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REPORT

OF THE

TASK FORCE

ON

CRIMINAL JUSTICE EFFICIENCIES

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Report of the Task Force on Criminal Justice Efficiencies

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Task Force on Criminal Justice System Efficiencies

Executive Summary

The Task Force was formed at the request of The Minister of Justice, Jerome P. Kennedy Q.C. The mandate of the Task Force was to examine the operation of the criminal justice system in St. John's, Newfoundland and Labrador with particular emphasis on the processing of cases in St. John's Provincial Court and to make practical recommendations to increase efficiency and reduce delay without compromising fundamental principles of justice.

The time from apprehension by police to adjudication by a court is typically ten to twelve months. This could be reduced to three to four months in most cases.

It was concluded that measures which would achieve this result could be taken in the following areas:

1. The time between release by police and appearance in court;
2. Reduction or elimination of unproductive court appearances;
3. Timely and comprehensive disclosure of the prosecution's case;
4. Early critical assessment of cases;
5. Assignment of Legal Aid counsel;
6. Meaningful case resolution efforts;
7. Scheduling of court hearings;
8. Delays due to geographical considerations.

Some of the Task Force's recommendations can be implemented immediately at little or no cost. Others require existing judicial, administrative, legal aid and prosecutorial resources be supplemented in relatively modest ways.

Summary of Recommendations

1. Those accused of crimes should be released to appear in court approximately two weeks after arrest by police.

2. Important and detailed information about the Legal Aid process should be made available to people upon release by the police.

3. The disclosure process should be streamlined through the use of police checklists, electronic formatting and vetting by paralegal personnel employed by the prosecution service.

4. Crown review of police files should be made at the first opportunity so that there is an early discovery and termination of cases that are without a reasonable prospect of conviction.

5. As early as possible in the process the prosecution should provide to the defence its intention regarding election in cases of hybrid offences and the penalty sought.

6. Crown Attorneys should inform the defence of their best offer in return for a guilty plea as early as reasonably possible in the criminal process.

7. Legal counsel working at the beginning of the court process from both the prosecution and legal aid services should be carefully selected. Ideally, the people chosen to do this work need to be able to make decisions under pressure and have the confidence and substantive knowledge required to do what is necessary to bring a case to an early and just conclusion.

8. Unnecessary delays and scheduling problems in the Provincial Courts can be eliminated in four important ways;

    a. Utilization of a centralized electronic scheduling system where hearings can provisionally be set without the immediate need for an appearance before a judge. A system which makes use of the new technological appearance and designation of counsel provisions of the *Criminal Code* sections 650(1.1), 650(1.2) and 650.02 should be implemented.
    b. A new system of case assignment to court rooms and judges shortly before a hearing should be used. The Case Assignment and Retrieval System (also known as the "**CAAR**" System) has the required flexibility and should be implemented.
    c. Appointment of per diem Judges who could be called upon short notice to supplement existing judicial resources when required.
    d. Pro-active monitoring of trial readiness by court administrators or case managers in consultation with the parties.

9. Audio and video remand systems should be used, where possible, for individuals detained while awaiting a hearing. Once proper equipment and arrangements are in place this can also serve to facilitate remote testimony, child witness testimonial aids, pre-trial conferencing and other administrative services.

Many of the Task Force recommendations can be implemented immediately. Some, such as the initiatives taken by the Public Prosecutions Division, are already underway.

All of the recommendations will only be fully 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 Task Force are dependent on the availability of a reasonable number of judges, court managers or administrators, prosecutors, and legal aid counsel. Moreover, the best system cannot work effectively if suitably modernized court facilities are not available.

It was agreed by all representatives on the Committee that, with appropriate leadership, goodwill and resources, its recommendations could be fully implemented by the fall of 2008.

Preface

Case processing time, beyond that which is necessary for a fair resolution of the issues, greatly undercuts the quality of justice. The point is often made that "justice delayed is justice denied".

To this end, the Minister of Justice, Jerome P. Kennedy Q.C. has struck a task force comprised of representatives from The Department of Justice, the Public Prosecutions Division, the Legal Aid Commission, the private bar and the Provincial Court of Newfoundland and Labrador with a mandate to identify and recommend the elimination of obstacles to the timely processing of cases and to make recommendations on ways to bring about improvements. The focus was on case processing in the Provincial Court in St. John's where the vast majority of criminal and quasi-criminal cases in the region are resolved.

The *Task Force on Efficiencies in the Criminal Justice System* commenced its work in December of 2007 with the goal to make recommendations and to meet any necessary budgetary deadlines for the ensuing fiscal year. The Report outlines recommendations which, if properly resourced and implemented, will see an improvement in the time required to process cases.

Members of the Task Force were Deputy Minister of Justice Christopher P. Curran, Q.C. (Co-Chair) and Assistant Deputy Minister of Justice Heather Jacobs, representing the Administration of the Department of Justice, Mr. Philip LeFeuvre of the Public Prosecutions Division, Mr. Nick Avis, Q.C. Chair of the Legal Aid Commission, Mr. Mark Pike and Ms. Erin Breen both representing the private bar and the Honourable M. Reginald Reid, Chief Judge of the Provincial Court (Co-Chair).

To the many groups and individuals who provided advice and information, often on short notice, we extend our gratitude.

Task Force on Criminal Justice System Efficiencies

Background and Observations

The mandate of the Task Force was to examine the operation of the criminal justice system in Newfoundland and Labrador, with particular focus on the processing of cases in the Provincial Court in St. John's, and to make practical recommendations to increase efficiency and reduce delay without compromising the fundamental principles of justice. The Task Force, launched in December 2007, was asked to provide its report prior to mid February 2008.

The Task Force examined each stage of the criminal process looking for ways to improve the speed and efficiency of criminal proceedings, while respecting the rights of the accused, the expectations of victims, and the needs of society. Following a literature review and informal consultations with interested and affected parties, it became apparent there were a number of areas where case processing could be made more efficient and fair in the frontline, criminal justice and court system.

The Task Force has concluded that implementation, in St. John's (by far the largest judicial center) will require an increase in and more effective deployment of resources, increased co-operation and co-ordination amongst the various participants in the criminal justice system, and the use of modern information technology. If these changes are fully effected they will increase efficiency and reduce delay at each stage of the criminal process.

A significant aspect of the focus of the Task Force was the examination of practices in the St. John's Provincial Court of Newfoundland and Labrador. Increased efficiency "unclogs" the courts and, consequently, leads to improved access to justice. There is no question that our system provides a great method for adjudicating questions of fact and law, but given the expenditure of public funds we are obliged to the people of Newfoundland and Labrador to provide the best possible system in terms of the efficiency of the process.

Some of the Task Force's recommendations can be implemented immediately with little or no cost. Other improvements require existing judicial, administrative, legal aid and prosecutorial resources be supplemented, in relatively modest ways.

The Costs of Delay – Apprehension to Adjudication

Delay in processing cases in the criminal trial courts has been a continuing focus of concern and reform. The voluminous literature on delay reviewed by the Task Force in the discharge of its mandate underscores the fact that case processing time beyond that which is necessary for a fair resolution of the issues, greatly undercuts the quality of justice. The point is often made that "justice delayed is justice denied" because witnesses may move or die, memories may fade, and the accused incurs costs because of pretrial restrictions on freedom, loss of income, and expenses incurred in mounting a proper defense. The accumulation of case delay produces backlogs that "waste court resources,

needlessly increase lawyer fees, and create confusion and conflict in allocating judges' time."

Experienced criminal law practitioners recognize that some measure of delay is necessary, and not of itself a bad thing. There are many systems of criminal justice which move far more speedily than our own, but whose standards of justice are not worthy of emulation. It is obviously desirable that allegations of serious wrongdoing are thoroughly investigated before any charges are laid. The reputation of a person who is charged with a serious criminal offence may be damaged irreparably even if that person is ultimately acquitted. Where consideration is being given to laying charges, it will often take considerable time to evaluate the evidence and to determine whether a prosecution should be brought. Prosecutors require reasonable time in order to prepare cases adequately for preliminary inquiry, and then for trial. Those accused must be afforded a reasonable opportunity to meet any case brought against them.

It is not delay as such, which is the problem, but rather delay which could have been avoided. Unnecessary delay:

- results in hardship for an accused who is in custody;
- renders it more difficult to ensure that any trial is fair;
- is likely to be prejudicial to the prosecution's case;
- can have a devastating effect upon both victims and key witnesses;
- increases costs and places additional pressure upon scarce resources; and
- breeds cynicism, and tends to bring the administration of justice into disrepute.

Many of these issues were identified and referred to in the *Purple Heart Campaign Report (2007).* The Task Force has observed that a number of local criminal practices and procedures continue simply out of inertia.

Release to Appear by Police – Time Frames and Information Sheets

The length of time between when the accused is arrested and first appears in court is approximately six to eight weeks. This period is excessive and may have arisen from inertia, confusion or miscommunication between the police and the court administration. Consultations with the Royal Canadian Mounted Police and Royal Newfoundland Constabulary quickly resulted in a commitment to reduce this time. It could be reduced from two months to two weeks with no added burden on the system.

Since almost half of those accused of crimes utilize the services of the Legal Aid Commission it is important that they have the necessary information about the application process as early as possible. The Task Force consulted with the police forces which service the St. John's metro region. Both the RCMP and RNC enthusiastically support the idea of making Legal Aid information available to people upon release. Currently, both police forces post Legal Aid information at their premises and have Legal Aid pamphlets on hand. These should be reviewed, revised and supplemented as necessary to

ensure that a person who is charged with an offence has the requisite information to guide him or her at the earliest point in the process.

Disclosure

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 available. Instructions as to how to proceed can then be obtained from the accused much earlier in the process and this will reduce the number of court appearances required before the case is resolved.

In all but the most complex cases disclosure materials are available from investigators at the conclusion of the police officer's work shift. Nevertheless it can take months before it is made available to the accused who is entitled to have it before being called upon to elect the mode of trial or plead to the charge. There are significant delays brought about by current practices which could be avoided.

A standard checklist should be developed and implemented by the police and the Crown to outline the proper contents of a Crown brief and disclosure packages. A checklist will make it easier for the Crown to quickly determine which material has been forwarded by the police. Also, it will eliminate, in most cases, the need for the Crown Attorney to prepare a second "disclosure inventory". Disclosure inventories are used by the Crown to keep track of what has or has not been provided to the accused. One standardized form could be used by both the police and the Crown, thereby eliminating this redundancy.

A significant initiative has already been undertaken by the prosecution in this critical area. The obligation to disclose and the extent and nature of the materials to be disclosed to the accused is addressed at length in the new *Guide Book of Policies and Procedures for the Conduct of Criminal Prosecutions in Newfoundland and Labrador (October 2007).* The *Guide Book* outlines the instructions of the Attorney General in the conduct of prosecutions and sets out the essential foundation upon which the public prosecution service is being reformed following the recommendations of the *Lamer Report 2006.* To enhance transparency and accountability the *Guide Book* will, for the first time, be made public. It contains the following statements (footnotes omitted):

Form of Disclosure

Crown Attorneys may provide the defence with copies of documents that fall within the scope of "basic disclosure" materials as defined above in either a paper format (e.g., photocopies) or an electronic format (e.g., by CD-ROM). Where the accused is unrepresented, Crown Attorneys should generally provide copies of such documents in a paper format.

Delaying or Limiting of Disclosure

Disclosure may only be delayed or limited to the extent necessary:

(a) to comply with the rules of privilege, including informer privilege;

(b) to prevent the endangerment of the life or safety of witnesses, or their intimidation or harassment; or

(c) to prevent other interference with the administration of justice.

Where a Crown Attorney limits disclosure to comply with the rules of privilege, the Crown Attorney shall so advise the defence.

In addition to the policy statements in the *Guide Book*, the Director of Public Prosecutions has issued directives on this subject and others which serve to emphasize the imperative nature and importance of certain practices. These directives are set out in Appendix A to this report.

As regards disclosure management initiatives, the *Guide Book* also states;

Disclosure Procedures

In all but the most routine of cases, the procedure followed in providing disclosure of the case is often critical to a successful prosecution. Unless planning and thought is given to developing a disclosure strategy and incorporating it into the operational plan, significant impediments to bringing the case before the court in a timely manner may arise.

Crown Attorneys can assist in disclosure management in a number of ways:

- *Providing advice on the general obligations to disclose as set out in case law;*
- *Providing advice and guidance on the structure of the disclosure process and strategy to ensure that the materials generated and collected by the investigators are in a form that meets prosecution needs and legal requirements;*
- *Providing advice on issues of privilege (such as police informer privilege) and editing; and*
- *Providing advice on the scope of disclosure that is required in a particular case*

(A complete statement of the policy of the Public Prosecutions Division on this subject is attached as Appendix "B").

An internal initiative is currently underway to implement this new *Guide Book* policy within the Public Prosecutions Division. In conjunction with the Crown Attorneys Office the Royal Canadian Mounted Police and Royal Newfoundland Constabulary have already made a significant commitment to ensure timely and complete disclosure. Efforts aimed at implementing *Directive #30* (infra) are already underway in the form of electronic disclosure of all cases from the RNC to the St. John's Crown Attorneys Office.

Other initiatives arising from management restructuring and redeployment at the Crown Attorney's Office St. John's, which include the use of paralegals or legal assistants to prepare disclosure packages in routine cases, have recently been completed. It is more efficient to have a qualified paralegal paid an approximate salary of $35,000 to do this work rather than a highly specialized, criminal lawyer earning $100,000. The Crown Attorneys can then be freed to carry out the complex analysis and duties for which they have been specially trained.

Early Critical Case Assessment

Earlier assessment of charges by Crown Attorneys can increase the overall efficiency of the criminal justice system. An early Crown review of police files will result in the discovery and termination of cases that are without a reasonable prospect of conviction. This will reduce the number of matters within the system so resources can be used to resolve viable cases. Conversely, early Crown input will strengthen worthy cases and this should result in earlier guilty pleas. Overall, Crown and defense workloads should decrease and judges will not have to hear trials on charges that should have been resolved at an earlier stage of the process. The overall efficiency and quality of our criminal justice system will be much improved.

The early and critical assessment of charges by the Crown requires two things:

1. Properly resourced Crown Attorneys Office;

2. Good working relationship between the Crown and the police so each can fulfill their respective roles.

Preparation by the prosecution and defence is mandatory in all cases. Since prosecutors have come to depend on guilty pleas immediately before trials and other postponements to allow them time for proper trial preparation in other cases, it is imperative that sufficient resources be made available to properly execute this function. This could result in considerable cost saving.

Crown Attorneys spend too much time doing work that should be handled by paralegals. More paralegals should be hired to do tasks such as preparing routine disclosure packages for defense counsel and organizing police files. This observation has already been made but bears repeating in this context as well. If these tasks were performed by paralegals, the Crown Attorneys would have more time to dedicate to the assessment of whether the charges laid by police have a reasonable prospect of being proven beyond a reasonable doubt.

On this subject the *Guide Book* sets out the following new instructions of the Attorney General to Crown Attorneys pursuant to the recommendations in the *Lamer Report (2006).* All footnotes have been omitted.

Critical Assessment of Charges

General Principles

Charge screening normally refers to the process by which a prosecutor, applying the "Decision to Prosecute" policy, critically assesses the advisability and appropriateness of proceeding with charges which have either been recommended or already laid by investigators. The purpose of this process is in part to ensure that only where proceedings are warranted do cases go forward, and that all cases proceed on the basis of appropriate charges. It also provides an opportunity to assess whether the investigation is complete or needs to be pursued. This type of initial intervention by prosecutors also permits an early

assessment of the manner in which the case should proceed or be dealt with, including the consideration of alternatives to prosecution.

Early charge screening and critical assessment of cases are decisive points in the prosecution process and constitute cornerstones of the criminal litigation policy. Crown Attorneys involved in this initial process will have a crucial impact on the way cases are dealt with.

In addition to the policy statements in the *Guide Book*, the Director of Public Prosecutions has issued Directives #1 - #3 on this subject, found in Appendix A.

A good working relationship between the Crown and police is also critical to the early assessment of charges. The police need to be able to obtain meaningful and timely advice from the Crown so they can make informed decisions on how, or how not, to proceed. Conversely, the police need to inform the Crown of upcoming charges and/or issues that may require special attention. The *Guide Book* contains the following statement:

> *In many ways law enforcement can be seen as a continuum. At one end, the police investigate criminal offences and arrange for suspected offenders to appear in court. At the other, the Attorney General, through the Crown Attorney, is responsible for neutrally and fairly presenting the Crown's case in court. Their roles are interdependent. While both have separate responsibilities in the criminal justice system, they must inevitably work in partnership to enforce criminal laws effectively.*

Role of Crown Attorneys before and after Charges Are Laid

Introduction

Crown Attorneys and investigative agencies play complementary roles in the criminal process. Both have roles to play before and after charges are laid. This is a substantial departure from past practices in Newfoundland and Labrador where there was, at one time, a general reluctance on the part of Crown Attorneys to become involved with advising the police prior to the laying of charges.

While the involvement of a Crown Attorney is not generally required as a matter of law at this stage, it has become increasingly apparent that it is desirable. Co-operation and effective consultation between the police and Crown counsel are essential to the proper administration of justice, as investigators are expected to gather evidence that is admissible and relevant to the charge. Later, when deciding whether to prosecute, consultation will often be helpful in assessing the sufficiency of the evidence and the public interest criteria.

Accordingly, Crown Attorneys should be available for consultation during an investigation and before the laying of charges. This will encourage investigators to ask their advice. It may also help to avoid the situation in which a person is charged unnecessarily and is needlessly subjected to the public censure and exposure attendant upon criminal proceedings.

In complex cases, Crown Attorneys may need to work closely with the police in identifying and acquiring relevant and cogent evidence. This does not mean, however, that Crown Attorneys should assume responsibility for work that properly should be done by investigators. At the end of an investigation, counsel's role is to provide the investigators with a fair and objective assessment of the strength of the case and the appropriateness of proceeding. In performing this assessment, counsel must guard against the possibility that he or she has been afflicted by "tunnel vision", i.e., has lost the ability to conduct an objective assessment of the case through contact with the investigating agency.

(A complete statement of the policy of the Public Prosecutions Division on this subject is attached as Appendix C).

Early Plea Discussions and Discounts

It has been recognized that implementation of practices which encourage early plea discussions between crown and defence would result in more efficiencies and time savings to the justice system and help avoid the unnecessary use of court time. It has been universally recognized that resolution discussions can also facilitate prompt and just disposition of cases in a manner more sensitive to the circumstances of the participants than would be possible in a formal trial.

As early as possible in the process the prosecution should indicate how it intends to elect in hybrid offences and the penalty sought. At meetings with criminal lawyers working at the Legal Aid Commission it was unanimously agreed that this alone would yield enormous benefits in the efficient resolution of cases.

This important subject is, for the first time in Newfoundland and Labrador, dealt with comprehensively, in the new *Guide Book*. The concomitant management and structural alterations to implement these policies are already underway as part of the administration changes and redeployment at the Crown Attorney's Office St. John's. The benefits to be gained from participation in pre-trial conferences, is also addressed in the policy.

As part of the new Criminal Litigation Policy implemented by the DPP, the new *Guide Book* states as follows (footnotes have been omitted):

Plea Discussions and Agreements

Introduction

In an environment of comprehensive and early disclosure of evidence, Crown Attorneys can often resolve issues of procedure, plea, facts and sentence to such an extent that running a case through the full criminal process would add little to what counsel achieve informally.

Discussions between Crown Attorneys and defence counsel which are intended to lead to a narrowing of the issues at trial, or which may avoid unnecessary litigation altogether, form an important and necessary part of the criminal justice system in Newfoundland and Labrador.

Discussions of this nature will be referred to throughout this section as "resolution discussions". Though not defined in the Criminal Code, resolution discussions embrace several practices: which charges an accused may plead guilty to, how the case may proceed, what an appropriate sentence might be, what the facts of the offence are for the purposes of a guilty plea, and, if the case is to proceed to trial, how the issues might be narrowed so as to expedite the trial. Resolution discussions can also facilitate prompt, just disposition of cases in a manner more sensitive to the circumstances of the participants than would be possible in a formal trial.

Crown Attorneys are to make their best efforts to reach agreements on such issues as soon as possible. The courts now recognize that it is appropriate for the Crown to enter into plea discussions with the accused and to agree to a lesser sentence or a lesser charge in return for an acknowledgement of guilt by the accused. It must be emphasized, however, that any recommendations made to the court as part of a plea or sentence discussion are subject to the overriding discretion of the court to accept or reject any submission

by counsel. The Newfoundland and Labrador Court of Appeal has decided that in determining whether a joint recommendation should be accepted depends upon if it is contrary to the public interest or would otherwise bring the administration of justice into disrepute.

In addition to the policy statements in the *Guide Book* reproduced in Appendix B, the Director of Public Prosecutions has issued Directives #10 - #17 on this subject which are reproduced at Appendix A.

Continuity of Crown and Legal Aid Counsel in Bail Court

The Crown Attorneys selected to handle the early assessment of charges and first appearances need to be well suited to that job. Ideally, the people selected need to be able to make decisions under pressure and have the confidence and substantive knowledge required to do what is necessary to bring a case to an early and just conclusion. This is a job for the "best Crowns". The same considerations apply to counsel provided by Legal Aid. Significant efficiencies are to be gained by ensuring that the right people are chosen for these complex tasks.

The Task Force recommends that managers in both offices be asked to give priority to this staffing issue.

Scheduling of Trials and Case Flow Management

Case-processing time has become one of the major criteria of trial court performance, akin to the use of arrest and recidivism rates in evaluating the police and corrections. The speed with which cases are processed has been viewed as having a determinative impact on numbers of cases handled, amount and types of resources required, and quality of justice achieved. Attacking trial court delay has therefore been a focus of reformers and researchers.

The Task Force reviewed the recently published *FPT Report on Early Case Consideration (2006)*. That report concluded that in studies of corporate innovation and excellence, as well as of courts and criminal justice, agencies in which there is success in attaining significant delay reduction goals, leadership emerges as a critically important characteristic. 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. The Task Force had the benefit of having as its co-chair Chief Judge Reid of the Provincial Court of Newfoundland and Labrador.

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 who come into contact with 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.

The Task Force'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 Task Force are dependent on the availability of a reasonable number of judges, court managers or administrators, prosecutors, and legal aid counsel. Moreover, the best system cannot work effectively if suitably modernized court facilities are not available. Only if adequate resources are provided will the potential efficiencies identified in these recommendations be fully realized. Nevertheless, additional resources alone will not bring about lasting change. Those in leadership positions in the criminal justice system must be effective in the implementation process.

A word of caution is in order. Experiences in other jurisdictions have led some observers 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 as well as 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.

Judges, lawyers and other court staff are not inert actors who perform tasks they are assigned. Empirical studies reviewed by the *Early Case Consideration Committee* which authored the *FPT Report on Early Case Consideration (2006)* referred to above, revealed that delays varied enormously across courts with almost identical structures, caseloads and personnel levels. 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. The *Case Flow Management Committee of the Provincial Court,* comprised of all stakeholders, may have a role to play in the implementation of the recommendations of this report.

Court Appearances and Scheduling of Criminal Trials

Cases which come before the Provincial Court in St. John's are taking too long to process in the front end of the criminal justice system. Limiting the number of unproductive appearances and finding better ways to achieve meaningful and efficient case scheduling are critical. Improvements in this area will yield immediate results.

Empty court rooms and idle (underutilized) judges are a tremendous waste of valuable resources. Our judges are the most highly valued personnel in the entire criminal justice system. The regular salary of a Provincial Court Judge is $177,063 which includes a bonus of 3.8% for the discharge of duties of Justices of the Peace carried on outside normal work hours. The current system, too often, ties a judge's hands and makes it impossible for him or her to continue to hear cases when a trial which has been scheduled months before, fails to proceed. This is especially troubling when there are hundreds of cases on the docket waiting to be heard. Because rescheduling a trial or preliminary inquiry can often only be done on a minimum of several weeks notice, a collapsed case,

which was scheduled to consume several days of court time, leaves a vacancy in the court calendar which can never be filled.

A similar situation arises when a case takes longer to complete than had been initially estimated. When this happens the continuation of the hearing must be postponed until the next available date even though only an extra hour or two of court time might be required. Long interruptions such as these create an inertia which can harm the interests of justice.

It is a well documented fact that criminal cases often fail to proceed (collapse) for a number of reasons beyond the control of the court. The current system of scheduling cases does not properly account for this. Court sitting times in St. John's have been declining for the last two years. It is a fact that in 2007, on average, in St. John's, only 31% of the available courtroom time was utilized. For 2006 and 2007, on average in St. John's, some 40% of the judge's available sitting time was lost primarily due to collapsed cases.

It is also evident that too much court time is expended on unproductive appearances and adjournments. In the majority of cases five to eleven appearances by both parties before a judge, sitting in a court room, are required before a case is set for trial. An inordinate amount of a judge's time is spent scheduling these cases for hearing. Statistics provided by the Provincial Court in St. John's indicate that this occupies as much as 72% of court sitting time. This activity requires few judicial skills. Under the existing regime, if all other legal preconditions are met an accused person is still required to attend court at least twice before a date can be set for hearing. Seldom is this minimum achieved.

Almost all of the court appearances currently being handled by Provincial Court Judges could, by law, be carried out by Justices of the Peace (See s.2, and Part XVI of the *Criminal Code of Canada*). The Justices of the Peace, employed at the Provincial Courts are now *inter alia* conducting hearings under sections 504, 507 and 508 of the *Code*. These Justices of the Peace are employed at a salary which is significantly less than a fully qualified Provincial Court Judge. As a matter of law and administration their duties could be expanded to relieve Judges from these routine and consensual appearances to focus on the substantive adjudications which they alone, are qualified to do. However, in the course of exploration of this option, it became apparent that policy decisions made by Government in 2004 to curtail the role of Justices of the Peace precluded any further consideration of this option absent a fundamental change.

The Task Force committee was informed by officials within the Department of Justice responsible for court administration, that it had been decided that Justices of the Peace (JPs) in this province lacked the requisite judicial training and independence. It had been concluded that the employment of those Justices in functions, which affect the rights and liberties of individuals, might be contrary the *Canadian Charter of Rights and Freedoms*. In 2004, the executive branch of Government and the Provincial Court Judges agreed that only Provincial Court Judges would perform these judicial duties. This eliminated the necessity of establishing a system (estimated to be cost-prohibitive) whereby JPs were

both judicially trained and compensated accordingly. In other provinces such, as Nova Scotia and British Columbia, fully trained, judicially independent Justices of the Peace carry out these duties.

Guidelines for sitting times established in British Columbia and Ontario standardize judge's sitting times at 165 to 170 days per year at 4.5 hours per day. This accommodates time for judges to discharge their many other non-presiding duties such as case management, judgment writing, administrative tasks, research, judicial meetings, education and professional development and many other important tasks. On average, based on the most recent (2007) figures available in St. John's, judges sit less than half (45%) of what is expected in these other provinces.

Unnecessary delays and scheduling problems can be eliminated in five important ways:

1. Utilization of a centralized electronic scheduling system controlled by the Court Administration where trials can provisionally be set without the immediate need for an appearance before a judge. An online booking process akin to those used by airlines would yield even greater savings and reduce the time spent waiting for adjudications.

2. Creative use, by the parties, of the new technological appearance provisions of the *Criminal Code* sections 650(1.1), 650(1.2) and 650.02. Advances in technology have revolutionized the modern world. The time has come for the administration of criminal justice to take full advantage of these improvements and find innovative ways for technology to create a more efficient justice system.

3. Expanded use, by the parties, of the new designation of counsel provisions of the *Criminal Code* s.650.01.

4. A new system of case assignment to court rooms and judges shortly before a hearing (instead of months in advance) based on adjudicative resource availability. The Case Assignment and Retrieval System (also known as the "**CAAR**" System) has the required flexibility. Once a case is commenced it could then continue until concluded without being restricted by the length of time which it had been estimated to take. Surplus or overbooking of cases could be done to reduce the loss of sitting time arising from collapsed cases, adjournments and last minute guilty pleas. This overbooking multiple could be adjusted and refined based on empirical data. This would also benefit from the creation of per diem judges who could be called upon short notice to supplement existing judicial resources when required.

5. Monitoring of trial readiness by court administrators or case managers by electronic communications with the parties. As soon as it is determined that a case will not require court time another can be set in its place. Good judges do not necessarily make good administrators.

The **CAAR** system proposed by the Task Force enables cases to be assigned in a manner which is dependant upon the assessment of the resources required on the day of hearing instead of months before. This would better ensure the full utilization of judicial resources and court facilities. Court rooms which would once be empty due to a collapsed case could then be filled. Judges who would otherwise be left without a case to decide could immediately be assigned another. In courts where more than one case is ready for hearing the excess cases could be retrieved and assigned to the next available court by the trial coordinator. Rigidity is replaced by flexibility.

The **CAAR** system requires a precisely timed and responsive deployment of judicial resources (courtrooms and judges) if it is to be fully effective. A combination of pretrial conferencing days or weeks in advance and coordination with the parties on the day of trial is essential. The current system permits transfer of cases between judges and courtrooms only under unusual circumstances. Under the **CAAR** system this would be the norm since often a particular case will have to be assigned or reassigned shortly before the hearing to fill an (otherwise) empty court. This reassignment could easily be accommodated up to the day prior to the hearing but would become most challenging in the event of a last minute collapse. In a system of this sort, the task of last minute reassignment will be critical. The degree of success will depend upon the cooperation of all parties.

Legal Aid Issues

1. Legal Aid must take a proactive role in the application process because applicants do not always apply for legal aid when they should or in a timely fashion. Frequently they do not provide the necessary financial information at all, in the correct form or in a timely fashion. Many appear to experience difficulty in completing the application process. Improving the process may be achieved in several ways:

    a) Open a Legal Aid office at the courthouse operated by an intake worker for immediate referral by the judge for completion of the application. This will require an additional staff member and it is believed that this requires a full time position. However, if not required for processing applications at court, this person can assist in the proactive application process.

    If the applicant is a recipient of social assistance and is charged with an indictable offence, eligibility can be determined immediately provided Legal Aid has immediate access to someone at HRLE. Case assignment will, however, still require a postponement of a short duration. It is felt that the office, for reasons of personal and information security, must be located within the Provincial Court area – one of the interview offices that are rarely used, for example.

b) For applicants not on social assistance, an additional intake worker to actively pursue obtaining the necessary financial information to determine financial eligibility.

c) A Legal Aid information sheet for judges and the courts. Some information sessions for judges so they better understand the application process, can help facilitate the process and reduce abuses.

d) Allow judges greater access to information regarding the status of a person's application. In order to overcome the legislative prohibition on this a consent/waiver provision can be added to the present application form.

e) Electronic appearances and out of court scheduling will help reduce court time.

f) An assistant to duty counsel program using paralegals and articling students will help make more efficient use of appearances and duty counsel. Depending on the outcome of Legal Aid's current budget request, this would not require additional funding.

g) Choice of counsel in murder cases, now being sought, will help reduce the delays in these cases prior to election and prior to the setting of preliminary inquiry dates as well as reduce the postponements of preliminary inquiries.

h) Early assignment and assessment of cases at Legal Aid and in the Crown's office.

i) Legal Aid does not have access to the youth offenders docket because of the legislative prohibition against publication of names and identity. It would help if this was available in advance and Legal Aid had access to the information on line. An amendment to the *Youth Criminal Justice Act* may be necessary to accommodate this.

The staff at Legal Aid is cautious regarding the effectiveness of the proactive initiatives outlined above, and is concerned that they should not be viewed as a panacea to the issues around Legal Aid applications. Some accused persons will still continue to manipulate the system, including Legal Aid. It can take time to obtain financial and other information.

Video Conferencing Technology

The Task Force 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.
- Expanded use of the new technological appearance provisions of the *Criminal Code* sections 650(1.1), 650(1.2) and 650.02.

There was strong support for this recommendation during the consultations. Many other provinces have implemented audio/video (A/V) as well as internet capabilities in their hospitals, correctional facilities and courts. Transporting accused to and from court for brief court appearances is expensive, disruptive to custodial institutions and dangerous. Once proper facilities are in place this can also serve to aid in remote testimony, child witnesses and other administrative and staff training uses. The Committee recommends that a permanent room be designated as an A/V room at the Provincial Court in St. John's. This room should be fully equipped with audio, visual and internet capabilities for the purposes outlined above.

It was determined by the Task Force that significant resources had been allocated to this equipment for the 2007 – 2008 fiscal year. The equipment for the courts has been purchased and its installation is nearing completion. Provision should now be made to ensure that use of these facilities is extended to correctional facilities and the relevant healthcare institutions.

Judicial Resources – Some Additional Observations

Standards for judicial sitting times set in Ontario and British Columbia (the standard) are compared to the actual sitting times of the Provincial Court in St. John's. Sick leave, out-of-court justice of the peace (JP) duties, circuit court and collapsed cases are taken into account in the analysis, which is found in Appendix D.

The utilization of judicial resources is not an exact science and is largely dependant upon case management. The focus of the analysis in this part of the report utilizes data and statistics from recent years. Some of the figures used are estimates and the conclusions are therefore approximate. The standard used and the figures derived represent the maximum potential of the judicial resources available. The standard is intended to be flexible and understood as such.

Throughout 2006 and 2007 the sitting time of the St. John's Court is on average 40% below the standard set by Ontario and British Columbia. This suggests that with a system that better utilizes current judicial resources significant improvements can be made in trial times at minimal extra cost. The cost of this loss in judicial salaries alone is in the order of $500,000.

Use of sick leave has dramatically increased since 2003 and 2004. Sick leave accounts for a substantial loss and the Provincial Court does not have the resources to compensate

for this. Recently a judicial position was transferred from St. John's to better service Labrador. The loss of this judicial position along with sick leave has undoubtedly contributed to the current backlog in the St. John's Court.

Paid leave for judges, when fully utilized, results in 225 lost work days. While it may not be possible to recapture this loss entirely, utilization of per diem judges would increase the available sitting time of the Court.

The court rooms in St. John's can accommodate over double the maximum number of available sitting hours of the judges. This means that the court facility can accommodate a multiple booking system without additional space being needed and without extending the sitting hours.

If the sitting time for judges is increased for any reason, this will result in more sitting time for clerks (reducing their time to process documents and type transcripts) and will require more staff. There will likely be more court time and preparation time for lawyers with the Crown Attorneys Office and the Legal Aid Commission since they will be expected to conclude more cases in the same amount of time. This may not necessarily require more lawyers and may be able to be accommodated through reorganization.

The Court should revise its management information system to allow initiatives and reforms such as those recommended in this report to be properly evaluated. Such a system should include hours booked, hours convened by courtroom and by judge (especially per diem judges), sick leave and paid leave taken, the number of collapsed cases (including the reason why), time spent on out-of-court JP duties, time providing relief for other courts and any other relevant data or statistics.

Appendix A

Guide Book of Policies and Procedures for the Conduct of Criminal Prosecutions in Newfoundland and Labrador (October 2007)

(Extract – Footnotes Omitted)

*Selected **Directives** on the **Conduct of Criminal Litigation***

DIRECTIVE #1

Critical assessment of the Crown's case should be assigned to a Crown Attorney capable of effectively and independently assessing:

- ***the sufficiency of the evidence and the public interest in prosecuting;***
- ***where a young person is charged, the availability of diversion as an alternative to the laying of, or proceeding with, charges; and***
- ***the need for the law enforcement agency involved to complete its investigation.***

To avoid having court time and other resources unnecessarily dedicated to charges that will not proceed, or a person charged unnecessarily, charge screening must be completed as soon as reasonably possible.

DIRECTIVE #2

Every charge will be assessed as soon as reasonably possible and prior to setting the date for trial or preliminary inquiry.

In complex or major cases, the assessment must be carried out before the indictment is preferred.

Because of the importance and scope of charge screening under this policy, a record of decisions made at that stage should be maintained. Such a record will serve several purposes, including certainty and consistency of approach.

DIRECTIVE #3

Prosecutors will keep a record of the assessment in each case indicating what has been done and, where appropriate, the reasons for so doing.

Prosecutorial Independence

Charge screening and critical assessment is not a continuation of the investigation, but rather an opportunity for counsel to independently assess the merits of the Crown's case before going forward with the prosecution.

Plea Discussions and Agreements

Introduction

A large percentage of criminal cases are resolved by a guilty plea, which may result in substantial savings for the system in general. On the other hand, few accused would plead guilty if there were not some advantage in doing so. The courts now recognize that it is appropriate for the Crown to enter into plea

discussions with the accused and to agree to a lesser sentence or a lesser charge in return for an acknowledgement of guilt by the accused. As noted by Carthy J.A. of the Ontario Court of Appeal, "... the justice system acknowledges and encourages plea-bargaining and must show some resistance to undoing a bargain". Plea discussions provide an opportunity to explore the benefits of such a plea.

DIRECTIVE #10

Crown Attorneys will seek, to the extent reasonably possible, to dispose of charges through plea discussions and agreements.

It is important to note that the rationale for engaging in plea discussions applies whether the case is a routine one or one likely to prove long and complex. In either case, plea discussions should be actively pursued, and the accused may be entitled to some advantage in return for a guilty plea. The distinction between these two situations lies in the particular focus of the litigation policy and the fact that the public interest is not necessarily reflected in the same way in both situations. Thus, it is easier to justify a more lenient approach to the resolution of routine (and usually less serious) cases than it is in respect of offences that are more serious and require stern denunciation. Moreover, the overall object of the policy is to encourage the early disposition of routine cases so that the necessary resources will be available for the prosecution of the more serious and complex cases.

DIRECTIVE #11

Cases involving the commission of serious offences may require that particular consideration be given to the need for public denunciation in determining whether a particular agreement on plea is in the public interest. This does not preclude seeking a mutually agreeable resolution in these as in all other cases.

Informed and Voluntary Pleas

A guilty plea which is not voluntary and informed does not serve the interests of justice, or the prosecution's interest in the early and conclusive resolution of cases.

DIRECTIVE #12

Where circumstances warrant, Crown Attorneys should initiate the appropriate plea comprehension inquiry, with special attention being given to the situation of unrepresented accused.

Moreover, it is important to remember that the object of plea negotiations is to avoid the costs of unnecessary litigation, but only in cases where the accused is guilty, and willing to admit guilt.

DIRECTIVE #13

Crown Attorneys will never enter into a plea agreement where an accused continues to claim his or her innocence.

Early Pleas

Guilty pleas are sometimes offered on the eve of, on the day of or during the course of trial, after the prosecution, police and the courts have already expended considerable time and resources dealing with the case. The administration of justice benefits from properly considered guilty pleas being entered at the earliest possible stage in the process. The approach to negotiations should accordingly tend to favour early pleas and discourage late pleas to the extent possible.

DIRECTIVE #14

Crown Attorneys will inform the defence of their best offer in return for a guilty plea as early as reasonably possible in the criminal process.

DIRECTIVE #15

Senior Crown Attorneys will establish within their respective offices a practice aimed at ensuring that the Crown's initial plea offer is communicated to the accused at the first reasonable opportunity.

DIRECTIVE #16

Absent a change in circumstances, no subsequent offer of settlement made by the Crown should be more advantageous to the defence than the initial plea arrangement proposed.

DIRECTIVE #17

Senior Crown Attorneys will put in place practices in their respective offices to oversee when and how a prosecutor may depart from a previous assessment of the best possible offer or agree to negotiate a sentence for plea at any time after the trial date has been set.

Where circumstances warrant, prosecutors should argue that the court should not grant the accused who enters a late plea the same extent of benefits which can sometimes accompany a plea of guilty. A late plea entered by an accused who has received timely disclosure does not reflect the element of reformation which is the usual basis for granting a benefit in return for the plea. Moreover, resource limitations within the criminal justice system are now such that the system cannot afford to encourage late pleas by treating them in the same manner as early pleas.

DIRECTIVE #25

In accordance with the Disclosure policy, disclosure will be provided as soon as it is reasonably possible.

DIRECTIVE #29

Crown Attorneys involved in complex investigations will advise investigators on the issue of disclosure and on the preparation of the necessary disclosure material as the investigation progresses.

DIRECTIVE #30

The DPP will explore with law enforcement agencies how the use of available technology can provide more cost-effective means of providing disclosure.

Appendix B

Guide Book of Policies and Procedures for the Conduct of Criminal Prosecutions in Newfoundland and Labrador (October 2007)

(Extract – Footnotes Omitted)

Plea Discussions and Agreements

Introduction

In an environment of comprehensive and early disclosure of evidence, Crown Attorneys can often resolve issues of procedure, plea, facts and sentence to such an extent that running a case through the full criminal process would add little to what counsel achieve informally.

Discussions between Crown Attorneys and defence counsel which are intended to lead to a narrowing of the issues at trial, or which may avoid unnecessary litigation altogether, form an important and necessary part of the criminal justice system in Newfoundland and Labrador.

Discussions of this nature will be referred to throughout this section as "resolution discussions". Though not defined in the Criminal Code, resolution discussions embrace several practices: which charges an accused may plead guilty to, how the case may proceed, what an appropriate sentence might be, what the facts of the offence are for the purposes of a guilty plea, and, if the case is to proceed to trial, how the issues might be narrowed so as to expedite the trial. Resolution discussions can also facilitate prompt, just disposition of cases in a manner more sensitive to the circumstances of the participants than would be possible in a formal trial.

Crown Attorneys are to make their best efforts to reach agreements on such issues as soon as possible. The courts now recognize that it is appropriate for the Crown to enter into plea discussions with the accused and to agree to a lesser sentence or a lesser charge in return for an acknowledgement of guilt by the accused. It must be emphasized, however, that any recommendations made to the court as part of a plea or sentence discussion are subject to the overriding discretion of the court to accept or reject any submission by counsel. The Newfoundland and Labrador Court of Appeal has decided that in determining whether a joint recommendation should be accepted depends upon if it is contrary to the public interest or would otherwise bring the administration of justice into disrepute.

These guidelines are intended to clarify the issues which Crown Attorneys may attempt to resolve, and to help ensure consistency in approach.

Statement of Policy

Crown counsel's approach to resolution discussions must be based on several important principles: fairness, openness, accuracy, non-discrimination and the public interest in the effective and consistent enforcement of the criminal law.

Crown Attorneys may participate in resolution discussions where:

- *the case meets the charge approval standard set out in this Guide Book as regards the Decision to Prosecute;*
- *the accused is willing to acknowledge guilt unequivocally; and*
- *the consent of the accused to plead guilty is both voluntary and informed*

Because of the importance of such discussions, Crown Attorneys should keep a record in respect of any offers made, or agreements reached.

Application of the Policy

The following guidelines are not designed to require a set form. Instead, they are intended to give Crown Attorneys some guidance as to how to engage in meaningful discussions.

Charge Discussions

Charge discussions may properly include the following:

- *reducing a charge to a lesser or included offence;*
- *withdrawing or terminating proceedings related to other charges;*
- *agreeing not to proceed on a charge or agreeing to terminate proceedings with respect to charges against others (for example, friends or family of the accused, or individual corporate officers);*
- *agreeing to reduce multiple charges to one all-inclusive charge (where permitted by law); and*
- *agreeing to terminate proceedings with respect to certain counts and proceed on others, and to rely on the material facts that supported the terminated counts as aggravating factors for sentencing purposes. (This may not be done, however, where the counts to be withdrawn are serious charges unrelated to the charges for which guilty pleas are entered.)*

The following practices are not acceptable:

- *instructing or proceeding with unnecessary additional charges to secure a negotiated plea;*
- *agreeing to a plea of guilty to an offence not disclosed by the evidence; or*
- *agreeing to a plea of guilty to a charge that inadequately reflects the gravity of the accused's provable conduct unless, in exceptional circumstances, the plea is justifiable in terms of the benefit that will accrue to the administration of justice, the protection of society, or the protection of the accused.*

Procedural Discussions

Procedural discussions may properly include the following:

- *agreeing to proceed summarily instead of by indictment;*
- *agreeing to dispose of the case at a specified future date if, on the record and in open court, the accused is prepared to waive the right to a trial within a reasonable time; and*
- *agreeing to the transfer of charges to or from Newfoundland and Labrador, or to or from a particular region within Newfoundland and Labrador.*

Sentence Discussions

Sentence discussions may properly include the following:

- *a recommendation by Crown Attorneys for a certain range of sentence or for a specific sentence;*
- *a joint recommendation for a range of sentence or for a specific sentence;*

- *an agreement by Crown Attorneys not to oppose a sentence recommendation by defence counsel which has been disclosed in advance;*

- *an agreement by Crown Attorneys not to seek additional optional sentencing measures (for example, prohibition orders, preventive detention, forfeiture). However, Crown counsel cannot negotiate sentencing measures which apply by operation of law;*

- *an agreement by Crown Attorneys not to seek more severe punishment by proceeding with a Notice of Intention to Seek Greater Punishment;*

- *agreement by Crown Attorneys not to oppose the imposition of an intermittent sentence rather than a continuous sentence; and*

- *the type of conditions to be imposed on a conditional sentence.*

The following practice is not acceptable:

- *a promise in advance not to appeal the sentence imposed at trial.*

Conducting Sentence Discussions

The following principles should inform Crown counsel's approach to sentence negotiation:

- *Because of the benefits that flow to the administration of justice from early guilty pleas, the Crown Attorneys should make its best offer to the accused as soon as practicable. Absent a significant change in circumstances, the offer should not be repeated at later points in the process.*

- *Crown Attorneys should initiate, as well as respond to, plea discussions;*

- *Crown Attorneys who conduct sentence negotiations shall have full authority to enter into binding agreements;*

- *Senior Crown Attorneys shall ensure that counsel are made available to conduct plea and sentence discussions; this may include, for example, the court where accused persons make their first appearance; and*

- *Where an accused changes counsel, Crown Attorneys should advise the new counsel of previous offers and the Crown's current position.*

- *Before recommending that a fine be imposed, Crown Attorneys should take every reasonable measure to ensure that the fine is an appropriate disposition, which will necessarily include forming an opinion as to whether an offender is capable of paying the fine. Where possible, Crown Attorneys should, as part of the negotiations for resolving the file by way of a fine, arrange with the defence for the payment of the fine on the day of sentencing; if the money to pay is not immediately available, but will be in the near future, Crown counsel should seek to have the sentencing proceedings take place on that day.*

Agreements on the Facts of the Offence

Where an accused decides to plead guilty, Crown Attorneys should agree to put before the court those facts that could have been proved by admissible evidence if the matter went to trial. Discussions regarding the facts may properly include the following:

- *agreeing not to include in representations to the court embarrassing facts which are of little or no significance to the charge; and*

- *agreeing to rely on an agreed statement of facts.*

The following practices are not acceptable:

- *an agreement respecting facts which results in or gives the appearance of misleading the court, such as:*

    a. an agreement not to advise the court of any part of the accused's provable criminal record which is relevant or could assist the court;

    b. an agreement not to advise the court of the extent of the injury or damages suffered by a victim;

    c. an agreement to withhold from the court facts that are provable, relevant, and that aggravate the offence; or

    d. an agreement to outline facts to the court which, when measured against the essential elements of the offence to which the accused has pleaded guilty, would cause the presiding judge to reject the plea in favour of a plea of not guilty.

Pre-Trial Conferences

Pursuant to s. 625.1(2) of the Criminal Code, pre-trial conferences are mandatory for cases in which a jury trial is to take place. Pre-trial conferences may also take place in trials to be conducted by a judge or justice alone, pursuant to s. 625.1(1). A pre-trial conference may also take place under Rule 15 of the Rules of the Provincial Court of Newfoundland and Labrador in Criminal Proceedings.

Judicially supervised pre-trial conferences are now an entrenched and important facet of our criminal justice system. They are effective not only for encouraging fair dispositions of cases without trial, but also for narrowing the issues in cases that do proceed to trial. Crown Attorneys are encouraged to take whatever steps are reasonably possible to ensure that such conferences run smoothly which may include:

- *ensuring that sufficient disclosure has been made to defence counsel prior to the pre-trial conference;*

- *meeting with defence counsel prior to the pre-trial conference;*

- *attempting to secure the attendance of an investigator on the case, where such attendance would be useful or necessary;*

- *initiating steps with court administrators for the holding of a pre-trial conference, where the court has not done so; and*

- *identifying before the pre-trial conference those areas in which agreements can be reached on issues which would shorten the proceedings.*

Narrowing the Issues for Trial

For cases that are proceeding to trial, it is incumbent on Crown counsel to attempt to narrow the issues to be litigated as much as possible. Towards this end, Crown Attorneys should:

- *identify any legal issues that may arise and seek the defence's position on those issues;*

- *more particularly, identify those issues from which defence counsel might make admissions, such as voir dires on the admissibility of statements; and*

- *identify witnesses whose evidence may not be necessary, so that unnecessary subpoenas are not issued.*

Consultation and Accountability

The resolution of cases and issues is often a difficult process and it is impossible to prepare precise instructions for prosecutors which predict and address the subtleties of every case. The guidance available to prosecutors is necessarily given in general terms with room for adaptability to the actual circumstances with which the prosecutors are faced. This is a process, however, in which experience can be valuable. The Law Reform Commission of Canada and the Martin Report have observed that the criminal justice system should not be deprived of this experience in regard to prosecutorial decisions. Continuous consultation between prosecutors, supervisors, and experienced colleagues in regard to the resolution of cases helps to ensure consistency in approach, permits the sharing of knowledge and information, and enhances the professional development of Crown Attorneys.

It is not possible (and probably not desirable) to prepare an exhaustive list of cases and situations which should or must involve consultation and team work. The need to consult will vary to some extent with the type of case, the experience of the persons involved, and the opportunities for consultation. Without limiting the general need for consultation in regard to significant and difficult decisions, the following principles are applicable to consultation in the decision to prosecute cases:

1. *Crown Attorneys **must** consult with the Senior Crown Attorney in regard to the decision to terminate proceedings in any case involving:*

   (a) a death, or

   (b) charges against public figures or persons involved in the administration of justice.

2. *Crown Attorneys **should** consult with the Senior Crown Attorney in regard to the decision to terminate proceedings in the following types of cases:*

   (a) criminal conduct involving group or organized activity;

   (b) cases expanding the use of particular Criminal Code provisions, or which raise novel issues relating aboriginal rights or any other legislation, including the Charter; and

   (c) cases which have attracted media attention, or which will likely be of public concern when presented in court.

3. *Crown Attorneys are strongly encouraged to consult with the Senior Crown Attorney and experienced colleagues in regard to the decision to terminate proceedings in all other significant or unusual cases. The determination of whether a case is significant requires judgment by the prosecutor involved. If a lengthy prison sentence appears to be appropriate for the criminal conduct, this may be a strong indicator that the matter is significant enough to involve consultation. Cases with multiple victims, large losses of property or which involve criminal activity at several locations are other examples of cases often considered to be significant.*

4. *Crown Attorneys are strongly encouraged to consult with Senior Crown Attorneys and experienced colleagues before deciding to terminate proceedings any case in which they are unsure of either the strength of the case or whether the evidential threshold is met.*

Unrepresented Accused

Plea or sentence negotiations with an unrepresented accused call for extreme care. In general, Crown Attorneys should not initiate negotiations with an unrepresented accused; if approached by an accused, however, counsel may negotiate in accordance with this policy. It is essential that any such discussions proceed only where it is clear that the accused is acting voluntarily. Pursuant to s. 606 (1.1) of the Criminal Code, a court must be satisfied that pleas of guilty are made voluntarily and understood by accused persons.

Crown Attorneys should first encourage the accused to retain counsel and, where appropriate, advise the accused of the availability of legal aid. If the accused declines to retain counsel, Crown counsel should generally arrange for a third person to be present during discussions because of the need to maintain an arms-length relationship with the accused. A detailed record should be kept of all discussions. In most instances, a written agreement or written evidence of an agreement will be appropriate. When the case is disposed of in accordance with a negotiated plea or sentence agreement, Crown Attorneys should tell the judge about the existence of the agreement and that the accused was encouraged to retain counsel but declined to do so.

Crown Attorneys should not conduct plea or sentence discussions with an unrepresented accused unless satisfied that the accused has been given full disclosure or is aware of the right to full disclosure.

Accuracy

Crown Attorneys should maintain a complete record of all plea and sentence discussions or agreements on the file. This will promote a consistent and informed practice.

It is important to maintain detailed records of resolution discussions and the rationale for agreements. In this way, "Crown-shopping" will be discouraged and continuity in approach will be maintained. Accurate records also enhance the ability of the Crown Attorneys' Office to provide appropriate information to the public and persons directly involved in a case, thus increasing confidence in the justice system.

In routine cases where the accused pleads guilty early in the criminal process and the Crown Attorney agrees to a sentence within the usual range for the offence charged, the position of the Crown and its rationale will usually be apparent from the court record. In all other instances, careful notes should be made in the prosecution file outlining any discussions which have occurred with defence counsel, any consultations with supervisors or colleagues, and the rationale for the position taken. This is particularly important when the
Crown Attorney has taken an "unusual" position; the case is complex; the prosecution is (or may be) passed on to another prosecutor; or the case is likely to attract public attention. When a matter is resolved as a result of plea discussions and an agreement between counsel, this fact should be stated on the record in open court as a "joint submission".

Openness and Fairness

The general principles of openness and fairness apply to all forms of discussions referred to above. Both principles are explained here.

Openness

Crown Attorneys should, where reasonably possible, solicit and weigh the views of those involved in the Crown's case -- in particular, the victim (where there is one) and the police or other investigating agency. However, after consultation, the final responsibility for assessing the appropriateness of a plea agreement rests with Crown Attorney. If a plea agreement is reached, counsel should try to ensure that victims and investigating agencies understand the substance of the agreement and the reasoning behind it. The scope of this discussion may, in unusual circumstances, have to be limited by privacy or secrecy considerations in the accused's interest or in the general public interest.

Where a plea or sentence agreement has been reached, counsel should present the proposal to the trial judge in open court and on the record. This is often framed as a "joint submission". In certain circumstances, it may be necessary to discuss some aspects of the agreement with the trial judge privately. This should be done only in rare and compelling situations involving facts which in the interest of the public or the accused ought not to be disclosed publicly. Common examples include cases where the accused is terminally ill, or has acted as a confidential informer for the police. The best mechanism for this may be an in camera hearing. It is not acceptable, however, to discuss a plea agreement privately with the trial judge in advance of the hearing to determine the court's reaction to it. This does not, however, prevent counsel's participation in a pre-trial conference conducted under section 625.1 of the Criminal Code or

under the Provincial Court Criminal Rules. Counsel may conduct sentence proceedings before the judge who presides over the pre-trial conference.

Fairness

All negotiated plea or sentence agreements should be honoured by the Crown unless fulfilling the agreement would clearly be contrary to the public interest. For example, Crown Attorneys must not proceed with an agreement if counsel has reason to believe that the criteria set out in "The Decision to Prosecute" section of this Guide Book have not been met. Additionally, Crown Attorneys may be justified in refusing to fulfill an agreement if misled about material facts. The decision not to fulfill an agreement should only be made after consultation with, and approval of, the Senior Crown Attorney.

As well, if counsel disagrees with an agreement earlier reached by a colleague, the matter should be referred to the Senior Crown Attorney, if the matter cannot be resolved between colleagues.

If an accused enters a plea based on a negotiated plea or sentence agreement and the court disposes of the case on those terms, no appeal may be undertaken unless exceptional circumstances exist and the Senior Crown Attorney authorizes the appeal after consultation with the DPP.

Appendix C

Guide Book of Policies and Procedures for the Conduct of Criminal Prosecutions in Newfoundland and Labrador (October 2007)

RELATIONSHIP BETWEEN CROWN ATTORNEYS AND THE POLICE

Introduction

In many ways law enforcement can be seen as a continuum. At one end, the police investigate criminal offences and arrange for suspected offenders to appear in court. At the other, the Attorney General, through the Crown Attorney, is responsible for neutrally and fairly presenting the Crown's case in court. Their roles are interdependent. While both have separate responsibilities in the criminal justice system, they must inevitably work in partnership to enforce criminal laws effectively.

This section of the ***Guide Book of Policies and Procedures for the Conduct of Criminal Prosecutions in Newfoundland and Labrador*** *describes the responsibilities of the police and Crown Attorneys, emphasizing the role of each in the administration of justice. Special attention is given to the following: the authority to commence prosecutions and deal with prosecutions once commenced, consultations, critically assessing or screening cases, and resolving disagreements between police and Crown Attorneys. The policy with respect to the termination of proceedings is set out in a separate section of this Guide Book.*

The Common Law

Maintaining the independence of the police from direct political control is fundamental to our system of law enforcement. Under the common law, the police could not be directed by the Executive Branch of Government or by the House of Assembly (or Parliament) to start an investigation, much less lay charges. As one former Attorney General said, "No one can tell an officer to take an oath which violates his conscience and no one can tell an officer to refrain from taking an oath which he is satisfied reflects a true state of facts". In R. v. Metropolitan Police Commissioner, ex parte Blackburn, Lord Denning described the principle in this way:

> *I hold it to be the duty of the Commissioner of Police, as it is of every chief constable, to enforce the law of the land. He must take steps so to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace. He must decide whether or not suspected persons are to be prosecuted; and, if need be, bring the prosecution or see that it is brought; but in all these things he is not the servant of anyone, save of the law itself. No Minister of the Crown can tell him that he must, or must not, keep observation on this place or that; or that he must, or must not, prosecute this man or that one. Nor can any police authority tell him so. The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone.*

It should be noted here that, for particular reasons, some Criminal Code offences -- for instance, public nudity, requires the consent of the Attorney General before an information can be laid.

Role of Crown Attorneys before and after Charges Are Laid

Introduction

Crown Attorneys and investigative agencies play complementary roles in the criminal process. Both have roles to play before and after charges are laid. This is a substantial departure from past practices in Newfoundland and Labrador where there was, at one time, a general reluctance on the part of Crown Attorneys to become involved with advising the police prior to the laying of charges.

While the involvement of a Crown Attorney is not generally required as a matter of law at this stage, it has become increasingly apparent that it is desirable. Co-operation and effective consultation between the police and Crown counsel are essential to the proper administration of justice, as investigators are expected to gather evidence that is admissible and relevant to the charge. Later, when deciding whether to prosecute, consultation will often be helpful in assessing the sufficiency of the evidence and the public interest criteria.

Accordingly, Crown Attorneys should be available for consultation during an investigation and before the laying of charges. This will encourage investigators to ask their advice. It may also help to avoid the situation in which a person is charged unnecessarily and is needlessly subjected to the public censure and exposure attendant upon criminal proceedings.

In complex cases, Crown Attorneys may need to work closely with the police in identifying and acquiring relevant and cogent evidence. This does not mean, however, that Crown Attorneys should assume responsibility for work that properly should be done by investigators. At the end of an investigation, counsel's role is to provide the investigators with a fair and objective assessment of the strength of the case and the appropriateness of proceeding. In performing this assessment, counsel must be guard against the possibility that he or she has been afflicted by "tunnel vision", i.e., has lost the ability to conduct an objective assessment of the case through contact with the investigating agency.

Statutorily Prescribed Involvement of Crown Counsel Before Charges Are Laid

In some instances, Crown Attorneys become involved in an investigation because of statutory requirements. These include, but are not limited to:

- *Obtaining authorizations for electronic surveillance pursuant to section 186 of the Criminal Code;*
- *Obtaining special search warrants and restraint orders pursuant to sections 462.32 and 462.33 of the Criminal Code in respect to suspected proceeds of crime;*
- *Obtaining management orders pursuant to section 490.81 of the Criminal Code;*

In these situations, Crown counsel can assist in preparing the materials necessary to seek such approval and in making the application to court, where applicable.

Non-Statutory Involvement of Crown Attorneys

Crown Attorneys can provide a wide range of assistance to investigators. In most of these non-statutory roles, Crown Attorneys play a supporting role, with the investigator drafting the materials and providing them to Crown Attorneys for review.

Advice Concerning Police Operations

The police have complete autonomy in deciding whom to investigate and for what suspected crimes. They also have the discretion to decide how to structure an investigation and which investigative tools to use.

However, prior to undertaking an investigation or in its early stages, investigators may wish to consult with a Crown Attorney for advice and guidance as to how the investigation should be structured to ensure a sustainable prosecution. It is best to make structural decisions early in the investigation, rather than waiting until it is too late to take corrective action. For example, if the operational plan contemplates an investigation of a large criminal organization or complex commercial fraud, it may be prudent to consult Crown Attorneys prior to undertaking the investigation. Decisions can be made early in the investigation that may assist in developing a case that can be put before the courts in an effective manner.

Crown counsel must be involved, as a practical matter of law, in the rare case of the granting of immunity from prosecution. Agreements to this effect should be reduced to writing.

While generally investigators are fully versed in the requirements for obtaining a search warrant, investigative agencies often regard consultation with Crown Attorneys as advisable, particularly when dealing with novel situations or potentially high profile searches.

Crown Attorneys can provide advice in obtaining a wide range of warrants and orders, including:

- *General warrants*
- *Tracking warrants*
- *Dialed number recorder warrants*
- *DNA warrants*
- *Production orders under sections 487.012 and 487.013 of the Criminal Code*

The nature of assistance will range from advising as to whether a warrant is needed to assisting in the drafting of the application. Actual drafting of these types of materials by Crown Attorneys should be considered necessary only in the most complex or sensitive of cases. Members of the RNC and R.C.M.P. assigned to cases which utilize these investigative tools usually have the expertise necessary to prepare the supporting documents.

Access to Sealed Packets

In some cases, investigators will obtain an order to seal a search warrant and supporting materials. Occasionally, either the subject of the search or the media may apply for access to the sealed materials. Crown Attorneys may appear on those applications.

The decision as to whether the initial sealing order ought to continue, or whether some form of partial release of information can be made, is made jointly by investigators and the Crown Attorney.

Extensions of the Time the Seized Items May be detained

As investigations have become more complex, the ability of investigators to conclude a case within the initial three month detention period provided by subsection 490(2) has become problematic. In many cases, the investigation may continue for a lengthy period after the search is conducted.

The Criminal Code provides for three stages of detention:

- *The first three months – ordered by the justice who receives a Form 5.2 Report;*
- *The next nine month period; or*
- *A period longer than one year from the date of seizure.*

Section 490 allows applications for detention to be made by either a prosecutor or a peace officer. In the vast majority of cases, peace officers are capable of dealing with these applications without the involvement of a Crown Attorney. However, in some cases, the application to extend can be a very complex proceeding. Protection of ongoing investigations, informers and other related issues might arise. The individual searched may attempt to use the detention hearing as a means of gaining access to the police file long before charges can be laid.

Crown Attorneys can play a role in detention hearings, including:

- *Reviewing and providing input into affidavit material prepared by investigators (even where Crown counsel may not appear at the hearing).*

- *Providing advice to investigators concerning the type of information that ought to be detained and that which ought to be returned.*

- *Appearing on contested hearings, where it is anticipated that complex issues will arise.*

Preparation of the Court Brief

The Court Brief is one of the most important documents that an investigator will prepare during the course of an investigation. It is through the brief that an investigator presents the theory of his or her case and demonstrates the evidence that exists to prove that theory.

Crown Attorneys can assist in a number of ways in the preparation of the brief, including:

- *Providing advice in the planning stages on how to structure the brief;*

- *Providing input during the course of an investigation on areas in the brief that need to be improved or addressed; and*

- *Providing advice on the use of electronic briefs.*

Disclosure Procedures

In all but the most routine of cases, the procedure followed in providing disclosure of the case is often critical to a successful prosecution. Unless planning and thought is given to developing a disclosure strategy and incorporating it into the operational plan, significant impediments to bringing the case before the court in a timely manner may arise.

Crown Attorneys can assist in disclosure management in a number of ways:

- *Providing advice on the general obligations to disclose as set out in case law;*

- *Providing advice and guidance on the structure of the disclosure process and strategy to ensure that the materials generated and collected by the investigators are in a form that meets prosecution needs and legal requirements;*

- *Providing advice on issues of privilege (such as police informer privilege) and editing; and*

- *Providing advice on the scope of disclosure that is required in a particular case*

Interviewing of Witnesses Prior to Charges

Generally, Crown Attorneys do not interview witnesses before charges are laid. Crown Attorneys assesses potential evidence by reviewing the material contained in the Court Brief, and in deciding whether the Decision to Prosecute criteria are met. This may include, for example, viewing videotaped statements of witnesses.

However, in some circumstances, it may be appropriate for Crown Attorneys to interview a witness prior to charges being laid. Situations where this might be appropriate include:

- *Where the prosecution will depend on witnesses of an unsavoury background, such as police agents and jailhouse informers. Given issues of credibility that arise with witnesses of this type, a pre-charge interview is generally prudent;*

- *Where the prosecution will depend on witnesses who may be reluctant to testify, given their lack of familiarity with the Courts and the special nature of the alleged offence. For example, where the*

allegation involves sexual assaults or young children, an interview may be appropriate to allow Crown Attorneys to explain the process and the protections for the witness. Here, caution must be used to ensure that the Crown Attorney is not taking on the role of investigator, but is instead, providing the witness with some additional information concerning the court process;[f]

- *Where the case involves particularly problematic Charter issues that necessitates a closer examination of the evidence; and*

- *Cases where there is a statutory requirement for Crown to consent to the laying of charges.*

During the Course of an Investigation

It is impossible to anticipate all forms of advice that Crown counsel is able to give during the course of investigation. When in doubt whether Crown Attorneys can assist, a senior investigator should contact the Senior Crown Attorney in the Region to determine if assistance can be given. Some examples of general advice include:

- *advice on limitation periods for the laying of charges and the renewal or extension of court orders;*

- *providing advice concerning agents and informers;*

- *providing advice as to whether a search warrant is needed in particular circumstances;*

- *whether taped interviews should be conducted with witnesses (e.g. "K.G.B." statements) and questions that should be asked to address certain aspects of proof. Counsel may also review transcripts and videotapes of interviews of key witnesses to provide input to investigators on the quality and reliability of such persons as Crown witnesses.*

Critical Assessment of Charges

The role of the Crown Attorney in the critical assessment or "screening" of charges raises a number of difficult issues. Investigators are clearly entitled to seek and receive legal advice before laying charges. Equally clear is the desirability of an effective working relationship to foster consultation when charges are considered. However, the extent to which the Attorney General can at law prevent the laying of charges, because of insufficient evidence or because a particular prosecution is not in the public interest, is not at all clear.

Some authorities argue that it is fundamental to our system of laws that no one can direct an investigator to lay a charge, or to refrain from doing so. Indeed, whether and to what extent the right of "anyone" (including a police officer) to lay an information under section 504 of the Criminal Code can be confined or abrogated is debatable.

In practice, however, a form of pre-charge screening or "charge approval" occurs in Quebec, New Brunswick and British Columbia. Under these schemes, charges can be laid only if a Crown Attorney reviews and approves them. Four main arguments have been advanced in support of a charge approval process: it is fairer to the accused; it ensures that only cases with a reasonable prospect of conviction will proceed; it is more efficient because fewer mistakes will occur in the laying of charges; and the decision whether to prosecute is more objective.

On the other hand, opponents of pre-charge screening say that Crown control of the process leads to an erosion of police independence, the making of decisions behind closed doors rather than in open court, and a pre-empting by the Crown Attorney of the role to be played by the courts in the criminal trial process.

The Attorney General of Newfoundland and Labrador, through the Office of the Director of Public Prosecutions considers that the following policy principles strike the appropriate balance between the role of the police and the role of the Crown Attorney before charges are laid:

> *Members of investigative agencies such as the Royal Newfoundland Constabulary and the Royal Canadian Mounted Police are entitled to investigate offences and carry out their duties in accordance with the law and general standards, practices and policies established by those agencies. During the investigation, investigators are entitled -- and encouraged -- to consult with Crown Attorneys about the evidence, the offence and proof of the case in court. At the end of the investigation, investigators are again entitled (and strongly encouraged in difficult or complex cases) to consult with the Crown Attorney on the laying of charges. This consultation might include discussions about the strength of the case and the form and content of proposed charges. Ultimately, however, investigators have the discretion at law to commence any prosecution according to their best judgment, subject to statutory requirements for the consent of the Attorney General, and the authority of the Attorney General to terminate proceedings if charges are laid. However, investigators may not give any undertaking to the accused or counsel for the accused about the conduct of the proceedings (concerning, for instance, conditions of bail, whether the charge will proceed or not) without first consulting the Crown Attorney assigned to the case.*

It is important to note that the Supreme Court has indicated the Crown and the police are to be given some latitude in deciding how to structure their relationship. In R. v Regan, LeBel J. stated: "Furthermore, while the police tasks of investigation and charge-laying must remain distinct and independent from the Crown role of prosecution, I do not think it is the role of this Court to make a pronouncement on the details of the practice of how that separation must be maintained."

Post Charge Proceedings

The right and duty of the Attorney General, through the Crown Attorney, to supervise criminal prosecutions once charges are laid is a fundamental aspect of our criminal justice system. Generally, just as peace officers are independent from political control when laying charges, Crown Attorneys are independent from the police in the conduct of prosecutions. Crown counsel's independence extends, for instance, to assessing the strength of the case, electing the mode of trial, providing disclosure to the accused, deciding which witnesses to rely on (including decisions about immunity from prosecution) and deciding if the public interest warrants continuing or terminating a prosecution.

The authority of the Attorney General to screen and critically assess charges at this stage is clear. Indeed, as described in this Guide Book in the section regarding the "Decision to Prosecute", Crown Attorneys are expected to review the initial decision to prosecute in light of emerging developments affecting the quality of the evidence and the public interest, and to be satisfied at each stage, on the basis of the available material, that there continues to be a reasonable likelihood of conviction. Crown Attorneys are also obliged to pursue early and fair resolution of all cases.

Once charges are laid, full responsibility for the proceedings shifts to the Attorney General. On request, police have, traditionally accepted the responsibility to carry out further investigations that counsel believes are necessary to present the case fairly and effectively in court. As well, the Attorney General has the authority to control the proceedings after charges are laid, including conditions of bail, termination of proceedings and representations on sentence. These decisions should, wherever reasonably possible, be made in consultation with the investigators although consultation (much less agreement) is not required as a matter of law.

Disagreements between Crown Attorneys and Investigator

After consultation, investigators and Crown counsel will usually agree on the charging decision. If they disagree, the issue should be resolved through discussion at successively more senior levels on both sides.

Normally, assessments respecting whether a case should commence or continue should be made at the Crown Attorney level. Access to witnesses, investigators and physical evidence make this a practical reality. Disagreements that are not resolved should be referred to the Senior Crown Attorney and then, if necessary, to the Director.

Appendix D

A Standard

Ontario and British Columbia have a standard of 4.5 hrs/day sitting time per judge in court. Ontario's standard is for 165 sitting days of the 209 available working days. In British Columbia it is 170 sitting days for urban centres and 165 for rural centres. We have no figures from British Columbia for the number of available work days.

At the rate of 4.5 hours/day the available time for each judge is: 165 days x 4.5 hours/day, for a total of ***742.5 hours****; or 170 days x 4.5 hours/day, for a total of* ***765 hours.***

In addition to sitting times the Ontario and British Columbia judges have other substantial judicial responsibilities as do our judges. Their judicial duties however do not include JP work.

For ease of reference these figures are referred to as the standard. The standard is intended to be flexible and understood as such in both British Columbia and Ontario. Ontario suggests that the standard may have to be exceeded in certain circumstances including the "presiding standard" of the particular location.

The Judicial Year – Newfoundland and Labrador

The judicial year in Newfoundland and Labrador has three components: Presiding in court or sitting time, out-of-court JP duties and other judicial responsibilities.

Sitting time in the St. John's Court includes presiding over trials for criminal and other federal statutes, preliminary inquiries, bail hearings, peace bonds, provincial offences including traffic court, small claims court, Charter and other applications, appearances and any time a judge must preside in court.

The JP out-of-court duties include: deciding if warrants should be issued, ex parte emergency protection applications, issuing subpoenas and administering extra-provincial process.

Other judicial responsibilities include:

> *a vast amount of reading, the content of which also has to be analyzed (numerous pieces of legislation, jurisprudence, journals, articles, continuing education materials, court documents, criminal pleadings, transcripts, exhibits, expert reports, factums, sentencing and other reports, etc)*
>
> *research,*
>
> *reviewing evidence,*
>
> *writing or preparing judgments and decisions,*
>
> *correspondence, telephone calls and other office management,*
>
> *administrative tasks,*
>
> *judicial meetings,*
>
> *community and ceremonial functions,*
>
> *travel to and from outside courts,*

education and professional development.

Newfoundland and Labrador Standard

Our judges have 5 weeks vacation time and 14 statutory holidays and there is an annual conference of approximately 1 week. This means that there are 43 weeks or 215 days available for presiding in court and for the other judicial responsibilities.

There is no apparent reason for us to depart from the 4.5 sitting hours per day regardless of the reason the judge is sitting. However, this figure must be adjusted to account for the time needed and used for out-of-court JP duties performed by the judges.

Paid Leave

In the past three years the average amount of paid leave taken per year is slightly below the amount of paid leave the judges would have accumulated. This means that use of paid leave over the past three years has not contributed to any loss of sitting time when compared to the standard. However, potential sitting time is still being lost and per diem judges could be used to increase the sitting time of the Court .

Sick Leave

Prior to 1 April 2002 judges were under a paid leave program which required that after 2 days of consecutive sick leave judges had to use their accumulated sick leave. No data is available regarding this use of banked sick leave.

YEAR	*SICK LEAVE TAKEN (days)*
2003	*43.5*
2004	*40.5*
2005	*298.5*
2006	*97.5*
2007	*111*

Use of sick leave has dramatically increased since 2003 and 2004. The 298.5 sick days taken in 2005 would appear to be an anomaly but it could also be a reflection of the current and future use of sick leave. The difficulty is to find a meaningful average.

PERIOD	*AVERAGE SICK LEAVE TAKEN (days)*	*% OF JUDICIAL YEAR or SITTING TIME LOST*
03 to 07	*118.2*	*54.9%*
05 to 07	*169*	*78.6%*
06 to 07	*104.25*	*48.5%*

To obtain the figures in the third column divide the numbers in the second column by the 215 days available for the judicial year. This gives the percentage of time lost of both the judicial year and the available sitting time.

For the purpose of calculating lost sitting time the 50% figure is used since we are using sitting times from 2006 and 2007.

The St. John's Court has in the past provided relief for judges on long-term sick leave though not in the past three years. Some of the required relief has involved extensive periods of time including periods of two and eight months. The Court may have to do this again in the future.

Judges Available Sitting Time

The figures from the court used in this rough analysis are for sitting times in each courtroom and are not applicable to any particular judge. However, other than a circuit court to Placentia in 2007, for a total of approximately 50 days/year, the judges of the St. John's Court have sat only in St. John's during the past three years. Therefore with this small adjustment in 2007 the courtroom sitting times accurately reflect the sitting times of the judges.

This adjustment for the Placentia circuit increases the total sitting time in 2007 by approximately 50 x 4.5 or 225 hours/year.

In 2006 there were 10 judges in St. John's. In 2007 a judge retired in April of that year and this position when filled was transferred to Labrador. So in 2007 there were 9.33 judges or judicial positions.

Chief Judge Reid estimates that he only has available half of his time for sitting and associated responsibilities. This results in the further loss of 0.5 of a judicial position.

Therefore in 2006 there were 9.5 judicial positions and in 2007 there were 8.83 judicial positions.

It is a reasonable assumption supported by available data and reasonable estimates that the Court loses 100% of a judge's available sitting time each year due to JP out-of-court duties. This means that there were 8.5 judicial positions in 2006 and 7.83 judicial positions in 2007.
Warrants and emergency protection applications take by far the most time of the out-of-court JP duties.

In 2007 there were 108 emergency protection applications processed.

In 2007 at least 621 warrants were issued and this figure does not include the number processed. Some 80% of these warrants issued occurred during office hours, for a total of 497. (Judges are compensated for duties performed outside of normal working hours.)

If it takes an average of 1.25 hours for each of these duties, which is a reasonable estimate, this amounts to a total of 756.35 hours (497 + 108 = 605 – 605 x 1.25 = 756.35). The assumption that 100% of a judge's available sitting time (742.5 hours to 765 hours) is lost due to out-of-court JP duties is therefore a reasonable one.

The number of judicial positions in 2006 and 2007 must also be adjusted for the percentage of time lost due to illness, which is approximately 50%.

Consequently in 2006 there were 8 judicial positions and in 2007 there were 7.33 judicial positions.

In 2006, with 8 judges sitting for 742.5 to 765 hours/year, the total available sitting time is between 5940 and 6120 hours/year.

In 2007, with 7.33 judicial positions with sitting hours from 742.5 to 765 hours/year, the total available sitting time is between 5442.5 and 5607.5 hours/year.

Adjusted Sitting Times of Judges Compared to Available Sitting Times

Figures for hours booked and hours sat are only available for 2006 and 2007.

The total hours sat in all 9 courtrooms is 3598 in 2006 and 3132 in 2007. Add to the 2007 figure the 225 hours/year for the Placentia circuit, and we have 3598 hours sat in 2006 and 3357 hours sat in 2007.

The range of lost sitting time for 2006 is between 2342 and 2522 hours/year or between 293 and 315 hours/judge. (Available sitting time minus actual sitting times.) These figures translate into a percentage of between 40% and 41% below the standard. (293/724.5 and 315/765.)
The range for lost sitting time in 2007 is between 2085.5 and 2250.5 hours/year or between 284.5 and 307 hours/judge. These figures translate into a percentage of between 39% and 40% below the standard.

This means that the St. John's judges, as a group, sit 40% below the standard taking into consideration out-of-court JP duties and sick leave, and adjusting the St. John's sitting times to include the Placentia circuit in 2007.

To quantify this into an economic loss or cost is not easy. However, a 40% loss in the sitting times of 7.33 to 8 judicial positions, with an annual cost of $177,000 per judicial position, translates into an annual loss or cost in the order of $518,964 to $566,400 per year for judges' salaries alone.

There are other factors that reduce the available sitting time that are not quantifiable. In any trial there are often one or more postponements of five to twenty minutes per day for counsel to confer with the police, their clients, witnesses or each other. The trial judge cannot be expected to do too much during such brief postponements.

During trials issues inevitably arise that may require some looking into or research. While the judge may be able to perform some of the other judicial responsibilities during such longer postponements, the court time is still lost.

As noted earlier, the St. John's Court used to have 10 judges and recently lost a judicial position to better service Labrador. While this does not affect the standard, replacing that judicial position would have increased the sitting time of the Court and would clearly have affected the current backlog.

Court Room Time Available

Theoretically 9 courtrooms are available for 247 days a year for 6 hours a day for a total of 13,338 hours. This is over double the maximum sitting time available with the judges functioning at the standard.

This means that the courtrooms will be vacant at least 50% of the time even with our judges sitting times meeting the standard. It also means that there is sufficient capacity in the courtrooms for a multiple booking system without extending the sitting hours or requiring new facilities.

Collapsed Cases

Collapsed cases are those matters or cases that are set down and are ultimately unable to proceed for any number of reasons that are beyond the control of the court and in many instances counsel as well. The reasons include illness, unavailability of witnesses, last minute change of plea or resolution, applications over choice of counsel and weather.

Collapsed cases are not a problem unless they result in lost sitting time. In fact cases that collapse due to resolution or change of plea are an integral part of the system.

Case management through a trial coordinator should help reduce the number of collapsed cases that result in lost sitting time.

If we compare the total number of hours booked to the number of hours sat in 2006 and 2007 (excluding courtroom number 7) the average ratio is approximately 1 hour of sitting time for every 2.5 hours booked.

<u>Per Diem Judges</u>

Per diem judges would be used for trials only.

On average 50 to 80% of a judge's available sitting time is lost due to sick leave. This is substantial and the Provincial Court does not have the judicial resources to compensate for this. This figure will fluctuate annually but it is a hard fact, easily ascertainable and therefore useful to work with for budgeting and other purposes. Since more than one judge may be sick at any one time, and one cannot predict when, per diem judges would be an ideal solution.

When government is budgeting for the potential amount of lost sitting time due to illness it should take into consideration the apparent anomaly in 2005 since it may reflect the current situation.

In addition, to help reduce the number of collapsed cases that result in lost sitting time a multiple booking system is needed. Since any system of multiple booking requires the immediate availability of judges, per diem judges are again the ideal solution.

Finally, per diem judges can and should be used to compensate for paid leave and thereby increase the available sitting time of the Court.

The precise number of per diem judges required to compensate for lost time due to sick leave, to prevent collapsed cases from resulting in lost sitting time and paid leave is not readily ascertainable.

There could be more sick leave than accounted for in the three year average and judges of the St. John's Court may be required to relieve other courts across the Province, as it has done in the past, if a judge becomes ill. Alternatively, per diem judges could relieve the other courts.

The number of cases that are ready to proceed as a result of other cases collapsing can only be determined by experience with the system put in place.

The problem is that the judges must be readily if not immediately available or the system fails. So the pool of per diem judges must be large enough to prevent this.

The number of hours or days per year it is reasonable to expect a per diem judge to sit is also an issue since the judge will have retired.

It seems reasonable that more per diem judges would be required initially to reduce the current backlog.

A possible alternative to per diem judges would be an additional permanent position in St. John's. This would not work to compensate for sick leave or in a system with multiple booking since more than one judge will likely be needed at any one time for the required flexibility.

Utilizing judges from other parts of the Province for videoconferencing would not work for trials since only witnesses may appear by videoconference.