

**The Future of Commercial Dispute Resolution Conference
Wednesday 11th June 2008**

The role of mediation in commercial disputes in Scotland

Scottish Mediation Network

The Scottish Mediation Network, which has a small full time office with 4 staff and me as its Director, was set up by mediators as a hub for mediation in Scotland. It is a national intermediary body that acts as a focal point, a centre of activity or interest rather than as a provider of mediation services or training. Currently, the principle funder of our various tasks is the Civil and International Justice Directorate of the Scottish Government. I should be clear that any opinions that I express today are my own.

Our vision is to embed mediation as a regularly used way of handling differences, disputes and conflict in Scotland.

Our mission is to support a significant increase in the appropriate use of mediation. We do not say that mediation is intrinsically a better or worse option than other ways of handling disputes - it's just that we know that mediation is presently an underused option in proportion to its benefits.

Our strategic aims are that:

- Mediation skills will become a mainstream part of daily life, (especially in the education system)
- There will be widespread support for providing sustainable mediation services and
- Mediation will be considered routinely.

We know from other jurisdictions where mediation has become embedded that “people get it when they use it”. At the Scottish Mediation Network our dual focus is on (A) creating the environment where it is normal to consider mediation and (B) helping people find mediators that they can trust.

Introduction

There are three areas I intend to cover today when discussing the role of mediation in commercial disputes in Scotland:

1. I will outline the current role of mediation in commercial disputes in Scotland
2. I will then highlight some recent and ongoing influential developments and then I will conclude with some thoughts on the
3. Possible future roles for mediation in commercial disputes

The current role of mediation in commercial disputes in Scotland

For those interested in further reading I acknowledge and recommend the works of Dr Bryan Clark of the Law School at the University of Strathclyde who published in 2006 research into commercial litigators attitudes and experience of commercial mediation as well as an article by John Sturrock QC who is also linked to Strathclyde University as a Visiting Professor, in the

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Chartered Institute of Arbitrators own International Journal of Arbitration, Mediation and Dispute Management produced in February 2007.

Clark describes the system of mediation in commercial matters in Scotland as “purely voluntary”. Sturrock observes that “mediation has had to stand on its own feet, demonstrate its own worth and rely on customers who elect wholly of their own volition to use it rather than having it directly or indirectly imposed by a third party. This” he suggests “has injected a note of market reality.”

That note of reality is reflected by the approach of Scotland’s largest company. Senior in-house lawyers with the RBS Group are clear that they have embedded mediation into the way that they handle their disputes. As part of their proactive management of litigation they task all their solicitors both in-house and externals to consider mediation at all appropriate stages. They do this because they have secured significant benefits for their business from the outcomes achieved using mediation across the world.

By the by, RBS have also trained some of their HR people as in house peer mediators and are offering to staff who lodge a grievance against a colleague mediation on a pilot basis. I understand that where the offer is accepted there has been a 90% resolution rate.

Last month at the Civil Mediation Councils conference in Birmingham a senior executive from the huge Insurance firm AXA explained how they also are targeting all their solicitors to consider mediation. He was entirely convinced of the commercial benefits of using mediation strategically even although he “admitted” that he had never been to or seen a mediation.

Of course, bigger businesses trading in Scotland usually also operate, at least across the UK. These businesses will see and be influenced by things like the aggregated figures produced from London based organisations. An example is the recently announced calculations from CEDR, (the Centre for Effective Dispute Resolution), indicating that commercial mediation has saved businesses £6.3 billion in the UK since 1990 by avoiding wasted management time, damaged relationships, lost productivity and legal fees.

By achieving earlier resolution of cases that would otherwise have proceeded through litigation, CEDR predict that the commercial mediation profession will save business in excess of £1 billion a year.

Also, the international law firm, Herbert Smith has published the results of their research into how large organisations across a range of industry sectors, including BP, RBS, GE, KPMG, Royal & Sun Alliance and Virgin, are using mediation.

Businesses which use early case assessment and systematic managements of disputes, including mediation, as central to their resolution *culture* achieve greater savings in external costs and in management time spent on dispute resolution.

So those who say that commercial mediation is not happening in Scotland are simply out of date if not just plain wrong. The addition to the market of several new commercial mediation service providers in Scotland evidences the growing demand.

Core Mediation (a division of the Core Solutions Group) launched in 2001 gained first mover advantage and probably still undertakes more commercial mediations each year than its competitors. Catalyst Mediation was set up in 2004 with a base in Glasgow. Their subsidiary Court Mediation Services are just about to conclude the two year contract with the Scottish Government to pilot mediation in Aberdeen and Glasgow Sheriff Courts.

Mediation Scotland llp appeared on the scene last year. One of its principals Marjorie Mantle runs the Edinburgh Sheriff Court Mediation Service for the Citizens Advice Bureau. They appear to be pricing their services very keenly. Newest to market is the Mediation Group. Sir Bill Gammel of Cairn Energy spoke at their launch enthusiastically endorsing the use of mediation as a matter of simple common sense. They have recruited a panel of mediators all of whom require to be on the Scottish Mediation Register, of which more anon.

In addition, the two longest established English commercial mediation outfits, the ADR Group in Bristol and CEDR sometimes set up mediations in Scotland. And of course, there is no need for disputants to go through a mediation service provider. I detect a trend toward repeat users of mediation selecting specific mediators rather than choosing from a panel. Indeed well organised advisors like Herbert Smith keep what they call “mediator metrics” on mediator performance.

Add to that CEDR’s research announced at their European Congress late last year showed that a number of individuals are now earning a comfortable living from commercial mediation. The most successful mediators reported an average fee per case of over £6500 on a case load of 100 giving an annual income of around £650,000.

While it may be sometime before mediators in Edinburgh match the income levels of those in London, the entrance of the new Scottish mediation organisations, the cross border activity I mentioned and the emergence of professional mediators who are instructed directly will, I believe, contribute to expanding the market. They will begin to tap into some of the unmet need rather than simply competing for the same work.

My observation appear to be supported by Bryan Clarks research which uncovered a small but significant measure of generally successful mediation practice across a range of commercial dispute areas, as well as a generally positive legal profession, well disposed towards the development of mediation. As one of Clarks respondents noted, “Mediation is no panacea but it may be appropriate in a wide range of cases in which currently the process is not considered”.

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When commercial parties embark on litigation there are some Judges and a few Sheriffs who are reported to have begun to suggest mediation to those who venture into their Court. There are several references in the various Court Rules which would allow the Bench to nudge disputants toward the mediators' round table and flip chart. However, my impression is that the rational sense of encouraging collaborative dialogue aimed at finding mutually acceptable solutions is often over ridden by the perceived judicial responsibility to adjudicate. "They have raised an action" the Sheriff earnestly tells me "so it is my duty to deliver a judgment." While I am entirely respectful of the obligations of judicial office, this prevailing Scottish view from Chambers seems to miss the plethora of evidence about experience of the users of Courts and their perceptions about justice.

I now intend to highlight some recent and ongoing influential developments

Influential Developments

Civil Courts Review

Sheriff Principal Taylor has spoken earlier today about the potential impact of the Civil Courts Review on Commercial Litigation. I propose to reflect on the possible impact of the Gill Review on commercial mediation. I sit on the Policy Group of the Civil Courts Review in a personal capacity and again any views I express are my own.

Last year, Lord Gill spoke at a conference in the same week that our extensive consultation document was launched. He described the Review as a "once in a generation opportunity". For mediators it has been assumed to be significant that the Review is asked in one of the four parts of its remit to consider the role of mediation and other methods of dispute resolution.

At that Holyrood conference, 73% of the audience thought that the courts should actively encourage mediation or other methods of dispute resolution. A similar number felt that mediation should be considered at any stage in the process and would not adversely affect the development of the law and precedent.

The Board of the Scottish Mediation Network have said to the Review that if mediation is to be embedded into the Court procedures, such a change will need to be accompanied by a programme of education for the professionals. Judges, Sheriffs, lawyers and court staff need to be clear about issues like: when mediation may or may not be appropriate, how to explain mediation to parties, what will happen at mediation meetings, and what is involved in representing a client in mediation.

In addition, anyone using mediation as part of the Court system will need to know that mediators have demonstrated an appropriate level of competence. As mediation is a relatively new occupation, work on quality assurance is important. Again, I speak more about this later on.

On the issue of compulsion the party line is to refer to the Guidelines on the Practice of Mediation, which are generally accepted in Scotland as a practice benchmark. There, mediation is defined as:

“A process in which disputing parties seek to resolve their differences with the assistance of a trained mediator acting as an impartial third party. Mediation is voluntary and aims to offer the disputing parties the opportunity to be fully heard, to hear each other’s perspectives and to decide how to resolve their dispute themselves.”

While mandatory forms of dispute resolution may be effective and helpful, SMN’s Board says that they fall outside this definition. Mediation works when people participate willingly, in good faith and free from the fear that what they say in mediation will be used elsewhere. They need to be able to explore all the possibilities, as it is from this rigorous exploration of options that solutions usually emerge.

Unlike the Scottish Consumer Council the SMN neither supports nor recommends the concept of compulsory mediation. The concern is that if parties are told by the Judge or Sheriff that they must participate, then one or both may not come to mediation “in good faith”. There is anecdotal evidence from England of someone coming to mediation and sitting in silence for several hours until everyone gave up, just to be able to confirm that mediation had been attempted to avoid a costs sanction.

It should be noted that it is the norm in other jurisdictions like Australia, parts of the USA and parts of Canada, including the province of Ontario. My view is that the argument about compulsion has clouded the more sophisticated discussion that needs to had about the appropriate level of information giving, facilitation and encouragement from the Court. In-courts schemes work best where the mediation service is readily at hand - administered by Court staff even - favourably viewed by everyone working in the Court and where “robustly encouraged” by Judges is routinely given. I believe we can have all of this in Scotland without coercing people to go to mediate.

Administrative Justice Steering Group

In 2006, concerned at the need to re-examine administrative justice in Scotland at a time of UK wide reform and innovation, the Scottish Committee of the Council on Tribunals jointly with the Scottish Public Services Ombudsman set up an Administrative Justice Steering Group. This Group is chaired by Lord Philips

The administrative justice system in Scotland is complex, having developed piece-meal over the years. The current system of administrative justice has been further complicated by the Scotland Act 1998 with the Scottish Parliament able to legislate in most areas of civil law, with the exception of reserved matters.

The impact on commercial dispute management is, I suggest, likely to be indirect through cultural change caused by cross fertilisation. For instance,

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the civil litigators sometimes practice before the Employment Tribunals. Commercial enterprises may find themselves in dispute with their employees. Since 2006 in Scotland there has been a practice directive to the effect that “where all parties to a claim agree that it should be sisted for mediation a Chairman of Employment Tribunals shall sist it for that purpose.”

The ET President Colin Milne indicated specifically that “The sole purpose of this Practice Direction is to focus parties’ minds on mediation as an option for the resolution of employment disputes. Although mediation is on the increase in employment cases there is some evidence to suggest that not all parties are aware of this as an option which might be utilised.” This simple initiative appears to be changing the approach of some employment law representatives. Some Unions are looking at mediation seriously.

Additionally, as a result of a DTI commissioned review by Sir Michael Gibbons further reforms are making their way through the UK parliament (for employment law is effectively a reserve matter). It seems likely that these changes will encourage more collaborative rather than adjudicative approaches to dispute management in this sphere of commercial life.

Scottish Legal Complaints Commission

Closer to home for the lawyers in the room, the Legal Profession and Legal Aid (Scotland) Act 2007 makes provision for mediation in section 8. when the Scottish Legal Complaints Commission begins handling complaints on 1st October this year, a mediation manager will work along side the investigation team and offer the solicitors and complainers mediation as a parallel process.

As part of the work to standardise handling of complaints about public services in Scotland following Professor Lorne Crearar’s Review, it is anticipated that the experience derived from the Commission will inform further embedding of mediation in other settings.

Again the relevance to commercial disputes is environmental. While statistically lawyers specialising in commercial disputes are unlikely to have a complaint against them that goes into the formal complaints process, advising lawyers can avoid trouble by preparing well. This seems likely to me to be a motivator for them to acquire greater knowledge and understanding of the mediation process so that they can participate effectively.

European Union Mediation Directive

And then there is Europe:

On 21 May 2008, the Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters was adopted.

Article 1 states the aim of the directive is

“to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by

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ensuring a balanced relationship between mediation and judicial proceedings.”

Its scope of application covers:

“Cross-border disputes, [...] civil and commercial matters except as regards rights and obligations which are not at the parties’ disposal under the relevant applicable law. [It shall not extend, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (acta iure imperii).]

The European Parliament and Council agreed the Directive to encourage the use of mediation as a cost-effective and quicker alternative to civil litigation, for cross-border commercial disputes.

These new provisions on mediation in cross-border cases will be need to be implemented by member states (excepting Denmark) within three years. The means we will need legislation by May 2011.

The Directive contains the key elements to help establish and harmonise civil and commercial mediation practice in the EU. These are:

- a formal recognition of the importance of mediation in ensuring access to justice
- allowing courts the right to refer ('invite') parties to mediation (or an information session on mediation if available) - without prejudice to national legislation making mediation compulsory or refusal to mediate subject to sanctions
- allowing for parties to make settlements directly enforceable in the courts
- protecting mediators/mediation providers from being called as witnesses except for major public reasons or for proving terms of settlement agreements and
- protecting limitation period rights where parties have opted for mediation.

The Directive also encourages Member States to:

- a. ensure training is available for mediators
- b. encourage the drafting of ethical codes of conduct and quality control measures
- c. encourage online information on mediators and providers be made available.

A European Code of Conduct for Mediators has already been established by a group of stakeholders with the assistance of the Commission and launched in July 2004.

ECHR

Now on another aspect of Europe, there has also been much discussion about the impact of the Article 6 of European Convention on Human Rights which enshrines the entitlement “to a fair and public hearing within a

reasonable time by an independent and impartial tribunal established by law.”

Writing in the Times on July 2007, Mr Justice Lightman put it clearly when speaking about the obstacles that have been placed in the path of would-be parties to mediation by the Court of Appeal decision in *Halsey v Milton Keynes*. He said:

“The court held ..that a litigant cannot be ordered to proceed to mediation against his will because this would contravene his right of access to the courts under Article 6 of the European Convention on Human Rights;”.

Lightman J went on to say that this proposition is:

“unfortunate and mistaken. In respect of Article 6, the reasons are twofold. First, the Court of Appeal appears to have been unfamiliar with the mediation process and to have confused an order for mediation with an order for arbitration or some other order that places a permanent stay on proceedings. An order for mediation does not interfere with the right to a trial: at most, it merely imposes a short delay to allow an opportunity for settlement. It may not even do that, for it may require or allow the parties to proceed with preparation for trial. Secondly, the appeal court appears to have been unaware that ordering parties to proceed to mediation regardless of their wishes happens elsewhere in the Commonwealth, the United States and the world at large...”

The chorus became even louder when Sir Anthony Clarke, Master of the Rolls, said as recently as 8th May 2008

“[d]espite the *Halsey* decision it is at least strongly arguable that the court retains a jurisdiction to require parties to enter into mediation”.

Scottish Courts have not been much troubled by such matters. Compulsory mediation is not on the agenda here. However, I have heard Article 6 used as a reason for not even offering a recommendation to mediate from the Bench. I do not think this view is any longer tenable.

Developments in English caselaw

And this takes us to the developing case law on mediation in England and Wales.

Judges continue to encourage ADR. Lord Justice Ward (a member of the court in *Halsey*) has been one of the most vociferous.

In *Egan v Motor Services (Bath) Ltd* [2007] EWCA Civ 1002, he was dismayed that the parties had spent about £100,000 arguing about a claim worth about £6,000. He said the parties were ‘completely cuckoo’ to have engaged in such expensive litigation with so little at stake.

He added:

“Mediation can do more for the parties than negotiation. In this case the sheer commercial folly could have been amply demonstrated to both parties

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sitting at the same table but hearing it come from somebody who is independent..... The cost of such a mediation would be paltry by comparison with the costs that would mount from the moment of the issue of the claim. In so many cases, and this is just another example of one, the best time to mediate is before the litigation begins. It is not a sign of weakness to suggest it. It is the hallmark of commonsense. Mediation is a perfectly proper adjunct to litigation. The skills are now well developed. The results are astonishingly good. Try it more often”.

This view was echoed and amplified by Lord Phillips of Worth Matravers, the Lord Chief Justice of England and Wales when he gave a speech in India on 29 March 2008 he said:

“It is madness to incur the considerable expense of litigation -- in England usually disproportionate to the amount at stake -- without making a determined attempt to reach an amicable settlement. The idea that there is only one just result of every dispute, which only the court can deliver is, I believe, often illusory. Litigation has a cost, not only for the litigants but for society, because judicial resources are limited and their cost is usually born -- at least in part -- by the state. Parties should be given strong encouragement to attempt mediation before resorting to litigation. And if they commence litigation, there should be built into the process a stage at which the court can require them to attempt mediation -- perhaps with the assistance of a mediator supplied by the court.”

Ministry of Justice

To support this judicial encouragement for civil and commercial mediation in England and Wales the government has established a “National” Mediation Helpline which currently receives 7,800 calls a month. Through this helpline mediation can be arranged for civil law disputes for a fixed fee. There is a 15% year on year growth rate planned for this service.

The MoJ have also employed a cohort of in court small claims mediators mostly recruited from Court staff. These mediators are working up to handling around 40 disputes a month. The mediations are free, time limited and often conducted on the telephone. I am told that repeat defendants like the Carphone Warehouse and Home base are so enthusiastic about the service they are suggesting mediation to potential plaintiffs at an early stage.

Legal Services Commission

Legal Aid is sometimes available in non family civil litigation which would fall within the realm of commercial dispute resolution.

Last month, a senior official at the Legal Services Commission speaking at a conference said that their data shows that, despite all the rules of court and judicial enthusiasm from the highest level that I mentioned, in civil litigation funded by the legal aid:

In 96.5% of cases *neither* side proposed mediation

In 2% of cases Dispute Resolution other than litigation was suggested and not used

In 1% of cases mediation was used and

In 0.5% of cases, some other method of dispute resolution was used.

He went on to say that:

Of the 241 cases taken to mediation in 2006/07

In 57% of cases, all issues were resolved

In 14% of cases the issues were not all resolved but the parties narrowed the issues and

29% of the cases were not resolved at mediation.

Interestingly, Colin Stutt, Head of Funding Policy at the LSC formulated two propositions from this data:

First; the current uptake of civil mediation does not reflect the value of the process to the parties and

Second: Low uptake of mediation can no longer be attributed to lack of awareness of the process on the part of lawyers, courts and clients in England and Wales.

As a result, he appeared to be edging toward favouring compulsion.

However, lack of awareness may not be the only reason for what I have described as an under use of mediation. I have often heard lawyers and judges asking how they can be assured about the quality of mediators. They rightly point out that mediation is not a prescribed activity and anyone can hang out their sign (or more likely launch a website) saying that they are a mediator. How can people do better than typing in “commercial mediation in Scotland” to Google?

The Scottish Mediation Register

Well, if you do put those words in to Google just below the Core Solutions site you will find the www.scottishmediationregister.org.uk

In early 2006, supported by funding from the Scottish Government, my office hosted a consensus building process focused on finding a Scottish solution to quality assurance questions for mediation.

We opened the site for registrations last year. The Scottish Mediation Register is a web-based listing of mediators who self certify that they meet minimum standards. These standards are in 6 specific areas of training, co-mediation and continuing practice development as well as adherence to an appropriate code of practice, complaints handling procedure and appropriate indemnity insurance.

Minimum standards have been set by an independent Standards Board. The majority of members of the Standards Board do not practice as mediators so the operation of the Register is distanced from the potentially conflicting interests of practitioners. Although the standards are the same for all spheres of mediation; details of Scottish Registered Mediators are displayed

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under different categories of work. For instance, you can find detailed information about nearly 20 Commercial and Business mediators available to mediate across the country.

Shortly we will be merging this Register with the well used map of Mediation that appears on the Scottish Mediation Networks website. Scottish Mediation Registered Mediators are allowed to use the specially designed logo and avatar which we intend will become a recognisable badge of quality assurance.

There are, of course, other emerging quality assurance schemes in commercial mediation. The Civil Mediation Council run an accreditation scheme for mediation service providers (and not individual mediators) devised principally to meet the needs for referral schemes in the Courts of England and Wales.

In anticipation of the changes expected in employment law, there appear to be attempts by training providers in England to seize the high ground by setting up various workplace mediation accreditation schemes. These schemes appear to have been devised to meet the needs of the market in England and Wales. Indicating that they encompass the whole of the United Kingdom has been described by some as pure hubris.

Possible future roles for mediation in commercial disputes

I will conclude as I promised I will look at the future roles of mediation in commercial disputes. I return to the work of the researcher, Bryan Clark. He wrote:

“In addition to further judicial support of such processes, further propagation of mediation in both the legal profession and the client base is undoubtedly required. Only then may [mediation] rhetoric become a reality and Scottish commercial mediation move from the sidelines into the mainstream.”

It has taken a decade since the reform of the English Court system by Lord Woolf to get to a stage where the current Chief Justice, Lord Phillips could show his strong support for the use of mediation when he said in the quotation I referred to before: “Parties should be given strong encouragement to attempt mediation ...”

We have an opportunity with the work of the Lord Gill’s Civil Courts Review to learn from that decade of experience south of the border.

If mediation is to become embedded into the way we handle commercial disputes in Scotland, the advice from Sir Anthony Clarke, Master of the Rolls for England and Wales needs to be taken on board:

“This will require education; education on the part of litigants, lawyers and the judiciary. Lawyers and judges will need educating so that mediation becomes part of the culture; so that it becomes second nature to

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us all. The onus lies on you and me to ensure that litigants appreciate mediation's many benefits: its informality, its confidentiality, the possibility it holds of enabling the parties to reach a consensual resolution to their dispute and to do so more quickly and at lower cost than might well be possible in the zero-sum game which is litigation".

One initiative that could address this issue would be the setting up of a Scottish Centre for Dispute Resolution. I understand that John Campbell QC, who speaks next will mention this idea in more details.

My view is that an intellectual resource for knowledge and learning about all forms of dispute resolution would be very valuable. If it were created by collaboration amongst dispute resolution practitioners as diverse in their approach as arbitrators and mediators then the value would be even greater.

An early area for such a Centre to research would be the emerging discussion about the effectiveness of different mediators' styles and approaches. One dichotomy is the difference between a facilitative approach and an evaluative approach to mediation.

Broadly, facilitative mediators want to ensure that parties come to agreements based on information and understanding. They predominantly hold joint sessions with all parties present so that the parties can hear each other's points of view, and sometimes have private meetings. In my experience, facilitative mediation is the predominant model taught in Scotland.

Typically an evaluative mediator assists the parties in reaching resolution by pointing out the weaknesses of their cases, and predicting what a judge would be likely to do. An evaluative mediator might make suggestions or even recommendations to the parties as to the outcome of the issues. They are usually concerned with the legal rights of the parties rather than needs and interests, and evaluate based on legal concepts of fairness. Evaluative mediators meet most often in separate meetings with the parties and their lawyers, practicing "shuttle diplomacy".

Kahleen Crawford of the CI Arb Scottish branch has been very active in highlighting the market and demand, especially in construction disputes, for an evaluative approach to mediation.

We also have, I believe, the opportunity to hone our jurisdiction to one where it is actively attractive to bring disputes here to be resolved. In addition to creating a community of dispute management specialists who collaborate and offer joined up services, we could create an environment which protects the confidentiality and privilege of the mediation process. This could be offer a real commercial advantage to Scotland, even over England.

In any event both the UK and Scottish Parliaments will need to address the consequence of this EU Mediation Directive. Scotland has the potential to create a niche market in dispute resolution. As the Head of Legal & Risk of Lloyds TSB Scotland, Karina McTeague said in the May edition of Business Insider, “Scotland could be seen as a country where parties can come to resolve disputes quickly and cost effectively in a sophisticated legal environment. That would be good for us all.” I could not have put it better myself.