2014

"A different day in court": Exploring the place of judicial mediation in Ontario's alternative dispute resolution landscape

Nicole Aylwin
Canadian Forum on Civil Justice, naylwin@cfcj-fcjc.org

Trevor C. W. Farrow
Osgoode Hall Law School of York University, tfarrow@osgoode.yorku.ca

Source Publication:

This article was first published by Thomson Reuters in the Journal of Civil Litigation and Practice and should be cited as Aylwin, Nicole; Farrow, Trevor C.W., "'A different day in court': Exploring the place of judicial mediation in Ontario's alternative dispute resolution landscape", 2014 3 JCivLP 122.

"A different day in court": Exploring the place of judicial mediation in Ontario's alternative dispute resolution landscape

Nicole Aylwin and Trevor C W Farrow*

In January 2011, the Ontario Bar Association established a taskforce to explore the question of how judicial dispute resolution could improve access to justice in Ontario. In their recently released final report, the taskforce offers some compelling conclusions. In particular, the report recommends that JDR be formally recognised as part of the alternative dispute resolution options available in Ontario since it would provide litigants the opportunity to receive their "day in court" without the necessity of a costly trial. This article elaborates on the findings of the report and places them within the larger context of current research and Canadian policy developments in access to justice.

INTRODUCTION

In 2011, the Ontario Bar Association (OBA) established a taskforce to explore the question of how judicial dispute resolution (JDR) could improve access to justice in Ontario. The final report of the taskforce, *A Different "Day in Court": The Role of the Judiciary in Facilitating Settlements* was released in July 2013.[1] The report provides a review of JDR in several Canadian jurisdictions along with recommendations on how best to provide JDR in Ontario. In this article we argue that the value of this report goes beyond its specific policy recommendations. When placed against the backdrop of a growing conversation about how to address the access to justice "crisis" in Canada, *A Different Day in Court* signals an increasing awareness in the justice community that formal, court-based dispute resolution must be adapted and reconfigured to meet the changing demands and needs of the public.

This article proceeds as follows. First, we provide an overview of the new access to justice policy landscape emerging in Canada. Secondly, we place *A Different Day in Court* within this landscape, noting how the report's recommendations align with the new access to justice framework guiding civil and family justice reform. Finally, we offer some concluding remarks on what this new access to justice landscape will mean for the courts and their ability more generally to adapt to changing public need. We recognise that similar questions are being examined in other countries. This article, however, focuses on recent Canadian initiatives.

CANADA'S SHIFTING ACCESS TO JUSTICE LANDSCAPE

Canada is currently experiencing an access to justice "crisis".[2] Courts are slow, procedures complex, lawyers expensive, and the adversarial nature of formal court processes, alienating. The result is a growing "justice gap" and a civil and family justice system that is often inaccessible to those who need it. Recent research has confirmed that:

* Nicole Aylwin: Canadian Forum on Civil Justice and Winkler Institute for Dispute Resolution. Trevor CW Farrow: Osgoode Hall Law School.

[1] Ontario Bar Association – Judicial Mediation Taskforce, *A Different "Day in Court": The role of the Judiciary in Facilitating Settlements* (Ontario Bar Association, July 2013), http://www.oba.org/getattachment/News-Media/News/2013/July-2013/A-Different-'Day-in-Court-The-Role-of-the-Judiciar/ADifferentDayInCourt7122013.pdf (*Different Day in Court*).

[2] McLachlin B, PC Chief Justice of Canada, "Remarks to the Council of the Canadian Bar Association" (delivered at the Canadian Legal Conference, Calgary, 11 August 2007), http://www.cba.org/CBA/calgary2007/pdf/chiefjustice_remarkscouncil.pdf. The Chief Justice continues to highlight the inability of the civil justice system to meet the needs of Canadians and the urgent need for civil justice reform: see eg, Action Committee on Access to Justice in Civil and Family Matters, *Access to Civil & Family Justice: A Roadmap for Change* (Ottawa, October 2013), http://www.cfcj-fcjc.org/action-committee (*Roadmap*) at 1; Action Committee on Access to Justice in Civil and Family Matters, *Colloquium Report* (Ottawa, June 2014), http://www.cfcj-fcjc.org/sites/default/files//docs/2014/ac_colloquium_web_FINAL.pdf at 5-7.

- *Canadians experience a growing number of unmet legal needs*. Recent studies indicate that 49% of the population in Canada will experience at least one legal problem in any given three-year period.[3] Most will not have the resources to solve them.
- *Unresolved legal problems have a disproportionate affect on marginalised communities*. Members of poor and vulnerable groups (eg low-income, aboriginal, disabled) experience more legal problems than members of other socio-economic groups and have more difficulty addressing them.[4]
- *Legal problems "cluster" and multiply*. Legal problems rarely occur in isolation; one legal problem can often lead to other legal, health and social problems.[5]
- *Unmet legal needs have social and economic costs*. Unresolved legal problems not only adversely affect people's lives, but also are a heavy drain on the public purse.[6]

While access to justice has been a "problem in search of a solution" for nearly three decades[7], the current "crisis" is increasingly reflected in a mounting body of evidence[8] that suggests that without change and major reform, the current system is not sustainable.[9]

In the past year alone, two major national reports have been released in Canada that explore this crisis: the final report of the national Action Committee on Access to Justice in Civil and Family Matters, *A Roadmap for Change*, and *Envisioning Equal Justice*, the final report of the Canadian Bar Association's Access to Justice Committee.[10] In many ways, these two major reports represent the codification of a new framework for access to justice that has been gaining momentum in Canada

[3] Canadian Forum on Civil Justice (CFCJ), "The Cost of Justice: Weighing the Costs of Fair and Effective Resolution to Legal Problems", http://www.cfcj-fcjc.org/cost-of-justice (Cost of Justice). For earlier survey research on national legal needs see Currie A, *The Legal Problems of Everyday Life: The Nature, Extent and Consequences of Justiciable Problems Experienced by Canadians* (Department of Justice Canada, Ottawa, 2007), http://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr07_la1-rr07_aj1/rr07_la1.pdf.

[4] *Roadmap*, n 2 at iii; http://www.cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf (*Final Report*); Canadian Bar Association (CBA), *Reaching Equal Justice Report: An Invitation to Envision and Act* (CBA, Ottawa, November 2013) at 138, http://www.cba.org/CBA/equaljustice/secure_pdf/EqualJusticeFinalReport-eng.pdf (*Equal Justice*). Both of these reports build on other Canadian and international legal needs research: see eg, Currie, n 3; Genn H et al, *Paths to Justice: What people do and Think About Going to Law* (Oxford: Hart 1999); Pleasence P et al, *Causes of Action: Civil Law and Social Justice* (Norwich: Legal Services Commission, 2004); Coumarelos C et al, *Legal Australia-Wide Survey: Legal Need in Australia* (Sydney Law and Justice Foundation of New South Wales, 2012).

[5] *Roadmap*, *n* 2 at 13; Currie n 3 at 89.

[6] *Roadmap*, *n* 2 at iii.

[7] Buckley M, "Use and Occupancy: Building Codes and Maintenance Manuals – Can Court Rules Increase Access to Justice" in Farrow TCW and Molinari P (eds), *The Courts and Beyond: The Architecture of Justice in Transition* (Canadian Institute for the Administration of Justice, Ottawa, 2013) at 127.

[8] See eg, Cost of Justice, n 3; Canadian Bar Association, *Envisioning Equal Justice Project* (CBA, Ottawa, Canada) http://www.cba.org/CBA/equaljustice/main; Law Society of Upper Canada (LSUC), *Ontario Civil Legal Needs Project* (LSUC, Canada) http://www.lsuc.on.ca/with.aspx?id=568.

[9] *Roadmap*, n 2 at iii.

[10] *Final Report*, *n* 4; *Equal Justice*, *n* 4. In addition to these two reports, several other reports dealing with specific aspects of access to justice have been released: see Action Committee on Access to Justice in Civil and Family Matters, Prevention, Triage and Referral Working Group, "Responding Early, Responding Well: Access to Justice through the Early Resolution Services Sector" (CFCJ, April 2013), http://www.cfcj-fcjc.org/collaborations; Action Committee on Access to Justice in Civil and Family Matters, Family Justice Working Group, "Meaningful Change for Family Justice: Beyond Wise Words" (CFCJ, April 2013), http://www.cfcj-fcjc.org/collaborations; Action Committee on Access to Justice in Civil and Family Matters, *Report of the Access to Legal Services Working Group* (CFCJ, April 2013), http://www.cfcj-fcjc.org/collaborations; Action Committee on Access to Justice in Civil and Family Matters, *Report of the Court Processes Simplification Working Group* (CFCJ, April 2013), http://www.cfcj-fcjc.org/collaborations; Calgary Poverty Reduction Initiative, Justice Sector Constellation, *Intervening at the Intersection of Poverty and the Legal System: Final Report of the Justice Sector Constellation of the Calgary Poverty Reduction Initiative* (March 2013), http://www.enoughforall.ca/wp-content/uploads/2013/03/Justice-Sector-Constellation-Final-Report.pdf; Macfarlane J, *The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants* (LSUC, May 2013), www.lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2014/Self-represented_project.pdf; Track L et al, *Putting Justice Back on the Map: The Route to Equal and Accessible Family Justice* (West Coast LEAF, February 2014), http://www.westcoastleaf.org/userfiles/file/FINAL%20REPORT%20PDF.pdf.

since the late 2000s. While traditional approaches to access to justice have aimed primarily at facilitating access to courts and lawyers, both *A Roadmap for Change* and *Envisioning Equal Justice* propose a different framework – one that relies on an expanded definition of access to justice and advocates for a justice system that is more "people-centered"[11] and "puts the public first".[12] This new framework includes the following key features.[13]

- A more holistic view of the justice system. Recognising that legal problems are usually experienced as part of a constellation of other non-legal problems, access to justice is no longer being defined strictly by the ability of the public to access formal court processes and obtain affordable legal counsel. While these remain important aspects of access to justice, this new approach to access to justice recognises that such a narrow focus on the formal justice system will fail adequately to address the complex nature of the problems, which are "intimately interwoven with other social and personal issues".[14] Consequently, a "more expansive user-centered vision"[15] of access to justice has been adopted in an attempt to create space for policy makers and justice stakeholders to address the multifaceted nature of legal problems experienced by everyday people.[16]
- A focus on collaboration and co-operation. The administration of justice has often taken place in "silos", with very little collaboration within and across jurisdictions and sectors.[17] Not only does a lack of collaboration result in the duplication of work and effort, it can make it difficult to solve the "wicked" policy problems that define access to justice.[18] Collaboration is needed not only within the formal justice system, but also between the justice system and other social service sectors. It is only through collaboration with non-legal actors and programs that the justice system will be able to provide integrated services that address the multidimensional nature of legal problems.[19]
- The recognition that there are "many paths to justice".[20] Not all paths to justice need to lead to litigation or other formal court and tribunal processes.[21] While courts and tribunal processes remain an important part of the dispute resolution landscape, more attention needs to be given to developing alternative forms of dispute resolution (within and outside the courts), which encourage early resolution, and preventing conflict in the first place. This includes developing and supporting multi-service hubs that offer various forms of dispute resolution as well as other social and community services.[22]
- A commitment to a "culture-shift"[23] that puts the user at the centre of the justice system. The justice system should be "trying to improve law and process not for their own sake", but rather for achieving fair and just results for those who use the system.[24] Too much attention has been paid

[11] *Equal Justice*, *n* 4 at 14.

[12] *Roadmap*, *n* 2 at 7.

[13] This article highlights only a few of the key features of the emerging access to justice framework. Please refer to the full reports for a comprehensive and detailed description of this new approach.

[14] *Equal Justice*, *n* 4 at 61.

[15] *Equal Justice*, *n* 4 at 61.

[16] *Roadmap*, *n* 2 at 2.

[17] *Equal Justice*, *n* 4 at 131; *Colloquium Report*, n 2.

[18] Wicked policy problems are characterised by their complex interdependencies with other problems. Wicked problems are often difficult to identify and solve: see *Equal Justice*, *n* 4 at 124; Buckley, n 7 at 132; Australian Public Service Commission, *Tackling Wicked Problems: A Public Policy Perspective* (2008) at 3-5, http://www.apsc.gov.au/__data/assets/pdf.

[19] *Roadmap*, *n* 2 at 7; see also *Colloquium Report*, n 2.

[20] *Equal Justice*, *n* 4 at 62; see also Genn, n 4.

[21] *Equal Justice*, *n* 4 at 61-62.

[22] *Roadmap*, *n* 2; Action Committee Working Group Reports n 10; *Equal Justice*, *n* 4 at 72.

[23] *Roadmap*, *n* 2 at 6.

[24] *Roadmap*, *n* 2 at 9.

to developing a system that makes sense for those who work within it. Court processes and other dispute resolution options need to make sense for the people who *use* the system. The system must focus primarily on "people's needs, not mainly those of justice system professionals and institutions".[25]

While both *A Roadmap for Change* and *Envisioning Equal Justice* provide more detailed accounts of this new access to justice approach than described here, these four highlights provide the basic scaffolding for a new "architecture of justice"[26] that will meet the needs of all Canadians.

It is within this context of reform that the OBA report, *A Different Day in Court*, emerges. In the next section, we briefly summarise the report and elaborate on its findings, highlighting, in particular, the ways in which the report reflects and contributes to the growing conversation on access to justice and civil justice reform.

"A DIFFERENT DAY IN COURT"

In 2011 the OBA established a taskforce[27] to study non-adjudicative JDR for the purposes of providing a recommendation on the optimal role of the judiciary in facilitating settlements in Ontario. JDR refers to the role of the judiciary in facilitating settlements in the civil litigation process. JDR can include, but is not necessarily limited to, conciliation and mediation. Currently, JDR is provided in Ontario on an "ad hoc" basis.[28] All 10 provinces in Canada, including Ontario, have some rules of court that allow for JDR. However, in contrast to Ontario's ad hoc system, the rules of court in several provinces, including Nova Scotia, British Columbia, Alberta, Saskatchewan and Manitoba, provide more formalised processes for JDR.[29]

Ontario's slow turn to formalised JDR is partly the result of policy decisions made in the late 1990s. When Ontario introduced the Ontario Mandatory Mediation Program in 1999, the choice was made to use private mediators rather than judges to provide mandatory mediation.[30] This has resulted in the development of a well-established private mediation system in Ontario, but has left JDR underdeveloped. In light of the growing consensus that the development of alternative dispute resolution options both within and outside the courtroom would be central to improving access to justice, the taskforce set out to determine how formalised JDR could add to the alternative dispute resolution landscape in Ontario. Of particular interest was the role JDR could play in improving the affordability of mediation and court efficiency. Additionally, the taskforce sought to explore how JDR could enhance client experience with the litigation system, provide more options for dispute resolution options and allow people to have "a day in court".[31]

After significant consultations and examinations of other jurisdictions, the final report, *A Different Day in Court* was released in July 2013. The report makes several specific policy recommendations on how the practice of JDR should be integrated into Ontario's justice system. These include:

---

[25] *Equal Justice*, *n* 4 at 58.

[26] Farrow TCW, "Introduction" in Farrow and Molinari, n 7 at 1-3.

[27] The taskforce was co-chaired by Bryan Finlay QC, WeirFoulds LLP and David Sterns, Sotos LLP. For a complete list of taskforce members see *Different Day in Court*, n 1 at 28.

[28] *Different Day in Court*, *n* 1 at 7. See also Winkler W, Chief Justice (as he was then), "Some Reflections on Judicial Mediation: Reality or Fantasy?" (Ontario Courts, Winter 2010) Advocates' Soc J, http://www.ontariocourts.on.ca/coa/en/ps/speeches/reflections_judicial_mediation.htm; Winkler W, "Access to Justice, Mediation: Panacea or Pariah?" (2007) 16(1) Can Arbit and Med J, http://www.ontariocourts.ca/coa/en/ps/speeches/access.htm.

[29] *Different Day in Court*, n 1 at 9-10. For an overview of JDR processes in Canada see Agrios JA, "A Handbook on Judicial Dispute Resolution for Canadian Lawyers" (CBA, January 2004), http://www.cba.org/alberta/PDF/JDR%20Handbook.pdf. More recently see Farrow TCW, *Civil Justice, Privatization and Democracy* (University of Toronto Press, Toronto, 2014) at c 3. For an international discussion of JDR see Sourdin T and Zariski A, *The Multi-Tasking Judge: Comparative Judicial Dispute Resolution* (Thomson Reuters, Australia, 2013).

[30] *Different Day in Court*, *n* 1 at 22. For a history of the policy development of the Ontario Mandatory Mediation Program, see Ontario Ministry of the Attorney General, "Public Information Notice – Ontario Mandatory Mediation Program", http://www.attorneygeneral.jus.gov.on.ca/english/courts/manmed/notice.asp; see also Farrow n 29 at c 3.

[31] *Different Day in Court*, *n* 1.

- separating the judicial settlement facilitation process from the pre-trial process, which would ensure JDR is voluntary;
- using either court rules or practice directions to ensure proper "gatekeeping" and management of judicial resources;
- providing appropriate training to judges (and allowing judges not well suited to mediation to be exempt from participating in JDR); and
- allowing parties to choose their preferred judicial mediator.

Beyond these Ontario-specific recommendations, the report enters into a broader conversation on how the Ontario courts can reform themselves to put the "public first".[32] More specifically, it uses the access to justice framework as the basis for considering the benefits of JDR and to guide its recommendations on the appropriate role of JDR in Ontario's dispute resolution landscape. The report highlights the following benefits provided by JDR.

- JDR offers a non-fee based option for dispute resolution. This is particularly advantageous to self-represented litigants or other parties of limited means who may otherwise be unable to afford the cost of private mediation or the full litigation process.[33]
- JDR provides "a day in court". Often parties have a desire to "tell it to a judge".[34] The reasons for this may vary, but the report notes that for those who are generally alienated from the system due to socio-economic factors, JDR offers the opportunity to feel that their case and circumstances have been given the proper "gravitas" in the court. This gives dignity to the parties and also helps to avoid unnecessary trials.[35]
- The *parties* experience with the justice system improves with JDR. Recent research on legal consciousness and access to justice suggests that while the outcome of a case is important, how a person is treated, together with how they understand and feel about their experience within the justice system, is equally or more important to parties than the outcome.[36] Increasingly, people are looking for a "new offer of justice" – one that does not consider the "adversarial nature of traditional litigation as the most desirable in a court process".[37] The report provides anecdotal evidence from Alberta showing that despite the wait time for a JDR date being longer than the wait for a trial date in some instances, parties are still opting for the former. This suggests that there has been a shift in how parties prefer to handle their disputes, and that JDR is playing a meaningful role in ensuring parties leave the system with a sense of satisfaction at having achieved "justice".[38]
- JDR improves the judicial experience. Litigant's sense of increased satisfaction also extends to judges, who report a greater sense of satisfaction when able to craft alternative solutions to problems that take into account the emotional, social and other non-legal issues that often intersect with legal disputes.

[32] Although a growing number of reports and recommendations, including the two national reports discussed above, focus on improving justice services outside of formal court and tribunal dispute resolution processes, efficient and effective courts and tribunals still remain a central part of a healthy and accessible justice system.

[33] *Different Day in Court*, n 1 at 18.

[34] *Different Day in Court*, n 1 at 15.

[35] The report further notes that JDR provides people with little experience with the justice system a sense of neutrality and fairness that may not come with private mediation. While the merits of such a claim may be debated, this is the way in which the benefits of JDR were characterised by participants in the interviews and during the Policy Day conducted by the taskforce.

[36] Farrow TCW, "What is Access to Justice?" (2014, forthcoming), Osgoode Hall LJ; *Equal Justice*, *n* 4 at 18.

[37] *Different Day in Court*, n 1 at 13.

[38] Alberta continues to sort out how to best handle its dual system, which uses both JDR and private mediation. For more information on the Alberta JDR process, see Rooke JD, "Use and Occupancy: Building Codes and Maintenance Manuals in the Court of Queen's Bench of Alberta" in Farrow and Molinari, n 7 at 97; Rooke JD, "Improving Excellence: Evaluation of the Judicial Dispute Resolution Program in the Court of Queen's Bench of Alberta" (Court of Queen's Bench, 1 June 2009), http://www.cfcj-fcjc.org/sites/default/files/docs/hosted/22338-improving_excellence.pdf; Goss J, "Judicial Dispute Resolution: Program Setup and Evaluation in Edmonton" (2004) 42 Fam Ct Rev 511.

The report mindfully balances the potential benefits of JDR with the need to ensure fair process and just results, paying careful attention to the potential for a judge's suggestion for settlement to be perceived as coercive[39] and the concern that JDR delivers "justice light"– or closed-door procedures without the scrutiny or procedural protections of a trial.[40]

When taken as a whole, the report demonstrates an attempt by the OBA to take seriously the idea of "re-centering" the courts so they address the "justice gap" in ways that meet the shifting needs of the Canadian public. It treats legal problems as multi-faceted, it gives careful consideration to user experience – without compromising on just process – and recognises that courts and judges – and not just private alternatives – have a role to play in providing (affordable) alternative dispute resolution options that are essential to improving access to justice.

CONCLUSION

There is clearly a growing consensus around the fact that to address the access to justice crisis in Canada, change is needed – both within and beyond the courts. Old patterns and old approaches are no longer providing adequate justice for a 21st-century public – one that is diverse, technologically savvy, pluralistic and global. To meet the needs of a modern citizenry, a modern justice system is needed. What does this mean for the courts? It means grappling with some difficult "identity" questions.

- Can the current, very structured and formalistic court system achieve and meet the demands and needs of those it is meant to serve? Or, do courts need a "renovation"?
- Will courts refuse to innovate and be left behind? Or, will they rise to the challenge to be more innovative, nimble and creative?

There is no single solution to the access to justice crisis – there are many. In a public rule of law-based society we want, and need, courts to play a central role in finding solutions and delivering justice. And, while there will always be the need for "heavy justice", there is an equal, if not greater, need for a justice system that is flexible, creative, and sensitive to the demands and needs of the people it serves. The OBA report is evidence that the questions above are already being discussed and their answers debated. How they are ultimately answered will have significant impact on how we "do" justice.

[39] *Different Day in Court*, n 1 at 16.

[40] *Different Day in Court*, n 1 at 17. For a general discussion of importance of public process and open courts, see Farrow n 29 at 43-50.