Unconscionable Delay of Civil Justice: Is it also Unconstitutional?

R. Lee Akazaki

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The judges [of the Superior Court] are to be commended for their Herculean efforts in hearing criminal, child protection and family cases in a timely way. However, an immediate consequence of this focus on family and criminal cases has been that judges are not able to hear civil cases with dispatch. For example, in the Toronto Region, long civil cases can now be scheduled only in 2008!

The Hon. Heather Forster Smith, Chief Justice of the Superior Court of Justice, Ontario

Do Canadians have a constitutional right to timely public adjudication of their private disputes? When it comes to rationing of judicial resources, the lever that directs the flow between criminal and civil proceedings is the institutional application of s. 11(b) of the Canadian Charter of Rights and Freedoms. The conventional and largely unquestioned wisdom is that the Charter guarantee of the rights of accused criminal litigants to trial in a reasonable time ought to prevail over the adjudication of what are widely termed as “property” rights. Will this mean that the civil justice system in Ontario will forever be at risk of buckling under the pressure of avoiding delays in criminal prosecutions? Some might say that the question is premature, others that it is overdue.

The Charter, a bill of rights for the people, was meant to be a bulwark against tyranny. It was never intended to tyrannize the courts. Nowhere in the Charter does it say that matters involving guaranteed rights must be heard in priority to other types of cases. In the seminal decision on the role of the courts after the introduction of the Charter, Mr. Justice McIntyre wrote.
While in political science terms it is probably acceptable to treat the courts as one of the three fundamental branches of Government, that is, legislative, executive, and judicial, I cannot equate for the purposes of Charter application the order of a court with an element of governmental action. This is not to say that the courts are not bound by the Charter. The courts are, of course, bound by the Charter as they are bound by all law. It is their duty to apply the law, but in doing so they act as neutral arbiters, not as contending parties involved in a dispute.

The Charter is part of the basic law of the land. Constitutional guarantees are “superior” to other laws, not because they are more “lawful,” but rather because they are less mutable. The inferiority of the ordinary law arises in its inability to change constitutional law, without being at risk of being limited or struck down. It does not make Charter cases more important than non-Charter cases, any more than the courts ought to give precedence to the rights of a personal injury victim over those of an accused trafficker in narcotics. In this regard, the courts in giving priority to its criminal case load have broken the unwritten law of the bread queue: First come, first served. In some quarters, queue-jumping is, and has been, enough to incite a riot. Even without riot, the visceral reaction, felt among a significant number of civil litigants, is enough to bring into disrepute the institution that dares betray that basic law. It is not the role of the courts to help the state prosecute criminal charges more speedily at the expense of the civil justice system. Their role, as a branch of government, is to take each case that comes before them in the order that it is ready to make its appearance.

The constitutionality of the acute rationing of judicial resources in Canada has come under question by at least one legal scholar, Lorraine Weinrib, who argues that there exists a constitutional duty of the executive branch of government to maintain the legislated judicial complement. Despite the political debate concerning the allocation of public resources to justice, one cannot but detect some inhibition against examining the legality of the practice of deferring the civil docket in favour of criminal decisions at risk of being stayed under s. 11(b) of the Charter. The reluctance likely stems from sympathy for the moral dilemma of senior administrative justices as the proverbial captains of lifeboats adrift at sea. Thus, as a matter of institutional culture, courts and observers of the courts first call for more resources, then look internally at the courts’ rules and case management procedures. When the reinforcements do not arrive, new forms and procedures are advocated, some blame is allocated, and the criminal, civil and family courts wind up trying to solve their backlogs in splendid isolation. In a recent report to the Chief Justice of the Superior Court of Ontario, the length of criminal trials is said to be putting the integrity of the criminal justice system at risk. The effect on civil justice (or that of civil justice on the criminal law case load of the court) receives
Similarly, the premise of the Ontario government’s most recent Civil Justice Reform Project is that a solution within the civil system is in sight, without regard to the impact of the administration of criminal justice. While this task force has yet to report, the terms of reference consist largely of changes to the *Rules of Civil Procedure* and the “microeconomics” of judicial rationing within its own rules and facilities.

At the foot of the courthouse steps, however, the greater community has reason to worry. Unresolved legal disputes among citizens exact an enormous toll on the economic and social growth of our nation. The World Bank, for example, has an active unit on the legal institutions of the market economy. It is watching the harm to individuals and the inhibition of economic growth caused by the inefficiency of the civil justice systems of leading industrial countries in resolving “disputes over contracts, property, family relations and other noncriminal matters.” Perhaps it will take a downgrading of our economic ratings for the greater public to take notice. Access to civil justice is, today, no longer the obscure interest of litigants and court administrators. The public cannot ignore it because it affects us all. An accident victim who has deferred treatment and rehabilitation while his tort claim languishes for years in court procedures must feel his health and security are as much compromised by a failure of public hospitals to shorten queues for operations. A stakeholder in a business whose merger or acquisition deal is stalled or extinguished because of an unresolved civil law suit may be exposed to financial and personal ruin. Nevertheless, while it may sometimes seem easy for some to caricature “law and order” as a perennial political issue, stakeholders in the civil justice system must acknowledge that controlling the spread of crime is as important to our gross domestic product as the enforcement of, for example, deeds and mortgages in the Land Titles registry. So the difficult task for Canadian jurists concerned about civil justice is not to pit one justice system against the other. They must first see that it is the administrative imbalance which places them in conflict. Then, the court must brace itself and restore the equal integration of civil litigation into the priorities of our justice system in the post-Askov regime. The path toward this balance takes us to the following three points:

1. **Uneven Allocation of Judicial Resources: A Barrier to Civil Justice**

2. **Constitutionality of the Barrier to Civil Justice**

3. **Applying the Economics of Scarcity to Courts Administration**
1. Uneven Allocation of Judicial Resources: A Barrier to Civil Justice

The focus of this paper is the Ontario Superior Court of Justice, and in particular the cyclical administrative policy of parting the waters for pending criminal prosecutions whenever a critical mass approaches the one-year guideline under the *Charter* jurisprudence. There is no intention of weighing the relative merits of the two systems. Each has its own case flow variables. One might hazard an educated guess, however, that the practice of setting aside places on civil trial lists in order to accommodate criminal trials has allowed the stakeholders in criminal trials to take comfort in the institutionalization of this policy. As a matter of basic economics, reallocating supply to meet a crisis within a regime of scarcity will discourage efficiency in the absence of a moratorium. Anointing the periodic reallocation with a constitutional legitimacy makes this worse. Courts administration in the age of *Askov* is a by-product of the unrestricted preeminence of *Charter* litigation in criminal justice:

With the introduction of the Charter, evidence that had been illegally obtained became the subject of applications to exclude. Justice Moldaver, in his speech to the Criminal Lawyers’ Association, noted that pre-trial applications, largely Charter-based, have become a growth industry in Canada. He had previously noted that, in enacting the Charter, Parliament failed to create a code of procedure designed to deal with such basic issues as how, when, why, to whom, and by whom Charter applications are to be brought, thereby contributing to the length and complexity of trials.

Before one examines the primacy of the guarantee of the administration of criminal justice over civil justice, it is necessary to distil the nature of the right of the parties to a private dispute to have their rights arbitrated publicly. Practitioners and courts take the right for granted, but a right that is taken for granted is also easily suspended, especially in favour of a new Code. This said, this paper will not pit *Magna Carta* against the *Charter*. In the 21st-Century Canadian legal ethos, the inquiry takes us to an old debate over the constitutional recognition of property rights, and to a new debate over the right to pay for a hip replacement.

The Supreme Court of Canada has held that a statutory prohibition against private health insurance, having the consequence of denying access to timely medical intervention, violates s. 1 of the Quebec *Charter of Human Rights and Freedoms* and is not justifiable under s. 9.1. If a comparison between Medicare and civil justice seems superficial and contrary to conventional wisdom, in legal circles George Zeliotis and Jacques Chaoulli had not been credited with much of a chance in challenging the provincial public health insurance system. The national political
debate has concentrated on the impact on the public nature of Canadian Medicare. However, the jurisprudential value of Chaoulli is the court’s treatment of the indirect consequence to individuals of the rationing of a public resource. In Chaoulli, the Supreme Court employed a human rights analysis to a private law right of freedom of contract. The bridge between these two ideas is instructive. The Court allowed the right of patients and doctors to engage in contractual relations with private insurers. The Court did not do so by giving primacy to the freedom of contract. Rather, it saw the consequence of the statutory prohibition, exposing patients to undue delay in the public Medicare system, as a violation of s. 1 of the Quebec Charter, which reads:

1. Every human being has a right to life, and to personal security, inviolability and freedom.

Three out of the four judges ruling for the successful appellants, including the Chief Justice of Canada, held that it also breached s. 7 of the Charter of Rights and Freedoms and is not justifiable under s. 1. S. 7 reads:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

The view that a restriction on the freedom of contract is unconstitutional where it has the indirect or consequential effect of depriving a guaranteed right or freedom is consistent with the established functional or consequential approach to Charter interpretation. In the reasons given by McLachlin C.J. and Major and Bastarache JJ., the following captures the application of this approach:

123 Not every difficulty rises to the level of adverse impact on security of the person under s. 7. The impact, whether psychological or physical, must be serious. However, because patients may be denied timely health care for a condition that is clinically significant to their current and future health, s. 7 protection of security of the person is engaged. Access to a waiting list is not access to health care. As we noted above, there is unchallenged evidence that in some serious cases, patients die as a result of waiting lists for public health care. Where lack of timely health care can result in death, s. 7 protection of life itself is engaged. The evidence here demonstrates that the prohibition on health insurance results in physical and psychological suffering that meets this threshold requirement of seriousness.
We conclude, based on the evidence, that prohibiting health insurance that would permit ordinary Canadians to access health care, in circumstances where the government is failing to deliver health care in a reasonable manner, thereby increasing the risk of complications and death, interferes with life and security of the person as protected by s. 7 of the Charter.

The real, albeit indirect, consequence of an exercise of government power which rations medical resources can trigger a breach of human rights guaranteed by the Quebec Charter and the Charter. The Charter jurisprudence holds that delays in obtaining medical treatment which affect patients physically and psychologically trigger the protection of s. 7 of the Charter.¹⁴ The Court then held that the legislation deprived the s. 7 rights contrary to the principles of fundamental justice, in that the prohibition of private health insurance was not required to maintain the legislative goal of protecting the public health system. Lastly, the prohibition could not be justified either under s. 9.1 of the Quebec Charter or s. 1 of the Charter, in accordance with the standard Oakes analysis as described by Deschamps J.:

First, the court must determine whether the objective of the legislation is pressing and substantial. Next, it must determine whether the means chosen to attain this legislative end are reasonable and demonstrably justifiable in a free and democratic society. For this second part of the analysis, three tests must be met: (1) the existence of a rational connection between the measure and the aim of the legislation; (2) minimal impairment of the protected right by the measure; and (3) proportionality between the effect of the measure and its objective.

The majority held that the prohibition might be constitutional if it were proven that health care services are reasonable as to both quality and timeliness, but unconstitutional where it is part of the public system’s failure to deliver reasonable such services.

There is a basic legal difference between access to medical services and access to civil justice. Judicial enforcement or determination of civil disputes overwhelmingly falls into the sphere of economic or property rights. Such rights are not specifically guaranteed under the Charter. Although the prohibition against private health insurance was a restriction of an economic right, even the dissenting judges in Chauouli recognized in health care an indirect impairment of personal security.¹⁶ It is simply too much of a stretch to apply the s. 7 Charter analysis of Chauouli to the failure of the civil justice system to deliver timely and efficient resolutions. Clearly, the constitutionality of access to civil justice must be approached by a route other than rights guarantees under the Charter. Nevertheless, circumstantial comparison
between public health and judicial resources leads to the conclusion that the only legal difference is that one involves a guaranteed Charter right, and the other involves a right that is not so guaranteed. Remember that our aim here is to determine whether one person’s right to a speedy criminal trial gives the Crown access to judicial resources in priority to parties waiting for the hearing of their civil actions.\textsuperscript{17}

Rationing of medical services in Canada arises from multi-faceted shortages and inefficiencies: facilities, personnel, drugs, supplies, administration and funding. In order to make an appropriate comparison between Medicare and the justice system, we should examine the two end-products: the operation and the trial. For a hip replacement operation to be scheduled, there must not only be a surgeon but an anaesthetist, nurses, and of course an operating room. If an operation must be delayed for the lack of an anaesthetist, it is not necessarily for the shortage of a surgeon, but often for a surgeon standing idle because of a missing team member. A civil trial not only requires a judge (either with or without a jury), but also a verbatim reporter, registrar, a deputy, and a courtroom. Based on a figure published in a 1995 study, the institutional cost in 2006 dollars of a three-day civil trial in Toronto would be calculated at $25,000.\textsuperscript{18} By comparison, a hip replacement surgery in 2006 costs approximately $10,500.\textsuperscript{19} We must avoid the temptation to compare the cost or value of the two public services. There are too many variables. What is important is that both involve not only a significant allocation of budgetary commitments, but also the organization of factors each having their own levels of scarcity. The comparison is irresistible. According to one recent survey, there are approximately 360 orthopaedic surgeons in active practice in Ontario,\textsuperscript{20} and the complement of Superior Court judges hovers around 220. Once again, we ought not to consider these figures in relation to each other, but rather as the critical facet of the rationing process.

We then review the philosophical and institutional priorities of the public hospital system and the judiciary and see more parallels. In medical triage, priority is ranked according to clinical need. This tenet of medicine constantly conflicts with the utilitarianism\textsuperscript{21} of a delivery system operated by a public trust. Dr. Chaoulli’s crusade to open a private surgical facility was in many ways a more complex by-product of this conflict. A shortage of operating room facilities and personnel driving the orthopaedic surgeons out of public hospitals is a function of medical triage and rationing: emergent and urgent surgery will be given priority over elective hip replacements. The Supreme Court was not convinced by the Province of Quebec’s argument that Dr. Chaoulli’s proposed private facility threatened the ability of the public hospitals to tend to heart surgeries and brain tumours. Having sided with the converse position, the Court expressly applied an economic
argument. After reviewing survey evidence of health systems in leading industrial nations, the majority stated:  

In summary, the evidence on the experience of other western democracies refutes the government’s theoretical contention that a prohibition on private insurance is linked to maintaining quality public health care.

In the public health care system, triage will tend to the risk of death before the certainty of discomfort, leaving an army of hip replacement candidates limping or housebound. This law of triage is the medical equivalent of Askov in the judicial system, with its attendant political dilemma: Should patients die because operating theatres are being used for orthopaedic surgeries? Should accused criminals walk free because judges are occupied with corporate-commercial disputes? As described at the outset of this paper, the Canadian justice system routinely shifts judicial resources from the civil caseload in order to prevent criminal charges from being stayed for want of timely prosecution. If the consequence of a delay of trial is that an accused will go free, it does not always follow that the courts are compelled to choose between a constitutionally guaranteed right and a non-guaranteed right. S. 24 of the Charter provides a remedy for the accused which does not impinge on any other stakeholder of the justice system. Rather, the courts must recognize that there is a political decision to put the avoidance of the consequences of delay of trial (charges being stayed) ahead of the rights of civil litigants to have their causes tried fairly and in a reasonable time. So it is not the right of the accused criminal, but the political fallout of this accused being set free, versus the rights of the crash victim. Yet is it the province of an independent judiciary to react to what is basically a political embarrassment? The Charter guarantees the accused the right to a fair trial in a reasonable time. It does not dictate that the courts must do so at the expense of anyone else’s rights. Indeed, s. 26 of the Charter contains an injunction against such practice:

26. The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.

S. 26 has been held not to have conferred any rights but to have protected non-Charter rights from intrusion from enumerated Charter rights. Consequently, anyone searching for a right to trial in a reasonable time in civil matters should not expect the courts to read it into this provision. By contrast, art. 6, s. 1, of the European Convention on Human Rights protects not only criminal litigants but their civil counterparts.
1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

The consequence of the lack of a constitutional guarantee in our Charter is that a civil litigant whose case is unduly delayed cannot avail himself of relief under s. 24, which reads:

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances. (Italics added)

Because it provides a remedy for guaranteed rights only, s. 24 does not empower the courts to rely on s. 26 as a stand-alone provision in aid of civil litigants. Rather, s. 26 is a check on the application of guaranteed charter rights where the enforcement of such a right denies access to the enjoyment of other fundamental rights in Canada. The fact that a particular criminal prosecution may be at risk cannot justify requiring a civil action ready for trial to give up a place in the queue.

It could be observed that the civil analogue to the application of ss. 11(b) and 24 of the Charter to criminal cases has long existed under the civil rules, namely Ontario Rule 24, which provides for motions for the dismissal of actions for delay. Practicing lawyers will attest to the reluctance of the courts to enforce the rule, despite many years of inaction on the part of plaintiffs or their lawyers to move a matter to trial. In Ontario, the test for application of the rule is that the defendant must satisfy the court that there has been unexplained or inexcusable delay combined with prejudice to the defendant’s ability to mount a defence at trial. In the absence of actual prejudice, it can be presumed from very lengthy delay or from the passage of a limitation period. Despite the availability of the relief and its occasional enforcement, few would now trumpet Rule 24 as an effective tool for removing backlogs from the civil court system. Among the administrative problems that plague Ontario’s justice system, deadwood is no longer considered the priority. Indeed, Rule 24 ceases to be applicable once a case is placed on a trial list, the very point where the civil trial backlog begins. Rather, the failure is the inability to provide judicial resources to resolve cases which are ready for trial. The introduction of case management in Toronto was extremely efficient in bringing cases to the courthouse steps, but it failed because there were insufficient resources to accommodate the increase in actions ready for trial.
Despite the lack of a guaranteed Charter remedy exercisable at the level of the individual case, the inquiry does not end here. Next we shall examine the constitutional basis of a civil litigant’s right of access to justice.

2. Constitutionality of the Barrier to Civil Justice

At the time of writing, assignment courts in the Superior Court of Justice at Brampton, a metropolitan centre outside Toronto, are fixing dates for civil trials starting in the spring of 2009. Given that even simple actions routinely take over a year to reach the assignment court stage, this means that an expeditious action in Brampton could take 3 to 4 years to completion. We know that the phrase, “justice delayed is justice denied,” is part of the vernacular. What weight does it have in law?

Any procedural hurdle will constitute a barrier to justice to those unable to overcome it. This is a simple but important principle of rights-based jurisprudence. Thus, institutional delays and diversions are barriers to those who wish to exercise their right of audience before an adjudicative body. As a result of comments made in obiter, the English Court of Appeal has ensured that its trial courts will not be permitted to incorporate mandatory mediation into its procedures.\(^\text{28}\) Mandatory mediation, the Court held, is a form of institutional “constraint” which would violate the right of access to civil justice under art. 6, s. 1, of the European Convention on Human Rights. In other words, the imposition of a procedure whose purpose is not to prepare the parties for disposition of a civil dispute by trial is a hurdle. A priori, a hurdle is intended to slow down all participants and to inhibit the advancement of some. The logic of the English Court of Appeal’s treatment of mandatory mediation is not directly relevant to Canada because the right to timely access to civil justice is not guaranteed under our Charter. However, it is instructive for the purpose of the s. 26 Charter analysis because it puts into proper perspective the courts’ inhibition of the civil process to accommodate criminal backlogs. If civil trials must be postponed due to the disproportionate consumption of resources by criminal justice, it cannot be for the purpose of a readying a civil proceeding for trial. The priority of the criminal system over the civil docket is an unjustifiable barrier, if the resultant delays are significant. Unless measures are undertaken to prevent such interference, the courts are in violation of s. 26 of the Charter, as well as their role, as defined by the Supreme Court in Dolphin Delivery, as a unique branch of government and a neutral arbiter interpreting and applying all laws as the cases come before them.

The latter role of the courts is without doubt an example of an “unwritten constitutional principle,” as described by the current Chief Justice of Canada:\(^\text{29}\)
What do we mean when we speak of unwritten constitutional principles? Are there some principles or norms that are so important, so fundamental, to a nation’s history and identity that a consensus of reasonable citizens would demand that they be honoured by those who exercise state power? What do we mean by a constitution? Is the idea of unwritten constitutional principles really a new idea, or is it merely a new incarnation of established legal thought?

To these questions I would answer as follows. First, unwritten constitutional principles refer to unwritten norms that are essential to a nation’s history, identity, values and legal system. Second, constitutions are best understood as providing the normative framework for governance. Seen in this functional sense, there is thus no reason to believe that they cannot embrace both written and unwritten norms. Third - and this is important because of the tone that this debate often exhibits - the idea of unwritten constitutional principles is not new and should not be seen as a rejection of the constitutional heritage our two countries [Canada and New Zealand] share.

Add to this the fundamental fairness in holding the state’s dispute with one of its citizens, a criminal prosecution, as having no higher place on the court’s trial docket than a dispute between citizens. An institutional decision to permit the state’s process to be advanced ahead of its citizens’, to jump the queue, implies a state that is more important than the people. Part VII, ss. 96-101 of The Constitution Act, 1867, provides for a judicature of inherent jurisdiction for Canada and its provinces. The absence of codified priority for one type of case or another must signify an unwritten or implied feature of the formation of these courts that they must be tribunals of general jurisdiction. As such, it is their constitutional duty to grant audience in the order in which the parties to a proceeding, civil or criminal, declare their readiness to be heard.

3. Applying the Economics of Scarcity to Courts Administration

There is no choice in what must be done. The only choice is in the speed with which the court must wean itself from the practice of postponing civil cases to relieve the criminal justice backlog. As a first step, the court must acknowledge that the rationing of judicial resources gives rise to economic problems involving a public monopoly and a diffuse consumer base. Attempts to tackle the problems without the aid of economists would be considered folly for the administrators of a modern service corporation or government department of similar human resources and infrastructure. Once recognized as an economic issue, it should not be surprising that increasing supply to one area of demand faced with inefficiency of
consumption (criminal litigants and the Crown, as classes of litigants) should promote more inefficiency.

It is generally not appropriate for the civil litigation bar to weigh into the internal reform process of the criminal justice system. Indeed, some major steps are being taken. Systemic problems relating to prosecution and adjudication must nevertheless be seen as part of the problem, since recent statistics for serious crimes in Canada have remained stable or are in decline. A review the Report of the Chief Justice’s Advisory Committee clearly shows that the Superior Court has taken measures to map out a sweeping reform of criminal procedure, including a fair amount of criticism of its own members. For example, the following statement gives recognition to a trend which the criminal bench and bar have hitherto only privately observed.

Trial judges are now less interventionist than in the past, resulting in counsel "pushing the envelope", leading to longer trials. Judges fail to tightly control and compress the timelines of the court day. Some judges are devoted to fairness and completeness, yet ignore their role in ensuring the effective use of court time to advance the trial. Some judges fail to reinforce judicial expectations of professionalism and punctuality from counsel from the outset of the trial.

Nevertheless, what is missing from the terms of reference for this dialogue is the fact that a significant proportion of the time and resources allocated to criminal prosecutions is being rerouted from the civil justice system without question as to the legality of this diversion. In such difficult times, it may sound irresponsible to call a massive constriction of the criminal justice system as a tonic to invigorate efficiency.

Although it may be the least desirable or feasible of methods of righting this imbalance, it may very well take a constitutional challenge to stir up the administration of the courts in the way that Chaoulli has challenged public delivery of health care in Quebec. In Chaoulli, the remedy was to invalidate a prohibition against private health insurance where it was found that it was causing undue suffering without aiding the cause of delivering public access to health care. The economics of Chaoulli differs from the civil justice crisis in that the doctor pleaded that he was willing and available to perform hip replacement surgeries privately. As described earlier, the scarcity of the hip replacement market arises not from the availability or willingness of qualified orthopaedic surgeons to perform it but from the priority given by medical triage in public medicine to other surgeries. The fact that people are willing to pay for a private service which is offered publicly for free indicates that they are paying not for the service but to curtail the delay in
receiving it. Despite the political fear of what economists call the “Veblen effect,” here the creation of tiered medical care based on socioeconomic standing, the Supreme Court could apply the Charter remedy because the rationing imposed by the specific public health model could be relieved by allowing access to a different market where the identical service exists in greater abundance. In the case of justice, the parties to a dispute may feel private courts may or may not be adequate substitutes for public courts of record. However, every act of public adjudication is a building block of the rule of law. It is not an option for the superior courts of record to offer or require parties to seek justice in the private sector. As stated by the English Court of Appeal in Halsey, an institutional detour from justice is a barrier to justice.

What the courts have done, by sacrificing civil justice to save criminal justice from collapse, is to distort the market forces that bear upon the executive branch of governments, both federal and provincial, to support the judicial branch. The empirical proof of this phenomenon is to be found in the Chief Justice’s report itself, quoted at the outset of this paper:

“Only a handful of judges were added in the early 1990’s to our overall judicial complement to address delays in criminal cases following the Askov ruling.”

The court hearkens back to this monumental time in our judicial history, because Askov showed how the judiciary was at risk of imminent collapse. Contrary to popular wisdom, it was not the Charter which precipitated the crisis. Rather, Charter litigation exposed cyclical unreasonable delays in criminal proceedings which had previously gone unchecked. The constitutional duty recognized in Askov was the duty of the state to prosecute criminal charges with dispatch. If the Chief Justice expressed the view that the political response to the spectre of alleged criminals going free en masse was half-hearted, perhaps it did show this:

- The fact that any response materialized, however modest or laggard, meant that a political response (supply) was elicited proportional to an acute need (demand).
- The fact that the crisis was averted showed the governments of the day that the courts did have some capacity to avert the crisis on their own by delaying or diverting civil cases. In so doing, the courts achieved a false economy, diminished the political response, and all but ensured the recurrence of the crisis.

Of course, the combination of these two facts leads to an irresistible deduction. What if the courts were to adhere to Mr. Justice McIntyre’s description of the courts
as neutral arbiters between Charter and non-Charter cases? Civil litigation will benefit from more predictable case-flow management. For criminal justice, however, it would have to get worse before it gets better. Either it will suffer the equivalent of a stock market “correction,” or it will be rescued by government before the equivalent of the collapse of the gold standard. In the aftermath of this adjustment, however, both the commitment to resource allocation and the reform of internal processes in criminal justice will have to be better and more sustainable. The answers to the question at the outset of this paper must be: Yes, there is a constitutional right to timely access to civil justice. Yes, it is wrong for our court to grant audience to disputes between the Crown and criminal litigants in preference to those between private citizens. No, there is no remedy except for a self-directed order, or one imposed by an appellate court, to halt the unconstitutional practice.

Endnotes


2 R. v. Askov (1990), 59 C.C.C. (3d) 449 (S.C.C.); see also Chapter 12 of the 1995 First Report of the Ontario Civil Justice Review: “[W]e note the reappearance of signs that the criminal lists in some quarters are beginning to approach pre-Askov levels. Should this possibility become a reality there will be pressure to transfer judicial resources from the civil side to the criminal side, a re-allocation of resources which can only make the already grave condition of the civil justice system even worse. On the other hand, if no such re-allocation is made, criminal cases will be stayed. There will be a public outcry at this.”


4 When put in such terms, the practice giving priority to the criminal docket has the ring of judicial systems around the world Canadians have criticized for lacking independence from government.


6 See, for example, New Approaches to Criminal Trials: The Report Of the Chief Justice’s Advisory Committee On Criminal Trials In The Superior Court Of Justice, May 12, 2006


9 The principal trial court for criminal and civil proceedings in the Province of Ontario, the most populous province of Canada.

10 New Approaches to Criminal Trials, supra, at para. 27. In Askov, a delay of almost two years in bringing a criminal case to trial following committal, resulting chiefly from institutional problems, was held to be an infringement of the right to be tried within reasonable time under s. 11(b) of the Charter: R. v. Askov, [1990] 2 S.C.R. 1199. 11. Chaoulli v. Quebec (Attorney General), 2005 SCC
35, [2005] 1 S.C.R. 791. Dr. Chaoulli sought to open a private surgical facility. George Zeliotis was a 73-year-old salesman and advocate for reduction of waiting times in Quebec public hospitals.


12 Chaoulli, supra, at paras. 123-24

13 Chaoulli, at para. 118.


15 Chaoulli, at paras. 192 and 203

16 The accused’s extraordinary Charter remedy does not require priority because the stay of proceedings eliminates his or her criminal jeopardy. It is the threat of the use of that remedy which threatens the procedural dismissal of the Crown’s proceedings, and which causes the diversion of resources from the civil docket.


18 Baine, “Active baby boomers consider knee and hip replacements... well, hip,” National Review of Medicine, 2004, Vol. 1, No. 1 (rounded from $10,472.76)

19 Shipton et al., “Critical Shortage of Orthopaedic Services in Ontario, Canada,” J Bone Joint Surg Am. 2003; 85: 1710-1715; q.v. www.ejbjs.org/cgi/content/abstract/85/9/1710. The figure of 360 is based on 337 being the responding 94%.

20 Most famously popularized by the economic philosophers Jeremy Bentham and John Stuart Mill, utilitarianism prizes the greatest good for the greatest number.

21 Chaoulli, at para. 149

22 The Queen in the Right of New Brunswick v. Fisherman’s Wharf Ltd. (1982), 135 D.L.R. (3d) 307, at 316 (N.B.Q.B); aff’d on other grounds, 144 D.L.R. (3d) 21 (N.B.C.A.). The lower court decision has been otherwise discredited for having construed property as an extension of personal security under s. 7 of the Charter. The interpretation of s. 26, however, appears to be good law: R. v. MacAusland et al., (1985), 19 C.C.C. (3d) 365 (P.E.I.C.A.), at 375: “Section 26 only indicates that the Charter is not limiting or interfering with any additional rights which already existed, but that is quite a different matter from saying the Charter guarantees those rights.” See also, to the same effect, Le Groupe des Eleveurs de Volailles et al. v. Canadian Chicken Marketing Agency, [1985] 1 F.C. 280 (F.C.T.D.).

23 As we will see below, this was the basis for the English Court of Appeal’ injunction against mandatory mediation.


25 Woodheath Developments Ltd. v. Goldman (2003), 66 O.R. (3d) 731 ( Div. Ct.), where the total delay was 12 years. Query whether the presumption arising from the expiry of a limitation period, under the old 6-year general statute of limitations, will raise a presumption of prejudice now that it is 2 years.

26 As evident in the abandonment of Rule 77 Case Management in the Toronto Region, and the introduction of Rule 78 and the Practice Direction of November 22, 2004, entitled “Toronto Region Civil Cases Backlog Reduction/Best Practice Initiative.” Whereas the aim of active case flow management under Rule 77 was to prevent actions from becoming deadwood, Rule 78 and the
Practice Direction restored the former practice of allowing parties to prosecute civil actions at their own pace.


29 The Constitution Act, 1867 (U.K.), 30 & 31 Victoria, c. 3.


31 New Approaches to Criminal Trials: The Report Of the Chief Justice’s Advisory Committee On Criminal Trials In The Superior Court Of Justice, supra, note 6, para. 45

32 Whereby the social or economic status associated with a product or service increases the demand for a product or service as the price increases.

33 A market being the place and method for the exchange of information and value to effect trade.

34 For example, private arbitration can be superior to public courts, in that the parties to an arbitration have the ability to choose a specialist in a particular subject, be it law, engineering, accounting, etc.

35 In this regard, the current practice of the Superior Court in Toronto, pursuant to a Practice Direction dated November 22, 2004, to require mediation before assignment of a trial date, is an unlawful and unconstitutional barrier to justice.