INTEGRATING ADR INTO CIVIL LITIGATION

What are the Challenges we Face?

Saskatchewan's court-connected mediation program was introduced in 1994. Over the past eleven years we have seen significant changes in how lawyers, judges and court staff view the program. As lawyers become more comfortable with their role in mediation and experience positive results, their attitude towards the program changes. I believe there has been a real shift in how members of the legal profession are practicing. The norms, behaviors and expectations are changing. That, in turn, has a huge effect on how clients approach the program and ultimately, the results that occur in the process. The culture ***is*** changing.

My concern is that court-connected mediation programs are still viewed by many as an "alternative" to the justice system or some type of "diversion" or "detour" rather than an **integrated** part of the whole. The justice system exists to provide dispute resolution mechanisms for members of our society who are in dispute. It must be accessible, timely and offer parties a means of participating directly in resolving issues. Litigation is one dispute resolution process, however, it should be seen as a last resort rather than the starting point.

Are we making progress? Certainly, Saskatchewan can be proud of the leadership it has demonstrated, and continues to demonstrate in this area. The justice system is changing and evolving and those working within the system will continue to change and adapt. Some days the changes will be pushed by those working within the system. At other times changes will come from external pressures. Regardless of the impetus, if we remain sensitive to the needs of the public **and** to those who work within the system we will succeed.

Since the completion of the Canadian Bar Association's Task Force Report on Civil Justice Reform, a number of initiatives have been introduced into the civil litigation process. As we review those initiatives to determine what we can learn, we must do this with the knowledge and the understanding of how change impacts individuals, how they react, how they adapt and how this affects organizations and broader systems. When change is being introduced into a system, we must be cognizant of the complexity of the larger system and anticipate people's reactions.

Change is not an event. It's a process. It is a transition. When we are working in a very complex system with a huge number of variables, it creates some challenges. The introduction of legislation might be described as an event. The shift in norms, behaviors and expectations of those working in the system has been and continues to be an evolution. My experience with both the introduction of a court-connected mediation process and in working with organizations struggling with change, suggests that often we focus on the effects of the

problem rather than the originating causes. In the justice system, the focus can quickly become how best to divert cases. If there are too many cases going through the courts or they take too long to be resolved, our first response is to simply pluck some cases out of the system. We don't fix the street – we send some folks on a detour. Quick fixes can provide some breathing room – it seldom solves the problem.

If we follow this path, it's easy to be caught in the short term analysis of how quickly we settle cases – how quickly can we get a case to trial, what does it cost participants and what does it cost to operate the system. We tend to talk with those working in the system and look for ways of doing the same work faster. Our discussions are about legal principles, legal issues, legal rights and legal procedures, and of course, the questions become how fast we can move from one step to the next. Statements of Claim, Statements of Defence, Statements as to Documents – should you go through a mediation process before discoveries or after, will the process slow you down on the way to pretrial - and we become captured by the system.

The debates we engage in focus on – can we require people to participate in a mediation process? When's the best time, who is going to pay, who should do the mediation – a Judge? a lawyer? While it's true these are valid questions, we must consider what it is we set out to accomplish. Is this about some minor adjustments to the system that can be accomplished with a few procedural amendments or are we attempting to fundamentally change the way the justice system responds to the needs of the public. If our focus is *how can we assist people resolve their own issues with dignity and respect,* it provides a much different lens for us to look through. It raises the question – why does the justice system exist and who does it serve? The system was originally designed as a dispute resolution mechanism for members of our society, a system that was fair, trusted and was accessible to the public.

In our efforts to ensure fairness, we created some rules and a few procedures. Over time, these blossomed into a complicated maze that can only be navigated by individuals who work within it – lawyers, judges, court clerks, local registrars. The costs associated with accessing the justice system to resolve a dispute have increased to the point where access to the system is effectively denied to many. Self represented litigants – those brave souls who attempt to navigate the system without a guide – are perceived as an inconvenience and a hazard to other drivers on the road. The fact there is an ever increasing number of self represented parties is one indicator that our system is breaking down and is in need of repair. Somewhere along our journey, we have taken the wrong turn. The developments in the area of civil justice reform are a result of us trying to get back on track – to realign our system so it works for members of the public.

The system is always experiencing minor changes; the public is always reacting and providing feedback about how they view the system. The danger is that

sometimes, we become so comfortable with how a system works we fail to recognize the early signs from users that adjustments are necessary. The early resistance we received to the mediation program was not from plaintiffs and defendants; they wanted to be actively engaged in the resolution of their issues. The struggle was helping the legal community make adjustments to how they viewed the litigation process and how they prepared a file. The public was much farther ahead in their thinking and expectations than those who worked in the system. We had been captured by the litigation process and by the rules and procedures we had created. While well intentioned, we had somehow forgotten that the system we worked in was originally intended to meet the needs of the users. It was to assist parties resolve disputes.

The reforms that are now being introduced require a significant shift in mindset. We are moving from a rights-based, adversarial process where the parties observe from the sidelines as their legal counsel translate their conflict into a legal problem to be debated, to an interest-based approach where the parties define their conflict in terms of interests and actively participate in designing a solution while their legal counsel coaches from the sidelines. It is a fundamental shift in the role of lawyers and in the participation level of their clients.

If our focus is to provide a forum where parties can come together and actively participate in resolving their disputes, then the real challenge is to create a shift in the mindset of those working within the system – a shift in the way we practice law and a shift in the way that we administer the courts. Certainly a much more daunting task than legislating the requirement to participate in a mediation process.

Accomplishing this shift requires more than legislating a polite conversation. It requires adjustments in the court system to allow cases to flow freely between various dispute resolution processes. Cases may move from mediation into case management or enter directly into case management and then move to mediation at a later, more appropriate time. It requires the recognition that case conferencing (a judge led mediation process) can be extremely effective in some matters and may be the appropriate first step in small claims. In other situations, the Judiciary needs the freedom to direct parties to court connected mediation programs where there is more time available to help parties work through the issues.

To achieve real integration we need to consider more flexibility in how cases move within the system, how we provide training and skill based learning opportunities to those working in the system and finally how we ensure that there are appropriate facilities available to conduct mediations, case conferences, pre trials and other collaborative processes. We must have a fundamental shift in the way we do business.