

Canada's Justice System to Reform, But For Wrong Reasons

by Conrad Black



A sign of the times was the Alberta judicial “triage” proposal, published this week, that advises prosecutors not to proceed with cases where there is only a “slim chance” of success, and in non-violent cases, to settle for lower offences to avoid the cost of trials. This is ostensibly a response to a ruling of the Supreme Court of Canada last summer that set time limits for the launch of proceedings in criminal cases, to avoid unnecessary delays for those entitled to the presumption of innocence.

I have been outraged at the manner in which the courts, led by the federal Supreme Court, have usurped the rights of Parliament on the pretext of acting on the Charter of Rights and Freedoms, and by the supine passivity of the federal and provincial legislators in allowing the courts to emasculate

them. The concept of the high court of Parliament has been strangled and the fear of Pierre Trudeau and others (including me) after the patriation of the Constitution in 1982 that the Notwithstanding Clause would be invoked to create gridlock between the federal and provincial authorities has not occurred (apart from a matter of commercial bilingualism in Quebec and same-sex marriage in Alberta).

Every instance of the courts egregiously ignoring the legislative intention regarding laws being interpreted from the bench should be overturned by the relevant legislators and readopted, with or without modification. Legislators legislate and judges judge; there is leeway to a judge and they are not robots and must not be constrained as in the absurd straight-jacket of legislated mandatory minimum sentences. But they can't just make the law up as they have been in the habit of doing. The alternative is to turn our entire system of elected governments, the supremacy of Parliament and the whole notion of responsible government into a farce, a noisy charade, like the European Parliament, where the legislators have no authority and are just a contemptible talking shop. (Good luck to Stéphane Dion – he has been sent to Brussels as ambassador to a corpse. At least the snails are good.)

Having got that off my chest once again, all Canadians should be grateful to the Supreme Court for lighting a fire under these lethargic prosecutors, who routinely indict people for serious crimes, often on flimsy evidence, have bail denied because of the gravity of their alleged offences, leave the accused languishing in holding jails, the catchments of the lowest and most dangerous elements of the urban criminal class, and delay the trial unconscionably. This violates every civilized precept of prompt justice, and penalizes indictees of modest means, as only the wealthy can afford a large bail sum or sophisticated counsel. The accused thus await the pleasure of prosecutors, who are conducting a shakedown for a guilty plea in exchange for a somewhat reduced sentence in a

more salubrious prison. It is an underfunded, unjust, and in many respects, an evil system.

As with medical care, Canadians have been in the habit of concluding that their system of justice is better than that of the United States, and is therefore among the best in the world. In the one case as in the other, this should be the narrowest of consolations for our shortcomings. (The one point all sides agree on in the United States health-care controversy, apart from the unevenness and costliness of their present system, is that they do not wish to emulate the Canadian system. There is a message here that most Canadians seem not to want to notice.)

The Canadian justice system is certainly preferable to the American. Perhaps half of American civil litigation would be dismissed in Canadian courts as frivolous and vexatious litigation, conducted for the pecuniary benefit of the country's more than one million lawyers, who devour about 10 per cent of U.S. GDP (almost \$2 trillion, 30 per cent more than Canada's entire GDP). Our conviction rate is only a little above 60 per cent, compared to 99 per cent in the U.S., 97 per cent without trial. The disparity is due to the facts that the evidentiary and procedural rules are fairly even in Canada, relatively few of our judges are ex-prosecutors, none of our judges are elected, the defence speaks last to the jury, grand juries and public defenders are not just stooges of the prosecutors, and prosecutors have much more difficulty extorting inculpatory perjured evidence, all compared to the United States. The sweet land of liberty, in such matters, is not much more of a society of laws than North Korea.

The fact that our justice system is better than that of the United States does not make it very good. The triage report in Alberta, while claiming to be a response to the Supreme Court decision, emphasizes a lack of funds. The reason invoked for not pursuing criminal cases where there is just a "slim" chance of success, is that it is costly. It seems not to

register that if there is a slim chance of success, given the powers of the state to elicit a conviction, the presumption of innocence may actually be indicative of an absence of guilt. What about enunciating that if there is only a slim chance of success, don't charge the individual in the first place and save even more money?

We are back-pedalling awkwardly from the grandstanding of the Harper regime, which did all but erect Haman's Gallows on Parliament Hill as it busily built more prisons to deal with a declining crime rate. Ubiquitous security cameras and an aging population have helped reduce crime, and the new prisons are bound to be occupied in inordinate numbers by native people, whose problems and offences will not be remedied or corrected by imprisonment. Now, public policy has begun a 180-degree turn, not because of misgivings about the whole antediluvian nonsense of throwing non-violent offenders in prison at immense cost to the taxpayers – of course it is unjust and counter-productive, a failure both as deterrent and cure – but because it is costly.

The same trend has surfaced in the United States, where there are 49 million official felons (including ancient drunk-driving and disorderly conduct convictions), and the country has six to 12 times as many incarcerated people per capita as Australia, Canada, France, Germany, Japan and the United Kingdom, the nearest comparably prosperous democracies. We, and the Americans, who have belatedly detected that their justice system is unsustainably costly but not that it is generally unjust, are doing the right thing for the wrong reason. Obviously, if public security really required more prosecutions and more prosecutors, the money would be found, but it is a frill. Canada could lead the world to a brighter sociological and juridical epoch if, in the case of non-violent offenders, we replaced community service and Spartan but not incarcerated living for imprisonment, and we would have less recidivism and save a great deal of money doing it.

We are following a parallel course in health care, where in the name of the asinine, impossible and undesirable cause of equal care for everyone, regardless of means, we are rationing health care and have doomed ourselves to a Sisyphean burden of mounting costs and declining service. Approve private medicine, let the well-to-do pay for their own health care which in the case of genuine medical need would be tax-deductible, and concentrate available resources on the economically less fortunate. Instead, we are toiling on like a nation of idiots on a path of false egalitarianism because Pierre Trudeau and Monique Begin were irritated by the remonstrations of the medical community and the provinces, and banned extra billing in 1984.

The flip-side of the move to cut costs has been the discovery that former social evils are in fact acceptable, and, incidentally, profit centres for our fiscally profligate political overlords. Alcoholic beverages, which only the Roman Catholic Church prevented from being banned by imitative Prohibition in the Twenties, is a popular money-spinner with government. (It was only 30 years ago that Bill Davis wouldn't let us have beer at the Blue Jays' games.) Casinos and lotteries, the scourge of the domestic economics of the working class for over a century, has become another fine profit centre for the state. Marijuana cannot be far behind. And if Patrick Brown, Michael Chong and Justin Trudeau, really believe they can do anything fiscally useful with a carbon tax beside Donald Trump's America, they are smoking it prematurely.

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