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Legal Culture

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1.0 Introduction

In the Green Paper entitled “The Foundations of Civil Justice Reform,” the Civil Justice Reform Working Group noted the growing access crisis in British Columbia’s civil justice system due to ever-increasing cost, complexity and delay.¹ The Green Paper identified some of the underlying reasons for this crisis and some of the barriers to change that would have to be surmounted in order to successfully reform the system.² It also proposed several strategies for achieving solutions to the crisis.³

Among the barriers identified by the Working Group was a resistance to change on the part of those “inside the justice system” (defined as the judiciary, the legal profession, government and court services staff). This resistance is due to a comfort with the status quo, a resistance which persists in spite of widespread recognition of the problems of the current system.⁴ The Green Paper noted some support for change among these “insiders,” but also noted that “the fear and uncertainty of changing a long established paradigm dilutes this support to one of encouraging only modest change, such as reforms around the margins or tinkering with procedures. They are not prepared to entertain or support change of a more fundamental nature.”⁵

If “change of a fundamental nature” to the civil justice system is to be possible, the resistance to change coming from within the legal community will have to be addressed. As the phrase “long established paradigm” suggests, much of this resistance relates to the deeply entrenched legal culture that underpins our justice system. This is a challenge being confronted in many jurisdictions. To quote one example, the Australian Law Reform Commission has said that

significant and effective long term reform [of the system of civil litigation] may rely as much on changing the culture of legal practice as it does on procedural or structural change to the litigation system. In particular, lawyers, their clients and the courts may need to change the ways in which they perceive their relationships and responsibilities.⁶

This paper explores the concept of “legal culture” generally, as well as the specific legal cultures of both our common-law justice system and civil law systems. It also examines ways in which legal culture might be changed. It is hoped that a better understanding of the underlying legal culture will help in devising successful long-term reforms to the civil justice system.

¹ British Columbia Justice Review Task Force. “Green Paper: The Foundations of Civil Justice Reform” 21 September 2004 [unpublished] 1.

² *Ibid.* at 3-8.

³ *Ibid.* at 8-13.

⁴ *Ibid.* at 7.

⁵ *Ibid.*

⁶ Australian Law Reform Commission. Issues Paper, “Review of the Adversarial System of Litigation” (1997) online: The Australian Law Reform Commission <http://www.austlii.edu.au/au/other/alrc/publications/issues/20/ALRCIP20.html> . [A.L.R.C., “Adversarial System”]

2.0 “Culture” and “Legal Culture”

The word “culture” may be defined as “the arts, beliefs, habits, institutions, and other human endeavours considered together as being characteristic of a particular community, people, or nation”⁷ or more simply as “the mode of behaviour within a particular group.”⁸

Culture is a broad concept that can be applied to any number of communities and activities, a fact which can be problematic when attempting to define and speak of a “legal culture.”⁹ Legal culture may be defined differently depending on the purpose of the person defining the term.¹⁰ Thus, the many definitions of legal culture range from very narrow conceptions (i.e. the culture of a specific local court) to much broader ones (i.e. global legal culture or the legal culture of a nation-state or of a “family” of legal systems).¹¹

This suggests that an examination of legal culture in the context of civil justice reform must be tailored to the legal culture present in the civil justice system. Though the civil justice system of British Columbia undoubtedly has its own unique culture, it is also a member of the common law family of justice systems, a family which shares common rules and procedures and also some common beliefs and attitudes about truth, justice and the roles of the various actors in the system. The common law system is frequently described as “adversarial” and an examination of this “adversarial” culture may help explain the current problems in the system and suggest ways in which it might be improved.

3.0 The Culture of the Adversarial System

While there may be some debate over the precise meaning of “adversarial”, Mr. Justice Davies of the Court of Appeal, Supreme Court of Queensland, Australia considers the key procedural elements of the system to be

- orality,
- a single climactic trial,
- party control over the dispute resolution process, and
- a belief that “the best and fairest way of resolving a dispute is by a contest between competing adversaries.”¹²

As Mr. Justice Davies notes, such a purely adversarial system would be unable to handle the volume and complexity of modern litigation, and indeed, many common law jurisdictions have implemented reforms such as case management and mediation with an eye to making the

⁷ *Gage Canadian Dictionary*, 1997, s.v. “culture”.

⁸ *The Canadian Oxford Dictionary*, 1998, s.v. “culture”.

⁹ Archie Zariski, “Disputing Culture: Lawyers and ADR” (2000) 7:2 *Murdoch U.E.J.L.* at para. 10.

¹⁰ David Nelken, “Disclosing/Invoking Legal Culture: An Introduction” (1995) 4 *Social and Legal Studies* 435 at 438.

¹¹ *Ibid*; Zariski *supra* note 9 at paras. 10-11.

¹² G.L. Davies, “The Reality of Civil Justice Reform: Why We Must Abandon the Essential elements of Our System” (Paper presented at the 20th Australian Institute of Judicial Administration Annual Conference, Brisbane, July 2002) 1 [Davies, “Reality”].

system less adversarial.¹³ Research suggests, however, that an adversarial culture remains in place and may be inhibiting the effect of these reforms. An examination of the roles of the various actors in the justice system reveals elements of this culture and also the problems it can create for the administration of justice.

3.1 The Role of the Lawyer

Lawyers have a central, critical role in the adversarial system of civil justice, in that the result of litigation depends largely on their preparation and presentation of the case. The smooth functioning of the system depends on their acting in an honest, ethical and competent manner.¹⁴ This role is reflected in the duties imposed on lawyers by professional codes of conduct. In British Columbia, for example, the Law Society requires its members “to promote the interests of the state, serve the cause of justice, maintain the authority and dignity of the courts, be faithful to clients, be candid and courteous in relations with other lawyers and demonstrate personal integrity.”¹⁵

Unfortunately, as the adversarial system promotes the view that dispute resolution is a “zero sum” game in which one party will “win” and the other will “lose”¹⁶, it can have the effect of distorting the lawyer’s role. The lawyer’s duty to the client is generally seen to trump the other duties, to the point where duties to the court and to the administration of justice will be interpreted narrowly so as not to interfere with the duty to the client.¹⁷ The result is a “zealous advocate” who will go to great lengths to prevail in court for their client.¹⁸

According to Dr. Julie Macfarlane, the “zealous advocate” operates on three assumptions which can cause problems in the administration of justice and reduce the effectiveness of alternatives to litigation.¹⁹ The first assumption is that conflict is always normative, so that “the source of conflict is an uncompromisable moral principle, or an indivisible good.”²⁰ Thus the system promotes litigation as a dispute resolution mechanism, as it is assumed that the claims of the parties are irreconcilable and best decided by adjudication.²¹

The second assumption is that “information is for winning”; therefore “[p]resenting information as evidence means presenting it as ‘fact’ and requires the denial of any ambiguity, circumstance or context (unless self-serving).”²² The result is a situation where “discovery is...principally about what information can be dragged from the other side and what can continue to be concealed

¹³G.L. Davies, “A Modified Adversary System: How Different is it From Yours?” (Paper presented to a seminar of judges, practitioners and scholars at the Max-Planck Institut, Hamburg, Germany, January 1995), 2 [Davies, “Modified”].

¹⁴The Hon. Mr. Justice D.A. Ipp, “Reforms to the Adversarial Process in Civil Litigation - Part I” (1995) 69 *The Australian Law Journal* 705 at 726.

¹⁵Law Society of British Columbia, *Professional Conduct Handbook*, online: Law Society of British Columbia, http://www.lawsociety.bc.ca/publications_forms/handbook/body_handbook_ch01.html.

¹⁶Dr. Julie Macfarlane, “Culture Change? Commercial Litigators and the Ontario Mandatory Mediation Program” (Paper prepared for the Law Commission of Canada, 2001) online: Law Commission of Canada, <http://www.lcc.gc.ca/en/themes/sr/rj/macfarlane/macfarlane.pdf> at 6 [Macfarlane, “Culture Change?”].

¹⁷A.L.R.C., “Adversarial”, *supra* note 6 at para 11.15.

¹⁸Macfarlane, “Culture Change?”, *supra* note 16 at 6.

¹⁹Julie Macfarlane, “What Does the Changing Culture of Legal Practice Mean for Legal Education?” (2001) 20 *Windsor Y.B. Access Just.* 191 at 194 [Macfarlane, “Legal Practice”].

²⁰*Ibid.*

²¹*Ibid.*

²²*Ibid.* at 200.

(often through endless motions).²³ Thus lawyers are often unwilling to negotiate until all the facts are known, at which point a great deal of time has already elapsed and a great deal of money has been spent by the client.²⁴

Finally, the adversarial system assumes that legal conflicts are “owned” by lawyers, who take possession of a problem from an unskilled client and transform it into a legal claim.²⁵ The result is a minimization of communication between lawyer and client and a de-emphasis on the emotional aspects of the client’s problem.²⁶

3.1 Commercial and Professional Considerations

In addition to the above factors, it is important to note the effect of commercial pressures on the legal culture in our system, a point made by many commentators, often in the context of a perceived “crisis” of professionalism among lawyers. For example, now Supreme Court of Canada Justice Rosalie Abella cites an “economic Darwinism” in the legal profession that is evidenced by “rigid billing requirements, increased competition and a restricted willingness to acknowledge requests for lifestyles that [include] living a life.”²⁷

The practice of hourly billing has been particularly criticised for its effect on legal culture. The American Bar Association Commission on Billable Hours notes that in the early days of hourly billing, law firms could increase revenues either by raising the hourly rate charged or by increasing the number of hours billed.²⁸ However, as competition in the profession grew, the ability of lawyers to raise their rates diminished, forcing an increase in the number of billable hours required.²⁹ These increased requirements have “caused the pace of law practice to become frenetic and [have] had a negative effect on mentoring, associate training and collegiality.”³⁰ The result is a drop in morale and an increase in lawyers leaving the profession. The impact of these pressures seems to fall disproportionately on young lawyers, who report the highest levels of job dissatisfaction.³¹

Ipp connects the economic pressures on lawyers to abuse of the adversarial system, saying “our system of civil litigation creates perverse incentives for lawyers.”³² The result is that “dubious delaying tactics, claims brought for tactical reasons rather than their true merit, sham defences and unnecessary motions are frequently to be observed.”³³ He also sees a connection between the rise in the number of practicing lawyers and a weakening of ethical standards. This due to the fact that the stigma of professional sanction becomes a less effective deterrent as a professional community becomes larger and more diffuse.³⁴

²³ *Ibid.* at 201.

²⁴ *Ibid.*

²⁵ *Ibid.* at 205-206.

²⁶ *Ibid.* at 206.

²⁷ Rosalie Silberman Abella, “Professionalism Revisited” *Ontario Lawyer’s Gazette* (November/December 1999), online: Ontario Lawyer’s Gazette, http://www.lsuc.on.ca/news/gazette/gazette_18.jsp.

²⁸ American Bar Association, “ABA Commission on Billable Hours Report” (2001-2002) online: American Bar Association, <http://www.abanet.org/careercounsel/billable/toolkit/bhcomplete.pdf> at 3.

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ Susan Daicoff, “Asking Leopards to Change Their Spots: Should Lawyers Change? A Critique of Solutions to Problems with Professionalism by Reference to Empirically-Derived Attorney Personality Attributes” (1998) 11 *Geo J. Legal Ethics* 547 at 554.

³² Ipp, *supra* note 14 at 726.

³³ *Ibid.*

³⁴ *Ibid.* at 726-727.

3.3 Psychological Considerations

It must be noted that while much academic writing focuses on the negative effects of the adversarial system on lawyer behaviour, there is some evidence that suggests that lawyers possess certain common personality traits that pre-dispose them toward an adversarial mindset.

In examining what she described as a “tripartite crisis of professionalism, public opinion of attorneys and attorney satisfaction and mental health”³⁵, Daicoff surveyed psychological studies involving lawyers and found eight common attributes that would require change in order to solve the crisis. Though she advocates change, she notes that many of the traits (which include aggressiveness, competitiveness, and insensitivity to interpersonal concerns, among others) are innate, present in future lawyers even before they begin law school.³⁶ Moreover, Daicoff suggests that many of these traits are necessary, both to attain professional success and to ward off the psychic conflict that may arise in lawyers who represent an unpopular cause or client.³⁷ This poses a considerable challenge in changing the culture of the adversarial system.

3.4 The Adversarial Lawyer and ADR

Perhaps not surprisingly, many commentators have found that the traits of a “zealous advocate” subject to high levels of economic pressure do not lend themselves well to alternative dispute resolution mechanisms. It has been argued that the greater availability of ADR mechanisms has not yet resulted in a change to the “consciousness of those whose job it is to solve legal problems”.³⁸ In a survey of lawyers’ attitudes in response to Ontario’s Mandatory Mediation Program, one Ottawa litigator remarked:

We’re trained as pit bulls and pit bulls don’t just naturally sit down and have a chat with a fellow pit bull, the instinct is to fight and you just get it from the first phone call...The whole attitude is one of confrontation and to go from that, you’re thinking well, do I bark back or how do I just switch this into a ‘let’s talk about voluntary mediation.’?³⁹

Several commentators have noted that adversarially-minded lawyers have been quite adept at incorporating the principles and practices of ADR into an adversarial litigation strategy.⁴⁰ This has led some writers to worry that the institutionalization of ADR could lead to a corruption of both ADR mechanisms and the wider civil justice system, as there remains the possibility that “good settlement practice will be marred by over-zealous advocacy or by over-zealous desire to close cases that may require either full adjudication or a public hearing.”⁴¹

However, Macfarlane’s survey of lawyer attitudes seems to indicate a belief that mediation is increasingly accepted among Ontario lawyers.⁴² Though she stops short of declaring this a paradigm shift away from the predominant adversarial culture, she does suggest (albeit with qualifications) that there are signs of a convergence of adversarial and non-adversarial cultures

³⁵ Daicoff *supra* note 31 at 593-594.

³⁶ *Ibid.* at 594.

³⁷ *Ibid.*

³⁸ *Ibid.* at 16.

³⁹ Macfarlane, “Culture Change?” *supra* note 16 at 73.

⁴⁰ *Ibid.*

⁴¹ Carrie Menkel-Meadow, “Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted, or ‘The Law of ADR’” (1991) 19:1 Fla. St. U.L. Rev. 1 at 33.

⁴² Macfarlane, “Culture Change?” *supra* note 16 at 69.

occurring within the legal communities of Ottawa and Toronto.⁴³ This suggests that the culture of our legal system at least has the potential for change.

3.5 The Role of the Client

As the preceding section suggests, the adversarial system of civil litigation assigns a minimal role to the client. In the classic adversary system, a client brings a problem to a lawyer, who then transforms that problem into a rights-based legal claim (what Macfarlane calls taking “ownership” of the problem, as opposed to “stewardship”).⁴⁴ The input of the client is then sought only where it advances the legal claim, and all emotional aspects of the client’s problem are to be “assuaged” or “controlled” by the lawyer.⁴⁵

In spite of this, it is important to note that clients (and the wider public) do play a role in shaping and perpetuating the adversarial culture. Portrayals of the legal system in the mass media invariably affect public perceptions of both the system and those who work in the system.⁴⁶ The prominence of courtroom scenes in television and movies may lead many to believe that litigation is the normal way to resolve disputes and may “create an expectation of [a] day in court”, resulting in litigants who are unfamiliar with the nature and availability of alternatives to litigation.⁴⁷ As the Australian Law Reform Commission notes (perhaps somewhat ruefully), “[p]opular culture has yet to fashion a popular interest in and knowledge of alternative dispute resolution.”⁴⁸

3.6 The Role of the Judge

As mentioned at the beginning of this section, the classic conception of the adversarial process assigns a largely passive role to the judge. The conduct of the litigation and the calling of witnesses being left entirely in the hands of counsel, the classic role of the judge is to be reactive, rather than proactive.⁴⁹ The role of the judge has been likened to that of an umpire, there to ensure the rules of the game are adhered to by the parties, but otherwise not becoming involved in the proceedings.⁵⁰

This classic role of the judge has become a subject of some debate, a debate which reflects a wider discussion about the purpose and goals of the justice system. On the one hand, there are those who believe that the purpose of the justice system is merely to resolve disputes as fairly as possible through application of the law based on the arguments and evidence provided by counsel.⁵¹ This view supports the classic passive role of the judge, as evidenced from the following quote from Lord Denning’s judgement in *Jones v. National Coal Board*:

⁴³ *Ibid.* at 85-86.

⁴⁴ Macfarlane, “Legal Practice” *supra* note 19 at 205.

⁴⁵ *Ibid.* at 206.

⁴⁶ Edward D. Re, “The Causes of Popular Dissatisfaction with the Legal Profession” (1994) 68 St. John’s L. Rev. 85 at 105-106.

⁴⁷ A.L.R.C., “Adversarial System” *supra* note 6 at para. 11.29.

⁴⁸ *Ibid.*

⁴⁹ A.L.R.C., “Adversarial System” *supra* note 6 at para 2.6.

⁵⁰ *Ipp*, *supra* note 14 at 713.

⁵¹ *Ipp*, *supra* note 14 at 714.

... the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large... So firmly is all this established in our law that the judge is not allowed in a civil dispute to call a witness whom he thinks might throw some light on the facts. He must rest content with the witnesses called by the parties.⁵²

On the other hand are those who claim a greater role for the judge on the grounds that the purpose of the justice system is to ascertain the truth and that the adversarial model of competing arguments is insufficient to ascertain it.⁵³ Not only is there the possibility that one side of an argument will be ineffectively presented due to lawyer incompetence, but the self-interested nature of this system may lend itself to costly abuse of procedures.⁵⁴

With these debates in mind, reforms have been considered and implemented in common-law systems worldwide that increase and enhance the role of judges, both pre-trial and during trial. As the Australian Law Reform Commission suggests, these reforms may include such things as powers to make orders independent of any request by either party, set and enforce timelines, convene settlement conferences or otherwise facilitate the settlement of the parties.⁵⁵

Evidence suggests that judges remain reluctant to take on a more proactive role. The Australia Law Reform Commission points out that most judges come from a litigation background themselves and may therefore be predisposed to a culture where judges take a more passive role.⁵⁶

DeGaris' 1994 survey of the opinions of Australian Federal Court judges with respect to dispute settlement sheds some light on judicial attitudes toward their role in the process. While the judges surveyed agreed that settlements were beneficial and that there was a role for judges in *facilitating* settlement (even where not requested by one of the parties),⁵⁷ they also believed that it was not the role of the judge to become actively *involved* in the settlement process⁵⁸ (for example, by informing the parties of expected rulings on evidentiary matters, points of law and difficulty of burden of proof).⁵⁹ The judges surveyed expressed concerns about the propriety of active judicial involvement in settlement discussions.⁶⁰

Although the DeGaris survey covers only one type of dispute resolution, its results indicate the persistence of the passive role of judges in the adversarial culture.

3.7 The Role of Law Schools

Many commentators also cite the role of law schools and legal education in shaping legal culture. It has been argued that law schools' focus on case law promotes the idea that litigation

⁵² *Jones v National Coal Board* [1957] 2 QB 55 63-64, cited in A.L.R.C. "Adversarial System" *supra* note 6 at para 2.8.

⁵³ *Ipp*, *supra* note 14 at 714.

⁵⁴ *Ibid.*

⁵⁵ A.L.R.C., "Adversarial System" *supra* note 6 at paras. 5.4 and 5.5.

⁵⁶ A.L.R.C., "Adversarial System" *supra* note 6 at para. 11.4.

⁵⁷ Annesley H DeGaris, "The Role of Federal Court Judges in the Settlement of Disputes" (1994) 13:1 U. Tasm. L. Rev. 217, at 236 (Appendix, Question 31).

⁵⁸ *Ibid.* at 235 (Appendix, Question 26).

⁵⁹ *Ibid.* at 234 (Appendix, Question 15).

⁶⁰ *Ibid.* at 235 (Appendix, Question 21).

is the “normal” way of resolving disputes, and minimizes the role of lawyers in resolving disputes through other means, thus producing lawyers pre-disposed toward the adversarial culture.⁶¹

Julie Macfarlane has discussed the ways in which law school curriculum reinforces aspects of the adversarial culture (specifically, the traits of the “zealous advocate” listed above), such as the prominence of legal mootings in legal education.⁶² She argues that the growing use of ADR mechanisms requires that law schools shift their curricula (in a way that goes beyond simply offering courses in ADR as an “add-on”⁶³) to take this new reality into consideration.⁶⁴ This change may be taking place already. For example, the Faculty of Law at the University of Ottawa now includes a mandatory course in Alternative Dispute Resolution as part of the core first year program, sending a strong signal to students of the importance of this legal role.⁶⁵

4.0 Changing Culture

As can be inferred from the above sections, legal culture is a complex concept that is shaped by many different stakeholders. Though there is some evidence that changes are already occurring in the culture of the adversarial system of civil litigation throughout the common law world, the amorphous and diffuse nature of legal culture suggests that it will be difficult to conceive and implement strategies for change that will be successful.

Nonetheless, some commentators hold up the evolutionary nature of the adversarial system as proof that change is possible (and indeed, inevitable). Thus Ipp, while finding that “[t]he adversarial process is irretrievably part of our legal system and its basic structures are part of the very fundament of our democratic life,” also believes that “most of the problems are caused by the failure to adapt aspects of the adversarial process to modern conditions.”⁶⁶ He then traces the history of the adversarial system and demonstrates how it has evolved in the face of problems encountered in the past and also how such changes have often been resisted by actors within the system. The story of how this resistance was overcome may provide clues for those seeking to reform the modern system.

For example, the system of civil litigation of 19th Century England was burdened with problems of complexity and delay not unlike those faced by our own system today. Then, as now, judges and lawyers seemed reluctant to accept reforms to the rules of procedure, even in the face of widespread public dissatisfaction with the system. However, a determined government working in conjunction with reform-minded judges

introduced actual changes at so moderate a rate that the profession became reconciled to one reform before the next one was forced upon it. As demands for reform spread, and their ultimate success became clear to the

⁶¹ Australian Law Reform Commission, The. Issues Paper, “Rethinking Legal Education” (1997) online: The Australian Law Reform Commission <<http://www.austlii.edu.au/au/other/alrc/publications/issues/21/ALRCIP21.html>> at para 5.10. [A.L.R.C. “Rethinking Legal Education”]

⁶² Macfarlane, “Legal Practice”, *supra* note 19 at 195.

⁶³ *Ibid.* at 192.

⁶⁴ *Ibid.* at 209-210.

⁶⁵ For more information, see University of Ottawa, online: <http://www.commonlaw.uottawa.ca/eng/admissions/firstyear.htm>

⁶⁶ Ipp, *supra* note 14 at 706-707.

profession, self-interest urged participation in framing the rules for their operation.⁶⁷

This history suggests that a gradual, co-ordinated approach among the various stakeholders in the justice system can produce successful results, even in the face of determined opposition. It also suggests a role for self-interest as an incentive for reform.

4.1 The Importance of Procedure

Ipp's recounting of the history of procedural reform also demonstrates another current of thought: the idea that changes in culture can be triggered or forced through changes to rules and procedures. Many writers, like Ipp, see the current problems in the civil justice system as problems of procedure, rather than culture (indeed, many advocates of reform do not mention culture at all). This line of thinking holds that once the proper reforms are ascertained and implemented, the legal culture will shift accordingly.

There is some evidence of the truth of this view. Many commentators have noted a shift in the legal culture away from an adversarial model in response to procedural reforms. For example, Macfarlane points out that the increased use of alternative dispute resolution mechanisms has changed the way lawyers interact with their clients, forcing them to "rely less on legal research which has nicely consolidated into a theory of the case and more on what his client tells him."⁶⁸ Furthermore, her survey of lawyer attitudes toward Ontario's mandatory mediation program found some evidence that exposure to mediation results in a "favourable attitude toward its use", a finding which echoes similar studies of American lawyers.⁶⁹ Proof of a culture shift may also be seen in changing law school curricula, which are becoming more critical of the adversarial model and more inclusive of alternative modes of dispute resolution.⁷⁰

Many of those who believe that culture can be influenced by procedural changes often look to the civil law or "inquisitorial" system present in much of continental Europe for ways in which the current system might be reformed so as to make it less adversarial. J.A. Jolowicz argues that the adversarial system, with its method of competing arguments, was adequate when the only dispute resolution alternative was self-administered justice.⁷¹ However, he believes that this method is flawed as it often does not allow the judge to ascertain the truth, and thus hinders her ability to render a "correct" decision (defined as "one that is reached by the judge who has at his disposal all the information he considers necessary about the facts and the law").⁷²

He concludes not only that a more inquisitorial procedure is required, but that recent changes to civil procedure in England indicate that a shift is already underway:

It will take time for the change in the character of civil litigation that has occurred in this country to be fully appreciated, but when it is, the adversary system as we know it will effectively have been replaced by something closer to what common lawyers are all too prone to dismiss as inquisitorial.

⁶⁷ *Ibid.* at 710-711.

⁶⁸ Macfarlane, "Legal Practice", *supra* note 19 at 206.

⁶⁹ Macfarlane, "Culture Change?", *supra* note 16 at 89-90.

⁷⁰ A.L.R.C. "Rethinking Legal Education", *supra* note 61 at para. 5.12.

⁷¹ J.A. Jolowicz, "Adversarial and Inquisitorial Models of Civil Procedure" (2003) 52 I.C.L.Q. 281 at 282.

⁷² *Ibid.* at 288.

As evidence of this assertion, he cites recent English reforms that have dramatically increased the information available to the judge, the judge's control of the proceeding and availability of alternative dispute resolution mechanisms.⁷³ He compares these to similar changes made in the French system in 1965. Interestingly, in addition to enhancing the powers of judges, France amended its Civil Code to include the requirement that "everyone is bound to co-operate with the administration of justice with a view to the revelation of the truth."⁷⁴ The result argues Jolowicz, is that not only are judges better equipped to keep the system running smoothly and keep costs down, but they are also better able to deliver substantively better decisions.⁷⁵ He concludes that the recent English changes put the English system on a similar track.⁷⁶

In a similar vein, Mr. Justice Davies argues that it is procedural defects that result in an adversarial culture which has negative effects on justice.⁷⁷ He points out that the hallmark elements of the adversarial system (a single climactic trial, control of litigation by the parties, and orality of evidence) all derived from the fact that originally all trials were conducted before juries.⁷⁸ As this is no longer the case, he argues that rigid adherence to these elements must be abandoned in favour of a modified approach, as their operation in modern times has led to higher cost and delay and lower quality justice (particularly where litigants are self-represented).⁷⁹

Though shifting a greater burden of litigation costs to the state is unlikely to happen in an era of fiscal restraint⁸⁰, Davies argues that, nonetheless, reformers in common law countries must abandon their prejudices and look to more inquisitorial models for ideas.⁸¹ While he declines to say which inquisitorial features should be adopted, Davies cites the unreliability of oral evidence, difficulties inherent in assessing expert evidence, rules surrounding disclosure and the plight of the unrepresented litigant as major problems in the adversarial system that require attention.⁸²

4.2 The Limits of Procedural Reform

Other commentators seem less certain that procedural changes alone will result in lasting successful reform to the system, with one asserting ominously, "Law reform is doomed to failure if it does not take legal culture into account."⁸³ Indeed, some of the facts and theories discussed above suggest this is so. Menkel-Meadow's account of how ADR mechanisms have been "co-opted" by the adversary culture is one example of this.⁸⁴ Zariski's discussion of the content of culture suggests that it consists not only of common activities, but also common beliefs:

⁷³ *Ibid.* at 287.

⁷⁴ *Ibid.* at 291.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.* at 295.

⁷⁷ Davies, "Reality" *supra* note 12 at 1.

⁷⁸ *Ibid.* at 3.

⁷⁹ *Ibid.* at 3-5.

⁸⁰ *Ibid.* at 10.

⁸¹ *Ibid.* at 6.

⁸² *Ibid.* at 11-15.

⁸³ Lawrence M. Friedman, "Is There a Modern Legal Culture?" (1994) 7:2 *Ratio Juris* 117 at 130.

⁸⁴ Menkel-Meadow, *supra* note 41 at 33.

It is not mere participation in the affairs of working life that counts but the meaning an individual gives to and receives through those commitments and connections. That meaning can be expressed in many ways – through adherence to an ideology and through beliefs, attitudes and values that help lawyers identify themselves as professionals with a special role in society.⁸⁵

In discussing why ADR has not spawned the creation of a new culture, Zariski describes three things that must be in place for a new culture to emerge: common norms, common ideology and affective rewards. While it can be said that lawyers increasingly have access to ADR mechanisms and increasingly agree in principle that ADR is good (common norms), they do not yet share a common ideology with respect to *why* ADR is good.⁸⁶ Nor is there any evidence of affective rewards, that is to say, of the emotional appeal of ADR mechanisms.⁸⁷ Zariski suggests that once these are in place, “we may see the birth of a new disputing culture.”⁸⁸

Proof of a lack of common ideology may be seen in Macfarlane’s survey of lawyer attitudes with respect to mandatory mediation. In her survey, she found that lawyers participating in mediation often held very different views regarding the benefits and usefulness of the process.⁸⁹ She concludes that there are “no emergent paradigms of practice which offer a consistent and coherent conceptual framework for the use of mediation in civil litigation.” And that this is “one of the reasons that some counsel and academics may not take civil mediation very seriously.”⁹⁰

With respect to the emotional aspect of culture, Zariski theorizes that ADR may eventually come to have this appeal given the widespread reports of distress among lawyers exposed to the adversary culture.⁹¹ This idea ties into the “crisis of professionalism” perceived by commentators like Abella and Daicoff. Abella notes with dismay the “droves” of lawyers leaving the profession due to stress and asks, “To what extent are we acknowledging that life in a law firm may be no life?”⁹² Daicoff cites an extensive list of studies showing that rates of job dissatisfaction, depression and substance abuse among lawyers are greatly in excess of the average.⁹³ Although, as noted above, Daicoff found that lawyers possess certain innate personality traits that may pre-dispose them toward the adversarial culture, she also found that external, environmental causes (including the “win-at-all-costs mentality”) contribute to lawyer job dissatisfaction.⁹⁴ The increasing rates of job dissatisfaction suggest that reforms aimed at introducing a less adversarial culture may find a receptive audience within the ranks of today’s lawyers.

How these elements of culture (norms, ideology and affective rewards) come to be in place is not clear. Zariski theorizes that norms begin in academia and trickle down through professional superiors to practitioners, whose experience informs further refinements to theory and practice.⁹⁵ This suggests a somewhat organic process over which institutional actors have only limited control. However, Zariski also suggests that there may be concrete actions that may be taken to facilitate this process:

⁸⁵ Zariski, *supra* note 9 at para. 18.

⁸⁶ *Ibid.* at para. 47-48.

⁸⁷ *Ibid.* at para. 46.

⁸⁸ *Ibid.* at para. 58.

⁸⁹ Macfarlane, “Culture Change?”, *supra* note 16 at 12-21.

⁹⁰ *Ibid.* at 94.

⁹¹ *Ibid.* at para. 46.

⁹² Abella, *supra* note 27.

⁹³ Daicoff, *supra* note 31, at 553-556.

⁹⁴ *Ibid.* at 557-558.

⁹⁵ Zariski, *supra* note 9 at paras. 56-58.

It may not be sufficient just to demonstrate success in the application of alternative processes, or to exhort lawyers to become problem solvers rather than combatants, or to police the boundaries of the legal professional turf. If a deep rooted and long lasting cultural change amongst lawyers is to occur, all of these elements must act complementarily to bring it about. Normative beliefs, emotional impulses and rational explanations all must be engaged in a process of cultural change.⁹⁶

4.3 Implementing Change

The preceding sections suggest that both procedure and culture are important parts of the reform process and that attention must be paid to both if reform is to be successful. Clearly, procedural or organizational reform can have an impact on culture. In an article about implementing organizational change in a large government agency, Steven J. Kelman describes the effect of an imposed change in procedure in an organization where people were presumed to be resistant to change.⁹⁷ He found that there was a small but significant “change vanguard” of employees within the organization that was dissatisfied with the old system and saw the imposed change as an opportunity to take action and help the reform succeed. These people, confident that a committed leadership was on their side, spoke out in favour of the reforms and helped to convert more sceptical employees to the cause.⁹⁸ He also found that support for the new system increased as people became exposed to it and had positive experiences with it, and that support increased over time irrespective of personal experience, as it became clear that the leadership was not abandoning the changes.⁹⁹

Some connections can be drawn between Kelman’s work and Macfarlane’s survey of lawyer attitudes toward mediation. Macfarlane found that support for mediation correlated with experience with mediation, a finding which mirrors those of Kelman.¹⁰⁰ She also found a connection between support for mediation and local legal culture. Mediators in Ottawa were found to be more supportive of mediation than those in Toronto, in part because of strong support for mediation from people in leadership roles within that legal community.¹⁰¹

The problem with applying these theories to the legal system is that the multiplicity of stakeholders involved reduces the ability of any one of them to impose change unilaterally. Government may act to change the rules of procedure, or may implement ADR mechanisms, but the effectiveness of these changes will depend on lawyers, judges and even clients. It seems that successful reform will require a co-ordinated effort on the part of all the stakeholders in the system, including government, the judiciary, the legal profession and perhaps even law schools.

This may be where Zariski’s elements of culture come into play. While government may impose procedural change, true and lasting cultural change (according to Zariski) will require a common ideology as well as some affective rewards.

⁹⁶ *Ibid.* at para 60.

⁹⁷ Steven J. Kelman, "Changing Big Government Organizations: Easier than Meets the Eye?" (May 2004). KSG Working Paper No. RWP04-026. online: Social Science Research Network, <http://ssrn.com/abstract=563163> at 1.

⁹⁸ *Ibid.* at 3-4.

⁹⁹ *Ibid.*

¹⁰⁰ Macfarlane, “Culture Change?”, *supra* note 16 at 90.

¹⁰¹ *Ibid.*

Perhaps if change can be articulated in a way that brings dissatisfied lawyers and judges on board as a “change vanguard”, change may be effected so long as commitment to this change by those in leadership roles is sustained over a long period of time. It is important to remember, however, that evidence suggests that change of this manner, if successful, would occur primarily at the local level, at least initially.

5.0 Summary and Conclusion

From this brief discussion, several tentative inferences about cultural change can be drawn:

- Legal culture is informed by procedure, but procedural change alone will likely be insufficient to trigger lasting cultural change.
- Legal culture involves intangible aspects such as norms, ideology and emotions. Though we may have less control over these elements, we must still be aware of them. The apparent dissatisfaction of some participants in the current system may mean there is a constituency willing to support change.
- As the legal system has many stakeholders, changing the legal culture will likely require concerted effort on the part of all stakeholders.
- Change is more likely to be successful if supported by authorities and professional elites. Consistent support of those in leadership roles allows a “vanguard” of dissatisfied participants in the system to emerge. This vanguard helps to sustain and promote wider change.
- Support for change increases over time, as participants in the system gain exposure to new procedures and norms and experience positive results.

In conclusion, legal culture is a complex subject of which we still do not know a great deal. Composed of such elements as common beliefs, values and practices, it is vague and difficult to define precisely. However, an examination of social science theory and data suggest that our legal culture, marked by its adversarial nature and preference for litigation, is capable of change and indeed is constantly changing, often in ways that are not immediately apparent.

Some theorists see a welcome evolution of our legal system and culture toward a more inquisitorial model, and advocate for procedural changes to facilitate this shift. Others are more sceptical, citing the persistence of the adversarial culture in the face of attempts to modify it through procedural changes.

It seems clear that process and culture are linked and that attention to both will be required if change is to be successful. This will be difficult given the many actors present in the legal system. However, research suggests that a co-ordinated, committed attempt by all stakeholders to bring about change may be the best possible way to achieve reform.

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