Don't Throw the Book at Defence Lawyers or the Charter for those Long Complex Trials

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Don't throw the book at defence lawyers or the Charter for those long complex Trials

DON STUART AND JAMES STRIBOPOULOS
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Mr. Justice Michael Moldaver of the Ontario Court of Appeal recently spoke out about what he sees as a cancer on our justice system—punishingly long and needlessly complex criminal trials. He sees the problem as multifaceted, but, in identifying the cause, he tends to focus on the Charter of Rights and Freedoms and defence lawyers. He sees defence counsel as more concerned with dragging out proceedings with bogus Charter motions to maximize their fees than they are with acting out of a concern for justice.

This is a serious charge against both the Charter and the defence bar, especially coming from someone as respected as Judge Moldaver. In our view, the judge has unfairly targeted all defence counsel.

His remarks are also disturbing to those of us who see the judicial assertion of entrenched Charter standards since 1982 as having constituted the only real check against the lure of law-and-order politics by politicians of all stripes, and the consequent unremittingly legislative trend to toughen the criminal law. We hope they will not result in an undue chilling effect on independent judges exercising their mandate to be "guardians of the Charter."

His remarks about the proliferation of pretrial Charter motions lasting weeks and months in superior courts has little resonance to provincial courts, where the vast majority of criminal trials now take place in a much shorter time frame and often under tight judicial control.

Many Charter applications deal with state actors breaching Charter standards such as those respecting search and seizure, arbitrary detention, racial profiling and excessive delay in bringing cases to trial. Any breach in the particular case has to be established by tested evidence. This is the inevitable cost of entrenching procedural rights with discretionary remedies for breaches. Defence counsel should not be discouraged from bringing such applications, otherwise the Charter's protections would be hollow.

Have defence lawyers been fairly singled out? Some do bear some of the responsibility. Most are hard-working, conscientious, underappreciated (unless you are charged) and earn much less than the increasingly high salaries paid to judges and prosecutors. But there are some who exercise remarkably poor
judgment in defending their clients and, in the process, serve to make simple cases needlessly complex. Judge Moldaver is right to be concerned about this sort of lawyering.

Yet, there is so much more to the picture. Due regard must be paid to other systemic causes and the role of other stakeholders: police, prosecutors, the judiciary — even Parliament. In Ontario, for example, we still use something called "post-charge" screening. Under this system, only after a criminal charge is formally laid will a prosecutor have a chance to scrutinize the adequacy of the case assembled by police. In Quebec, prosecutors screen cases before charges are brought.

If this seems like a small point, think again. Largely because of this, Quebec has a much higher conviction rate than Ontario — 73 per cent of cases, as compared with 56 per cent. Even more important, in Quebec, less than 11 per cent of cases are stayed or withdrawn by the Crown, whereas, in Ontario, that number is 41 per cent. In other words, because of how we structure charge-screening in Ontario, a great many more deficient cases get into the courts. Of course, once those cases are in the system, it takes time and resources to finally get rid of them. The police routinely lay every charge they can. Overcharging needlessly complicates cases and creates avoidable delays, as accused persons try to negotiate the charges down. In addition, logistically, the police sometimes do not adapt well to their disclosure obligations. Cases are routinely delayed for months while everyone waits on the police to provide a single item of evidence.

Prosecutors also play an important role. They sometimes fail to rein in police overcharging. Tired and overworked, they can often pass deficient cases down the line. This means that many of those cases that are ultimately stayed or withdrawn only meet this fate on the morning of a scheduled trial, after a case has been in the system for months. Poor judgment by some prosecutors is also a problem. Although the great majority are conscientious professionals, a minority takes unreasonable positions before and at trial, needlessly complicating and prolonging proceedings. Megatrials of numerous accused on numerous counts have proved to be a nightmare for all concerned.

The judiciary also must shoulder its fair share of the blame. In the past 15 years, many areas of law, not just Charter jurisprudence, have grown far too complex. Courts of appeal and the Supreme Court are themselves often inconsistent and prolix.

Parliament has also played a contributing role. Repeated calls for legislative overhaul of needlessly complex law have gone unheeded. These easily correctable shortcomings increase the likelihood of reversible error. Parliament’s own law-and-order agenda shows little commitment to the value of keeping
things simple. It has, for example, enacted a torrent of complex new laws aimed at gangs, terrorists and dangerous offenders. Expect litigation in those areas to be complex and time-consuming. And don't just blame defence lawyers.

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