AS WE MOVE INTO THE FUTURE
WHERE ARE WE GOING AND WHY ARE GOING THERE?

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We live in an age where problems, as they arise between people or between groups of people, are framed as disputes. A problem, of course, is not necessarily a dispute. A problem can be a difficult question, a conundrum that we have not yet been able to solve.

One thing we have learned is that, with enough will, determination, time and skill we humans can solve ANY problem.

We fly through the air
Walk on the moon
Eradicate small pox.

But once a problem has been framed as a dispute, the adversarial system is readily positioned over it, bringing a certain set of rules, of tools, a certain framework, to resolve the dispute.

We know that "most cases settle".

We also know that, in the last five years, the "most cases settle" maxim has become even stronger. The number of civil cases that go to trial in Vancouver have been cut almost in half (decreased by 44%) in the last five years (1997-2002).

Coupled with this statistic is one that I find troubling: of the cases that went to trial, those cases took almost twice as much time.

Why?

An easy, and professionally self-serving answer is only the truly complicated matters go to trial.

The problem with that answer is it means, statistically, every complicated matter that went to trial in 2002 was twice as complicated as the complicated matters that went to trial in 1997.

If we subscribe to that answer, it means that there has been a doubling of complication in five years, and a complete inability of the lawyers involved to simplify any of that. The lawyers have been unable to do anything to streamline the trial process. Not in just one case, but in a

significant enough number of the cases that it doubled the average length of trial.

There may be another reason why half the number of trials have expanded to double the length.

Law is a business.

A lawyer whose bottom line was predicated on twelve weeks of trial in 1997, who has not adjusted his business skills and expectations, still has a bottom line that is predicated on twelve weeks of trial in 2002.

Where are we headed as a profession? If we fast-forward fifty years, what will our daily professional lives look like?

This is a huge question, and one that we tend not to ponder. After all, none of us will be practising in fifty years.

Yet lawyers are the front door of the legal institution. We are the major players. For everyone who comes to see a lawyer we are the point of first contact with the legal institution.

We have a choice how we are perceived by the public:

As the professional who can help an individual resolve a problem he or she has, or as a professional who runs a business and needs a certain number of trial weeks to meet his or her bottom line.

The more we are perceived as a professional who can help an individual resolve a problem, the more we will continue to be retained.

My hope for today is that this conference will help stimulate each of us to think about what we can do in *crafting* change.

The legal institution is slow, cumbersome, and resistant to change. We all studied precedents that were 100 years old when we were in law school. The Divorce Act still retains some concepts, for example collusion, that are vestiges of a 150 year old assumption that two married people should not be able to agree to divorce.

As lawyers, we are taught that it is the status quo that we turn to build argument. Precedents and statutes, the building blocks that we use to plead or defend a case, are built on what has already happened – what has gone before. We are trained to look backwards, both in the garnering of evidence and in the building of submissions.

But we live in a time when change is happening so rapidly – in all areas – that the legal

institution is being dragged ahead, having to cope with the extraordinary changes of our times.

How are we going to do this?

How fast will this change happen?

Will the changes in the number of trials continue at the same rate?

Will statutory changes gallop ahead?

Thirty three years ago I was in a California courtroom and I watched as two young men were being arraigned for having consensual sex with each other, which was a felony. If anyone told me then that in 33 years I would live in a province where these men would be free to marry each other, I would not have believed change could come that rapidly.

But it has. And indications are that the speed of change is becoming even more rapid.

Let us assume for a moment that the trend of the number of trials --Vancouver civil trials -- decreasing by 44% with the length doubling every five years – is a trend we can extrapolate over the next twenty years. This is how it would play out, based on 393 trials in 2002:

2002	393
2007	220
2012	123
2017	69
2022	38

If these numbers hold up into the future, one thing is clear: the litigation model is not a model we can sustain.

Who is going to walk through our doors, twenty years from now, and say, "start an action."?

"I know I won't go to trial. Only billionaires or wealthy corporations can afford trials, and that's not me, but I want to give you my money to start an action anyway and pretend like we are going to go to trial."

If we assume that this is the future, the vast majority of lawyers are going to have one role: as problem solvers. As dispute resolution experts.

We don't know what the legal institution will look like in 50 years.

We don't know what the substantive changes will be.

We don't know what the process options will be, and what new and different process options may be available.

And we do not know what these changes will mean **subjectively** – both for clients, in their subjective experiences when they have a dispute and come to the legal institution, or for us as lawyers – what of our subjective experience as the worker bees of the legal institution?

What do we want in these subjective realms?

This is not an area that we give much professional thought to, let alone think we have any control over.

After all, the legal system is very much an objective structure – we can describe what it looks like, how it works.

We can also describe what it feels like subjectively, both for us and for our clients. But we tend to believe that we have little, if any, control over the subjective realms.

Max Gluckman, an anthropologist who has studied justice systems, says that societies develop dispute-resolution processes that match the value they place on relationships.

What I would like to do is encourage us to dialogue about what we want in the personal, subjective realms. If we value relationships, what kind of subjective experience do we want people to have – both clients and the lawyers who spend much of their life working within the institution?

Let us actively engage in reshaping the legal institution in a way that meets personal and professional subjective needs.

This is my wish list of the personal subjective – for my clients:

- Cost efficiency
- Process effectiveness
- Meets my clients timing needs
- Safety for my client
- Understandable
- Alleviates my client's anxiety, or at a minimum, does not increase his or her anxiety
- Preserves relationships
- Does no harm

This is my professional wish list:

- A morally congruent practice life; by this I mean, what I do in my professional life is morally congruent with my personal life.
- To make a positive difference in people's lives
- To have work that is intellectually stimulating – I want to think, and be able to use my brain
- I wish to continue to learn and develop skills – and it's a bonus if I can use these skills in my life outside my work.
- I do not want to be called upon to engage in dehumanizing behaviour

How the subjective professional component is defined is going to dictate who is attracted to this profession.

If the subjective component of our profession is not defined, then all that is left is money, and this will be the only touchstone to measure our professional success.

If we build our professional careers around a healthy core of the personal and professional subjective, the objective component – what the legal institution looks like – will change in a way that reflects the subjective.

We are the gatekeepers of the legal institution. The fact that the legal institution is inaccessible to most people, and because it is inaccessible, largely irrelevant, is not new.

> I would like to read a quote form an English judge at the beginning of the 19th century.
> Mr. Justice Maule was sentencing a man convicted of bigamy.
> Before sentencing, the judge paused to ask the prisoner why judgement should not be passed upon him.
> The convicted man said that his wife had run away with a hawker five years before, he had not heard from her since, and that he had only recently remarried;
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> Mr. Justice Maule responded, and I am certain his irony was likely lost on the convicted man.
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> 'I will tell you what you ought to have done; and if you say you did not know, I must tell you that the law conclusively presumes that you did. You ought to have instructed your attorney to bring an action against the hawker for damages. That would have cost you about a hundred pounds. When you have recovered substantial damages against the hawker, you would have instructed your proctor to sue in the ecclesiastical courts for a divorce *a mensa et thoro.* That would have cost you two or three hundred pounds more. When you had obtained a divorce *a mensa et thoro*, you would have had to appear by counsel before the House of Lords for a divorce a *vinculo matrimonii*. The bill might have been opposed in all its stages in both

> Houses of Parliament; and altogether you would have had to spend about a thousand or twelve hundred pounds. You will probably tell me that you never had a thousand farthings of your own in the world; but prisoner, that makes no difference. Sitting here, as a British judge, it is my duty to tell you that *this is not a country in which there is one law for the rich and another for the poor.*'[1]

Although there has been much change in the last 200 years, the recent trial statistics indicate that most people's ability to access a trial judge are slim to nil. And those who can, do so with a huge economic price tag.

For a moment I'd like us to think about our place in the unfolding of history. Collectively we are a potent force. I would like us to assume that how we perform our roles can make a difference in the changing legal institution.

Looking back, 100 years from now, on the beginning of the 21st century, it is my hope that historians will be able to say this about our profession:

It was at the beginning of the 21st century that a significant number of lawyers took the lead in changing the legal institution to make it more responsive to the needs of individuals.

They also took the lead in developing, within the profession itself, a more hospitable and healthy climate for lawyers. They began reframing what "access to justice" meant, and developed a system that assisted ordinary people with the resolution of disputes in a manner that did not destroy relationships.

It was, at the beginning of the twenty first century, **lawyers** that helped transform the culture from a culture of adversarial conflict to a culture of problem solving that values relationships.

These lawyers were able to bring a vision to their profession. They took the time to think about their role in a new way.

They took the time to have the necessary professional dialogues;

To read – and write – thought provoking literature on dispute resolution;

To build the necessary skills. To work with new processes. Sometimes they failed, and they were not discouraged by their failures, but learned from their failures, and continued to refine new processes.

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[1]Canada Law Journal 1910 vol. XLVI pg. 639

Like lawyers before them, they brought their intellect to their professional lives. They also brought their courage, the courage to wrestle with the unknown. Despite the fact that these lawyers had been trained to look backwards, they instead dared to look into the future. They did not resort to cynicism, they did not to return to the comfort of the status quo. They consciously worked towards an extraordinary evolution of the legal institution.

