Follow-Up Discussion on Integration:

The Next Step in Conflict Resolution

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Since publication of the article Integration: The Next Step in Conflict Resolution in the summer edition of *the Verdict*, I have had several interesting conversations around the idea. In case you haven't read the article, here is the executive summary:

The foundational assumption contained in the article is that most civil litigation can be roughly divided into two segments. One creates new law that reflects changing societal values. The other applies existing law to limited groups of litigants. It is this latter, much larger segment where change is most needed and can be most effectively implemented.

The concept does not propose any changes to the Supreme Court Rules, legal doctrine or existing rights of parties involved in civil litigation. Instead, it proposes an option to formal litigation in which:

- at the outset of a legal action, a designated mediator and a separate, designated arbitrator replace the courthouse and its usual personnel;
- both the mediator and the arbitrator are jointly selected by the litigants;
- both the mediator and the arbitrator are available at the convenience of the litigants, in proportion to the matter at hand (e.g., phone calls, emails, in addition to personal attendances);
- procedural as well as substantive issues can be addressed;
- the option is to be used only when direct negotiation breaks down.

This yields a cost effective system within the control of the disputants where different conflict resolution modalities are applied as required to meet their needs.

No one has really taken issue with the basic assumption or the model itself. Negative response can be summarized as follows:

- "An adversarial culture and a false belief that process equals justice create a resistance to change that is impossible to overcome."
- "There is too much bureaucracy involved in the form of implementation proposed."
- "The government won't fund it."
- "It's just an idea."

These are not substantive arguments against the proposal. These objections instead signal very real feasibility and implementation issues that should be treated seriously, which I begin to do below.

POINT ONE: "ADVERSARIAL CULTURE AND COMPLEXITY"

Lawyers naturally and rightfully interpret their duty to their clients as requiring the consideration of all options made available through the justice system. This would seem to be the genesis of the commonly held belief that process equals justice.

However, the presumption that all matters will be handled in an adversarial manner encourages unhealthy procedural momentum due to other factors such as:

- putting off the inevitable;
- unavailability of timely court dates;
- belief that one can outlast the other party, either in terms of time or money;
- hope that they'll get lucky and draw the "right judge";
- the client's subjective considerations which can trump counsel's objective analysis, for a variety of reasons.

The courts themselves have held that diversion of cases to mediation and arbitration is an important and valuable part of the process. I concur. This is not about two ways of doing things but about striking a balance between adversarial and collaborative processes.

Mediator involvement on an ongoing basis as opposed to a singular intervention late in the game.

I think the value of the mediation component in the context of the discussion so far is best described in Justice Kent's recent decision in *Matsqui First Nation v. Canada (Attorney General)*, 2015 BCSC 1409, at paras. 18 and 19:

> *The beauty of mediation lies in its confidentiality and flexibility. With the assistance of a skilled mediator, the parties are free to speak to each other directly and to frankly express*

their concerns and interests without fear of prejudicing the litigation should the matter not settle. That is to be encouraged. Empathy and apology can and often does play a powerful role. Seemingly intractable positions become less so. …

One cannot help but ask what do the parties have to lose by confidentially exchanging and explaining perspectives and interests? If nothing else, perhaps some accommodations and efficiencies may be reached regarding evidence or other trial process that may reduce mutual inconvenience and cost.

Adversarialism is present in all stages of litigation. Embedding mediation on an ongoing basis, with its natural emphasis on solution rather than opposition, achieves a structural mitigation of adversarialism. Mediated activity not only encourages settlement and reduces adversarial tone, but also can be used to preserve agreement on various components so as to narrow the scope of points of conflict that may eventually require arbitration.

The Arbitrator as predictable, present and proportionate

In those circumstances where arbitration is necessary, having an arbitrator that:

- has been accepted in advance by the parties to the dispute for his/her skill and impartiality;
- views the litigants as clients that he/she has committed, in advance, to being available for and at the convenience of those clients;
- deals with the dispute in a way that is proportionate to the issue rather than the structure;
- provides for a timely and cost efficient way of dealing with procedural roadblocks. It also improves predictability of outcome and acceptance of decisions on substantive issues.

Arbitrators, cast in a service provider role, will only be commercially successful if they are seen as optimal service providers by all litigants. This can only be achieved by objective and efficient interpretation of the law in resolving the issues brought before them.

POINT TWO: "THERE IS TOO MUCH BUREAUCRACY INVOLVED."

This refers to the idea that there would be a separate Roster of Coordinators working within a separate organization, operating with a defined set of protocols, centrally coordinating all files. In my original article I labeled this the Dispute Resolution Agency. The equivalent within the world of litigated dispute resolution is the existing network of Court Registry offices.

Given that there is no similar central device for facilitating non-litigated dispute resolution whatsoever at the moment, anything at all is going to be seen as more complicated and expensive. However, can you imagine civil litigation operating without Court Registry services? A central registry service is essential to the functioning of any large scale dispute resolution mechanism. Arbitrators and mediators, we need to get in the game!

What was proposed in the article is modest compared to the Court Registry. It would be one private sector entity, operating under the supervision of a publicly mandated body, applied to one small area of alternate dispute resolution activity. It is a cautious opportunity for innovation that holds the potential for lessons to be learned; lessons that provide the possibility of large scale advances in conflict resolution within our society.

From that springboard let us imagine the creation of a central registry service applied to the entire range of non-litigated dispute resolution activity. Perhaps the lack of such a central registry within the world of alternate dispute resolution is at least a partial explanation for why growth of ADR seems to have plateaued at unacceptably low levels.

POINT THREE: "THE GOVERNMENT WON'T FUND IT."

Here are three quotes from an email I received from a respected member of the legal community.

> *"Don't forget about all the cases that can't get into the system now because of its inefficiency and cost. To the extent that you make the system work better there is a huge inventory of unmet legal need that will be able to flow into the system – so called, 'net widening'. The system will always be full; you won't reduce system costs that way."*

This first quote illustrates the obvious fact that there are large numbers of cases that are not funded at all by government right now, and in practical, fiscal terms, never will be.

> *"The clear trend over time is that courts are taking longer to process fewer cases at higher cost. Political and public confidence in the system is low, and now SRLs [self represented litigants] are creating a growing cohort of people who are profoundly unhappy / angry with the system."*

This second quote underlines the problems created by the current, partial government funding of litigation.

> *"Most fundamentally, I am no longer convinced that the answer lies in trying to engineer a fix by making clever modifications or additions to civil procedure. There are 2 forces that have managed to defeat, or at least substantially contain, such efforts in BC and in other jurisdictions over the last 20 years. The first is the apparently inexorable drive toward increasing procedural complexity. … It is part of the legal world view that justice = process, so more process = more justice – notwithstanding somehow that the cost of all that process denies most people entry to the system. …*
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> *The second fundamental barrier is, in my view, adversarial culture. The core values of adversarialism are deep in the bones of the justice system such that ADR remains an add-on to a fundamentally adversarial structure – it is "alternative" even after 30 years of experience and promotion."*

This third quote reiterates the other important factors that need to be considered in any meaningful solution that approaches the problem from the perspective of funding.

Ultimately, the proposed diversion process will reduce costs for the government as well as litigants. Many litigants are recipients of legal aid, financed by government and often the government finds itself, or the corporations and agencies on which it relies for dividends at budget time, as one of the litigants. The government also pays the wages of judges and other court personnel.

Governments, especially in the past generation, have been highly interested in financing pilot programs at a small expense to see if such a program would deliver the across-the-board savings that are indicated. Nothing in the government's record, or that of the official opposition, for that matter, indicates a reluctance to test pilot programs for initiatives that promise, like this one, across the board medium- and long-term reductions in the cost of government.

Specifically, as well as being too expensive, by its very nature formal litigation is too adversarial, too complex and, I will add on my own, therefore too slow. Past efforts to make a naturally adversarial process less adversarial, to make a complicated process less complicated, and to rely on a stubbornly adversarial and complicated process to deliver timely and broadly understandable resolution to civil conflicts have not succeeded to the extent needed today.

When I was talking about this aspect with one lawyer, she suggested that in some complex cases the model I proposed in the article could work financially without any government support. That suggestion opened up a whole new set of possibilities.

With respect to those cases where the savings in legal fees and avoidance of delays could easily eclipse mediation and arbitration costs anticipated by the proposed model, including the cost of provision of ongoing support services, government funding ceases to be an issue. Right now, there is nothing legally stopping disputants retaining at their own cost, established mediation and arbitration services reconfigured in the way proposed here. On that scale, 'registry services' could be provided by support staff already em-

ployed by some mediators and arbitrators.

In terms of effecting wider, positive change, a successful demonstration of the model in one or more of these cases could be built upon to widen its application. Acceptance and effectiveness of such change would be greatly enhanced by having evolved directly from the people who work in the system being changed; and with the needs of the users of the system taken into account – i.e., developed within the environment of a service provider to client relationship.

I suggest that, were the government willing to devote a comparatively minuscule amount of the current justice budget to some form of innovation in this area, mediators and arbitrators and litigants up to the task could be found to further the model in practical terms. This might be of interest to the BC Family Justice Innovation Lab (see Kari Boyle articles at http://www.slaw.ca/2014/02/28/the-social-lab-a-bridge-over-the-implementation-gap-for-justice-reform/).

Application of a successful innovative experience to a wider scope of cases could result in a net savings to the justice budget in terms of increased efficiency over the existing courthouse model.

However, just increasing efficiencies does not represent a total solution to the problem. Implementation of more efficient funding in a limited number of cases only augments funding of civil litigation to a limited extent. Larger funding issues for the majority of cases still need to be addressed.

Government funding dollars could be stretched quite effectively by substantially increasing existing court user fees. This has been demonstrated over many years in health care with Pharmacare and various therapy modalities wherein access to these essential resources is also popularly seen as citizens' rights.

Incorporating meaningful and affordable user fees into the model could encourage further efficiencies and increased mitigation of adversarialism as well as add to current funding levels and generate awareness of the value of civil conflict resolution services.

Corporate entities, in the form of disability and liability insurers and business-to- business litigants are heavy users of the litigation system. Given that they are bottom line entities, having a meaningful cost attached to different stages of litigation over and above the usual solicitor-client fees and disbursements would provide a framework for them to incorporate the actual justice system costs into the financial management of their litigation strategy. Right now, with only token fees attached to these sorts of services, there is no legitimate way for a corporate entity, with its for-profit mandate, to recognize the cost to society of their legal strategy decisions.

Putting a litigant-based cost on justice services also serves to increase awareness of the real value of such services in a way that makes individual litigant decisions more measured. This would address to some extent both the net widening effect and mitigates the unreasonable expectations currently placed on the system.

However, making court fees affordable as well as meaningful is critical. Everyone should have access to justice at a price they are able and willing to pay given their attachment to their particular issue. Applying a sliding scale to court fees that takes into account individual litigant capacity to pay, somewhat levels the playing field and also discourages frivolous litigation.

Increased user fees in the context of access to justice has very recently been addressed in the Supreme Court of Canada decision, *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General),* 2014 SCC 59. The Government already has the legislation written that can be modified in accordance with the direction from the Supreme Court of Canada to increase user fees without negatively impacting the access to justice issue.

The SCBC Report for 2012 advises there were 37,000 new civil filings excluding criminal and family matters. An additional $1,000 increase in average fees through a revised schedule of costs from notice of civil claim to trial amounts to $37,000,000 per year additional revenue at the disposal of the government to devote to the creation of an ADR Registry and to provide for sliding scale user fees; as well as augment existing legal aid subsidies within the existing litigation system.

POINT FOUR: "IT'S JUST AN IDEA."

All good things start out as ideas. What could be wrong with the idea of delivering a broad range of conflict resolution support to your clients in a convenient and cost effective way? What is wrong with including an element in your legal services that actually addresses the human need as well as the legal requirements? Isn't the opportunity to leave your clients with the knowledge that they not only obtained a fair result but were treated with respect by a system perceived as understandable and responsive to their needs worth looking beyond the daily grind for a moment or two? Frankly, I think this is the way individual practices are built and respect for the justice system is maintained.

The elements for the transformation of this idea into an agent for constructive change exist as you read this article. If you have a case that has the potential for expensive and prolonged litigation, pick up the phone and call an arbitrator or mediator you trust. See what practical steps could arise out of that conversation, in the context of this idea. It might provide for a resolution your client would view as beyond their current expectations of the legal system. V

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