

I would like to thank CIAJ for putting on this Conference. I would also like to thank you for the invitation to speak on “Innovation in the Justice System: Ideas Worth Spreading and Lessons to be Learned.” I am delighted to be here.

Let me say at the outset: thank you. Thank you to all of the Judges, lawyers, court officers, Clerks, court staff, legal aid staff, police, victim witness, and others who work so hard to deliver justice in our society. Thank you for the work you do. It is, in many ways, one of the best justice systems in the World because of the work that you and those who have gone before have done.

Our justice system is what distinguishes us from many other Societies. It is the foundation of our society. You need a strong foundation if you are to have a strong society.

However, notwithstanding the excellent work of so many, the justice we all desire and work so hard to achieve is becoming less accessible, less timely and less affordable for many of the people we serve.

Chief Justice Strathy was direct at the opening of this Conference. To paraphrase his words: our civil justice system is too slow, too complicated and too expensive for most. We will lose it if we do not change it.

I will confine my remarks to the family part of the civil justice system. Family law is an area in which I claim no particular expertise. I practiced criminal law for 23 years, so I often saw a particularly terrible part of too many family disputes. I became very involved in family law when I was Attorney General for Ontario from 2007 to 2011, listened to experts, and brought in the 4 Pillars of Family Justice.

Family disputes touch many lives. Hundreds of thousands of people are directly affected in Ontario every year. As families work through the issues, and children in particular live with decisions they have not made, extended families, friends, and work colleagues are all affected. The human toll in grief, violence, cost, and lives forever changed is unimaginable.

Providing a means for families to resolve their issues that is timely, understandable and affordable should be the least we can do. Yet for many the family process is not what it should be. In fact, in Ontario, over 50% of people go to family court without a lawyer. Think of going into surgery without a doctor or a nurse.

Many have said the system is in crisis, but effective action that will change the state of crisis is hard to find. The Profession says the right things, but the system does not change and people continue to suffer.

We, the Profession, serve the people of Canada. It is their right to justice, and the system must serve them. Increasingly, though, it is too slow, complicated and expensive for them. Many do not have access to the very justice system they pay for. And they do pay for it. It is a publicly-funded justice system that the public is increasingly excluded from, or unable to be included in.

Pleased: I entitled this speech “Pleased, Concerned, Hopeful”. I am pleased because I see that, in Ontario, within 5 years, 75% of those who now go to court to resolve all or most of their family issues will have a faster, more affordable and simpler alternative.

That is great news! Every year there are about 80,000 new family law cases in the three types of family court we have in Ontario. These cases involve about 160,000 people. (That does not include the people whose cases carry over from one year to the next.)

I am convinced that 120,000 of them, within 5 years, will have a simpler, faster and more affordable way to resolve their family issues. And this is 120,000 people every year. 120,000 who will suffer less emotional or physical pain, who will understand the system they must turn to, who will not spend as much money trying to resolve their issues, and who will be able to get on with the rest of their lives sooner and after a more supportive process.

I lived for announcements like this during my 10 years in government. To make 120,000 people happier is a huge accomplishment. To relieve some of the stress, anxiety, cost and disruption to their lives in very difficult circumstances is very important. We should all be very happy.

Concerned? Why would you be concerned about this great news? I am concerned because I am not sure of the extent to which it will involve lawyers or Judges. I believe in our Profession. I believe in the work you do. I believe in the importance of it. I want the Profession to lead on the provision of legal advice and services, to serve people the way they need to be served.

The traditional court system, unfortunately, has become far too slow, complicated and costly for most Ontarians. It shows little sign of changing. Recent family court rules changes in Ontario appear to have made it worse for the people who have to use the system. We were even asked if we would consider preparing instructional videos for family court litigants who had to use the system. Why not simplify the system instead? The consumer appears to have little voice in the existing system.

So where is innovation happening? In the space before and outside court.

A combination of process and technology is starting to do what the Profession appears unable or unwilling to do-respond to consumer need.

It might come from an online dispute resolution portal such as BC initiated with MyLaws BC. These are early days yet, but the system is being improved every day. HiiL, the Dutch group, has a system that can take couples right through resolution. There have long been moves by some to take cases out of court through mediation, arbitration, collaborative approaches and other means. These initiatives are accelerating. Automation and the use of intelligent systems allow so much more to be done faster and cheaper than ever before. The pace of change is quickening.

The Legal Innovation Zone's Family Community Collaboration ran a 4 month initiative designed to develop an approach for people to resolve family issues before and outside court in a faster, simpler, more supportive and more affordable way. Over 200 people, lawyers, Judges, professionals, law students, LPP candidates, students, clients, and members of the public, participated in 5 sessions. The 4 cornerstones of the approach they developed are: education/information, screening, triage and resolution.

New approaches involving people, process and technology are being developed. It will take some time for consumers to get used to them. Those in charge of the existing system will probably never warm to them. I am confident that when Canadians know what they can do at a lower, more affordable, price, they will do what they do (and you do) in every other part of their lives – take advantage of it!

Some members of the Profession have already started to decry the “privatization” of justice. Nonsense. For decades we have seen those who could, flee the courts for the mediation, arbitration, private courts or other options they could avail themselves of. Mediation is more affordable for some now, but not all, much of the Profession resists it, and it is still wrapped in a complicated and lengthy system. Lawyers, Judges and Law Societies did not prevent the rich and others who were able, and their lawyers, from leaving the system. They must not try to stop the rest from obtaining the justice they need that many, increasingly, cannot get in court: timely, simple and affordable.

It is the people’s right to justice that is constitutionally guaranteed, not the Profession’s right to deliver it in a way and on a schedule that suits the Profession. It is time that our justice system is returned to the people whose system it is. The providers do not own it, they work in it.

Governments should get serious about this, and recognize it as a real problem. They cannot offload their constitutional obligation for the administration of justice to others. Ensuring justice for the people they represent is one of the core responsibilities of government. It is not an optional extra. If you are not doing so, or are delivering justice that is too complex, slow and unaffordable for most, the people will start to ask what their government is really necessary for.

Now many will speak to the need for more judicial or lawyer resources. The answer to so many access questions posed to the Profession seems to be that we need more of us. If only the people who already pay a lot of money for a system they cannot afford to access would pay even more, they might get some access to it.

With respect, no. We have invested too many of the resources dedicated to justice in paper and process. The efforts are undoubtedly well-intentioned, an effort to achieve perfect justice by micro-managing it with paper and steps. This has had the effect of driving up complexity, time and cost. The system is being strangled from too much paper and process. No consideration seems to be given to the consumer, and their cost in time and money to comply with each of these steps and each form. No one asks the consumers how they would like to interact with the system.

It is time for a different approach. Einstein said that the level of thinking that got us here is not the level of thinking necessary to get us to where we need to be. He also said that doing the same thing in the same way and expecting a different result is, to paraphrase, not likely to succeed.

Hopeful. Why would you be hopeful? There is still time. Time for the profession to lead, and not be bypassed. Time for the system to continue to be an important part of justice delivery into the future. Time to take the few simple and straightforward steps that will rescue the system from those who would “perfect” it. Those steps begin with triage, and streamlining by cutting the paper and steps.

First, triage. Triage is not a new concept. It has been used for years in many areas. It is, in essence, no more than identifying and prioritizing the important, and separating that from the rest. Our Family Community Collaboration recognized what professionals have been saying for years: triage early and often. Triage long before the case gets to court, and then before or at least as the papers are being filed. Continue triaging throughout.

Our court system is a publicly-funded resource. It must be used for the issues that require, and justify, the expenditure of public resources and money. You cannot enter a hospital with a wrist injury and expect to see the heart surgeon-she might be available, but you can’t see her without justification and

demonstrable need. We need to focus the effort at the beginning on the issues that require our attention.

Justice is not an all you can eat buffet where you get to do what you can afford to do just because it's there. Our Judges should take greater control of the system that they exercise control of.

Now I have heard that some Judges want only to play the umpire. I suggest, respectfully, that the job is to make decisions. But even if only the umpire, surely, if someone comes to the baseball game with goalie pads, a hockey stick and a puck, even the umpire throws them out. This may well mean that litigants, and their lawyers, are given more direction than they are used to. Good. The public obligation is not to fund a system to accommodate every wish and strategy of every litigant and lawyer, but one that will provide justice on the relevant and important issues.

Triaging early and often helps people who are being harmed or are at risk of being harmed, usually women and children, get the help they need quickly: police, sex assault centre, family crisis centre, lawyers, counsellors, Judges, and others. Delaying that help can only increase the risk of harm.

Some lawyers will argue forever about who should do it, how, and on what form. Just do it. Early and often.

Second, streamline the system by cutting out the paper and the steps.

The most successful organizations, public and private, whatever they make or do, have been using a lean approach for decades. In law, we have been going in the opposite direction, by adding paper and steps. We have decided to try to micro-manage every step in the process by adding forms, meetings, paper and steps. It is grinding the system to a halt and making it unaffordable for most.

Within 4 months you could redesign the family court process to get to the decision-point faster, and implement the new process. 4 months to start delivering a huge justice benefit to all of those entering the family justice system every year, 160,000 people in Ontario, plus all of those in the system already.

Why hasn't the government done this already? I can speak to part of that. When Attorney General, we brought in the 4 Pillars of Family Justice. It involved more access to mediation in courts, more counsellors and support people, greater access to lawyers and legal advice for people, and more legal aid. Lots more of us. The Profession welcomed the extra resources. The fourth pillar, the pillar that would have maximized the benefit from the extra resources, was to reform the family court process by cutting out the paper and steps. No progress has been made on that front. Indeed, if anything, the process has become even more complicated.

Governments don't control the rules committees. A small minority of the appointees are made by the government. Judges are the majority, and organizations make up the rest.

I'm hopeful because progress would be so easy to attain, and real benefits to families and people who are hurting so relatively easy to provide. No new resources are required, and existing resources could be focused on cases that require them.

The Profession can lead or be bypassed. The choice, for now, is in our hands. Within 5 years it won't be. Every day that passes without tangible change will mean more people will get their measure of justice

without us. The good news is that, one way or another, the people who matter will increasingly get what they need, in the way they need it – justice that works for them.

Chris Bentley

(Adapted from a speech given at the CIAJ Conference in Ottawa on October 7, 2016.)