

The Prospects for Civil Justice Reform

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Consideration of the prospects for civil justice reform requires us first to predict whether changes to the civil justice system actually will be made. Having no crystal ball, the best we can do is assess how congenial the current climate is to putting reform proposals into action. But our topic is not limited to prognostication; it also invites consideration of whether certain actions, in fact, constitute reform. After all, reform is not just change, but change for the better. Determining whether change for the better is likely to occur requires qualitative judgment. So our topic boils down to two questions : what is likely to be done in the civil justice system and will these steps, if taken, make it better?

There probably has never been more interest or activity in civil justice reform in Canada than there is today. There probably have never been more innovative projects underway in the civil courts than there are at present. Simplified rules, case flow management, Alternative Dispute Resolution initiatives and redoubled efforts to collect and exchange information about civil justice are some well-known examples. Governments, the judiciary, the bar and the public all seem interested in improving a system that is perceived by many to be too slow, too expensive and too traumatic. What is more, all seem willing to take action. In short, the attitudes, ideas and action necessary for change are in place. The prospects for reform have probably never been better, and in fact a great deal is happening.

That brings us to the qualitative aspect of the topic : Are the reforms contemplated or taken improvements? The answer to this qualitative question leads to tough empirical and evaluative issues. Measuring the effects of change is extraordinarily difficult. There are too many variables and the many facets of the system are so tightly interconnected that conclusions about cause and effect must be general and tentative. Then there is the difficult value judgment about whether the changed system is, in fact, better than it was before. The multitude of factors, the minute balancings and the plethora of objectives combine to make easy answers suspect.

This qualitative aspect of reform is the aspect on which I intend to focus this paper. There are a few fundamental qualitative issues that need our attention as we move forward in civil justice reform. I intend to outline them briefly and then to offer a few reflections on each.

By inviting you to focus with me on the qualitative aspects I do not suggest that all reform efforts should stop while we sort out the conceptual issues. I do not propose we emulate the two mythical law professors who, on observing the successful test flight of a new aircraft remarked : "Sure it works in practice, but will it work in theory?" But I do suggest that the qualitative aspects of civil justice reform raise important questions that require explicit consideration.

I. SOME COMMON THEMES

Reform proposals and activity throughout the common law world have certain common features. First, the role of courts is becoming more "hands-on", particularly from the point of view of actively managing the pace of litigation and, to some extent, tailoring procedure to the perceived needs of the individual case. Second, and consistent with the first, a management perspective is being brought to bear on the conduct of litigation in the courts : objective, quantifiable measures are used to assess the performance of the court over the run of cases. Although the availability of pertinent data is very limited, interest in it has grown exponentially. Third, procedure is identified as a key variable in the expense of litigation and removing the possibility of resorting to certain "expensive" procedures is viewed as one way of reducing the cost of litigation. Fourth, alternatives to litigation are being institutionalized and promoted as a way of resolving cases without the trauma of an adversary trial and hopefully more quickly and cheaply.

What are the qualitative issues with respect to these reform strategies? I would suggest that there are a few fundamental issues to which they are inextricably connected yet which do not receive much consideration. Consider the following.

1. Limiting the availability of certain procedural steps is one way of trying to make the cost of using the civil process proportional to what is at stake. It is no insight that elaborate procedures which are intended to further justice may become mechanisms to allow "monied might to weary out the right". But the question of whether a process is proportional involves difficult qualitative judgments. How significantly does the procedure under consideration contribute to correct decisions or to the parties' sense that justice has been done? How much will some rationing of that procedure affect either of these factors? What are the beneficial effects of this rationing; in particular, is substantial justice achieved more often over the run of cases?
2. The issue of proportionality is ultimately concerned with our conception of justice. Traditionally, we tend to think of litigation as a painstaking and minute investigation of the particular dispute. How many resources that enterprise required was not really the point : *fiat justitia ruat coelum*. But perhaps our conception of justice is shifting away from its traditional emphasis on the search for perfect justice, largely defined in procedural terms and in relation to individual cases, to a conception that is more concerned with maximizing outcomes that are substantively just over the run of cases.
3. The institutionalization of alternatives to litigation involves diversion from the formal process. The question of what should be diverted from the courts requires consideration of what should not. This topic cannot be broached without a working conception of the roles of courts. In turn, the definition of the roles of courts must take account of the public interest in private litigation. When should we set in place processes that allow or even require parties to be diverted from the formal process with its virtues of publicity, reasoned elaboration and faithfulness to law? And if we are to institutionalize alternatives, how should the role of judges evolve to take account of these changes?

From this, two broad qualitative or policy questions emerge and it is about these that I intend to devote the rest of the paper. First, I ask whether we accept proportionality as part of our conception of justice and, if so, what are its consequences and limits. Second, I invite consideration of how the public and private goals of the civil justice system are to be integrated and balanced, particularly in light of the move to alternatives to the formal process.

II. PROPORTIONALITY

The quality of justice is often thought of as depending upon minute investigation, elaborate formal procedures and lengthy deliberation. Efficiency is thought to be concerned mainly with disposing of cases as quickly and easily as possible. Taken to extremes, high speed and low cost could become the overriding values. It is easy to see how efficiency could be perceived as antagonistic to fair procedure and correct results. At one extreme the picture of that foggy Chancery courtroom so brilliantly painted by Dickens in *Bleak House* comes to mind; at the other, one can imagine the tyranny created by mindless insistence on speedy dispositions above all else.

These images, however, are caricatures. Our conception of justice includes correct outcomes, fair procedures and reasonable efficiency. But imagining justice as including each of these requires that each be accommodated and an appropriate balance struck among them. This balance must be achieved if they are not to be antagonists, but, as they should be, important elements of a complex conception of justice.

Of course, we place a high value on correct decisions. Bentham, for example, said that "rectitude of decision" is the overriding objective of legal procedure.¹ But rectitude of decisions is not the only objective if for no other reason than it is usually impossible to know if the "correct" decision was, in fact, arrived at.

We also place a high value on "how" we reach decisions. Substantive justice is unascertainable. As a result, we rely heavily on the more observable and objective measure of the means by which decisions are reached. Fair procedure is seen as a good in itself² and as a quality that can be assessed independently of the outcome of the particular case. In many ways, our traditional conception of justice under law is concerned mainly with procedural justice. Each matter for decision is to be subjected to rigorous consideration according to established procedures with the goal of ensuring fairness.

Of course, this emphasis on procedure is not a complete account of our sense of justice. Justice is concerned both with process and quality of outcomes. Moreover, our sense of justice is not only concerned with the outcome of individual cases that go to court, but the quality of justice in society generally. The focus on fair procedures for

1. J. Bowring, *The Works of Jeremy Bentham*, vol. 2 (Edinburgh : W. Tait, 1843).

2. See R. Summers, "Evaluating and Improving Legal Processes — A Plea for Process Values" (1974) 60 *Cornell L. Rev.* 1; M. Bayles, "Principles for Legal Procedure" (1986) 5 *Law and Philosophy* 33 at 45-56.

individual cases, sometimes referred to as "micro-justice", may impede achieving substantial justice in the larger societal context. Nader and Shugart explained :

There is a tradition in our law that favors the handling of legal complaints one by one. An institutional fit exists between such a tradition and the manner in which lawyers have evolved their businesses [...] There is also a functional fit with the individualistic spirit of American culture. Just as the welfare and progress of society as a whole is expected to result from individuals' pursuit of economic self-interest in the market, so too should the public good emerge out of people's assertion of their individual rights in court and from individual handling of the cases. [...]

[L]egal thinking has been preoccupied with "microjustice" — a focus on particular plaintiffs and defendants — rather than with "macrojustice" — a perspective in which cases are viewed in aggregate and the broad consequences of laws and legal institutions are analyzed. [...]

In general, finding bloc or wholesale solutions for classes of complaints — solutions that are either preventive or remedial — seems to be antithetical to [...] the law. [...] Part of the control inherent in liberal ideology is solving cases one by one rather than making structural changes such as mandating simplicity in design where possible.³

This conception of micro-justice and macro-justice — the individuated and the systemic ideal of justice — raises one aspect of the issue of proportionality. If a highly individuated approach to dispute resolution fails to achieve substantial justice in the run of cases, it may be that the minute examination of individual cases is impractical. The effort required is not proportional to the result. This insight has enormous practical implications for both procedural and substantive law. For example, class action procedures and substantive rules allowing aggregated damage assessments are founded on the belief that individuated dispute resolution in some cases is impractical and ineffective. This aspect of the proportionality issue thus goes to the heart of the enterprise; it is not so much concerned with the particular processes within the civil justice system as with the broad approach to particular social problems. At the very least, it reminds us that individuated dispute processing is only one of the possible approaches.

The relationship between fair procedure and efficiency illustrates another aspect of proportionality. As mentioned earlier, fairness and efficiency are sometimes considered antagonists — expedience is seen as the antithesis of reasoned deliberation. In fact, however, effectiveness is as much a part of our conception of justice as is fair procedure and correct results. Adrian Zuckerman explained this well in the context of delay in his important article, "Quality and Economy in Civil Procedure" :⁴

3. L. Nader & C. Shugart, "Old Solutions for Old Problems" in L. Nader, ed., *No Access to Law : Alternatives to the American Judicial System* (New York : Academic Press, 1980) 57 at 63-64.

4. A.A.S. Zuckerman, "Quality and Economy in Civil Procedure : The Case for Commuting Correct Judgments for Timely Judgments" (1994) 14 *Oxford Journal of Legal Studies* 353 at 360-61.

[...] just result of procedure is one in which the court correctly applies the law to the true facts; that is, a judgment which gives the parties their due. But there is a further dimension to just results : time. Delay may have two different effects on a decision : it may undermine accuracy in the sense that it increases the risk of error, and it may undermine the practical utility of judgments for the purpose of redressing rights. [...] Accordingly, a decision may be unjust not because it is incorrect in law or in fact, but because it comes too late to put things right.

The same line of reasoning applies to procedures that are too complex, too expensive or too traumatic to permit effective justice. Thus, far from being antagonists, fair procedure and effective procedure are integral to our conception of justice. They must co-exist in a delicate balance.

An important measure of the effectiveness of procedure is whether the time, expense and disruption of invoking it are worth the effort; in short, whether the means are proportional to the ends. When the time, expense or disruption of the process exceeds its benefits, either the parties were unreasonable in pursuing the matter or the process is unjust because it is not sufficiently effective. In striking the balance between fair procedure and effective procedure, some disincentives to resort to the process are necessary to encourage informal resolution. But lack of proportionality in the case of matters reasonably pursued constitutes a failure of justice.

Acknowledging the need for proportionality is one thing; measuring it is another. One side of the ledger is not unduly difficult. Time, expense and disruption are fairly easy to measure, although deciding how much of each is inherent to the process as opposed to the manner in which it was used may be a challenge. The other side of the ledger is much more complex. How does one go about determining what is at stake in a dispute? Objective factors such as the complexity of the legal issues and the amount in dispute can be measured fairly easily. But what about the circumstances of the particular parties? Twenty-five thousand dollars may be one party's life savings and an insignificant amount to another. A small claims case may involve only a few hundred dollars to the plaintiff, but may put at risk millions from the defendant's viewpoint if, for example, thousands of similar claims exist. So assessing what is at stake in a dispute is far from straightforward even if we consider only the perspectives of the parties.

The assessment of what is at stake cannot be limited, however, to that perspective. There is a public interest dimension to the question. The issue raised in the dispute may be of public interest as may be the range of outcomes or remedies. There may be a public benefit justifying more elaborate procedures or more intensive consideration. This relates to the reconciliation of the public and private dimensions of dispute resolution, a subject discussed in the next section of the paper. The point for now is simply that the question of proportionality, which involves considering what is at stake in the dispute, must take account, not only of the objective and subjective aspects of the parties' perception of the dispute, but also of the broader public interest.

Having urged consideration of proportionality as an integral part of our conception of justice, have I led the discussion to a dead end by pointing out that assessing proportionality may be extremely difficult? I hope not. Acknowledging the difficulties and

limitations, I suggest that recognizing proportionality as an integral component of our conception of justice is valuable for several reasons.

First, we can avoid the trap of treating our existing procedural practices as if they, in themselves, defined justice. Our rules about summary judgment, discovery, rights of appeal — our whole procedural arsenal — do not come to us on tablets of stone. They represent important, sincere and skillful attempts to design processes to achieve justice. But the principle of proportionality reminds us that justice is a delicate balance of right results, fair procedures and effectiveness and that this balance requires continual reassessment.

Second, acceptance of proportionality requires us to test our theory against our experience. By requiring us to think about the actual outcomes of our systems of dispute resolution, we must move from rhetoric to where the rubber hits the road. Theory and tradition, of course, have their place, but they need to be enlightened by knowledge of the present real-life impact of the process.

Third, consideration of proportionality requires us to think about dispute resolution processes as a system, because proportionality must be thought about from the run of cases to which the system must respond. Measures of what is at stake will necessarily be rough and ready; allocation of procedural resources will necessarily turn on general and somewhat arbitrary rules. The measure of success will be the overall performance of the system rather than simply its appropriateness in a specific individual case. This systemic view is essential, I suggest, to the reform enterprise.

Finally, the consideration of proportionality directs us to some important qualitative assessments. While aspects of the issue can, and should be, analyzed empirically, resort to statistics alone cannot strike the balance. It is, perhaps, direct discussion of these qualitative judgments that are under-emphasized in our justified enthusiasm to get things done.

III. THE PUBLIC INTEREST IN CIVIL LITIGATION

So far, we have considered some qualitative questions related to the balance among different facets of our conception of justice : correct outcomes, fair procedure and effectiveness. In this section, we take up a set of questions related to another balance that needs to be considered in civil justice reform : that required in defining the roles of the courts and the judiciary. While this balance has always been important, it is now central. A key theme of current reform activity is the encouragement and, in some cases, the institutionalization of alternatives to traditional adversary litigation. This has two aspects. First, it requires diversion of disputes from the traditional process and second, it requires courts and judges to take up an expanded range of activity far beyond the processing and adjudication of adversarial disputes. Both of these raise issues about the proper role of courts and judges in the new civil process.

Debate about the proper role of civil courts is not new. In an important article, Kenneth Scott developed two models of the civil process which highlighted the fact that

the civil courts exist to resolve individual disputes but also to vindicate rights.⁵ While the courts make findings of fact and attempt to reach just solutions in individual disputes, they also declare the law and thereby clarify and vindicate the rights of citizens generally. They also administer justice publicly : hearings are open and the reasons for decision are given publicly.

These different objectives or roles need to be balanced and sometimes the particular balances struck may be controversial. Consider, for example, expanded class action procedure or liberal rules of standing. If the traditional dispute resolution role is emphasized, one would tend to oppose these innovations on the basis that they move the process too far away from its core function of resolving individual disputes. If, however, the rights vindication and law declaration functions are given more weight, expanded class actions or more liberal rules of standing might be viewed as allowing courts to serve these purposes more effectively. The point for now is not the resolution of these particular issues, but the tension which the debate about them illustrates : courts have a party-centered role in the resolution of particular individual disputes, but they also serve broader societal functions.

Why do I claim that current initiatives encouraging ADR accentuate the tension inherent in balancing the different roles of courts? There are two main reasons. Diverting matters from the traditional process raises the question of the appropriateness of diversion in particular cases or types of cases. An important consideration here, of course, is whether the core roles of courts or the appropriate access of citizens to the courts are being undermined by the proposed diversion. Secondly, creating a greater range of options within the court system — the multi-door courthouse as this is often called — puts new demands on judges and administrators. There are issues to be addressed here about whether these new demands are appropriately placed and about the priority among the various sorts of work that need to be done.

The issue of diversion exposes in fairly stark terms the tension between individual dispute resolution and the public value of litigation. Alternatives to litigation may well be quicker, cheaper and less traumatic than adversarial litigation. And, of course, nobody would suggest that people who want to settle a case should be prevented from doing so. But where the civil process requires or encourages use of alternatives, important public interests may be lost. Justice may no longer be public, there may be no public affirmation of fair process or just laws and there is no declaration of what the law is to guide future conduct.

5. K.E. Scott, "Two Models of the Civil Process" (1974-75) 27 *Stan L. Rev.* 937.

This suggests that there are limits on what may be diverted and where it may be sent. That such limits exist is shown by well-established practice. Consider, for example, cases in which we have long taken control of the final disposition of the matter away from the immediate parties because of concern to protect the public interest or more vulnerable persons in society. The approval of the settlement of cases involving infants is one example. Variation of trusts, quieting of titles and child welfare matters are other examples. These are sufficient to make the point that there are limits on the sorts of matters that the parties may resolve by agreement without going to court.

The much more difficult issue is what these limits should be. Establishing rules for the allocation of disputes to particular processes is probably an impossible task. R. A. Macdonald's meticulous study of the issue supports his conclusion that it is.⁶ The detail, complexity and nuance of proposals by some who think it is possible may lead many to the opposite conclusion.⁷ But while detailed allocation rules may not be possible to formulate, there are some general principles worth discussing.

For example, some argue that determination of legal questions should not generally be diverted from the courts to less formal methods of dispute resolution. Daniel Mistervich concludes that while :

*[t]he court's dispute resolution function may be severed and turned over to alternative processes [...] the law-declaring function which enforces public values should not be delegated. [...] It is this core governing function which must be preserved."*⁸

Another strong claim for adjudication arises where the interests of particularly vulnerable persons are at stake or where there are serious inequalities of bargaining power between parties. In short, courts should be concerned with the fairness and justness of dispute resolution in matters being diverted from courts just as they would be with matters resolved in court. This requires the protection of both vulnerable persons and the public interest in any mediated or negotiated settlement reached at the instance or with the encouragement of the court.

Of course, many people may not agree with even this rough sketch of the limits of diversion from the civil courts. But that does not detract from the main point of the discussion. There are important qualitative decisions to be made about the roles of formal court processes as we decide to promote diversion from those processes. The purpose of this discussion is to urge that these decisions be made more explicit and openly debated as part of our ongoing reform efforts.

6. See R.A. Macdonald, *A Study Paper on Prospects for Civil Justice* (Toronto : Ontario Law Reform Commission, 1995) at 111-142.

7. See e.g. R.A. Baruch Bush, "Dispute Resolution Alternatives and the Goals of Civil Justice : Jurisdictional Principles for Process Choice" (1984) 4 Wis. L. Rev. 893.

8. D. Mistervich, "The Limits of Alternative Dispute Resolution : Preserving the Judicial Function" (1992) 70 U. Detroit Mercy L. Rev. 37 at 41.

Just as the diversion of cases from the formal process raises fundamental issues about the roles of courts, so does the expanded range of duties of judges raise important issues about the judicial role. Judicial case management, pre-trial conferences, mini-trials, early neutral evaluation and judicial facilitation of settlement discussions all require of judges a new range of activities and skills. There are many pragmatic questions about this evolution of the judicial role : Is it a good use of resources? Do the judges have the skills required? Will this detract from the availability of judges to sit in court? and so on. But there is also a more fundamental question about the appropriate role of judges in the resolution of disputes other than through adjudication. In short, when is a judge being a judge?

The traditional conception of the judicial role was of the judge as an umpire, a person who enforced the rules of the game and then made impartial rulings based on the parties' submissions. Of course, this too is a caricature. It has long been recognized that judges may be and sometimes should be much more actively involved in the process. Pre-trial conferences and case management are not new. The role of judges has certainly evolved in ways that do not undermine the basic position of the judge as an impartial arbiter bound to give effect to the parties' legal rights.

It seems to me, however, that the involvement of judges in diverting cases from the courts or participating in some of the alternatives, such as mediation, raises issues that are worthy of careful consideration. In saying this, I do not want to suggest that I am either opposed to or in favour of this expanded role, but merely raise it as one of the important qualitative issues that must be addressed. There are surely limits on how far the role of judges may evolve to include aspects in addition to impartial adjudication. But in acknowledging that such limits exist, we should not assume that every evolution is wrong in principle.

What are some of the relevant considerations? The two essential characteristics of the judicial role are impartiality and faithfulness to law. Any activity that may reasonably jeopardize these two characteristics should be avoided; any institutionalized process that detracts from these characteristics is inappropriate. Is there any risk that extensive, long term, hands-on involvement by judges in the settlement process may lead to the perception that judges are little more than deal-makers? Is there any risk that finding acceptable agreements rather than adjudicating rights may, over time, undermine the prime responsibility of the judiciary : impartial adjudication under law? These questions are not posed rhetorically. I am sure that at this point, I do not know the answers, although I suspect they need to be approached in much more specific contexts. I know that many able judges and others who have thought carefully about these issues have strong and sometimes conflicting views. I think there is a need for a principled debate about these issues — important qualitative issues — as our civil justice reform efforts move forward.

CONCLUSION

The prospects for significant change to the civil justice system have never been better. The issues are on the public policy agenda and there is a willingness by many of the key players to act. There are many carefully thought-out proposals available for study and many innovative programmes underway. This is all to the good. But I have argued that it is not enough. We must pay careful attention to the qualitative aspects of our reforms. Are we improving the quality of justice and strengthening the civil justice system? While these are difficult and multi-faceted questions that require rather subjective assessments of what is good and less good about the justice we administer, they are questions that are inescapable. Our civil justice reform process has, in my view, matured to the point that we should ask them and debate the answers.