Access to Justice for Corporate Litigants: Embracing Change Procedural and Technological Innovation in the Court and in Arbitral Institutions

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PROCEDURAL AND TECHNOLOGICAL INNOVATION IN THE COURT AND IN ARBITRAL INSTITUTIONS

INTRODUCTION

While commercial parties in a dispute do not share the same goal for the substantive outcome of a case, they do often share the same goals with respect to the process for reaching resolution — to have their issues adjudicated in a timely, cost-effective manner (with minimal impact on reputation). With these goals in mind, commercial parties are giving more consideration to whether they will be better served by an arbitral or court proceeding. To those who have experienced both, the question often remains, is one really better than the other?

Inefficiencies in the traditional civil litigation process are well documented. The Supreme Court of Canada issued a ground breaking decision in *R v Jordan*, 2016 SCC 27, wherein the Court admonished the "culture of complacency" in the Canadian criminal justice system[1] created by "[u]necessary procedures and adjournments, inefficient practices, and institutional resources…", and as having caused "great harm to public confidence in the justice system".[2]

While *Jordan* was decided in the criminal law context, its message will ring true to commercial parties, counsel and courts, and is a reminder of the same concern expressed by the Supreme Court of Canada in its earlier decision *Hyrniak v Mauldin*, 2014 SCC 7, where the Court called for a cultural shift in the legal profession and judiciary towards resolution-focussed proceedings to combat delay. Likewise, in *Humphreys v Trebilcock*, 2017 ABCA 116, the Alberta Court of Appeal observed that the lack of timely resolution in litigation is a "corrosive force" in the civil justice system:[3]

> Litigation delay harms those who are directly and indirectly involved in an action tainted by inaction, the civil justice system as a whole and the greater community. Litigation is a form of stress that has the potential to make those directly and indirectly affected unhappy — litigation is expensive, introduces uncertainty and may undermine a person's ability to earn a livelihood and to plan ahead — and may diminish the productivity of the persons affected by the unresolved dispute. People understandably expect that the mechanisms our state has constructed for the resolution of disputes will process them at a reasonable rate and not allow stale actions to survive. When these legitimate expectations are not met, individuals most closely linked to actions and the greater community may lose confidence and respect for the manner in which justice is administered. Litigation delay is a corrosive force in a free and democratic state committed to the rule of law.

It is not a novel observation that without timely and cost-effective access to justice, there is no access to justice. In 1995 Chief Justice Lamer, speaking to the Empire Club of Canada, questioned whether the traditional approach to litigation (i.e. no stone unturned) would eventually cause our

[1] At para 40.

[2] PJ LeSage and M Code, *Report of the Review of Large and Complex Criminal Case Procedures* (2008) at 16.

[3] At para 90.

legal system to become irrelevant, and identified our greatest challenge "over the next several years" as learning to cope with "complexity and prolixity in legal proceedings":[4]

> Delays have been reduced in many courts across Canada and innovative programmes have been put in place to provide quicker and more economical dispute resolution. All of that said, there are still some tremendous problems.
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> Like so many other areas in the public sector, resources are scarce and the workload is increasing. Public expectations of service are not always matched by the commitment of public funds. Delay and expense in litigation are not under the sole, or even the primary, control of the judiciary, but I can tell you the judiciary is doing everything it can to try to improve the situation. These efforts have been successful in many areas.
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> I will give just a couple of examples. On the civil side, there are success stories with pre-trial procedures. Pre-trial conferences have been found to contribute significantly both to the settlement of actions and to the narrowing of issues so that precious court time is saved. The use of summary trials and mini-trials also helps considerably to reduce the time it takes to get a case heard and decided. The success of these techniques has required changes to the Rules of Court, training for judges in pre-trial techniques and genuine desire on the part of lawyers and their clients to get the case resolved.
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> [...]
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> I also believe that we need to assess aspects of our system at a more systemic and institutional level. Some trials are so long that one wonders whether the process will not collapse under its own weight. [...] Does our thoroughness, at times, place substantial justice out of reach? Of course, the process must be fair, but so must be the result. Do we run the risk, at times, of concentrating on micro justice so that we lose sight of macro justice?
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> I think our greatest challenge over the next several years will be to cope with complexity and prolixity in legal proceedings. We must find ways to retain a fair process, but in the context of a process that can achieve practical results in a reasonable time and at reasonable expense. If ways to do this cannot be found, I fear that our legal system will become simply irrelevant for most purposes. Moreover, if we do not rise to the challenge of complexity and prolixity, will we not be forced to re-examine fundamentally our trial process?

Since Chief Justice Lamer shared these words, it seems as if the "complexity and prolixity in legal proceedings" has only grown (especially in light of e-discovery), meaning that the need for accessible solutions to "achieve practical results in a reasonable time and at a reasonable expense" has also grown. As the need for accessible solutions has grown, so too has the search. In the search, many have agreed to arbitrate, anticipating a process by which they can, for example, avoid the cost and

[4] Antonio Lamer, "The Role of Judges" (13 April 1995), *The Empire Club of Canada Addresses*, online: <http://speeches.empireclub.org/61076/data?n=1>

labour-intensive process of extensive documentary and/or oral discovery in favour of producing reliance documents only, and questionings in favour of cross-examinations on witness statements.

While parties and counsel may commence arbitration with these best intentions in mind, very often they are lost in the "fight" and parties find themselves mirroring in arbitration the litigation procedures (and expense) they were hoping to avoid by agreeing to arbitration in the first place. Tellingly, cost has emerged as one of the *worst* features of arbitration.[5] As a result, many are beginning to question whether arbitration can live up to its promise as an inexpensive, flexible, fast alternative to litigation.

Rather than pit the merits of one type of proceeding against the other, it seems more important to recognize their similarities and their common goal – a fair, timely and cost-effective process – and consider how we can better manage either process in order to meet that goal.

MAXIMIZING TECHNOLOGY

There is no question that when managed efficiently, technology can play a key role in the more timely and cost-effective resolution of a commercial dispute, with possibilities ranging from conducting questionings, examinations-in chief, and cross-examinations by video, to a paperless trial and electronic hyperlinked briefs.

(a) Document Production and Technology Assisted Review

Arguably, technology is the most useful in large disputes where parties retrieve thousands, and sometimes tens of thousands, of documents, emails, texts, and other forms of electronically stored information (**ESI**) for review and, ultimately, production. The universe of documents which are retrieved in these types of disputes are now measured in gigabytes or terabytes of data,[6] the approximate magnitude of which can be understood as follows:

- 60,000 pages of emails or word processing documents (24 boxes);
- 150,000 pages of spreadsheets (60 boxes);

[5] White & Case, "2015 International Arbitration Survey: Improvements and Innovations in International Arbitration" (September 2015), online: <https://www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2015_0.pdf> ;
IBA Arb 40 Subcommittee, "The Current State and Future of International Arbitration: Regional Perspectives" (September 2015), online: <https://www.ibanet.org/Document/Default.aspx?DocumentUid=2102ca46-3d4a-48e5-aa20-3f784be214ca>

[6] John Tredennick, "Taking Control: How Corporate Counsel are Integrating eDiscovery Technologies to Help Manage Litigation Costs" (11 June 2014), Digital Discovery & e-Evidence, at 2, online: < https://www.slideshare.net/catalystrepository/taking-control-how-corporate-counsel-are-integrating> [**Tredennick, "Taking Control"**]. As noted by Mr. Tredennick, the discovery process can amount to up to half of a corporation's litigation budget.