

Commentary – Responses to Justice Moldaver’s Remarks

Response to Justice Moldaver’s Remarks to the Justice Summit – 2006

By

COHN

By David Cohn

What follows is intended to address remarks made to the Summit Justice by the Honourable Justice Michael Moldaver on November 15, 2006.

The position of Justice Moldaver in his speech is that the criminal justice system is at a crossroads. He is of the opinion that both complexity and prolixity plague the very existence of the criminal justice system.

The position of Justice Moldaver is that there are defence counsel who trivialize and demean the Charter and use the Charter to delay and obstruct justice. He

and contrary to the administration of justice. However, the problem with these comments is that they are made without factual underpinnings, anecdotal or real evidence. They are, what I would submit, baseless allegations without merit.

Just to be clear, Justice Moldaver disagreed with the notion that the prolixity of some counsel is simply a product of “poor judgment by many criminal defence counsel on what Charter issues are worth litigating, as well as a plodding and prolix approach by some in advancing these claims”, as was suggested by an assistant professor at Osgoode Hall Law School. Justice Mol-

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claims that there are counsel who clog the courts by bringing baseless Charter applications. Justice Moldaver, in his remarks states directly that the antics of these same counsel are depriving other persons of their day in court in a timely way. Justice Moldaver as well suggested these same counsel are “pilfering precious legal aid funds at the expense of needy litigants with legitimate causes”. He suggests that some counsel abuse the system and make a mockery of it.

No one would disagree that any counsel who would act in the way suggested above by Justice Moldaver is acting contrary to their oath as a barrister

daver’s position is that the cause of the problems is not poor judgment but rather intentional actions by criminal defence counsel in an effort to abuse the criminal justice system, steal legal aid funds, and bring baseless applications before the courts.

What does Justice Moldaver rely on to support his position that some counsel are engaging in the despicable acts that he alleges? Justice Moldaver uses what he says was a statement by a distinguished member of the defence bar to him in response to an address at the Criminal Lawyers Association, when this lawyer purportedly said, “judge, you only have a

problem with long criminal trials because you are on a fixed salary”.

Assuming for the moment that that lawyer was serious when he made the statement to Justice Moldaver, that certainly is not the position of the vast and overwhelming majority of criminal defence counsel. Justice Moldaver suggests the message is that when one is making \$600/hour or \$6,000/day in court, or some amount less, one would want the trials to go on forever. To suggest that lawyers want trials to go on in order to fleece their clients and the system and essentially commit fraud on either their clients or the state is a serious condemnation and an inaccurate one in my observation at the bar in the last 25 years.

Justice Moldaver's reasoning is not only flawed, but paints with a broad brush and condemns all for the acts of a very few. There may be a "bad apple" in every bunch but the

same could be said of the police or any other large group of human beings. If Justice Moldaver, or anyone else is aware of such unprofessional conduct, the place for complaint is the Law Society of Upper Canada which has the power to discipline its members. Further, if he or anyone else feels that some lawyers are "pilfering" legal aid funds the complaint should go to the police.

I would respectfully submit that the judge's statements and consequent condemnation of the defence bar at large is baseless. Most criminal lawyers quote fees and charge fees on a block fee basis. It would be nonsensical from a business perspective and would be counter-intuitive to continue trials longer than required.

As well, the number of lawyers who are able to charge clients \$600/hour and \$6,000/day are few and far between. Certainly, I wouldn't think that Justice Moldaver

would suggest that lawyers who had very busy practices and were able to charge such fees would act in such an unprofessional way. It is a serious and overreaching allegation of professional misconduct and is made without statistical, empirical, or logical evidence.

Justice Moldaver goes on to utilize his speech as a rally call for judges to regain control of the courtrooms which he feels have been ceded to the litigants. I have not seen a judge lose control of the courtroom



to the litigants. I have never heard of such a situation even anecdotally. This rally cry to regain control and to blame defence counsel for the prolixity and clogging of the system is a house of cards without foundation.

However, Justice Moldaver does make many accurate points with respect to the complexity of the substantive issues that have developed in criminal law. The legislators have codified the law. The judges have interpreted the law.

The judges have written the judgments which are relied upon by lawyers. The complexities and subtleties that plague criminal law and leave the trial judges "wondering about their ability to complete a criminal trial from start to finish without committing reversible error" have not been created by criminal lawyers. I agree with Justice Moldaver that complexity is "a pox on our criminal justice system". How-

ever, judges and lawyers are guided by the rule of law. When the Supreme Court of Canada speaks or our parliament speaks, lawyers and judges are required to listen.

The criminal defence bar has a tradition of courage, independence and excellence. As G. Arthur Martin, probably the most well respected criminal defence lawyer ever to have practiced in Canada said, "the role of the defence counsel is to provide professional advice and assistance to the client in accordance with the strict ethical standards that govern the role of defence counsel.

The defence counsel is not a messenger, an alter ego merely to carry out the wishes of the client irrespective of whether they comport with professional standards. The role of defence counsel is to be the champion of the clients cause and to see that his or her rights are not wrongly invaded from any quarter".

The most eloquent description of the defence lawyer was given by Lord Birkett as follows, "I am quite sure that when men and women are brought into the civil or criminal court, for whatever reason, they should be able to turn for assistance at what may be the critical moments of their lives to a trained body of advocates, independent and fearless, who pledge to see that they are protected against injustice and that their rights are not wrongly invaded from any quarter.

The vocation of the advocate calls for the nicest sense of honour and for complete devotion to the ideals of justice, and I believe it to be a lofty and necessary calling which is vital for the maintenance of that way of life in which we have come to believe". Great advocates have passed on this tradition. A courageous bar, a fearless bar is, as G. Arthur Martin said, "essential to the existence of a free society".