"Neither Out Far, Nor In Deep": A Comment

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In Professor Cromwell's presentation he "steps back and takes a broader view" choosing to regard the Zuber Commission Report as a somewhat simplistic study with recommendations affecting "little fundamental change" — "neither out far, nor in deep." This contrasting comment provides a closeup of some of those recommendations if for no better reason than that I believe the recommendations are likely to be implemented, a step which, if taken, should be taken with a full awareness of its consequences.

That the litigation process is too expensive and too lengthy is beyond serious debate. A $10,000 action taken to trial in New Brunswick will attract legal fees of approximately $10,000[1] and the proceeding will take twelve to eighteen months from the first visit to the lawyer's office to final cheque. If one can create an alternative delivering the same product — dispute resolution — faster and cheaper, it is bound to nave popular appeal on which politicians are likely to capitalize. Lawyer bashing has always had a certain public attraction. A slashing of the lawyers' fee table occurred in New Brunswick as early as 1802.[2] In June of this year the Fredericton *Daily Gleaner* ran a story under the headline "Civil Disputes Law Introduced," the first paragraph of which reads "[The Minister of Justice] has introduced new legislation aimed at providing a framework for resolving civil disputes in a reasonable amount of time." It would seem then that expeditious and inexpensive justice are live issues in New Brunswick today.

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[1] *New Brunswick Rules of Court*, R.59 Tariff A, Scale 3 — Party and Party Costs — $1750.00; which represents approximately 30 to 40% of the total costs for each party; in *Judicature Act*, R.S.N.B. 1973, c. J-2, s. 77. See also Whelly, "Costs — Rule 59" (1987) 3 *Sol. J.* 8.

[2] D.G. Bell, "The Transformation of the New Brunswick Bar 1785-1830: From Family Connection to Peer Control" (address to the Law in Society Conference, Ottawa, 10 June 1987) [unpublished] citing J.W. Lawrence, *The Judges of New Brunswick and Their Times* (Saint John, New Brunswick: Acadiensis, 1987).

As Professor Cromwell has pointed out, the Zuber Commission Report recommends the creation of a "people's court," a civil court of unlimited monetary jurisdiction with the consent of the parties and a $10,000 limit without consent. It is to be "a court with simple procedures so that people can represent themselves," and "have sufficient jurisdiction so that most cases can be dealt with there."[3] The report notes: "Where there are lawyers and judges, there is also a tendency to complicate matters in an effort to make them better. In the [people's court] this tendency must be resisted at all costs."[4] Costs are limited to disbursements and "should not extend to indemnification for lawyers' fees."[5] The commission would create a lawyerless court resolving disputes through a simplified procedure (no motions or discoveries) and without the customary costs indemnity.[6]

There are a number of difficulties with these proposals: $10,000 as a non-consensual monetary limit is not merely an inflationary adjustment of a typical small claims jurisdiction but rather a quantum leap to 37% of the average annual net income of a New Brunswick family.[7] If the parties agree or, as is more likely, fail to object, the monetary jurisdiction is unlimited. The indemnity principle that "costs follow the event" originated in statutes dating from 1275.[8] While not free from criticism, the partial payment of the successful litigant's legal fees properly compensates the victor for the damages he has sustained as a result of being taken to court "wrongfully." The exposure to payment of costs undoubtedly discourages litigation of questionable merit. The "moderate" reform of the Zuber Commission would effectively abolish a fundamental principle of some 750 years standing.

More important is the change in the role of the judge. Given the absence of pre-trial procedures — designed, I always thought, to identify the real matters in dispute between the parties and to shorten the proceedings — the case comes before this court by way of "fill in the blank" pleadings.[9] In my experience courtrooms with litigants rather than lawyers are places to be avoided. To preside over a trial involving the parties by themselves, each filled with an equal amount of righteous indignation, is indeed a difficult challenge and one which rarely results in judicial satisfaction. In this context the report reads:

> [in] cases where parties are unrepresented by counsel, a degree of intervention by the judge is necessary. It is not suggested that the judge should ever be less than impartial or should become an advocate for one party. However

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[3] *Report of the Ontario Courts Inquiry* (Toronto: Ontario Ministry of the Attorney-General, 1987) (Chair: T.G. Zuber) at 72.

[4] *Ibid.* at 72.

[5] *Ibid.* at 92.

[6] *Ibid.* at 91.

[7] *Percentage Distribution of Families by Income after Tax Groups and Provinces* (Ottawa: Statistics Canada, 1985) table 2 at 36.

[8] G.D. Watson, S. Borins & N.J. Williams, *Canadian Civil Procedure: Cases and Materials*, 2d ed. (Toronto: Butterworth's, 1977) at 2-4.

[9] *Report of the Ontario Courts Inquiry*, *ibid.* at 92.

> a judge should be free to assist both parties by explaining appropriate procedures, pointing out to them evidence that should be called, and suggesting adjournments if essential facts or witnesses are missing.[10]

The judge becomes, in effect, an inquisitor, initially sorting out the issues in dispute, identifying the evidence relevant to the elements of the plaintiff's claim and the defence and determining the parties' readiness to proceed. He must then explain the examination in chief and cross-examination, probably conducting both himself in the interest of efficiency and out of frustration. This role would differ dramatically from that described by Lord Denning:

> The judge's part in all this is to harken to the evidence, with only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the robe of an advocate; and the change does not become him well. Lord Bacon spoke right when he said that "Patience and gravity of hearing is an essential part of justice and an overspeaking judge is no well tuned cymbal."[11]

New Brunswick now has such a "people's court" under Rule 75. The tribunal is not bound by the rules of evidence and may call witnesses and ask questions it considers necessary. Costs are limited to filing fees. All that is needed to implement the Zuber Commission's recommendation is an amendment to Rule 75.01 increasing the monetary jurisdiction from $1,000 to $10,000.

In an effort to address the two fundamental and legitimate criticisms of our present system — cost and delay, the report recognizes mediation as an alternative:

> An increase in the successful use of alternative methods of dispute resolution can be accomplished only by substantial changes in attitude and by the improvement of skills. *The best place to begin this process of change is with the judiciary*. This inquiry therefore recommends that the judiciary set up seminars and continuing legal education programs with respect to the value and operation of alternative methods of dispute resolution and that, more importantly, these seminars include instruction with respect to the skills necessary to conduct effective pre-trial conferences and mediation hearings. It is anticipated that as the judiciary become more expert in pre-trial and mediation procedures, the legal profession will be compelled to follow.[12] [Emphasis added]

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[10] *Ibid.* at 219-220.

[11] *Jones* v. *National Coal Board*, [1957] 2 All. E.R. 155 at 159.

[12] *Report of the Ontario Courts Inquiry*, *ibid.* at 202.

I suspect that this recommendation originates in the relative success of the pre-trial conference in Ontario, success being measured by the number of times the pre-trial conference results in settlement of the action. The commission does not seem to appreciate a fundamental distinction between the pre-trial conference and mediation. Simply put, mediation is the resolution of the dispute by the parties, facilitated by a mediator, without regard to their respective legal positions. It has been said, "We are not going to attempt to say who is morally or legally justified, we are interested in settling things."[13] The skills employed by a mediator are communicating, listening, observing, analyzing, questioning, problem defining and problem solving, which are best delivered in an informal "sleeves rolled up" atmosphere early in the conflict. While judges and lawyers can certainly learn those skills, it must be recognized that they are the antithesis of traditional adversarial tactics.

A body of professional mediators is developing in Canada. For example, in the Yukon the Small Debt Court (claims of less than $1500) backlog in 1984 was approximately six to eight months. In an effort to reduce that delay, lay people were trained as mediators by professional mediation counsellors from Vancouver. Mediation was made mandatory before trial dates were assigned. By the end of 1986 the small debt could be mediated within ten days of filing the claim and, if mediation failed, tried within two weeks thereafter. The mediation success rate was 80%. In 1984 the State of Maine made mediation mandatory in contested family matters involving children.[14] A Canadian study indicates that the cost of a mediated divorce is approximately 15% of a litigated divorce.[15] Mediators and their particular expertise should be recognized and employed as a distinctly defined, publicly recognized and readily available alternative.

Judges, on the other hand, should continue to discharge their customary responsibility. This is not to say that the judge should confine his activities to the trial. Pre-trial conferences or what might be better described as "settlement conferences" are legitimate forums for judicial talent. There the factual and legal issues dividing the parties *and their lawyers* are brought sharply into focus and the judge, with insight as to what is likely to occur at a trial, can move the litigants towards settlement.

> Unfortunately the settlement conference occurs too late in the process — usually on the eve of trial, when much of the expense of the litigation has been incurred. In New Brunswick the pre-trial conference is available only "when the proceeding is ready for trial."[16] The corresponding Ontario rule does not contain a reference to time.[17] Its utility is outlined by the York District Court Practice Direction which provides "early pre-trial conference dates will be made available once a defendant or respondent has indicated *an intention to*

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[13]H.H. Irving, *Divorce Mediation: The Rational Alternative* (Toronto: Personal Library Publishers, 1980) at 42.

[14]M. Harris, "A Discussion on Mandatory Mediation" (1987) 3*Resolve* 9 at 10.

[15]*Ibid.* at 11.

[16]*New Brunswick Rules of Court*, R.50.01(1).

[17]*Rules of Civil Procedure*, Ontario R.50.01.

defend."[18] Unlike the "Quick Ruling", consent of the other side is not required. Failing to attend the settlement conference allows the Court to strike out that party's pleadings.[19]Apart from providing the parties with an opportunity to resolve their *bona fide* differences in a legal context with the assistance of a judge, the conference may be used to forestall untenable legal postures. The settlement conference, like mediation, must be utilized by the lawyer as an option available to his client to reduce both the expense and the length of the litigation. The Zuber Commission's recommendation of compulsory pre-trial conferences in every case forces this alternative on the profession.

In Mr. Justice Morden's introduction to the new Ontario Rules of Court he observed, "if one of the matters that divides the parties is a dispute over material facts there can, in absence of settlement, be no substitute for a trial."[20] The trial will continue to constitute the ultimate dispute resolution mechanism. It has served us well for the last 900 years. It is expensive and it can be slow moving but its validity as a means to end public and private controversy is indisputable. The community accepts the court's final judgement as a just termination of the conflict not only in terms of compensation for injury but also as satisfaction of the natural vindictive feelings directed towards the wrongdoer.[21] Alternatives exist but they need to be formally identified and made easily accessible. The Bar must become committed to them. Otherwise the recommendations by the Zuber Commission will become a reality.

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[18]Practice Direction: District Court, Judicial District of York issued December 1984 (Cod J.) in G.D. Watson & M. McGowan, *Ontario Supreme Court and District Court Practice* (Toronto: Carswell, 1987).

[19]*Murch* v. *Murch*, [1982] 24 R.F.L. (2d) 1, (Ont. S.C.) Vannini L.J.S.C.

[20]J.W. Morden, "An Overview of the Rules of Civil Procedure of Ontario" (1984-85) 5 *Ad. Q* 257 at 275.

[21]See generally J.M. Kelly, "The Inner-Nature of the Tort Action" (1967) 2 *Ir. Jurist* 279.