

**10th COLLOQUIUM ON THE LEGAL PROFESSION
UNIVERSITY OF OTTAWA
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Address by:

**The Honourable Justice Michael J. Moldaver
Court of Appeal for Ontario**

Over the next fifteen minutes or so, I want to talk to you a little bit about our Criminal Justice System.

In particular, I want to talk about process and the emphasis we place on it and the risk we run in doing so.

In the end, my goal is to provoke some thought and hopefully stimulate some discussion.

As I speak, I would ask you to keep in mind several questions that I believe are pertinent to the debate:

- (1) In our effort to create a justice system that is better than fair, have we ended up with one in which process counts for too much and truth and justice too little?
- (2) In our effort to create a perfect justice system, have we ended up with one that is on the verge of collapsing under its own weight?

- (3) Have criminal trials become interminable games, in which the trial of the accused is regularly overshadowed by the trial of the investigation?
- (4) Given the length and complexity of criminal trials, have we created a regime in which only the very rich or the very poor can fully participate?
- (5) Has the quality of justice increased proportionately to the increased length of criminal trials?
- (6) Is the public being well-served by our criminal justice system and if so, can we still do better?
- (7) Is the public becoming disenchanted with our criminal justice system and if so, how can we do better?

As some of you may know, I have been speaking out for some time now about the length and complexity of criminal trials and the urgent need to stem the tide and bring some balance and proportionality back into our criminal justice system. The road has not always been easy. There have been a few bumps along the way. I have been accused of being a *Charter* basher; I have been accused of speaking out for political gain; and I have been told that I do not understand the important role that defence counsel play in our society.

In response, I say this – on balance we have a very good justice system. Indeed, it may be one of the finest in the world.

When I speak out about our criminal justice system, I do so not because I am anti-*Charter* (whatever that means) and not because I have a problem with the basic tenets of our criminal justice system and most assuredly not because I want to see innocent people wrongfully convicted. In that regard, I embrace, without reservation, the notion that it is better to free ten guilty people than to convict one innocent person. That is not a question for me.

The more pressing problem today – and one that engages the issue of process in its broadest sense – is where we draw the line on freeing people whom we know to be guilty. That is something with which the courts have been struggling, and finding the proper balance presents a difficult task indeed.

Be that as it may, the point I wish to make is that when I speak out about our criminal justice system, I do so because I am concerned about what I am seeing and I believe we can do better and I believe that the citizens of this country deserve better.

With that in mind, let me outline some of my primary concerns. I begin with the length of criminal trials.

It is no secret that over the past twenty-five years, criminal trials have come to take on a life of their own. More and more, they seem to go on endlessly, often for weeks and months and sometimes for years at a time.

There are many reasons for this and all of the major stakeholders in the criminal justice system bear responsibility. The problem is a collective one and it requires a collective response.

And I have spoken to the defence bar about this – and I have spoken to Crowns and I have spoken to the police. In each instance, I have tried to point out areas of concern and things that could be done by way of improvement.

With respect to the police, I have alerted them to various concerns including:

- (1) Overcharging;
- (2) Failing to make adequate and timely disclosure;
- (3) Failing to comply with the requirements of the *Charter*; and
- (4) Engaging in tunnel vision and generally failing to conduct full and impartial investigations.

With respect to the Crowns, I have alerted them to the following concerns:

- (1) Failing to accede to reasonable defence requests;
- (2) Proceeding on too many charges and against too many accused;
- (3) Giving in to pressures from victims and victim interest groups;
- (4) Failing to agree to bail on reasonable terms;
- (5) Failing to put an end to cases where there is no reasonable prospect of conviction;
- (6) Pushing the evidentiary envelope beyond what is required to obtain a conviction;
- (7) Failing to monitor the police to ensure compliance with their *Charter* obligations, particularly the need to make full and timely disclosure; and

- (8) Engaging in improper trial tactics, particularly in their cross-examinations of the accused and in their closing addresses to the jury.

And lest there be any doubt, let me assure you that the judiciary bears its fair share of responsibility and I believe that we can and must look inwardly and where there is room for improvement, we should do what is necessary to bring that about.

By way of example, I believe that trial judges bear responsibility for:

- (1) Allowing counsel to go on endlessly;
- (2) Not bringing a quick halt to frivolous and vexatious motions;
- (3) Not requiring counsel to pare down the issues and narrow the evidence; and
- (4) Generally, giving up control of their courtrooms to the litigants.

As for the appellate courts, I believe that we bear the responsibility for:

- (1) Layering the criminal law with complexities;
- (2) Writing in abstract terms rather than setting down clear guidelines for the police, counsel and trial judges to follow;
- (3) Writing judgments that are difficult to comprehend and not always responsive to present day needs and issues;
- (4) Failing to consider in advance, how and in what ways, our decisions are likely to impact on the overall length and complexity of criminal trials.

Yes – the problem is a collective one and all of us bear responsibility.

And when I look at criminal trials today, I am struck by the fact that they bear virtually no resemblance to the criminal trials I engaged in as a defence counsel some thirty years ago. To me, they are almost unrecognizable.

Without wanting to sound like a broken record, the truth is – we used to complete murder trials in five to seven days; now they regularly take five to seven weeks and often five to seven months. Sexual assault trials that lasted a day or two now go on for weeks at a time.

And the question I ask is “at what cost and for what gain?”

My second concern relates to the complexity of the criminal law and its impact on the criminal justice system. And I can honestly say, as a some time student of the criminal law for the past thirty-five years, that the criminal law has taken on complexities the likes of which are truly mind-numbing.

Sadly, we have reached a point where many trial judges, including those who have been schooled in the criminal law, express serious concerns about their ability to complete a criminal trial from start to finish without committing reversible error. One very experienced trial judge recently confided in me that he had come to view the first trial as little more than a dress rehearsal.

And the public, I believe, is becoming disenchanted. Some are beginning to lose faith and confidence in our criminal justice system. Many are becoming upset with the interminable delays and marathon-like trials that mark our criminal landscape today.

Still others are coming to understand what one of this provinces most experienced and respected criminal law jurists meant when he said this about today's criminal trials, and I quote: "The trial of the accused has become a mere side-show; the trial of the investigation is now the main event".

And there are some who believe that we have lost our way and in our quest to create a perfect criminal justice system, we have created one in which process counts for just about everything and truth and justice for little or nothing.

Still others believe that in our desire to be better than fair, we have ended up with a system that is on the verge of collapse.

And many feel that the time has come to bring some balance and proportionality back into the criminal justice system.

And who can blame them! Take a moment and think about it. Think of the cost – think of the expense – and think of the drain on precious resources.

Let me give you a simple example.

When I did murder trials, there were two homicide officers assigned to the case. During the trial, one remained in the courtroom and the other looked after things on the outside. After a week or so, when the trial completed, the officers returned to their division and began working on other homicides.

Today, those same two officers could easily find themselves tied up in a trial lasting twenty weeks or more – and if they are out of commission for twenty weeks, who is out there solving the new murders?

With murder trials lasting ten to twenty times longer than they used to, are we to assume that the size of homicide squads have increased proportionally. If so, the monetary cost to society is huge. If not, the cost to society is equally huge, with serious crimes going unsolved due to a lack of resources.

And what about legal aid funds. We all know how scarce and precious they are. And if a trial that lasts a year could have been completed in six months, just think of the waste. Think about the people who had to go without funding, particularly those needing help in family and civil matters.

And take the same case and think about the judge and courtroom tied up needlessly for an extra six months and the effect this has on other litigants who have been waiting their turn to access the justice system in a timely fashion.

And the whole thing is insidious. And it feeds upon itself. And we make a big mistake if we think that we can hive off the criminal justice system from the civil justice system and treat the criminal justice system as an island unto itself. We all know or should know that it doesn't work that way.

Section 11(b) of the *Charter* requires that criminal trials be heard in a timely fashion. And if push comes to shove, the criminal cases will be given precedence over the civil cases and the civil cases will go to the back of the line and litigants seeking to access the civil justice system in a timely fashion will have no recourse, short of abandoning the public system and moving to the private one.

Ladies and gentlemen, to this point I have essentially been speaking in the abstract. I now want to take a moment and give you a concrete example of how the criminal justice system can go terribly wrong.

The case is a real one. Indeed, it emanates from this jurisdiction.

In 1990, two Ottawa citizens were gunned down in cold blood. Within a short period of time, four people were arrested and charged with first degree murder. Their names will be known to some of you – Sauve, Trudel, Mallory and Stewart.

That was 1990!

Seventeen years later, in 2007, after a preliminary hearing that lasted two and a half years; two separate trials – one for Sauve and Trudel and one for Mallory and Stewart – that each lasted the better part of eighteen months; two sets of appeals that took six to eight years to be heard by our court and eventually ended up in new trials being ordered – seventeen years later, the charges against all four were stayed on account of delay.

And when I reflect on that case, I say “shame on our justice system”. And without ascribing blame to anyone, I consider it to be a disgrace.

Fortunately, cases like that are few and far between. Thankfully, they are not the norm, although it is not at all uncommon for our court to see cases in which the trial has occurred three or four years after the event and the appeal is heard two to three years later. That means that if a new trial is ordered, it will often occur seven or eight years after the event in question. And we all know how

difficult it is to put a case together within a year of the event, let alone seven or eight years later.

Be that as it may, when cases like *Sauve* and *Trudel* occur, they give the Canadian justice system a black eye. They bring the administration of justice into utter dispute. We can and must do better.

All of that said, there is a bright side.

On a positive note, I am pleased to say that the concerns about which I have been speaking are receiving attention across the country and measures are being taken on a nationwide basis to get at the problems that continue to plague our criminal justice system.

In the end, I believe that a strong and vibrant justice system is necessarily dependent on the collective goodwill and good faith of the people who serve it. To that end, I urge the leaders of the bar to get involved and speak up and speak out.

To that end, I urge the major stakeholders to come together and listen attentively to each other, so that each may better understand the other's problems and concerns.

Ladies and gentlemen, we have a very good justice system but it needs caring for and tending to if we want it to continue to grow and flourish. Complacency, I believe, is its worst enemy and we must guard against it, lest it destroy that which we have worked so hard to achieve.