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Underfunding the Real Crisis
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There has been a lot of discussion about the so-called “crisis” in the justice system lately. Among many thoughtful commentators, Justice Michael Moldaver has stated in several speeches that the administration of justice is “on the verge of collapsing under its own weight.” He has described an “urgent need to stem the tide” and bring “balance and proportionality back into our system of justice.”

Recently, Moldaver, a respected criminal lawyer and seasoned appeal judge, described the problem as one created by our pre-occupation with ‘process.’ He said that the answer lay in deciding, “Where do we draw the line on freeing people whom we know to be guilty?” In other words, when the police have the evidence are we wasting too much time scrutinizing how they got it?

Is that the right question? Is the criminal justice system teetering on the brink of disaster because of “process?” Are Charter applications brought on behalf of “guilty” defendants really grinding the system to a halt? Or, is the Charter being blamed for the failure of a chronically under funded system to produce results quickly enough?

The claim that the source of the problem is cases where the only issue is “freeing people whom we know to be guilty” bears inspection. Should we have legal motions challenging police behaviour where constitutional misconduct has produced evidence of guilt? Civil libertarians see this as a no brainer: When the police misbehave and violate the constitution, the courts should restore both the police and the citizen to their original positions. Section 24(2) of the Charter makes criminal defendants the surrogates for enforcing constitutional rights belonging to the rest of us. The criminal trial is the forum where this occurs. If a guilty defendant thus goes free, that’s the price we pay for having constitutional civil liberties.

This is fundamentally no different a price to pay than requiring the police to respect individual rights from the outset. The Charter does not require the defendant to “unclutter” the criminal trial by pursuing his claim in a civil proceeding. Pragmatists see this as too costly. For them, the delay entailed in judicial review of police behaviour outweighs the social cost of routinely approving police misconduct.

But, the country has long since resolved the debate over whether constitutional rights are “worth the trouble.” By democratic process we have decided that they are. Polls show the citizens of this country overwhelmingly support that choice.

If it should be irksome to those who feel the guilty are only entitled to a spoonful of process, it’s time to repeat Justice David Doherty’s memorable observation in *Regina v Clayton*: “The scope of individual constitutional rights and the significance of the violations of those rights does not depend on whether the individuals’ whose rights are violated turn out to be criminals or law-abiding citizens. Criminals do not have different constitutional rights than the rest of the community.”

Usually, criminal trial Charter applications relate to fairly straightforward violations of the right to counsel or the right to privacy. On occasion, the litigation will raise a novel issue. It can on occasion be complex or uncertain. Conscientious lawyers understand their duty to seek reasonable remedies favourable to their clients. The most significant development in Charter litigation, the right to disclosure, has produced better justice and more timely guilty pleas. It was the result of a creative, novel Charter application by responsible defence counsel. Nurturing the “living tree” of the Constitution sometimes consumes court time.

To be sure, there have been some high profile disasters in the administration of criminal justice. Some involve conduct of defence counsel. Some of those counsel embarrassed themselves with time-wasting, merit-free Charter arguments. But, no good law reform is ever balanced on the back of a couple of attention-grabbing examples. Indeed in social science terms, the sample size is so small as to be meaningless.

Important changes to public policy in the administration of justice deserve more evidence. The occasional unfair trial is not a basis for re-thinking how much power trial judges have. No one argues that Canada’s series of high-profile wrongful convictions would justify diminishing the independence of Crown prosecutors. A few, even spectacularly unprofessional defence counsel, are not a basis for discounting the important work that most defence counsel do to breathe life into the Charter.

Governments at the provincial and federal level are interested in Moldaver’s point. What has been missing from the discussion is evidence showing that a “crisis” exists, and that this “crisis” can be traced to the “process” associated with Charter applications. Governments everywhere do one thing well and that is to collect data. In the three years since this debate began, I have never seen a public document proving that lawyers using the Charter to defend clients has contributed to anything that could

amount to a system-wide crisis. Police charging decisions, Crown policies and Crown prosecution styles, in contrast, are obvious sources of system-wide delays.

In any event, there is no obvious crisis in the criminal justice system that would not be fixed by a reversal of the business decisions made repeatedly by successive provincial governments to under fund that system. Those who work in the system know that each year we are asked to produce the same high quality results with less and less money.

It's not surprising that a system under this kind of financial and social pressure would start to bulge at the seams. It's also not surprising that people of good faith would look for solutions within. But it would be a shame if Charter litigation became warm clay in the hands of those who want to mould a new, more efficient trial. It's true that defence counsel ask judges to supervise police behaviour, including their compliance with the constitution of Canada — in the middle of a criminal trial. That is our job.
But, we are the least able — among police, prosecutors, judges and government — to influence the speed at which the system operates. Change to the system, though needed, should not start where it will be least effective.

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