BCAMI Symposium

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Notes for keynote address
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Thank you for inviting me to participate in this conference.

I realize that the primary purpose of your gathering is to share best practices, network with fellow professionals, and learn about emerging issues in the business of actually providing ADR services.

But I hope you won't mind if I take advantage of this opportunity at the outset of your gathering to say how important this work is.

I am convinced that if our justice system is to be truly effective in making both access to justice and the rule of law real for citizens in a world of increasingly complex interactions and disputes, there is a fundamentally important need and role for non-judicial dispute resolution.

In my ideal lexicon, there's no need for the A in ADR. Rather, there is a need to recognize that justice is best achieved when the process chosen to facilitate resolution of a dispute is most apt for the kind of problem being addressed. Sometimes that is a courtroom. Sometimes not.

That may be because what is critically needed is subject matter expertise, as in the case, say of labour arbitrators or security commissions. It may be because the dispute is relational rather than transactional, and a process is required, such as mediation, or collaborative family law, which can bring disputants together rather than encourage their differences. And so on.

My point is that the recognition that a courtroom is not the best place for all dispute resolution is fully consistent with a commitment to both access to justice and the rule of law, rather than, as is sometimes suggested, some sort of mercenary exercise in expedience, in which these fundamentally important values are traded off or eroded in the name of efficiency or cost.

Progress in the development and expansion of ADR has tended to occur largely as a result of demand over time.

It's a demand that reflects an impatience or frustration with courts. With cost, delay, complexity, inefficiency, yes. With the lack of subject matter expertise, also. And with the sense that a court decision may decide legal rights and yet leave the parties somehow more alienated than they were before.

The result is innovation in dispute resolution. And of course, as you will learn in this symposium, that innovation continues.

These innovations often require - and sometimes spring from - public policy interventions.

Legislatures have played an important role both in supporting, and sometimes in driving, change in dispute resolution.

This takes many forms. Legislation gives formal recognition and effect to commercial arbitration decisions, by making them enforceable. Legislation creates tribunals and other decision-making processes for the adjudication of statutory rights and the enforcement of statutory decisions. Legislation requires litigants to attempt mediation before continuing with court processes.

To repeat myself, taken as a whole, these innovations in my view advance the rule of law. The rule of law is more than just the rule of judges or of courts.

It is always challenging to legislate in the area of legal process and structure. The status quo is jealously defended. For every innovator there is a voice that speaks to the importance of tradition. Of course there is a difference between reforms that force change, and reforms that simply permit it.

But sometimes the only way to achieve change is to force it.

I agree with Chief Justice Beverly McLachlin's statement in 2013 that access to justice is the "most pressing challenge" facing the administration of justice in Canada.

But I also think that addressing this challenge means that we all need to be prepared to re-think the status quo. It's not just something more – more judges, more money for legal aid – but something different. Perhaps startlingly different.

Viewed from this perspective, let me briefly explore how two recent decisions of the Supreme Court of Canada may have erected barriers to innovation in dispute resolution.

These are quite likely unintended consequences. In both cases the Court clearly thinks it is advancing the cause of justice for the powerless. But in doing so the Court has clearly emphasized the primacy of the courts and court-processes. It has taken, in other words, a traditional view of the role and rule of courts.

First, the 2014 Trial Lawyers Association decision.

In this case a majority of the Court struck down BC's Supreme Court hearing fees on the basis that they violated both section 96 of the Constitution Act, 1867, the superior court appointing power, and the "underlying principle of the rule of law," which increasingly looks less like an "underlying principle" and more like a substantive, if unclearly defined, basis for judicial review.

The Court holds that while section 92(14) of the Constitution Act 1867 gives the provinces the responsibility for the administration of justice, s. 96 restricts this power. The court expands that restriction. It's not just that neither the legislatures nor parliament can abolish or destroy the existence of superior courts. In the view of the majority, "legislating hearing fees that prevent people from accessing the courts infringes on the core jurisdiction of the superior courts" and therefore violates s. 96.

In the words of the majority,

> "The historic task of the superior courts is to resolve disputes between individuals and decide questions of private and public law. Measures that prevent people from coming to the courts to have those issues resolved are at odds with this basic judicial function….To prevent this business being done strikes at the core of the jurisdiction of the superior courts protected by s. 96 of the Constitution Act, 1867."

This finding is buttressed by the Court's statement that "the provincial superior courts are the foundation of the rule of law itself." Access to the courts, therefore, is "fundamental to our constitutional arrangements."

The majority clearly sees access to the courts as synonymous with access to justice. It speaks of the right of litigants to have "their private and public law disputes resolved by the courts of superior jurisdiction – the hallmark of what superior courts exist to do."

The scheme that failed constitutional muster in this case imposed no hearing fees at all for the first three days of a trial. Thereafter there was a sliding scale. On any reasonable view, the scheme was written to encourage the efficient use of court time. And there was a long-standing right of a litigant to ask that the fees be waived because of their financial circumstances.

But that was not good enough for the Supreme Court of Canada, which passed on the opportunity to say anything about whether justice was truly served by a ten-day trial of a relatively simple family law dispute, as this case was.

At the heart of this decision is a view about the role of section 96 courts that will almost certainly constrain legislatures as they consider whether there are certain kinds of disputes that can be resolved more fairly, more effectively, more lastingly, less divisively, and less expensively without recourse to those courts. After all, a legislative scheme requiring litigants to pursue alternative dispute resolution processes for certain kinds of disputes conceivably is a direct attack on their right to have their disputes heard by superior courts. This highly traditional view of section 96, which freezes the exclusive authority of superior courts based on the historic accident of which level of court was doing what in the provinces of Canada in 1867,

certainly constrains innovation, and fails to take into account all that we have learned since 1867 about dispute resolution. So, too, does a view of the rule of law focused so heavily on the centrality of superior courts as the only guardians of the rule of law.

The second decision is the Saskatchewan Federation of Labour case.

This represents the most recent of a series of labour law decisions by the Court over the past several years in which they have read into the Charter's protection for freedom of association the constitutional protection of collective bargaining. These decisions all reverse the Court's early post-Charter jurisprudence which plainly held that the Charter did not protect collective bargaining. The culmination, at least for now, is the Court's ruling in Saskatchewan Federation of Labour there is a constitutionally protected right to strike.

There's a lot that can be said and has been said about these remarkable decisions.

For present purposes my point is this. A fundamental premise of labour policy in the post World War II era is that idea that labour relations are complex, and that they do not belong in courts; rather, there is a need for specialized, expert tribunals and related processes to administer, manage – and, where necessary, adjudicate – the exercise of collective bargaining rights. It is not putting too fine a point on it to say that one reason for excluding courts from the administration of labour relations is that courts, traditionally, were not very good at this line of work. There are delicate balances of power between collective and individual rights at stake here. Maintaining those balances requires tribunals for whom this is a full-time job. And a need for legislative intervention from time to time to adjust those balances, according to evolving policy priorities. Those adjustments have been most controversial in the area of public sector labour relations. But the controversy here has been fundamentally political. No one has plausibly argued that the structure of rights and dispute resolution which is modern labour law is fundamentally unprincipled, unfair, or contrary to the rule of law.

And yet. The Supreme Court's recent jurisprudence here represents a dramatic re-introduction of the courts into labour relations. The full implications of his re-introduction remain to be seen – clearly one immediate consequence of these judicial developments has been an increase in litigation. Perhaps the Supreme Court will refine its thinking in ways that limit the potential range of these decisions. But again, what has happened here is that the superior courts have given themselves a book of business that may actually undermine, rather than support, innovation in dispute resolution.

Did the Court intend to write decisions with the potential to undermine innovation in dispute resolution? Perhaps not. But that, in my view is what they have done. These decisions reflect a traditional view of the exclusive primacy of courts that represents at least a challenge, if not an obstacle, to those who argue that courts are not institutionally equipped to offer the best or fairest or most affordable solutions to people's disputes. If we are to take up the challenge of reformers, including those members of the Supreme Court of Canada whose speeches outside courtrooms lament the threat to access to justice, we are simply going to have to find the collective wisdom and courage to recognize that the old ways are not always the best ways and to embrace real change, perhaps radical change, in our rules, structures and processes, if we actually intend to take seriously the call for access to justice. Perhaps, the next time the Supreme Court invokes the principles of access to justice and the rule of law it will do so in a way that encourages, rather than stifles, the innovation needed to protect both these fundamental values.

In the meantime I encourage you at this conference to continue to develop the innovative practices that will meet the needs of citizens and say, once again, that this is important and necessary justice system work.

Thank you.