Breaking the Log-jam: Revisiting the Role of Lawyers in Resolving Business Disputes

Prepared for: Legal Education Society of Alberta
Business Disputes

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For presentation in:
Lake Louise, May 5, 2018

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INTRODUCTION

It is important for lawyers to continually improve their skills and our systems for resolving business disputes, to ensure that litigation, arbitration and mediation tools are used most efficiently.

However, that is not sufficient in today's world. Our litigation system is under significant stress, and it is not too much to say that without new and innovative approaches to conflict resolution, that system may break under that stress. Certainly, it is reasonable to expect business clients to tell us that their access to justice through our Court system is severely compromised in today's world, and does not meet their needs.[1]

Our profession, the Courts, and our government have been slow to respond to this changing environment. Access to justice is under siege.

We have a duty to our clients to look for new and innovative solutions. That requires us to look beyond the traditional dispute resolution processes.

The purpose of this paper is to encourage all of us to embrace that idea, and take those steps.

So much of what we read within the legal profession on business dispute resolution is a description of processes like litigation, arbitration and mediation. We are told how to be better advocates, how to use the system more efficiently, and how to be better negotiators. We learn how to draft better contracts, and so on.

It is remarkable that so little is written about the foundation underlying all of this: human conflict. Conflicts in real life are rarely about nice legal disagreements. Instead, they are concerned with business matters such as disagreements over business practices, negatively affected business revenues, lost clients or suppliers, communications or miscommunications, and so on. They commonly have a strong emotional component. A serious understanding of a conflict requires a careful analysis of the presenting problem and its business, economic and social context. There is no simple one-size-fits-all formulation.

This short paper is not about the litigation process. Or the arbitration process. Or even the mediation process. It is not about advocacy skills or drafting agreements either.

[1] Anecdotally, I recently had a conversation with a well-respected senior commercial litigator who told me that some companies may start insisting jurisdictional clauses in their contracts to take disputes outside Alberta due to the delays in our system.

Instead, this paper presents a challenge to all of us privileged to practice law to revisit or expand our role in helping our business clients avoid legal conflicts, or to resolve them once they have arisen, without recourse to the Courts, arbitration or formal mediation.

I should be clear at the outset about two things:

1. This is not intended to be a description of what I have done in my years of practice. I have often fallen short of the ideals challenged and espoused here. These are thoughts that have motivated me in my practice. I have come to the view that we can and must do better to deserve the public's trust.

2. For the foreseeable future, the need for skilled advocates in Court and arbitration processes will remain, as will the need for skilled negotiators in mediation processes. The challenges offered in this paper are not intended to take the place of those skills, but rather to help stem the tide of ever-increasing costs and delays in the adversarial processes which are too often out of reach for many of our clients today.

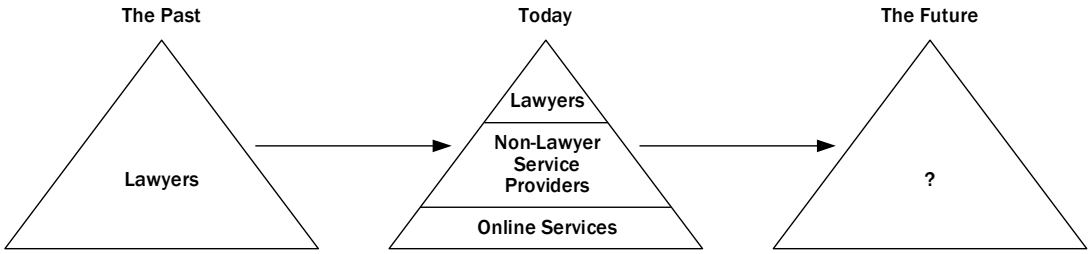
THE BACKDROP

It was not very long ago when the resolution of disputes was squarely within the mandate of lawyers, almost to the exclusion of all others. That resolution occurred through the Court system, with the vast majority of cases settled before trial. Trial dates could be obtained easily, and it was rare for a civil trial to last more than a week or two. Costs were manageable for most businesses.

Today, lawyers no longer have a monopoly on this work. Accountants and other professionals play an increasingly large role in dispute resolution. For smaller matters, on-line services are occupying the field with increasing frequency and volume.

The following provides a pictorial representation of what has happened and is actually happening in the provision of legal services in the western world:

THE LEGAL SERVICES PYRAMID



This has real meaning to us as lawyers. I would argue that in the mid to long-term, if we do not innovate and provide materially better access to justice, our role in the provision of legal services will continue to shrink.

The education of lawyers is still too much based upon the adversarial model which for hundreds of years has been the bedrock foundation of our legal system. For example, at the University of Alberta, there are no mandatory courses concerning conflict resolution. There are optional courses in mediation advocacy, techniques in negotiation, labour arbitration, and international dispute resolution.

At the University of Calgary, there is a mandatory course in negotiation, and optional courses in areas such as dispute resolution and a business clinical program.

The CPLED program in Alberta currently has a very helpful program in negotiation.

As useful as these courses are to law students, they only incidentally touch on the basic education of the nature of human conflict.

Turning to the practice of law, while there are many changes in the law firm business models current today, law firms are slow to change and adapt. Billable hours are still in most firms an important measure of a lawyer's productivity. It has been observed in many arenas that the model of billable hours does nothing to promote innovative and creative problem solving and has a tendency, albeit unintended, to promote inefficiency and a focus on process, not timely problem solving.

The costs of business disputes is increasing at a rapid rate, and is moving litigation and arbitration into the realm where it is not available to many within our society. The delays in the Court and arbitration systems challenge the notion that we provide access to justice in Canada in a timely way. Damage to business relationships are not addressed in any real way within these processes.

The following quote from the Honourable George W. Adams, Q.C. in his book *Mediating Justice: Legal Dispute Negotiations* (CCH, 2003) at page 5 is helpful:

> The legal profession – antiquated as it may sometime seem – has not been insulated from change. Increases in the diversity and size of the profession have contributed to ideological tensions and other communications problems between lawyers. Lawyers increasingly distrust one another. The profession is no longer a seamless cadre of legal professions. Recessions and the economics of lawyering have also increased the number of inexperienced lawyers willing to handle lawsuits. The Courts have been slow to adopt modern management techniques to administer the growing caseloads primarily because our traditional conception of justice encourages judges