True North in Canadian public policy

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Straight Talk

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Straight Talk: Scott Newark

Scott Newark's 35-year career in criminal justice has given him ample opportunity to discern the shortcomings of the Canadian justice *system.* In the latest edition of MLI's *Straight Talk* Q & As, he shares his insights on the cumbersome procedures and inefficiencies that are causing the wheels of justice to turn ever more slowly and ineffectively. Newark calls for reforms to ensure that justice is satisfactorily meted out in a fair and timely manner for offenders – and their victims.

Scott Newark's 35-year criminal justice career began as an Alberta Crown Prosecutor, with subsequent roles as Executive Officer of the Canadian Police Association, Vice Chair and Special Counsel for the Ontario Office for Victims of Crime, Director of Operations for the DC based Investigative Project on Terrorism, and as a security and policy advisor to both the Ontario and federal Ministers of Public Safety.

MLI: Why should we be concerned about the effectiveness and efficiency of Canada's criminal justice system?

Newark: The justice system is first of all a public system and it is designed to deliver what is essentially a core value in Canadian, and indeed Western, society. People sometimes forget this wasn't just invented by the Department of Justice a couple of decades ago. It goes back to King Henry II and the establishment of the King's courts in Great Britain in the 1200s. He was trying to get the various barons not to take the law into their own hands, and so he made a deal with them. Instead of you determining what you're going to do about a perceived wrong, let the Crown do it. That's the reason why the titles of the cases are always Regina v. so-and-so. It's the Crown, and it's that fundamental principle that if a defined criminal act occurs, it is a wrong against all of society. So, when that system protecting those values doesn't work as it should, it is an attack on a core principle – who we are as a society.

It is also probably one of the public systems that is inherently reliant on public confidence. It was described originally as a contract between the Crown and the people: Don't solve things yourself, and don't take the law into your own hands. The Crown will do it for you. People have an expectation it will be done in an effective way, and that the intentions and purposes of the system are actually carried out.

MLI: What are some of the specific effects of delay and inefficiency on victims and on the accused?

Newark: Obviously, if somebody is in this process where the potential consequences are a loss of liberty and going to jail, that creates stress and it can cause difficulty in people's lives. The same thing is true with respect to victims who are looking to that same system for justice. The longer it gets dragged out, the longer there is a sense that it's not being delivered. I've worked extensively with crime victims and when there is non-delivery of justice, such as a delay, it re-victimizes the victims. That's not particularly well appreciated, but it's real.

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And, the longer the system drags on and somebody is on bail and has conditions, the likelihood increases that the person may breach those conditions because the case hasn't been resolved. That generates more charges, which causes more delay. We saw that in the analysis of statistics about the increase in the administration of justice offences that I did for the Macdonald-Laurier Institute.

Our justice system literally relies on the confidence of the public that it's supposed to be serving. If people don't think the justice system is working, they're probably not going to resort to it. I remember once we were talking about parole reforms. It was in Scarborough and these people were concerned about people who were being released on bail. One lady who lived in public housing said, "So, I'm encouraged to come forward and report this guy dealing drugs to my kids

and his friends in the parking lot, and so I do that and two days later I look out and he's standing out in the parking lot on bail. Why would I continue to do that?"

A justice system that is perceived to be ineffective or inefficient is not going to get results. You're going to see more people choosing not to resort to it. That was something that Statcan's victimization survey reported on, back around 2000. One of the reasons was that people had less confidence that the justice system was actually going to produce a result. We shouldn't underestimate the potential problems that creates.

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MLI: We've been discussing a few specific cases and in extreme cases charges, even serious charges, can be thrown out because of delays in the trial. Can you recall a few such instances that might illustrate this problem?

Newark: In Alberta, a guy named Regan was charged with first-degree murder and the judge actually threw out the case because it had taken five years to come to trial. There are a couple of other cases in Alberta that were reported on recently. This is becoming such a problem, in part because of a shortage of federal court judges, that the Crown is now considering which cases it's going to proceed with. The original *Askov* case which went to the Supreme Court concerned somebody who had a long record and it took simply too long to get to court. It's a *Charter* right to a prompt trial that has been interpreted, and it applies to all criminal charges. Therefore, the more complex the case, and the more the procedure (which was designed before the *Charter* era) is unsuited to expeditious processing of the case, the more likely it is to take longer. In the last two years, there has been an increasing number of studies and reports, including by the MLI, on the delays occurring in our justice system.

MLI: A prominent Supreme Court decision came down this summer in the Jordan case. Can you speak to that a little bit?

Newark: There were delays involved in the case and for the first time the Supreme Court laid down arbitrary timelines for the processing of cases. If they were done summarily, which is a single-step procedure, there was a specified time limit. If it was done on the more serious cases by indictment, the time limit doubled. The Supreme Court has literally said if cases are not completed within this time limit, there is a presumption in law that the person's *Charter* rights have been breached. So, there are now objective standards. It's as though there's a new playing field that these cases have to be measured against. Don't be surprised if you see a whole lot more cases chucked out.

MLI: Do you have confidence that this will provide the impetus for system reform?

Newark: Call me cynical, but no, I don't. Instead of yet another edict from the Supreme Court, which in many ways is responsible for the delays because of the various *Charter* rulings they've

made and the increased focus on process, I think we're only going to fix this system when we drill down into what the problems are. By understanding why the delays are occurring, we'll have a much better chance of saying what can we do to fix them. And, there appears to be some progress towards that kind of analysis. The federal/provincial/territorial ministers met recently in Atlantic Canada and this was a subject on their agenda. This is a really encouraging sign because the federal government makes criminal law, but the provincial government administers it. Most frequently, the municipal police services are the ones on the front line involved in all of this, so the various levels of government need to co-operate with each other to address what's causing the delays and then try to find steps to deal with them. I am an optimist; I am confident that we can make some progress.

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MLI: You touched a couple of times on what a difference the Charter has made in terms of the lengths of trials. How has the Charter been applied on the existing judicial system in ways that are creating delays?

Newark: The *Charter of Rights* essentially laid out a series of procedural requirements with the options that either legislation itself could be struck down or evidence that was otherwise relevant could be excluded. So, it would have an outcome obviously on the trial, but unintentionally, I think, it ended up creating a justice system where the issue was not so much whether the evidence was relevant, but whether it was admissible. As a result, so much of how the system worked and how the players had to conduct themselves became focused on the process.

Back in my days as a prosecutor, the affidavit to obtain information to get a wiretap was like 10 pages. Well, now because of the *Charter*, and counsel arguing that "you didn't tell the judge this" and "you didn't say this and that", the police are forced to try to imagine every scenario, and those authorizations to get the evidence are now hundreds of pages long. The focus becomes – with that example about the wiretap – not what was actually said on the phone, but whether the process used to get the authorization to get the evidence was a breach of somebody's *Charter* rights. A criminal justice system had been in existence for hundreds of years and the *Charter* process requirements got imposed on that. I think that's one area we need to look at to see whether there are things we can do that will be *Charter*-compliant, but will change the way we do it so it's not as lengthy or inefficient as it otherwise has become.

MLI: It seems to me that there's a fair bit of incentive built in for people to stay in jail on remand, for example, or to insist on strict procedural compliance in an effort to drag out trials.

Newark: I think that's true. I heard one person say that the *Charter* was intended as a shield, but it's become a sword. The line I used was that most defence counsel ask for disclosure in the hope that they won't get it. Therefore, they could argue that their client's *Charter* rights were violated, as opposed to whether or not the person actually committed the crime they were

charged with. And, there's been some judicial recognition of that. There was an Ontario Court of Appeal case earlier this year that touched on that, too. The courts are going to have to realize they need to be cognizant of the impact of their decisions on the overall performance of the justice system, and that is something I think has not really been addressed.

MLI: In its *Jordan* ruling, the Supreme Court referred to "a culture of complacency towards delay". Anecdotally we hear that everyone involved is quite accepting of adjournments and postponements for little reason. Do you agree with the court's characterization?

Newark: Yes. The other thing is that the public officials in our system – police officers, prosecutors, judges, corrections officials after the fact – operate with discretion. That's the way our system was designed. But if people become risk-averse – and this is another observation I've heard during the Senate committee hearings on this subject – and they don't use that discretion, that can cause delays as well. That's also an observation from the Canadian Bar Association. I think it's quite correct.

It used to be that the courts would only deal with the facts of the case in front of them. But, instead, over the last number of years, in considering a *Charter* issue they literally create theoretical situations, or let the defence counsel create theoretical situations, to say although it's not applicable in these facts, this could be the case that these charges were laid in this way. This is something you see in a lot of the courts' considerations of mandatory minimum sentences. I think it's just so fundamentally contrary to what our justice system is about because the exercise of discretion is inclusive in it. The courts should wait until there's a case that comes along, but don't make up facts to justify what is in effect a policy position. Occasionally, there have been some dissenting judges – Justice Moldaver in the Supreme Court actually commented on this – but it's something that shows the contradiction between what I would call a "judicial activist" approach driven by the *Charter* and the basic principles of our justice system, including the official participants having discretion.

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MLI: You refer in your MLI paper titled "Justice On Trial" to a few specific recommendations with regard to pre-trial credit and disclosure in preliminary inquiries. Could you please briefly explain those recommendations and how you think they'll help?

Newark: One of the realities of our justice system is that there's a disproportionately large volume of crime committed by a disproportionately small number of offenders. But maybe 15 years ago in Ontario some judges started commenting on what they perceived to be the inappropriate conditions in remand facilities. Remand is where you're held, if you are denied bail, before you go to trial. To be clear, section 515 of the *Criminal Code* sets out a presumption that people are entitled to get bail, but there are criteria where the court can deny bail. Included

among those is if we think you're going to commit more crimes because you've got a record that drops to the floor, or a history of criminal offences of breaching court orders. We say, "We're not satisfied if we release you that you're going to obey the conditions". That's a lawful detention authorized by the *Criminal Code*.

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These Ontario judges decided the conditions aren't as nice, the programs aren't available, and they started making comments expecting the government to try and change things. When the government didn't, they said, fine, we're going to give credit – as they were allowed to under the *Criminal Code* section 719 – for the time the guy was in custody awaiting trial, and we're going to give double credit or triple credit, in some cases even quadruple credit. Guess what? At the time of sentencing, we ended up rewarding the repeat offenders, and nobody figured this out faster than the bad guys and their lawyers. So, the guys would not apply for bail or they wouldn't seek to get conditions for bail. They'd stay in custody longer, the cases would drag out, and then they'd come for sentencing and complain about the fact the guy was in over-crowded conditions. When you look at the data, the numbers just spiked once that pre-trial custody credit started. So, that's one of the things the Harper government tried to reform. I don't think they did a particularly good job of it and the Supreme Court struck down that legislation – not the entire concept, but the legislation, on a made-up fact scenario. That's an example of something where this unintended consequence occurs that creates extra delay.

Another example is in relation to preliminary inquiries. It used to be that in our process before the *Charter*, the person who was accused learned what the evidence was in a preliminary inquiry, and if the judge was satisfied that a properly instructed jury could reasonably return a verdict of guilty, he would say, "I'm committing you to stand on trial." Then, it would go up to a higher level of court and everything would just repeat itself. About 20 years ago, the Supreme Court came out with the *Stinchcombe* decision that said that quite apart from this preliminary inquiry requirement, the accused is entitled to disclosure for all cases. In other words, they get to know what the Crown's case is against them before they go to trial. So, we created this duplication and that, too, is being used, in my opinion, as a sword, as opposed to a shield, with demands for more and more disclosure.

Hence, most defence counsel ask for disclosure in the hope that they won't get it. It's become a terrible delay and backlog. This is something that the Canadian Bar Association pointed out and it's one of the areas, I think, where some police services – because they're the ones who have the information and who put it together – do a better job than others, so we can learn from that. We can probably create an electronic database so counsel or the accused can go online and access the information. Given that the courts have mandated that we have to give this information in advance, we don't need preliminary inquiries as much as we used to. We could get rid of them in a lot of cases and potentially save a lot of trial time as well. That's the kind of stuff I think we need to delve into quite specifically and see what changes we can make.

MLI: In the paper you referred to the requirement for preliminary inquiries for more serious crimes, and yet there are a lot of crimes on the books that – even with crimes that carry a maximum life sentence – aren't prioritized as seriously as they once were. You refer to residential break-and-entry as one example. Can you elaborate on that a little bit?

Newark: It used to be that breaking into someone's residence was among the most serious offences. It carries a penalty of up to life imprisonment. Well, the *Charter* says that if you are subject to imprisonment of more than five years you have a right to a jury trial, which means a preliminary inquiry. Nobody ever gets life imprisonment for break-and-entry into a residence, but because of the way that the *Charter* ruling, the *Charter* itself, and the current system are put together, this ability to drag things out is there if you want to play the system. Also, our publicly funded defence counsel or Legal Aid is mostly run through private counsel who are hired and paid based on the amount of time they spend on the case. That creates an incentive to drag things out. One of the recommendations I made is to set up a pilot project, use full-time salaried Legal Aid public defenders, and see what the result is in getting cases resolved more expeditiously.

MLI: Are there any other important measures we should be taking that we haven't discussed, and are there any aspects of this issue that you think are vital that people understand?

Newark: I would make two points. The first is about repeat offenders. I don't think we have done a particularly good job at differentiating between the people who are first, second, and third offenders and the career criminals who are committing crimes over and over again. Our system tends to deal with it generically and I think we can change that both in terms of sentencing, but also especially in terms of parole eligibility. I don't think somebody who is serving his fifth federal sentence and has violated parole eight times should be eligible for parole on the same basis as a first offender, but that is our current law.

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The second point is that there is a tonne of data available for us. Statistics Canada is doing an improved job about what they are reporting in terms of its relevance, but we should be identifying who is committing these crimes, how many are committed by people on bail, and how many by people on probation/parole, or subject to a previous criminal deportation order. We gather that information, but it's not analyzed or reported.

I think it's probably among the best vehicles to provide systemic accountability. Canadians will be able to see how the justice system is actually performing. Those data give you the insights needed to make substantively informed policy choices. The line that I used in the paper was, "we don't need to be tough on crime; we need to be honest about crime so we can be smart about crime".

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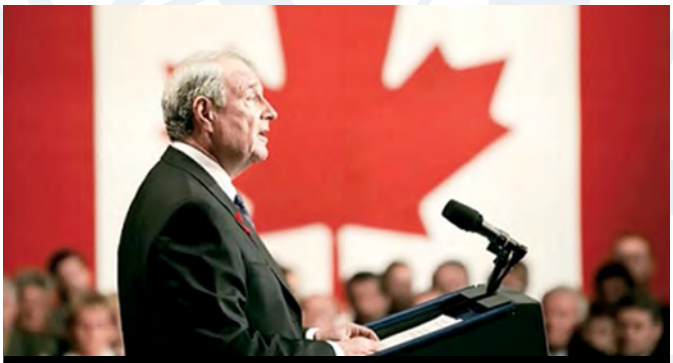

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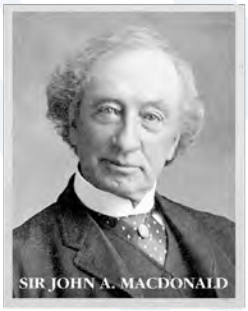
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