensure the continued vitality of our public system and enhance our commitment to access to civil justice for all. It strikes me that the public system, properly functioning, can exist quite nicely alongside a healthy private system – the two can and should be complementary.

Background

Before turning to the lessons we can learn from the private system, let me give some background to this public versus private discussion.

Private ADR processes are not new dispute resolution techniques.[4] Rather, as noted by the Law Commission of Canada in its 2003 report on participatory justice, "the history of the inability of formal justice models to provide the types of outcomes that disputants really want and need can be traced at least as far back as the Middle Ages."[5] By way of example, the Law Commission cites the original English "merchant courts", which were developed as an alternative to the King's courts by the merchant classes who wanted a speedier and more practical means of resolving their commercial disputes. Sound familiar? What is relatively new, however, is the level of acceptance in Canada today of ADR processes as true, viable alternatives to the public civil justice system.[6] To use the words of one commentator:

> Today, ADR has now become part of the mainstream diet of American and Canadian practitioners and academics. … Students, lawyers, retired judges and other professionals are increasingly seeking meaningful ADR-related careers. Further, courts at all levels are both sanctioning and at times mandating this trend [footnotes omitted].[7]

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4 See Trevor C.W. Farrow, "Dispute Resolution, Access to Civil Justice and Legal Education" (2005) 42 Alta. L. Rev. 741 at 744 [Farrow, "Dispute Resolution"]; see also Hon. Mr. Justice George W. Adams & Naomi L. Bussin, "Alternative Dispute Resolution and Canadian Courts: A Time For Change" (1995) 17:2 Advocates' Q. 133 at 133.

5 Law Commission of Canada, *Transforming Relationships Through Participatory Justice* (Ottawa: Law Commission of Canada, 2003) at 89.

6 Farrow, "Dispute Resolution", *supra* note 4 at 744-45.

7 *Ibid*. at 745.

For example, in a 2000 decision the Ontario Court of Appeal acknowledged that "until very recently, lawyers and judges in Canada were not generally trained in negotiation, mediation or arbitration. Only in the last ten years has instruction in alternate dispute resolution become a necessity amongst lawyers and judges across Canada."[8] Similarly, in a 2003 Supreme Court decision, LeBel J., referring specifically to arbitration, stated that it is, "in a broader sense, a part of the dispute resolution system the legitimacy of which is fully recognized by the legislative authorities."[9] This is certainly true. As you are all no doubt aware, all of the provinces and territories of Canada have arbitration legislation, and there is also a growing body of jurisprudence governing the relationship between the public and private systems.

Back in 1996, the CBA Task Force on Systems of Civil Justice recognized this fundamental shift in our legal landscape and specifically encouraged the development of a "multi-option civil justice system", where litigation lawyers would "move away from a focus on rights-based thinking and adopt a wider problem-solving approach", according to which they would encourage their clients to consider dispute resolution options.[10] Cognisant of the magnitude of the change

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[8] See *Canadian Union of Public Employees v. Ontario (Ministry of Labour)* (2000), 51 O.R. (3d) 417 at para. 41 (C.A.).

[9] See *Desputeaux v. Éditions Chouette (1987) inc*., [2003] 1 S.C.R. 178 at para. 41.

[10] Task Force on Systems of Civil Justice, *supra* note 1 at 63.

it was advocating, the Task Force concluded that this new approach ought to be recognized in rules of professional conduct, so as to place it at the same level of obligation as other aspects of representation and advocacy.

To an extent, this call has been heeded. For example, the Law Society of Upper Canada amended its *Rules of Professional Conduct* to provide that "[t]he lawyer shall consider the use of alternative dispute resolution (ADR) for every dispute, and, if appropriate, the lawyer shall inform the client of ADR options and, if so instructed, take steps to pursue those options."[11] Justice Gonthier, in his 2001 judgment in *Fortin v. Chrétien*,[12] echoed this professional obligation when he stated that, whenever it is appropriate to do so, a "good advocate" "must discuss alternative dispute resolution methods (mediation, conciliation and arbitration) with his client, and must properly advise the client regarding the benefits of settling disputes."

Let me be clear here, however. Although private ADR processes are now broadly accepted as part of our system of civil justice, I am not suggesting that these processes are appropriate for all types of civil disputes. For a variety of reasons, many disputes will always be dealt with in the public system. To start, in some

[11] Law Society of Upper Canada, *Rules of Professional Conduct* (Toronto: Law Society of Upper Canada, 2000).

[12] [2001] 2 S.C.R. 500 at para. 53.

cases, one or the other parties will insist upon it. They may require public vindication, be unable to agree on a private arbitrator, be unable to afford a private process or prefer the clear precedent of a public court decision.[13]

Moreover, many civil cases by the nature of the legal issues involved must be decided by the courts. Cases involving statutory remedies, bankruptcy cases, class actions, cases dealing with shareholder rights, judicial reviews and *Charter* cases are examples. Unquestionably there will always be a large number of disputes that will require public declarations of legal rights.

However, the fact that the courts will continue to have more than enough cases in no way diminishes the fact that, over the past decade in particular, the way in which we conceptualize and ultimately resolve civil disputes in this country has significantly changed. In addition to our public system, we must now accept that we also have a private, parallel system of dispute resolution that is increasingly becoming more attractive to many potential litigants.

Why is that? Proponents of the private system point to a number of factors, such as the privacy of proceedings, reduced expenditures of time and money for parties,

[13] See Adams & Bussin, *supra* note 4 at 146.

more accessible forums for people with disputes, the ability to choose laws, procedures and judges, speedy and informal settlement of disputes otherwise disruptive of the community and/or lives of the parties and their families, the ability to tailor resolutions to the parties' needs, increased satisfaction and compliance with resolutions in which the parties have directly participated and the potential to maintain relationships.[14] What cannot be lost amidst this list of potential advantages, however, is the fact that the private system still needs a robust and well-functioning public system; it cannot stand on its own. Let me explain.

First, the private system needs a strong, just and accessible public system to act as a touchstone, giving the private system coherence and integrity. With this touchstone in place, parties can then negotiate or use other types of ADR "in the shadow of the law"[15] which they have a realistic expectation of being able to resort to successfully if necessary.[16]

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[14] *Ibid.* at 141-42; Trevor C.W. Farrow, "Privatizing our Public Civil Justice System" (Spring 2006) 9 *News and Views on Civil Justice Reform* 16 at 16, online: Canadian Forum on Civil Justice < http://www.cfcj-fcjc.org/issue_9/CFCJ%20(eng)%20spring%202006.pdf>.

[15] Robert H. Mnookin & Lewis Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce" (1978-79) 88 Yale L.J. 950.

[16] Andrew J. Cannon, "A Pluralism of Private Courts" 23 C.J.Q. 309 at 323.

Second, the public system also provides the private system with clearly established precedents and legal frameworks to apply to disputes in order to come to or at least shape resolutions.

Third, the private system must rely on the public system for the enforcement of its resolutions, as well as for judicial review and appeals (although private appeals are now available in some jurisdictions).

Finally, it cannot be left unsaid that work in the public civil justice system helps to develop the skills necessary to make the private system function effectively. Counsel without adequate trial experience are typically less able to evaluate cases accurately and may be more likely to settle or pursue ADR options for the wrong reasons – *e.g.* for fear of their own inadequacy.[17] Moreover, the public civil justice system supplies the private system with retired judges, who are able to bring their considerable experience and reputations as public judicial officers to bear on the private disputes that are brought before them.

But this is not a one-way street. The public system also receives a considerable benefit from the existence of the private system. From a purely practical

[17] David Luban, "Settlements and the Erosion of the Public Realm" 83 Geo. L.J. 2619 at 2623-24.

standpoint, having some disputes go private eases the workload of the courts, reduces backlogs and saves time, money and other public resources. All of these are good things.

It must also be acknowledged, however, that the emergence of the private system potentially has some negative consequences for the public system. The chief concern about the private system is that it may drain off the important, possibly precedent-setting cases, leading to the stagnation of the common law.[18] The Systems of Civil Justice Task Force was clearly alive to this concern, encapsulating it in its 1996 report as follows:

> The development of the common law depends on the courts hearing and deciding disputes that enable them to define and redefine legal norms. … [I]f the only cases heard by the courts are the unusual ones, this may have a distorting effect on the development of the common law that would not be in the public interest.
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> As well, litigation often brings to light issues that demonstrate a specific instance of a more generic problem requiring public attention and

[18] Domenic A. Crolla, "The value of a good defence" (2000) 19:1 Advocates' Society Journal 10 at 16; see also Chris A. Carr & Michael R. Jencks, "Uncommon Law: The Privatization of Dispute Resolution Across the Pond" [2000] Denning L.J. 7 at 9.

> reform. Thus, in some instances, something may be lost in the development of the law when cases involving matters of public interest are settled in private.[19]

Although I recognize that there could be some negative consequences when "good cases go private", I do not think that the growth of the private dispute resolution system need lead to the stagnation of the common law.

For one, it strikes me that for the foreseeable future there are more than enough cases to go around. Martin Teplitsky, admittedly a well known advocate for the private system, has said that "[o]n any realistic assessment, … consensual private judging poses no threat to the court system nor does it represent another tier that is objectionable. … Even in California, the Mecca of 'rent-a-judge,' the use is infinitesimal compared with the total number of cases [*e.g.* an estimated 0.089 percent of all civil trial dispositions]."[20]

While some forecast that the private system creates a threat to the proper development of law, my own observation is that this concern is nowhere close to becoming a reality. The law reports continue to be filled with high quality, first

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19 Task Force on Systems of Civil Justice, *supra* note 1 at 63.

20 Martin Teplitsky, "The Privatization of Adjudication" 15 C.I.P.R. 1 at 6-7 [Teplitsky, "Privatization"].

class judgments from courts of all levels across Canada. I have yet to see any indication that the development of the law in recent years is being stifled as a result of the impact of private ADR.

Let me now turn to the lessons that I suggest the public system can learn from the private system, so that we can aim to improve the public system and ensure its continued vitality. I think it behooves us to understand why many cases are going private these days.

I am going to focus on six lessons or messages and admittedly I present some of them with a view to provoking discussion.

Lesson No. 1: The Quality of the Product is Crucial

The market is telling us that Canadians like having the ability to select a "dispute resolver" with expertise in the issue at hand.[21] From my own experience, when I was still practicing, I found that the ability to select the judge was the single most important factor in clients' decisions to go private. Mr. Teplitsky puts it this way:

[21] Carr & Jencks, *supra* note 18 at 19.

> [In the private system, the parties can select an adjudicator] in whom they repose confidence, with whose reputation they are comfortable and who has proven expertise in the area of their dispute and whose behaviour and conduct of the proceedings will be impeccable.[22]

I agree with that. However, Mr. Teplitsky goes on to say that the public system guarantees none of the above. I do not agree with that. The public system does provide highly qualified judges and in some cases judges with an expertise in a particular area. For example, there is a long history of special family courts or family court branches across Canada made up of a core group of judges committed to family justice. Similarly, in Toronto (and now elsewhere), we have a specialized panel of judges to deal with commercial cases. Special procedures adopted for the hearing of matters on the Commercial List allow a single judge to supervise complex cases and provide day-to-day direction so that matters are brought to a resolution on an expedited, businesslike basis.[23] The Commercial List is broadly viewed as an enormous success. The Tax Court is a specialty court. The Federal Court designates judges with specialized training for national security matters. There is nothing new about specialized judging.

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22 Teplitsky, "Privatization", *supra* note 20 at 5.

23 See "Practice Direction – Commercial List – 2002", 57 O.R. (3d) 97; see also William G. Horton, "ADR in Canada: Options for the appropriate resolution of business disputes" (2002) 21:2 Advocates' Soc. J. 11 at 14.

However, since the market is telling us that Canadians who are confronted with the prospect of civil litigation like the ability to select a specialized arbiter, perhaps we ought to consider some further, modified specialization in our public court system – more specialty branches or simply making judges available who are known specialists, *e.g.* in areas such as administrative law, estates or possibly personal injury? Although I continue to be firmly of the view that judges should, at bottom, be generalists, I think we should be open to discussing increased modified specialization initiatives so as to respond to this message from the market. The reality is all judges do not have the same expertise and experience. The market knows that. We should recognize that reality more than we do now.

Lesson No. 2: Timing is Everything – Avoid Unnecessary Delays

The second lesson we can learn from the market is that timing is everything. This is obvious. In the private system, an ADR adjudication can typically be arranged within a few months, and even more quickly if there is greater flexibility in the choice of adjudicator. In many jurisdictions, court delays are longer, sometimes much longer.[24]

[24] Teplitsky, "Privatization", *supra* note 20 at 5.

In the private system, it is also more likely for a case to start on the day scheduled. The cost and inconvenience for all involved of uncertain trial commencement times can be very high.[25]

Moreover, in the private system, parties can often expect a decision to be rendered in a quicker fashion. For example, one private dispute resolution group aims to deliver arbitral awards within thirty days of completion of arbitration. Unfortunately, the same cannot be consistently said of decisions from our courts.

It is certainly true that delay is not a new problem for our civil justice system by any means, but it is one that we ignore or become complacent about at our peril. I am mindful of the fact that rules committees and the courts in recent years have conceived of and implemented a number of creative reform initiatives aimed at attending to this problem of delay but I think that we, at least in Ontario, still have some distance to go. Clearly, the public system has a far larger volume of cases to handle; however, I propose that those with responsibility for creating rules and procedures and running the courts should see the time expectations achieved in the private system as benchmarks for reform. While because of volume, the public

[25] *Ibid*.

system may not be able to meet the same timelines, we must keep an eye on how the competition is performing.

Lesson No. 3: Curb Conspicuous Consumption of Public Judicial Resources

One of the problems of the public system is that it is stretched too thinly – too few resources for too many cases. One of the reasons for this is that a relatively small number of cases consume a large amount of court time. Back in 1995, the *First Report* from Ontario's Civil Justice Review team estimated that the institutional cost of running a three-day trial was perhaps as high as $20,000.[26] Today, more than ten years later, this figure is surely far higher. In contrast, one private dispute resolution group requires a deposit of between $4,000 and $6,000 per day of arbitration estimated to be required.

I think it is fair to say that today the daily cost of running a trial court in the Ontario Superior Court of Justice is at least as great – and probably substantially greater – than the daily cost of adjudication in the private system. I question, then,

[26] Ontario Civil Justice Review, *Civil Justice Review: First Report* (Toronto: Ontario Civil Justice Review, 1995) at 142.

why taxpayers should be providing unlimited access to our public civil justice system to all. I question whether the courts should have greater ability to gate-keep or otherwise limit some parties' use/abuse of the system. Here, I am thinking especially about very long civil trials that have little or no public interest component to them. Recently, we have had several such cases in Ontario. One case required over 200 trial days and 13 days of appeal court time.[27] It was essentially a dispute over a business between two brothers who did not get along. While I am sure that the courts did a good job of resolving the dispute, the resolution came at an enormous public expense.

From a market standpoint, it seems somewhat irrational to allow these sorts of trials to proceed unchecked, ravenously consuming court time and therefore taxpayer money while preventing other parties from accessing the court system in a timely way. We know from the experience in the private system that when parties have to pay for adjudication, they are less likely to engage in tactics that unnecessarily lengthen the dispute resolution process. Accordingly, we may be at the point where it is necessary to consider taking what previously have been considered unacceptable steps in order to reduce the problem of excessively long trials. One option is the imposition of time limits. Recently, at the Advocates'

[27] See *Waxman v. Waxman*, [2002] O.J. No. 2528 (S.C.J.), appeal allowed in part [2004] O.J. No. 1765 (C.A.).

Society conference in Toronto in March entitled "Streamlining the Ontario Civil Justice System", there was support among the participants in the "Trial Process" breakout group for a rule or practice direction formally vesting in trial judges the jurisdiction to set time limits for examinations and submissions (with input from counsel, of course) and to require counsel to adhere to them. Arguably, this authority already exists. A recent decision in our court affirmed the authority of the trial judge to impose time limits.[28] However, I think more formal recognition of that authority, perhaps in the rules, would underline its importance. It would then be important for judges to ensure that time limits are enforced. More drastically, it may be time to consider the need for user fees or other cost options for some lengthy civil trials when the use of court time is abused – for example, the court could set a reasonable or even generous amount of trial court time for a particular case, after which the court would have a discretion to require payment of some of the court's costs.

I am aware that there is strong opposition to the idea of user fees. According to the Advocates' Society's Long Trial Survey, conducted in 1998, 74% of respondents opposed or strongly opposed the implementation of user fees in respect of court

[28] See *R. v. Felderhof* (2003), 68 O.R. (3d) 481 (C.A.).

facilities.[29] That said, we may eventually reach a point where limited user fees for excessively long civil cases make some sense.

Less important, in my view however, is the particular time- and cost-saving initiative pursued and more important is the basic need to commit (or, to be precise, re-commit) to reform in this area. We simply cannot allow a small number of people/companies to litigate in our trial courts with abandon while others still wait in line for mere access to the courthouse doors.

Lesson No. 4: Reduce Complexity and Increase Flexibility in our Rules of Civil Procedure

One of the advantages of the private system is that parties can tailor their own procedure to the case at hand.[30] As a result, in the private system, what are in effect "pretrial procedures" are far less complex and time-consuming than those we encounter (or some would say endure) in our public civil justice system. My impression is that the time consumed by pretrial procedures in the private system is far less, perhaps a half or even a third of that normally consumed in the public system. In fact, the so-called pretrial procedures in the private system seem to me

[29] Ronit Dinovitzer & Jeffrey S. Leon, "When Long Becomes Too Long: Legal Culture and Litigators' Views on Long Civil Trials" (2001) 19 Windsor Y.B. Access Just. 106 at 145.

[30] See also Teplitsky, "Privatization", *supra* note 20 at 5.

to be more akin to the procedure we in Ontario were accustomed to under the pre-1985 *Rules of Practice and Procedure – i.e.* much less discovery and production and far fewer procedural rules. Today, in the public civil justice system, parties can easily get bogged down in pretrial procedural wrangling, thereby costing themselves and the courts time and money.

Here the market is sending a strong message. We need to reduce the overall complexity of our procedural rules for many cases. As noted in the final report of the Advocates' Society conference I mentioned earlier, "[t]he notion that more procedure necessarily equates with better procedure needs to be resisted."[31] Moreover, we need to allow parties more flexibility to tailor what procedures are necessary for a particular case, the way they do in the private system. One regime does not fit all cases.

Certainly steps have been taken in some jurisdictions to reduce the time for discoveries, to provide simplified procedures for cases below a certain amount and to limit case management procedures to cases that really require them. These ideas for reform are important but we need more of them in order to avoid the procedural

[31] The Advocates' Society, *Final Report: Streamlining the Ontario Civil Justice System* (March 2006) at 12, online: The Advocates' Society <http://www.advocates.ca/pdf/Final_Report.pdf>.

morass that has dogged some cases and so that we can move toward a more efficient and therefore more attractive and accessible public civil justice system.

Lesson #5: Simplify the Resolution of Multi-Jurisdictional Disputes

In recent years, we have witnessed the emergence of a truly global economy and increased international mobility. For the public civil justice system, this has presented difficult and complex choice of forum, choice of law and judgment enforcement issues.[32] We spend a lot of time and effort sorting out which court has jurisdiction to hear a case. Not so in the private system, where multi-jurisdictional disputes are handled much more easily. As a result, many such disputes are "going private". There is an enormous attraction to potential litigants if all aspects of a dispute can be resolved in a single, all-encompassing proceeding.

Our courts should take a cue from the private system and strive to simplify the resolution of multi-jurisdictional disputes. Again, I recognize that to some extent this is already happening. For instance, in April 2004, the Ontario Superior Court of Justice Commercial List approved the adoption of the *Guidelines Applicable to*

[32] Carr & Jencks, *supra* note 18 at 14.

Court-to-Court Communications in Cross Border Cases.[33] This is a very positive step.

In light of the apparent trend to globalization, multi-jurisdictional disputes are sure to become more and more common. We need more initiatives like the Commercial List's *Guidelines* to help make our public civil justice system better able to deal with these sorts of disputes, lest they essentially become primarily the domain of the private system. Canadian courts should take a leadership role in developing protocols for streamlining the resolution of multi-jurisdictional disputes. To start, one would think that this should be more easily achieved with respect to inter-provincial proceedings.

Lesson #6: Private System Is Much More User-Friendly for Non-Contested Resolutions

The sixth and final lesson we can learn stems from the fact that parties who want to use mediation to resolve their disputes seem to prefer private mediation. This may be because of the availability of greater mediator expertise and choice, as well as the privacy and flexibility inherent in private mediation. The preference for private

[33] Ontario Courts, Superior Court of Justice, Commercial List, "Protocol Concerning Court-to-Court Communications in Cross Border Cases", online: Ontario Courts <http://www.ontariocourts.on.ca/superior_court_justice/commercial/protocol.htm>.

mediation may also be partly due to the fact, as many argue, that when at least one province, Ontario, decided to institute court-annexed mediation programs, it "got it backwards" by making mediation mandatory and by making it occur too early in the litigation process. This, many say, has had the effect of undermining the distinctiveness and effectiveness of mediation as a dispute resolution technique. In this regard, one commentator argues that "at a minimum, [mandatory mediation] systems undermine the voluntary nature of mediation, they clothe the mediation process in litigation attire, make the parties more tenants than owners of their mediation and turn the mediator into an agent of the state, even when selected by the parties."[34]

That said, it seems to me that mediation is an important aspect of the litigation process and a well-designed and funded public system should offer mediation as an option. The question of whether mediation should even be mandatory is very contentious. At a minimum, I think a strong, well-staffed court-annexed mediation program should be available on a consensual basis at a time agreed by the parties. The biggest challenge it seems to me is providing mediators in whom the parties have confidence. Training and expertise are essential.

[34] Patricia Hughes, "Mandatory Mediation: Opportunity or Subversion?" (2001) 19 Windsor Y.B. Access Just. 161 at 202.

I note that tomorrow's conference program includes a session on integrating ADR into the litigation process, with a focus on discussing what we have learned from jurisdictions that have introduced some form of court-annexed ADR. I look forward to hearing what suggestions for reform come out of this session, because, in my view, the state of court-annexed mediation programs in particular, as compared to mediation options that are available privately, is unsatisfactory at this point in time.

Conclusion

The phenomenon of private dispute resolution is not going to disappear; in fact, we can expect it to grow even more in the years to come. It is possible that the emergence of a private, parallel system of dispute resolution may have some negative consequences for our public civil justice system. However, as I have tried to point out, the private system may also provide those of us who work in the public system with some valuable lessons, which, if heeded, could help to ensure the continued vitality of our public system and bolster our commitment to access to civil justice for all.

The market is sending us clear messages. The challenge is to listen.

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