Ethics and Leadership in Times of Austerity:
Ontario's Courts and "Justice on Target"

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ABSTRACT

Inefficiencies in the public service are best identified by public servants actually delivering the services. If these employees are convinced that they will be treated with respect—which includes the assurance that they will continue to be employed although possibly in a different capacity—and if these employees have the integrity to care about the public good in contrast to thinking of their employment as merely a job to pay the bills, they are likely to generate ideas that could result in more effective public services at less cost. In addition to input from the field, a successful cost saving strategy requires strong, high profile leadership from top departmental personnel such as the Minister and Deputy Minister. And finally, a successful strategy requires that all key stakeholders are properly consulted, and buy into to the recommended strategy (Gabor and Greene, 2002).This paper tests this argument by analyzing the successes and failures of the Ontario Ministry of the Attorney General's "Justice on Target" initiative. Announced by the Attorney General in 2008, the goal of this innovation 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. Unnecessary delays in processing cases lead to hardship and pain for many litigants and often also for witnesses. Failure to prevent and reduce unnecessary delays is clearly an ethical issue.

Keywords: justice system ethics, court delays, criminal justice reform, stakeholder participation, caseflow management

Inefficiencies in caseflow management

Caseflow management refers to the management of cases, both criminal and civil, filed in any court, beginning with the filing of the case in court, and ending with the disposition of the case. Court administration is a distinct field in public administration because of two major factors.

First, because of judicial independence, judges have the constitutional power to control any administrative matters in their court that directly affect Adjudication (Valente *v.* The Queen [1985] 2 S.C.R. 673).

Second, unlike most other public service departments, where all stakeholders want the department to work as efficiently and as effectively as possible, this is not the case with courts. Some trial lawyers hope to delay their client's case from coming to trial for as long as possible.

Counsel representing criminal accused persons who are in danger of being found guilty (either because there is bias in the evidence, or because they are likely guilty), may think that the best strategy is to delay as long as possible. In criminal cases, witnesses will move away, or get discouraged after coming to court several times and having the case put over, and of course their memory will fade, making it easier for counsel for the accused to trip them up in cross examination. In civil cases, parties at risk of losing their case will sometimes delay in order to raise the money they expect to be liable for. As well, lawyers for wealthy corporations know that they may be able to force smaller litigants to settle out of court for less, because the smaller litigants cannot afford the cost of lengthy delays (Greene, 2006).

Because of these factors, the academic study of court administration is a distinct field in the discipline of public administration (Baar and Greene, 2010). There is a constant battle between those who want to make the system work as efficiently, effectively and fairly as possible, and those who do not. So long as we remain part of the common law adversarial system, this battle will continue. As well, the recommendations or decisions of administrative staff may be overruled by judges, thanks to the important and legitimate principle of judicial independence. This situation will exist for as long as courts remain a separate branch of government—a necessary condition to promote impartial judicial decision-making.

Unnecessary delays in case processing are expensive to taxpayers, and unfair to many litigants. It was both of these factors that led to the Ontario Government's Justice on Target initiative that began in 2008. The general thrust was to require all pure provincial courts to reduce the number of appearances from initiation to disposition by nearly one-third (30%) over four years (Ministry of the Attorney-General, 2010). 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.

In 2007, the average number of court appearances between trial and disposition was 9.2. (Ministry of the Attorney-General, 2014b).Reducing the number of appearances to 6 or 7 is entirely feasible, although a more reasonable number would be 3 or 4. (In 1992, the average number of appearances across Ontario was 4.3).

The major reason why unreasonable delays exist is because those persons causing them are allowed to get away with causing them. Let me provide a recent example from my research. In early April, I was observing cases in the Youth Court at 311 Jarvis Street. A young woman residing in a group home had been ordered to appear for a hearing, and had signed an undertaking to appear. The group home had known about this situation for six weeks. Nevertheless, at the last minute, the group home staff decided that it would be inconvenient for

them to take the young woman to court. An arrest warrant would have been issued for the young woman had she not telephoned her father to tell him that the group home would not bring her in. The father, who was waiting in the court for the hearing, told the crown attorney, who telephoned the group home, confirmed that the group home would not bring the young woman to court (it was not impossible, simply inconvenient) and reprimanded the director. The group home's negligence led not only to an unnecessary adjournment, but to wasting the time of social workers, lawyers, and witnesses who were prepared to have the case go ahead. As well, it is possible that the young woman lost trust in the group home. She had been placed there apparently to learn that she must follow the rules, and yet the group home violated a serious rule and got away with it with a verbal reprimand. Apparently, the group home operator knew that there would be no serious consequences for the group home for ignoring the court order.

But negligent group homes constitute a minor player in this situation. Amongst others, unprincipled lawyers contribute to unnecessary delays. Like the group home operator, they know that in most cases they can ignore the rules and get away with it (Greene, 1983). In the case I observed, the lawyer for the accused did not bother to show up. She was on vacation and did not arrange for someone to cover her.

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 Statistics

The Ministry of the Attorney General's Justice on Target web page presents data on some significant events between the initiation of cases and their disposition for all Ontario Court of Justice court sites. This is a laudable initiative, which not only makes the delay problem in the pure provincial Ontario courts transparent, but may provide an incentive for court sites to compete with each other to reduce unnecessary delays.

The Justice on Target web page also lists the many Justice on Target initiatives that have been set up in the Ministry as a result of the Justice on Target initiative. These include:

- Meaningful First Appearances;
- Dedicated Prosecution;
- Crown Access Commitment;
- Streamlined Disclosure;
- Appearance Standard;
- Increased Availability of Plea Courts;
- Direct Accountability;
- Enhanced Video Conferencing;
- Prisoner Transport;
- Bail Enhancements; and
- On-Site legal Aid (Ministry of the Attorney-General, 2014a).

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 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 have been of limited success to date.

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 Ontario Court of Justice reports 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 (Ontario Court of Justice, 2014)

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 located in the same urban centre (Church et al., 1978; see also Gallas, 2005-06 and Burke and Broccolina, 2005-06). 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 (Greene, 1982).

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 shows 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.

From my perspective, the key factor in the failure of Justice on Target to meet its initial 30% target to reduce disposition times 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, and committed to its success.

Another factor in the initial failure of Justice on Target to meet his objectives 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 eight. That would have resulted in a much better use of resources.

Conclusion

From the perspective of its original goal, the Justice on Target is a resounding failure. Yet the Ministry of the Attorney General is trumpeting it as a success because delay reductions of up to 10% have been achieved. 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, asa result of JOT the provincial average number of court appearances dropped to 8.5 (down 8.1%).

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, but nowhere has the 30% reduction in delay goal been achieved.

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 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 (Russell, 1975). 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, Justice on Target needed 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. The Attorney General at the time, Chris Bentley, and the Deputy Attorney General, Murray Segal, were committed to Justice on Target, but likely did not realize the challenge of changing local legal culture to achieve the JOT goal, and so did not focus on the

change management that would have been required to achieve the goal. Although court administration staff on the ground in courthouses across Ontario had a good deal of input into the delay reduction strategies incorporated into Justice on Target, they most certainly knew that these strategies would not work effectively without buy-in from the judiciary, the bar, and Crown Attorneys.

The Ministry has committed to continue the Justice on Target program until better results are achieved. Beginning in 2013, Justice on Target management began to pursue a more gradual approach to delayreductions by introducing more realistic benchmarks for annual delay reduction based on the complexity of particular types of criminal cases (Ministry of the Attorney-General (2014a) To achieve these new targets, the Minister and Deputy need to be much more involved in recruiting the legal community to actively support the initiative. They need to be aware of the challenge of local legal culture, and the need to commit to do their part in appropriate change management.

Unnecessary delays in the Ontario Court of Justice are not only costly, but they are unethical because of the harm they cause to litigants and witnesses. Strong and sustained leadership from the Minister and the Deputy, a continued commitment to input from front-line staff, and the deep involvement of key stakeholders—in particular the judiciary, the trial lawyer community, and the prosecutorial community—may turn the very limited success of the Justice on Target initiative into a more complete success after all.

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Ian Greene holds the title of University Professor at York University in Toronto. He is semi-retired from York where he has taught public policy and administration for 28 years. He is a member of the executive committee for the York Collegium for Practical Ethics and the executive of the York Centre for Public Policy and Law. Professor Greene can be reached at igreene@yorku.ca.

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