Beyond Adjudication to JDR[*] and Problem Solving...

One Court's Story[†]

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Introduction

There is little doubt that the world of judging is changing. Not only do we live in a time in which the public no longer accepts unquestioningly the actions of institutions and their persons in authority, but those in authority are realizing their role needs to change to reflect the evolving needs of the public. The story of the evolution of the Provincial Court of British Columbia over the last 15 years is a case in point.

Context of the Provincial Court of British Columbia

The Provincial Court of British Columbia serves the whole of the province of British Columbia, the westernmost and third largest province in Canada. It is a large and geographically diverse area, approximately 3 times the size of New Zealand and 1/8 the size of Australia.

Yet this relatively vast province has a population of only approximately 4.2 million persons, something more than half of whom reside in the city of Vancouver and nearby municipalities clustered in the south-western corner of the province.

The court sits in 88 locations throughout the province, including of course the various urban centres, but also including remote circuit points throughout the predominantly rural northern half of the province, many of which communities are populated primarily by our First Nations, or Aboriginal citizens.

The court has 135 full time judges, 17 supernumerary judges, 35 judicial justices of the peace (independent judicial officers, but for the most part not legally trained) and administrative staff of approximately 74.

The Provincial Court is the “court of first instance” in British Columbia. There is a second trial court called the British Columbia Supreme Court, and a provincial Court of Appeal (all of which are subordinate to the 9-judge Supreme Court of Canada located in Ottawa, Ontario).

The Provincial Court assumes carriage of approximately 98% by volume of all criminal prosecutions in the province, but only judge alone trials, while the Supreme Court handles all murders and the relatively small number of other criminal jury trials. The Provincial Court exercises a civil jurisdiction to a monetary limit of $25,000 (existing legislation permits an increase to $50,000 by regulation, which is understood to be imminent). The court has exclusive jurisdiction in child protection and handles approximately one half by volume of the inter-spousal custody and access and child support disputes in the province. By way of volume, the court handles approximately 100,000 criminal cases per annum, 17,000 civil disputes, 12,000 child protection and inter-spousal family cases, and 65,000 traffic disputes.

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[*] The acronym "JRD" is used in place of "Judicial Dispute Resolution"

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Prior to 1972, the court was comprised of lay magistrates, although through the 1960's it had become the norm for newly-appointed magistrates to be lawyers. In 1972, the first "*Provincial Court Act*" was enacted creating the fully professional Provincial Court which continues today.

The court exercises a fair degree of administrative independence through management of an annual budget of approximately 50 million dollars, although there remains from the court's perspective an unacceptable degree of fiscal and administrative interdependence with the provincial Ministry of the Attorney General.

An important element of the court's independence is its "Judicial Council", an independent statutory body chaired by the Chief Judge, and including in its nine members two other judges, a judicial justice of the peace, representatives of the Law Society and provincial Bar Association, and three lay persons. The council has statutory oversight of judicial continuing education (which in practice is operated by the judges' professional association), and ultimate authority for oversight of judicial conduct, including judicial discipline (although most issues of judicial conduct are handled in a staged process by the Chief Judge). The Judicial Council is also responsible for vetting potential judicial appointments; while the provincial cabinet actually appoints new judges, it may do so only from a "pool" of lawyers who have been recommended by the Judicial Council through a rigorous screening process.

Beginning the Move Beyond Adjudication

In 1991, the provincial government in consultation with the Provincial Court determined it would be appropriate to increase civil monetary jurisdiction from $3,000 to $10,000. As one component of a plan to accommodate that increased jurisdiction without requiring substantial additional judicial resources it was determined, upon recommendation of the judiciary, that a new process and rules for the court would require a mandatory mediation-styled "settlement conference" in every case. A dispute would only proceed to adjudication in a trial if a consensual resolution was not achieved at the settlement conference.

The enabling legislation for the new process required that disputes be resolved in a manner which is "just, speedy, inexpensive and simple." The settlement conference was conceived as a key element of achieving those goals. In the context of 1991, it was an extreme, even heretical, proposal that judges get down off their bench and sit with litigants around a table with a view to facilitating a consensual resolution. Perhaps not surprisingly, the proposal met considerable resistance from some judges.

The Honourable Judge Dennis Schmidt, who has since 1991 spent many years as an Associate Chief Judge of the Court, was assigned responsibility for implementation of the new process. Judge Schmidt retained private lawyer mediators to train an initial cohort of 20 volunteer judges. In the first instance, it was determined that judges would not be required to act in this mediative capacity at settlement conferences if they had a principled objection to engaging in that role.

Because the process in the 1991 context was so new and so unusual, Judge Schmidt wisely determined that it would be important to create a new and visibly different environment for these conferences. To that end, in most courthouses in the province, conference rooms were constructed with a round conference table and relatively few conventional accoutrements of a courtroom, save for the official court crest on the wall.

What followed was a gradual, even if sometimes somewhat grudging, acceptance of the new process by the judges. The greatest contributor to that evolution of acceptance was the impact of judges who were performing the conferences advising colleagues of the often surprising, and sometimes even

transformational successes they experienced in facilitating the parties' crafting of their own consensual resolution.

Over the years, the rate of cases which do not proceed beyond settlement conference has remained relatively constant at approximately 60%. It has been an effective case management tool in increasing the number of cases which resolve at the "front end" of the process, but it also has been received very positively by a majority of litigants.

Today, virtually all of the judges of the Court preside at civil settlement conferences and family case conferences. All have received basic mediation skills training, and a majority have taken advantage of refresher or more advanced training sessions.

Pushing the Evolution into Family Law

In 1996, the court, again in consultation with government, initiated mandatory "case conferences" in all child protection disputes, again requiring that government child protection authorities and parents participate in a mandatory mediation-styled conference aimed at crafting a consensual resolution, as a precondition to being permitted to engage in an adversarial, adjudicative process. The legislation required that children aged 12 and older be entitled, although not obliged, to participate in the conference.

Once again, the results were gratifying, and sometimes even transformational.

Interestingly, feedback from counsel suggested that in the child protection conference, as compared to the civil settlement conference, it was appreciated if judges would inject more of an evaluative approach than one would expect within classic mediation. It seemed there was a salutary effect to judges "reality checking" either with child protection authorities who appeared to be acting more aggressively than the circumstances may have justified, or with parents who seemed not to be appreciating the very real jeopardy that they might temporarily or permanently be deprived of the privilege of raising their own children.

The success with child protection conferencing led two years later to the creation of a new process and rules requiring a mandatory mediation-styled case conference in all inter-spousal disputes regarding custody and access. In inter-spousal disputes, even before parents could engage in a judicially-facilitated case conference, they were required to participate in a "Parenting after Separation" course, and frequently to participate in mediation convened by a non-judge "family justice counsellor". The judicial case conference would be scheduled following an initial court appearance where the judge concluded the parties appeared to be unable to craft their own resolution.

Once again, and still today, the results of family case conferencing have been gratifying. It is relatively uncommon in the Provincial Court of British Columbia today, from a percentage perspective, to find inter-spousal custody and access cases proceeding to a formal and traditional adjudicative trial. Consistently it is found that judges can assist parents in rising above their immediate inter-personal conflict, to craft some arrangement for the sharing of parenting which they can agree will serve the best interests of the child or children. It is common for judges to break an impasse by observing that the parents have a choice between making their own decisions as to how to care for their children, or adjourning to a trial in which a stranger who knows relatively little about their children will make those decisions instead.

Exploring JDR and Problem-Solving in the Context of Criminal Law

The reality in British Columbia today is that there exists relatively little, if any, structured JDR or other problem-solving in criminal law practice. In 2000, the court introduced a new set of criminal rules of practice called the "Criminal Caseflow Management Rules" ("CCFM") which were intended, in part, to promote early resolution of criminal cases, thereby reducing the number of cases set for trial unnecessarily, and avoiding all of the inconvenience, expense and inefficiency associated with cases not proceeding for trial when they had ostensibly been scheduled to do so.

One component of CCFM is an "arraignment hearing" in which counsel are required to confirm in writing with the court that they have met and discussed the possibility of resolution. There was some hope that the arraignment hearing might create an environment in which there could be more active dialogue, facilitated by the judge, to explore the potential for an early resolution which would be determined to be appropriate by both Crown and defence.
For a variety of reasons – including the deeply ingrained "culture" of the criminal Bar and Bench - there was considerable resistance to this sort of approach in criminal prosecutions. While some aspects of the CCFM Rules have improved practice in the court, the arraignment hearing has not evolved to promote anything which reasonably would be recognized as constituting JDR.

In the meantime, the court has developed in Vancouver a Drug Court which operates on the model which has evolved in a few other cities in Canada, but in a great many locations in the United States. This is a "problem-solving" court in that drug-addicted defendants agree to participate in an intensive therapeutic program, with continuous monitoring by the court, in the hope that if they "graduate" from the therapeutic program that the original drug charge will be stayed, and no conviction entered. The program has realized very real successes with individuals, but the numbers are really quite small, viewed in the context of the overall volume of drug-addicted offenders in the Vancouver court. The role of the judge is dramatically different: the judge meets before court with Crown and defence and service providers to discuss the approach to be taken with each defendant. In court, the judge can be cheerleader or taskmaster. There is of course an adjudicative component, but it is secondary to the role of problem solver.

At the time of writing this paper, there is active planning towards creation of a "Community Court" in Vancouver, which would operate similarly to the Community Courts in Midtown, Manhattan, in Red Hook, Brooklyn, and others which have evolved from those throughout the United States, and somewhat similarly to the Community Court which has begun operating in Liverpool, England, and the "Neighbourhood Justice Centre" which is pending in Melbourne, Australia.

While the establishment of the Community Court is not 100% assured at this point, it does appear probable that it will proceed and be operational before the middle of 2007. The court will bring a "problem-solving" approach to offenders who reside in the Vancouver downtown core, or who commit offences in the downtown core, and are charged with a range of *Criminal Code* offences which, broadly speaking, would be included in the category of so-called "minor crime". The current planning contemplates an approach in which individuals who meet the demographics as to both offender and offence would come first to the Community Court and be offered the opportunity to participate in a primarily rehabilitative response if they are prepared to acknowledge the commission of the offence and to enter a guilty plea, with the "carrot" being that the punitive component of the disposition would be less severe than that which they reasonably might expect in the conventional court. The court would be substantially more closely integrated with health care professionals and other service providers than existing courts, and it would be expected that there would be greater access to therapeutic and similar resources. The court also would reflect a change from conventional practice in including a citizens' advisory panel, anticipating that the judge, as well as Crown and defence, would meet regularly with

community representatives and explore ways to permit the community to be engaged in the court-ordered outcomes (although not, of course, the core functions of the court itself).

Aspirations for Greater JDR and Problem-Solving in Criminal Law Practice

While there are considerable inefficiencies and frustrations with certain processes associated with the prosecution of violent and other serious criminal offences, one needs to be cautious when dealing with serious crime in adjusting criminal procedures which have developed over many years to ensure the integrity of criminal prosecutions, and to preserve and protect the rights of individual accused persons.

There exist, however, significant numbers of offenders, and prosecutions, for whom and for which existing processes are at a minimum inefficient, but also seem frequently to fail to address the real interests of both the offender and the community. It seems at least arguable that this may in part be attributable to a collection of inaccurate assumptions. So, for example, we structure aspects of criminal process on the assumption that there is a stigma to a criminal conviction, yet a significant percentage of offenders committing "routine" criminal offences have a long record of criminal convictions; presumably there is little or no stigma to one more. Similarly, we structure processes on the assumption that every case is going to trial, yet we know that at least 93% of the cases (in British Columbia) either will end up in a guilty plea or a stay of proceedings, or otherwise not ever lead to the calling of viva voce evidence. Thus we have persons coming to court repeatedly for purposes such as securing additional Crown disclosure (at a level of particularity that may be appropriate for trial, but isn't necessarily required for informed decision making as to plea), and for arrangements to be made for publicly appointed trial counsel, and so on. Within the population of offenders who commit a large volume of the "routine" offences, there is a preponderance of persons who are drug-addicted and or struggle with mental health challenges, who find it extremely difficult to meet the procedural expectations of the court. Inevitably, this leads to warrants being issued for their arrest and time being spent otherwise unnecessarily in pre-trial custody. It is too frequently the case that the eventual disposition after a great many procedural court appearances is a sentence of "time served", which seemingly is an acknowledgement that the process has become the punishment, rather than the judicially crafted sentence imposed by a judge.

For all of these and other reasons it seems there could be considerable merit to identifying an appropriate way in which to require whatever may be determined to be the criminal law equivalent of a civil settlement conference or a family case conference at the very outset of a prosecution to ascertain whether in the circumstances of the particular offence, and the circumstances of the particular offender, it may "make sense" to identify a resolution which is acceptable to both Crown and defence, and likely to be acceptable to the independent court.

JDR and Problem-Solving More Generally

I expect that fifteen years ago a majority of the judges of our court would have said, if asked, that it was not part of their role to be involved in case management, and not their role to encourage or facilitate litigants to solve whatever kind of problem may be bringing them to a courthouse. The judicial function was perceived narrowly as the adjudicative role undertaken in a trial setting under prescribed rules of procedure and evidence.

Today I expect that a majority of the judges of our court would describe their roles substantially more expansively. I expect they would say that they perceive their function as judges in 2006 to include doing whatever they reasonably and ethically can to assist members of the public and representatives of the state to achieve a sensible resolution to whatever dispute brings them to a courthouse, and to do so if possible with a minimum of process and expense. Particularly in the area of family law, I am confident that the

judges of our court would speak with some passion about the benefits which accrue to families and to children in identifying arrangements for the care of children without the acrimony and long-term damage associated with adversarial family litigation.

In the area of civil litigation, it has become apparent in British Columbia that conventional litigation in the Supreme Court has become so complex, time consuming and expensive that the average citizen has functionally been disenfranchised in the sense of being denied practical and realistic access to the publicly-funded dispute resolution process. It is often said in British Columbia that one cannot "afford" to litigate a civil claim of less than $100,000 as the costs of the litigation are very likely to be wholly out of proportion to the amount in dispute, and in extreme cases to exceed the amount in dispute.

It must surely fall to judges, as the persons who ultimately control process in the civil, family and criminal courts, to work creatively, and without undue attachment to deeply embedded historical practices, to find and provide mechanisms for dispute resolution which are just, speedy, inexpensive and simple. We will do well to try to approach these challenges from the perspective of the average citizens who require access to justice, rather than from the traditional perspectives of lawyers and judges, even while being informed by our knowledge of substantive law, and experience with criminal, civil and family practice.

In the context of this conference in which the focus is Alternate Dispute Resolution, and in particular, mediation, it is worth observing that with the rapid development of highly trained and qualified non-judge mediators, it may be time for judges to relinquish mediation functions to others, and to focus their attention on the creation of "alternate" adjudicative processes which continue to be "just", but which are substantially simplified, and substantially more accessible for the public we are privileged to serve.

It is my personal hope that 15 years from now we will describe an effective justice system which is as different from 2006 as 2006 is from 1991.