ALTERNATIVES TO THE COURTS IN CANADA*

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Traditionally, resolution of both civil and criminal disputes has taken place in the context of formal proceedings in the courts. Commencing with a brief summary of the history of alternative approaches, the author discusses programs presently in operation in Canada aimed at achieving justice following procedures which are less formal, less expensive and ultimately more satisfying for the parties. The roles played by diversion, mediation, conciliation and arbitration in obtaining these goals are also analysed.

I. INTRODUCTION

On the theory that there are limits to what can be accomplished in both human and financial terms through judicial mechanisms, there have been proposals for the introduction of alternative procedures to traditional dispute resolution mechanisms. The alternative could employ one or all of the following techniques: mediation, conciliation and arbitration. The purpose of such alternatives is to remove matters that are presently in the domain of judicial adjudication and to place them in programs whereby expeditious, low-cost and informal resolution is obtained. In addition to the anticipated cost savings, it is hoped that such resolution will be more humane in that the traditional adversarial elements will not be present to the same extent.

II. HISTORICAL FACTORS

It is interesting to note that alternatives to formal court procedures have always existed in society. In traditional societies an elder within a family was frequently called upon to fulfill various functions of mediation, conciliation and even arbitration in certain circumstances. Depending on the nature of the dispute, it was not uncommon to have formal procedures conducted by village elders.

Professor Harry Arthurs, in an address to the Conference on the Cost of Justice (Canadian Institute for the Administration of Justice, 15 November, 1979), related some historical experience with respect to the machinery of justice. In particular, Professor Arthurs traced the history of the court of requests and described the situation in 1787 where citizens sat as lay commissioners receiving no compensation for their service on the bench. Together with volunteer judges in cities, towns and villages across England, the lay commissioners brought to most ordinary people the only kind of civil justice they would ever receive. These local courts were much less expensive than the formal system at Westminster and perhaps more importantly were mandated to decide cases according to "equity and good conscience" with the result that they often appeared to have been influenced by a spirit of mediation, situation equity, and responsiveness to local community expectations and relationships. Arthurs concluded that: "The formal system identified legal winners and losers, but contributed nothing to maintenance of the social fabric."

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Mr. Justice Estey of the Supreme Court of Canada first broached the subject of alternatives to the formal judicial system in a paper entitled "Theorem on Judicial Administration" which was also presented to the Conference on the Cost of Justice. In a fuller discussion of the topic in a chapter entitled "Who Needs Courts?", Mr. Justice Estey asked the following question:[1]

> Is it possible to establish a new and less formal conduit through which we can pass the smaller and simpler differences (and by far the most numerous category of disputes) and thereby channel them away from the expensive and overburdened routes?

The kind of dispute that was contemplated included such matters as petty property disputes, by-law infractions of significance to the immediate neighbourhood only, minor traffic offences, claims in simple debt for small amounts, failure to pay minor public accounts, certain aspects of automotive collision disputes, and even, perhaps, the less fundamental aspects of domestic relations. Mr. Justice Estey answered the question by recommending an adaptation of the administrative tribunal concept through the revival of neighbourhood tribunals. These tribunals would engage local citizens in the community parties to a wide range of smaller-scale disputes which are of sigificance to the individuals concerned but not of sufficient importance to justify the engagement of the community justice machinery.

Mr. Justice Estey identified the twin benefits of (a) increased communty participation in their own judicial systems and (b) a lowering of the tax burden and the privately borne cost of going to court which would enure to all citizens.

III. DIVERSION IN THE CRIMINAL JUSTICE SYSTEM

The first major developments in procedures for alternative measures have occurred in the criminal justice system. The programs have most frequently been described as "diversion", which has been defined by the federal Department of Justice and the Ministry of the Solicitor General of Canada "as an alternative to the traditional process of court appearance and sentence but a component of the formal criminal justice process". Diversion programs have been established in Canada over the past decade and have in many cases been based on earlier experimentation that took place in the United States.

In practice, diversion has tended to mean the turning aside of an accused or potential accused from the criminal justice system either prior to charge, prior to trial, or subsequent to trial. The underlying policy with respect to diversion is one of restraint. The objectives include the desire to promote community tolerance and responsibility for the management of some types of criminal behaviour, to promote more effective use of criminal justice resources through community institutions and to foster the restoration of social harmony between the victim, the offender and the community. In a working paper on diversion that is attached to "Studies on Diversion" published by the Law Reform Commission of Canada, the term diversion is described as including programs serving a wide variety of functions such as the following:[2]

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1. 1 *Windsor Yearbook of Access to Justice* (1981) 263 at 275.
2. Law Reform Commission of Canada, Working Paper 7, *Diversion* (1975) at 5-12.

(1) Community absorption: Individuals or particular interest groups dealing with trouble in their area, privately, outside the police and courts.

(2) Screening: Police referring an incident back to family or community, or simply dropping a case rather than laying criminal charges.

(3) Pre-trial Diversion: Instead of proceeding with charges in the criminal court, referring a case out at the pre-trial level to be dealt with by settlement or mediation procedures.

(4) Alternatives to Imprisonment: Increase in the use of such alternatives as absolute or conditional discharge, restitution, fines, suspended sentence, probation, community service orders, pre-trial detention in a community based residence or parole release programs.

One of the leading projects in this category is being operated by the John Howard Society of Saskatchewan (with early financial support from the Donner Canadian Foundation) in its mediation diversion program that operates in Moose Jaw and Regina. It has been structured as a pre-trial mediation model program for adults charged under specific Criminal Code offences. The project has fairly elaborate selection criteria with the major categories of complaint eligible for diversion falling within the areas of family disputes and neighbourhood disputes where the complainant and respondent share forms of pre-existing relationships. This has led to certain Criminal Code offences being referred to the program; for example, causing a disturbance, theft under $200.00, false pretenses, wilful damage, fraudulently obtaining food and lodgings, joyriding and car theft, common assault and threatening.

There is still a lack of formal acceptance in all jurisdictions of the desirability of diversion programs and they continue to be characterized in many locations as experimental. Thus, the initiative and leadership continue to come from private organizations such as the John Howard Society rather than the public sector. Government positions on this important area are long overdue.

IV. MEDIATION OF CIVIL DISPUTES

Diversion in Canada tends to be associated with criminal activities and there are relatively fewer programs that provide alternative solutions to civil disputes. Nevertheless, there is growing interest in fashioning programs that will provide such alternatives and, as noted, commentators such as Mr. Justice Estey and Professor Arthurs have suggested that we are simply restoring some historical practices in terms of conflict resolution.

A further reason for hightened interest in alternative civil dispute resolution is the enormous amount of activity taking place in the United States in this field. The American Bar Association Special Committee on Resolution of Minor Disputes in 1981 identified 141 active dispute resolution programs in the United States. The original motivation for establishing alternative dispute resolution forums arose because of an increasing concern in the United States over the way in which justice was being delivered. This was particularly the case with respect to the responsiveness of institutions charged with resolving, or assisting in the resolution of, disputes that arise in the course of daily life. While many of these matters could appear to be of relatively small magnitude, to the individuals concerned they are often the most important matter for the moment. Collectively, they are of enormous social consequence. Thus it was considered essential that mechanisms to effectively resolve such disputes be provided.

The American Bar Association played a leading role in organizing

groups which were joined in the debate regarding the court's role in dispute resolution. The ABA (in particular through its Committee on the Resolution of Minor Disputes) co-sponsored a conference with the Judicial Conference of the United States and the Conference of Chief Justices on the subject of "Causes of Popular Dissatisfaction With the Administration of Justice" (The Pound Conference). The Chairman of that Conference was Griffin Bell and when he became Attorney General of the United States in 1977 he was instrumental in starting programs known as Neighbourhood Justice Centres in Atlanta, Georgia; Kansas City, Missouri; and Los Angeles, California. These programs were developed by the Department of Justice and promoted by the American Bar Association. Briefly stated, the centres were to provide third-party mediation to resolve disputes and an alternative to traditional litigation.

A review of the 141-odd alternative dispute resolution initiatives in the United States and current research suggests that mediation projects process cases rapidly, the projects appear to be viewed favourably by the disputants, the projects may be more effective than courts in resolving disputes, and the projects improve access to justice.

In Canada, the development of alternative programs has had a modest beginning. One program which falls into this category is a community mediation service that is being operated in the Kitchener-Waterloo area by the Mennonite Central Committee (Ontario). The service was established late in 1979 as a result of several years of planning and study by a committee of community persons associated with the Mennonite Central Committee (Ontario).

Several members of the Committee had participated in the founding and ongoing administration of the Victim-Offender Reconciliation Project as well as other community-based involvements in the criminal justice system in the Waterloo region. The perception of a need for a neighbourhood dispute settlement process that would operate as an alternative to the adversary system of the courts, developed out of conversations with local police officers, court officials and various members of social service agencies. In addition, the committee members studied the American experiments and were impressed with the success of settling disputes before they escalated to the point of criminal activity. The Committee was convinced that mediation as a technique for resolving a broad range of minor disputes had been well established in the American programs. It was found that police and other officials were often frustrated at the amount of time required to deal with minor cases and were also ill-equipped to deal with the root of the problem, since the complaint was usually only the culmination of a series of events arising out of a malfunctioning relationship. The mediation proceeding provides an alternative forum in which disputing parties will be brought together with a neutral third party who will attempt to mediate an acceptable restructuring of the relationship. If an agreement is reached it can be reduced to writing and signed by both parties as a legally binding contract. It is felt that the mediation process allows the interests of both parties to be respected in a way that overcomes the "win-lose" circumstances which exist in the adversary process, since both parties have a personal stake in preserving the restructured relationship they themselves have helped to design. Dispute mediation programs are currently operating in the cities of Halifax and Montreal. These programs employ a variety of program

models, training approaches and organization structures while sharing the underlying philosophy of establishing an informal conflict resolution process.

Under the leadership of the Kitchener-Waterloo program, a national workshop on dispute mediation was held in April 1981 in Saskatoon, Saskatchewan. This workshop was an important step in the development of the mediation process in Canada, since programs have developed largely independent of one another.

In January, 1980, the Canadian Bar Foundation commenced research into the issue of costs and delays in the administration of justice. The specific research activity was undertaken with the view to devising a program directed at minimizing unnecessary delays and costs in connection with the administration of justice. A specific project design was presented to the Foundation and it was accepted in principle. With further financial assistance from the Donner Canadian Foundation, the Canadian Bar Foundation established, on November 4, 1981, on a two-year pilot basis, an alternative dispute resolution centre in Windsor, Ontario, known as The Windsor-Essex Mediation Centre, to test mediation and conciliation techniques in the resolution of minor civil disputes. The objectives of the project are:

(a) to minimize the delays inherent in our court system, and
(b) to provide an alternative method of dispute resolution for appropriate types of controversies, such as:
    (1) simple family disputes
    (2) neighbourhood problems (i.e. noise, pets, nuisance)
    (3) landlord/tenant
    (4) claims in simple debt for small amounts
    (5) consumer/merchant
    (6) employer/employee

The participants to these kinds of disputes are involved in an interdependent relationship and in such cases there is a need for a voluntary process (such as mediation) that has a capacity of re-establishing the relationship between the parties rather than simply dealing with the surface systems of the relationship as the judicial process would.

The Centre is staffed by an Executive Director, an Associate Director, a full-time secretary-receptionist and a Social Work student on placement from the University of Windsor. The Centre also utilizes the dedication and talents of thirty volunteer mediators, consisting of lawyers, social workers, psychologists, teachers and labour representatives, who preside over the mediation sessions without remuneration. The mediators underwent an intensive training program consisting of mock mediation demonstrations, lectures, demonstrations, video tape presentations, role playing and critiques in the areas of communication skills, mediation skills, evidence, information management, problem solving, negotiating and agreement writing.

The tasks of the mediator are to assist the disputing parties to find the basic elements of the conflict between them, to discuss various remedies and to guide the parties in selecting the most appropriate solution. He/she acts as an impartial third party to facilitate communication and to help the parties reach a mutually satisfactory agreement. If the process is successful, the mediation sessions will culminate in the disputants

themselves actually writing or directing the mediator to write the settlement that has been arranged to by both the parties. Throughout the entire exercise, the parties will be made aware of the fact that agreeing to mediation will not remove any legal or civil alternatives that they may possess. The mediation service is completely free to the people from the Windsor-Essex County area. The mediation sessions are conducted during the day, evenings and on week-ends. The activities of the Centre are monitored by The Canadian Bar Foundation and an Advisory Committee, with representation from the legal, social service, labour and business communities. Referrals to the Centre come from the police, lawyers, Legal Aid and public and private social agencies.

There is a standard follow-up for all cases two weeks after an agreement has been signed, and a three-month check to make sure that there have been no further problems. The follow-up procedure addresses itself to the following questions:

(1) Is the agreement as stated at the end of the mediation session being followed by all parties?
(2) Are the parties experiencing more or fewer difficulties in their relationship?
(3) Have there been any further incidents of conflict, and if so, what is the nature of the conflict?
(4) What are the feelings and perceptions of the parties towards the mediation approach?
(5) Did they feel it was of some help in resolving or reducing their conflict?

Throughout the period of the experimental program, it will be an integral part of the program that on-going evaluations be made by both the staff of the program and potentially outside objective observers (the Department of Justice). The program will be evaluated utilizing the following criteria:

(1) the ability to process cases rapidly;
(2) the improvement of accessibility to the system;
(3) the satisfaction level of disputants, both in terms of gaining access to the Centre and the nature of the dispute resolution;
(4) the relative costs of the mediation;
(5) the impact of the Centre on the court case load, the community agencies and other variables;
(6) the quality of the justice rendered by the Centre (leaving open for the moment the appropriate methods of measuring "quality");
(7) the issue of whether community expectations have been met by the program.

Unlike the United States where the federal Department of Justice played a leading role in the original design and introduction of Neighbourhood Justice Centres, there has been no involvement by government in the exploration of alternative techniques. Had it not been for the financial support of institutions such as the Donner Canadian Foundation there would not even be experimental programs in Canada at this time. Indeed the lack of government response to challenges and suggestions of leading members of the legal community, including Mr.

Justice Estey, is mystifying and regrettable. As is the case with criminal diversion programs, there is an urgent need for government positions being established in the field of alternative civil dispute resolution.

V. ALTERNATIVE TECHNIQUES WITHIN THE JUDICIAL SYSTEM

There continue to be developments within the judicial system to employ alternative techniques. These initiatives are being developed particularly in the provinces of Ontario and British Columbia where mediation services are being employed in the small claim courts. An informal experiment started by Gordon Killeen, Chief Judge of Middlesex County Court in London, Ontario, for the mediation settlement of small claims, has prompted similar experiments in Toronto and Ottawa. Settlement rates through mediation vary between 33 and 76 percent and the volume has predictably grown with the increase in the Court's monetary jurisdiction to $1,000. In London, local lawyers have been appointed deputy judges for mediation services and it is hoped that mediation may eventually be used in all Small Claims courts across Ontario. In British Columbia a Small Claims court alternative dispute resolution program is underway in the Lower Fraser Valley. The program was proposed through the Office of the Chief Judge and has received Provincial Government policy and budgetary approval.

Ms. K.M. Morrison, a court examiner in B.C., in a memorandum about a dispute resolution project in her jurisdiction, suggested that in the case of the Neighbourhood Justice Centres in the United States, " . . . there has been little discussion of *why* such alternatives should be developed *outside* the existing court system; rather, the tendency has been to proliferate structures rather than to improve the current machinery". Her argument is that the conciliation and mediation options should be included within the court structure.

An excellent model for alternatives being developed inside an existing court system can be found in the Province of Quebec. The Small Claims legislation is not a separate statute but is Book Eight of the Code of Civil Procedure, thus making it possible to deal with Small Claims within the regular framework of the law as a whole. An interesting departure in Quebec is that lawyers are barred from the Small Claims process and the courtroom except in rare cases. Provision is made for the absence of lawyers through the requirement of the judge acting as a mediator. The relevant provision is Article 975 which reads:

> Whenever possible, the judge attempts to pay reconciliation of the parties. If necessary, the judge causes the clerk to take minutes recording the agreement of the parties, such agreement, signed by the parties and countersigned by the judge is equivalent to a judgment.

According to Chief Judge Allan B. Gold (Provincial Court of Quebec):[3]

> . . . about 25% or more of our cases are settled right in the courtroom or in the corridor with the encouragement, and in some cases the urging, of a judge.

Thus, according to Chief Judge Gold, the Quebec Small Claims Court system fits into the general scheme of the Civil Law and the culture and mores of Quebec's society while dispelling or at least diminishing the im-

3. "Quebec Experience Under the 1971 Legislation" (believed to have been published in the proceedings of the *1978 Annual Workshop on Commercial and Consumer Law* which Professor Jacob Ziegel of the Faculty of Law, U. of Toronto, assisted in corrdinating. At time of printing, Prof. Ziegel could not be contacted to verify this information).

pact of certain beliefs held of the Small Claims process in general that it provides second class justice.

The Ontario Family Court Judges' Association has instituted a conciliation committee which is monitoring experimental conciliation projects and assisting with conduct of research. Until some empirical data is available it appears that the Province is not prepared to institutionalize conciliation services. As well, the Province and the bench will be most interested in the position of the bar on the use of conciliation. Experimental conciliation projects are operating in Toronto and Kingston. An important part of the projects is to measure costs. Hopefully the conclusions will provide some clear indication of what costs and time can be saved. Furthermore, it is anticipated that the Hamilton Family Court will contribute findings on its three years of operation of a more developed conciliation project; out of all the experimentation it is hoped that a comprehensive Province-wide approach can be developed regarding the use of conciliation for the resolution of many family disputes.

Another example of the conciliation model is the Frontenac Family Referral Service in Kingston, Ontario. This service uses conciliation as a process which, with the assistance of an experienced counsellor, helps couples reach agreement on disputed and non-disputed issues that might otherwise have been settled through litigation. The service provided is intended to be an alternative as well as an adjunct to the Family Court system. The initiatives of the project include outreach, crisis counselling, conciliation and forging of links with other services. The Frontenac Family Referral Service uses methods for encouraging participation in their process, notably, personal direct contact by counsellors with individuals in distress, stressing the importance of the absent partners' views and the counsellors' interest in hearing them. A report about the service, "Couples in Crisis", contains descriptions and evaluative materials as well as their forms and negotiation procedures.

VI. ARBITRATION

The resolution of disputes between merchants and their customers over the quality of goods and services by means of arbitration has been recorded since time immemorial. Various reasons have been advanced to justify the attractiveness of arbitration including the confidential character of the proceedings, as well as parties feeling more secure in the knowledge that an arbitrator of choice will be a specialist in the area in question capable of providing an expeditious resolution to the dispute. In each of the provinces there is some provision for the enforcement of private arbitration with Arbitration Acts having been enacted in every province but Newfoundland, where the Judicature Act governs, and Quebec, where the Code of Civil Procedure prevails. Respective Ministers of Justice have indicated that there is no need for federal legislation regarding arbitration although limited provisions do exist, for example, with respect to compulsory labour arbitration under the Public Service Staff Relations Act.

A further effect of reluctance to take action at the federal level of government is that Canada has not adhered to the New York Convention on Arbitration. This Convention has been signed by most of the industrialized countries in the world (including the United States) with a view to ensuring that commercial arbitration awards will be enforced

through the domestic courts. It should be noted that one difficulty which is peculiar to Canada arises from the decisions of the Supreme Court of Canada in the *Labour Conventions*[4] case and relates to the proper authority for implementation of the Convention following adherence by the Canadian government.

Nevertheless, it appears that the popularity of commercial arbitration is growing in Canada. The United States Arbitration Association has reported that in 1979 it had more arbitrations involving Canadian enterprises that in any other previous year. Furthermore, the Institute of Arbitrators in Canada is becoming better known and the arbitration system of the International Chamber of Commerce in Paris is universally used.

One organization which has been very active in promoting the concept of arbitration in the domestic context is the Better Business Bureau of Canada (BBB) which currently operates an arbitration program for the resolution of consumer-business disputes in Vancouver, Edmonton, Calgary, Winnipeg, Kitchener, Windsor and Halifax (the Montreal Bureau is considering the introduction of arbitration). The service is provided by the BBB which absorbs the administrative costs of arbitration. It is promoting the program as a quicker, cheaper settlement of disputes than can be found in the judicial process. The service is carried out under the respective Province's Arbitration Act and a hearing takes place if mediation by the Bureau has failed and the consumer and the businessman both agree in writing to submit their dispute to formal arbitration. The arbitrator for a particular hearing will be chosen from a pool of volunteers who have qualified at a formal training program (within reason anyone is eligible to apply to take the training program and upon its completion is placed in the pool for selection to act as an arbitrator).

VII. CONCLUSION

The experiences that individuals have with the administration of justice will profoundly effect their attitudes towards the legal system in their country. The greater the number of avenues for participation, the greater the potential for respect and confidence in the administration of justice on the part of the citizen. Citizens who actively participate in the resolution of their disputes are making a positive contribution by redirecting a matter that is not properly the subject of judicial attention, and hopefully they will arrive at a more humane and long-lasting solution.

In Canada, we are slowly moving towards a revised approach in dispute resolution within and outside the judicial system. The present approaches are by no means complete and permanent; they are partial and temporary answers in the evolution and development of Canada's social and legal institutions.

4. [1937] A.C. 326.