INTEGRATION: THE NEXT STEP IN CONFLICT RESOLUTION?

I have deliberately framed the title of this article as a question. While there is an idea I would like to promote, the purpose of this writing is less about delivering a message and more about provoking a discussion. I believe modern dispute resolution techniques, in and out of the litigation system, have now matured to a state where they can be combined into a new and more effective means of delivering fair, timely and cost-effective outcomes in civil litigation.

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Nick de Domenico has been in the business of personal injury claims settlement for over 43 years. He began mediating in 2000 and has completed almost 2,000 fee paid mediations, mainly in the personal injury field. He and Kathy Sainty have recently developed a co-mediation model appropriate for multiparty mediations. He also has extensive experience as a small business owner and on strata council. He is currently a member of the MediateBC Roster Committee. Nick is married and has a 30 year old daughter. He and his wife Silvia enjoy exploring the Pacific Northwest and parts beyond on their motorcycle.

I truly believe the old adage: "there is nothing new under the sun". Even so, great and positive change does occur in the world daily. This change is effected mostly by combining existing elements, in different ways, at opportune times.

Henry Ford's ideas around mass production could not have occurred until certain socio-economic and vehicle design developments were in place; cars had to become reliable enough to be worth producing in quantity while at the same time there had to be a middle class with the financial wherewithal to buy them. Only with the concurrent arrival of these two factors was Mr. Ford able to successfully take the various components inherent in individually hand-crafting cars and rearrange them along a moving 'assembly line'.

While there are some cars that are in fact works of art, and will always be hand built (and therefore only within the financial reach of a very few), nowadays safe, reliable and increasingly efficient cars (mainly for the purpose of transportation) routinely come off the assembly line at a price most of us can afford.

In the world of civil litigation, those cases where new law is made, and the impact is felt on a societal basis, absolutely require rigorously enforced attention to an elaborate process. That takes time and costs money, and, considering the stakes, we all seem to agree that it is worth the investment.

In the vast majority of cases before the courts however, all that is required to arrive at a fair outcome is the application of existing law to the interests of limited groups of individual litigants.

Unfortunately the same legal process that is designed for, and works to, our advantage in creating new law, is all that is currently available for the two neighbours fighting over a yard boundary issue; or an insurer and an accident victim in a dispute about the value of a personal injury claim; or the interpretation of a lease agreement between two businesses.

Using the model designed for creating new law in cases with little or no overriding societal impact results in a judiciary struggling with overwhelming case loads and litigants confronting onerous and expensive processes that take precedence over the swift and cost-effective resolution of their conflicts.

In spite of my assembly line analogy, I am not advocating for an abbreviation of process at the expense of justice. Instead I am advocating for the creation of a process that is effective because it promotes resolution over procedure.

If we look at litigation as a continuous negotiation instead of a series of separate legal processes tightly regulated by the Supreme Court Civil Rules and the Judiciary we can begin to see the real means of resolving whatever conflict happens to be before the Courts:

- negotiation, carried out directly between the parties under the advisement and advocacy of counsel, but at the litigant's instruction,
- negotiation, assisted by a neutral party where control of the outcome is still held by the litigants,
- negotiation, through competing advocacy, before a neutral third party exercising binding authority over the matter.

In our current system, direct negotiation remains the primary tool of choice and it should be; it delivers the maximum control of the outcome to the parties. The problem with direct negotiation is that it can be halted unilaterally – either party may decide at any time to withdraw from the negotiation. And then, while all the ensuing (expensive and onerous) chambers applications may yield more evidence, or adjust a trial date, they will not likely produce a resumption of meaningful settlement discussions.

In the current system, to overcome a unilateral halt in progress, there are only two alternatives.

The first is mandatory mediation. This can only be made to happen once. Because it requires the attendance of the parties and their counsel and a neutral facilitator, it's awkward and expensive. Because it's voluntary there is no guarantee of certainty of outcome. Because mediation's express purpose is to resolve the substantive issues, mandatory mediation usually occurs after the legal discovery process is complete, and therefore often independent of consideration for when the litigants are actually ready to settle.

The second alternative is to have the matter determined at trial or arbitration which in the current model only occurs at the very end of the process. Both trial and arbitration are expensive. And every single issue is cast into doubt notwithstanding any consensus that may have actually been achieved beforehand. Four or five years of effort and expense boils down to four or five days of trial/arbitration. Control is taken from the parties and comes to rest in the heart and mind of a single human being – one selected by the system and not by the parties (trial) or, even if pre-selected by the parties (arbitration), one who has no vested interest in the matter and decides based on the parties' evidence, not on their interests.

If one could design a system which gives resolution of conflict within groups of litigants primacy over a predetermined procedure that is focused on overall societal interests, then we would have a process that works for litigants rather than litigants who work for a process. Access to justice would indeed be significantly improved.

There is a group of well-trained and knowledgeable professionals in the ADR realm. I believe that, to some extent, those ADR resolution professionals have outgrown their current environment. At the same time there is an accumulation of knowledge around process in the ADR community. There is a professional institution that is capable of being modified and combined with both the professional ADR community and their knowledge of process. This combination can then produce a new and effective system of resolving the majority of cases currently before the courts.

WHAT WOULD THAT LOOK LIKE?

Well first of all it needs a structure.

There are mediators and private arbitrators floating around out there haunting law offices, hotel rooms and the odd mediation centre. But for those counsel brave enough to step off the well-worn path to the doors to the court house, and try a different approach, it's all *ad hoc*.

While alternative dispute resolution services have matured in terms of professionalism, they lack the physical equivalent of the staff and facilities currently embodied in the Registries and Courts.

Envision for a moment two separate bodies integral to this new system I am proposing. One is a private sector entity that is contracted to administer the process – call it the Dispute Resolution Administrator or DRA. The second is a supervising body, a society with a mandate for the public good – call it Dispute Resolution BC, or DRBC. Neither of these entities are daring new ideas.

A proven resource is already available to fulfill the DRBC role in the form of MediateBC. My vision sees DRBC as an expanded MediateBC with three sets of "rosters"; one each for mediators and arbitrators and a third being for a position I will call coordinator.

The creation of a roster of curated mediators by Mediate BC has proven beneficial to both mediators and the public good since implementation of the idea seventeen years ago (in 1998).

The creation of a roster of curated arbitrators within this institution could provide similar benefit. There is already a wealth of personnel out there for the creation of such a vetted and government approved pool.

This new model envisions a group of very sophisticated line workers; these are the individuals I refer to as "coordinators". These coordinators would be employed directly by the DRA. The coordinators would ensure that each case moves forward in an expeditious manner. In my model, coordinators need considerable organizational and conflict resolution skills. They would in effect be managing and to some extent, mediating, but not arbitrating, procedural issues.

Currently, MediateBC maintains an Associate Mediator Roster comprised of individuals with training, referencing and liability insurance who have not yet acquired the experience requirement to mediate substantive issues on their own. It would be an easy step to convert the Associate Mediator Roster to a Coordinator Roster.

As an added bonus, administration of the Coordinator Roster could provide the currently missing transition device for those acting as coordinators to, over time, become fully certified and experienced in the mediation of substantive issues.

While we do not currently have an organization specifically devoted to civil conflict resolution such as is contemplated by the DRA, various Provincial governments have experimented over the years with the private contracting out of government services. In BC, our government has created a new tribunal – the Civil Resolution Tribunal (CRT) – which, when it is fully functioning, will use an integrated process using case managers, online dispute resolution, mediators and, eventually, arbitrators, to resolve small claims and strata property (condominium) disputes. However, unlike the model I am proposing, the CRT uses a linear approach to dispute resolution not an approach that allows for movement between facilitated negotiation, mediation and arbitration at all stages of the dispute as is the case in my model.

Private enterprise is usually regarded as having an advantage in terms of function while government entities are more often thought of as guardians of the public good. The model I am proposing allots functionality to the private enterprise DRA and public good to the government sanctioned DRBC.

The DRBC would contract with the DRA for the DRA to supply administrative services and the DRBC would provide the DRA with a best practices guide directed to the execution of DRA duties. The DRA would operate within the best practices guide, use only DRBC approved process contract templates, and work only with "certified" coordinators, mediators and arbitrators.

A litigant would file a dispute at the DRA and apply for a coordinator. A similar assignment procedure as currently exists at MediateBC for mediators would be in place for the coordinator.

As I noted at the beginning of this article, I am not advocating changes to or elimination of our existing litigation system. New law must still be made, and done so with great care, as is provided for in the existing system.

Nor am I suggesting the elimination of jury trials in appropriate cases. Judges are assisted in part by input from the community through the ongoing utilization of jury trials. Indeed jury trials in themselves are integral to democracy in their acknowledgement of a universal right to submit one's actions to the judgment of one's peers.

Therefore, in my model, the other litigants to an action must be provided with the opportunity to either agree to enter into this alternate process or have a hearing before a judge to argue for exclusion. Grounds for exclusion would be that their case is one of societal importance or because they simply opt to have their case heard by a jury.

Assuming that the matter has been placed into this new process, then a coordinator from the DRA would initially assist the disputants in selecting a mediator and arbitrator, employing a similar default procedure as was used in selecting the coordinator.

Unlike the public court system, and instances of private arbitration, this model provides for the litigants to not only jointly select their mediator and arbitrator; it also allows participants to know who these people are at the beginning of the process.

My vision contemplates selecting different people as the mediator and arbitrator, guided by different procedural responsibilities; however, the model does not preclude the involvement of a med-arbitrator. Either option could exist, at the behest of the parties, within this model.

The litigant-selected coordinator, mediator and arbitrator then comprise a resolution team collectively dedicated to the particular dispute. This adds another element of predictability that I anticipate will serve to reduce points of conflict and unnecessary re-invention of the wheel while enhancing control of outcome for the litigants.

Backups, from the appropriate rosters, could also be designated ahead of time to fill in when members of the primary team are unavailable.

In order to ensure clarity in the process, the parties would draw from a standard template, to be developed, and create their own "resolution process contract". That template would contain standard provisions for the framing of the specific type of action to the point of resolution, the development of evidence, and eventually, its assessment. The resolution team works with the disputants to modify the appropriate template and develop a contract of procedure, custom built for their

particular dispute.

A key provision in all process contracts would be agreement that the progressive application of direct negotiation – mediation and arbitration – is available and applied as required at all stages of the action, including during formulation of the initial contract and, later if necessary, its subsequent amendment.

Let's take a closer look at this new process in terms of the previously noted means of conflict resolution.

Direct negotiation remains what it has always been. It is modified only to the extent that a coordinator monitors and facilitates progress. The coordinator acts on requests by one or more of the parties for the involvement of the mediator and/or arbitrator at any stage.

Mediation in the context of this idea should not be understood as the more formal and elaborate process that currently prevails. Depending on the complexity and significance of the issue, mediation can occur by telephone and email interwoven in the daily routine of most practitioners. The more elaborate format (requiring all party, personal attendance at a location outside the practitioner's office) can also be used where required at a given time, subject to the provisions of the process contract.

When impasse is encountered and confirmed, arbitration is invoked. This can be with respect to a procedural matter as well as a substantive one. And it could be invoked by the parties, with or without mediation having occurred.

The intent of the process is to favour an application of resources that is proportionate to the issue at hand. Therefore arbitration, like mediation, could be conducted using anything from emailed submissions to a full hearing, depending on the circumstances.

Where preliminary direct negotiation, mediation and arbitration have left some substantive issues for resolution, the last positions of the disputants on the substantive issues at impasse are all carefully recorded in preparation for a final arbitral procedure.

The resolution process contract could call for the arbitrator to be restricted to rendering a decision only on issues at impasse, or on all substantive issues. The process contract could call for any final arbitral decision to be adjusted to fall within the parameters outlined by the last positions of the disputants or not.

Some may feel that the development of a system which focuses on resolution may either directly or indirectly dampen advocacy. I agree that it would be a mistake to increase efficiency through the diminishment of counsel's use of advocacy.

It is acknowledged that all relevant perspectives must be properly considered when reaching a resolution of any dispute. Since advocacy is the putting forward of perspectives and the evidence to support them, advocacy is integral to fairness.

As a practicing full time mediator I can confirm that advocacy is alive and well within both voluntary and mandatory mediation activity. Nothing in the construction of this new process should reduce emphasis on advocacy. In fact, I am certain that the availability of mediation and arbitration at all stages of the conflict will serve to promote constructive advocacy.

Whether or not the end result of this process is subject to judicial review may be addressed in the process contract.

WHAT ABOUT FUNDING?

Just as litigants in the current system only pay for the administrative cost of justice based on current tariffs, I submit that the majority of funding for this new process be paid for by the public.

Solicitor-client fees are not affected by the implementation of this model. Just as finding for registry and court administration and infrastructure is paid for by government, so to should funding for the DRBC, DRA and coordinators, mediators and arbitrators be drawn from the government's existing justice budget on a fee for services basis. That way money from that budget, excluding start up costs, would only flow to the extent that it relieves the litigation system's work load. The increased efficiency of this new system could result in a net reduction of funding necessary to sustain the civil section of the justice system.

Increased volume and flexibility of income earning opportunities could allow for the reduction of current mediation and arbitration fee rates while at the same time providing for greater overall income for mediators and arbitrators.

Disbursements would be awarded according to the same principles currently in effect. How to effect this in any given situation could be included in the process contract. For example, whether reimbursement for a particular disbursement would be ordered could be directly negotiated, then mediated and/or arbitrated during the process; rather than at the end, as is the case in "standard" litigation. Addressing costs of disbursements in specific contract form might avoid a lot of the contention over costs now forming part of the Court's busy work schedule.

Any disputes around interpretation of the contract would be handled in the same way as other matters; through the cycle of direct negotiation, mediation and arbitration, delivered on a timely and proportionate basis.

Referring back to the original analogy, we have taken the components of the existing legal system and, using the advances made over the last twenty years in alternate dispute resolution, combined them into a design that could now be, like the car in Henry Ford's time, reliable enough to be made available to the public in large quantities. Certainly the public is looking for an affordable unit that they can rely on to transport them safely and effectively from conflict to resolution.

As a bonus we free up the current Court resources for matters of greater societal relevance. A final advantage on a cultural level is the increased emphasis on the constructive resolution of conflict within society generally.

I have written this article to provoke thought and discussion. As such, I invite readers to contact me to carry on the dialogue by either emailing me at nick@njd.ca or visiting the blog on my website at www.njd.ca. I look forward to engaging with you. V