THE PROBLEMS WITH OUR COURTS…

…and how to fix them.

THE PROBLEMS WITH OUR COURTS

AND HOW TO FIX THEM

Table of Contents

THE PROBLEMS WITH OUR COURTS AND HOW TO FIX THEM

Introduction

I am a lawyer in Ontario. Though much of this paper may well apply to other Provinces or jurisdictions, I cannot offer any assurance that such is the case. I have practiced primarily (though not exclusively) in the East Judicial Region, though I have also appeared in Courts in Toronto (Superior Court and the Court of Appeal), and Ottawa. I have also been involved in cases in the Divisional Court and the Federal Court, though not enough that I would claim any particular expertise in the functioning of those Courts.

My practice has been a general bilingual one from the beginning. Much of my experience is in the Family Court, but as a general practitioner I also have experience in criminal, quasi-criminal regulatory and civil courts.

I have been Duty Counsel in both family and criminal court (including W.A.S.H. Court which at first I thought might be a short form of whitewash, but which actually is an acronym for Weekend And Statutory Holiday Court), I am on the personal rights panel of the Office of the Children's Lawyer, and I am the prosecutor for the Ministry of Transportation in Provincial Offences Court in Kingston and Napanee.

Although the nature of a general practice has perhaps given me insights that no specialized lawyer might ever have, I do not doubt that specialized lawyers (whether certified specialists or not) and other general practitioners views and opinions may be quite different from mine. It may also be that my particular insights do not include every aspect of what would be necessary to effect change, and it may be that there are better solutions than what I propose in this paper – but change has to start somewhere, and someone has to take the first (or next) step.

In no way do I purport to have the only solution, nor do I proclaim nor believe that the ideas and proposals herein cannot be improved upon. Quite the contrary. I invite constructive criticism and feedback and would like nothing more than to see other lawyers and justice system participants join me in fixing a system which is both the best we have and in need of improvement.

Our court system, whether civil, criminal, or family, is bogged down and simply not working. Not surprised? Nobody is. It is no secret that something has been terribly wrong with how our courts "work" for quite some time.

Long ago the Courts were where citizens could turn to resolve problems. The uninformed still think they are. Those who work within the system know better.

It used to be that if a citizen had a legal problem which could not be resolved the matter was brought to a Court of Common Law, the issues would be analyzed, the facts determined, the laws applied and a conclusion reached.

The Courts of Common Law eventually became bogged down in rigid rules, and as an alternative in many areas of law, there was a new kind of Court, the Courts of Equity (also known as the Court of Chancery), whose purpose was in part to avoid the slow pace and harshness of the Courts of Common Law.

Our Courts are, according to law, a combination of the Courts of Common Law and the Courts of Equity but now they too are getting bogged down. That will not come as a surprise to anyone who works in the system or has had to go through it. What is surprising is that nobody seems to know how to fix it – except the people who work in it every day – and they have no ability to change anything.

More surprisingly, the steps being taken to address the issue are only making things worse. Courts are now keeping statistics in an attempt to measure efficiency. Making things look better by improving statistics has replaced making things actually work better as a goal.

The lawyers, judges and court staff are now working, willingly or not, to please bureaucrats who measure efficiency based on how many cases are cleared and how often arbitrary time-lines are met or exceeded. These things can be quantified and tabulated. Whether justice was done is ephemeral and is therefore not part of the equation. The bureaucracy does not concern itself with that which cannot be measured.

Who is to blame? Who can fix it? The answers you will get if you ask those questions will depend on whom you are asking but they can generally be summed up as "Not me, someone else." Believe it or not, that may actually be the case.

The system is now so complicated that it is extremely difficult to determine whose responsibility fixing the problems is. Although it hasn't been getting better, the problem is not new – it goes back at least as far as the Constitution Act 1867, specifically sections 91 and 92 which set out the responsibilities and areas of authority of the Federal and Provincial levels of government. These sections assign the administration of justice to the Provincial level of government even in areas of law which are exclusively within Federal jurisdiction such as criminal law. Neither level of government can fix the problems on their own, they have to cooperate.

Depending on which Court you are in, the Judicial Officer (a "catch-all" term encompassing Justice of the Peace, Deputy Judge, Master, Provincially appointed Judge, or Federally appointed Judge), may have been appointed by either the Federal or Provincial level of government. This does not mean that that level of government can fix whatever is wrong.

No matter which level of Court you are in, how that Court is run (the administration of Justice) is an area of Provincial authority and jurisdiction (though possibly subject to Federal laws), so in any Court which is presided over by a Federally appointed Judge or Master, the support staff and security are governed by the Provincial government and are almost certainly Provincial employees or contractors with the possible exception of the police who provide security for the courthouses – they may be municipal employees. So in any

Superior Court it takes cooperation between all three levels of government to allow the Court to operate.

Even with all three levels of government working together, that's not enough for the Courts to operate much less to change how they operate to become more efficient. It is relatively easy for any one of the stakeholders to make a change to their one area of court operations; and it is easy for that change to cause difficulties for other stakeholders or to reduce the overall efficiency of the system – but to make things better requires coordinated effort from all of the stakeholders, not just all three levels of government.

Judges and Justices of the Peace are separate branches of government (Federal and Provincial depending on which level of government appointed them). Their independence from the elected governments and the administrative branch is sacrosanct, based in the Constitution, and jealously guarded (with good reason).

This means that other than appointing them in the first place, neither the Provincial nor the Federal government can control what Judges do nor how they do it. All anyone, including the Attorney General for the Province or for Canada, can do if they are not happy with a Judge's conduct, is complain to the Judges collectively. Only Judges can discipline or control Judges.

Most of the support staff are Provincial employees, and are members of Province wide unions. Those unions are powerful in themselves, and their cooperation is also essential to the running of the Courts and to any change being implemented.

Lawyers and paralegals are members of self-regulated professions and are not directly accountable to any level of government. Within those self-regulated professions, each law firm, lawyer, or paralegal sets their own procedures and rules.

So for a Court to function at least two and possibly three levels of government must work with government employees (and their union(s)) and with Judges. For a Court to function efficiently, lawyers must also cooperate.

Added to the mix are Provincially funded (but nominally separate and independent arms' length) Legal Aid Plans which are intended to allow those who cannot afford a lawyer to retain one. Legal Aid is notoriously underfunded and inadequate, leaving many people to fend for themselves in this complex maze of systems.

There is no effective oversight or management of the system as a whole. Nobody is to blame, and nobody is accountable for any issue – each of the separate groups can easily deflect any blame to any one or more of the other groups. A member of the public is most likely to blame "them" or "the government" and be less than interested in detailed analysis of what is actually the problem. All the public sees is that "the courts" (which they falsely see as a single cohesive entity) don't work, and there is a blame game going on, nobody will fix anything,

everybody is content with the status quo which at least allows them to not do anything for their lavish salaries and pensions.

That our Courts work at all is a testament to the people involved – but that is not to say that the system can't or shouldn't be much better and more efficient than it is; merely to set out why the fix won't be easy.

In the distant past, a citizen subject would take any grievance directly to the ruling monarch. When the monarch became overwhelmed with such issues the role of judge was created as a proxy for the monarch and the task of resolving such issues was downloaded to the judges. Long ago the Court of Common Law would hear any kind of case, whether it was criminal or civil.

Our system hasn't worked that way for a very long time even though some of the people (Superior Court Judges and a few lawyers) in it still do. Sub-categories of civil and of criminal areas have developed (civil, for example now includes family, child protection, small claims, wills and trusts, real property, and many other areas). Most lawyers stick to a few areas of law and steer clear of others. A few lawyers practice in a wide variety of legal areas.

We now have Family Courts, Civil Courts, Criminal Courts, and Provincial Offences Courts, and those courts themselves are further sub-divided either into formal specialty courts, special purpose days, or both. This division or specialization contributes to the problems in our Courts, including the delays and costs as well as the frustration of the citizens whose matters come before the various Courts.

For example, only the criminal court can change bail conditions (unless there is an Application for Bail Review to a Superior Court, or bail review is triggered by bail not being dealt with within a set time frame), but while that court can impose or remove a condition which will affect your ability to see your children it cannot grant access or change when or how access occurs; that change must be made in a Family Court (which cannot amend or remove a condition on your bail – that has to be done in Criminal Court). This is true even though the very same Judge whom you appear before in Family Court could change the same conditions if they were sitting in criminal court (particularly so if the Family Court is a unified Court presided over by a Superior Court Judge who could hear a bail review application).

Some hearings must be presided over by a Judge, others can be handled by a Master (in the Superior Court) or a Justice of the Peace (in a Provincial Court). It would seem more efficient to deal with all of the bail cases together and all of the child protection cases together, and in some ways it is; but that specialization is now also often part of the problem.

If you are appearing in a criminal remand court and want to resolve the matters by pleading guilty to one or more charges and having others dismissed you will have to come back to a different court on another day (and wait in a detention centre in the meantime) because the remand court is being presided over by a Justice of the Peace who cannot hear your plea or impose a sentence.

This is just one example of a matter coming before a Master or a Justice of the Peace when the parties need to do something which must be done in front of a Judge and the case being delayed and re-scheduled as a result.

The converse is also true – if you are before a Judge and need to do something which would normally be done by a Justice of the Peace, the case may be delayed and re-scheduled so that a Justice of the Peace can handle it – not because a Judge can't legally do it, but perhaps because the Judge is too busy, or sometimes because the Judge is unaccustomed to that type of appearance or the necessary support personnel or systems are not in place for the Judge on that day or time or in that room.

In theory a Judge can do anything a Master or Justice of the Peace can do and more; but in practice Judges' courts are often staffed with different support people and some support people (such as a trial coordinator) may not be available because it is not anticipated that a Judge will need to deal with them, since it is a Judge sitting and not a Master or Justice of the Peace, and the Court is not expecting to have to schedule things like bail hearings or remand appearances. The result is often that a matter is adjourned to another court rather than resolved.

So, if we have Judges who can hear anything (in their Court), why do we appoint Masters and Justices of the Peace to hear some of those matters? The simple answer is: they cost less, and Judges are busy doing things that only a Judge can do – some of which don't actually advance the progress of a case, but rather serve to meet statistical targets or to show what passes for progress in moving a case forward – for example, holding a "case conference" or "settlement conference" to meet an arbitrarily imposed timeline even when everyone involved knows no real progress will be made – wasting the parties money, and everyone's time – parties, lawyers, and the Court's, but making the statistics look better.

A more complete answer is that Judges are often doing things that don't really advance the cases that come before them. There are a lot of inefficient court appearances. There is a lot of wasted time, and frankly there are a lot of wasted court appearances that take too long and do little or nothing to move the case forward.

In Criminal Courts, there are days when the Court hears long lists of cases that aren't ready to go to trial, and lawyers and accused individuals line up to take turns telling a Justice of the Peace (who can only adjourn the case) that the case still isn't ready, often exactly what everyone expected would be said when the appearance date was first set. Even if everyone knows that the case won't be ready for months, the Court often requires everyone to come back again in a few weeks and provide an update to the Court. If lawyers are involved the parties are paying for this (including the time their lawyers spend waiting to be able to officially tell the court what is already known), if they're representing themselves they're taking time off work (at best) to spend the day sitting waiting for a few seconds of the Court's time.

Later in the process the number of such appearances can be used to "justify" forcing the matter to go ahead regardless of the needs of the case. The number of appearances is one of the metrics the bureaucrats use to assess court efficiency, and one of the things the judicial officers (justices of the peace, masters and judges) are pressured to reduce – all while refusing to

agree to lengthy adjournments and demanding regular official in person on the record updates even when they are entirely predictable.

In Civil and Family Courts there are numerous conferences, at which the Rules forbid the Judge or Master from doing anything substantive, but even though nothing can happen, parties still have to attend (with their lawyers) and often spend large parts of the day waiting for a few minutes in a fully staffed court to speak with a Judge whose hands are tied.

It doesn't matter if everyone knows that nothing will be solved until there is a trial – the process rules over common sense – all of the checkboxes have to be checked off, and if the process requires three or four different conferences spaced months apart then everyone has to have that many conferences (each costing at least a few thousand dollars in legal fees or days off work or both). The adversarial nature of court appearances also frequently result in the fanning of the flames of conflict between the parties.

Preparing for the conference usually requires reviewing all of the highly confrontational downright nasty material the other party has already filed. People who were on the path to settlement, when they are reminded of the foregoing nastiness, can change their minds about making concessions. The process, nominally intending to promote settlement, often works against its stated goal and instead fosters nasty litigation and more court appearances (and wasted time and money). Because the time from initial filing of materials to each conference and the time between conferences is another easily measured metric, that is one of the ways the bureaucrats track efficiency, and another way that seeking efficiency leads to inefficiency.

For example, if a case is approaching a settlement conference and the parties and their lawyers are negotiating a comprehensive settlement, courts can and do often refuse to adjourn the date for the formal conference because of the length of time that has passed – even when the lawyers on both sides ask for the adjournment on the basis that drafting the conference briefs will derail the tantalizingly close settlement agreement. In the name of efficiency the court's response is "If you're so close, settle it; otherwise your briefs are required, the matter will not be adjourned." The case then either settles (with both sides feeling bullied by the court and neither of them actually freely consenting – they are both under duress, but from the court). In the name of efficiency, the goal of solving the underlying issue is sacrificed on the altar of timelines.

Even when settlement is not imminent, these numerous court appearances which accomplish little or nothing all (either in fact or in the perception of the members of the public who are involved in the case) cost the parties involved (financially, psychologically and emotionally) and they all cost the government vast sums of money.

Wasting time in court is a huge but largely unacknowledged access to justice issue. Even appearing to waste time is a significant and unaddressed issue in the reduction in respect for the Courts and the decrease in the public's confidence in the administration of justice. Spending months and thousands of dollars to see no definite progress is frustrating; that frustration is vented at front line staff.

Dealing with angry frustrated people (members of the general public as well as lawyers, other court staff, supervisors, and bureaucrats measuring proxies for efficiency) leads to staff burnout and loss of empathy. This leads to the perception that staff are being rude, don't care, and are entirely unconcerned with helping – often a false perception – but for each individual dealing with the court their personal perception is reality.

The fact that staff, who generally do not have legal training, are given effectively secret policies (policies which are neither known by nor shared with anyone other than the staff) to follow in administering rules which are written for lawyers and Judges but which are increasingly being interpreted by self-represented lay people, rules which do not accurately describe or control what really happens and which vary in implementation from court to court and region to region, which are subject to not only regional "Practice Directions" and local practices doesn't help reduce frustration among those who come to the Court for help and certainly doesn't help reduce the stress experienced by the staff who are on the front lines.

Court staff know and do their best to follow their policies and what the local Judges tell them they want done. Lawyers know the Rules, know where to find the formal Regional Practice Directions, and after practicing in an area for a while learn the local practices. Self-Represented litigants have to figure things out for themselves with what help staff (who cannot give legal advice) can give and maybe with limited summary legal advice from various Duty Counsel lawyers – none of whom have enough time or resources (nor do they have the mandate) to be able to properly manage an entire case.

Most citizens come to the Court with a problem they need solved. Many expect that the Court will resolve issues quickly and efficiently – Judge Judy handles two cases in a half hour; and she does so quickly and apparently correctly, but certainly decisively.

In our Courts, cases languish for months and years before a trial date is so much as set. It's not that nothing is being done, it's just that little or nothing is being accomplished or being seen to be accomplished by what is being done.

Even more frustrating is that in an age in which video calls can be made from any cell phone, it is not possible to appear in court by video (unless you are in police custody at a police station or in a prison or detention centre with a video link). Documents must be filed in person.

In some courthouses, people make their living standing in line to file documents. Ubiquitous free online services like Google calendar can be used to plan parties and meetings, but to book a court date takes hours attending the court in person. The courts are being dragged kicking and screaming into the late 19th / early 20th century.

The rest of us are well into the 21st century.

In an effort to seem, and honestly to be, more efficient, Courts will double, triple, quadruple, quintuple, sextuple (or more) book themselves (they've stopped telling people how many cases are booked for the same court room for the same date and time). What is not a secret is that setting a trial date doesn't mean you actually have your trial on that date – courts are too busy for that. You will, if you're lucky, be told your trial will be sometime during a particular week – probably, or maybe not – but if you`re called you`d better be ready to go with all of your witnesses fully prepared and ready to testify with all of the evidence (documents etc.) ready to be introduced.

You need a day for your trial? Ok, sometime the week of July 15th, next year (assuming everyone is available). If your case is actually going to go ahead, the Court will call you 24 hours in advance.

If the Court calls, you must be fully prepared to start, have all of your witnesses and evidence ready. On the other hand, because most – but not all - cases settle (almost always because people run out of patience and money so someone caves in) several weeks' worth of trials are booked for the same Court during that week, so maybe your case won't be reached. If your case isn't reached, you'll just have to come back to assignment court to set another date to try again.

What is assignment court? It's where you were when you set the date for your trial that didn't happen. It's a date to come to court to set a date to come to court. No, I'm not kidding.

No, you can't do it over the phone. No you can't email anyone. No there is no web site you can use to do this. No you can't appear by video. No it doesn't matter that you live a five hour drive away. No you can't send your availability to the Court, you have to be there or have someone else attend for you (your lawyer or agent).

Cases which are (supposed to be) ready for trial will again be called one at a time and the lawyers and parties will, one at a time, confirm whether or not they are available for the date(s) suggested by the trial coordinator – when again the trial may or may not happen (but this time we'll make it a higher priority), and no there is no way to know until the day the trial is scheduled to start.

This is done to ensure that the Judge's time isn't wasted waiting around for lawyers and parties to be available, which on the surface makes sense if you only consider the cost of the judge and court staff, the taxpayers are paying no small amount to have the Court available and staffed. However, if you add into consideration the cost to the other justice system participants (the Parties) who, if they have privately retained lawyers are paying hundreds of dollars an hour for dozens of lawyers to twiddle their thumbs, the expense of a staffed Court becomes relatively insignificant very quickly. Even from a taxpayer point of view it may be more economical to focus on saving lawyers' time – except that the Legal Aid Plan has a policy of just not paying for waiting time (even though the lawyer has no choice but to be at court waiting). Can anyone wonder why lawyers are reluctant to accept Legal Aid Certificates?

How to fix it

1. Encourage, fund, and promote alternative dispute resolution services and resources (A.D.R.) – BEFORE a matter can be brought to Court not just afterwards.

This mainly applies to family and civil court, but could apply in the criminal context in appropriate cases as an increased focus on restorative justice. (e.g. shoplifting charges in situations in which the value of the item taken was minimal and there was no actual loss, mischief to property charges where the mischief was minimal, mutual assault charges not involving significant physical harm to either party). All of these are examples of situations in which restorative justice can be more effective and efficient than the current system – not just in terms of speed of resolving cases, but also in terms of identifying addressing and correcting underlying issues.

In both the civil and family court processes in Ontario, much effort and time is devoted to encouraging settlement AFTER a court case has begun. Ontario family courts have implemented a M.I.P. (Mandatory Information Program) which is essentially two hours of a lawyer and a mediator reading a script to attendees. The script emphasizes that court action should only be started as a last resort, and the program is available (but not mandatory) before starting a court proceeding. Once one party starts the proceeding, both parties are required to attend. The Applicant may be thinking that it would have been nice to know before starting the action, and the Respondent will likely be thinking "What am I supposed to do about it – I didn't start this!"

Making attending an information session such as the Family Court M.I.P. a mandatory prerequisite BEFORE starting a court case (with the possibility of an exception in emergency circumstances) and properly promoting and funding ADR services could reduce the load on the Courts greatly.

Encouraging people to resolve their issues outside of court by using A.D.R. services and resources would have the additional benefit of promulgating problem solving skills such as active listening, listening to understand as opposed to listening to respond, and compromise. These skills could result in fewer cases escalating to the level at which courts are (or seem to be) a viable option.

2. Put matters in front of Judges more quickly (mainly for Family and Civil Courts)

Anything which prevents or delays access to a Judge who can make a decision and issue an order is a barrier to access to justice. Having a Judge or other judicial officer triage cases and set out which steps must be completed in a particular case (making an Order as to what the next steps are and setting out a timeline as early as possible) could also save enormous amounts of Court resources and speed the process up significantly.

This could also speed intervention by other services – if the allegations in a family law matter are severe enough to warrant police or children's aid intervention, the judicial officer (ideally a Judge or Master) could trigger that involvement.

Matters such as interim custody of and access by children could also be decided at this stage, preventing a party from effectively winning sole custody and primary residency by starting a court proceeding and severely restricting the other party's time with children for months on end while waiting for such things as Case Conferences and the report of the Office of the Children's Lawyer.

A common delay tactic is to drag out the filing of responding materials as long as possible before setting a Case Conference date months later, then only consenting to the involvement of the Office of the Children's Lawyer at or after the Case Conference – delaying any action on custody or access for the better part of a year and establishing a new status quo in the interim – a status quo which is difficult to change.

3. Make routine orders earlier (Family and Civil Courts)

Another factor which contributes significantly to delay (and wasted court appearances) is failure of one or more parties to comply with disclosure obligations. Making these sorts of orders at the very beginning of the process, even on an interim without prejudice basis, would speed up the resolving of cases and reduce the advantages one party or the other might seek to obtain by starting or prolonging litigation.

The existing rules regarding routine disclosure requirements are fairly clear for lawyers (or at least lawyers who practice regularly in a particular area of law in a particular jurisdiction have figured out how to get things done in their particular Court), but non-legally-trained parties often either don't understand what they must share or flat out refuse to do it until (and sometimes after) they are directly ordered to do so.

This is not to say that the existing rules should not be changed – for example they require all financial material to be filed before issues of parenting time with children can be addressed. Other existing rules specify that there is no nexus between finances and parenting time (payment or non-payment of child support is not a factor in deciding whether the child sees a parent). This built in systemic cognitive dissonance is not resolved within the current rules.

The current Family Law Rules forbid bringing any Motion (with arguably ineffective exceptions) until after a Case Conference has been held.

There is no rational reason for requiring a Case Conference (often 4 or more months after the Application is served, and the better part of a year after problems came to a head) before making such orders as:

- What disclosure is required of each party and when it must be provided
- Interim custody and access
- Interim child support

- Interim spousal support
- Involving the Office of the Children's Lawyer
- Involving other services such as the Family Court Clinic
- Involving the Children's Aid Society
- Requiring disclosure of Children's Aid Society records

In high conflict situations (as most cases in Family Court start out being), this requirement for full disclosure of all financial data can be used by one parent to gain an advantage later in the litigation, particularly when combined with the ineffective exceptions to the initial prohibition on bringing a Motion before a case conference.

4. Implement Case Management as the Rule, not the Exception

In all courts (primarily Family and Civil courts, but also in Criminal Courts at different hearings or stages such as bail, voir dire, preliminary enquiry and trial), parties repeat their story over and over because for each appearance they are in front of another judicial officer who may know nothing about the case and who may or may not have read the materials.

Not only is this a waste of time and money (and therefore extremely frustrating for the parties), but it is also used by some parties to learn how to deceive a Judge – more so when related matters are in different courts. Someone can tell each court the story that most benefits them in that court or refine a false story in one court, and tell the more convincing version to the second court, and an even better version to each succeeding court or Judge.

Unless parties have the funds to get a transcript of each appearance in every court (not cheap at several dollars per double spaced wide margined page), no court knows what the other court was told or said.

Even in the same Court, without case management by the same Judge a party can practice a lie in front of Judge after Judge until trial and seldom if ever get caught or face any consequences. If there are matters between the parties in different Courts (for example family Court and criminal Court which happens quite often) then even with case management in each Court, one Court may actually teach a liar to be a more convincing witness in the other Court.

There is a perception among many civil and family court litigants, that lying to the court is if not encouraged by the court, at least condoned by it.

One party can say whatever they want, and even if the other party can prove the statement is false, there will be no consequence for the other party to having lied unless there is a trial – something which is exceedingly rare (likely fewer than 2% of cases make it through the process to trial because most people cannot afford it either financially or emotionally).

A party who is telling the truth and being reasonable will feel that they are at a disadvantage because both parties are being taken at their word.

The court may actually be encouraging disagreement and vitriol by its process which is nominally intended to do the opposite. By having different judges at each appearance the court may be going even further – it could actively be teaching people how to lie to a court convincingly.

If a matter were always in front of the same Judge (at least up to trial), or if the same Judge presided over every aspect except settlement discussions (thus allowing the Judge to hear the trial), it would be much more difficult for any party to misquote that Judge to him or herself, and there would be no question of learning to lie convincingly to a Judge with the (unwilling) assistance of other Judges.

Importantly, at least in Ontario, this was supposed to be a fundamental aspect of the Unified Family Court, but it was not implemented as the Unified Family Court expanded. With the renewed expansion of the Unified Family Court comes another opportunity to implement universal case management.

There is no good reason that the same judge couldn't manage cases in both criminal and family court whether the Unified Family Court exists in that jurisdiction or not, and where a Unified Family Court does exist, the same Judge could also preside over any civil or estate matters.

5. Let Judges control or customize the process

- The current Family Law model in Ontario is both unnecessarily general and overly specific. While that may seem a contradiction, it is not.

- If a case is to be started fresh (meaning there is no prior Court Order or written agreement or contract between the parties) then an Application is required. If the parties have an existing Final Court Order or have previously signed a contract or agreement (such as a separation agreement or a cohabitation agreement) then what follows does not necessarily apply and a Motion to Change[1] is needed

- All Applications must go through the entire Application track, whether or not the steps make any sense in a particular case and regardless of what the lawyers involved may agree on. Those steps are:

    - The Applicant must first "file" an Application with all supporting documents (must make all claims in one document, so custody, access, child support, spousal support, property claims, claims for restraining or refraining orders etc. must all be made in one document). This process is often colloquially

[1] A Motion to Change allows a Court to change a Final Order or Agreement made previously, something unique to Family Law and provided for in O. Reg 114/99 made under the Courts of Justice Act, R.S.O. 1990, c. C.43 in *Rule 15*. I address some problems with Rule 15 in another paper.

referred to by lawyers and Court staff as having the Application "issued", but the *Family Law Rules* do not use that term.

- After the Application is "*issued*", the Applicant must have some other adult serve it on the other party (or parties) involved in the case together with any required supporting documentation (which may include several years' worth of financial information as well as other mandatory Affidavit evidence which largely repeats what the Application says on separate forms all of which must be sworn or affirmed before a commissioner of oaths) and blank copies of the forms the responding party or parties may need to respond to your Application;

- The person who served the Application and all of the supporting documents must then swear or affirm an Affidavit of Service in front of a commissioner of oaths;

- The Applicant (or their agent) must then file the Application with the Court (not the same thing as the first step) together with proof of service in the form of an Affidavit of Service (although the *Family Law Rules* don't actually require that this be done, if it is not done the rest of the process falls apart because the time lines for the following steps all depend on when the Application was served)

- File an Answer with all supporting documents (there is a 30 day time line from when the Application was served, but extending that time line is not usually difficult)

- A Reply may also be filed by the Applicant with any more required supporting documentation

- Attend at Court to set a date for a Case Conference (often months after the final documents are filed)

- Prepare and exchange new documents for the Case Conference including a Case Conference Brief (repeating or updating what was in the Application, Answer or Reply, which the Judge won't usually read since they rely on the Case Conference Brief) and updating financial information since the financial information filed at the start of the process is out of date by this point even if it was accurate an fully and correctly completed (which it often isn't because of how complex the forms and rules are)

- Attend at a Case Conference on the date set for it to hear a Judge's views on the case (though the Judge cannot make any Order which is not on consent or merely procedural or administrative), identify the issues, discuss what kinds of evidence may be required at trial (particularly expert evidence) and explore settlement possibilities

- Only after all of these steps are completed can a Motion be brought[2]

- The system does not allow the Case Conference to be skipped except in a case started by a Children's Aid Society or if the parties consent to a Final Order on all issues[3], no matter what the lawyers or parties know about their case, for example:

    - The only issue is whether one parent can move across the Country with the child for employment purposes.

    - the parties are locked in to their positions – one says yes, the other says no – and

    - the parties agree that there is no middle ground no possible compromise, no expert evidence is needed; all that is needed is for someone to break the deadlock between the parents;

    - the parties have, with their experienced lawyers, fully and completely explored all possible methods of ADR, and had no success;

    - both counsel agree that the deadlock can only be resolved by a Judge, all alternative dispute resolution mechanisms have been tried unsuccessfully.

- In the case described above, both parents will be required to spend thousands of dollars and months of time waiting to get to a Case Conference[4], which can and will in no way advance the case except that only then, when a Judge finally looks at the file, can the parties satisfy the process that they have done enough to allow them to ask for a hearing and a decision - but not that day, they will have to schedule a different day in front of a different Judge and spend thousands of dollars to prepare documents for the Motion – for what is likely viewed as a simple answer to a "Yes" or "No" question.

This is not a hypothetical worst case scenario. I have had a case which was a prime example of this exact scenario happening. In that case opposing counsel and I worked together to draft the Application and Answer and related documents, we did not waste time and money preparing Case Conference Briefs (instead we attended before a Judge who understood why we hadn't spent time and money on that step and adjourned it to a date to argue the issue) but we still had to wait for a Case Conference Date and go to Court to explain what was obvious.

---

[2] *Family Law Rules,* (Ontario Regulation 114/99 Courts of Justice Act, R.S.O. 1990, c. C.43), *Rule 14(4).*

[3] Family Law Rules, (Ontario Regulation 114/99 Courts of Justice Act, R.S.O. 1990, c. C.43), Rule 17(1).

[4] It is possible to have a "combined" conference, pursuant to *Family Law Rules,* (Ontario Regulation 114/99 Courts of Justice Act, R.S.O. 1990, c. C.43), Rule 17(7), but it is not possible to go straight to a decision by way of hearing, trial of an issue, or trial without the conference no matter how futile everyone may know it to be *Family Law Rules,* (Ontario Regulation 114/99 Courts of Justice Act, R.S.O. 1990, c. C.43), Rule 17(1) and 14(4)

Far from being far-fetched or unique, this scenario and others like it play out in our courts every single day.

The *Family Law Rules* require all documents for a case to be filed together.[5] This means that if financial issues (such as child support, spousal support, or property – whether a relatively simple equalization of Net Family Property claim or a more complicated equitable claim relating to property) are raised by any party, other issues such as where children live and whether their time with one parent or the other should be increased are put on hold until the documents related to the property claim are put together, attached to a Financial Statement, served and filed with the Court.

Until both parties file their last three years' full income tax returns, notices of assessment, notices of re-assessment together with their recent pay stubs (and if one of them is self-employed they need to file even more), the Court will not so much as look for a date on which a Case Conference can be held, never mind booking such a conference or holding one.

The children are kept in limbo while their parents go through this process. The Court's time is wasted. The parties' time and money are wasted. Time and money which would be much better spent on and with the child.

The only thing maximized by this happening is frustration between the parties and the justice system.

It is a routine, mandated by the existing court system, waste of the clients' resources in the form of money and time and it is a significant source of frustration with the system as a whole.

There is no reasonable rationale for it.

Let Judges hear all aspects of a case they would otherwise be allowed to hear (more easily implemented with Unified Family Courts presided over by federally appointed Judges)

If the same parties are involved in a family law matter and a criminal law matter, let the same judge hear the whole matter in the same proceeding.

This is not a radical suggestion, but rather an incremental change to the existing Unified Family Court system – put not just all family law matters but all matters involving the same family in the same court with the same judge.

In the Criminal Courts there are some charges which must be heard in a Provincial Court and others which must be heard in a Superior Court. Still more charges (the vast majority) can be heard in either level of Court depending on the particulars of the individual case.

[5] This is something lawyers know inherently, but the *Family Law Rules* do set that out, if you read the right ones together – the applicable Rules are: *Rule 1(9.2), Rule 8, Rule 13 generally,* and possibly *Rule 15*.

The Provincial Courts have their rules and procedures, the Superior Courts have their own rules, and the Criminal Code (Federal legislation) requires that the two systems work together. Some aspects of cases can be heard by a Justice of the Peace (such as search warrants and bail hearings) while other aspects (such as guilty pleas) must be dealt with by a Judge. That is not ideal, but it is worse in other areas such as Family Law.

Depending on where you live your Family Court may be a branch of the Ontario Court of Justice or it could be a division of the Superior Court of Justice. If your Family Court is part of the Ontario Court of Justice your case could still be heard in the Superior Court if one of the people involved asks for a divorce from another person involved. This is in the process of changing as the Ontario and Federal governments move toward implementing Unified Family Courts throughout the Province once again, but until that process is complete, some cases are in one level of Court, and others in the other.

No matter whether your Family Court is presided over by a federally or provincially appointed Judge, most of the laws it will apply are Provincial areas of authority. The staff will be Provincial employees and the security may be provided by the municipal police force. If the Judge is not satisfied with the security in the courtroom, there's not much he or she can do about it except refuse to sit until he or she is satisfied. If no support staff are available, court cannot convene. If there are staff and security but no Judge, there may be nothing the Province or the Provincial Judges can do about it.

The same family could have parts of their lives in the Criminal Court, some matters in Family Court, other matters in Youth Court, and still more issues in a Child Protection Proceeding in the Family Court as well as proceedings in Civil Court for such matters as estate litigation or litigation against one or more of the family members by third parties.

Each of these courts has its own rules, Practice Directions, processes, procedures, and local practices; and none of them communicate directly or efficiently.

The processes are so separate and distinct, the Courts so effectively pigeon-holed, that they are not even aware of the problems they cause each other – and even if they are made aware, they are too busy with their own issues to do anything about it.

Establishing a rule of one family one Judge and allowing that Judge to hear all aspects of any case affecting that family would ensure that the Judge knows about all legal proceedings involving that family, save time and resources by reducing the number of times lawyers and parties have to repeat their stories, make it extremely difficult to change your story to suit the particular aspect of the case, and ensure a consistent approach across legal areas.

No longer would a litigant hear from one Judge "I realize that your bail conditions will have to be varied, but I can't do that for you. The other Court will have to do that; and I don't know when, or how you might accomplish that, or whether the other Court will do so." Until that is done though, I can't do anything to help you.

That same person will hear, at the "other Court" from the other Judge or Justice of the Peace the following: "I understand that you want to see your children, but I can't do anything about that, you'll have to go to another Court for that, all I can do is change your bail conditions."

It is possible that the person will actually be appearing in front of the same judge in the other court to have the necessary step taken – for example: if the person is a parent who is being held in custody on a criminal charge pending trial, has their family matter in a Unified Family Court and is brought to a Superior Court for bail review after being told that their bail conditions prevent them from moving forward as they need to in the Unified Family Court. The Judge presiding in Unified Family Court could also preside in the Superior Court in a criminal matter.

More frustrating and difficult for a lay person to understand is when the Superior Court Judge is unable to make a change to their bail conditions, but a Justice of the Peace can do so.

A matter ruled on by a Justice of the Peace (for example in Provincial Offences Court) can be appealed to a Judge of the Ontario Court of Justice. A decision by a Justice of the Peace to deny bail will be brought to a Judge of the Superior Court for bail review.

A Superior Court Judge can't change a bail condition, but if they were sitting in a different court could grant bail and set out all conditions if bail had been denied and there are other ways a Superior Court Judge may be required to rule on bail or bail conditions, including *Mandamus* or *Habeus Corpus*, but that same judge can't make such a ruling in this particular court or on this particular day no matter what you do.

When bail conditions interact with access to a child, neither court can resolve the issue and the person is caught in a judicial chicken and egg situation. This can only foster frustration with "the courts" and "the system". Vexatious litigants can use this systemic disconnect to gain advantage in family law litigation, and opposing parties will tell you they often do exactly that with, apparently, the full support and assistance of "the courts".

At present, it is often the Ontario Court of Justice which governs bail, and the Family Court of the Superior Court of Justice which controls custody and access, or it could be the Ontario Court of Justice dealing with custody and access, or maybe it's the Superior Court of Justice (but not the Family Court of the Superior Court of Justice) dealing with custody and access.

The judge who might preside over an application for bail review (at which that judge would have the express authority and task of varying bail conditions up to and including removing any and all conditions) if sitting in family court must tell the same person that they do not have the ability to change bail conditions – a judge in another (lower) court must do so.

If the person knows a little bit about the courts, they will know that the judge who is telling them they cannot change anything could hear an appeal from and overturn the decision of the judge they are being told to go to. A summary conviction appeal from a finding in the Ontario Court of Justice goes to the Superior Court of Justice.

The rationale for why a judge of the Superior Court of Justice who can overturn a decision made by a Judge in the Ontario Court of Justice cannot make a change that is within the jurisdiction of the Ontario Court of Justice is not one that the general public understands – possibly because it runs contrary to common sense. In no other situation does a superior have to defer to a subordinate – and that is how members of the public see the relationship between a judge of the Superior Court of Justice and a judicial officer (whether judge or justice of the peace) of the Ontario Court of Justice.

The two levels of Court do not work in any kind of coordinated fashion – they each exist in their own silo. Which type of Superior Court the parties are dealing with depends on where the child lives (not every area has a Unified Family Court).

Whether the Ontario Court of Justice has jurisdiction in family law matters depends on whether the parents were married and if they were married whether either of them claimed a divorce. Because of jurisdictional issues this would be most easily implemented in a Superior Court such as the Unified Family Court – but the cooperation of all levels of government and all other stakeholders will be essential.

Proceedings under the Youth Criminal Justice Act are conducted in the criminal courts (Court of Justice – Provincially appointed Judges and Justices of the Peace)

The Family Court (which could be either a Provincial Court or a Superior Court) may or may not know what is happening in the youth court.

If the family court is in the Provincial level court (if there is no unified court and if there is no claim for a divorce) the Judge in youth court may be the same as the Judge in the family court. Otherwise the Family Court Judge will be unfamiliar with the youth court process and unable to find out what is happening there.

If a child is in the care of a children's aid society they may have a case in family court (unified or otherwise - child protection court which may be a Provincial Court or a Superior Court) and in youth court (which is always a Provincial Court). The youth court often imposes conditions on a child such as to abide by the rules of the house – changing a parenting matter into a criminal matter.

If a child breaks curfew they may not only lose privileges, but be saddled with a youth record (which can grow quickly and eventually become a permanent criminal record). How can we as a society justify branding a child as a criminal for not taking out the garbage or breaking curfew? We can't, because it cannot be justified – yet the system we have created does exactly this day in and day out. That has to change, and right now simply isn't soon enough.

6. Reduce the number of court appearances necessary

In several different courts there are large numbers of appearances at which little or nothing happens. In criminal courts and Provincial Offences Courts these are often called "remand courts" – meaning they are courts whose sole purpose is to put cases off to another date, often in the same remand court time after time.

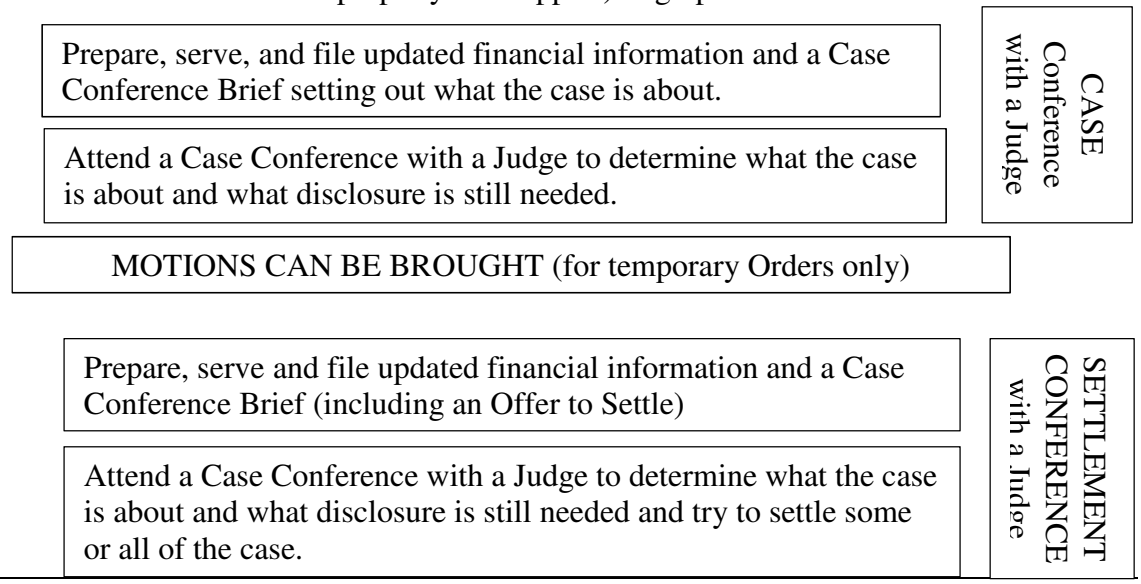
While this **may** serve some purpose when people are representing themselves (allowing the Court to make sure the case stays on track) the effect of these remand courts on cases in which the parties are represented by lawyers or paralegals is to dramatically increase the cost of going to court. Lawyers and paralegals spend hours sitting waiting for their opportunity to tell the court when they will come back to sit and wait again (usually no more than a few weeks later) – and their clients get billed for it.

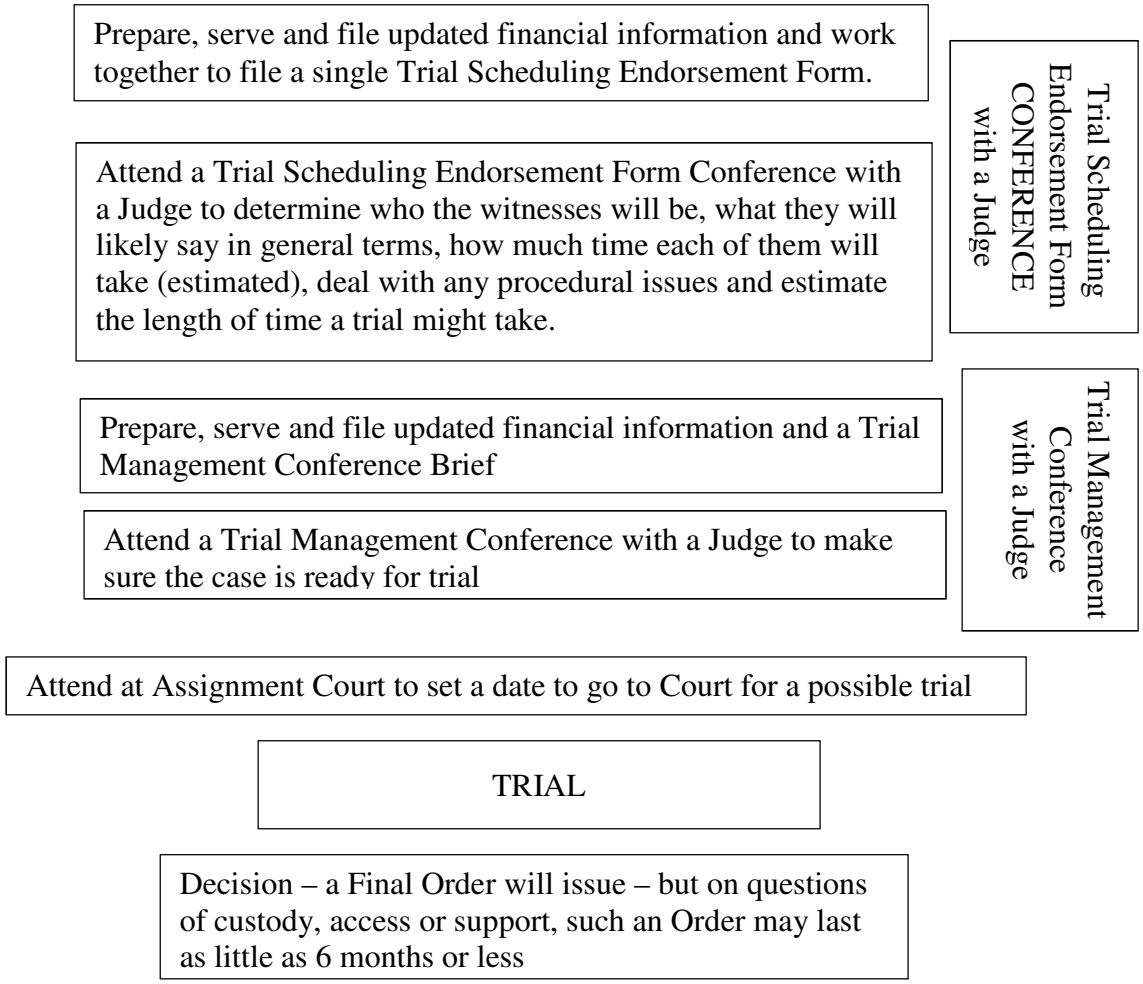
In Family and Civil courts there are many conferences at which little or nothing is accomplished.

These conferences require preparation of documents specific to each conference (documents which may not ever be used or seen again), and more time waiting for each matter to be called – again increasing the costs of litigation.

This is a significant access to justice issue, quite likely the most significant issue, but it is largely unacknowledged. When it is recognized the cost of litigation is most often blamed on lawyers' fees, which is blaming the effect for the cause. The lawyers are not to blame for the amount of time and effort the process requires be wasted, neither is there anything they can do about it.

Keeping in mind that getting a decision is the purpose of starting an Application, here is the process (after all of the forms are filled in, issued, served, and filed by both sides (so now everyone knows what the case is about, what each side wants, and has all of the financial information to determine issues of property and support) in graphic form:





In more detail and filling in the blanks not addressed in the chart above, here are the steps in a typical Family Law case in Ontario:

- Applicant / Moving Party drafts Application or Motion to Change and supporting documents (Financial Statement, Affidavit in support of claim for custody or access, Change information form)

- Applicant has Application issued by Court and obtains a "first court date"

- Applicant obtains dates for attendance at Mandatory Information Program for both Applicant and Respondent

- Initiating documents are served on Responding Party

- Within 30 days of being served (which may be extended) the Responding Party:

    - Finds a lawyer
    - prepares, serves and files all responding documents

- At the "first court date", provided that the responding party (who may be called the "Applicant") has had enough time and has filed all of their material and isn't requesting more time or if they did request more time were unable to get it, the parties meet at court and set a date to go to court for a case conference.

  They almost certainly don't see or appear in front of a Judge – they see a clerk – and the only things that can happen at this "court date" are that it can be set to happen again on another day (if something hasn't been filed or if more time is allowed), a date can be set to have a Case Conference, the person who hasn't filed something can be "noted in default" so that the case can theoretically proceed without their input (but this is often and relatively easily undone if it is done before that person has had **every possible chance** to file everything), or a Judge can decide which of those things will happen – but nothing else.

- Applicant and Respondent update their financial statements within 30 days of the date set for the case conference (since they will both be stale-dated by then – conferences book months in advance.)

- Applicant and Respondent each prepare, serve and file a "Case Conference Brief" for use at the case conference (these may be the *only* documents the Judge reads, do not form part of the court record, and often repeat what is in the Application and Answer) (the Court may, but won`t necessarily, read anything but the Briefs)

- Applicant and Respondent attend at Court for a Case Conference with a Judge who will probably not be the Judge at any eventual trial and who cannot make any Order or decision except on consent (and with consent the order may be requested in writing.)

- The main purpose of the Case Conference[6] is to figure out what the issues are and what information the court or the parties might need to deal with those issues. If this is not clear from the documents the parties have prepared, served each other with and filed months before the Case Conference, then those documents are horribly deficient and the parties apparently have no idea what their case is about.

- The Court and the Judge often focus on settling the issues (there is a separate conference called a Settlement Conference for that purpose)[7], but that rarely happens.

[6] *Family Law Rules,* (Ontario Regulation 114/99 Courts of Justice Act, R.S.O. 1990, c. C.43), Rule 17(4) sets out the purposes of a Case Conference, the Case Conference Brief is Form 17A (17B in child protection cases).

[7] *Family Law Rules,* (Ontario Regulation 114/99 Courts of Justice Act, R.S.O. 1990, c. C.43), Rule 17(5) sets out the purposes of a Settlement Conference which duplicate many of the purposes of a Case Conference. The Settlement Conference Brief is Form 17C (17D in child protection cases)

This begs the question, if the extensive pleadings which were custom designed for this process don't make it clear what the issues are, how can another form do so? If the pleadings do make the issues clear, why doesn't the Court use them, what is the purpose of the new form (Case Conference Brief) and why are people spending time and money filling in a different form and appearing before a Judge, particularly when (at least from the Parties` perspective) nothing substantive will happen at the Case Conference)

- The Case Conference Judge is prohibited by the *Family Law Rules*[8] from making any Order at the Case Conference – unless the Order is made on consent (everyone agrees – in which case it could have been filed in writing) or simple, uncomplicated or purely procedural – which in practical terms usually means Orders are only made at a Case Conference if everyone agrees.

  Effectively the Judge is handcuffed and nothing useful comes from the Conference. At the end of the Case Conference the Case Conference Briefs are returned to the parties. The Court does not keep a copy.

  Although there is a fully staffed court (including a Court Reporter), it is not possible to get a transcript of the proceedings. The only record of what happened is the endorsement written by the Judge, and it does not (cannot) contain any reference to anything that was discussed unless an agreement was reached, including what the Judge said or any opinion the Judge gave either side.

  It is easy to see how the Parties leave the Case Conference feeling that they have just wasted a day and thousands of dollars.

- At the end of the Case Conference the matter will almost invariably be adjourned to a Settlement Conference (and the Briefs will be returned to the Parties or their counsel). The *Family Law Rules* do not *require* a Settlement Conference, but if the case does not settle at the Case Conference stage, the routine is to have at least one Settlement Conference (sometimes more than one, or one conference which is split into different days effectively having more than one Settlement Conference.

- In some cases a Judge will write an endorsement to indicate that the conference (Case or Settlement) was held, but adjourned to a continuation even when nothing substantive has happened at the conference – because that way the statistics will show that the Conference was held within timelines.

- At this point either the Applicant or Respondent can bring a Motion for a temporary Order[9].

[8] *Family Law Rules,* (Ontario Regulation 114/99 Courts of Justice Act, R.S.O. 1990, c. C.43), Rule 17(8) and its sub-rules.
[9] *Family Law Rules,* (Ontario Regulation 114/99 Courts of Justice Act, R.S.O. 1990, c. C.43), Rule 14(4)

- For the Settlement Conference the Applicant and Respondent must again update their financial statements and prepare, serve and file a Settlement Conference Brief which will not form part of the Court record.

- Applicant and Respondent attend for a Settlement Conference with a Judge who will not be the Judge at trial and who may have read nothing other than the Settlement Conference Briefs prepared for this appearance.

  These documents bear a striking resemblance to the Case Conference Briefs which were prepared for the first conference, the biggest difference being that this time the Brief must contain an Offer to Settle

  Although the *Family Law Rules* require that the Settlement Conference Brief includes an Offer to Settle; there is no requirement that the offer be reasonable and no clear penalty for failing or refusing to include an offer at all.

- After the Settlement Conference the matter will be adjourned to a Trial Scheduling Endorsement Form Conference – another chance to meet briefly with a Judge but only to discuss what will likely happen at trial. Often Parties are misled by the name of the conference. This conference actually has little to nothing to do with scheduling the trial, and the trial dates are never set at this stage.

- At the Trial Scheduling Endorsement Form Conference both (all) parties are expected to have cooperated in completing parts (but not all) of the Trial Scheduling Endorsement Form.[10] This may work when both (all) sides are represented by reasonable counsel who are able to exercise some "control" over their clients[11], but works not nearly as well (or not at all) when the case includes self-represented litigants, inexperienced counsel, unreasonable litigants, high levels of emotion and stress.

  This conference is particularly badly named as it leads self-represented litigants to believe that the conference is about scheduling the trial, which it actually isn't about at all, and that step takes place at a different appearance which is often scheduled at the Trial Scheduling Endorsement Conference.

- After the Trial Scheduling Endorsement Conference the matter may be set to Assignment Court – a date on which parties and lawyers attend at court to set a date to go to court, possibly for trial and also possibly for a Trial Management Conference.

[10] The Trial Scheduling Endorsement Form has not been assigned a number under the *Family Law Rules*, but is available from the Court staff or in Divorcemate software used by family law lawyers as one of the Form 00 forms.

[11] Lawyers do not control their clients, they advise them, but how they give that advice can direct the clients toward more (or less) reasonable positions which can greatly influence the instructions the client gives the lawyer.

- For a Trial Management Conference, the Applicant and the Respondent must each prepare a Trial Management Conference Brief[12] as well as draft opening statements and overviews of what their witnesses might say. These briefs, unlike the others, will form part of the Trial Record which will be available to the Trial Judge

- The Applicant must prepare a Trial Record containing the Application and Answer and some other documents – the Application and Answer may be years old at this point and may not have been reviewed or read since they were filed.

  If the case was started by way of a Motion to Change and converted to the "trial track"[13] there will be no Application or Answer to file and the *Family Law Rules* do not allow the Motion to Change and related materials to be filed.

- If the parties are called for trial they must be ready to go, but often the first day of trial is used for a last minute settlement conference.

- Trial is held, and a Final Order[14] issues.

- In matters of custody, access, child or spousal support the Final Order which issues will last for 6 months or until there is a "material change in circumstances" (whichever comes **FIRST**)[15] when the same issues can be brought back to Court by a Motion to Change.

If the case was started by a Motion to Change a Final Order or Agreement, there is a whole different process to follow and while some of the forms and steps are the same, most of them are not. Even if the issues are the same as they were in the original proceeding, or if there was an Agreement and there never was an Order (depending on the issues raised in the proceedings), the shorter process is used until and unless the Court orders otherwise.

If and when the case is switched to the trial track (most often because a Judge or one of the parties believes the issues may be best addressed by a trial with *viva voce* evidence rather than at a motion argued on affidavit evidence, the Family Law Rules end up requiring the parties to file a Trial Record with pleadings which don't exist (such as the Application, Answer, and Reply) and do not allow for the filing of the pleadings which do exist (such as the Motion to Change and the Response to Motion to Change).

[12] The Trial Management Conference Brief Form is Form 17E under the *Family Law Rules*

[13] It is common for court staff, Judges and lawyers to refer to the different procedural routes as "tracks"

[14] A Final Order on issues of parenting or support lasts until there is a "material change in circumstances" or for six months, whichever comes first when either side can start a Motion to Change a final Order as set out below

[15] *Family Law Rules,* (Ontario Regulation 114/99 Courts of Justice Act, R.S.O. 1990, c. C.43), Rule 15

The procedure on a Motion to Change is much simpler:

- the Motion and supporting materials such as the Change Information Form (which is often only partially applicable and therefore causes confusion and is often largely blank when properly completed) must be served and filed, (by the moving party who is never referred to as such but remains either the Applicant or the Respondent)

- the Response to Motion to Change be served and filed by the responding party (who may or may not be the Respondent),

- a Case Conference must be held, for the same reasons as in an Application, and regardless of whether it will do anything but delay the final hearing by months and increase costs to the parties for preparing serving and filing the Case Conference Briefs which will not be in the Court Record at all;

- The matter may then be heard by way of Affidavit evidence.

It is important to note that this procedure is available to change an Order or Agreement which may have dealt with every aspect of a case (which may have been heard at a trial). Some time will have passed since the Final Order of which a change is sought, but that time could be less than six months or more than ten years.

Why is it that only one conference and a hearing is needed to change what several conferences and a trial were necessary to establish?

7. Amend legislation to give real effect to the presumption of innocence (criminal law)

The presumption of innocence has long been a legal fiction more than an actual reality. For some charges, the allegation is enough to destroy lives even if the charge is eventually withdrawn or dismissed. This needs to change.

The presumption of innocence could be re-established as a real and legal entitlement by amending the Criminal Code of Canada to make it illegal to publish the name of or identifying information about an accused before a conviction is entered after either a plea of guilty or a trial unless prior judicial authorization is obtained on the basis of need to publicize the name of or other identifying information about the accused to protect the public.

No doubt the media would object to such a change, but the right of the media to report is not absolute and must be balanced against the right of the accused to be presumed innocent. This is a case of competing rights, many of which are protected by the Charter[16]. The right of an accused to be presumed innocent is expressly and individually specifically protected by 11(d) of the Charter (and can also be read into section 7), and freedom of the press is enshrined in section 2(b).

[16] Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982*.

Any prohibition of publication would clearly infringe on section 2(b) rights, but allowing the publication of the names of accused persons arguably (or, tongue-in-cheek, *allegedly*) renders the protection of section 11(d) nugatory.

A careful balancing of rights analysis will need to be undertaken, and such an analysis is beyond the scope of this paper – in fact it could easily result in a longer paper all by itself, so for purposes of this paper I simply suggest that the status quo is that an accusation may be published freely and such publication effectively negates the purported protection provided by section 11(d) of the Charter completely.

An accused, legally presumed innocent, may find his or her life completely destroyed by a mere accusation (following an immediate conviction in the court of public opinion), and that life is not restored nor is there any remedy available to the accused following a finding of "not guilty". Forbidding publication of the accused's identity or of identifying information would avoid that situation while, at least arguably, minimally impairing the freedom of the press and freedom of expression.

Once a conviction has been entered, the prohibition of publication of the convicted citizen's name and identifying information would not continue.

Another relatively simple change to the criminal law could also support the presumption of innocence – define what a "Criminal Record" is as to exclude anything not tied to a conviction and prohibit any police force from disclosing so called non-conviction records. Ontario passed such a law two years ago, but has yet to proclaim it.

A third possible amendment would be to allow a plea of *nolo contendere* so that an accused need not admit guilt to dispose of a criminal charge.

While it is common belief (among those not familiar with the real legal system) that an innocent person would never plead guilty, that is simply not the case. Even with the slowly appearing waning of overly restrictive bail conditions thanks to *R.* v. *Antic*, [2017] 1 SCR 509, 2017 SCC 27.

In that case, the Supreme Court of Canada essentially reminded the lower Courts that bail is dealt with in §515 of the *Criminal Code of Canada*, and that everyone, Courts, Crown Attorneys and Defence counsel need only follow the law as clearly set out in the *Criminal Code*.

It is perverse to have an accused, who is presumed innocent, put in the position of having to admit legal guilt to put an end to the proceeding brought against him or her by the state failing which he or she must continue to incur legal fees (Legal Aid not actually funding cases properly or at all) and run the risk of being (wrongly) convicted and receiving a harsher sentence following a trial even when he or she is prepared to admit that he or she will likely be convicted at trial. The world is not a binary place, why are pleas forced to be absolute "guilty" or "not guilty"?

8. Give Crown Attorneys security of tenure

Crown Attorneys are currently beholden to their political masters, yet they are told that they are to behave as impartial ministers of justice.

Their ability and willingness to use their professional judgment is severely restricted by the fact that they are often hired (initially) as articling students and then after their articling term is over (their articles having prepared them to work in the Crown's office – but not for much else – particularly not for private practice) on a short term contract basis and spend years going from one contract to the next hoping a permanent full time position becomes available.

This means that they will prosecute matters which ought properly to be withdrawn because they may not get the next contract if they don't safeguard the public image of the then-current Attorney General.

This leads to situations in which a charge is laid when there shouldn't really be a charge (e.g. domestic argument) because of politically motivated policies, and the charge is prosecuted despite a lack of evidence or reasonable prospect of conviction because of another politically motivated policy directive.

The only other people we as a society expect to be impartial arbiters of justice have security of tenure to ensure that they can be and are in fact independent – they do not fear for their jobs if they displease the current government; they are Judges. Defence counsel need not fear the current government because they are not government employees. Crown Attorneys (Federal and Provincial) are the only government employees who are supposed to make impartial apolitical decisions who may suffer consequences if they actually do so.

This leads to cases being prosecuted not because there is a reasonable prospect of conviction, but because there is a *chance* of conviction (maybe if the Judge or jury believes the ridiculous story being told by one witness and ignores all the other witnesses and common sense there might be a conviction) and a strong likelihood of negative press and political pressure if the charge is withdrawn – better to run the trial and lose (so the public can blame either the activist Judge or the slimy defence lawyer or the law for having some technicality) than to intercede and stay the charge. Staying the charge could mean your contract is not renewed or you are not awarded a full time permanent job. Interestingly, senior Crown Attorneys with full time permanent jobs are often much more willing to withdraw a charge – if they are the one to decide.

9. Assign Crowns to specific files at the outset

Further, defence counsel often find that they cannot have meaningful resolution discussions with Crowns (particularly but by no means only with junior Crowns) because files are not assigned to any particular Crown until and unless trial is set. The Crown with whom defence counsel meet often has no idea what is in the file, and is not responsible for its management. They can defer decisions saying that will be up to the Crown at trial while knowing that nobody knows who that may eventually be.

This is done allegedly in the name of making the system more efficient, but often works against the stated goal, though it may be a factor in innocent accused entering guilty pleas in order to bring their matter to a close (particularly if they are sitting in a detention centre awaiting trial). Such a resolution should not be viewed as a success, but it would count toward decreasing the average time to dispose of a case, which is one of the metrics used to assess efficiency.

10. Implement support structures for victims of crime regardless of conviction

There has been a sizable hue and cry from victims of crime and their advocates that the criminal justice system does not do enough for the victims of crime.

With respect, the criminal justice system does not exist to serve nor to compensate victims. It exists to denounce and deter behaviour which violates social mores. The criminal justice system is concerned with protecting and defending society as a whole, not with individual victims. That is why a case is R. (Regina – the Queen) and not the victim versus the accused.

That is not to say that victims should be ignored, quite the contrary.

There should be support for all justice system participants, including witnesses, victims, jurors, lawyers (both Crown and defence) and Judges. Given that I am suggesting support be provided for witnesses, lawyers and Judges, it goes without saying that there need be no conviction in any particular case to make a justice system participant eligible for support.

The supports to be provided should include an educational component[17], counselling, support for witnesses who will have to testify, accommodation of witnesses particular needs to facilitate their testimony (keeping in mind the accused's right to a fair trial including confronting the accuser) and therapy as appropriate.

These supports should not be in any way tied to whether a conviction results from a trial. Whether the Crown has proven every element of the alleged offence to the beyond a reasonable doubt standard does not determine whether the victim, witness, or other justice system participant needs and would benefit from supports.

[17] Ideally the educational component would be incorporated into the primary and secondary school curriculum

It may well be, and likely is, the case that a person has been the victim of a crime and does need counselling, therapy or other support even though the Crown was unable to obtain a conviction for any of a variety of reasons which led to the existence of reasonable doubt in the mind of the trier of fact.

Victims of crime are victims of crime regardless of whether a crime was legally found to have happened and a particular accused convicted of it. The conviction of an accused is commonly used in the media as a litmus test for whether justice was done. If an accused is acquitted, the victim was denied justice. Justice is not done for or on behalf of a victim, but on behalf of society as a whole.

It has long been a fundamental element of our justice system that we as a society believe it is better to let 100 guilty accused go free than to convict one innocent accused.

An acquittal does not mean the victim is not a victim, and in no way diminishes the supports a victim requires. Those supports should be provided regardless of whether a conviction is ever registered against anyone. The victim's (or witness' or other justice system participant's) needs don't change, why should society's willingness to help and support them depend on the registering of a conviction?

It is most likely best if the supports are neither funded nor administered exclusively or even primarily by the justice system, but through health or social services.

11. Provide sufficient resources – pre-implementation, during, and after implementation

At least in the short term, implementing these changes will require an investment of resources, including but not limited to cash.

Courthouses will need to be merged and brought up to date. In some jurisdictions there are courthouses spread over a wide geographic area for no good reason except the absence of a suitable facility to house them all. Sharing of records and staff is much more easily accomplished within one building than between several buildings spread out over a large area.

Judges and judicial officers will have to be appointed and how they are assigned to cases will have to change to allow for widespread case management. Effective case management should dramatically reduce the number of conferences and appearances required for each case and eventually lead to a reduced need for Judges and judicial officers, but the effect will not be immediate.

The Rules of Civil Procedure, the Family Law Rules, and the Criminal Rules will have to be revised to simplify them, and if not integrate them, at least rationalize them each with the others.

As an example of how Rules can be simplified, the current Family Law Rules in Ontario allow for two (2) different ways to start a matter (Application or Motion to Change) under two (2) different rules (about which lawyers are sometimes confused and Court staff are

sometimes unable to agree as to which way is correct), four (4) different kinds of Motions form commonly brought Motions (Motion to Change, Notice of Motion, Motion Form, Motion for Summary Judgment) under three (3) different Rules (there are at least three (3) other forms for Motions, as set out below), but no way to bring a Motion for a Final Order on consent after a proceeding has started.

Address Legal Aid Funding issues and apparent ludicrously low thresholds

Legal Aid programs need to be properly funded and administered to ensure that financial limits are set realistically and funding is available to anyone with a need for representation who cannot actually afford to fund legal counsel. This is not the case now. There is no functional Legal Aid program, there is a shadow of a program which serves only to permit the wool to be pulled over the eyes of those not actively involved in the justice system.

A whole case approach should be adopted to avoid situations such as Legal Aid funding only one side of a family court case because one parent has (or claims) the children residing with them or a parent facing the choice of running a trial as a self-represented defendant (Legal Aid being refused on grounds that the Legal Aid administration do not believe incarceration is a likely outcome – based on nothing other than a Crown screening form) or pleading guilty with the assistance of duty counsel funded by Legal Aid.

The existing Legal Aid program, at least in Ontario, does not adequately protect the right to counsel, nor the right to a fair trial, as guaranteed by the *Charter of Rights and Freedoms*. In denying counsel to indigent or low income defendants, an underfunded or poorly administered Legal Aid plan likely does more to undermine confidence in the legal system than any other single factor.

Any suggestion that an individual living in Ontario and earning $15 320.00 per annum can afford legal representation in any matter is ridiculous – yet that is the top threshold for a certificate to issue to a one person household without having to contribute to those costs. [18]

There is no consideration given to whether the individual is facing proceedings in multiple courts (such as a parent charged with assault in a domestic context who is facing criminal charges and a family law action to regain access to his or her children) in Ontario, nor does it matter if the person is seeking to be the Applicant or the Respondent in a family law proceeding. There is no real merit test before Legal Aid funds an Application or a Motion to Change.

As of April 1 2019, with newly raised limits, an individual earning $17,732 per annum cannot qualify for a Legal Aid Certificate even by contributing to some of their legal

[18] Legal Aid financial eligibility https://www.legalaid.on.ca/en/publications/downloads/Certificate-Financial-Eligibility-Criteria.pdf?t=1431820800026

costs, because such a person can afford to pay their own lawyer at private rates in any number of matters.

However - if you earn $20 000.00 per annum as a single person you can get a certificate from Legal Aid despite making more than their cut off income – if you allege that there was domestic assault in the relationship – even if you are the party who committed the assault. The increased limit for victims of domestic assault works exactly contrary to the purpose for which it was put in place and encourages spurious allegations of domestic assault – clearly not what it was intended to do.[19]

An adult working a 35 hour week in a full time job at minimum wage would earn $25 480.00 (35 hours / week, at $14 per hour over 52 weeks). Legal Aid believes that such a person can afford to retain a lawyer for any number of matters in any number of courts. Ridiculous is not a strong enough word.

If a couple has two children, the one who leaves the home (unless he or she takes the children – and there are shelters available to women who leave the home, but not for men) is considered single, but the other parent can earn as much as $30,213.00 and still have a lawyer provided by the Legal Aid Plan for the family law matter – and no need for a lawyer for the criminal proceeding.

Of course having an income below the (ridiculously low) financial threshold is not enough to get a Legal Aid Certificate. You also have to have essentially no assets. For a single person, the current asset cut off is $1 419.00. The number is not the whole story though it is also important to take the broad definition of "asset" into account – unfortunately the system doesn't do so in a way that makes sense.

It doesn't even matter if the "asset" is an R.E.S.P. which has been set aside for a child's future post-secondary educational expenses, those funds must be cashed out and spent (triggering the loss of contributions from the government, the loss of contribution room and the potential for receipt of government funds since unlike an R.R.S.P. you can't put money back into an R.E.S.P. once you have taken it out).

The system which nominally puts the best interests of the child first forces a parent to spend the child's R.E.S.P. (and possibly creating long term issues for the child, the parent, and the family) before allowing a legal aid certificate to be granted. The alternative is to just give in to the other parent. This also causes people to question the integrity, intelligence, and impartiality of the courts.

Assuming your financial situation is poor enough to get you under the income threshold, and your assets have a sufficiently low value to get you under the asset cut off, your case will still be assessed to determine whether it meets a legal qualification.

[19] The definition of domestic assault for the purpose of issuing a Legal Aid Certificate is far more broad than what would be captured by the *Criminal Code* definition of assault, but that is not made clear on Legal Aid Ontario`s web site.

In criminal law this is usually based on whether there is a realistic probability of incarceration (in the opinion of a Legal Aid Ontario employee who has not reviewed the file, may or may not be a lawyer, is certainly not the Judge, and who bases their opinion largely on what the Crown screening form which was filled out by a Crown Attorney often before any real review of disclosure in the particular case.)

The probability of incarceration is assessed primarily on whether the Crown who screened the file has indicated that the Crown sill seek gaol; if the screening form indicates no gaol, there is deemed to be no risk of incarceration – even when the accused is being held in a detention centre.

Many defendants have had several video appearances in remand court from a detention centre where they are being held before advising the Court that their application for Legal Aid has been refused because they are not likely to be incarcerated.

Imagine attending court by video from gaol day after day, week after week, to hear that you can't get a Legal Aid certificate to hire a lawyer with on the grounds that you are not likely to go to gaol.

Ludicrous is too soft a word to describe this situation, but it is all too common in our courts. Is it any wonder that people are losing respect for this system?

For children accused under the *Youth Criminal Justice Act*, there is a game being played with their freedom. Legal Aid Ontario routinely refuses to issue certificates to children on the basis that their parents can pay, or that there is no real chance of a custodial sentence. Many courts have responded by issuing an order under section 25 of the *Youth Criminal Justice Act* without conducting even a *pro forma* enquiry.

The Judges do this on the basis that the parents are not the accused, and whether the sentence is custodial is up to them. In essence Legal Aid Ontario has a large rubber stamp which applies to all applications from defendants charged under the *YCJA*. That stamp says "NO". The Judges have implemented their own, larger stamp which says "YES". Removing this game from the system entirely would improve efficiency and respect for the system.

On occasion I have managed to meet a child who was detained in custody, arrange for a representative of Legal Aid to take their application, have the application rejected by Legal Aid and obtain an Order under section 25 of the *YCJA* on the same day. This illustrates that when everyone understands the game (which is what it is) the effect on the young person`s rights can be minimized sometimes – but this is a budgetary game which has no place in a justice system.

So, why is this charade being repeated in court after court day after day and year after year? Simple. If the certificate issues as the result of the young person's application the funds come from Legal Aid Ontario's budget. If the certificate issues pursuant to an Order under

section 25 of the *YCJA*, the funds come from the Attorney General's budget. It a bureaucratic shell game which leaves children in gaol as a fundamental rule of the game. That must change.

Legislative amendment will be required, as will cooperation between all levels of government as well as from the public sector unions, paralegals and lawyers.

12. Take advantage of modern technology

It is impossible to explain to a member of the public why they can videoconference for free from any computer to any other computer, coordinate their schedules with large groups of people on line, collaborate on documents with any number of contributors and email documents, audio and video recordings anywhere in the world but they must appear in person in court (or pay a lawyer or paralegal to do so) to set a date for the next court appearance, file hardcopies of documents in the court file in person, the court does not accept faxes or emails and does not have the ability to allow anyone to videoconference in to court (unless from a select group of police stations, detention centres, or correctional facilities.

The reason explaining this to a member of the public is impossible is it makes no sense. It can't be because of personal information – tax returns are filed on line, and your tax history including detailed information over the past several years is online even if you haven't set up an account! In addition, in most cases anything filed with a Court automatically becomes public record, so privacy concerns are waived or gutted by the mere act of filing a document or making a statement or submission.

The only reason that our courts are often stuck in the 19th century is that courts are extremely slow to adapt to change – hence the continued tradition of wearing gowns, court collared shirts and tabs (though thankfully the courts do change, hence the absence of horse hair wigs in Canadian Courts and the change from addressing Judges as "My Lord" or "My Lady" to a more gender neutral "Your Honour").

There is no excuse for courtrooms not having internet access and basic computer facilities including video and audio conferencing.

There is no good reason to still require lawyers to wait in line to speak with a Judge, Justice of the Peace, or Court Clerk to set a date for a court appearance. The cost to parties of such antiquated practices is a real barrier to access to justice. Parties who can initially afford a lawyer spend money having their lawyers attend these dates. Those who can't afford counsel take time (often full days) off work to attend themselves.

When school children use online tools such as Google classroom to collaborate on assignments, when universities offer courses online, when the Canada Revenue Agency makes income tax filing (and records) available on line, and parents are encouraged to use online resources such as Our Family Wizard to coordinate their families' lives, or Skype, Facebook, or Instagram for parents to have access with children, it is not at all reasonable for the Courts to fail and refuse to use on line resources to make their own operation more efficient, to reduce barriers

to access to justice, and to make litigation less stressful for parties; yet that is exactly what they do.

Ignoring, or seeming to ignore, modern technology which works in everyday life outside of court and making people spend large sums of money and large chunks of their time because of a failure or refusal to use technology in the courtroom does nothing to enhance the operation of the legal system and much to undermine its credibility and the respect it demands of the citizens it purports to serve.

13. Allow – ENCOURAGE – Multi-part hearings or trials (mainly for family / civil)

A long standing approach to litigation is that all claims must be brought and heard together in one Application or Claim. This is meant to require parties to plan out their case and to not bother the Court until they are organized. In Family courts, this can have the effect of preventing justice from being done.

It is this principle of hearing all aspects of a case together that prevents time sensitive issues (such as custody or access) from being dealt with in a timely way because other issues (such as fulsome financial disclosure) are not ready to be adjudicated.

There is no reason a Court needs to know the values of all chattels on the day the parents got married, on the day they separated, and currently, to decide whether a child spends time with one parent or the other; nor does the Court need to know what each parent spends in an average month on their cell phone bill to assess the best interests of the children as to their residence and access to each parent, yet the archaic rule of bringing and hearing all claims in one action persists.

The effect of this is to encourage the parent who has established a status quo regarding the children to prevaricate and delay disclosure – thereby extending the lifespan of the status quo and increasing the likelihood that the children will continue to reside with that parent in the long term.

Parents in custody and access cases are often baffled when they hear that if the state actor, the Children's Aid Society, removes their child from their care, an apprehension hearing must by law take place within 5 days and an interim care and custody hearing can be scheduled as soon as they are ready for one – but if their spouse takes their child out of their care (as long as they permit *some* access[20] – even as little as supervised access or telephone access) it will be ***months*** before a Judge will even hear about the matter, and that will be at a ***conference*** at

[20] See *Rosen* v. *Rosen*, 2005 CanLII 480, [2005] OTC 31, [2005] WDFL 897, [2005] OJ No 62 (QL) ,136 ACWS (3d) 327 (ON SC), which attempts to clarify the decision of Belch J. in *Hood* v. *Hood*, 2001 CanLII 28129 (ON SC), 20 RFL (5th) 78, [2001] OJ No 2918 (QL), (ON SC)

which the Judge can't make any Order except on consent – such an Order will require a Motion which cannot be brought until after the ***conference***[21].

Why is it that the Court can quickly determine interim care and custody when a state actor takes children away (what used to be called an "Apprehension"[22] but which has recently be renamed "a removal to a place of safety"[23] – a change which is no more effective than putting lipstick on a pig), but not when another parent does it? There is no good answer – the children's best interests need to be assessed in both cases. Their lives have been disrupted in both cases.

If anything it would make more sense to have the child protection case take longer since the Society's arrangements for care of a child are deemed to be safe and are controlled by legislation, while the parent's arrangements may or may not be safe, and the parents (and child or children) may not have had any advance warning or opportunity to gather evidence.

Once the issue of custody of or access to a child is before the Court, regardless of whether a child protection agency or a parent (or both parents) have brought the issue to Court, it should be addressed forthwith at a hearing at which affidavit and viva voce evidence (at least from the parents) are permitted, and an interim order should be made.

Ancillary orders, such as interim child support or spousal support orders should also be made at this hearing where appropriate, with the ancillary orders being subject to review once all parties have served and filed financial information.

There is no good reason to delay dealing with time-sensitive child-centred issues when financial disclosure or forms required to grant a Divorce are outstanding. Doing so is not consistent with the best interests of the child or children involved, in fact I suggest it is contrary to the children's best interests. What is best for children is to take any game playing their parents may want to do on adult issues and insulate them from such games as completely as possible. At the moment we are permitting children to be used as playing pieces in the games whenever one (or both) parent(s) think it may benefit them overall. That must stop.

We cannot count on the adults to be reasonable since reasonable adults work out their issues without involving the Courts (except in cases such as Divorce where a Court Order is required – but even then reasonable adults work out the issues and seek and obtain a Divorce on consent rather than via contested litigation.)

When dealing with unreasonable adults, the Court must be the voice and hand of reason. To do so effectively it must use a sensible coherent approach. That will require change.

---

[21] Unless of course there are no early conference dates available or you meet the test in *Rosen* (supra) and *Hood* (supra)

[22] Child and Family Services Act, R.S.O. 1990, c. C.11, (repealed on April 30, 2018) Part III at §40 et. seq.
[23] Child, Youth and Family Services Act, 2017, S.O. 2017, c. 14, Sched. 1, Part V at §83 et. seq.

14. Incorporate solution-focused processes (ADR) into Family Law litigation

There are two completely different approaches to resolving Family Law issues operating within the legal community, and they are (or have been) largely mutually exclusive.

The first is litigation, which is about each Party ramming its rights as far down the other Party's throat as possible while preventing the other Party from doing the reverse. This is what the Courts see, and what the current Court system is designed to deal with (which effectively requires Parties to take diametrically opposed extreme positions in their pleadings and then try to support those positions with allegations). This process typically ends well before trial; but only because one or more of the Parties runs out of both money and emotional capacity and surrenders to the inevitable. This process is only potentially good for the lawyers, but for no one else involved and it has little to nothing to do with resolving the issues which brought the people to the Court in the first place.

The second is alternative dispute resolution (ADR), which is a broad term for any other approach than forcing your rights on the other party while trying to stop them from doing the same to you. ADR is generally agreed to be about solving the problem without focusing all of your effort and energy on your rights, while in many cases still being informed of your rights by independent counsel.

ADR can take many forms including mediation, arbitration, collaborative family law, family centred conferencing, and family group decision making. Incorporating solution-focused ADR processes into the Court system would not only improve the efficiency of the Courts, but would also support potential litigants using such processes without coming to Court; both of which would ease the case load on the Courts.

An example of how ADR principles and approaches could be integrated into the Family Court process is as follows:

A proceeding is commenced by one parent. The parent seeks Orders relating to custody, access, child support, spousal support, equalization of Net Family Property, exclusive possession of the matrimonial home, exclusive possession of the contents of the matrimonial home, a restraining order, guardianship of the child's property and a divorce.

The parties are required to attend before a Judge for a conference from which will result in an interim order as to custody, access, residence, child support and spousal support, and may also appoint the Office of the Children's Lawyer to represent the interests of the child(ren) or to prepare a report for the Court pursuant to §112 of the *Children's Law Reform Act*. The consent of the Parties will not be required.

There shall be a presumption in favour of the status quo, rebuttable by either Party. Viva voce evidence will be the norm at these initial hearings – the Parties will tell their story to a Judge, and the Judge will render a decision which is effective immediately (even if only in the interim). The Judge may be required to take a more inquisitorial role at this conference, particularly if one or more of the Parties is unrepresented.

At the initial conference, the Parties will submit or the Court will canvas the names and contact information of anyone who is involved in the child's life and who may have information relating to the child including family members, professionals, and friends of the family (and where appropriate of the child).

Also at the initial conference, the Court will make an Order setting a date for disclosure to be completed by the Applicant, for the Respondent to file Responding materials (including disclosure) and set a date for the next step, being a Child's Issues Conference (which need not wait for disclosure to be made or completed by either Party). That Order can be made on consent if the parties agree, but if they do not, the Court will make an interim Order based largely on the status quo.

The next step would be a Child's Issues Conference, modelled on the Family Group Decision Making Conference process.

At that Child's Issues Conference anyone identified as having information or being willing to support the child or the family will attend, including (unless inappropriate) the child / children and their counsel, unless otherwise Ordered by the Court; and the Court will deal with the time-sensitive matters which have an impact on the child or children. Professionals involved with the family (particularly people like Probation Officers, counsellors, therapists, support people) should also attend this conference.

Where they are involved, and where deemed appropriate, counsel representing either parent in criminal proceedings and a representative of the Crown in criminal proceedings should be invited to attend or to be available to their client by telephone during the Child`s Issues Conference so that discussions as to amendments of bail conditions or other documents can be discussed and dealt with at the Conference. If the Judge presiding over the Conference cannot make changes to conditions of release, then a Judge who can make those changes should also attend or be available at the Conference so that any changes necessary to protect the best interests of the child or children can be made without delay.

This conference can (and should where possible) be facilitated by a FGDM facilitator (who can invite additional people to attend the conference) or if no FGDM facilitator is available by the Judge if the Judge is appropriately trained. If the Child's Issues Conference is run by a FGDM facilitator, the Judge who has carriage of the file for the purposes of the conference or for case management if it be implemented (or Judges who have jurisdiction to deal with any matter which may be raised at the Child`s Issues Conference if the Conference is in the Unified Family Court and if the Unified Family Court Judge lacks jurisdiction to vary bail or conditions of release) shall be available to provide input from the Bench or to hear requests to make an Order (Interim or Final) on one or more issues, upon request of the Facilitator.

The Child's Issues Conference shall, where possible, develop a plan for the care of the child or children including their residency and access schedules and any other child-centric issues which can be resolved either on an Interim or Final basis, and an Order shall issue accordingly in the discretion of the Court. A date may be set for a follow-up Child's Issues

Conference if one is foreseeably necessary. A further Child's Issues Conference may be requested at any time and may take place in the Court's discretion.

After the Child's Issues Conference, non-child-centric issues will be addressed (on an Interim or Final basis) after financial disclosure is completed, by way of a hearing on Affidavit evidence. Where feasible, this hearing may be incorporated into or immediately follow the Child`s Issues Conference.

The non-child-centric issues (equalization of NFP, spousal support etc.) will then move on to a Trial, following which a Final Order will issue.

Any subsequent request to change a Child's Issue (being child-centric matters such as custody, residency, access, or mobility) shall, except in cases of urgency, be the subject of a follow-up Child's Issues Conference. Financial issues shall be dealt with by way of Motion filed with up to date financial disclosure from the Moving Party and shall be determined based on Affidavit evidence unless the Court orders otherwise.

15. Simplify the forms

For example, in Family Court there are currently no fewer than **seven (7)** different forms for a Motion:

- Form 14 (Notice of Motion for temporary order)
- Form 14B (Motion Form for simple or procedural orders)
- Form 15 (Motion to Change)
- Form 15C (Consent Motion to Change)
- Form 15D (Consent Motion to Change Child Support)
- Form 31 (Notice of Contempt Motion)
- Form 32A (Notice of Forfeiture Motion)

Yet there is no Motion Form for a Final Order, which is what most people come to Court to get. (Form 14 is used, and the Rule which specifies it to be for temporary relief is ignored)

At its core, a Notice of Motion must advise the other party (or parties) and the Court of the following information:

- What relief is being sought (i.e. "**What do you want?**")

- When and where the hearing is to take place (When will it be argued)

Some of the Motion Forms, particularly Form 15C (Motion to Change) and Form 15D (Consent Motion to Change Child Support) are several pages long and it is often the case that most of the pre-printed pages simply don't apply to a particular case – thus wasting time,

paper, and effort, as well as causing confusion and consternation among those who must use the form, all while making it harder for the court to find the information it needs.

It is unclear even to lawyers when a Form 14 must be used vs when a Form 14B may be used. Some Courts in some cases actually require a Form 14B Motion Form to bring a Motion to permit a Form 14 Motion to be brought – and the forms are served at the same time and made returnable at the same time and place. The rules and how they are applied vary from county to county. Why?

The Form 14 Motion is the simplest of the Motion Forms, but the Form 14B makes it more clear which laws and Rules are being relied upon as well as which parts of the Continuing Record are important for the Motion. Perhaps Rule 14 could be used or amended (as necessary, though it seems fine as is) to apply to **all** Motions, whether for temporary or final relief, including a Change to a Final Order, and to require a Form 14B Motion form for all Motions. Guides as to what the Court needs for any particular kind of Motion could easily be promulgated as checklists.

As with Motion Forms, we have an overabundance of Affidavit forms, most of which can be replaced with the general Affidavit form (Form 14A):

- Form 6B (Affidavit of Service)
- Form 14A (Affidavit – General)
- Form 23C (Affidavit for Uncontested Trial)
- Form 26A (Affidavit of Enforcement Expenses)
- Form 26B (Affidavit for Filing Domestic Contract or Paternity Agreement with Court)
- Form 32C (Affidavit for Warrant of Committal)
- Form 34A (Affidavit of Parentage)
- Form 34D (Affidavit of Adoption Applicant(s))
- Form 34G (Affidavit of Adoption Licensee or Society Employee)
- Form 34G.1 (Affidavit of Society Employee for Adoption of a Crown Ward)
- Form 34H (Affidavit of Adopting Relative or Stepparent)
- Form 34J (Affidavit of Execution and Independent Legal Advice (Children's Lawyer))
- Form 35.1 (Affidavit in Support of Claim for Custody or Access)
- Form 36 (Affidavit for Divorce)

All of these Affidavit Forms seek to answer the question which follows a party asking the Court for relief, that question being "**Why should you get it?**"

Some of these forms of Affidavit are only used by professionals within the system, such as Form 34G or 34J, but there is no reason to have so many forms to answer one simple question: **Why should you get what you are asking for?**

Form 14A can be used to replace all of these forms, with checklists as to what the Court requires for each of the types of Affidavits currently in use. Having one form to use would greatly simplify the determination of which is the correct form.

16. Titrate the limit of the Small Claims Court to practical considerations

The limit of the Small Claims Court of the Superior Court of Justice is currently set at twenty five thousand dollars ($25 000.00)[24]; an amount which has been increased significantly in recent years in part as a response to the cost of litigating civil matters in the Superior Court of Justice. That limit is still too low.

The limit of the Small Claims Court should be set by taking into account the costs of litigating in the Superior Court of Justice.

At present, a litigant with a civil claim must choose which Court to bring their claim in. This is not an easy choice to make. If the claim is near the limit of the Small Claims Court, making the wrong choice (which will be determined with 20/20 hindsight when the case is over) can have serious consequences.

If the claim is brought in the Small Claims Court the forms and process are designed to be more user-friendly, but the limit is an absolute ceiling on how much can be awarded so if your claim is worth $40 000.00 (forty thousand dollars) you have to waive $15 000.00 (fifteen thousand dollars) if you choose the Small Claims Court, so the defendant who should owe you $40 000.00 makes $15 000.00 for forcing you to sue. You will also not recover nearly as large a portion of your out of pocket legal expenses if the claim adjudicated in the Small Claims Court.

If the claim is brought in the Superior Court of Justice the process is more complicated, the forms are more difficult to complete accurately, and paralegals are not permitted to represent you. If you are a corporate plaintiff you must be represented by a lawyer. One of your first choices is as to which procedure to use, standard or simplified. This choice may well determine which rules apply to your entire case, but the defendant (or any of them) can force the more complex procedure.

If you win in Superior Court, but don't win more than the limit of the Small Claims Court for whatever reason, you may actually lose money by winning your case because you will be required to pay the other side's legal fees. It may well be cheaper to give up $15 000.00 of your claim than to risk spending $60 000.00 fighting for $40 000.00 – particularly if you succeed in winning $25 000.00 and then have to pay the other party's costs of $40 000.00 on the basis that you should have sued in small claims court. Otherwise you can lose by winning.

Any litigant with a claim of under $100 000.00 must therefore choose between waiving up to $75 000.00 of their claim or quite possibly spending that amount (or more) on their lawyer and on steps such as discoveries and procedural motions.

[24] Courts of Justice Act, R.S.O. 1990, c. C.43, O. Reg. 626/00, §1(1).

It simply isn't financially worth it to sue in the Superior Court unless your claim is much more than four times the current small claims court limit. If the defendant has plenty of money, or has little money, or simply chooses to be obstinate, they can force the plaintiff to accept a settlement far below what a fair settlement would be just to stop the haemorrhaging of money in legal fees and costs.

Some litigants are using the cost of litigation as a weapon in litigation, and the current system has the Courts helping them do it. How can that have anything other than a negative effect on the public perception of the justice system and therefore respect for it?

17. Make Civil awards tied to criminal conduct durable, just like restitution awards (Civil Court)

A criminal court, whether the Ontario Court of Justice or the Superior Court of Justice, has the ability to make a restitution award in favour of a victim of crime, thus sparing the victim the cost, stress, and delay of pursuing a judgment in civil court to recover damages inflicted by an accused who is convicted of an offence.

Up to that point, restitution and allowing a criminal court to make a restitution order makes sense. However, restitution orders are not mandatory, even if the court has found that the defendant caused the victim harm (economic harm) beyond a reasonable doubt – whether to make an award or not is left up to the Judge's discretion.

If the Judge refuses (or fails) to make a restitution order, the victim must either absorb the losses or bring a civil claim against the defendant to prove the damages on the civil standard of balance of probability even though another court has found that they were incurred and caused by the defendant on the higher standard of proof beyond a reasonable doubt.

The victim must fund the civil suit themselves, and is subject to the same considerations as to the costs of civil litigation as any other plaintiff.

If a victim follows through with a civil suit and wins, what the successful victim/plaintiff will get for their time, stress, effort, and money, is an Order that the defendant pay them a set amount. All the defendant need do to avoid paying is hide assets and income (thereby forcing the plaintiff to spend more time and money trying to find them) or file an assignment in bankruptcy (thereby erasing the debt)[25].

Either of those tactics by a defendant is a way to re-victimize the victim. Again, it is not hard to see how a victim of a crime would quickly lose respect for the Courts upon learning these hard truths.

[25] The *Bankruptcy and Insolvency Act* does provide some protection for some court orders, but not all of them, and actually provides preferential treatment for restitution orders over civil judgments. See §178 of the *Bankruptcy and Insolvency Act R.S.C. 1985, c. B-3*.

If a restitution order were required to be made or if a civil judgment tied to criminal conduct survived a bankruptcy as child support and restitution orders do, victims of crime would not have to go through what they are now required to and their victimizers would not be given new opportunities to re-victimize their victim with the unwitting assistance of the justice system.

Allowance could be made for a Judge to refuse a restitution award, provided reasons are given, (a victim should be able to appeal such a decision), or for a defendant to be able to obtain an order from the court to allow the inclusion of a restitution order or civil judgment tied to criminal allegations in an assignment in bankruptcy at a hearing at which the burden would be on the bankrupt and at which the victim would be able but not required to make submissions with or through legal representation. Even with such allowances, the changes set out herein would at least put the justice system clearly on the side of the victim, whereas now it may appear to be on the side of the convicted defendant.

18. Make meaningful, durable, costs awards (all Courts)

There are two major problems with how costs are being awarded and enforced, both of which are seriously undermining respect for the legal system. Both can be remedied, and easily.

First, the basis on which costs are awarded is flawed.

There are three standard levels of costs awards, and sometimes the Court chooses to make a lump sum award not based on any of those levels. The three standard levels have gone by different names over time and are currently called “Partial Indemnity”, “Substantial Indemnity” and “Full Indemnity” costs. The older names for those three levels were “Party and Party costs”, “Solicitor and Client costs” and “Solicitor and His Own Client costs”.

No matter what the levels are costs are called, they translate in practical terms to approximately 1/3 of your costs, 2/3 of your costs, and all of your costs. The higher the fraction of your costs the less likely you are to have the court award them to you.

Presumptively, the successful party is entitled to “Partial Indemnity” (1/3) costs. If the successful party made any offers to settle which were better than the final result for the unsuccessful party then costs may rise to the level of “Substantial Indemnity” (2/3) for some or all of the process, and if the conduct of the unsuccessful party was so egregious that the Court deems it necessary to denounce it, perhaps even to “Full Indemnity” (3/3) costs, but almost always for only part of the court proceedings.

However, in practice the higher the fraction of the winning side’s legal costs the less likely they are to be awarded, and full indemnity costs are almost never awarded.

The common perception that the loser pays the winner's legal costs is far from accurate. For some steps, costs are almost never awarded. If costs are not dealt with at any particular step in a proceeding the presumption is that each side bears their own costs for that step. This means that a self-represented litigant who is entitled to a costs award might not get it because he or she didn't know to ask for it.

Why should a Party who was given no choice about going to Court and who won their case be left with any legal costs at all? The operating presumption should be changed to accord with what people think it is – the loser pays the winner's costs – in full – unless the Court orders otherwise after hearing from all litigants, and after a trial the full costs of the proceeding are reconsidered based on the Court's analysis of the entire case.

There is another transparent ruse being used in Courts every day. Anyone and everyone can see through it almost every time, but Courts cling to it – when assessing costs the Court does not ask, and it is inappropriate to tell the Court if the Party is receiving Legal Aid and the lawyers are to submit bills of costs setting out their regular rates. At the same time, the Parties are required to file financial statements in any case involving property or support (child or spousal) and those financial statements must include full details and particulars of all debts (such as Legal Aid liens) and expenses (such as legal fees or contribution to legal fees). The Court simply pretends it doesn't know or care about the information it requires the Parties to provide – under oath.

Then, the Court makes an Order for costs – perhaps awarding $500.00 or $1 000.00 in costs to a Party who spent $3 000.00 to $6 000.00 (plus HST and disbursements) for a simple Motion which was only necessary because the other Party was not willing to be reasonable. If the unreasonable Party is receiving Legal Aid they will have incurred no actual costs and the costs order against them will probably never be paid (so they have no reason to be reasonable).

The reasonable Party who hired a lawyer "wins" and "recovers their costs" but is actually completely out of pocket and even in theory would have paid far more in legal fees than the unreasonable Party – and they are to believe that this is justice?

Even if or when full costs are awarded, the Order may be meaningless. Costs awards are not insulated from bankruptcy. A vexatious litigant can initiate a frivolous action and drag it out, slowing it down, making it cost the other litigant(s) more than they can afford, then lose the case, have the court impose significant full indemnification costs, and then file an assignment in bankruptcy to make it all go away.

Protecting costs awards from bankruptcy proceedings would make such orders have much more meaning than they in many cases do now.

19. Family Court Orders need to be enforceable

One of the worst kept secrets in the Family Court is that most if not all of the orders made in Family Court are unenforceable – there are few if any real consequences for breaching a Family Court Order, the notable exception being child support orders which are completely protected from bankruptcy.

Making changes to how costs awards are made and how durable and enforceable they are as suggested in this paper could go a long way to changing that fact without being a revolutionary change – costs attributed to child support are already enforceable as child support and thus enjoy protection from bankruptcy.

Another way to make Family Court Orders more enforceable, and to demand that such Orders be respected is to do away with the largely artificial distinction drawn between child support amounts owing and costs awards. At the moment, child support is inviolate, cost awards and spousal support amounts are treated much differently.

If parent A owes $500.00 per month in child support to parent B, but parent B owes $500.00 in costs to parent A, parent A cannot offset the costs against the child support and must pay parent B $500.00 and try to get it back from parent B as payment of the costs award. While those who analyze this from a strictly legalistic approach may be able to rationalize it, those who are not legally trained cannot do so because at the end of the day, money is money – a buck is a buck.

At the moment, there is often no way to actually enforce most Orders the Family Court makes.

Financial penalties are often not collectable, particularly if the Party on whom they are imposed has a lot of money (and knows how to hide it), or has no money (and therefore nothing to take).

It is not appropriate to punish a parent by limiting their child's ability to spend time with them when spending time with that parent is in the best interests of the child overall.

Restricting a parent's access to the court prevents them from seeking Orders which may be necessary for the well-being of the child, and that would be contrary to the statutes and the purpose of the court's existence.

Refusing to award a parent's costs when they would otherwise be recoverable might be somewhat effective, but only if the parent has incurred costs – what can be done to a self-represented litigant (who are more and more common)?

Setting the system up so that only those litigants who can afford to and do hire lawyers can be forced to abide by Court Orders would only encourage more people to represent themselves, which would not help make the Courts more efficient and would arguably further degrade any remaining respect for the legal system.

The Court does have the power to find a litigant in contempt, and to impose penalties for contempt, including incarceration. However, in family law even this extreme remedy may well be impractical to the point of being useless. What happens if the parent who is not obeying the Court order is the parent with whom the child resides? Does that parent go to gaol regardless of the effect that will have on the child? If so, where does the child live? The options may be either with the parent with whom it is not in the child's best interests to live or foster care.

If the Court can't or won't enforce its orders, why would anyone respect them?

20. Review the system and its components regularly for rationality

A large contributor to the public's loss of confidence and trust in the justice system is the lack of understanding of the system coupled with the system's lack of apparent rationality in many respects.

The public have been told, even taught, that the justice system is impartial. Some laws make this seem untrue. For example, the *Insurance Act* and its regulations require that awards made by a jury be reduced by amounts set out in statute and that the jury asked to determine an appropriate amount to award not be informed of the legal requirement to reduce their award.

It may well be that there is a rational reason for the requirement in the *Insurance Act* to reduce jury awards; but from the perspective of the general public the system appears to require that a civil jury determine what a fair amount of compensation is so that the system can deliberately not award fair compensation – in order to benefit an insurance company or insurer and to prefer the insurer's profitability over ensuring that an injured party is adequately and fairly compensated.

Other areas of irrationality may creep in to the system by the interaction of unrelated legislative changes or amendments.

A group made up of lawyers, judges, and members of the public could and should review laws, rules, procedures and penalties to make sure they are and remain understandable, rational, sensible, consistent with each other, and efficient.

Examples of cognitive dissonance in existing legislation are easy to find in every area of law. They should not be.

In Provincial Offences, why is it that the maximum penalty for having a wheel come off a commercial motor vehicle[26] (an absolute liability offence) two and a half times the penalty for operating an unsafe commercial motor vehicle[27] (a strict liability offence) - $50 000.00 vs $20 000.00 – when the unsafe commercial motor vehicle could be fully loaded with dangerous goods?

In criminal law, why is an unconditional discharge an available sentencing option for offences which are generally perceived as more serious than other offences for which a discharge cannot be granted?

Why, for example, is manslaughter[28] not subject to a higher minimum penalty than holding a toy gun[29]?

Why is there a minimum sentence for sexual exploitation (section 153[30]), but not for sexual exploitation of a person with a disability (section 153.1[31], which, as is made clear by the section number itself, was added **after** section 153)? A discharge is available for the latter, newer offence, but not for the former because of the minimum sentence disparity[32].

The ridiculous assertion above is further reinforced by comparing the maximum sentences available. Sexual exploitation prosecuted by indictment under §153(1)(a) carries a maximum sentence of fourteen (14) years and a minimum of one (1) year. By contrast, the maximum sentence for sexual exploitation of a person with a disability prosecuted by indictment under §153.1(1)(a) carries a maximum penalty of five (5) years imprisonment with no minimum.

Based on the severity of the sentences available, these two sections seem to stand for the proposition that it is less offensive to sexually exploit someone with a disability than an able-bodied victim. That is ludicrous, but also how the *Criminal Code* reads.

Why are uniformed police officers automatically subject to a 10 year minimum sentence for using a prohibited weapon in the commission of an indictable offence simply because they are wearing their service issued sidearm at the time? Given that the law requires such a charge and sentence, why are police not charged under that section? This leads to the reinforcement of the idea that the police are above the law – undermining confidence in the legal system, and it does so unnecessarily.

Revising one law without due consideration to the overall effect and impact of such a revision can have dramatic unintended, counterintuitive and counter-productive consequences.

---

[26] Highway Traffic Act, R.S.O. 1990, c. H.8 §84.1
[27] Highway Traffic Act, R.S.O. 1990, c. H.8 §84
[28] Criminal Code of Canada, R.S.C., 1985, c. C-46 §236(b)
[29] Criminal Code of Canada, R.S.C., 1985, c. C-46 §85(2)
[30] Criminal Code of Canada, R.S.C., 1985, c. C-46 §153(1.1)(b)
[31] Criminal Code of Canada, R.S.C., 1985, c. C-46 §153.1
[32] Criminal Code of Canada, R.S.C., 1985, c. C-46 §730(1)

There seems to be no general review, no oversight, no careful consideration for the overall rationality of the law. These instances of irrationality, cognitive dissonance, or whatever name they are given, reinforce any predisposition to believe that "The law is an ass", and undermine confidence in the justice system generally.

A regular review of laws by a Law Reform Commission could not only find existing irrationality in the law and recommend fixes, but could also be used in drafting significant revisions to the laws to ensure that the revision is consistent with the existing statute. This idea is not new; there was such a commission from 1971–1993 and from 1997 – 2006. Re-instating such an organization should not be difficult.

21. Overview

- Review the Rules, Forms, and Procedures (and where necessary laws) – **from scratch** – to assess whether they serve the people or vice-versa.

- Analyze the system from the perspective of those who will turn to it for help:

    - What do they expect from the system?
    - Why do they turn to the Courts?
    - Why is each step, form, Rule, or law necessary?
    - If a step is otherwise necessary or useful, does it pass a cost/benefit analysis from the point of view of the citizen, the bar, the Crown, and the Court? (if not, eliminate or change it)

- Courts are a customer-service industry.

- The customers are the people within the Court's geographic jurisdiction.

- If a step, form, Rule, or law does not serve the customer's interests it should be amended or dispensed with.

- Court orders must be enforceable and durable – an Order to pay restitution or costs must not be easily defeasible.

- It is not enough to say things have been done this way for X years. Steps should only be required if they are currently justified as being the most efficient way to move the matter to the most durable reasonable resolution possible.

- Establish (or Re-Establish) independent law review commissions to re-evaluate the system and its components including legislation and

regulations on an ongoing basis. These commissions should be made up of representatives of all justice system participants

- The system must make common sense if it is to be commonly respected.

Until the court process makes sense from the point of view of a member of the public, and until the courts appear to work efficiently from that point of view, respect for the entire justice system cannot help but continue to erode.

It is not possible to measure the efficiency of a justice system the same way the efficiency of a production line can be measured. Justice is ephemeral and to a certain extent subjective.

The justice system does not – **must not** – seek to produce outcomes regardless of whether they are legally or equitably correct or just; we must instead endeavour to produce just and equitable outcomes efficiently. This cannot be measured in terms of time from the start of a proceeding to its end – indeed shortening those times may be a better indicator of decreased justice than of increased efficiency.

Much less time is required to coerce an accused into a guilty plea than to actually put the state to its burden of proof. Keep a parent in pre-trial detention, put them at risk of losing their job, their child or children, their home, and everything they have and they'll plead to anything.

Dealing with civil claims quickly is simple – if you ignore evidence and procedural fairness you can drastically chop the court time required – just flip a coin to decide a winner and use a random number generator to decide the quantum. Of course, you can't call that justice with a straight face.

Family law cases could be sped up by drastically increasing the costs – parents will run out of money faster and capitulate in "settlement" which brings the case to conclusion faster. Of course, this increased "efficiency" would come at the cost of being able to call the system a justice system without adding bold quotation marks around the word justice.

What the system is doing is not yet *quite* always as bad as set out above, but it is much closer to that system described above than to a true justice system, and the description above is how members of the public often see it. That's why this paper isn't entitled "The problems with our justice system and how to fix them"; too often our system prefers a result over justice.

We are perhaps fortunate that there is no ability to leave online reviews for the justice system. I doubt we would be proud of the reviews that would be left, even by people who can afford to go through the entire process and who eventually achieve a just result. A cost/benefit analysis of most cases which produce an objectively (or subjectively) just result would likely usually indicate that the benefit does not justify the financial and emotional costs.

Members of the public who come (or are brought) to court usually want two things: to be heard, and to have a just decision rendered. We, as a system, are often being compared (unfairly) to how things are done on television and on the internet.

A case comes before a Judge, the evidence is heard, and a decision rendered in about 15 minutes (including commercial breaks) daily. Judge Judy and her ilk have no problem doing that day after day. They've been doing it for years.

A crime is committed, investigated, an arrest effected and a trial held all within an hour on any one of several crime shows (admittedly there may be days or weeks compressed into that hour) – but even then, the entire process takes days or weeks, not years, and everyone is heard.

People come to court for a decision. Those who are new to the system expect justice to be done expeditiously. They expect to be able to tell a Judge their story, challenge evidence against them, and have a decision rendered.

We aren't doing that often enough. We conference files to death instead. Many settlements are reached not because the parties come to a reasonable and equitable compromise, but because one or all of them just can't bear to go through the meat grinder which is our current system any more, and they capitulate.

That has to change, and it is up to lawyers, judges, justices of the peace, police, and court support workers to make the changes happen. It won't be easy, almost nothing worthwhile ever is.

Easy or not, it must be done, and soon.

Anyone in a customer service business will confirm that it takes a long time to build a reputation, a short time to destroy one, and a much longer time to rebuild a destroyed or damaged reputation.

We as a system have a lot of rebuilding to do.