Abstract

Over 40 years ago Frank Sander facilitated the birth of a "dispute resolution centre" in his speech at the Pound Conference of 1976. The new idea was quickly christened the "multi-door courthouse" and became prominent in the ADR movement worldwide. This paper asks, and tries to answer, the question whether the multi-door courthouse as an immigrant to Canada is having a highly productive middle age or a mid-life crisis. The paper first examines the elaboration of the multi-door concept and its global spread and institutionalisation. It then traces the history of multi-door in Canada to the present time within the unique constitutional and jurisprudential framework of Canadian courts. The current challenges and opportunities for multi-door courts in Canada are examined with a focus on the Provinces of Alberta, British Columbia, Saskatchewan, Ontario and Quebec and comparisons with the District Court of the Northern District of California. It concludes with observations on the possible futures of multi-door courts as a mature concept with established strategies and practices.

"A weekend in Canada, a change of scene

Was the most I bargained for". Eddie Heywood and Norman Gimbel, Canadian Sunset

Introduction

Frank Sander’s 1976 vision of a "dispute resolution center" entailed both a bold claim and an equally bold challenge. The claim was that the formal legal system could, and should, be involved in responding to all manner of disputes within society; the challenge was that courts could, and should, play a co-ordinating, if not controlling, role in that response. This was an early expression of what became recognised as the modern dispute resolution dream: that every dispute would be handled by a process appropriate to it, in a way acceptable to the parties, and to the benefit of society generally.

The development in the United States of what quickly became known as the "multi-door courthouse" concept has been well traced by many scholars of ADR. The history of its reception by lawyers and judges can be described as falling into four stages roughly corresponding to the four decades since its introduction. These are the periods of marginalisation (1976–1986); legitimation (1986–1996); institutionalisation (1996–2006); and industrialisation (2006 to the present). Rather than outright rejection, the American legal profession’s first response to the dispute resolution movement was to limit it to "minor disputes", although Sander himself cautioned that "small" matters in monetary terms could be legally complex. Most lawyers and judges were initially content to let neighborhood justice centers handle those disputes that were labelled as "minor" in terms of their legal ramifications and potential as fee generators.
The Dispute Resolution Act of 1980 was dedicated to encouraging such dispute handling organisations. As dispute resolution started to be taught in leading law schools such as Harvard the second period saw gradual acceptance of the idea that respectable lawyers might at least dabble in alternative processes such as mediation, and more judges were convinced that trials should not be their only concern. Dispute resolution gradually gained legitimacy as part of legal practice. In the third stage a critical mass of lawyers, lawmakers and judges had developed, encouraged and supported the integration of diverse processes within court systems. This was the era of experimentation and institutionalisation supported by the Dispute Resolution Act of 1990. For over a decade now, in the current stage of development, dispute resolution has been a sizeable industry and a recognised, profitable legal specialisation. It is now clear that the legal profession is one of the chief beneficiaries of institutionalisation which tends to favor lawyers as third parties.

Forty years on, the multi-door courthouse concept is now "middle aged" and it is fair to say that it has lived up to Sander’s expectations in some ways, but not in others. The major outcomes in America of his radical proposal can be summarised as follows:

Most courts today offer alternatives to rigid traditional civil litigation procedure. These include "tracks" for complex and other special types of cases; expedited and simplified procedure; arbitration; mediation; neutral evaluation of cases; summary jury trials, and more. More doors and rooms have been added to courts literally and figuratively. This plethora of processes is no longer considered "alternative", but rather simply part of courts’ core dispute resolution function.

Virtually all courts, and most judges, now take an active role in promoting settlement of cases short of adjudication. Judicial dispute resolution and judicial mediation are common. From the dispute resolution perspective, the phenomenon of the "vanishing trial" must be accounted a success story.

On the other hand, the "sorting mechanism" by means of which disputes are analysed and assigned to appropriate processes is still lacking. This stems from the lack of a rigorous "diagnostic" theory of civil disputing which would justify such decisions. Sander pointed to the "nature of the dispute" and characteristics of the parties as key factors to be considered, but elaboration of these ideas has not proceeded very far. In 1983 the Civil Litigation Research Project noted the dramatic difference between the substantial funding and large volume of research dedicated to studying criminal cases in contrast to the meagre amounts and results on the civil side. Nothing approaching the substance and sophistication of criminology has yet been developed to apply to civil disputes. The political will to support in-depth research into social conflict has been lacking, likely due to the foreseeable ramifications of the results on highly sensitive issues such as race, class and gender. Perhaps wisely, most courts and judges have shied away from the task of sorting lawsuits individually and instead resorted to two different competing strategies: either mandating alternative process for all cases or allowing litigants to choose. It is only in the family law area that psychologists and social scientists have advanced well-founded theories of family dynamics, spousal conflict and child development that are now assisting courts which deal with divorce and its consequences.

Further, so-called "minor disputes" are still out in the cold as far as most courts are concerned. This arises from a disconnect between the access to justice and dispute resolution movements that has simply become larger over time. The cost of litigation has continued to rise over the last four decades to the extent that most lawyers today would find it hard to bear the cost of hiring one of their brethren. The field of minor disputes has become enlarged to include virtually every case in which an individual is a party on their own. Only contingency fees and class actions offer the possibility of relief in some cases. However, minor disputes are now starting to invade the courts in the guise of pro se (self-represented) litigants who forego legal representation. This "revanche" of personal disputants is a serious matter for courts and judges ill-equipped to adapt process and procedure designed with the legal profession in mind.

To my knowledge, an historical and comparative account of the reception of the multi-door courthouse concept in Canada has not been written. I hope this article will help to supply that.