

Delays in Criminal Proceedings

Presentation by Ian Greene to the
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It is an honour to have been asked to make a presentation to you today. I have been studying unnecessary delays in Canada's courts, especially in Ontario, since I worked on my PhD dissertation at the University of Toronto from 1976 to 1983. However, my research into the causes and cures for unnecessary delays has been only one part of my research agenda over the past four decades. Other topics have included ethics in public life The Charter of Rights, judicial behavior, and program evaluation. Therefore, my comments today will be very general.

To try to understand unnecessary delays in Ontario's courts for my PhD research, I interviewed a random sample of 40 judges at all levels of court in Ontario, as well as a representative sample of about 30 each of litigation lawyers, crown prosecutors, and court administrators who worked in the same court houses as the judges in my sample. I interviewed 134 persons altogether. Everyone on my sample agreed to be interviewed, with the exception of one judge. My working hypothesis was that delays were primarily caused by the fact that our political-legal system had not worked out how to respect both ministerial responsibility regarding control of the courts, and judicial independence, and this resulted in no overall administrative plan. However, very few of those I interviewed mentioned this theoretical issue as posing a problem. Rather, the most frequent response I received was what I labelled a "blaming" response. Judges blamed some lawyers for causing unnecessary delay. Some lawyers, they said, would purposely delay in their clients' interest. Others would take on cases that they did not have the background for, and so it took them time to get up to speed. Others took on too many cases, or were disorganized. Litigation lawyers blamed judges for not being good administrators, and they also blamed other law firms for the same types of behavior mentioned by the judges. Crown attorneys blamed lawyers and judges for delays, and court administrators blamed judges, lawyers, and crown attorneys. My conclusion was that delays were not being tackled because no one or no group was taking responsibility for them. Anecdotal information that I have gathered is that the same problem persists today.

In my dissertation, I recommended that groups should be established to bring together all of the key persons and groups in the courts, including the police in criminal courts, to find solutions to delay problems. Such groups had already been established informally in some of Ontario's smaller cities, and I was impressed by the solutions they found to delay problems. Delay problems are sometimes caused by local issues, or "local legal culture,"¹ and so local solutions need to be found. In 1987, Mr. Justice Thomas Zuber referred to my research in his recommendations to the Ontario Government about court restructuring in Ontario.² He recommended the establishment of Court Administration Advisory Committees in each of Ontario's regions, and he also recommended a province-wide committee. These committees were established. I have not had the opportunity to do systematic research into these

¹ Geoff Gallas, "Local Legal Culture: More Than Court Culture," p. 23, and Judge Kevin Burke and Frank Broccolina, "Another View of Local Legal Culture: More Than Court Culture", p. 29, in National Association for Court Management, 20 (4) *Court Manager* (winter 2005-06), at <http://cdm16501.contentdm.oclc.org/cdm/singleitem/collection/ctadmin/id/1172/rec/1>

² Mr. Justice Thomas Zuber, Report of the Ontario Courts Inquiry (Toronto: Ministry of the Attorney General, 1987).

committees, but anecdotal evidence is that they work or don't work depending on the personalities of committee members, and the leadership demonstrated by the chair.

My research has brought home to me the harm created by unnecessary delays in the courts. Unnecessary delays harm real human beings, and they can often cause great harm. Two years ago, I was granted permission to observe a hearing attend a youth court hearing in Toronto so that my wife and I could be character witnesses for a 16-year-old aboriginal girl who had been placed in a group home. At the last minute, the social worker who was supposed to bring the girl to court decided she was too busy to come to court, and so the hearing was put off until the next month. There were no consequences for the social worker. This was the third time the case had been postponed, and it would be postponed twice more. Each time, my wife and I came to court, and the girl's father came from several hundred miles away. The bottom line was that she did not need to be in the group home. She was there because of an administrative offence of the sort you heard about from Justice LeSage. There was never any need for her to be incarcerated, but once incarcerated, a number of unnecessary delays kept her from getting on with her life. She is still recovering from that terrible experience. And similar stories are repeated across Canada hundreds of times every day. The problem is that people in the justice system just get used to things the way they are. They become immune to seeing the human suffering that delays are causing and that could be prevented. My visits to Ontario Court of Justice courtrooms in Toronto with my students during the past 25 years have demonstrated countless examples of unacceptable reasons for delay. And yet, these delays are generally tolerated.

Justice On Target in Ontario

I'd like to spend a few minutes on the challenges faced by a well-meaning program in Ontario to tackle unnecessary delays. The Justice On Target program was announced by the provincial Attorney General in 2008. The goal of this initiative was to reduce by an average of 30 per cent the number of court appearances between the initiation of a case and its disposition, and the average time between initiation and disposition. This goal was to have been met within four years. The general thrust was to require all pure provincial courts³ to reduce the number of appearances from initiation to disposition by nearly one-third (30%) over four years.⁴ In 2007, the average number of court appearances between trial and disposition was 9.2,⁵ which was double the number in 1992. Reducing the number of appearances to 6 or 7 is entirely feasible, although a more reasonable number would be 3 or 4.⁶ The administrative offices at all court sites were encouraged to develop strategies to reduce delays, and the result was the partial list of projects shown above. Clearly, field staff were consulted, and had an

³ The Canadian court structure is primarily a unitary one in which both the provincial and federal governments have some responsibilities, and hear cases arising out of both provincial and federal legislation. At the bottom of the pyramid are the pure provincial courts. They are established and administered by the provinces, and the provincial cabinets appoint the judges. These courts hear all but the most serious criminal cases under the *Criminal Code of Canada*, as well as youth criminal justice cases and some family cases. The pure provincial court in Ontario is entitled The Ontario Court of Justice. In many provinces, the pure provincial courts also hear small claims cases. In Ontario, the small claims courts (civil cases up to \$25,000) are pure provincial courts, but the provincial government has placed them under the jurisdiction of the Superior Court of Ontario, and so they are not included in the Justice on Target initiative.

⁴ Ministry of the Attorney General, A Brief History of JOT, http://www.attorneygeneral.jus.gov.on.ca/english/jot/a_brief_history.asp

⁵ Ministry of the Attorney General, Achievements of JOT, <http://www.attorneygeneral.jus.gov.on.ca/english/jot/achievements.asp>

⁶ In 1992, the average number of appearances across Ontario was 4.3. <http://www.attorneygeneral.jus.gov.on.ca/english/jot/achievements.asp>

important role in developing the strategies. My review of these initiatives indicates that most appeared to have been well thought-out to tackle causes of unnecessary delay identified by dedicated employees in Court Services. However, the data, a small portion of which is captured in Table 1 below, indicate that these initiatives were of limited success in the first four years.

One of the slowest, most delay-plagued courts in Ontario is the Ontario Court of Justice site at Old City Hall in Toronto. One of the least delay-plagued courts is the Ontario Court of Justice site in Stratford. The following table shows the average number of days from initiation to disposition for these two court sites, and the average number of appearances from January, 2007 to June, 2012. The results for these two court sites are presented here because they represent two extremes in regard to disposition times. However, after reviewing all of the data, it appears that these two court sites represent a trend that is shared by most other court sites: only a small reduction in delays between 2007 and 2012. The Ministry of Justice reported an 8.5% reduction in the average number of appearances between 2007 and 2012, and a 6.5% reduction in the average number of days between initiation and disposition in criminal cases.⁷

The data in Table 1 are illuminating. On average, the number of days from initiation to disposition in Old City Hall is three times or more than the same average in Stratford. As well, the average number of appearances from initiation to disposition is more than twice as large in Old City Hall than in Stratford. However, the two court sites handle a very different volume of cases: Old City Hall has nearly 17 times the volume of Stratford. Even so, assuming that Old City Hall has resources and a budget commensurate to the volume of cases that it processes (and this appears to be the case), there must be other reasons why Old City Hall is so inefficient.

The relevant literature points to “local legal culture” as a likely explanation, not only to the challenges faced by Old City Hall, but also as a likely explanation to the failure of the many Justice on Target initiatives listed above.

TABLE 1: Disposition Data from Old City Hall and Stratford

Period	Old City Hall Days to disposition	Stratford Days to disposition	Old City Hall Average No. of appearances	Stratford Average No. of appearances
Jan – Dec 2007	307	92	12.6	4.6
Jan – Dec 2008	273	96	13.1	5.6
Jan – Dec 2009	275	88	13.1	5.0
Jan – Dec 2010	275	91	12.5	5.2
Jan – Dec 2011	271	111	12.9	4.9
July 2011 – June 2012	282	77	12.2	4.9

Local legal culture

In perhaps the best known study of inefficiencies in court administration, Thomas Church and his associates conducted a comprehensive study of 21 U.S. federal trial courts and 21 state trial courts

⁷ Ministry of the Attorney General, JOT Achievements,
<http://www.attorneygeneral.jus.gov.on.ca/english/jot/achievements.asp>

located in the same urban centre.⁸ They discovered that in courts with high quality caseflow management plans, a significant number of court sites had a poor record in reducing delays. As well, they discovered that some courts with poor caseflow management plans had more success in reducing delays than some courts with good caseflow management plans. Moreover, there were strong correlations between the case processing times of state and federal courts located in the same cities. The researchers attributed these results to “local legal culture.” Their theory was that in some communities, the key players in caseflow management are accustomed to quick results; in others, they are accustomed to slow results. They will continue with the paradigm they are used to unless a carefully planned initiative changes how they proceed.

Therefore, it takes more than a good plan for caseflow management to change the “local legal culture.” The key stakeholders in the courts – judges, prosecutors, trial lawyers, legal aid, duty counsel, court staff, the police, corrections, social workers, and others – have expectations about how long court processes typically take. From the perspective of most stakeholders, it is natural for a certain amount of time to elapse between the initiation of a case and its disposition. They are used to that time period, and my research shows that most stakeholders do not think that delays can be reduced because of the ingrained habits of judges, trial lawyers and prosecutors. The perception of many stakeholders is that members of these groups are highly resistant to change.⁹

I would guess that most legal system stakeholders in Toronto are not aware of the vast difference in disposition times between Toronto and Stratford. This difference indicates that Toronto case processing times could be significantly reduced, contrary to their assumptions.

The data on the Justice on Target web site show that most courts in smaller localities have shorter periods of time between initiation and disposition than those in larger centres. An important reason for this situation is that in smaller centres, most key stakeholders know each other to some extent. Lawyers rely on their reputations to do well in their careers, and in the smaller centres, most are not willing to risk their careers by inventing excuses for delays (because they will be found out), or not coming to court prepared to represent their clients with competence (because word will quickly spread in the legal community about a particular lawyer’s incompetence). The prosecutors are also lawyers, many of whom plan to eventually become part of the defence bar, and they too are not willing to risk their reputations. In larger centres, such as Toronto, there are so many lawyers and prosecutors that most do not know each other, and therefore the risk of losing one’s reputation because of inventing excuses for delay, or because of incompetence, is smaller.

For any delay reduction strategy to succeed, it is essential that the key stakeholders, and in particular the trial lawyers, prosecutors and the judiciary support the strategy. The key stakeholders need to know that significant delay reduction is possible, and that delay reduction has benefits for all stakeholders, save the minority of trial lawyers who specialize in delay in order to advance the interests of their clients.

⁸ Thomas Church, Alan Carlson, Jo-Lynne Lee, and Teresa Tan, *Justice Delayed: the Pace of Litigation in Urban Trial Courts* (National Centre for State Courts, 1978). See also Geoff Gallas, “Local Legal Culture: More Than Court Culture,” 20 (4) *Court Manager* (winter 2005-06), 23, and Judge Kevin Burke and Frank Broccolina, “Another View of Local Legal Culture: More Than Court Culture”, 20 (4) *Court Manager* (winter 2005-06), 29.

⁹ Ian Greene “The Politics of Court Administration in Ontario.” *Windsor Yearbook of Access to Justice*, 2 (1982),124.

From my perspective, the key factor in the shortcomings of Justice on Target was that it was a top-down Ministry of the Attorney General initiative. The project provided incentives for Ministry staff in regional and local court offices to develop projects aimed at contributing toward delay reduction. However, based on my three decades of research into court administration, I am fairly certain that Ministry staff in regional and local offices realized that delay reduction can only be achieved with the full support of the judiciary, the trial bar, and Crown Attorneys and Assistant Crown Attorneys, and I suspect that their pleas to find a way to get these stakeholder groups engaged may not have been listened to by their superiors. The bottom line is that the judiciary, the trial bar, and the Crown Attorneys are unlikely to take a delay reduction initiative seriously unless they are deeply involved in the planning and implementation of the initiative.

Another factor in the initial failure of Justice on Target was that the goal of a 30% reduction in disposition times was set for every Ontario Court of Justice court site in the province. This was a mistake, because many of the court sites in smaller centres, like Stratford, already had disposition times that were acceptable and likely could not have been further reduced. Justice on Target should have focused on court sites with days to disposition of greater than about 150 days, and average number of appearances of more than about 8. That would have resulted in a much better use of resources.

The Justice on Target initiative has continued since 2008, but with a revised strategy. JOT has developed benchmarks for different kinds of cases, depending on their complexity. The benchmark for “less complex” cases is a maximum of five appearances and 90 days from initiation to disposition. In 2012, this benchmark was being met 63% of the time regarding appearances, and 62% of the time regarding days. The results in 2013 were similar. For “more complex” cases, the benchmark was 10 appearances and 240 days, which was met 67% of the time in 2012 and 2013 for appearances, and 68% of the time for appearances in 2012, but only 66% of the time in 2013. For “provincial and federal” cases, the benchmark was 9 appearances and 180 days. This was met 64% of the time in 2012 and 2013 for appearances, and about 65% of the time for days on both years. From the data currently available on the JOT web site, delay reduction seems to have stalled.

From the perspective of its original goal, the Justice on Target was a failure. Yet in 2013 the Ministry of the Attorney General was advertising it as a success because delay reductions of up to 10% had been achieved.¹⁰ Table 1 is typical of large and small court sites for the Ontario Court of Justice across the province: there has been a reduction in delays of up to 10% at some court sites.

¹⁰ The Ministry of the Attorney General web site reports the following:

In 1992, it took an average of 4.3 court appearances to bring a charge to completion. By 2007, this figure had more than doubled to 9.2 appearances. By June, 2012, as a result of JOT the provincial average number of court appearances dropped to **8.5 (down 8.1%)**.

In 2007 it took an average 205 days to complete a criminal charge. By June, 2012, as a result of JOT that figure dropped to **192 (down 6.6%)**.

See <http://www.attorneygeneral.jus.gov.on.ca/english/jot/achievements.asp>

Nevertheless, the Justice on Target project resulted in dozens of excellent ideas from front-line staff about how delays can be reduced. From my perspective, many of these initiatives might have been successful if they had included a change management strategy that included all relevant stakeholders, and in particular the judiciary, the trial lawyer community, and Crown Attorneys. Local legal culture should have been taken into account. The court system is incredibly complex, and in order to be successful, delay reduction initiatives must include all stakeholders connected with to the desired change. Without substantial stakeholder buy-in, the change plan is liable to failure.

Part of the change that will be necessary for effective delay reduction will be to ensure that lawyers come to accept that the courts are a public service, not simply a place where judges and lawyers practice their craft at public expense.¹¹ An improved system will benefit lawyers in a number of ways – they can settle their cases more quickly so that they can get paid and take on new cases, and this change will make their practices more interesting and less tedious.

It will take leadership and persistence to change the current paradigm regarding cases processing times in the minds of trial lawyers and other key stakeholders in Ontario's large cities. To succeed, programs like Justice on Target need one or two high profile leaders willing to explain to the bar the impact of local legal culture in Ontario, and who would work tirelessly to involve all stakeholders in planning and implementing delay reduction strategies.

I'm nearly out of time and space, so to conclude, here are a few other suggestions for tackling unnecessary delays in criminal courts that could benefit from initiatives of the federal government:

1. Improve the system for federal judicial appointments under s. 96 of the Constitution Act, 1867. Patronage should be taken entirely out of the process. As well, the Superior Courts should be encouraged to specialize so that they have criminal and civil divisions, and judges should be appointed who have expertise in one of these areas. As well, administrative experience should be taken into account in making judicial appointments. A better process is needed for the selection of chief justices and associate chief justices, in which administrative ability is one of the key factors in selection.
2. Unified family courts should become the norm across Canada. The absence of unified family courts in many parts of Canada leads to unnecessary delays and expenses, and unnecessary trauma for families, especially children.
3. Encourage provincial governments (perhaps through funding incentives) to expand the jurisdiction of their ombudsman offices to include the provincial and superior courts. Adequate safeguards could be built in to safeguard judicial independence. I believe that ombudsman's offices would be in an ideal position to make recommendations that could lead to identifying maladministration in the courts and suggesting solutions, and that could have a big impact in reducing unnecessary delays.
4. I agree with the ideas already presented by several of your witnesses to review the Criminal Code and bring it up to date. While conducting that review, consider requiring minimum qualifications for Justices of the Peace who hear cases involving the rights and obligations of litigants, for example in bail hearings. Several provinces have moved to a requirement that sitting JPs in these kinds of cases must have a law degree, and a minimum of several years of experience. Changes in the criminal code might be used to

¹¹ Peter Russell, "Judicial Power in Canada's Political Culture," M.L. Friedland, ed., *Courts and Trials: A Multi-Disciplinary Approach*. Toronto: U. of Toronto Press: 75.

light a fire under the laggard provinces, such as Ontario. As well, these changes should provide the police with more discretion about handling the kinds of administrative offences described by Justice LeSage. The Prince Albert Hub project mentioned in an earlier one of your hearings is a good example.

5. The great majority of criminal cases do not go to trial. They are settled in advance through plea bargaining or less frequently, diversion. Plea bargaining has many potential drawbacks as well as some benefits. More study needs to be done to promote fair and expeditious settlements for the great majority of cases that will never go to trial.

6. Much could be learned from innovative projects across Canada designed to assist self-represented litigants. On the civil side, the Canadian Forum for Civil Justice, which began at the University of Alberta and is now housed at Osgoode Hall at York University, has created an on-line Civil Justice Reform Inventory. This inventory is frequently updated, and provides a wealth of information to court administrators about what is working and not working in civil justice reform. There is no equivalent for criminal justice. The creation of a Canadian Forum on Criminal Justice with funding to create a database of criminal justice reforms in Canada would be extremely useful, and not very expensive.

7. Make funding available to encourage projects like Justice on Target to be established and to succeed in every province or territory where this approach is needed.

8. I agree with a suggestion made in earlier hearings that the federal Public Prosecution Service should be merged with the provincial crown attorneys services. Having two separate prosecution services is inefficient and wasteful. When I was doing my dissertation research, the fact that there were two separate prosecution services was cited by a significant number of crown prosecutors and judges as an important cause of unnecessary delay. When I asked lawyers and prosecutors why two separate services were being maintained, I was told that the primary reason was for political patronage reasons. The winning party after a federal election could appoint lawyers who had served the party well to part-time federal prosecutor positions on retainer. Lawyers who were supporters of both major national parties tended to see no problem with that system – at some time their party would win and they would get a chance to feed from the trough. I understand that with the creation of the Public Prosecution Service in 2006, the federal prosecution service has been professionalized to a large extent, and I have no knowledge about whether political patronage still plays a part in selecting any of the more than 800 private sector lawyers who act as agents for the Service – I would hope not. But if patronage is gone, as it should be, then I can see no good reason for retaining two separate prosecution services. Because the federal prosecutors focus mostly on narcotics cases, there are many court centres across Canada where having a full-time federal prosecutors is not feasible – hence the private sector lawyers retained as agents. It cannot be expected that these agents would have the same level of experience or expertise in prosecution as provincial crown attorneys, and so this lack of expertise creates another source of unnecessary delay.

9. Take into consideration that between 20 and 40 per cent of prisoners in Western countries likely have Attention Deficit and Hyperactivity Disorder, but have not been diagnosed.¹² Every prisoner in Canada should be screened for ADHD, as in the United Kingdom.¹³ ADHD is possibly a major factor that

¹² Patrick J. Hurley and Robert Eme, *ADHD and the Criminal Justice System: Spinning Out of Control* (ISBN 1-59457-860-5, 1008)

¹³ Amelia Hill, "All Prisoners to be tested fo ADHD", *The Guardian*, Dec 27, 2009. Accessed on March 8, 2016 at: <http://www.theguardian.com/uk/2009/dec/27/adhd-prisons-mental-health-crime>

leads to the excessive number of administrative offences mentioned by Justice LeSage. Treating ADHD is much less expensive than putting people in jail, will help to reduce recidivism and court delays, and will help ADHD people to lead happy lives and use their many talents.