# THE FINAL REPORT ON EARLY CASE CONSIDERATION OF THE STEERING COMMITTEE ON JUSTICE EFFICIENCIES AND ACCESS TO THE JUSTICE SYSTEM

## Background

The objective of a criminal court system is the **just** and **timely** determination of every case that comes before it. However, the Canadian justice system is taking longer to resolve adult criminal cases. The mean elapsed time from first to last court appearance is continuing a long-term trend toward increased duration[1]. Moreover, increases in elapsed times appear to have accelerated in the past four years. Overall, the elapsed time in the average case increased from 137 days ten years ago to 226 days in 2003/04. The mean processing time for the least complex cases, those with a single charge, increased from 121 to 215 days during the same period, while the processing time for multiple charge cases increased from 157 days to 236 days.

The Supreme Court of Canada considered the issue of reasonable elapsed time between the laying of charges and the accused being brought to trial, for the purposes of s. 11 (b) of the *Charter of Rights and Freedoms*, in *R. v. Askov*[2] and *R. v. Morin*.[3] While the Supreme Court did not prescribe a strict time limit within which all criminal cases must be completed, it did indicate that most cases should be completed within an eight to ten month period. This is not only to protect the security of the person, liberty and fair trial interests of the accused, but also society's interest in ensuring that lawbreakers are tried promptly and fairly on the merits.[4] There are also practical benefits to the quick resolution of criminal cases for witnesses and victims. The community at large is entitled to see that the justice system works fairly, efficiently and with reasonable dispatch. Public confidence in the justice system is diminished if cases are repeatedly stayed for unreasonable delay.

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[1] Adult Criminal Court Statistics, Canadian Centre for Justice Statistics, *Juristat*, Vol. 12 no. 12, p. 10.
[2] (1990) 59 C.C.C. (3d) 449.
[3] (1992) 71 C.C.C. (3d) 1.
[4] *R. v. Qureshi et al* (2004), 190 C.C.C. (3d) 453 (Ont. C.A.) at pp. 458-9.

Another consequence of an increase in the elapsed time it takes to complete criminal cases is an increase in the time spent in custody by those who are detained pending trial. Time on remand is often referred to as "dead time" because the accused is housed in facilities designed for short-term detention and may have no access to recreation, work or rehabilitative programmes.[5] Since 1986/87, not only has the number of admissions to custody on pre-trial remand increased, the proportion of provincial admissions due to remands when compared with the number of offenders serving sentence has also greatly increased. Since 1986/87, the proportion of total admissions to provincial correctional facilities due to **remands** has steadily increased by 37% to almost 60% in 2000/01.[6]

In addition to an increase in mean processing time per case, the number of court appearances per charge has also steadily increased over the past ten years. In 2003/04, the average number of appearances was 5.9. Ten years ago the figure was 4.1[7]. This suggests that despite a decrease in the number of charges processed by the court system, the demand placed on court resources has actually increased over time. The number of appearances is an excellent overall indicator of court workload because it relates directly to the activity consuming the most court resources. The number of court appearances needed to dispose of a case is also the primary factor in determining the case elapsed time. Generally, each additional court appearance increases the median elapsed time from first to last court appearance by approximately 30 days.[8]

As the number of court appearances increase, so to does the possibility that the bailed accused will fail to appear as required or otherwise breach his terms of release. In

[5] In response, courts frequently apply "2 for 1" or "3 for 1" sentencing credits whereby the sentence of a convicted accused is reduced to take into account on an enhanced basis the time spent in pre-trial custody. In *R. v. Roulette et al.*, 2005 MBCA 149, the Manitoba Court of Appeal recently cautioned trial courts against automatically giving offenders a 2 for 1 or 3 for 1 credit and upheld the 1.5 for 1 sentencing credit applied at trial. The appeal court stressed that the appropriate sentence in every case must take into account the unique circumstances of the case and it is open for counsel to argue for a reduction in or increase of the 2 for 1 norm.

[6] Adult Criminal Court Statistics, Canadian Centre for Justice Statistics, *Juristat*, Vol. 23 no. 7, p. 6.

[7] *Ibid.*

[8] Case Processing In Criminal Courts, 1990/00, Canadian Centre for Justice Statistics, *Juristat*, Vol. 22 no. 1, p. 3.

2003/04, failure to comply with a court order was the fourth most frequently occurring offence in Canada.[9] Administration of Justice offences, which include failure to comply with a court order, have steadily increased their share of the caseload over the past ten years. This offence group accounted for 19% of all cases in 2003/04, versus 16% five years ago, and 14% ten years ago.[10]

Only 9% of the cases coming into the court system are resolved by way of a trial.[11] The average number of appearances per case that goes to trial is 5.5. The case elapsed time for cases that go to trial is 150 median days. Of the 91% percent of cases that do not go to trial, 41% do not result in a conviction; they are withdrawn by the Crown or resolved without a conviction in some other way. In this category of cases, there is an average of 4.9 appearances per case and the case elapsed time is 103 median days. Of the 59% of cases that do not go to trial and result in a conviction,[12] 18% are resolved by an initial plea of guilty, with an average of only two court appearances per case and a case elapsed time of 1 median day. Sixty-nine percent of these cases are resolved by way of a change of plea to guilty. Cases involving changes of plea to guilty require, on average, 5.7 appearances per case and case elapsed time of 103 median days.

It appears there are a number of areas where case processing can be made more efficient and fair in the adult criminal court system.[13] Thirty-seven percent of all cases that do not go to trial (because the case is withdrawn or is otherwise resolved without a conviction) currently require, on average, 4.9 court appearances. This average is close to the average number (5.5) of court appearances required for cases that go to trial. It should not take almost as many court appearances for the parties to decide whether to resolve a case as it takes the court system to conduct a trial. Moreover, the average number of appearances

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[9] Failure to comply with a court order represented 8% of all cases. The most frequently occurring offences in 2003/04 were impaired driving (11%), common assault (11%) and theft (9%). See Adult Criminal Court Statistics, Canadian Centre for Justice Statistics, *Juristat*, Vol. 12 no. 12, p. 10.

[10] *Ibid,* p. 9.

[11] *Ibid*, p. 5. Seventy-four percent of cases that go to trial result in a conviction and 25% in an acquittal.

[12] Case Processing In Criminal Courts, 1990/00, Canadian Centre for Justice Statistics, *Juristat*, Vol. 22 no. 1, p. 5.

[13] Increased efficiency "unclogs" the courts and, consequently, leads to improved access to justice.

per case (5.7) where the defence changes its plea to guilty **exceeds** the average appearances per case (5.5) where the court system conducts a trial.

**Criminal Case Flow Management**

Experience in Canada and elsewhere suggests that effective delay reduction can only be achieved by supervision or management of the time and events involved in the movement of a case through the court system from the point of initiation to disposition. There is a broad consensus that the following measures contribute to effective case flow management.[14]

- Rapid preparation and transmission to the prosecutor of necessary police and forensic documentation.
- Rapid retrieval of prior criminal record information.
- Effective early case screening and vetting by prosecutors.
- Realistic prosecution policies.
- Early appointment of defence counsel for eligible accused and, for other cases, court procedures that ensure prompt participation by counsel for the accused.
- Early disclosure by the prosecutor, if possible in advance of the first court appearance of the accused.[15]
- Case differentiation, with separate tracks used for the processing of cases depending upon their complexity.
- Case scheduling practices that facilitate expeditious disposition of simple cases.
- Rapid identification of cases likely to require more counsel time and judicial attention so that good use can be made of limited courtroom capacity and counsel preparation time.

[14] "Improving Your Jurisdiction's Felony Caseflow Process: A Primer on Conducting an Assessment and Developing an Action Plan" prepared by the Justice Management Institute for the Bureau of Justice Assistance, Criminal Courts Technical Assistance Project, American University (April 2000).

[15] Early **exchange** of disclosure is recognized as an important aspect of effective case flow management in the United States. In *Williams v. Florida*, 399 U.S. 78 (1970) the constitutionality of an alibi-notice provision was upheld under a rationale that extended to a much broader range of prosecution discovery of the defence case. In *U.S. v. Nobles*, 422 U.S. 225 (1975), the Supreme Court held that compelled disclosure by the defence does not violate the defendant's privilege against self-incrimination unless it requires testimonial disclosure.

- Case timetables set by the judge in consultation with counsel and geared to the complexity of the case.
- Meaningful court events, designed to resolve cases or narrow issues.
- The development of a "legal culture" that does not tolerate delay.

## Changing Legal Culture

In the early 1970s the United States Congress and several state legislatures enacted laws requiring that criminal cases be resolved quickly. These "speedy trial" acts typically set deadlines for the completion of each stage of the proceedings. If a deadline was not met, the case was dismissed. Despite the clear, unambiguous mandates in these laws, few shortened disposition time.[16] In the jurisdictions where time limits actually reduced delays, one or more judges were committed to reducing delays. By contrast, in court systems where speedy trial acts failed, they were often enacted over the strong objections of judges, lawyers and other justice system actors. This has led those who closely watched the American experience to conclude that no program can succeed without the active participation of officials directly involved in administering justice. Courts are governed by a complex set of formal rules and informal practices. Judges, lawyers, and others who work in the court system know these norms far better than any outsider and can use this information advantage to defeat reforms with which they disagree.

As it became clear that structural reforms were having little effect on disposition times, reformers began to re-examine the assumption that judges, lawyers and other court staff were inert actors who performed whatever tasks they were assigned. Empirical studies revealed that delays varied enormously across courts with almost identical structures, caseloads and personnel levels. These studies established that delay was not an external phenomenon thrust on unwilling participants but a consequence of behavior of judges, counsel, accused, police and other participants in the justice system.

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[16] "Reducing Court Delays: Five Lessons From the United States" World Bank (Dec. 1999).

The American case flow management literature indicates a correlation between timeliness in case processing times and effective advocacy. Research demonstrates that meaningful and effective advocacy, itself an integral component of quality case processing, is more likely to occur in court systems where case resolution is most timely.[17] Since the relative pace of litigation depends largely on the local legal culture and attitudes of judges, prosecutors and defence counsel, in the more expeditious courts, personnel have more efficient work orientations, including clear case processing goals.[18]

In studies of corporate innovation and excellence, as well as of courts and criminal justice agencies that succeed in attaining significant delay reduction goals, leadership emerges as a critically important goal. When practitioners in successful courts were asked about reasons for the court's effectiveness, one of the most frequent responses was a reference to the leadership qualities of the chief judge. The specific leadership qualities mentioned in this context varied, but generally included references to the chief judge's vision, persistence, personality and political skills.[19] Lasting success, however, requires more than one judicial leader. All participants in the criminal justice system have a stake in ensuring that the system responds to change and is effective in dealing with those that come before or into the system. The judiciary particularly stands in a unique position to bring various participants and parties together to explore more effective ways of handling criminal matters.

Meaningful goals from inception to disposition and for specific stages of process are also integral to effective case flow management systems. Especially important are time standards that shape expectations with respect to the maximum length of time appropriate for particular types of cases in particular court locations. In the absence of clear goals, practitioners have no way of measuring their own (or their organizations) effectiveness in

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[17] "Efficiency, Timeliness, and Quality: A New Perspective From Nine State Criminal Trial Courts" *National Institute of Justice* (June, 2000).

[18] Counsel in these courts also had more positive views about resources, management policies, and the skill and tactics of their opposition than did their counterparts in less expeditious courts.

[19] Mahoney, B. *Changing Times in Trial Courts,* (National Centre for State Courts, 1988).

managing their caseload.[20] These goals must be developed taking into consideration local factors. One size does not necessarily fit all. Each court location, region, and jurisdiction must consider what procedures and protocols will work best to effectively and efficiently streamline the front end of the criminal justice systems.

In summary, to bring about meaningful change and defeat systemic delay at the early stages of the trial process, all participants in the criminal justice system must closely examine and, if necessary, modify the way they go about their work. Police and prosecutors must adopt more focused charging practices and be in a position to provide defence disclosure at the earliest stages of the process. Prosecution and defence counsel must reject a culture of last-minute decisions that sees cases warehoused between hearings and be more receptive to reasonable pretrial resolutions. Finally, judges must be willing to play a greater leadership role by becoming engaged earlier in the life of a file and assuming more "ownership" of its progress through the system.

## The Mandate Of The Early Case Consideration Subcommittee

It is against this backdrop that the Justice Efficiencies and Access to Justice Steering Committee[21] mandated the Early Case Consideration Subcommittee, composed of The Hon. Chief Justice Joseph P. Kennedy, Supreme Court of Nova Scotia, The Hon. Chief Judge Raymond E. Wyant, Manitoba Provincial Court, Murray Segal, Deputy Attorney General, Ontario Ministry of the Attorney General, Terrence J. Matchett, Q.C., Deputy

[20] Other attributes of effective case flow management are timely and accurate information, good communications and broad consultation, education and training, and mechanisms for accountability.

[21] The Steering Committee on Justice Efficiencies and Access to Justice was created to recommend solutions to problems relating to the efficient and effective operation of the criminal court system, without compromising its fairness. The Steering Committee is composed of six representatives of the judiciary, six Deputy Ministers of Justice from the federal and provincial levels and three members of the private bar. The key objectives of the Steering Committee include:

- Identifying practical and effective solutions that can be implemented in a timely manner;
- Building on – rather than repeating – work already being done to address specific justice efficiency issues, and
- Engaging, at the most appropriate time, other justice system stakeholders whose participation will be necessary to affect change.

**It is important to note that the Final Report on Early Case Consideration of the Steering Committee on Justice Efficiencies and Access to the Justice System does not necessarily reflect the official views of the organizations represented on the Steering Committee**.

Minister of Justice and of the Attorney General, Ministry of Justice of Alberta and William (Bill) Trudell, Chair, Canadian Council of Criminal Defence Lawyers,[22] to identify ways to improve processes and relationships in the justice system with the goal of decreasing the number of court appearances necessary to resolve a case. This must be done in a way that respects roles and advances the tenets of justice. The Subcommittee commenced its work by conducting a literature review.[23] This review suggested the work of the Subcommittee should focus on the following six areas.

- Police and prosecution linkages
- Police release from custody
- Bail and remand
- Early resolution mechanisms
- Diversion and restorative justice
- Case flow management

The Subcommittee prepared a set of draft recommendations relating to each of these areas. It then conducted an informal consultation process involving judges, Crown counsel, defence counsel, legal aid and court officials and police officers from across the country. Once the consultation process was completed, the following recommendations were refined and presented to the Steering Committee.

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## A. EARLY POLICE/PROSECUTION LINKAGES

There is a broad consensus in the police community that the enactment of the *Charter of Rights and Freedoms* has had the greatest effect on police investigative practice in the history of Canadian policing.[24] A series of Supreme Court of Canada decisions increasing *Charter* safeguards for suspects and accused has had a direct and dramatic impact on

[22] Robin Dann, of Alberta, and John Pearson, Alexandra Paparella and Linda Kahn of Ontario supported the Subcommittee in its work.

[23] See Appendix A

[24] A 30 Year Analysis Of Police Service Delivery And Costing: "E" Division, Research Summary, School of Criminology and Criminal Justice University College of the Fraser Valley and the Institute for Canadian Urban Research Studies, August 2005, p. 9.

police operations, workload and costs.[25] These decisions have steadily increased the number of different steps the police must take from discovery of a crime to presenting the case to Crown counsel for prosecution.[26] To maximize the effectiveness and efficiency of this increased work, it is crucial that police have timely access to competent and practical prosecutorial advice.

**Recommendation One: Pre-Charge Involvement of Crown Counsel**

> ***The Steering Committee recommends expanded involvement of Crown counsel during the pre-charge stage of police investigations.***

- **Crown counsel shall assist the work of the police by providing pre-charge legal advice on such issues as complex or special search warrants, charging decisions, Crown brief preparation, etc.**
- **Crown counsel should also be involved in providing educational opportunities and training to police officers on relevant pre-charge issues, including search and D.N.A. warrants and the essential elements and proof requirements of offences.**

It is now generally recognized across Canada that the early involvement of Crown counsel in complex investigations is essential. A number of commentators suggested that expanding the pre-charge involvement of Crown counsel in a broader range of cases would make the system more efficient by removing weak or overburdened cases earlier in the criminal process. New Brunswick, Quebec and British Columbia require a prosecutor to approve charges before they can be laid by a police officer. A number of jurisdictions have provided the police with the ability to access Crown counsel outside of business hours or from a remote location by means of a 1-800 number. The Canadian Association of Chiefs of Police supports the involvement of Crown counsel during the

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[25] See, for example, *Hunter v. Southam Inc*., [1984] 2 S.C.R. 145, *R. v. Therens*, [1985] 1 S.C.R. 613, *R. v. Collins*, [1987] 1 S.C.R. 265, *R. v. Brydges*, [1990] 1 S.C.R. 190, *R. v. Hebert*, [1990] 2 S.C.R. 151, *R. v. Duarte*, [1990] 1 S.C.R. 30, *R. v. Garofoli*, [1990] 2 S.C.R. 1421, *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, *R. B. (K.G.),* [1993] 1 S.C.R. 740, *R. v. Feeney*, [1997] 2 S.C.R. 13 and *R. v. Campbell and Shirose*, [1999] 1 S.C.R. 565.

[26] *Supra*, note 25 at p. 14, indicates that the number of steps needed to handle a drinking and driving case has increased by 42% over the last 30 years, the number of steps need to handle a domestic assault case has increased by 61% over the same time period, and the complexity of drug trafficking cases has increased by 72% over the last 30 years.

early stages of the investigative process but stresses the need to respect the different roles of investigators and prosecutors delineated by the Supreme Court of Canada in *R. v. Regan*. [27]

**Recommendation Two: Standard Checklist for Crown Brief and Disclosure Packages**

> ***The Steering Committee recommends that police and prosecution services in each jurisdiction jointly develop and implement a standard checklist for Crown brief and disclosure packages.***

- **A standard provincial checklist should be jointly developed and implemented by police and prosecution services to outline the proper contents of a Crown brief and disclosure package.**

- **Police services should develop training programmes to ensure high quality Crown brief and disclosure packages.**

- **Police services should implement quality control mechanisms to ensure their officers are fully aware of and comply with requirements relating to Crown brief and disclosure packages.**

The format and contents of Crown briefs vary widely across the country and even within jurisdictions. These inconsistencies can lead to confusion and inefficiencies. The Federal/Provincial/Territorial Heads of Prosecutions Committee is in the process of working with the police community to develop a standardized checklist for Crown brief and disclosure packages. This is important work that should be given a high priority. Police services experience high turnover rates and providing new officers with standardized checklists assists them in improving the quality of their work. Moreover, electronic Crown briefs are the way of the future and work done now to standardize content requirements will ease the transition to electronic format. Developing and implementing electronic disclosure systems requires significant initial investment but in the long term they are cheaper, faster and better than current hard copy systems.

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[27] [2002] 1 S.C.R. 297.

## B. POLICE RELEASE FROM CUSTODY

### Recommendation Three: Police Education and Use of Police Discretion

> ***The Steering Committee recommends that police make better use of the available statutory forms of release (ss. 498 and 499 of the Criminal Code), including release with appropriate conditions on a recognizance without surety or with an undertaking as required. The Steering Committee further recommends that police education be supplemented in this regard. It recognizes that increased police training is an essential element of any plan to reduce unnecessary bail appearances.***

The Federal/Provincial/Territorial Heads of Prosecutions Committee is of the view that increased use of police discretion to release arrested accused will result in a reduction in pre-trial remands. It appears that in some jurisdictions the police make limited use of their release powers. A number of commentators suggested that the violation of a release undertaking to the police should be included in s. 515(6) of the *Criminal Code*, thereby reversing the onus and requiring the accused to show cause why a further release order should be made. In Quebec, police officers wishing to detain an arrested person in pre-trial custody must contact a senior prosecutor. They are able to do so by telephone, 24 hours a day, 7 days a week.

### Recommendation Four: Modernizing Police Powers of Release

> ***The Steering Committee recommends that consideration be given to amending s. 498 (1)(c) of the Criminal Code to broaden police powers of release without sureties in an amount not exceeding $5,000, and without deposit of money or other valuable security.***

- **The Steering Committee has identified inconsistency and under-utilization of police powers to release persons arrested by way of a release on a recognizance. This frequently results in overcrowding in bail courts with many persons subsequently being released on consent by Crown counsel.**

- **While a person arrested without warrant may be released on a recognizance without surety or deposit, the Steering Committee notes that persons arrested by warrant may also be required to sign an undertaking in Form 11.1, setting out various conditions analogous to those typically set out in Court.**

- **The Steering Committee recognizes the necessity and importance of police education concerning these procedures.**

A number of commentators suggested that many of the bail provisions of the *Criminal Code* should be reviewed and modernized. There is currently a Federal/Provincial /Territorial working group conducting a comprehensive review of the bail system. Members of the defence bar consulted on this recommendation expressed the view that an increase in police releases would reduce the number of "lower end" bail proceedings taking up court time. Police officers expressed concern that the recommendation fails to reflect the realities of front-line policing. It assumes that because a person is a suitable candidate for bail at a bail hearing or first appearance, the police should have released following the arrest of the accused. As the first responders of the justice system, police confront situations at their most volatile and dangerous. The circumstances can look remarkably different even 12 hours later.

**Recommendation Five: Information Sheets for Accused Persons**

***The Steering Committee recommends that when an accused is released by the police and given an appearance notice, that the police service provide to the accused a Legal Aid & Court Information Sheet.***

- **The information sheet should outline the availability of legal aid, provide general information about what typically happens at a first appearance and explain what expectations the court will have of the accused, including the fact that the accused should have, or be actively in the process of, retaining counsel.**

- **Information should also be provided about the availability of interpreters and provision for other particular needs that an accused may have.**

- **In order to ensure that the information sheet is accessible and useful, its language should be plain and it should clearly state that it is an important document that should be consulted.**

- **Jurisdictions may wish to consult with their local police services about the possibility of having the information sheet incorporated in documents currently provided to an accused and/or for an officer to review the salient points of the information sheet with the accused.**

A consensus emerged during consultations that this recommendation warrants further consideration. Members of the police and prosecution communities expressed concern about the procedural, evidentiary and constitutional implications of the recommendation. They also indicated reluctance to see another informational function imposed on front line officers. Other commentators were enthusiastic about the recommendation and felt it would encourage accused to contact legal aid in advance of the first court appearance. Ensuring that accused who are released by police clearly understand the next step in the process may also reduce the number of fail to appear charges. In support of this recommendation, one commentator stated: “It seems to me that this may be one of the least costly and yet perhaps most effective of the recommendations in terms of early case resolution.”

## C. BAIL/REMAND

**Recommendation Six: Bail Application Officers**

> ***The Steering Committee recommends that the appropriate legal aid body consider the use of bail application officers to assist duty counsel and to reduce delays in commencing bail hearings.***

- **Duty counsel have a dual role, interviewing persons arrested and contacting sureties, while simultaneously being counsel in court assisting with remands and hearings. This can cause considerable inefficiency, especially when accused are not transported to court in a timely fashion.**

- **Bail application officers, acting as paralegals, would assist duty counsel with the out of court bail hearing preparation. This can include the contacting of potential sureties, assisting in the development of proposed plans of release and explaining the responsibilities of a surety to prospective candidates.**

- **The Steering Committee sees allocation of sufficient resources, facilities and access to accused as necessary to a proper assessment of bail application officers’ effectiveness.**

The Federal/Provincial/Territorial Legal Aid Working Group supports this recommendation in principle. To maximize the full potential of bail application officers, the working group indicates that police need to be persuaded to put additional resources into the early provision of case and accused related information to Crown counsel.

Adequate training of bail application officers is also essential. Where there are a high percentage of aboriginal accused, aboriginal courts workers can be used as bail application officers. The working group is also of the view that similar consideration should be given to nongovernmental organizations (e.g. the John Howard Society) where they are successfully operating bail verification and supervision programmes. A number of jurisdictions questioned where the resources to fund a bail application officer programme would come from and indicated any available additional money would be better spent on existing legal aid programming.

**Recommendation Seven: Weekend Bail Courts**

> ***The Steering Committee identified inefficiency in the current operation of weekend and statutory holiday ("WASH") courts. Promoting these courts as regular bail courts and not remand courts may be desirable in high volume jurisdictions.***

- **The appropriate use or establishment of WASH courts has the potential to significantly reduce inefficiencies in the use of bail court time.**

- **It also has the potential to reduce the cost of prisoner transportation and the strain on police and correctional resources.**

- **Where contested matters are not regularly commenced in WASH courts, extra weekday bail courts may become necessary to assist with overflow.**

- **The presence of both Crown Counsel and duty counsel is a best practice for any WASH court intended to function as a regular bail court.**

- **Such courts need to be properly resourced in order to ensure their effectiveness.**

- **The Steering Committee recognizes that flexibility in structure and delivery is required to ensure that such Courts meet the needs of individual jurisdictions.**

Bail proceedings are conducted in a number of different ways across the country. In a majority of jurisdictions, provincial court judges preside at bail hearings. In other jurisdictions, justices of the peace preside. In some provinces, judicial officers will make themselves available at any time to conduct a bail hearing; in other jurisdictions, bail hearings are held in courts that sit regular court hours. The calling of witnesses and

sureties is a common occurrence in some jurisdictions; testimony is seldom heard at a bail hearing in other jurisdictions. A number of commentators noted that telephone and video conferencing technology now provides the means to conduct bail proceedings from remote locations at reduced cost and increased security.

**Recommendation Eight: Bail Supervision And Verification Programmes**

> ***The Steering Committee recommends the use of bail supervision programmes. It is recommended that these bail supervision programs provide monitoring, referrals and supervision beyond simply verifying an accused person's reporting conditions.***

- **Numerous reports have commented on the effectiveness and utility of bail supervision programmes.**
- **Bail supervision programmes are community - based services that assist individuals who, because of their financial circumstances or lack of social ties, are at risk of being denied bail on the primary ground - risk of non-appearance. In exchange for the accused's pre-trial release, bail program staff undertakes to supervise the accused and to promote his or her compliance with bail conditions and attendance at subsequent court dates.**
- **Ideally, programs should also offer referrals and materials to accused to meet their needs (e.g. counseling, treatment opportunities etc.).**

There has been steady erosion across Canada in the availability of community support programmes for accused with special needs that could be managed in the community. In the absence of such programmes and because of the real or perceived increased public safety risk presented by these accused, pretrial custody becomes the only option. This contributes to the strain on correctional resources. Bail supervision and verification programmes have been operating in Ontario since 1979 and are highly regarded by the police, the judiciary, and counsel. In 2003/04:

- 81% of bail supervision programme clients attended all their court appearances, thereby increasing court efficiency by avoiding failures to appear;
- 37% of bail supervision programme clients were found not guilty or had all their charges withdrawn and would have been detained unnecessarily were it not for the program; and

- 19% of bail supervision programme clients were released to either a surety or on their own recognizance, demonstrating the value of the "verification" process and avoiding the costs of programme supervision or custody.[28]
- Bail supervision and verification programmes cost approximately $3 a day per client, while custody costs $135 a day per inmate.

Philosophical as well as pragmatic considerations support the existence of bail supervision programmes. All accused should have the right to be presumed innocent. Pre-trial detention can only be justified when detention is necessary in order to ensure the accused's attendance at trial, to protect the public, or to prevent the administration of justice from falling into disrepute. The Steering Committee believes that considerations of fairness and the public interest in reducing custodial costs justify government support for bail supervision programmes that promote the attendance of accused persons in court without requiring pre-trial incarceration.

**Recommendation Nine: Use of Crown Discretion**

***The Steering Committee sees the role of Crown counsel in the bail court as central to its proper functioning and encourages continued emphasis on Crown training in efficient bail court procedures and the proper ambit of Crown discretion.***

- **The Steering Committee equally encourages continued efforts within the prosecution service to communicate a sense of support to Crown counsel in bail court, particularly in the exercise of discretion in difficult cases.**
- **Continuity of Crown counsel in bail courts is seen as a best practice. Such continuity allows for streamlined procedures, uniform approach and a sense of ownership of the cases and the process.**
- **Assigning experienced Crown counsel prepared to exercise their discretion should be encouraged.**

[28] In 2004/05, two new performance measures were added: percentage of program clients released to the program as a result of consent releases, thereby demonstrating the value of the "verification" process, avoiding the need for a formal bail hearing and contributing to the efficiency of the court process; and the average number of adjournments prior to the decision to release to the programme, thereby contributing to the efficiency of the court process.

A number of commentators indicated that the "best Crowns" should be regularly appearing in bail court. Those responsible for the management of prosecution services pointed out, however, that senior Crowns are in high demand throughout the system. In response to the recommendation that bail court be assigned to senior Crown counsel, one commentator noted: "There appears to be a variance of comfort of Crown prosecutors in the exercise of discretion which is not directly related to the seniority of the individual. Judgment, which carries with it an intelligent exercise of discretion, is not something that necessarily comes with age or seniority". Another commentator emphasized the need for risk assessment tools to be developed. "Without such tools, Crown counsel are basing their decisions on "gut feelings" and consultation with the arresting officer – relying on experience alone to justify decisions which may have life or death implications seems remarkable in this day and age." Police commentators stressed the importance of continuing to involve investigating officers in bail decision-making.

**Recommendation Ten: Reverse Onus Bail Proceedings**

> ***The Steering Committee recommends that consideration be given by the Federal/Provincial/Territorial bail reform working group to the repeal of paragraph 515(6)(c) of the Criminal Code, so that a justice presiding in bail court will no longer be required to order that an accused charged with an offence contrary to the administration of justice be detained in custody unless the accused shows cause why detention in custody is not justified***.

Where an accused is charged with: 1) failing to attend court in accordance with an undertaking or recognizance or a court order, 2) failing to comply with a condition of an undertaking or recognizance or a court direction, 3) failing to comply with a summons, or 4) failing to comply with an appearance notice or promise to appear, the justice shall order that the accused be detained in custody until he is dealt with according to law, unless the accused, being given a reasonable opportunity to do so, shows cause why his detention is not justified.[29] As a consequence of this "reverse onus" provision, an accused charged with a relatively minor offence who was originally released by the police or granted judicial interim release and who breaches even a minor term of the release, shall

[29] Paragraphs 515(6)(a) and (d) of the *Code* have withstood *Charter* challenge in the Supreme Court of Canada (see *R. v. Morales* (1992), 77 C.C.C. (3d) 91 and *R. v. Pearson* (1992), 77 C.C.C. (3d) 124).

be detained in custody unless the accused can show why detention is not justified. If the accused is unable to satisfy the onus imposed by 515(6)(c), the accused will be remanded in custody and may spend longer in pretrial custody than would be the appropriate sentence following conviction for the original offence and the subsequent failure to comply. The Steering Committee questions whether two consecutive minor offences should so significantly increase the likelihood of pretrial custody.

As previously noted, mean elapsed time from first to last court appearance is continuing a long-term trend toward increased duration. The elapsed time in the average case increased from 137 days ten years ago to 226 days in 2003/04. The mean processing time for the least complex cases, those with a single charge, increased from 121 to 215 days during the same period, while the processing time for multiple charge cases increased from 157 days to 236 days. Consequently, accused are on bail for longer periods of time. Moreover, the longer an accused is on bail the more times he has to attend court and as the number of court appearances increase, so does the possibility the accused will fail to appear as required or otherwise breach the terms of release. In 2003/04, failure to comply with a court order was the fourth most frequently occurring offence in Canada.[30] Offences against the administration of justice have steadily increased their share of the caseload over the past ten years. This offence group accounted for 19% of all cases in 2003/04[31], versus 16% five years ago, and 14% ten years ago.[32] The number of s. 515(6)(c) "reverse onus" bail proceedings and, presumably, the number of detained accused increase as the number of these offences increase.

**Recommendation Eleven: Surety approval mechanisms**

> ***In jurisdictions where surety testimony is routine, the Steering Committee recommends that alternatives to viva voce evidence should be encouraged, particularly where a release on consent is proposed.***

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[30] Failure to comply with a court order represented 8% of all cases. The most frequently occurring offences in 2003/04 were impaired driving (11%), common assault (11%) and theft (9%). See Adult Criminal Court Statistics, Canadian Centre for Justice Statistics, *Juristat*, Vol. 12 no. 12, p. 10.

[31] Preliminary work in Ontario indicates that 75% of the charges underlying these administration of justice charges are for non-violent offences.

[32] *Ibid,* p. 9.

- **In addition, standard affidavits and information packages for potential sureties should be prepared in advance by local duty counsel and provided to Crown counsel.**

- **Crown counsel should be encouraged to accept affidavits and receive continuing education on the efficient use of cross-examination in consent release cases.**

- **Extended Justice of the Peace availability for surety approval should be promoted to allow for surety attendance.**

- **Availability and sufficiency of full time duty counsel is a key factor in ensuring the success of alternative surety mechanisms.**

It appears that in most jurisdictions prospective sureties are not required to testify and are seldom required to swear affidavits. In other jurisdictions, however, it is common for prospective sureties to testify. Some commentators from the prosecution community feel strongly that proposed sureties should testify so they understand and unequivocally accept the responsibilities they are undertaking. Evidence under oath or an affidavit also enhances the Crown's ability to seek estreatment in the event of a breach.

**Recommendation Twelve: Court - Detention Centre Communication Protocol**

***The Steering Committee recommends that each court location have a protocol for contact between the court and detention centres. This could assist the court with list management, provide a method for the detention centres to inform the courts of any developing transportation problems and allow the court to assist in identifying a priority list for transportation.***

- **One potential cause of delay in bail courts relates to the delayed arrival of prisoners from local police divisions and detention centres. With the advent of larger detention centres, each sending detainees to a large number of courts over varying distances, transportation efficiency will be challenging, and the concomitant impact on courts can be great.**

The Federal/Provincial/Territorial Heads of Corrections Committee agrees that establishing formalized protocols with local courts will be of benefit in meeting these challenges. Commentators from Quebec suggest that hospitals should also be involved in the development of such protocols.

**Recommendation Thirteen: Use of Audio and Video Remand Systems**

> ***The Steering Committee recommends that audio and video remand systems be used, where possible, for individuals detained while awaiting a hearing. It is an essential component of such systems that defence counsel have secure and convenient access to their clients.***

- **Video remands should be used when counsel availability for a hearing date is unknown.**
- **Accused persons should only be transported to court when their actual attendance is required.**

There was strong support for this recommendation during the consultations. The Federal/Provincial/Territorial Heads of Corrections Committee noted that various provinces have implemented audio and video capabilities in their correctional facilities and courts. From their perspective, the challenge remains that audio and video appearances are not conducted by default and are subject to judicial support. The Canadian Association of Chiefs of Police strongly supports this recommendation because transporting accused to and from court for brief court appearances is expensive, disruptive to custodial institutions and dangerous.

**Recommendation Fourteen: Availability of Crown Briefs**

> ***The Steering Committee recommends that police should ensure that Crown briefs for persons arrested overnight are available in a timely fashion to allow for Crown preparation and meeting with counsel prior to court.***

Practices vary across the country when it comes to how soon the police can provide Crown briefs for persons arrested overnight. The resources available for brief preparation play a major role. Police and prosecution capacity to prepare, transfer and receive the brief in electronic format facilitates the process. The length of the bail court list will also determine how much preparation time Crown counsel requires. In busy court locations, receipt of the Crown brief **at least an hour before court** starts is essential. However, police resource pressures result in this not occurring consistently. An abbreviated brief may be sufficient at this stage, but it must meet minimum requirements so that it is useful to both counsel. In Quebec, under its pre-charge screening system (systeme d'autorisation

des plaints), paper files must be received by the Crown prosecutor no later than 11 am, so they can be reviewed, a charge drafted if appropriate, and the prosecutor can determine whether a surety should be requested. The information is sworn at 2 p.m. on the day prior to the first court appearance of the accused.

The Canadian Association of Chiefs of Police supports the concept of consultation with Crown counsel prior to the bail hearing and suggests that issues of timing and delivery of the Crown brief be discussed in the context of the overall process. In some jurisdictions, the prosecution service utilizes administrative rather than legal staff to receive the file from the police and prepare the Crown brief under the supervision of Crown counsel.

**Recommendation Fifteen: Bail Hearing Information**

***The Steering Committee recommends that as much information as possible be provided to the Crown at the time of the bail hearing. This will put the Crown in a position to provide defence counsel with as much information as possible early in the life of the case.***

- **Before the bail hearing, the police should provide Crown counsel with, at a minimum, the following material.**
  - **The synopsis and record of arrest;**
  - **the criminal record of the accused; and**
  - **a synopsis of any videotaped statements where a transcript of the statement has not been prepared.**

There was general consensus during the consultations that the earlier disclosure can be provided to the defence, the better. The sooner counsel for the accused receives disclosure, the sooner he or she can advise the accused of the strength of the prosecution case and outline the options open to the accused. This will reduce the number of court appearances required before the case is resolved. The less time the police and Crown counsel have between arrest and bail appearance, however, the less information that can be assimilated and produced. Some commentators felt that it is impossible for the police to put together the package contemplated by this recommendation before the bail hearing.

The specific items recommended for inclusion in the package may not be achievable at such an early stage, except in simple cases or where there has been an extended investigation.

In a number of jurisdictions, discussion between the police and the Crown with respect to a wide variety of disclosure issues is ongoing (e.g. policy/practice, e-disclosure and costs). The Canadian Association of Chiefs of Police is of the view that the *Report of the Martin Committee to the Attorney General of Ontario* and the decision of the Supreme Court of Canada in *R. v. Stinchcombe*[33] make it clear that disclosure to the defence is a Crown responsibility. The C.A.C.P. feels it is fundamentally inappropriate for the police to be providing disclosure to the defence or participating directly in associated discussions and negotiations with defence counsel.

**Recommendation Sixteen: Expedited Disclosure Following Detention Order**

> ***The Steering Committee recommends that when an accused is detained in custody, the provision of disclosure should be expedited.***

- **Absent exceptional circumstances, the accused should be provided with disclosure as soon as possible before the bail hearing.**
- **Crown counsel should ensure that disclosure for in-custody cases is screened within two days of receiving the disclosure from the police service.**

While this recommendation was recognized as a "best practice" during the consultations, many commentators stated that current resources do not permit its implementation in their jurisdictions. Others indicated they already provide disclosure as fast as they possibly can and an admonition to "expedite" disclosure is not going to make it any faster. The general view expressed by prosecutors was that only in the least complex of cases could Crown screening take place within two days of receiving the Crown brief from the police.

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[33] [1995] 1 S.C.R. 754.

## D. EARLY RESOLUTION MECHANISMS

**Recommendation Seventeen: Case Management Teams**

> ***Where appropriate to the local jurisdiction, the Steering Committee recommends that dedicated case management teams be established within each Crown Attorney's office. Where dedicated teams are not feasible, it is recommended that vertical file management procedures be developed to promote Crown ownership and accountability over files.***

- **Early assignment of cases helps ensure both consistency and accountability in the handling of individual files.**

- **Not having each Crown counsel be held accountable for the individual criminal files that he or she handles often results in an inefficient use of Crown counsel's time when another Crown counsel has to repeat the identical exercise of becoming familiar with the file before being able to take the necessary action.**

- **Each case management team should be designed to ensure that a minimum number of Crown counsel review and make decisions on a particular file.**

- **Each case management team will perform the following functions:**

    - **Bail court (some jurisdictions may not include bail court in the case management team's duties);**

    - **Screening (including making decisions regarding elections, the appropriateness of the charges for diversion or withdrawal);**

    - **First appearance court;**

    - **Crown and judicial pre-trials (including early case resolution);**

    - **Further disclosure requests;**

    - **Set date court;**

    - **Respond to applications returnable in set date court (e.g. disclosure and adjournment applications);**

    - **Plea court;**

- **Confirmation hearings (where counsel and accused appear four or six weeks before the trial and confirm that they are ready to proceed);**
- **Ensure that effective communications are maintained with the investigating police officer; and**
- **Police and case management coordinator training.**

- **Where case management teams are not appropriate or necessary for a particular jurisdiction, the Steering Committee recommends adopting alternative procedures or best practices that will realize the goal of ensuring consistency and accountability in the handling of cases.**
- **The Steering Committee recognizes that consistency and accountability with respect to the management of each file is a joint responsibility of defence counsel, Crown counsel and the judiciary.**

Some of the prosecutors consulted on this recommendation found it to be too general, imprecise and unworkable in large intake courts at current resource levels. On the other hand, Quebec prosecutors noted most of their offices (but not Montreal) use the "poursuite verticale [vertical prosecution] system" which, in principle, assigns the same prosecutor to every stage in the life of a charge, from authorizing the charge to the appeal. This approach has yielded significant efficiency improvements. Those jurisdictions that have implemented vertical prosecution systems noted that judicial and court services collaboration is critical for the successful continuity of files.

**Recommendation Eighteen: Early And Meaningful Charge Screening**

***The Steering Committee recommends that dedicated Crown case management teams, or their alternatives, screen files in a meaningful way and in accordance with any relevant Ministry policies. It is also recommended that the Crown case management teams, or their alternatives, should ensure the following tasks are completed prior to first appearance court:***

- **Bail court (some jurisdictions may not include bail court in the case management team's duties);**
- **Ensure vetted defence copy of disclosure is available;**
- **Note a specific sentence recommendation for an early guilty plea to be conveyed to the accused at first appearance (subject to change based**

**upon information conveyed by defence, police or victims, or in the event that a plea is not entered at an early stage);**

- **Determine necessary witnesses to prove the case for the Crown;**
- **Determine files that should be pre-assigned;**
- **Determine the proper charges on which to proceed;**
- **Determine eligibility for diversion programmes; and**
- **Determine the Crown's election.**

It is acknowledged that in complex cases more time will be required in order to complete each of these responsibilities. The recommendation enjoyed broad based support during the consultation process. A number of commentators were of the view that cases are frequently "dragged out" by disclosure issues and the failure of Crown counsel to advance a clear position on sentence in the event of a guilty plea. A member of the defence bar suggested that over-charging by the police also slows the progress of a case with time and effort being required to negotiate a reduced charge with the Crown.

**Recommendation Nineteen: Case Conferences between Crown and Defence Counsel**

***The Steering Committee recommends that case conferences between counsel for the Crown and defence take place to see if the case can be resolved, the issues narrowed or defined or the need for a judicial pre-trial hearing eliminated.***

- **A thorough and meaningful Crown-defence case conference should be held before any judicial pre-trials are scheduled. The Crown and defence counsel involved in these meetings should be well aware of the contents of the file and be in a position to make decisions on the file.**

- **At these case conferences, counsel should strive to resolve the case, narrow or define the issues for trial and determine whether a judicial pre-trial would be of benefit.**

- **If both Crown and defence counsel are satisfied that a judicial pre-trial will not assist in moving the case forward, the judicial officer may waive the requirement of a judicial pre-trial[34].**

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[34] In any case to be tried with a jury, the holding of a judicial pre-trial is required and cannot be waived, pursuant to subsection 625.1(2) of the *Criminal Code*.

Early and meaningful consultation between Crown and defence counsel prior to setting a matter down for trial or preliminary hearing can play an important role in ensuring that the parties determine what can be agreed upon and what can be settled as early in the process as possible.

**Recommendation Twenty: Judicial Pre-trials**

- **Judicial pre-trials will be appropriate in the following circumstances:**
    - **Where mandated by the *Criminal Code*;**
    - **Where a judicial officer is of the view that a judicial pre-trial would be of assistance in resolving the case, shortening the length of time required for trial, or otherwise moving the case forward[35];**
    - **Regardless of the length of time required for trial, judicial pre-trials are recommended after a meaningful Crown-defence case conference where both parties agree that a judicial pre-trial would assist in moving the case forward; and**
    - **When necessary in the context of preliminary hearings to assist the parties in determining the witnesses required and issues to be dealt at the preliminary inquiry.**

Judicial pre-trials take different forms across the country. In some jurisdictions, they only address procedural matters while in other jurisdictions both procedural and substantive issues are addressed at the judicial pre-trial. They should be scheduled at a time convenient to both the defence and to the case management Crown with carriage of the case where feasible. To obtain maximum benefit from a judicial pre-trial, the judge who conducts the pre-trial should not be the trial judge. In order for judicial pre-trials to be meaningful, sufficient time should be allocated for each individual pre-trial to canvass relevant issues and accommodate guilty pleas in special circumstances. It is also important that the pre-trial be confidential. Pre-trial meetings, with or without a judge present, are only effective if both counsel attend with specific goals and objectives.

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[35] In Quebec, the consent of the parties is required for the judicial pre-trial hearing to address issues that go beyond subsection 625.1 of the *Criminal Code*.

Meeting for the sake of meeting is counter productive. Counsel must attend with a view to resolve the case, narrow and define the issues, or otherwise move the case forward. The meeting must have a **concrete purpose**.

A number of commentators expressed concern about the lack of any mention of judicial responsibility for case management in the recommendation and, in particular, the need for judges to hold counsel to existing rules of court or practice directions imposing deadlines. The absence of any reference to the obligation on counsel to give timely notice of *Charter* and other motions was seen as particularly problematic. However, one commentator objected to being "forced" to meet with a judge and found the tenor of the recommendation incompatible with the adversarial nature of our criminal justice system. There was general agreement that a judicial pre-trial system will only be effective if the parties voluntarily enter into resolutions and agreements. The pre-trial judge has an obligation to see if he or she can "get the parties together" but not to impose a resolution or agreement by coercion.

### Recommendation Twenty-One: Judicial Pre-trial Assignments

> ***The skills that make an effective trial judge are not necessarily the same skills that make an effective pre-trial resolution judge. Judges interested in broadening their early resolution skills should be encouraged to do so.***

- **While the Steering Committee recognizes that the judiciary in Canada is highly qualified and able, not every judge may be suited to or interested in conducting pre-trial conferences.**

- **The National Judicial Institute offers excellent courses for judges interested in broadening their skills in this area.**

## E. Case Flow Management

### Recommendation Twenty-Two: Maximizing First Appearances

***The Steering Committee recommends that the first non-bail related court appearance of the accused take place no later than four weeks from the date of arrest.***

- **For specialized cases such as domestic violence cases, cases involving young persons, or child abuse, the first appearance date should be earlier than four weeks from the arrest (provided that disclosure can be prepared to accommodate a shortened time frame).**

- **If reasonably possible, the following events ought to occur at an the first non-bail related appearance of the accused in court:**

    - **Full disclosure and the Crown screening form made available;**

    - **Accused advised of the Crown's position on early resolution;**

    - **Accused provided opportunity to speak to duty counsel regarding the Crown's position on early resolution;**

    - **Legal aid available on site to receive applications from eligible accused who have yet to apply for legal aid;**

    - **Legal aid application completed (where an accused wishes legal aid and has not yet applied);**

    - **Accused advised in court by the presiding judge of the steps that the court expects the accused to have completed prior to the next court appearance as well as other steps required before a trial date or preliminary hearing date can be set; and**

    - **Unless there are special circumstances dictating otherwise, any applicable Crown election should be made.**

A number of commentators observed that four weeks is a difficult deadline to meet given the work that needs to be done. A concern was also expressed that many accused do not have the cognitive capacity to assimilate all the information contemplated by the recommendation and respond in an appropriate fashion**.** The recommended earlier deadline for specialized cases was the subject of some adverse comment because of a fear that "scarce justice system resources will be diverted to domestic violence cases to the detriment of other cases of equal societal interest". One commentator also expressed concern about "dancing on the line – endangering

an accused's *Charter* right to a fair and full trial by finding efficiencies for the state at a significant cost to my clients."

In Quebec City and Montreal, the first court appearance of the accused usually occurs 12 weeks after arrest and release. This timeframe is inherent in the charge approval system, which requires a review of the case, any supplementary review and the preparation of disclosure. The 12-week timeframe suits all parties and provides for a thorough investigation and analysis before proceeding with a court appearance.

**Recommendation Twenty-Three: Full Disclosure To The Accused**

***The Steering Committee recommends that in the absence of exceptional circumstances full disclosure should be provided routinely to the accused in person, or to counsel appearing with the accused, on the first appearance, in the case of those accused out of custody, and within 7 – 14 days of arrest, for those accused persons in custody.***

- **No formal request by an accused or by his or her counsel should be a prerequisite for initial disclosure to be given.**
- **The Crown brief should be finalized by the police no later than three weeks from the date of arrest and provided to the Crown one week prior to the first appearance (to allow for Crown screening).**
- **To protect the privacy or safety interests of victims, witnesses, or confidential informants, the defence copy of disclosure should be "vetted" by removing any personal identifiers of victims, witnesses or confidential informants.**

In the words of one commentator, "this recommendation speaks to the single, largest, impediment to the timely resolution of cases". While many commentators agreed with the sentiment behind this comment, a number of important issues remain to be settled in this area. Who does what when it comes to disclosure? When are things to be done? Who pays for what as between the police and the prosecution service? Other problems identified during the consultation process include: the difficulties associated with late arrest; complex files; heavy volume locations; and the severe strain that constitutionally mandated disclosure requirements are placing on already thin resources. The police

community is of the view that all affected parties should study the various issues surrounding disclosure so principled and practical solutions can be fashioned. Disclosure is a critical part of effective case flow management. Resolving outstanding disclosure issues requires comprehensive consultation because it affects so many justice system participants. However, it is of crucial importance that this consultation takes place immediately so necessary solutions can be developed and implemented expeditiously.

**Recommendation Twenty-Four: Maximizing Second And Third Appearances**

***The Steering Committee recommends the following guidelines with respect to the second and third appearances of the accused:***

- **It is expected that counsel will have been retained by the second appearance;**
- **A further adjournment of the case may be necessary to allow for a Crown-defence case conference, and to resolve any further disclosure issues;**
- **The reason for any adjournment should be clearly noted on the record or on the information, and any s.11 (b) *Charter* issues arising from the adjournment should be canvassed prior to fixing a return date;**
- **On the third court appearance an accused should be prepared to set a trial or preliminary hearing date, or to set a date for a judicial pre-trial (provided full disclosure has been given);**
- **At the third appearance of an accused it is expected that a Crown-defence case conference will have been conducted, and any further disclosure issues fully canvassed, although it may be that the actual provision of the further disclosure has not occurred where a report and the results of any scientific testing are not yet available; and**
- **In cases where the accused has an election and the option of requesting a preliminary hearing, the accused should be put to his or her election. This will allow the court to be in a position to ascertain whether a preliminary hearing will be necessary. Dates for the filing of any statements or agreements that are required in respect of the preliminary hearing, pursuant to sections 536.3 or 536.5 of the *Criminal Code*, should be fixed by the Court on this appearance, except where a further judicial pre-trial is necessary.**

While there was broad agreement during the consultations that cases should be advanced along these timelines, consensus broke down on the question of whether it

is feasible to enforce this recommendation because of the number of variable that come into play, including the increase in the number unrepresented accused coming before the courts. One commentator observed that the issue of access to justice is squarely implicated by this recommendation. Another suggested that what occurs on second or third appearance will in all probability be dictated by the nature of the case. Judicial discretion will determine how the matter will proceed and there is little to be gained by attempting to set out the practice and procedure after the first appearance.

## F: Diversion and Restorative Justice

### Recommendation Twenty-Five: Increasing The Range of Available Programmes

***The Steering Committee recommends that a range of adult diversion programmes, with clear operating principles/eligibility criteria of community use, be made available and that Crown counsel be encouraged to consider and promote the use of diversion programmes in all appropriate circumstances.***

There was broad consensus during the consultations that resort to diversion and restorative options in appropriate circumstances are highly desirable. However, resourcing/funding issues are important factors in determining the number of programmes and options available. A number of jurisdictions reported an unfortunate lack of resources for adult diversion. The Federal/Provincial/Territorial Heads of Corrections Committee also noted that diversion from custody into community supervision could impact on the workload of probation and parole officers depending on who is required to provide supervision.

### Recommendation Twenty-Six: Appropriate Consideration of Complementary or Alternative Forms of Justice

***The Steering Committee recommends that each jurisdiction give consideration to a range of various alternative responses to certain types of criminal charges (e.g. mediation, sentencing circles, etc.).***

- **Cases that can be diverted from the criminal justice system at an early stage through complementary responses should be met with approaches that encourage restorative justice.**

A number of commentators noted that the public interest must be taken into consideration when considering complementary or alternative forms of justice. Care should also be taken so that reforms are not, or are not seen to be, "privatized" justice (the downloading of criminal justice to the community or the private sector). Criminal justice is a state responsibility and there are risks associated with devolving it to restorative justice alternatives that are less costly but also less visible and accountable to the public. If victim participation is required in these initiatives, it must be informed and truly voluntary.

**Recommendation Twenty-Seven: Equal Justice Initiatives**

***The Steering Committee recommends that each jurisdiction ensure that there are equal justice initiatives for special-needs accused (e.g. accused persons with mental health issues, drug and/or alcohol addictions, fetal alcohol spectrum disorder, etc.) which may include pre-charge diversion programs. The Steering Committee recommends that strategies to alleviate the over representation of mentally ill individuals in the criminal justice be given particular attention.***

- **The Steering Committee recognizes that strategies to alleviate the over representation of special needs accused requires adequate resourcing and recommends that this be seen by government as a priority.**

- **The Steering Committee recommends that courts and governments continue to explore the benefits of problem solving courts and processes.**

The incarceration of mentally ill offenders has a major impact on adult correctional institutions. Various provinces are currently engaged in partnerships to create programmes for the diversion of the mentally ill from the justice system. The biggest deterrent to the diversion of such individuals is the lack of resources to support the necessary programmes. It was consistently acknowledged during the consultation process that whatever is attempted by way of reform in this area, public safety and, therefore, public confidence in the justice system, must be an important factor.

A number of jurisdictions are also exploring the benefits of specialized or "problem solving" courts and processes. These courts develop treatment options for offenders that

repeatedly commit minor offences because of drug addiction or mental health disorders. The court monitors and attempts to assist the offender's progress. While the process is resource intensive, it can bear long-term dividends if the offender is rehabilitated. Similarly, the domestic abuse court process seeks to break cycles of violence that repeatedly brings offenders before the courts.

The Vancouver Intensive Supervision Unit (VISU) was identified during the consultation process as an innovative multi-disciplinary approach to individuals that "cross-cut" social, health and justice services. B.C. Corrections Branch, the Vancouver Coastal Health Authority and Forensic Psychiatric Services jointly operate the unit. Probation officers and mental health workers staff it. They provide service to a caseload of 40 offenders with multiple psychiatric diagnoses for the duration of court ordered community supervision. Staff assists clients in obtaining basic living essentials, such as housing, financial management, access to health care services and access to mental health treatment providers. The goal is to reduce offending and admissions to hospital and psychiatric institutions.

**Recommendation Twenty-Eight: Increased Information For Justice Sector Participants**

> ***The Steering Committee recommends that each jurisdiction ensure that continuing education and information sessions for all justice sector participants (including judges, justices of the peace, Crowns, defense and legal aid counsel, police, probation Officers, etc.) are organized and implemented to ensure that everyone is aware of the availability of diversion, restorative and alternative justice programs***

## G. CONCLUSION AND NEXT STEP

A point made **repeatedly** during the consultation process is that the Steering Committee's recommendations will only be effective if the criminal justice system is allocated adequate resources. Unrepresented accused tend to delay the resolution of cases. Adequate resources for legal aid are, therefore, clearly necessary. Adequate funding of the courts, prosecution services and police are equally important. Many of the delay reducing steps recommended by the Steering Committee are dependent on the availability of a reasonable number of judges, justices of the peace, prosecutors, legal aid

counsel, court support workers and police officers. Moreover, the best system cannot work effectively if suitable court facilities are not available. Only if adequate resources are provided will the potential efficiencies identified in these recommendations be fully realized. Additional resources alone, however, will not bring about lasting change. Those in leadership positions in the criminal justice system **must make change happen**.

Before any of the Steering Committee's recommendations are implemented, a more comprehensive and inclusive consultation process should be conducted. In the time available to it, the Early Case Consideration Subcommittee did not have an opportunity to consult widely. However, it did receive extremely valuable input from the individuals and organizations consulted.[36] The Law Amendments Committee of the Canadian Association of Chiefs of Police, for example, made cogent submissions on the need for the court system to give greater consideration to the operational and financial consequences on the police of the additional legal, evidentiary and procedural requirements imposed by the enactment of the *Charter of Rights and Freedoms.* The committee pointed out that more selectivity by Crown counsel in tendering police evidence and greater use of police affidavit evidence would also free up officers for other duties and reduce overtime costs.

This report ends where it began, by observing that cases are taking too long to process in the front end of the criminal justice system. Limiting the number of remands and appearances and establishing timelines and clearly articulating expectations will result in more effective and efficient case processing. Performance measures should be established to articulate expectations for the criminal justice system.

**The Steering Committee suggests that this report be referred to the Federal/Provincial/Territorial Deputy Ministers Responsible for Justice for their consideration.**

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[36] See Appendix B for a list of the individuals and organizations consulted.

## APPENDIX A

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Institute for the Bureau of Justice Assistance, Criminal Courts Technical Assistance Project, American University (April 2000).

# APPENDIX B

## Organizations And Individuals Consulted

***National Organizations***

Federal/Provincial/Territorial Heads of Prosecutions

Federal/Provincial/Territorial Heads of Corrections

Federal/Provincial/Territorial Legal Aid Working Group

Law Amendments Committee, Canadian Association of Chief of Police

***Law Amendments Committee Focus Group***

**Mike McDonell**
Assistant Commissioner, Criminal Intelligence Directorate
Royal Canadian Mounted Police

**Sue O'Sullivan**
Deputy Chief
Ottawa Police Service

**Vince Westwick**
General Counsel
Canadian Association of Chiefs of Police

**Frank Ryder**
Detective Chief Superintendent
Ontario Provincial Police

***Manitoba Focus Group Participants***

**Janice Lemaistre**
Supervising Senior Crown Attorney
Domestic Violence Unit
Manitoba Justice

**Tim Owens**
Crown Attorney
Manitoba Justice

**Gerry McNeilly**
Executive Director
Legal Aid Manitoba

**Irene Hamilton**
(Former) Assistant Deputy Minister, Courts Division
Manitoba Justice

**Timothy Killleen**
Defence Counsel
Winnipeg, Manitoba

**Josh Weinstein**
Defence Counsel
Winnipeg, Manitoba

***Newfoundland Focus Group Participants***

**Michael A. Madden**
Counsel, Federal Prosecution Service

**Thomas G. Mills**
Director of Public Prosecutions

**Dennis C. MacKay, Q.C.**
Senior Staff Solicitor, Newfoundland Legal Aid Commission

**Randolph J. Piercey**
Kelly, Piercey, Barristers and Solicitors

**Robert E. Simmonds, Q.C**.
Simmonds Kennedy, Trial and Appellate Lawyers

*Nova Scotia Focus Group Participants*

**Joseph Kennedy**

Chief Justice, Supreme Court of Nova Scotia

**Frank Hoskins**
Nova Scotia Public Prosecution Service

**Anne Derrick**
Nova Scotia Provincial Court

**John Scott**
Nova Scotia Public Prosecution Service

**Joel Pink**
Barrister and Solicitor

***New Brunswick Focus Group Participants***

**David D. Smith**
Chief Justice, The Court of Queen's Bench of New Brunswick

**A. Wilber MacLeod**
Barrister and Solicitor

**W.J. Corby**
Crown counsel

**Scott F. Fowler**
Barrister and Solicitor

**Anthony Allman**
Crown counsel

***Prince Edward Island Focus Group Participants***

**Jacqueline R. Matheson**
Chief Justice, Supreme Court of Prince Edward Island Trial Division

**W. Kent Brown**
Director of Legal Aid

**David P. O'Brien**
Senior Crown Counsel

**Cyndria Wedge**
Director of Public Prosecutions

**John K. Mitchell, Q.C.**
Barrister and Solicitor

***Quebec Focus Group Participants***

**Maurice Galarneau**
Juge à la Cour du Québec

**Claude Parent**
Juge à la Cour du Québec

**Me Gilles Trudeau**
Directeur de bureau
Affaires criminelles et pénales
Centre communautaire juridique de Montréal

**Me Marie-Andrée Trudeau**
Substitut en chef du procureur général
Direction générale des poursuites publiques

**Me Josée Ferrari**
Membre du comité en droit criminel
Barreau du Québec

**Me Lucie Joncas**
Déléguée par l'exécutif de l'association des avocats de la défense de Montréal

**Me Sabin Ouellet**
Substitut en chef du procureur général et directeur du bureau des affaires criminelles par interim

**Me Annie-Claude Bergeron**
Substitut du procureur général

***Ontario Focus Group Participants***

**Rob Buchanan**
Vice President, Client Legal Services, Legal Aid Ontario

**Mike Cantlon**
Deputy Crown Attorney, Peel Region, Criminal Law Division,
Ontario Ministry of the Attorney General

**Angelo Longo**
President and CEO, Legal Aid Ontario

**Deb Paulseth**
(Former) Assistant Deputy Attorney General, Courts Services Division
Ontario Ministry of the Attorney General

**John Pearson**
Director of Crown Operations, Central West Region
Criminal Law Division, Ontario Ministry of the Attorney General

**Murray Segal**
Deputy Attorney General

**William (Bill) Trudell**
Canadian Council of Criminal Defence Lawyers

**J. David Wake**
(Former) Associate Chief Justice,
Ontario Court of Justice

**Lou Strazos**
Criminal Lawyers, Association

***Saskatchewan Focus Group Participants***

**Associate Chief Judge Snell**
Provincial Court

**Murray Brown, Q.C.**
Executive Director
Public Prosecutions

**Jane Lancaster, Q.C.**
Saskatchewan Legal Aid Commission

**S/Sgt Ross Gervan**
Criminal Operations, F Division
Royal Canadian Mounted Police

**Bernie Pannell**
Deputy Chief
Bureau of Support Services
Saskatoon Police Service