The need for a paradigm shift for transforming relational conflict

From court-centric to family-centric ADR

This paper provides a brief overview of mediation with a focus on clients' self-determinism in family mediation or family dispute resolution (FDR) and Ontario court-connected alternative dispute resolution (ADR) programs. Throughout this text, "ADR" and "mediation", as well as "FDR" and "family mediation" will be used interchangeably. A key purpose is to outline existing concerns as they relate to court-connected ADR, within both the public and professional spheres. The twin-objective is to provoke discourse through insertion of commentary and general observations. This paper concludes with identifying benefits of establishing community-centred ADR.

Brief Examination of Family Mediation

Mediation is an ancient concept, born with the inception of humankind on this earth. For where there are two or more people, there will be inevitably be conflict and conflict will result in either resolution or in further conflict or "battle". Facilitated by a neutral person, mediation is a voluntary process where individuals engage in discussions aimed at resolving conflict. The facilitator does not have decision-making authority nor a stake in the result. He or she guides the process to promote respectful dialogue and a mutually agreeable outcome. Mediation continues to be a preferred dispute resolution process, especially when dealing with interpersonal disputes.[1] Research has noted many advantages: it is more expedient, non-adversarial and less expensive than litigation.[2] It is also a private process, which means that the information exchanged is privileged and confidential[3]; this allows parties to speak freely and focus on the issues at hand, rather than the fear of reprisal.

Generally accepted as a more civilized way of resolving conflicts, there has been a lot of interest in incorporating the process of mediation in various forums, especially in family disputes.

Historically, marriage was viewed as a "lifelong partnership." Couples were committed to staying together "till death do we part",[4] irrespective of their level of satisfaction. Divorce was considered socially unacceptable, disruptive and a catalyst for long-lasting psychological harm, especially where children were involved. As such, many families stayed in unhappy marriages

for fear of harming their children, as well as maintaining an "upright" image in the community. Following major shifts in the socioeconomic and political spheres, over the past three decades, the stigmatization of divorce has decreased and, today, almost one in two families have experienced divorce. Studies show that the real challenge is not with "divorce" *per se*, but how couples manage their separation and post-marital adjustment. Parental conflict, particularly, is now widely recognized as negatively impacting children's psychosocial functioning.[5]

As divorce rates increase and courts grapple with overloaded dockets, the family justice system has become a fertile ground for the birthing of dispute resolution mechanisms. There is an increased consensus that the traditional adversarial model of litigating custody matters is not the healthiest pathway for families. For example, emerging research has found that going to family court is associated with conflict escalation[6] and deleterious consequences, including cases of homicide-suicide.[7] Furthermore, when parties are required to submit affidavits, the accusatory and blameworthy content has been related to an increase in post-separation intimate partner violence. Other significant predictors of partner violence are the parties' level of education and physical abuse, especially in the six months following a separation or divorce.[8] Reviews of family courts have consistently shown that the adversarial system generally produces zero-sum outcomes and further destroys post-separation relationship with couples "caught up in its heavy machinery."[9] Even in those instances when litigants are able to secure a court order in their favour, in many cases, enforcement is a frustrating exercise. Julie Macfarlane found that many self-represented litigants (SRL's) *"…assumed that having secured an order (this was particularly the case was the order was for the payment of monies) that the court would take responsibility for ensuring the money was paid. Instead, they were often appalled to learn that they now had to take further steps to collect the money themselves.* ***"What's the point of the judge granting orders if no one is going to enforce them? [emphasis added]"****.*[10]

Zooming in on Ontario

It is within this context that litigants, judges, policy makers, mental health professionals and lawyers began exploring strategies that promote optimal post-separation adjustment and mitigate against identified risk factors. Referred to by the Ontario government as the "Four Pillars" of family justice system, reforms were recommended to: I. provide early information to separating couples; II. to identify issues and triage; III. to help litigants navigate and obtain information about dispute resolution options; and IV. to improve the efficiency and focus of the court process.[11]

One initiative under these Pillars was instituting court-connected ADR (Alternative Dispute Resolution) in all courthouses in Ontario. It was first announced as a pilot program in 1994 to help with civil disputes. Upon positive evaluation, the program was gradually extended to all courts. Some of the positive results[12] identified that:

- Cases in mediation settled in half the time than those that settled before trial;
- 15% of cases referred to mediation settled before commencement of mediation;
- Majority of lawyers and clients were satisfied with the process, whether or not they settled;

- Lawyers felt that they would not have fared better had they gone to trial; and,
- Lawyers felt positively about the reduced time and costs associated with the process.

Ontario's judicial system determined that ADR should be integrated into the court system.[13] For one, it was the perceived obligation of the state to establish dispute resolution programs and second, it would ensure service accountability for both the court and the public since they would operate under the auspices of the court. Currently, the Ministry of Attorney General funds programs which offer information referrals and mediation services (including family) at a sliding-fee scale according to individual income. Additionally, when filing an application, all family law litigants must attend a Mandatory Information Program (MIP) providing information about the court system and the impact of family breakdown on families and children after they begin.

Families or Judicial System: In Whose Hands is the Mediation Process?

Essential characteristics in mediation are the parties' volunteerism, self-determinism and the mediator's neutrality.[14] In family mediation, individual agency and active participation in the decision-making process are vital to ensuring post-separation well-being. Following separation, the majority of parents need to preserve some form of relationship. It is, therefore imperative that the mediation setting be constructed in such a manner that it is both fostering and promoting of these elements.

It is evident that court-connected ADR was born out of the need to deal with the court backlogs and increased number of litigants, although there was no prior research or empirical evidence to purport that the interests of divorcing families would be best served by government-operated mediation services. While ADR was shown to produce settlements at a faster and less costly rate, there has been little evidence to support that settlements reached in the shadow of the court represented the best long-term outcomes for parents and children.

Consistently referred to as the hallmark of mediation process, self-determination plays an essential role in the decision-making process. According to the Self-Determination Theory, an empirically-driven psychological theory, humans are inherently driven to realise their capabilities through "intrinsic motivation, social internalization and integration, and connecting with others."[15] Depending on the appropriate social conditions, individuals can experience growth and well-being, or suffering and ill-being.[16] Autonomy has been identified as one of the needs directly correlated with individual growth and well-being.[17] This need is fulfilled when individuals experience volition and the ability to make choices, and is frustrated when experiencing external pressure or coercion.[18]

Expanding on the above, it follows that in the family context, parental autonomy plays a crucial role. The manner in which parents make decisions can have a long-lasting impact on their families and community at large. Studies have shown that divorce acts as a depressing force on the parties' basic psychological needs,[19] thus parties already find themselves in a vulnerable

state. Recognizing and properly dealing with all of these complex elements can promote a sense of equilibrium and help parties achieve optimal and sustainable outcomes. On the other hand, amplifying the hurt can manifest in dysfunctionality; anywhere from harbouring internal stresses to more overt behaviours that are harmful or threatening for both the family and the public.

Despite its stated intention to uphold the values of ADR, it is illusive to suggest that self-determinism or voluntarism is not compromised when operating in the shadow of the court. Fundamental differences in design, approach and values, make it a futile and expensive exercise to try to replicate key characteristics of family mediation within the confines of the court system.

For instance, professionals questioned the usefulness of family law information centres (FLIC's) located in every courthouse across the province. A review of the family courts found that the information provided to the public was inconsistent. There was minimum communication with community organizations. Facilities were sometimes lacking in computer terminals. Operating hours were short, and no child-care was provided. Some professionals viewed the FLIC's as being part of the adversarial system and clients reported that staff was intimidating.[20] Furthermore, the physical location of the centres within the courthouses was viewed as a barrier for individuals who did not want to be seen by other community members as going to court.[21]

The Mandatory Information Program (MIP) is another court-adjunct service. It was established as part of the court-connect services to provide family law litigants with information about the court process and dispute resolution options. With a few exceptions, all parties have to attend this 2-hour lecture before proceeding further with their application. From the onset, notably, litigant couples have to attend on separate dates, therefore setting the stage for the adversarial arena. Despite there now being an online version of the MIP available and that service providers encourage people to join these sessions, most litigants obtain the information too late in the process and at a stage where parental conflict has increased beyond the baseline of the intensity of the separation;[22] making it exponentially more challenging to pull clients back to a healthier degree of collaboration. The mandatory aspect, heavily reflective of punitive-like systems, reinforces the top-down adversarial approach and implies a one-directional relationship where the judiciary formulates and imposes all the rules and guidelines. The undertone of this type of relationship is indubitably transported into all other forums, including court-connected mediations. Instead of fostering a collaborative relationship, the government operationalization of court-connected ADR serves to confuse roles and perpetuate judiciary mistrust.

The manner in which court-connected contracts are awarded has also raised a few eyebrows. Every number of years, the Ministry of Attorney General (MAG) puts out tenders – Requests for Proposals (RFP) to contract with family mediation service providers. At the culmination of a bidding exercise, for-profit companies (generally) are awarded contracts. As a result, these companies receive direct referrals within the court system, most times from the judiciary itself, and cases are distributed to roster mediators. MAG makes it a requirement that roster mediators are accredited and insured. To become an accredited mediator and therefore be permitted to join a court-connected roster, a professional has to complete FDR training and pay

for an internship, costing between $3,000 and $5,000. It is not uncommon that the service providers are also FDR trainers. It is also not uncommon for roster members to have graduated as students and/or interned with the same service providers. Concern has been expressed with these non-arms length relationships that have generated an increase in the number of private, paid internships, which in turn has had an impact on service delivery, quality of mediators and conflicts of interest. Moreover, in a context of fundings by local and national state governments, family court mediators work in a bureaucratic setting in which speed and efficiency are valued more highly than mediation values such as "self-determination" and "facilitation" which slow down the process of clearing court dockets. *Truly* resolving conflicts takes more time than settling them, so settlement is valued over resolution, advocacy over facilitation.

An equally problematic concern with its design is the potential of creating monopoly where clients' choices are limited. Such degree of control may also eliminate motivation to collaborate with local communities, as well as stifle innovation. In fact, minimal community collaboration was one of the concern expressed in the same family court review mentioned some paragraphs above. This landscape will likely produce considerable challenges to designing governmental policies to regulate degree of choice and competing abilities. Clearly, even more resources would be diverted and taken away from client-centricity.

These important findings loudly demonstrate that people's perception of the court is that of an adversarial approach and institutionalizing of family dispute resolution acts as a stumbling block to developing fundamental dispute resolution skills independent of the court system.

Perception is a Client's Reality

ADR has been promoted as a voluntary dispute resolution mechanism and as an alternative to court. Since it is, however, located in the court and operates in its shadow, it is unreasonable to expect the public to make this distinction. One concern is that the hybridity of adjudication and ADR creates confusion and places the court system at its centre. Additionally, in a perceived adjudicative system or closely enough connected to be associated with it, the core values and integrity of the mediation process are jeopardized. Situated in a position of authority and power, the court system exerts a great deal of influence; concomitantly, so do its auxiliaries. Just like court staff, court-connected mediators are most likely perceived as court representatives and in authoritative roles; irrespective of mediators' actual comportments.[23] Simultaneously, assuming a perceived position of power, court-connected mediators may adopt its characteristics, therefore seriously impacting their neutrality.

A famous study, The Stanford Prison Experiment, is probably one of the best illustrations of how an environment can have powerful influences. In his study, Zimbardo assigned a group of university students to roles of "prisoner" or "guard". All the conditions were created to simulate those of a jail environment. "Prisoners" were celled in the basement of Stanford University and wore prison uniforms. "Guards" had clubs, mirror sunglasses and carried a whistle around their neck. Over a very short time, the experiment revealed that both groups began to strongly identify with and assume characteristics of their assigned roles. The guards began humiliating and

abusing the prisoners while in turn, the prisoners became submissive and were starting to show signs of helplessness. The experiment had to be stopped after only six days as the behaviour of everyone involved was getting out of control and the extreme personality transformations were troublesome.

This experiment is a classic demonstration of situational power and the influence on individuals' behaviours and attitudes. The environment changes the people. In court-connected contexts, mediators and clients are pressured to favouor institutional practices.[24] In a sense, parties cannot practically be afforded autonomy and active participation in the decision-making process. Clients' motivation then, for reaching settlements in court-connected mediations, may be very different than those reached outside of the court. Consequently, their bargaining positions and sustainability of their agreements may be compromised. The reality is that if parents feel coerced into reaching a settlement, it will not only undermine the public's trust in the judiciary, but will also contribute to creating a distorted view of ADR.

What's Law Got to Do with it?

Divorce is not a "legal problem." Rather, it is a highly stressful and emotional event that may have some legal issues. Framing divorce as a legal problem poses the risk of parents' heavy reliance on legal assistance and perpetuating the idea of reaching out to a lawyer and/or the court, as a first resort.

The dependence on the court system to deliver ADR comes at a cost of community well-being and sustainability. The procedural rigidity and heavy legislative interference compromise parties' ability to create agreements that resolve more than just legal issues. Parties need support and resolve in several other areas, such as coping and conflict resolution skills, emotional management, general physical and mental health, co-parenting and information about children's post-separation adjustment.

There is no question that both legal information and advice are necessary; however, negotiating family matters within the legal framework, may inhibit clients' ability to generate more practical options. The law is limited to behavioural and financial remedies. Rarely do these match or address the whole assembly of parties' complex needs. Rights-based approach, negotiation style preferred by lawyers[25] may produce the best legal outcome. There is a big caution here, grounded in evidence submitted by Dr. Ellis[26] and others. Leaving psychological and relational components unsatisfied, will impact the quality of post-separation parental and parental-child relationships and the durability of their mediated agreements. Focusing only on the legal dimensions of divorce is trivialising all the important supports that families need during and post-separation (mentioned above).

Custody and access are still the most contentious issues and, when compared to other family law matters, cases involving children are trapped in the court system for a lot longer time. Although matters involving children are by default, foreseeably more complex, it is concerning to note that parents are conditioned to choose court as first resort. The legal framework is not equipped to recognize and account for the psycho-social human fabric motivating clients' steps

and adherence to their positions. To mediate "under the shadow of the law" requires legal knowledge, but does not require knowledge of relational and cognitive elements underlying clients' stated positions.[27]

The skills required to practice law are undeniably different from those needed for mediation. A study that looked at lawyers' negotiation styles found that, compared to other types of practitioners, family lawyers were "more adversarial and less problem solving." Also, when compared to other lawyers, they were characterized as "ethically adversarial" or "unethically adversarial".[28] In emotionally heightened situations, such as divorce, every small gesture or word can trigger a stressful response for a party.[29] If appropriate response is not provided, there is a risk of doing more harm. It is hopeful to see that some law schools are now introducing ADR into their curriculum and there is an increased interest of students participating in ADR processes. However, it is concerning, and we may as well be witnessing the cultural shift produced by court-centricity of ADR, that a large number of lawyers view family mediation as an "adjunction" to their legal practice. It is further concerning to note that some lawyers are confident that their legal training sufficiently prepares them to deal with what are usually complex family relationships, underlying motivations and emotions. This is another example of cultural shift fueled by the divorce as a "legal problem" paradigm.

When Was the Last Time You Had a Lawyer at Your Kitchen Table?

Ideally, parents can negotiate amicably – right at their kitchen table. They can sit down in a calm environment, have a cup of coffee and focus on creating functional post-separation relationships. If they cannot come to an agreement on resolve some or all of the issues, the next step would be to engage a trusted third party or a mediator. The stress may have increased by that stage, but a carefully designed environment can mitigate, by affording parents the space where self-determination and volition are not threatened. As stated earlier, this type of environment cannot possibly be replicated in the court system or within a legal framework; it would need to be established in the community and away from the [perceived] adjudicative umbrella.

"Band-Aid" Solution at the Cost of a Less Litigious Society

Operating under the court's umbrella, with similar rules and regulations, the court-annexed mediation model places lawyers and courts at the centre. It further acts as just another Band-Aid solution to reducing workload, instead of preserving and promoting the quality and values of mediation. We should be concerned with such inferences and the systemic changes it yields. Institutionalizing mediation can be perceived as serving the interests of the courts while the interests and needs of the parties automatically take a secondary role. Simply put, it lays the groundwork for a cultural shift away from ADR's original form and intention.

Court-connected mediation is the only point of entry for individuals in the low and middle income brackets, while higher income people can choose from a wide range of out-of-

court family dispute resolution options. The current landscape not only denies the right of choice, but places individuals and their children at risk of harm with conflict escalation.[30] Barriers such as educational background, financial means, geographical distance, language or mental illness make accessing court-connected mediation centres an almost impossible and highly frustrating option.

"Medi-gation": Court-connected ADR Blurs the Line between Mediation and Litigation

Notwithstanding large investments and initiatives to educate the public about ADR, court-centricity of mediation acts as an opposing force. On the one hand, enormous amount of research that I referred to earlier is illustrative of the damage of going to court. On the other hand, the organizational structure of the ADR program is directing individuals to that very same court.

Hey, State! Leave those Parents Alone!

Divorce or separation does not automatically strip parents of their rights, responsibilities and parenting values. A fair and dignifying presumption is that parents continue to be the primary caregivers and best qualified to make decisions for their children. Barring extreme situations, especially when there are safety concerns, there is no justification for governmental meddling in private family matters and standing in *loco parentis*, irrespective of marital status. Framing divorce as a "legal" issue directs individuals to the courts as the first resort and also places post-separation decision-making in the hands of the state. Governmental meddling in private family matters, by dictating or heavily influencing parenting decisions, erodes individuals' sense of parental autonomy. It arguably diminishes parents' ability to rearrange their post-separation relationships and make crucial, life-long decisions for their families.

One in two families in Ontario are or will be going through divorce. Studies have found that the earlier parents can be involved in a dispute resolution process, the more likely they are to reach a settlement.[31] A common complaint of divorcing families is that they did not have early access to legal information and ADR. It would evidently reduce the tension if families would have access to these resources (legal information, education and ADR) in their respective communities to enable them to make informed decisions about their post-separation arrangements. Having a family-centric, rather than a court-centric entry-point in the community, would also provide the flexibility for parties to create agreements according to their unique needs, values and belief systems.

There is no doubt that court-connected ADR may benefit those litigants who are already in the system, especially those unrepresented by counsel. In the long run, however, it produces a shift away from the original impetus of ADR.

Moving Ahead

Based on logic alone, it makes sense that our well-being is connected to others', and wider, to societal well-being. Studies have confirmed that fostering wellness has a positive impact on an individual's physical health, substance abuse, quality of life, longevity, employment and social behaviour.[32]

In order to promote best possible outcomes, we need to engage qualified professionals who have a clear understanding of all the elements involved and who possess adequate skillsets to positively support parents moving through stages – away from the court system. Unlike court-centred programming, family-centred ADR hubs would have the malleability to evolve within the community and incorporate diverse changes into its fabric. The dual capacity would therefore create a family-centred ADR that is both proactive and responsive to families' needs. This nimble, adaptive feature, takes on a significant advantage when compared to the rigidity and generally slow-pace of the government.

Carefully interwoven in the community's fabric, a family-centred ADR entry-point can:

I. Improve access to ADR and expand its reach, especially to vulnerable groups and members of the public who, for various reasons, would not access the court system;
II. Empower families to resolve their family matters outside of court;
III. Contribute to an increased sense of community connectedness and well-being;
IV. Foster problem-solving and enhance conflict resolution skills, not just those of the disputants', but other community members;
V. Improve relationship quality and reduce risk of domestic violence;
VI. Reduce litigation and increase compliance with parental and financial responsibilities;
VII. Increase respect and trust in the judiciary;
VIII. Provide access that is culturally and linguistically appropriate;
IX. Educate and support families through their conflicts;
X. Enhance the community's general dispute resolution skills and build resilience;
XI. Reduce governmental costs associated with family breakdown;
XII. Serve as a referral source to local services; and
XIII. Reduce the stigma associated with divorce.

Despite many unanswered questions, it is a well-known fact that conflict is inevitable and common to humankind. The intention of this short paper is to stimulate the family dispute resolution field to recognize the need for a cultural shift – a paradigm shift away from the court-centered system and into a more community-centred entry point with holistic programs. Given the knowledge that we have gained, as members of a growing ADR community, we have a responsibility to act – now, in the best interests of the public. We need to begin establishing a culture where individuals have access to voluntary legal information, family supports and ADR processes away from court buildings and into the community. This will be the sound investment we need to strive to achieve, for the long-term care and well-being of our communities.

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