AN URGENT NEED TO ADDRESS LENGTHY COURT DELAYS IN CANADA

Final report of the Standing Senate Committee on Legal and Constitutional Affairs

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EXECUTIVE SUMMARY

Canada's criminal justice system is in urgent need of reform. Delays in criminal proceedings have become a significant problem as it takes too long for many criminal cases to reach a final disposition. Lengthy trials and multiple adjournments are particularly hard on victims and their families, as well as on accused persons, whose stress can be worsened as the time between the laying of charges and the end of the trial stretches out month after month. When these delays become very lengthy, courts may find that the accused's constitutional right to a trial within a reasonable time (as guaranteed by section 11(b) of the *Canadian Charter of Rights and Freedoms*) has been breached. If this happens, the only judicial remedy available in Canada is an order for a stay of proceedings, which ends the process without a completed trial on the merits of the case.

After the Senate Standing Committee on Legal and Constitutional Affairs (the committee) began reviewing these matters in February 2016, the Supreme Court of Canada released its decision in *R. v. Jordan* in July. The Supreme Court provided a framework for addressing delays and included strict time limits for completing proceedings. Stays have since been ordered by lower courts applying this decision across Canada in cases involving murder; manslaughter; sexual assault (and sexual assault against minors); impaired driving; and drug charges. Hundreds of cases involving applications for stays are being reported across the country and many more are expected as many proceedings approach the *Jordan* time limits.

Stays are of great concern to Canadians. They can have a harsh impact on victims and affect public confidence in the criminal justice system. When stays are granted in cases involving alleged child abuse or murder, it shocks the conscience of Canadian communities. They represent a failure to properly prosecute crimes and thereby protect our society. The reputation of our justice system is at stake.

The committee strongly believes that Canada's legal community, including its judges and federal, provincial and territorial ministers of justice/attorneys general must all take decisive and immediate steps to address the causes of delays and to modernize our justice system. Leadership in taking the necessary reformative action must come from the federal Minister of Justice.

During the committee's study, it became clear that the causes and effects of delays are many and varied. The Supreme Court has already identified that a primary cause is a culture of complacency that has permitted unnecessary procedures and adjournments, inefficient practices, and inadequate institutional resources to become accepted as the norm. Several witnesses cautioned the committee that there would be no one simple, quick fix to solve the delays crisis. There are broad, systemic changes needed, and smaller, more targeted reforms that will also help. Many agreed that what is needed most is a cultural shift among justice system participants that moves them away from complacency and towards efficiency, cooperation and fairness. It requires, in the Supreme Court's words, "all participants in the criminal justice system to cooperate in achieving reasonably prompt justice."

A recurring concern voiced by witnesses and raised in *Jordan* was with respect to how the justice system has been underfunded for too long, a problem that was left unaddressed due to the culture of complacency. But while it is evident that the criminal justice system would benefit from greater funds,

more personnel, and better research and data, increasing resources alone will not fix the problems. If resources are increased without being accompanied by broader institutional changes, it is likely that the delays will continue.

Outdated methods of administering courthouses and scheduling matters before judges must be replaced with computerized systems that facilitate cooperation, permit increased information sharing and improve efficiency. The *Criminal Code* must be modernized to meet contemporary challenges. It is also time to rethink how our criminal justice system handles the diverse types of cases and accused persons that pass through its courthouses and to encourage measures that are more appropriate and efficient. Too many accused persons in Canada's courts, remand centres and prisons have mental health concerns and too many are Indigenous Canadians. This will not change until we address the root causes that brought them there. It is also time to honour the promise made to Canadian victims that their voices and dignity matter in our pursuit of justice.

Delaying Justice is Denying Justice: *An Urgent Need to Address Lengthy Court Delays in Canada (Final Report)* concludes the committee's court delays study. Between 3 February 2016 and 9 March 2017, the committee heard testimony from 138 witnesses, including former and sitting judges, the federal Minister of Justice, and a wide range of participants in our justice system. It received dozens of written submissions, and travelled to Vancouver, Calgary, Saskatoon, Montreal and Halifax in order to hear local perspectives and learn best practices that might resolve these complex issues. In August 2016, the committee released *Delaying Justice is Denying Justice*: *An Urgent Need to Address Lengthy Court Delays in Canada (Interim Report).* This previous report presented the committee's initial findings by focusing on four recommendations pertaining to, in brief: the urgent need to appoint more judges; the importance of robust case management by judges; technological modernization; and the promotion of alternative measures and restorative justice.

This report reviews the many contributing factors to the delay crisis, potential solutions for fixing them, and other ways in which our justice system can be made more fair and efficient. It considers the various roles played by key participants: judges, lawyers, police, accused persons, victims, and public officials. It finds examples of best practices from different parts of the country and examines how populations in northern communities and Indigenous Canadians are served by the system. In seeking solutions for improving Canada's approach to justice, it covers many wide-ranging challenges and criminal law issues.

This report includes 50 recommendations, of which 13 have been identified as priorities. Most of these focus on steps that need to be taken by the federal Minister of Justice, but all participants in our justice system must demonstrate that they are doing their share and fulfilling their responsibilities. The federal minister must demonstrate that Canada is serious about justice reform. The provincial governments must prioritize developing their own plans to address delays within their jurisdictions. The judiciary also bears a heavy responsibility; as we stressed in our interim report, the lack of robust case management is one of the most significant factors contributing to delays and it falls on judges to ensure this is addressed. Lawyers, courthouse personnel, social service providers, and many other participants also have both important contributions and changes to make.

The first priority recommendation put forward arises from the committee's concern that stays of proceedings in cases involving serious criminal offences, such as murder and the sexual assault of children, must be avoided. A single, drastic remedy to deal with delays not only fails to properly address the public's and victims' interests in seeing a trial on the merits of the case. The committee recommends that alternative remedies for dealing with delays should be added to the *Criminal Code* in order to create more just outcomes and permit greater flexibility in dealing with delays. The Attorney General of Canada should send these amendments to the Supreme Court of Canada in the form of a reference in order to assess their constitutionality (particularly given that stays are a judicial remedy).

Other priority recommendations contain specific steps the minister can take on an urgent basis, such as addressing the excessive vacancies of federally appointed judges. Improving the system for the appointment of Superior Court judges will help address delays, particularly by ensuring that new appointments are made on the day of any anticipated retirement for a judge. Another contributor to delays is the number of procedural matters that take up valuable court time and judicial resources. The committee recommends that the *Criminal Code* be amended to provide greater opportunity for these to be handled by other judicial officers. This would expedite the process and free up time for judges to focus on matters for which they are most necessary. Another step that can be taken by the minister is to restrict or perhaps eliminate preliminary inquiries, which are largely unnecessary given modern policing and prosecution practices, particularly with regard to the full disclosure of evidence.

Another priority recommendation involving amendments to the *Criminal Code* concerns adding a presumption that the Crown disclose all evidence prior to the start of the trial and, and if it comes afterwards, the reasons for this must be justified before the judge. While this may already be the expectation in practice, adding this to the law sends a message that judges should be more strict in enforcing deadlines to discourage complacency.

The committee also recommends that the minister prioritize implementing the recommendations made in the Truth and Reconciliation Commission of Canada's report on the legacy of the Indian Residential Schools that pertain to justice matters in order to address the unacceptably high number of Indigenous accused persons and offenders in our criminal justice system. By addressing this regrettable situation and the causes that have created it, this will mean that court and prison resources can be reallocated to other justice matters, we will see better rehabilitative options for Indigenous offenders, and this will consequently help reduce the demand on our justice system that contributes to delays.

Three priority recommendations are aimed at having the Minister of Justice take a leadership role to ensure that improvements in the administration of justice are implemented across Canada. The committee recommends that the minister coordinate a strategy with clear targets to ensure that adequate health-related services and alternative (or "appropriate") measures are in place within the justice system to serve, treat and rehabilitate persons with mental illnesses, including addictions. The numbers of persons with mental illnesses in Canada's courts and prisons is of great concern. Our criminal justice system is not equipped to deal with their needs, to address the root causes of their criminal behaviour and to rehabilitate them; alternatives to current practices must be made available.

The committee also recommends that the minister work with the provinces to find better ways of dealing with certain offences that are taking up too much court time. For instance, administration of justice offences represented 23 per cent of cases completed in adult criminal court, which pertain to such matters as breaches of release conditions or failure to appear in court. Steps must be taken to ensure that the conditions imposed on accused persons are appropriate and related to the original charges, and to reduce the impact these proceedings are having on delays. Impaired driving offences represent about ten percent of the most common offences tried in court. Provincial schemes to deal with drivers with lower levels of blood alcohol concentration through administrative penalties (instead of criminal sanction) show promise in reducing the demands on our court system while addressing this social problem. The committee recommends that the minister prioritize the implementation of more efficient means to address these matters.

Another crucial contributor to delays is the insufficient levels of legal aid funding across Canada that, among other things, results in too many unrepresented accused persons who are unable to navigate the justice system efficiently without legal counsel, thereby adding to delays. Given that federal contributions in this area have fallen dramatically in recent years, the minister must prioritize bringing legal aid to acceptable levels.

The remaining priority recommendations pertain to modernizing the administration of justice through the adoption of more efficient technologies and scheduling practices. Videoconferencing and computer systems should be developed to eliminate the need for many routine in-person court appearances and allow easier communications among courts, legal counsel, accused persons, victims, witnesses and offenders. Court scheduling can also be improved by adopting existing best practices, such as “shadow courts,” summer trials, extended court hours and other related initiatives where they are appropriate. Lastly, and perhaps most importantly, the judiciary must improve its approach to case management and ensure that all judges are properly trained in best practices for achieving reasonably prompt justice. The minister should work with the provinces and the judiciary to assist in the adoption and implementation of such best practices.

The remainder of the report addresses 37 other recommendations and provides many more observations concerning ways to take urgent and necessary action to ensure the integrity and fairness of our justice system. We look forward to learning about the steps the Minister of Justice will be taking in the near future and the plan of action that must come out of the federal-provincial-territorial justice ministers’ meeting scheduled for September 2017.

Priority Recommendations

1. **Alternatives to Stays of Proceedings (see recommendation #4)**

   The committee finds that stays of proceedings should not be the only judicial remedy available for unreasonable delays in criminal proceedings, particularly those involving serious indictable matters. Recent court decisions that have entered stays of proceedings in cases involving murder charges (see *R. v. Picard*, 2016 ONSC 7061 and *R. c. Thanabalasingham*, 2017 QCCS 1271) and child sexual assault charges (see *R. v. Williamson*, 2016 SCC 28) shock the conscience of the community and bring the administration of justice into disrepute in Canada.

   The Committee recommends that the remedy for unreasonable trial delay be found in sentencing and costs and that a reference to the Supreme Court of Canada be made by the Attorney General of Canada to ensure the constitutionality of the proposed changes to the *Criminal Code* to give effect to the remedy.

2. **Judicial Appointments (see recommendation #17)**

   The committee finds that the delays in the appointment of Superior Court Judges in Canada contribute to unreasonable court delays and that there is no reason why a recruitment process cannot be instituted to fill vacancies immediately instead of awaiting assessments of applications after a judge retires.

   The committee recommends that Superior Court Judges be appointed on the day of a known retirement of a Judge and the only exceptions to this immediate replacement would be an unexpected death or unexpected early retirement of a sitting Judge.

3. **Case Management (see recommendation #13)**

   The lack of robust case and case flow management by the judiciary is perhaps the most significant factor contributing to delays. The judiciary in Canada needs to ensure that its members are getting sufficient training and guidance on how to use the tools they have to ensure that matters proceed as expeditiously as possible.

   The committee recommends that the Minister of Justice work with the provinces and territories and in particular with the judiciary to:

   - **stress the need for judges to improve case management, such as by imposing deadlines and challenging unnecessary adjournments, using the tools that already exist; and**
   - **consider making amendments to the *Criminal Code* to support better case management as necessary.**

4. **Indigenous Persons and the Justice System (see recommendation #47)**

The committee finds that across Canada there is an unacceptably high per capita rate of Indigenous accused persons and offenders in our criminal Justice system. Measures already in place to address this issue require adequate funding and resources, such as programs that support Indigenous courtworkers and the preparation of *Gladue* reports. In order to see more positive results, the Minister of Justice and her provincial and territorial counterparts must take action to expedite their review and implementation plan for the recommendations contained in the Truth and Reconciliation Commission of Canada's report pertaining to the justice system**.**

The committee recommends that the Minister of Justice expedite the Government of Canada's review and implementation plan in response to the Calls to Action pertaining to the justice system contained in the Truth and Reconciliation Commission of Canada's report.

5. **Persons with Mental Health Issues and the Justice System (see recommendation #35)**

The committee finds that the overrepresentation of persons with mental health issues among Canada's accused persons and convicted offenders, including those with drug and alcohol addictions, must be addressed on an urgent basis. Solutions may be found in increasing the availability and quality of diversion programs, both pre-charge and post-charge, allowing the consideration of whether persons with mental health issues should be considered for alternative sentencing options or treatment when faced with mandatory minimum sentences, and gathering consistent data on the screening for mental health issues undertaken by the courts, among other options.

The committee recommends that the Government of Canada, in particular the Ministers of Justice, Health and Public Safety and Emergency Preparedness, coordinate an evidence-based strategy with clear targets to ensure that adequate health services are available for Canadians with mental health issues, including those with drug and alcohol addictions. In particular, funding should be provided for programs aimed at the prevention of crime by persons with mental health issues and for the treatment of such persons in detention.

6. **Administration of Justice Offences (see recommendation #33)**

The committee finds that administration of justice offences are taking up an inordinate amount of court time, which is thereby contributing to court delays for trials. Of particular concern are those cases where an accused person is back in court for minor matters, such as a breach of curfew or arriving late for trial, cases where conditions are unrealistic, such as requiring an alcoholic to abstain from drinking alcohol, and in cases where the conditions imposed do not in fact relate to the original charges.

The committee recommends that the Minister of Justice prioritize the reduction of court time spent dealing with administration of justice offences and develop alternative means of dealing with such matters with the provinces and territories.

7. **Full Disclosure Prior to Trial (see recommendation #26)**

The Committee finds that both late and untimely disclosure of evidence can cause court delays.

The committee recommends that the Minister of Justice introduce an amendment to the *Criminal Code* setting out a presumption that the Crown will disclose all evidence in accordance with any timelines set by the judge prior to trial and that any evidence introduced thereafter will need to be justified based on due diligence or previous unavailability.

8. **Judicial Officers (see recommendation #20)**

The committee finds that resolution of many pre-trial procedural matters by judges is an inefficient use of their time and of court resources. Many of these matters could be handled by a judicial officer in a manner similar to the prescribed responsibilities for prothonotaries set out in section 50 of the *Federal Courts Rules.*

The committee recommends that the Minister of Justice amend the *Criminal Code* to allow certain procedural matters in criminal hearings to be performed by a judicial officer other than a judge.

9. **Technology and the Justice System (see recommendation #21)**

The committee finds that many common practices in the criminal justice system are inefficient and should be replaced by those based on technological solutions. Most procedural matters are still dealt with in front of a judge, such as the setting of dates and rescheduling of court appearances. The widespread adoption of a common computer system across the justice system would help facilitate proceedings and allow for easier communication among the courts, legal counsel, clients, unrepresented accused persons, witnesses, victims and other affected parties. Similar efficiencies could be achieved by making videoconferencing technology available to avoid unnecessary in-person appearances and to facilitate communications among various participants in the justice system.

The committee recommends that the Minister of Justice take a leadership role and establish a program to design computerized systems that can be adopted by provinces and territories that will:

- **effectively manage criminal and courthouse proceedings;**
- **allow for more procedural matters to be addressed by means of computer to avoid unnecessary court appearances;**
- **permit the disclosure of evidence by a standard electronic system; and**

- **provide a user-friendly access portal to unrepresented accused persons, witnesses, victims and other affected parties concerning criminal proceedings in which they are involved.**

10. **Legal Aid (see recommendation #29)**

The committee finds that unrepresented accused persons contribute to trial delays. Insufficient funding and support for legal aid plans from Canadian governments has meant that many accused persons do not qualify for assistance and yet cannot afford a lawyer.

The committee recommends that the Minister of Justice undertake a full-scale review of legal aid plans with a view to bringing access to legal aid up to acceptable levels across Canada.

11. **Preliminary Inquiries (see recommendation #7)**

Some provincial governments have concluded that preliminary inquiries should be eliminated or restricted as a way to deal with trial delays. The committee is aware there is no consensus on this issue, but believes they are of limited utility if the constitutional requirements regarding disclosure of evidence are respected.

The committee recommends the Minister of Justice take steps to eliminate preliminary inquiries or limit their use.

12. **Administrative Penalties (see recommendation #9)**

Certain social issues that are currently being addressed through criminal proceedings could be dealt with more efficiently and just as effectively through the imposition of administrative penalties in lieu of court proceedings. For instance, lower levels of impaired driving are being addressed under provincial highway safety legislation, which requires less court resources than offences under the *Criminal Code*.

The committee recommends that the Minister of Justice review the merits of designating offences for appropriate social issues to be dealt with as administrative penalties in order to reserve criminal law procedures for more serious crimes and thereby reduce the strain on limited court resources.

13. **Scheduling Practices (see recommendation #15)**

Court administration in Canada could benefit from the adoption of some of the existing best practices and new methods being used in certain regions.

The committee recommends the Minister of Justice take a leadership role in helping provinces and territories develop scheduling practices and tools to ensure productive, optimal and efficient use of courtrooms, such as by implementing "shadow courts," summer trials, extended courthouse hours and other related initiatives.

CHAPTER ONE - INTRODUCTION

Canada's Critical Delay Problem

In 2012, in *R. v. Picard,* the accused had been charged with first degree murder.[1] In 2016, when the case was being scheduled to go to trial, Justice Julianne Parfett of the Ontario Superior Court of Justice instead ordered a stay of proceedings after finding the accused's constitutional right to trial within a reasonable time had been breached. In arriving at her decision, Justice Parfett applied the recently released judgment of the Supreme Court of Canada in *R. v. Jordan.*[2] These cases have received national attention as Canadians raise concerns and ask questions about the integrity of our justice system, particularly when legal proceedings are stayed in a case involving murder charges.

The *Picard* case represents one of many in recent months in which stays of criminal proceedings have been granted because the delays in getting to the final stage of the case were unreasonable. Stays have been ordered in cases involving murder and manslaughter,[3] sexual assault against minors,[4] drug possession and trafficking,[5] and impaired driving,[6] among others. Hundreds of cases involving applications for stays are being reported across the country. Stays of proceedings involving serious offences are of great concern to Canadians and affect public confidence in the criminal justice system.

Section 11(b) of *The Canadian Charter of Rights and Freedoms*[7] provides that:

> **11.** Any person charged with an offence has the right…
> (*b*) to be tried within a reasonable time;

Usually, when cases are stayed, there is no trial on the merits and no judicial decision as to whether the accused are guilty or not. The accused are often free to return to society and attempt a return to a normal life, even though he or she will never have the chance to clear his or her name of the charges. For victims and their families, there will be no resolution either. While the accused's right to a trial within a reasonable time may have been protected, the public is left without any feeling that justice has been done.

The *Jordan* case has had a dramatic impact on Canada's justice system. It set out strict time limits that must not be exceeded in order to ensure that criminal proceedings do not run unreasonably long and infringe an accused person's constitutional right to a trial within a reasonable time. Justice Parfett

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1 *R. v. Picard*, 2016 ONSC 7061. This decision has since been appealed to the Ontario Court of Appeal (Court file number C62949).

2 *R. v. Jordan*, 2016 SCC 27.

3 *R. v. Picard; R. v Regan*, 2016 ABQB 561; *R. c. Thanabalasingham*, 2017 QCCS 1271; and *R. v. Manasseri*, 2016 ONCA 703.

4 See *R. v. Williamson*, 2016 SCC 28; and *R. v. J.M.*, 2017 ONCJ 4, among others.

5 See *R. v. Jordan*, 2016 SCC 27; *R. v. Cody*, 2016 NLCA 57; *R. v Ny and Phan*, 2016 ONSC 8031, among others.

6 See *R. v. Reynolds*, 2016 ONCJ 606; *Boisvert c. R.*, 2016 QCCQ 11068 [Available in French only]; *R. v. DeSouza*, 2016 ONCJ 588, among others.

7 *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

concluded her judgment in *Picard* by acknowledging the unsatisfactory outcome for the victim's family and the "hollow victory" for the accused person. She then explained her reasons for ordering the stay:

> [T]he thread that runs through the present case is the culture of complacency that the Supreme Court condemned in *Jordan*.
>
> *Everyone*, not just the Crown, was content with trying this matter within the time for delay that has become the norm in [the City of] Ottawa….
>
> In the present case, the justice system has failed this accused *and* the public. Consequently, a stay of proceedings will be entered.[8]

The message the judges in the *Picard* and *Jordan* decisions are sending is that the justice system is failing Canadians, largely due to a culture of complacency where: "[u]nnecessary procedures and adjournments, inefficient practices, and inadequate institutional resources are accepted as the norm and give rise to ever-increasing delay."[9]

Delays are very hard on those involved with a criminal trial. The long wait to reach a final resolution can be stressful for both the accused and victims, and is made worse by every adjournment that adds yet another court appearance. Delayed proceedings weaken the connection between the commission of an offence and its ultimate resolution, including possibly its confirmation and condemnation by the courts. Delays also have an impact on the quality and reliability of evidence, as memories become less clear over time. This Committee agrees that lengthy and delayed criminal proceedings have become a systemic problem that needs to be addressed, though the causes and impacts vary across Canada's regions.

In most respects, Canada has an excellent justice system with a strong international reputation. And yet, due to excessive delays, charges are now at risk of being mandatorily stayed across Canada, leaving justice undone. Canadians have seen a variation on this crisis before. In the 1990 and 1992 Supreme Court decisions of *R. v. Askov*[10] and *R. v. Morin*,[11] the court set guidelines for determining when a stay should be ordered for unreasonable delays. As a result of the *Askov* decision, tens of thousands of charges were stayed in Ontario alone within a short period of time. While *Askov* should have prompted institutional changes, some commentators believe that things have since gotten worse.[12]

After the Standing Senate Committee on Legal and Constitutional Affairs began its study concerning delays in criminal proceedings in February 2016, the consensus we gathered from our initial hearings was

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8 *R. v. Picard*, paras. 80-82.

9 *R. v. Jordan*, para 40.

10 *R. v. Askov*, [1990] 2 S.C.R. 1199.

11 *R v Morin,* [1992] 1 SCR 771.

12 See the testimony of Eric Gottardi, Peck and Company (Evidence, 27 September 2016).

clearly that delays are a concern, though stays of proceedings were in fact fairly rare.[13] Then, as the committee was about to release its interim report, *Delaying Justice is Denying Justice*: *An Urgent Need to Address Lengthy Court Delays in Canada (Interim Report),*[14] the Supreme Court of Canada released its decision in *R. v. Jordan* in July 2016.[15] This decision represents a significant development in the legal principles and tests to be applied in determining whether an accused person's constitutional right to a trial within a reasonable time has been breached (a right guaranteed by section 11(b) of the *Canadian Charter of Rights and Freedoms*). The strict timelines included in the decision are shaking up the justice system as courts, lawyers, legislators and many others try to find ways of ensuring as few cases as possible are stayed.

As the committee was preparing to release this final report, commentators were weighing in almost daily in various media outlets and publications on the dire situation facing the criminal justice system. Provincial attorneys general, chief judges and other participants in our justice system have been making public statements calling for what seem to be desperate measures for desperate times. Some are talking about getting rid of all but the most necessary preliminary inquiries, while others are seeking to facilitate early resolutions through more proactive plea bargaining for lighter sentences.[16] Meanwhile, delays in some parts of the country look only to be getting increasingly dire.

Many witnesses who appeared before this committee shared a concern raised in *Jordan* regarding how a lack of sufficient resources and funding for the justice system was left unaddressed due to the culture of complacency ;[17] Some noted that there are too few judges, Crown prosecutors, and

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13 All references to evidence and testimony from witnesses contained in this report are taken from meetings of the Standing Senate Committee on Legal and Constitutional Affairs, unless otherwise stated. A full list of witnesses and the meetings they attended is included in Appendix B.

For this footnote, reference is made to the testimony of Ian Carter and Tony Paisana, Canadian Bar Association; Greg DelBigio, Canadian Council of Criminal Defence Lawyers (Evidence, 18 February 2016); and Heidi Illingworth, Canadian Resource Centre for Victims of Crime (Evidence, 24 March 2016), among others.

14 Senate, Standing Senate Committee on Legal and Constitutional Affairs, *Delaying Justice is Denying Justice: An Urgent need to Address Lengthy Court Delays in Canada (Interim Report)*, Eighth Report, 1st Session, 42th Parliament, August 2016.

15 The Supreme Court began considering legal questions pertaining to section 11(b) and the *Jordan* framework in *James Cody v. Her Majesty the Queen*. A decision is expected later this year.

16 See for example: Nova Scotia, Nova Scotia Public Prosecution Service, *Early Resolution Initiative of the Criminal Justice Transformation Group*, News Release, 7 February 2017; Ontario, Ministry of the Attorney General, *Ontario Making Criminal Justice System Faster and Fairer*, News Release, 1 December 2016 and About Ontario's Plan for Faster, Fairer Criminal Justice, Backgrounder, 1 December 2016; Quebec, Table Justice-Québec, "Plan d'action de la Table Justice-Québec – Pour une justice en temps utile en matières criminelle et pénale," News release, 3 October 2016 and *Plan d'action 2016–2017, Pour une justice en temps utile en matières criminelle et pénale*, October 2016 [Available in French only]; Manitoba, Court of Queen's Bench, Practice Direction, *Scheduling of Resolution Conferences, Pre-Trial Conferences, Pre-Trial Applications and Voir Dires, and Trial Dates in Criminal Matters,* 20 October 2016.

17 See the testimony of Kate Matthews, Ontario Crown Attorneys' Association (Evidence, 9 March 2016); and Eric Gottardi, Peck and Company (Evidence, 27 September 2016), among others.

courtrooms, or that there is too little invested in legal aid, support services and treatment programs for accused persons and offenders. Other contributors to delays that were discussed included:

- criminal trials have become more complex, due to such factors as the increasing cost and complexity of police work or increased requirements for the disclosure of evidence by the Crown prosecutor to the accused;
- Canada's *Criminal Code*, which has been amended in an *ad hoc* manner for decades, is in dire need of being revised and modernized;
- the justice system has been slow in adopting modern technologies that could improve efficiencies;
- the lack of skilled case management by judges is preventing courts from ensuring cases proceed without unnecessary delays..

Many within the legal community tend to claim that groups other than their own are responsible for delaying matters; in other words, defence counsel, the Crown prosecutors and the judiciary point the blame at one another.[18] Many witnesses agreed that what is needed is a shift in the legal culture.[19] Some noted that it is commonly accepted in many parts of Canada that delays are just part of "the way it's always been."[20] Others discussed how it is too common to have multiple adjournments and added court appearances during proceedings, many of which may be unnecessary. Some explained how inefficiencies that slow down proceedings stem from a general reluctance to adopt modern technologies that could save preparation and court time.

One of the more pressing causes of delays presented by many witnesses lies in the fact that the criminal law system is attempting to deal with too many cases that it is not suited to handle. A large portion of accused persons and offenders have mental health issues and drug addictions or are struggling with poverty and other socioeconomic challenges. Many are not getting sufficient treatment or assistance, whether before or after they enter the criminal justice system. When they are released, if their health issues are the root cause of their crimes and are not treated, then it can be predicted that in time they will be apprehended by the police again. Many witnesses suggested it is time to explore alternative measures that may be more effective and efficient and less expensive.

The Committee's Study

On 28 January 2016, the Standing Senate Committee on Legal and Constitutional Affairs was mandated to review the roles of the Government of Canada and Parliament in addressing court delays. During our 31 public meetings that took place between 3 February 2016 and 9 March 2017, we heard testimony from 138 witnesses and received dozens of written submissions. The committee travelled to

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18 See the testimony of Professor Ian Greene, York University (Evidence, 9 March 2016).

19 See the testimony of Professor Ian Greene, York University (Evidence, 9 March 2016); Judge Raymond Wyant, Senior Judge of the Manitoba Court, Former Chief Judge of the Provincial Court of Manitoba (Evidence, 23 March 2016); Professor Anthony Doob, University of Toronto (Evidence, 13 April 2016); and Eric Gottardi, Peck and Company (Evidence, 27 September 2016), among others.

20 See the testimony of Professor Ian Greene, York University (Evidence, 9 March 2016).

Vancouver, Calgary, Saskatoon, Montreal and Halifax in order to conduct site visits and to hear local perspectives and learn best practices that could solve these complex issues. We received testimony and submissions from: the federal Minister of Justice; former and sitting judges (some of which were in private); lawyers (Crown and defence counsels); government officials (federal, provincial and territorial); legal experts and academics; victims and victims' groups; representatives from Indigenous peoples' organizations and Aboriginal Courtworker programs (now the Indigenous Courtwork Program);[21] social service providers; law enforcement and probation officers; public safety, mental health and addictions experts; courthouse workers; and technology experts, among others.

In August 2016, the committee released *Delaying Justice is Denying Justice*: *An Urgent Need to Address Lengthy Court Delays in Canada (Interim Report).* It presented our initial findings by focusing on four topics:

1. The need to implement best practices in case management and case flow management[22] by the judiciary to reduce the number of unnecessary appearances and adjournments that contribute to delays;
2. The need for the Government of Canada to make the necessary judicial appointments to superior courts as efficiently and expeditiously as possible;
3. The need to implement best practices and better procedures with regard to mega-trials as well as alternatives to, or diversions within, the traditional criminal justice system model, including restorative justice programs, integrated service models, "shadow courts" and therapeutic courts; and
4. The need to develop suitable technologies and make them available to modernize court procedures and infrastructure.

In this final report, we now review the various roles played by and the perspectives of the key participants in Canada's justice system: judges, lawyers, police, accused persons, victims, and public officials. We examine recent developments in Canadian criminal law and the circumstances that led to the urgent problems with delays. We review the ideas that are being put forward about how to make our justice system more fair and efficient – both generally across Canada, but also in particular in relation to how populations in northern communities and Indigenous Canadians are served by it. We also look at the various ways in which Canadians are thinking "outside the box" and pushing for alternative and more appropriate measures for dealing with criminal cases and criminal behaviour.

The committee has been engaged in determining how Canadians can address these many and varied contributors to delays in Canada's court system for over a year. In this report, we provide an overview of the causes and effects of court delays and make 50 recommendations in order to begin the process of addressing them.

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[21] Department of Justice Canada, *2017-18 Departmental Plan – Supplementary Information Tables*, Sub-sub-program 1.1.2.5: Aboriginal and Northern Justice.

[22] Case management is here used in reference to individual criminal proceedings, and case flow management to the broader administration of criminal cases through the system.

Moving forward

As we emphasized in our interim report, justice delayed is justice denied. The current status quo has put the integrity of the system at stake and threatens the public's confidence in it. Canadians deserve a system that is far more accessible, fair and efficient. Victims of crime in Canada need to feel that respect for their integrity is a vital part of our justice system.

When the Minister of Justice appeared before the committee on 9 March 2017, she acknowledged that much of what was laid out in our interim report will form part of her efforts in addressing the delay problem, as well as fulfilling her mandate to "[u]ndertake modernization efforts to improve the efficiency and effectiveness of the criminal justice system, in cooperation with provinces and territories."[23] She acknowledged the importance of federal leadership in tackling delays. The committee urges the Minister to act with haste to create a strategic plan with her provincial and territorial counterparts to deal with these pressing issues related to delays and to start changing the culture of complacency. The committee is confident that, when the conditions for change are created, lawyers, judges, legislators, officials and other key stakeholders will participate in making this happen. Stays of proceedings are being ordered across our country for serious crimes – including murder and the abuse of children – and more will follow if we hesitate. Canadians need to act without further delay.

[23] Office of the Prime Minister, *Minister of Justice and Attorney General of Canada Mandate Letter*.

CHAPTER TWO – UNDERSTANDING THE BASICS OF DELAYS

> We have developed a system within the criminal justice system, and within the civil justice system as well, where the accepted expectation, the accepted norm, is that it's all right for things to take months and months to get resolved.
>
> – KEVIN FENWICK, THEN DEPUTY MINISTER AND DEPUTY ATTORNEY GENERAL, MINISTRY OF JUSTICE, GOVERNMENT OF SASKATCHEWAN

When a person is charged with an offence in Canada, the wheels of a complex system start turning and procedures are followed to ensure that this person receives a fair trial and, if found guilty, a fair sentence. When the total number of days from an individual's first court appearance to the final decision in the case is excessive – or looks like it will be excessive before reaching that final decision – then there is a risk that an accused person's constitutional right to a trial within a reasonable time may be violated. The consensus gathered from the committee's study confirmed our understanding that delays in criminal proceedings are a significant concern across the country, but are worse in some jurisdictions.

As the committee emphasized in our interim report, delays are a problem for many reasons. When the trial time increases, the connection between the commission of an offence and its condemnation weakens. The opportunity to achieve swift and predictable justice is lost, and its potential to deter crime is less strong. Delays can also reduce the quality and reliability of evidence as the memories of accused persons and witnesses become less clear. The psychological impact on the accused and on victims is immeasurable, as proceedings drag on and prevent a resolution that will allow them to return to some kind of normal life.

As the committee paused to prepare an interim report to call for urgent action to address delays, the Supreme Court of Canada released its decision in *R. v. Jordan* in July 2016.[24]This decision has, to say the least, shaken up the *status quo* of the criminal justice system unlike any case in recent years. Attorneys general and ministers of justice across Canada are all being forced to respond to the Court's attempt to bring Canada's delay problems under control. This decision is explained and placed in context below.

[24] *R. v. Jordan*, 2016 SCC 27. The Supreme Court began considering legal questions pertaining to section 11(b) and the *Jordan* framework in *James Cody v. Her Majesty the Queen*. A decision is expected later this year.

The *Canadian Charter of Rights and Freedoms* (Charter)[25] guarantees certain legal rights to accused persons, including the right to a fair trial[26] and the right to be tried within a reasonable time.[27] While the courts have recognized the societal interest in seeing a trial on the merits, there is no formal right for the victim to see justice done. This chapter reviews the right to be tried within a reasonable time and the legal framework protecting it, the relevant statistics pertaining to delays in criminal proceedings, the division of powers and how Canadian governments respond to justice matters, and the various factors contributing to the delay problems in Canada.

The Right to be Tried within a Reasonable Time

As part of Canada's constitution, section 11(b) of the Charter guarantees to any person charged with an offence in Canada the right "to be tried within a reasonable time."[28] Determining what constitutes a reasonable timeframe is left to the courts to decide depending on the circumstances of an individual case. The priority the Supreme Court of Canada places on the speedy trial issue has been emphasized in several decisions over the years. Previous precedents from the court in the early 1990s included *R. v. Askov*[29] and *R. v. Morin*,[30] which established a framework for dealing with unreasonable delay that is further discussed below. As a consequence of the *Askov* decision, tens of thousands of charges were stayed in Ontario due to unreasonable delays. In releasing the *Jordan* decision, the court sought to address the problem of delays and prompt significant change without repeating the high number of stays that followed *Askov*.

Jordan involved an accused facing drug trafficking charges. The total delay in this case between the time charges were laid and the end of trial was 44 months (excluding delays caused by the defence). The Supreme Court considered this case to be "not so exceptionally complex," and declared that "[m]uch of the institutional delay could have been avoided had the Crown proceeded on the basis of a more reasonable plan by more accurately estimating the amount of time needed to present its case." The delay was found to be unreasonable and the Supreme Court ordered a stay of proceedings.

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25 *The Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (U.K.), 1982, c.11. The genesis of this right goes back to at least the *Magna Carta* in 1215, under the fortieth article of which King John made the following undertaking: "To none will we sell, to none will we deny, or delay, right or justice."

26 Section 11(d) of the Charter guarantees anyone charged with an offence the right: "to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal."

27 Section 11(b) of the Charter guarantees anyone charged with an offence the right: "to be tried within a reasonable time."

28 The right to a trial in a reasonable time does not apply to civil trials. This has led to claims by lawyers in civil cases that the timelines set by the *Jordan* decision mean that an understaffed Superior Court has had to redeploy judges away from civil cases to hear criminal matters at risk of being dismissed for delay (see Jacques Gallant, "Ontario lawyers warn civil court delays a worsening 'disaster'," thestar.com, 23 January 2017.

29 *R. v. Askov*, [1990] 2 S.C.R. 1199.

30 *R. v. Morin*, [1992] 1 S.C.R. 771. The majority in the *Jordan* decision said that: "The *Morin* framework … has given rise to both doctrinal and practical problems, contributing to a culture of delay and complacency towards it … [by being] too unpredictable, too confusing, and too complex. It has itself become a burden on already over-burdened trial courts."

In coming to this decision, the Supreme Court established a new framework to encourage all participants in the criminal justice system to cooperate "in achieving reasonably prompt justice."[31] The key to this framework is a presumptive ceiling beyond which delay — from the charge to the actual or anticipated end of trial — is presumed to be unreasonable, unless exceptional circumstances justify it. The court set a presumptive ceiling at 18 months for cases tried in the provincial court, and 30 months for cases in the superior court (or cases tried in the provincial court after a preliminary inquiry). The *Jordan* decision does not specifically address how the time from the end of trial to the final disposition at sentencing should be counted.[32] Delay attributable to or waived by the defence does not count towards the presumptive ceiling.

Under the *Jordan* framework, once the presumptive ceiling is exceeded, the burden is on the Crown to rebut the presumption of unreasonableness on the basis of exceptional circumstances. If the Crown cannot do so, a stay of proceedings will follow. Exceptional circumstances lie outside the Crown's control in that (1) they are reasonably unforeseen or reasonably unavoidable, and (2) they cannot reasonably be remedied. The seriousness of the offence, chronic institutional delay, or lack of prejudice suffered by the accused cannot be used to justify delays after the presumptive ceiling is breached. Below the presumptive ceiling, the burden is on the defence to show that the delay is unreasonable. To do so, the defence must establish that (1) it took meaningful steps that demonstrate a sustained effort to expedite the proceedings, and (2) the case took markedly longer than it reasonably should have. If these two factors are not proven, the application for a stay of proceedings will fail.

For cases that were already before the courts as of 8 July 2016, the Supreme Court stated that transitional exceptional circumstances can be considered in addition to the aforementioned factors. In its majority decision in *Jordan*, the court indicated that this was to avoid repeating the consequences of the *Askov* decision; in the minority decision, disagreement was expressed about whether these transitional steps would be sufficient to avoid causing many stays. The transitional scheme in *Jordan* differs depending on whether the delay goes beyond the ceiling. Where the delay exceeds the ceiling, a transitional exceptional circumstance will apply if the Crown satisfies the court that the time the case has taken is justified based on the law as it previously existed (i.e., as per the framework set out by the Supreme Court in *R. v. Morin*). This requires a contextual assessment[33] and the framework must be applied flexibly.[34] The Supreme Court mentions that the delay may exceed the ceiling if the case is of moderate complexity in a jurisdiction with significant institutional delay problems, as:

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31 *R. v. Jordan*, at para. 5.

32 Under the previous framework, the time frames were based on the period from the time charges are laid until the end of the trial. The Supreme Court subsequently specified in *R. v. MacDougall,* [1998] 3 SCR 45 that section 11(b) also extends to sentencing. This was not, however, clarified for the new *Jordan* framework. Statistics Canada measures adult criminal court case processing times as being the amount of time it takes from an individual's first court appearance to the final decision in their case. See: Ashley Maxwell, Statistics Canada, *Adult criminal court statistics in Canada, 2014/2015*, 2017.

33 *R. v. Jordan*, paras. 96 and 97.

34 Ibid., para. 105.

> Parliament, the legislatures, and Crown counsel need time to respond to this decision, and stays of proceedings cannot be granted en masse simply because problems with institutional delay currently exist. … This transitional exceptional circumstance recognizes that change takes time, and institutional delay – even if it is significant – will not automatically result in a stay of proceedings.[35]

If the delay falls below the ceiling, the defence must meet the same criteria as under the new scheme. However, for cases already in the system, the defence does not have to demonstrate that it took the initiative to expedite matters for any periods of delay that preceded the *Jordan* decision.[36]

Stays of proceedings may appear to be an extreme measure, but they are the means by which Canadian courts have chosen to protect this important constitutional right. (In Chapter Three, the committee explores whether other remedial options should be considered.) In 1987, when the Charter was still a recent addition to Canada's constitution, the Supreme Court examined the section 11(b) right and considered what the appropriate remedy would be when it has been infringed. In its reasons set out in *R. v. Rahey*,[37] the Supreme Court held that a stay of proceedings was the minimal remedy for unreasonable delay. The reason for this was because of a loss of jurisdiction:

> If an accused has the constitutional right to be tried within a reasonable time, he has the right not to be tried beyond that point in time, and no court has jurisdiction to try him or order that he be tried in violation of that right. After the passage of an unreasonable period of time, no trial, not even the fairestpossible trial, is permissible.[38]

Three years later, the right to a trial in a reasonable time was examined again in *R. v. Askov* in which the Supreme Court of Canada set out some guidelines as to how long a delay before trial is too long. In *Askov,* the Court held that there had been an unreasonable delay of almost two years between the end of the preliminary inquiry and the beginning of the trial. On the other hand, in *Morin*, for which a judgment was rendered just two years later, a delay of 14.5 months between the accused's arrest and her trial was not found to be unreasonable, because the Court determined that little or no prejudice could be inferred from the delay. The result of applying the *Askov* guidelines was significant in that tens of thousands of charges were stayed for unreasonable delay in Ontario. In the majority decision, Justice Cory of the Supreme Court mentions how "most unfortunate and regrettable" the consequence of having to stay proceedings is, and adds that:

> There can be no doubt that it would be in the best interest of society to proceed with the trial of those who are charged with posing such a serious threat to the community. Yet, that trial can only be undertaken if the *Charter* right to trial within a reasonable

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35 Ibid., para. 97.

36 Ibid., para. 99.

37 *R. v. Rahey*, [1987] 1 S.C.R. 588.

38 *R. v. Rahey*, para. 48.

> time has not been infringed. In this case that right has been grievously infringed and the sad result is that a stay of proceedings must be entered. To conclude otherwise would render meaningless a right enshrined in the *Charter* as the supreme law of the land.[39]

One would have hoped that after the *Askov* decision, the causes of delays would have been sufficiently addressed. Since this did not happen, Canada is again facing the potential for hundreds, perhaps thousands, of charges being stayed: a risk acknowledged in the minority decision of the Supreme Court in *Jordan*.[40] The committee's review of recent jurisprudence found that numerous reported cases are already applying the *Jordan* framework and arriving at decisions to both grant[41] and not grant[42] stays. Some of these decisions have stayed proceedings for very serious crimes. In *R. v. Williamson*,[43] charges for sexual offences against a minor were stayed by the Supreme Court. The total delay in this case, between the laying of charges to the end of trial, was 34 months (excluding defence delay). The Supreme Court concluded that "while the crimes committed by W are very serious, the balance weighs in favour of his interests in a trial within a reasonable time, over the societal interest in a trial on the merits" (para. 30). In *R. v. Picard*, which was quoted in Chapter One of this report, charges of first degree murder were stayed. In *R. v. J.M.*,[44] charges of sexual assault by a 15-year-old against two three-year-olds at a home day care were stayed. In *R. v. Regan*,[45] the accused was charged with the first degree murder of another prisoner, but the 38.5 months delay was well past the presumptive ceiling and held to be inexcusable and unjustified, so the charges were stayed.

In *R. v. Park*, Justice Martinez of the Provincial Court of Saskatchewan dismissed the application for a stay, but took the time to underscore his concerns about delays in Canada.[46] He concluded that the defendant's actions did not do "anything to move [the matter] along in any sustained or meaningful way," as required by the *Jordan* criteria. As such, his conduct did not satisfy the criteria for a stay of proceedings where the delay falls below the presumptive ceiling.

Canada is still in the early days after *Jordan*, and many more courts are considering applications for a stay of proceedings. According to *The Globe and Mail,* in 2017, criminal defence lawyers have applied for stays in 800 criminal cases across Canada, which included trials for charges of murder, attempted

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39 *R. v. Askov*.

40 Justice Cromwell wrote for the minority that: "…In my view, these transitional provisions will not avoid the risk of thousands of judicial stays of proceedings." See *R. v. Jordan,* paras.282-285.

41 See for instance: *R. c. O'Donnell*, 2016 QCCQ 12087 [Available in French only]; *R. v. Bragg*, 2016 NLPC 0016PA00100; *R. v. Han*, 2016 ONCJ 648; *R. v. M.N.T.*, 2016 BCPC 338; *R. v. Keller*, 2016 SKQB 319.

42 See for instance: *R. v. Rasul*, 2016 NLTD(G) 181; *R. v. Singh*, 2016 BCCA; *R. v. Cristoferi-Paolucci*, 2016 ONSC 6923; *R. v. Rhode*, 2016 SKQB 330; *R. v. Ramsay*, 2016 ONCJ 569.

43 *R. v. Williamson*, 2016 SCC 28.

44 *R. v. J.M.*, 2017 ONCJ 4.

45 *R. v Regan*, 2016 ABQB 561.

46 *R. v. Park*, 2016 SKPC 137.

murder and manslaughter.[47] According to the CBC, in fall 2016, there were over 400 cases under review in Calgary alone due to concerns that the delays had exceeded the *Jordan* limits.[48] A study conducted by Professor Stephen Coughlan and Ms. Jessica Patrick from Dalhousie University noted that there had only been a slight increase in the rate of stays granted since the *Jordan* decision, though the committee notes that cases for which stays are being sought now would presumably be reviewed in accordance with the Supreme Court's transitional guidelines.[49]

For cases that were already in the system at the time of the *Jordan* decision, courts must consider whether any transitional exceptional circumstances apply to reduce the total calculated time of delay. Chief Justice Neil Wittmann of the Court of Queen's Bench of Alberta mentioned to the committee there was some confusion about how to apply these: "I haven't heard anybody who knows exactly what that transition of reliance means," he explained. Justice Parfett of the Ontario Superior Court of Justice mentioned in *R. v. Picard* that the transitional guidelines are not simple to apply: "While the new framework is relatively simple to apply, the transitional guidelines are not."[50] On 1 December 2016, the committee issued a press release calling on the Attorney General of Canada to request clarification from the Supreme Court regarding the transitional provisions outlined in *R. v. Jordan*.[51]

The Division of Powers

> "I think that the various pieces need to work together. I don't believe you can prioritize one part of the problem and expect the entire system to respond favourably. I believe that a more complete approach to addressing the issues that involve statutory reform but also may involve resource issues and frank discussions among the various levels of government is probably what you need in order to effect real change that can address the shocking delays ..."
>
> – PROFESSOR CARISSIMA MATHEN, UNIVERSITY OF OTTAWA

47 See Sean Fine, "Courts shaken by search for solutions to delays", *The Globe and Mail* [Toronto], 12 March 2017.

48 Meghan Grant, "Calgary has 400 cases under review over concern delays will allow accused criminals to walk free", CBC News, 13 October 2016.

49 Tonda MacCharles, "Fears of widespread trial dismissals not borne out, says law professor", *Toronto Star*, 10 April 2017. According to the authors of the study, of the 69 pre-*Jordan* identified cases, stays were granted in 26 cases (or 38%); of the 101 post-*Jordan* identified cases, stays were granted in 51 cases (or 50%). These findings are expected to be published at a later stage.

50 *R. v. Picard*, 2016 ONSC 7061, para. 21.

51 Senate, Standing Senate Committee on Legal and Constitutional Affairs, "Senators ask for clarification of Supreme Court decision," News Release, 1 December 2016.

Any strategy to address efficiencies in the justice system in Canada will need to reflect our unique constitutional arrangement for the passing of criminal laws and the administration of justice. From the outset of this study, the committee has been mindful of the fact that criminal law is a matter of overlapping jurisdiction between provinces and the federal government. Under section 91(27) of the *Constitution Act, 1867*,[52] Parliament has jurisdiction in relation to "the criminal law, except the constitution of courts of criminal procedure, but including the procedure in criminal matters." Under section 92(14), the provinces have jurisdiction in relation to "the administration of justice in the province, including the constitution, maintenance and organization of provincial courts, both of civil and criminal jurisdiction." Under section 92(15), the provinces can also impose any "punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province." This division of responsibilities allows for consistency in the making of criminal law across Canada, while also allowing local solutions to be developed for how criminal justice is administered.

Canada's shared jurisdiction over criminal law was described by Assistant Deputy Minister Donald Piragoff from the Department of Justice Canada in the following terms: "Cooperative federalism is an essential part of Canada's criminal justice system: Neither level of government can successfully carry out its mandate without the cooperation of the other." This is seen concretely in the *Criminal Code* which, by the way it defines "Attorney General" in section 2, grants prosecutorial authority to provincial Crown attorneys over most *Criminal Code* offences. Federal prosecutors, however, have carriage over other federal offences, such as those found in the *Controlled Drugs and Substances Act.*[53] It can arise that an accused is alleged to have violated both the *Criminal Code* and the *Controlled Drugs and Substances Act.* There would then be two Crown prosecutors, a provincial one for the *Criminal Code* matter and a federal one for the *Controlled Drugs and Substances Act*.

The committee is, of course, cognizant of the different and separate roles played by the federal, provincial and territorial (FPT) governments and by the judiciary. It is also mindful, however, of the fact that the federal government and Parliament can play a role in addressing delays in the criminal justice system either directly through legislative or funding changes or indirectly by providing information to the provinces on best practices being used in other jurisdictions. In studying these matters, the committee heard not only from experts in constitutional and criminal law, but also from government officials who responded to questions about how criminal justice matters are studied and addressed through working groups of representatives from the federal, provincial and territorial governments.

In order to facilitate cooperation between the federal, provincial and territorial governments, officials establish various working groups to address the issues that require coordinated attention. The federal, provincial and territorial ministers responsible for justice and public safety meet yearly to discuss priorities. As Donald Piragoff explained, these are "essentially set by ministers" and then "cascade down to the deputies and then the deputies cascade their work down to the various working levels below them."

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52 *Constitution Act 1867,* 30 & 31 Victoria, c. 3 (U.K.).

53 *Controlled Drugs and Substances Act*, S.C. 1996, c. 19.

A Coordinating Committee of Senior Officials drawn from Canadian governments then determines how inter-governmental issues will be delegated to the various working groups who focus on the criminal justice system.[54] During the period of our study, the federal government and provincial government of Saskatchewan have been co-chairs of this committee. The Coordinating Committee provides legal and strategic advice to the deputy ministers and ministers, and provides a forum to foster discussion of each administration's policies and practices. It may determine that certain topics are more suited to discussions among justice ministers, deputy ministers or senior officials. Working groups created over the years have addressed such topics as delays, human trafficking, victims, organized crime, sentencing, and criminal procedure, among others. Much of what is discussed during the working group meetings is confidential and therefore strategies under consideration are not shared with the public.

There are many other important federal, provincial, territorial and inter-governmental initiatives whose purpose is to improve the administration of justice and address the various factors that contribute to delays in criminal proceedings. A full review of all of these is beyond the scope of this report, though the committee discussed many relevant examples with witnesses.[55] To list only a few, there are several forums designed for intergovernmental cooperation, such as the Economics of Policing and Community Safety Initiative, which is a pan-Canadian forum aimed at sharing information and seeking innovative approaches to policing efficiency and effectiveness and to community safety across jurisdictions. The National Coordinating Committee on Organized Crime is responsible for the identification of national public policy issues, developing national strategies and initiatives to combat organized crime and advising the federal, provincial and territorial Deputy Ministers Steering Committee on Organized Crime on the nature, scope and impact of organized crime.[56] Other organizations provide national leadership, such as the National Crime Prevention Centre, which seeks cost-effective ways to prevent and reduce crime by identifying and addressing risk factors, especially in high-risk populations and locations, and by supporting targeted interventions and building and sharing practical knowledge. The Uniform Law Conference of Canada was founded in 1918 to "harmonize the laws of the provinces and territories of Canada, and where appropriate the federal laws as well."[57] Its delegates are selected by the federal, provincial and territorial governments. Its Criminal Law Section brings together government lawyers, Crown prosecutors, private lawyers, academics and members of the judiciary to consider issues regarding the implementation and reform of the *Criminal Code* and related statutes. The Criminal Law Section may also issue reports and make recommendations when it identifies deficiencies, defects or gaps in the existing law, or address problems created by the judicial interpretation of existing law.

Another important cooperative effort is the Steering Committee on Justice Efficiencies and Access to the Justice System. It was created in 2003 to bring major participants in the justice system together to

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[54] The Canadian Intergovernmental Conference Secretariat coordinates senior level intergovernmental conferences. For information regarding intergovernmental work on justice issues that has been released further to these conferences, please see: Canadian Intergovernmental Conference Secretariat.

[55] See the testimony of Gina Wilson, Public Safety Canada (21 April 2016), among others.

[56] Public Safety Canada, *National Coordinating Committee on Organized Crime*.

[57] See Uniform Law Conference of Canada. See also the testimony of Elizabeth Strange, Uniform Law Conference of Canada (21 April 2016).

share best practices and recommend solutions to problems affecting the system.[58] It is composed of six federal and provincial deputy ministers responsible for justice, three representatives from the Canadian Judicial Council, three representatives from the Canadian Council of Chief Judges, one representative from the Canadian Bar Association, one representative from the Barreau du Québec, one representative from the Canadian Council of Criminal Defence Lawyers, and two representatives from the police community for a total of 17 members.[59]

The committee is consistently impressed with the work that is undertaken by public officials across this country and is aware that the excellent work they perform is a key reason that Canada's justice system is internationally respected. This being said, Canada's attorneys general and ministers of justice are now facing one of the most significant challenges ever faced by Canada's justice system in the aftermath of the *Jordan* decision. While the Supreme Court of Canada's decision was a wake-up call and has forced Canada's attorneys general/ministers of justice into a position where they must take action, it has also presented an historic opportunity – it is time for significant reform.

In the subsequent chapters of this report, the committee identifies various ways that the issue of delays can be addressed by Canadian governments and, in particular, ways in which the federal government can provide the leadership role mentioned above. Many of our recommendations pertain to areas where we know that FPT working groups are already engaged. With all due respect to these efforts, the current situation requires greater efforts and more urgent attention. These forums have been engaged with many issues for years now and have not progressed sufficiently: *Jordan* is itself evidence that successful reform has not been achieved in addressing delays. In Chapter Eight, the committee reviews alternative measures such as restorative justice programs which have, in some cases, existed for over 30 years. While Canadian governments have extolled the value of these programs over the years, some programs are still being offered as pilot projects or are only being offered in certain centres. Many witnesses commented on the lack of good research and analysis of their effectiveness. The committee believes the time is well-overdue to see evidence-based and properly evaluated restorative justice programs working across the country and available to serve Canadians.

Canada's constitutional arrangement means that federal-provincial consultation and cooperation is required to respond to the urgency of the post-*Jordan* situation and produce effective reform of the justice system – as well as to implement the recommendations provided in this report. The committee is aware that a national conference of Canadian ministers of justice and other FPT representatives focused solely on the delays issue had its initial meeting in April 2017 and will meet again in September. This conference needs a bolder agenda and mandate than those of the Steering Committee on Justice

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[58] See the testimony of Donald Piragoff, Department of Justice Canada (4 February 2016) and (21 April 2016); and William Trudell, Canadian Council of Criminal Defence Lawyers (18 February 2016), among others. See also Government of Canada, "Backgrounder: The Steering Committee on Justice Efficiencies and Access to the Justice System."

[59] The Committee holds three meetings per year and occasionally publishes reports on topics such as mega-trials and effective case management. See, for example: Government of Canada, *Final Report on Mega-trials of the Steering Committee on Justice Efficiencies and Access to the Criminal Justice System*; and, Government of Canada, "Guiding Principles For Effective Case Management."

Efficiencies and Access to the Justice System or the routine FPT working groups on justice matters. Representatives from the judiciary, legal community and other key stakeholder groups should be encouraged to participate and submit their views. Canada's ministers of justice must not only meet to discuss the matters covered by this report, but must produce a comprehensive and detailed strategy for addressing delays and modernizing the justice system. It is crucial that this strategy be made public in order to ensure that Canadians' confidence in the justice system is maintained.

Recommendation 1

The committee recommends that when Canada's federal, provincial and territorial ministers of justice meet to address issues pertaining to delays in criminal proceedings in September 2017, they:

- **develop and publish a national strategy for taking immediate action to address delays in criminal proceedings; and**
- **create a funding plan for how the federal government can assist the provinces and territories in modernizing their justice systems.**

Overview of Criminal Court Statistics

In order to gain a deeper understanding of the nature of the delays that various jurisdictions across Canada are facing, the committee discussed relevant data and statistics with Statistics Canada officials and other witnesses. Key data pertaining to the criminal justice system is reported by Statistics Canada through the Integrated Criminal Court Survey (ICCS),[60] the Uniform Crime Reporting (UCR) Survey[61] and the General Social Survey on Victimization (GSS).[62] Statistics relevant to this study are organized according

[60] "The objective of the Integrated Criminal Court Survey is to develop and maintain a national database of statistical information on appearances, charges, and cases in youth courts and adult criminal courts. The survey is intended to be a census of pending and completed federal statute charges heard in provincial-territorial and superior courts in Canada. Appeal courts, federal courts (e.g., Tax Court of Canada) and the Supreme Court of Canada are not covered by the survey. The survey includes information on the age and sex of the accused, case decisions, sentencing information regarding the length of prison and probation, and amount of fine, as well as case-processing indicators such as case elapsed time." See Statistics Canada, *Integrated Criminal Court Survey (ICCS)*, 2016 and Ashley Maxwell, Statistics Canada, *Adult criminal court statistics in Canada, 2014/2015*, 2017.

[61] The Uniform Crime Reporting data "reflect reported crime that has been substantiated by police. Information collected by the survey includes the number of criminal incidents, the clearance status of those incidents and persons-charged information." See Statistics Canada, *Uniform Crime Reporting Survey (UCR)*, 2016 and Mary Allen, Statistics Canada, *Police-reported crime statistics in Canada, 2015*, 2016.

[62] The General Social Survey on Victimization is "a national survey of self-reported victimization and is collected in all provinces and territories. The survey allows for estimates of the numbers and characteristics of victims and criminal incidents. As not all crimes are reported to the police, the survey provides a complement to officially recorded crime rates. It measures both crime incidents that come to the attention of the police and those that are unreported. It also helps to understand the reasons behind whether or not people report a crime to the police." See Statistics Canada, *General Social Survey - Victimization (GSS)*, 2016 and Samuel Perreault, Statistics Canada, *Criminal victimization in Canada, 2014*, 2015.

to a number of different criteria, such as by the number of completed cases[63] and completed charges; the median length of cases and the median number of court appearances; the crime rate; the number of police-reported offences; and reported victimization incidents.

In 2015, police-reported crime in Canada increased for the first time since 2013 (rising 3 per cent from the year 2014), but is still 29 per cent lower in comparison to 2005 levels. Several witnesses pointed out that although the crime rate has been declining in recent years, delays are in fact increasing.[64] Some witnesses tried to explain why this is happening. Joseph Oliver from the Canadian Association of Chiefs of Police and Chief Jean-Michel Blais from Halifax Regional Police, among others, thought this is due to the increasing cost and complexity of police work. Defence lawyer Leo Russomanno thought the increasing complexity of cases was responsible, as well as the increased demands of disclosure requirements, a decrease in funding going into the justice system, and the fact that, while the crime rate has decreased, the Canadian population has increased.

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63 According to Statistics Canada, "[a] case is one or more charges against an accused person or company, which were processed by the courts at the same time (date of offence, date of initiation, date of first appearance, or date of decision), and received a final decision." (Maxwell, Statistics Canada, 2017, p. 17).

64 See the testimony of Leo Russomanno, Criminal Lawyers' Association (Evidence, 18 February 2016); Joseph Oliver, Canadian Association of Chiefs of Police (Evidence, 25 February 2016); Josh Paterson, British Columbia Civil Liberties Association (Evidence, 23 March 2016); Chief Jean-Michel Blais, Halifax Regional Police (Evidence, 6 May 2016); and Kim Beaudin, Congress of Aboriginal Peoples (Evidence, 27 October 2016), among others.

Police reported *Criminal Code* incidents (excluding traffic) and crime rate

	Crime rate[65]	Crime Severity Index[66]
2015	5,198 incidents per 100,000 population (or 1,863,675 incidents)	69.7
2014	5,046 incidents per 100,000 population (or 1,793,612 incidents)	66.7
2013	5,195 incidents per 100,000 population (or 1,826,431 incidents)	68.8
2012	5,632 incidents per 100,000 population (or 1,957,227 incidents)	75.4
2005	7,325 incidents per 100,000 population (or 2,361,974 incidents)	101.3

Source: Mary Allen, Statistics Canada, *Police-reported crime statistics in Canada, 2015*, table 1a and 1b, pp. 33-34.

Adult criminal court statistics are based on completed cases, which are set out in the chart below (along with the total number of charges). In 2014-2015, the number of completed adult criminal court cases decreased by 13 per cent from the previous year. This is the lowest number of completed cases in the last decade. A decrease in the total number of cases criminal courts are able to process each year could be an indication that more cases are being delayed, or at least taking longer to reach a final disposition.

Total number of completed cases and charges

	Total cases	Total charges
2014-2015	328,028	992,635
2013-2014	379,058	1,134,483
2012-2013	387,614	1,182,345
2011-2012	394,116	1,196,169
2005-2006	382,322	1,094,431

Source: Ashley Maxwell, Statistics Canada, *Adult criminal court statistics in Canada, 2014/2015*, Catalogue no. 85-002-X, 2017, table 1, p. 17

[65] According to Statistics Canada, "[t]he traditional crime rate has been used to measure police-reported crime in Canada since 1962, and is generally expressed as a rate per 100,000 population. The crime rate is calculated by summing all *Criminal Code* incidents reported by the police and dividing by the population. The crime rate excludes *Criminal Code* traffic violations, as well as other federal statute violation such as drug offences." (Allen, Statistics Canada, 2017, p. 6).

[66] According to Statistics Canada, "[t]he Crime Severity Index (CSI) was developed to address the limitation of the police-reported crime rate being driven by high volume, relatively less serious offences. The CSI not only takes into account the volume of crime, but also the seriousness of crime. In order to calculate the police-reported CSI, each violation is assigned a weight. CSI weights are based on the violation's incarceration rate, as well as the average length of prison sentence handed down by criminal courts.6 The more serious the average sentence, the higher the weight assigned to the offence, meaning that the more serious offences have a greater impact on the index. Unlike the traditional crime rate, all offences, including *Criminal Code* traffic violations and other federal statute violations such as drug offences, are included in the CSI." (Allen, Statistics Canada, 2017, p. 6).

The time to complete a case is, according to Yvan Clermont, Director of the Canadian Centre for Justice Statistics "calculated from the date of the first appearance until the date of the final decision. Between those two dates, the processing time is expressed in days. We use a median which is the central point of a series of values …." In 2014-2015, while the median case processing time declined (from 127 days in 2013-2014 to 121 days in 2014-2015), the median number of court appearances remained stable at five.[67] Of course, the cases that involve excessive delays are those that take longer than the median time. Cases that involve a trial (as opposed to the large majority of cases that are resolved without a trial by guilty pleas, withdrawal of charges, etc.[68]) often require a lot of time and resources to hear all of the testimony, legal arguments and victim impact statements. In addition, Mr. Clermont explained that the more appearances there are, the longer a case takes to arrive at a decision. The five most common offences from 2014-2015 were theft (10 per cent), impaired driving (10 per cent), failure to comply with a court order (10 per cent), common assault (9 per cent) and breach of probation (9 per cent) - making up nearly half of all completed cases. For the first time in 10 years, impaired driving offences were not the most commonly reported. The median length of cases for these offences (and the numbers of those offences) and their disposition (along with homicide and sexual assault cases) are set out below:

Cases completed in adult criminal court, by type of offence, Canada, 2014/2015 and 2013/2014

	2014/2015		2013/2014	
	Number	Median length of case (days)	Number	Median length of case (days)
Theft	34,001	71	37,522	76
Impaired driving	33,121	105	44,476	155
Fail to comply with order	31,544	83	36,362	85
Common assault	29,867	141	34,169	135
Breach of probation	29,626	62	32,035	64
Homicide	236	493	278	451
Sexual assault	2,586	310	3,135	324

Source: Ashley Maxwell, Statistics Canada, *Adult criminal court statistics in Canada, 2014/2015*, Catalogue no. 85-002-X, 2017, table 3, p. 18

[67] Cases involving more serious offences often require more appearances and are heard by higher courts. Provincial court cases (representing 99 per cent of all completed cases) had a median number of five court appearances and superior court cases had a median number of 15 appearances. See Maxwell, Statistics Canada, 2017, p. 11.

[68] According to Professor Ian Greene, "Ninety per cent of criminal cases don't go to trial."

Cases completed in adult criminal court, by type of offence and decision, Canada, 2014/2015

	Guilty[69]	Stayed[70]	Withdrawn[71]	Acquitted	Other decisions[72]
Theft	20,720	5,760	6,967	388	166
Impaired driving	26,096	921	4,483	1,450	171
Fail to comply with order	21,336	2,987	6,424	582	215
Common assault	14,104	4,443	9,194	1,737	389
Breach of probation	23,772	1,972	3,189	501	192
Homicide	111	32	74	7	12
Sexual assault	1,116	399	774	252	45

Source: Ashley Maxwell, Statistics Canada, *Adult criminal court statistics in Canada, 2014/2015*, Catalogue no. 85-002-X, 2017, table 3, p. 18

The median length of cases by province and territory is also very different, as set out in the chart below. This can be explained by the fact that provinces have constitutional jurisdiction over the administration of justice. Also, provinces and territories each face their own regional trends and challenges.

Province and territory	Median length of cases (days)
Canada	121
Nunavut	71
Northwest Territories	61
Yukon	103
British Columbia	105
Alberta	107
Saskatchewan	77
Manitoba	151
Ontario	104
Quebec[73]	239
New Brunswick	106
Nova Scotia	163
Prince Edward Island	47
Newfoundland and Labrador	143

[69] According to Statistics Canada "[g]uilty findings include guilty of the offence, of an included offence, of an attempt of the offence, or of an attempt of an included offence. Also includes guilty pleas, and cases where an absolute or conditional discharge has been imposed." (Maxwell, Statistics Canada, 2017, p. 19).

[70] According to Statistics Canada it "[i]ncludes stays as well as court referrals to alternative or extrajudicial measures and restorative justice programs." (Maxwell, Statistics Canada, 2017, p. 19).

[71] According to Statistics Canada it "[i]ncludes withdrawals, dismissals and discharges at preliminary inquiry." (Maxwell, Statistics Canada, 2017, p. 19).

[72] According to Statistics Canada, it "[i]ncludes final decisions of found not criminally responsible and waived out of province or territory. Also includes any order where a conviction was not recorded, the court's acceptance of a special plea, cases that raise Charter arguments and cases where the accused was found unfit to stand trial." (Maxwell, Statistics Canada, 2017, p. 19).

[73] According to Statistics Canada, the median length of case completion in Quebec may be overestimated given that data from municipal courts, which tend to handle the least serious matters, are unavailable. (Maxwell, Statistics Canada, 2017, p. 15).

With respect to victimization, in 2014, 5.6 million people reported that they or their household had been the victim of at least one of the eight crimes measured by the GSS.[74] In total, 6.4 million criminal incidents were reported that year.

Victimization incidents reported by Canadians, by type of offence

	Violent victimization (in thousands)	Household victimization (in thousands)	Theft of personal property (in thousands)
2014	2,245	2,029	2,154
2009	3,267	3,184	2,981
2004	2,751	3,206	2,408
1999	2,691	2,656	1,831

Source: Samuel Perreault, Statistics Canada, *Criminal victimization in Canada, 2014*, Catalogue no. 85-002-X, 2015, table 1, p. 30.

The committee discussed Statistics Canada's data with Richard Audas and Scott Newark, authors of recent Macdonald-Laurier Institute reports, which used this data extensively for their research assessing the performance of Canada's justice system. Mr. Audas' report, co-written with Benjamin Perrin and titled *Report Card on the Criminal Justice System: Evaluating Canada's Justice Deficit,* concluded that the Canadian justice system is slow, inefficient and costly and that Canada is suffering from a "justice deficit": a large and growing gap between the aspirations of the justice system and its actual performance.[75] Mr. Newark's report, *Justice on Trial: Inefficiencies and Ineffectiveness in the Canadian Criminal Justice System,* "provides a data-based analysis of relevant issues concerning inefficiencies and performance in the Canadian criminal justice system. It also explores related criminal justice system issues including corrections, crime rates and legal aid spending, and offers a number of recommendations to enhance systemic performance and public safety."[76]

In reflecting upon the quality and sufficiency of the available data, Mr. Audas said, "I think that while Statistics Canada does a tremendous job in collecting the data, it's not as easy to access it and then to interpret it … we're only able to analyze the data available to us." He added that better data is needed to create indicators that can be used to assess and improve performance management within the justice system. In particular, he explained that we know little about repeat offending and recidivism, victimization, accused persons who self-represent and alternative dispute resolution. Sue O'Sullivan, the Federal Ombudsman for Victims of Crime, agreed that more data on victims is necessary.

Mr. Newark expressed similar concerns about the need for better data, but also said the data needs to be properly analyzed in order to "introduce a measure of systemic accountability that is… significantly

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74 The eight types of offences that the GSS surveyed are: violent victimization (sexual assault, robbery or physical assault), theft of personal property and household victimization (break and enter, theft of motor vehicle or parts, theft of household property or vandalism).

75 Benjamin Perrin and Richard Audas, Macdonald-Laurier Institute Report, *Report Card on the Criminal Justice System: Evaluating Canada's Justice Deficit*, September 2016, p. 4.

76 Macdonald-Laurier Institute, *Justice on Trial: Inefficiencies and ineffectiveness in the Canadian criminal justice system*, News Release, 27 September 2017. See also Scott Newark, *Justice on Trial: Inefficiencies and ineffectiveness in the Canadian criminal justice system*, Macdonald-Laurier Institute Report, September 2016.

lacking in our justice system" and "because it helps to make informed policy decisions." He also mentioned that there is a need for more inter-governmental cooperation in collecting data since not all current data systems are compatible, in particular in relation to justice, health care and social services.

The committee agrees with Mr. Audas' views on how crucial it is to have complete data, to interpret it, and use it to point to inefficiencies in the justice system:

> It is important to be responsive to what the data is saying, delays and deficiencies and inequities need to be carefully monitored and addressed in a timely fashion and more timely data needs to be made available to those within the system, and those individuals should be accountable when their performance falls below agreed standards.

Another area of research for which more data would assist those who study Canada's justice system pertains to the experience of racialized groups, religious and sexual minority groups, and different sexes/genders with the justice system. In Chapter 10, the committee examines issues relevant to Indigenous Canadians in the justice system. Existing evidence notes that Black Canadians are also over-represented in increasing numbers.[77] More detailed statistics could help researchers better understand the full impact that racial profiling and other social factors are having on Canadians. A full Gender-Based Analysis Plus[78] of how different groups are being treated within the justice system is worth further exploration, but is beyond the scope of the present report.

Statistics Canada is aware that there is an opportunity to expand the data it collects. Mr. Clermont informed the committee that the agency had just begun to redesign the Integrated Criminal Court Survey by conducting a wide consultation with its partners in order to identify priority needs. He said, "[t]his redesign, we hope, will aim to improve data entry, increase awareness of statistical process and utility among court administrators, and enhance the information system technologies to do so." Kevin Fenwick, then Deputy Minister and Deputy Attorney General, Ministry of Justice, Government of Saskatchewan, also noted that Saskatchewan is working with the Canadian Centre for Justice Statistics: "By linking policing, courts and corrections, this initiative should allow us to better target programming that could decrease further demand on the justice system." From discussions with Statistics Canada and witnesses, the additional data that should be collected pertains to: proceedings in superior courts, legal representation, specialized and therapeutic courts, warrants, crown proceedings and crown election,

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77 Canadian Council of Chief Judges, *Brief Submitted to the Standing Senate Committee on Legal and Constitutional Affairs*, 26 April 2017; Office of the United Nations High Commissioner for Human Rights, *Statement to the media by the United Nations' Working Group of Experts on People of African Descent, on the conclusion of its official visit to Canada, 17-21 October 2016;* and Office of the Correctional Investigator, *The Changing Face of Canada's Prisons: Correctional Investigator Reports on Ethno-Cultural Diversity in Corrections*, 26 November 2013.

78 See: Status of Women Canada, *Gender Based Analysis Plus*. According to this site: "GBA+ is an analytical tool used to assess the potential impacts of policies, programs, services, and other initiatives on diverse groups of women and men, taking into account gender and other identity factors. The "plus" in the name highlights that GBA+ goes beyond gender, and includes the examination of a range of other intersecting identity factors (such as age, education, language, geography, culture and income)."

modes of trial, pleas, bail and remand, recidivism rates, victimization, restorative justice, alternative measures and diversion programs, among others. It is also important that the statistics better reflect, if possible, the number of cases where a stay of proceedings has been ordered due to a violation of the right to be tried within a reasonable time.

The committee urges Statistics Canada to continue to expand the scope of the data it is collecting. It should work with the provinces and courthouses across Canada to assemble as complete a picture as possible of the criminal justice system so governments and courthouses can develop solutions based on clear evidence. The Minister of Justice can take a leadership role in this endeavor by working with her provincial and territorial counterparts to ensure that the data identified by Statistics Canada is collected as quickly and completely as possible and is also as complete as possible. The minister should provide recommendations for how to improve the accuracy, completeness and reliability of the data in future.

Recommendation 2

> **The committee recommends that the Minister of Justice take a leadership role and assist Statistics Canada by working with the provinces and territories and other relevant stakeholders in the justice system to ensure that the data collected for the Integrated Criminal Court Survey is reliable and sufficient for Canadians to have as complete an understanding as possible of the criminal justice system. The statistics should better reflect, if possible, the number of cases in which a stay of proceedings has been ordered due to a violation of the right to be tried within a reasonable time.**

Legal Culture and the Causes of Delay

> "As we have observed, a culture of complacency towards delay has emerged in the criminal justice system …Unnecessary procedures and adjournments, inefficient practices, and inadequate institutional resources are accepted as the norm and give rise to ever-increasing delay. This culture of delay "causes great harm to public confidence in the justice system" (LeSage and Code, at p. 16). It "rewards the wrong behaviour, frustrates the well-intentioned, makes frequent users of the system cynical and disillusioned, and frustrates the rehabilitative goals of the system" (Cowper, at p. 48)."
>
> – R. V. JORDAN

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[79] *R. v. Jordan*, para. 40, citing: Patrick J. Lesage and Michael Code, *Report Of The Review Of Large And Complex Criminal Case Procedures*, Ministry of the Attorney General of Ontario, Toronto, November 2008; and, BC Justice Reform Initiative, D. Geoffrey Cowper QC, *A Criminal Justice System for the 21st Century*, 27 August 2012.

As Richard Fowler from the Trial Lawyers Association of British Columbia explained, Canada has a "tripartite system" of justice, with a judge, a defence lawyer and a prosecutor:

> If any of those people in our adversarial system is a weak link, either because the judge is not trained in criminal law or the prosecutor is not properly resourced or the defence lawyer is not properly trained, you will have an inefficient system.

Indeed, throughout the study, the benefits and challenges of this tripartite dynamic were evident. The three parts of the system must work cooperatively together, but each has a specific role with specific interests. The conventional view of a court case is that someone "wins" and someone "loses" in an adversarial competition refereed by a steadfastly impartial judge. Professor Ian Greene discussed his research on delay and noted a phenomenon related to this point when he surveyed judges, litigation lawyers, Crown attorneys and court administrators about the causes of delay:

> The most important thing I found was that all of these groups blamed each other. The judges blamed lawyers for being unprepared, for taking on too many cases, and for delaying in the clients' interests. Lawyers blamed other law firms for doing those things, but not them; they would never do that. They blamed judges for not being adept at administrative issues. The Crown attorneys blamed the judges and lawyers, and the court administrators blamed everybody else. Nobody was taking responsibility to try to tackle some of these problems, except in some of the smaller communities in Ontario.

The committee, like many of the witnesses, sees the reality that there is no single blameworthy source of delays in criminal proceedings across Canada, and all participants in the justice system will need to accept their responsibility in order to address them. Delays are caused by many complex factors and the various participants in the legal system can all be contributors. David Field from Legal Aid Ontario explained this as follows:

> Delay in the criminal justice system does not have a single cause and is not something that any one justice system participant can solve or fix. The problem is made up of many parts, and it will take a combined and cooperative effort on the part of many players to deal with this effectively.

Not surprisingly, in a country as large and diverse as Canada, the causes and effects of delays vary across regions. According to Brian Saunders, the then Director of Public Prosecutions:

> It is also important to keep in mind that delay times vary from province to province and within a province, from judicial district to judicial district. They may also vary within a judicial district from the provincial court to the superior court and within the courts, depending on the type of case. This suggests that what is causing delay similarly varies.

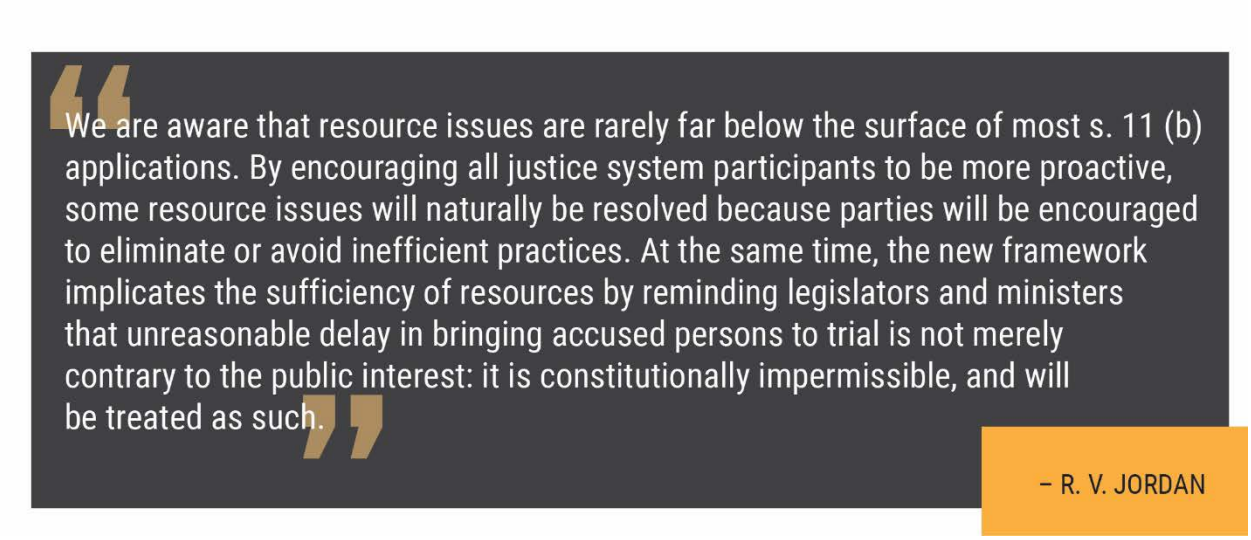
Professor Anthony Doob also discussed how delays "reflect the culture of individual courts." The committee agrees that while delays are a national issue, they are also a local problem that will require local solutions. In the upcoming conference of Canada's ministers of justice in September, participants must share best practices and methods that local courthouses can adapt to their own needs. The federal Minister of Justice can ensure that such practices are brought into the national discussion.

Throughout the study, witnesses offered many views on the various contributors to delay. Chief Judge Matchett of the Provincial Court of Alberta, for instance, explained how developments in criminal and constitutional law over the last forty years have contributed to trial length:

> There are many reasons that we have arrived at this situation: the sheer number of cases and the complexity of those cases today, the advent of Legal Aid in the mid-1970s, the Charter of Rights in 1982, forensic and DNA, which by the mid-1990s had started to expand in all directions; and, more recently, the technological digital age that we're faced with. All of these developments, while they have improved the quality of justice outcomes, have increased complexity and they have contributed significantly to delays in the justice system. … It's a complicated system with many inputs and many criminal justice participants. Delays must be addressed at multiple points and at many levels.

Other witnesses also discussed these historical developments and how they have added to the time it takes to complete criminal proceedings. Many of these are taken up in further detail in later chapters. For instance, the duty that Crown prosecutors have to disclose all the evidence used or considered in preparation for trial is discussed in Chapters Three and Six. These disclosure requirements can result in a significant amount of work and add to the length of proceedings. As noted above, the Supreme Court has recognized that in the calculation of trial length, there is a certain amount of time that is "inherent" in the process.

Another contributor to the total amount of delays that is discussed throughout subsequent chapters is a lack of resources, whether this means a lack of judges, Crown prosecutors, funding for legal aid, or services offered for diversion programs, , among others. Kate Matthews, President, Ontario Crown Attorneys' Association, described this as a "significant issue" and added that: "The system is not properly resourced, and we cannot really conquer these problems until we are." Lawyer Eric Gottardi also added: "Despite the court's clear affirmation of the accused's right to be tried within a reasonable time and the Crown's duty to ensure that this occurs, resources remained inadequate in many places for many years."



[80]

The committee recognizes that all jurisdictions in Canada need to ensure that more resources are put into the justice system. As discussed in Chapter Eight, smarter investments in alternative measures and triaging accused persons to diversion programs when appropriate could free up a significant amount of money to improve service delivery and hire more judges and Crown prosecutors, among other things. But, there are institutional fixes that must happen regardless of how much funding becomes available. Mr. Gottardi quoted from the *Jordan* decision when noting that under-resourcing had contributed to the culture of complacency: "Courts and the prosecution service became resigned to the fact that no further investment was going to be made in the criminal justice system and as such the rules were applied in a way that, 'Allowed for tolerance of ever-increasing delay.'" Indeed, underfunding has been particularly challenging for many Crown prosecutors across Canada as it has for many other stakeholders.[81] The justice system needs to be properly supported in order for participants to have confidence that it can work: that delays can be avoided, that access to justice is achievable for Canadians, and that just sentences can be given and offenders rehabilitated. In turn, however, lawyers will also need to reflect upon and change the *status quo* for the better.

Many witnesses discussed the need to change the legal culture in Canada as "probably the most important thing"[82] for fixing delays. Ian Greene explained this culture as being a local variable, where in some communities people "get used to a certain amount of delay":

> [I]f you're to think about delays, you have to think about the local legal culture and you have to have a change management strategy that engages all the groups and convinces them that, yes, delay can be reduced, and if we don't reduce it, it creates a lot of unnecessary harm to people. Through reducing delays, you could save money, and that

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80 *R.v Jordan,* at para. 117.

81 As discussed in Chapter Six.

82 See the testimony of Judge Raymond Wyant, Senior Judge of the Manitoba Court, Former Chief Judge of the Provincial Court of Manitoba (23 March 2016).

money could go to, for example, providing more resources to overburdened Crown prosecutors right across the country.

There is no simple solution for changing the culture, though if all justice system participants work together and do what they can, reform is possible. The hard ceilings in the *Jordan* decision are clearly meant to force change. Other bodies are hoping that lawyers can be pushed towards change as well. For instance, Claudia Prémont mentioned that the Barreau du Québec is working to change the legal culture and she noted that its professional code of conduct[83] can be used to discipline lawyers for any abuse of process or any procedure improperly undertaken as these would constitute a breach of ethics. Another tool for change is education. Adam Villeneuve of the Young Bar of Montréal is of the opinion that "the lawyers we have to influence are those just entering the profession, to prevent them from getting into bad habits." Law societies, law schools, and the federal, provincial and territorial attorneys general and ministers of justice need to determine how to roll out a broad educational campaign in tandem in order for a national strategy to be most effective. While producing this culture shift will be a challenge, the committee can envision what it will look like when complete. Judges will be well-versed in case management rules to ensure that delays are minimized. Crown prosecutors and defence counsel will agree to establish realistic timelines that ensure fair and efficient proceedings. Diversion and restorative justice programs and therapeutic courts will no longer be seen as "alternatives" to the justice system, but integral parts of triaging accused persons to the most appropriate and efficient route for both justice to be served and for their rehabilitation. The Minister of Justice and her provincial counterparts will put in place an effective system to proceed with wise and timely judicial appointments and ensure that the country is properly served with a sufficient number of judges. Technological solutions that help organize and expedite legal proceedings will be adopted by key participants in the justice system. Computer systems will eliminate the need for many unnecessary routine court appearances and keep victims and witnesses informed as to how cases are progressing. Provinces will maintain an appropriate number of Crown prosecutors to ensure that they are able to effectively perform their duties. Inefficiencies in courthouse operations will be addressed and free up public resources for prevention and rehabilitation programs. Most importantly, all participants in the criminal justice system will, to borrow words from the Supreme Court in *Jordan*, "cooperate in achieving reasonably prompt justice."[84] These are just a few examples of a vision of an efficient and accessible justice system that is explored in subsequent chapters.

Recommendation 3

The committee recommends that the Minister of Justice develop a national education and awareness strategy for the judiciary, the legal profession and other key stakeholders concerning ways to address delays and other inefficiencies in the justice system.

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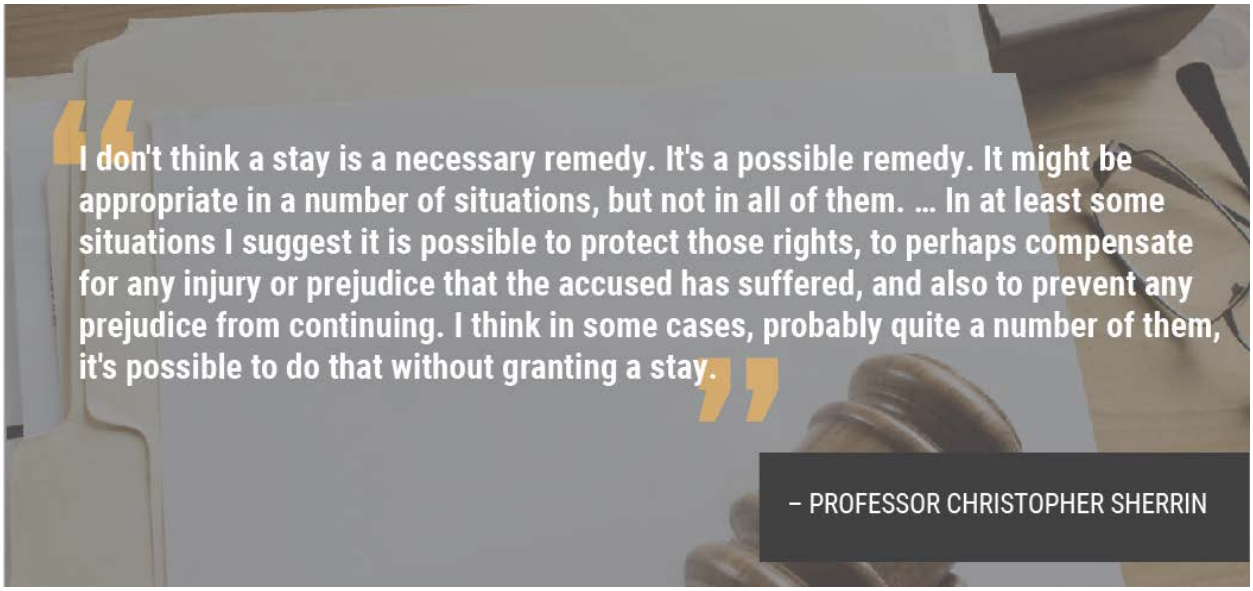
83 *Code of Professional Conduct of Lawyers, Act respecting the Barreau du Québec*, Chapter B-1, r. 3.1 (Quebec).

84 *R. v. Jordan*, para. 5.

CHAPTER THREE – LEGAL REMEDIES, REFORMS AND REVISIONS

Several witnesses cautioned the committee that there would be "no silver bullet," no one simple "magic" solution or quick fix to solve the delays crisis in Canada.[85] As noted in Chapter Two, there are many contributing factors to delays and their impact varies across Canada's diverse regions. That being said, the committee heard many interesting proposals for specific legal reforms that would help modernize the criminal justice system and improve its efficiency and fairness. This chapter explores key ideas discussed during our study pertaining to legal remedies and to possible amendments to the *Criminal Code* and other criminal law statutory provisions.

Alternatives to Stays of Proceedings



Section 24 of the *Canadian Charter of Rights and Freedoms* has permitted the courts to make flexible and proportional remedies using broad discretion to fit the gravity of the violation of a Charter right. More specifically, section 24 (1) states:

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

[85] See the testimony of Donald Piragoff, Department of Justice Canada (Evidence, 4 February 2016); Kevin Fenwick, Ministry of Justice, Government of Saskatchewan (Evidence, 24 February 2016); David Field, Legal Aid Ontario (Evidence, 25 February 2016); Chief Jean-Michel Blais, Halifax Regional Police (Evidence, 6 May 2016); Eric Gottardi, Peck and Company (Evidence, 27 September 2016); Chief Judge Terrence Matchett, Provincial Court of Alberta (Evidence, 28 September 2016); John H. Hale, Hale Criminal Law Office (Evidence, 5 October 2016); and Jody Wilson-Raybould, Minister of Justice and Attorney General of Canada (Evidence, 9 March 2017), among others.

As discussed in Chapter Two, the Supreme Court of Canada determined in *R. v. Rahey*[86] that a stay of proceedings is the appropriate judicial remedy for an infringement of an individual's constitutional right to be tried within a reasonable time. However, a stay of proceedings is a drastic remedy. Among other things, a stay denies a chance of public vindication to the victim, the accused and to Canadian society more broadly. It has the potential to let a murderer walk away from their crime unpunished. Professor Christopher Sherrin explained how the severity of the mandatory remedy may dissuade some judges from finding that there has been a section 11(b) violation:

> [T]he distaste for granting such an extreme remedy has led the courts in a number of cases to grant no remedy, to not find a violation, in cases where there has been significant delay, where the accused has not been responsible for much or maybe even any of that delay, and where the accused sometimes has suffered evident prejudice such as lengthy periods in custody or lengthy time on bail restrictions.

These concerns have led some to question whether a stay of proceedings is, in fact, the most appropriate remedy for unreasonable delays and whether in some situations, alternative remedies should be considered.

The purpose of the stay of proceedings remedy is to protect an accused person's section 11(b) right, but it also serves as an incentive to avoid delays – at least for Crown prosecutors and judges. Yet the *Askov* decision was released more than a quarter of a century ago and in *Jordan,* the Supreme Court was still discussing how a culture of complacency in the justice system is causing delays. Despite tens of thousands of charges being stayed in the wake of the *Askov* decision, Canadian governments did not make the changes that were needed to avoid a similar crisis.

One critique of the *Jordan* decision is that it gives precedence to only one side of the unreasonable delay issue, namely that of the right of an accused person to a trial within a reasonable time. There are other interests at play in seeing that matters are tried as expeditiously as possible. Victims and witnesses have an interest in seeing a criminal proceeding concluded, as does the public in general. As Professor Peter C. Hogg informed the committee, there is no mention in the *Jordan* decision of the public interest in having a trial on the merits.[87]

Professors Peter C. Hogg, Bruce Macfarlane and Christopher Sherrin agreed that a stay is not necessarily the only remedy that courts should consider for unreasonable delay. They discussed various suggestions for alternatives to this one-size-fits-all remedy for delays. Professor Sherrin proposed that stays of proceedings may be appropriate in some situations, but not all. He also questioned the Supreme Court's reasoning in choosing stays as the one remedy for delays, saying that it put too much emphasis on trial length and not enough on preserving fairness and the accused's basic legal rights:

> The reason why the Supreme Court of Canada decided a number of years ago that a stay had to be the minimum remedy was based on simple reasoning that once delay is

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[86] *R. v. Rahey*, [1987] 1 S.C.R. 588.

[87] See the testimony of Professor Peter Hogg (Evidence, 9 March 2017).

> bad, more delay has to be worse. That, while attractive, is not quite correct because what the interest in a speedy trial protects is not so much the interest in not waiting, but the interest in preserving a fair trial, in preserving liberty, in preserving security of the person.

He added that the courts should be considering the "interests of society and the interest of alleged victims and the interest of witnesses" in fashioning a remedy; instead, the only available option is "the remedy that is least desirable to those individuals."

In considering alternatives to stays, the committee notes that in certain cases the problem may not be the length of the delay in and of itself but, rather, the effects of that delay on the right to a trial within a reasonable time.[88] This means that if it is possible to eliminate or at least reduce the effects of the delay, then even a delayed matter need not be stayed in all cases.[89] Professor Hogg's suggestion was that the "common sense solution" for delays is an order for a speedy trial. The committee understood this to mean that the judge would do all in his or her case management powers to expedite the trial (a topic discussed in Chapter Five). The committee recognizes, however, that perhaps our criminal justice system is not yet equipped to make such orders practical.

That being said, some alternatives to stays of proceedings have been proposed that can still defend the interests protected by section 11(b) of the Charter. One of those interests is the right to a fair trial, which can also be phrased as the right to make full answer and defence. A delay in getting to a trial can have a negative impact on the ability to mount a defence, because evidence is lost due to fading memories or documents and witnesses disappearing. Unless the damage to the accused's case is irreparable, a remedy may be found in making a costs award against the Crown to compensate the accused for additional expenses in establishing evidence that has been lost or in investigating how to respond to such a loss.[90] A second interest protected by section 11(b) is liberty – ensuring that an accused is not constrained for a lengthy period of time by pre-trial detention or restrictive bail conditions. As summarized by Professor Sherrin, one remedy could be to restore the accused's liberty:

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88 In paragraph 54 of *R. v. Jordan*, the Supreme Court writes that prejudice will no longer play an explicit role in the s. 11(*b*) analysis and that an absence of actual prejudice cannot convert an unreasonable delay into a reasonable one. Prejudice only informs the setting of the presumptive ceilings which apply to all cases without regard to their specific facts. This does not ask the courts to look at the constitutional rights infringements that may have been suffered by a specific accused.

89 In *Mills v. The Queen*, [1986] 1 S.C.R. 863, para. 298, Justice La Forest wrote: "I cannot, therefore, accept that the only remedy for unreasonable delay is a stay. I would have thought that in many cases, the most obvious remedy for delay would be to expedite the proceedings. Thus an order could be issued compelling whoever was causing the delay, whether the police, the prosecuting authorities, the preliminary hearing magistrate or the trial judge, to act with greater expedition. As well, if the accused were ultimately convicted, delay might be taken into account in sentencing, even in situations not otherwise considered in imposing sentence. Delay might also give rise to an award for damages in a subsequent civil action. The draconian remedy of a stay should be reserved for the more compelling cases."

90 Christopher Sherrin, "Reconsidering the *Charter* Remedy for Unreasonable Delay in Criminal Cases," *Canadian Criminal Law Review*, Vol. 20, Issue 3, July 2016, p. 275.

> To take a simple example, if the prejudice to the accused is that he has been detained in custody for an excessive period of time, let him out on bail, perhaps on very relaxed bail conditions. Then at the time of trial, if he is convicted, perhaps grant a reduction in sentence to compensate for the excessive period of time he spent in custody prior to trial and prior to conviction.

The liberty interest is also related to security of the person, in this case referring to the damage to one's reputation upon arrest and the subsequent anxiety about the outcome of the proceedings. A response short of a stay could be ordering the accused's release pending trial or relaxing some bail conditions. Another possible response is to reduce the accused's sentence following a conviction.[91]

Other jurisdictions have sought ways to avoid imposing a stay of proceedings as the sole possible response to unreasonable delay. In England and Wales, it is the position that "where delay jeopardises the fairness of a forthcoming trial or where, for any compelling reason, it is not fair to try an accused at all, the proceedings must be brought to an end."[92] That jurisdiction, however, treats a breach of the right to be tried within a reasonable time as something that can be cured, even if not prevented, by taking such alternative steps as: expediting the trial, reducing the sentence (if the accused is found guilty), releasing the accused on bail, excluding certain evidence, or providing some form of compensation, financial or otherwise.[93] If these measures cannot ensure that a trial is "fair" in the legal sense of that term, then a stay should be ordered. As explained by the Right Honourable Sir Brian Leveson, President of the Queen's Bench Division, Judiciary of England and Wales, the *European Convention on Human Rights*, includes a right of fair trial (in article 6), but does not have an automatic stay. He added: "If you breach convention rights, the European Court of Human Rights has said that doesn't mean to say you don't get prosecuted, but it can be reflected in the sentence.[94] He also noted that in England, "There is a jurisdiction … of abuse of process which permits the court to stay a case on the grounds of excessive delay but only if it deprives the defendant of the right of a fair trial."

While the committee recognizes the utility of having a significant consequence when the state has failed to try a person in a reasonable time, it is a grave issue when charges for murder and the sexual assault of children are stayed. In such cases, stays need to be avoided. To be clear, this remedy may be necessary in certain cases, but the lack of alternatives that might be more adaptable to the unique circumstances of each case is a problem. Again, stays are a drastic remedy. Furthermore, they are only granted when delays have become so unreasonable that there has been a violation of a constitutional right. The Supreme Court has indicated that this unreasonableness may be presumed when the ceilings set out in *Jordan* have been reached. As the minority decision stated in Jordan:

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91 In *R. v. Nasogaluak*, 2010 SCC 6, the Supreme Court confirmed the ability of judges to reduce a sentence to compensate for Charter breaches, so long as the breaches related to the circumstances of the offence or the offender.

92 *Spiers v. Ruddy*, [2008] 2 WLR 608, per Lord Bingham of Cornhill, para. 15.

93 Ibid. See also: Andrew L-T Choo, *Abuse of Process and Judicial Stays of Proceedings*, 2nd ed., Oxford: Oxford University Press, 2008, pp. 95-96.

94 Council of Europe, *European Convention on Human Rights*, article 6(1).

> What evidence there is in the record suggests that it would be unwise to establish these sorts of ceilings. For the vast majority of cases, the ceilings are so high that they risk being meaningless. They are unlikely to address the culture of delay that is said to exist. If anything, such high ceilings are more likely to feed such a culture rather than eliminate it.[95]

The committee would add that it is not just the fact that the ceilings are so high, but also the fact that there is only one drastic remedy available that discourages the parties to cooperate in expediting criminal proceedings from the outset. Providing alternatives that judges are more likely to use could be a better means to shaking up the culture of complacency.

Since a stay of proceedings is a judicial remedy in accordance with section 24 of the Charter, it is to a large extent the Supreme Court that will have to reconsider whether other alternatives are available. (The Supreme Court noted in Jordan that it refrained from revisiting the question of remedy because it was "not invited to revisit" it.)[96] The committee explored with witnesses the possibility of recommending that the Attorney General of Canada send a reference to the Supreme Court with a question concerning the constitutionality of alternative remedies. The three professors appeared to generally support this idea, though we were cautioned by Professor Hogg that the timing of such a reference would be important. *Jordan* is still such a recent decision and we are still in the period where the transitional provisions apply. The Supreme Court may wish to give courts more time to adapt to the *Jordan* framework before considering further reform. The committee notes, however, that the majority in the *Jordan* decision itself said that: "We may have to revisit these numbers [18 and 30 months] and the considerations that inform them in the future."[97] If the presumptive ceilings can be revisited, perhaps the results of those ceilings (i.e. stays of proceedings) could also be revisited.

In order to ensure that this matter moves forward, Professor MacFarlane added a helpful suggestion to this conversation: "It would be my recommendation that the *Criminal Code* be amended to outline the options in terms of remedies, including an order expediting the trial." A federal bill containing the necessary amendments to the *Criminal Code* could be sent directly to the Supreme Court by the Attorney General as a reference to enquire whether this response to a breach of a Charter right is constitutionally valid. The committee recommends that the Minister of Justice take the necessary steps to make this happen.

Recommendation 4

> **The Committee recommends that the remedy for unreasonable trial delay be found in sentencing and costs and that a reference to the Supreme Court of Canada be made by the Attorney General of Canada to ensure the constitutionality of the proposed changes to the *Criminal Code* to give effect to the remedy.**

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95 *R. v. Jordan*, para. 276.

96 *R. v. Jordan*, at footnote 1.

97 *R. v. Jordan*, para. 57.

The Criminal Code

> "[We need to] have a modern criminal justice system and not a system that resembles the way things were done during the era of Charles Dickens."
>
> – BRUCE MACFARLANE

Throughout our hearings, the committee heard that the *Criminal Code* is badly in need of a thorough revision. The Honourable Patrick J. LeSage, former Chief Justice of the Ontario Superior Court of Justice, pointed out that the last substantial revision of the *Criminal Code* was in the 1950s. Since that time, the *Criminal Code* has been amended in a piecemeal fashion countless times and has become a very complex document. It has also become outdated; seven provisions of the *Criminal Code* that have been declared unconstitutional (some many years ago) are now being repealed by Bill C-39.[98] The *Criminal Code* also uses inconsistent language to describe criminal responsibility, thereby placing an unnecessary burden on the criminal justice system in trying to rationalize matters.[99] It also lacks any kind of declaration of principles, such as that found at the beginning of the *Youth Criminal Justice Act* (which is discussed in Chapter Eight).

One suggestion made to the committee was for some offences to be changed from indictable to hybrid offences to give the Crown the option to proceed summarily and thereby avoid a preliminary inquiry.[100] A further suggestion was that a national law reform commission be revived in order to take on

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98 Bill C-39, An Act to amend the Criminal Code (unconstitutional provisions) and to make consequential amendments to other Acts, 1st Session, 42nd Parliament.

99 To illustrate with an example: In general, Canadian criminal law is based on the premise that a person should only be convicted of an offence if they acted with *mens rea* or a guilty mind. This is often expressed by saying an offence is committed when it is done "wilfully." One exception to this general rule is the offence of criminal negligence, set out in section 219 of the *Criminal Code*. This offence is made out if an act or mission by an accused shows a wanton or reckless disregard for the lives or safety of other persons. Criminal negligence does not require proof of intention; simply giving no thought to the risk posed by one's actions is sufficient. Yet section 446 of the *Criminal Code* purports to combine these two contrasting bases of criminal responsibility by making it an offence to injure an animal while being conveyed by "wilful neglect." Furthermore, the other offences of animal cruelty use standards of criminal liability that include ""wilfully," "wilfully permits," "wilfully and without lawful excuse," and "wilfully, without reasonable excuse."

100 See the testimony of Scott Newark, DSN Consulting (Evidence, 2 November 2016).

the task of reviewing "60 years of piecemeal reform".[101] A sentencing commission could also be established to gather the facts on sentencing and provide Parliament with the benefits of its expertise. Both bodies could provide well-researched recommendations on such matters as the reform of the *Criminal Code* and the sentences it contains. The committee also notes that the benefits of such a commission include independence from government, a long-term vision, and access to groups of experts in a number of areas who are focused on the commissions' issues. The committee notes that the two initial projects of the Law Reform Commission of Canada, when it was created in 1971, were to revise the *Criminal Code* and the *Canada Evidence Act.* These revisions were never completed.

Professor MacFarlane's recommendation that a new section be added to the *Criminal Code* to make the responsibilities of the "three main players" very clear with regard to avoiding delays is worthy of mention. His proposed heading is: "Expediting Proceedings to Ensure Compliance with Constitutional Requirements." In this section, he proposes that three principles be set out:

> The first is to set out the expectation of Parliament in terms of prosecutors, that it's expected that prosecutors will provide disclosure in a timely way, will ensure that their case is focused in terms of the number of people charged, the number of counts, and the evidence led at trial. So it's a focusing expectation. Finally, that Parliament expects the prosecutors will be prepared to proceed to trial within the time frame contemplated by section 11(b) of the Charter.
>
> The second principle would be directed to counsel for the accused. It would be to the effect that upon receiving full disclosure from the Crown, that Parliament expected that defence counsel would be ready, willing and able to proceed to trial, again within the time frame contemplated by section 11(b) of the Charter.
>
> Finally, a principle that would be directed to members of the judiciary, and that would simply outline the expectation that trial judges are expected to manage pretrial processes in such a manner that the case can proceed to trial, again, within the time frame contemplated by section 11(b) of the Charter.[102]

While the committee anticipates that there may be some resistance from the legal community, particularly the defence bar (whose primary role is to protect the accused's right to provide a full answer and defence no matter how long it takes), setting out these principles could serve as important guide posts for judges and lawyers with regard to their responsibility to maintain an efficient justice system and

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[101] See the testimony of Patrick J. LeSage, former Chief Justice of the Ontario Superior Court of Justice (Evidence, 3 February 2016); Rebecca Bromwich, the Church Council on Justice and Corrections; and Kim Pate, Canadian Association of Elizabeth Fry Societies (Evidence, 10 March 2016); among others. See also Canadian Bar Association, "Study on matters pertaining to delays in Canada's criminal justice system", *Brief Submitted to the Standing Senate Committee on Legal and Constitutional Affairs*, 17 February 2016.

[102] Bruce MacFarlane (University of Manitoba),"Brief for a Presentation to the Standing Senate Committee on Legal and Constitutional Affairs on March 9, 2017", *Brief Submitted to the Standing Senate Committee on Legal and Constitutional Affairs*, 9 March February 2017.

to "cooperate in achieving reasonably prompt justice."[103] The Minister of Justice should consider the merits of Professor MacFarlane's proposal.

Recommendation 5

> **The committee recommends that the Government of Canada establish an independent body of experts with a mandate to undertake a comprehensive and impartial review of the *Criminal Code* and provide recommendations for the modernization and reform of this law.**

Pleas

Another potential aspect of criminal proceedings that could be reevaluated in order to seek more efficient practices is the plea process. Kevin Fenwick from the Government of Saskatchewan described how accused persons entering pleas late in the proceedings means that court times and resources were being used when perhaps this could have been avoided had the plea come earlier:

> The data tells us that we are averaging approximately eight court appearances per guilty plea in Saskatchewan. We're not talking about just provincial court. We have to ask ourselves: What has changed from the first court appearance until the eighth court appearance where it's now appropriate to enter a guilty plea?
>
> Similarly, in the superior courts we have situations where a large number of matters are scheduled for trial and then the guilty plea happens on the day before or week before the matter has been scheduled for trial. Meanwhile we've tied up our courts.

The *Criminal Code* allows an accused person to enter three types of pleas when called upon to answer to a charge. An accused may plead guilty or not guilty, or a special plea permitted by the *Criminal Code* and no others.[104] Certain conditions apply before a court may accept a guilty plea. A court must be satisfied that the accused is making the plea voluntarily and understands:

- that the plea is an admission of the essential elements of the offence;
- the nature and consequences of the plea; and
- that the court is not bound by any agreement made between the accused and the prosecutor.

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[103] *R. v. Jordan*, para. 5.

[104] *Criminal Code*, R.S.C., 1985, c. C-46, s. 606. The special pleas permitted by section 607 of the *Criminal Code* are autrefois acquit, autrefois convict, and pardon. Where an accused pleads autrefois acquit or autrefois convict, he or she is stating that the accused has already been lawfully acquitted, convicted or discharged under subsection 730(1), as the case may be, of the offence charged in the count to which the plea relates. A plea of pardon refers to a free or conditional pardon that may be granted pursuant to section 748 of the *Criminal Code*. Where a free pardon is granted, the person in question is deemed never to have committed the offence in respect of which the pardon is granted. The pleas of autrefois acquit, autrefois convict and pardon are disposed of by a judge without a jury before the accused is called on to plead guilty or not guilty.

Where an accused person refuses to plead, a court will order the clerk of the court to enter a plea of not guilty. Victims can advise the prosecutor of their wish to be informed of any plea agreement, but a failure to advise a victim does not affect the validity of a plea.

Donald Piragoff mentioned that: "[g]uilty pleas were found to reduce case processing time. The median case length was 58 days with a guilty plea and 190 days when there was no guilty plea." Given the savings in time and in costs for witnesses and Court resources, since a not guilty plea means a trial will follow, Canada's courts and attorneys general often encourage early guilty pleas. This is done through the plea bargaining process, whereby the Crown prosecutor agrees to make a lighter sentencing submission to a judge if the accused pleads guilty. Professor Ian Greene mentioned that: "Ninety per cent of criminal cases don't go to trial. They're settled mostly through plea bargains, so we have to make sure that process is efficient and fair."

The committee is aware that in the wake of the Jordan decision, some provinces are openly encouraging plea bargaining to speed cases up. In Nova Scotia, for instance, a working group of lawyers and judges developed a simple one page form that Crown prosecutors can use to outline his or her sentencing submissions. This can be used to speed up the process for minor offences, and the intention is to offer lighter sentences if the option to plead guilty is selected prior to a specific date. Other provinces considering similar initiatives to offer lighter sentencing submissions for early guilty pleas are Alberta and Quebec.[105]

Judge Raymond Wyant, Senior Judge of the Manitoba Court and Former Chief Judge of the Provincial Court of Manitoba, suggested that the committee consider the possibility of recommending a legislative change to allow for an alternative plea other than "guilty" and "not guilty". He mentioned that some jurisdictions in the United States have a no-contest plea. When an accused enters this plea, it means they are not admitting or disputing a charge, but are simply accepting that a judge will proceed to deliver a sentence for the charge in question. In other words, the accused does not have to admit guilt (which, depending on the jurisdiction, may prevent further liability in civil litigation or other legal matters). He added that: "[W]e could think about using a third plea in order to have someone admit responsibility in certain types of low-level cases so that they don't necessarily tie up our system." He said that the advantage would be that the accused "don't necessarily fight a case that they might ordinarily do, because criminal record is not in play." He suggested using this alternative plea for minor offences and specific categories of offenders "who are vulnerable or chronic offenders, and those who are often before the courts because of addiction or mental health issues." The committee would refer this suggestion to the Minister of Justice for further consideration.

Another possible method to encourage early pleas is for a judge to consider evidence of such a timely plea to be a mitigating factor when sentencing an individual. While judges may in fact consider this in practice, it is not explicitly set out in the sentencing principles found in sections 718-718.2 of the *Criminal*

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[105] See for example: Nova Scotia, Nova Scotia Public Prosecution Service, Early Resolution Initiative of the Criminal Justice Transformation Group, News Release; Quebec, Table Justice-Québec, *Plan d'action 2016–2017, Pour une justice en temps utile en matières criminelle et pénale*, October 2016; Alberta, Alberta Justice and Solicitor General, *Prosecution Service Practice Protocol, Triage*, 2017.

Code. Adding this in would send a message to accused persons that value is placed on earlier rather than later guilty pleas. Of course, early guilty pleas are only appropriate when they reflect the true sentiment of the accused person; encouraging them should never force an accused person to compromise their belief that they are innocent.

Recommendation 6

> **The committee recommends that the Minister of Justice introduce legislation to amend the *Criminal Code* to add a principle to section 718.2 that when an accused person pleads guilty early in the proceedings, the court should consider it to be a mitigating factor for sentencing.**

Preliminary Inquiries

In the *Jordan* case, the Supreme Court wrote that "Parliament may wish to consider the value of preliminary inquiries in light of expanded disclosure obligations."[106] This is a reference to Part XVIII of the *Criminal Code* entitled "Procedure on Preliminary Inquiry" and to the obligation for the Crown prosecutor to disclose all the evidence it intends to introduce to prove the accused's guilt (disclosure is discussed in detail in Chapter Six). This Part of the *Criminal Code* allows a Justice of the Superior Court to determine if there is sufficient evidence to set an indictable matter down for trial. In practice, a preliminary inquiry can be used to test the strength of the Crown's case as it provides a form of disclosure.

In *R. v. Hynes*,[107] preliminary inquiries were described by the Supreme Court in the following terms:

> The primary function of a preliminary inquiry justice is to determine whether the Crown has sufficient evidence to warrant committing the accused to trial.The preliminary inquiry is not a trial. It is rather a pre-trial screening procedure aimed at filtering out weak cases that do not merit trial. The justice evaluates the admissible evidence to determine whether it is sufficient to justify requiring the accused to stand trial.[108]

A preliminary inquiry will be scheduled in any one of the following situations:

- the accused elects trial by judge alone or judge and jury (section 536(2), 536(4) of the *Criminal Code*);
- the accused is charged with an offence under section 469 (e.g. murder, treason);
- the accused refuses to make an election as to the mode of trial (section 565);
- a provincial court judge exercises discretion in ordering the matter be prosecuted by indictment (section 555(1)); and/or
- the Attorney General orders a trial by judge and jury (section 568).

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106 *R. v. Jordan*, para. 140.

107 *R. v. Hynes*, 2001 SCC 82.

108 Ibid., para. 30.

Section 548 of the *Criminal Code* sets out the options for a preliminary inquiry judge after all the evidence has been taken by the justice. In brief, the question to be asked by a preliminary inquiry judge under this section is the same as that asked by a trial judge considering a defence motion for a directed verdict; namely, "whether or not there is any evidence upon which a reasonable jury properly instructed could return a verdict of guilty."[109] This means that a preliminary inquiry judge must commit the accused to trial "in any case in which there is admissible evidence which could, if it were believed, result in a conviction."[110] If the judges finds, as per section 548(1)(b), that "on the whole of the evidence no sufficient case is made out to put the accused on trial," then he or she shall discharge the accused.

Preliminary inquiries increase the amount of time it takes to complete a case if the judge orders the accused to stand trial.[111] In 2014/2015, there were 9,179 completed adult criminal court cases (provincial and superior court cases) that had at least one charge with a preliminary inquiry that was requested and/or held. Of those cases, 7,432 were completed in less than 30 months, while 1,747 took 30 months or longer to complete. These data indicate that preliminary inquiries are not a common occurrence in Canada. The same Statistics Canada report states that, in 2014/2015, there were 328,028 cases completed in adult criminal court. This means that only 2.8 per cent of cases completed in adult criminal court involved a preliminary inquiry.[112]

There was a lively debate about the very nature and the value of preliminary inquiries in the course of the committee's study, with a wide variety of opinions offered. The variety came from the different roles that preliminary inquiries can play. Thus, the committee was urged to think about why preliminary inquiries were created - to furnish the defence with disclosure. Since the release of the Supreme Court of Canada's decision in *R. v. Stinchcombe*[113] in 1991, however, the defence has a constitutional right to full disclosure of all relevant evidence (though not to a preliminary inquiry).

Another role a preliminary inquiry can play is allowing the defence to test the strength of the Crown's case. As Rick Woodburn, representing the Canadian Association of Crown Counsel, added, defence counsel can call witnesses to "discover what they want, and that's really what the preliminary inquiry is for." Brian Saunders, the then Director of Public Prosecutions, discussed the standard for sending a matter on to trial following a preliminary inquiry: "The standard is whether there's any evidence upon which a properly instructed jury could convict". But he pointed out that a higher standard is now used by prosecution services, namely whether there is a reasonable prospect of conviction based on the evidence. In his opinion, if prosecutors are doing their jobs properly, a preliminary inquiry is not really required.

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109 *United States of America v. Shephard*, [1977] 2 S.C.R. 1067, p. 1080.

110 Ibid.

111 Factors other than the holding of a preliminary inquiry can be used to explain lengthy court processing times. For example, cases involving more serious offences often require more appearances, and take longer to complete than cases involving less serious offences. Preliminary inquiries will be held more often for the more serious cases.

112 Ashley Maxwell, Statistics Canada, *Adult criminal court statistics in Canada, 2014/2015*, 21 February 2017, p. 11.

113 *R. v. Stinchcombe*, [1991] 3 S.C.R. 326.

Even if it were conceded that the disclosure and evidence justifying trial functions of preliminary inquiries have lost their resonance, some witnesses still argued in favour of retaining them. Defence lawyer Christine Mainville emphasized the benefit of preliminary inquiries from a case management perspective:

> [T]hey allow the parties to focus their case for trial and narrow the issues before the proceedings in Superior Court. In particular, they allow Crowns to assess the strength of their case by seeing their witnesses testify, which might also favour resolution or abandonment of some of the charges. They allow the defence to test the evidence in a way that might lead to abandoning certain motions or to lay out for their client the reality of the strength of the case against them….Preliminary inquiries, finally, allow the parties to obtain the perspective and guidance of the judge at an exit pretrial, which I mentioned, which very much favours resolution.

The perspective of a practitioner was supported to some extent by academic studies which showed that the preliminary inquiry continued to, in Cheryl Webster's words, "play a role in weeding out weak cases." In some instances, preliminary inquiries resulted in at least some charges being dismissed. In addition, the majority of cases with a preliminary inquiry were ultimately resolved in provincial court, avoiding the more resource-intensive and time-consuming superior court.

There was no consensus among witnesses on whether to retain or eliminate preliminary inquiries.[114] Nor was there one on whether they should be restricted to only the most serious offences. The committee was also informed that there is no consensus on this issue amongst the provinces.[115] The Committee was made aware of the Province of Alberta's study into these matters, which concluded that "[p]reliminary Inquiries should be eliminated in all but the most serious cases, like murder":

> Modern policing and prosecution practices have largely eliminated the need for preliminary inquiries to exist. When one considers their monetary cost and the inconvenience to civilian witnesses, the current preliminary inquiry regime in Canada is no longer justified.[116]

These varying opinions may be an indicator of the complexity of the issue, as what may be a problem in one jurisdiction may not be an issue in another. There seemed, however, to be some agreement that preliminary inquiries could be made more efficient. A reform of the preliminary inquiry process is not without precedent. In 2002, Parliament made the preliminary inquiry optional, authorized agreements to

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[114] See the testimony of Donald Piragoff, Department of Justice Canada (Evidence, 4 February 2016); Brian Saunders, Public Prosecution Service of Canada (Evidence, 17 February 2016); Joseph Oliver, Canadian Association of Chiefs of Police (Evidence, 25 February 2016); former Chief Justice of the Superior Court of Quebec, François Rolland (Evidence, 13 April 2016); Damian Rogers, Alberta Crown Attorneys Association (Evidence, 28 September 2016); and Chief Justice Neil Wittmann, Court of Queen's Bench of Alberta (Evidence, 3 November 2016) and (Evidence, 16 November 2016), among others.

[115] See the testimony of Donald Piragoff, Department of Justice Canada (Evidence, 4 February 2016), among others.

[116] Alberta Justice and Solicitor General, *Injecting a Sense of Urgency: A New Approach to Delivering Justice in Serious and Violent Criminal Cases*, 2013; and: *Eliminating Preliminary Inquiries paper*, 2013.

limit the scope of the preliminary inquiry and authorized the holding of a pre-hearing conference.[117] The Supreme Court has described these measures as part of a trend toward the adoption of mechanisms that are better adapted to the needs of the parties, not the imposition of more inflexible procedures.[118]

The measures adopted in 2002 should have reduced the number of preliminary inquiries and their length. Among the changes was the addition of section 540(7) to the *Criminal Code*.[119] This provision allows for evidence to be filed in written form at a preliminary inquiry, rather than always requiring evidence to come from witness testimony. The committee heard, however, that this option is not being used in a manner that expedites proceedings, as was intended.[120] The suggestion was made that, if the issue is committal for trial, the parties could take advantage of section 540(7) and file their documents, statements, and other materials and then simply argue the issue of committal. Other similar means of expediting preliminary inquiries can, hopefully, be found. Otherwise, the committee is in agreement with the view that preliminary inquiries could be eliminated, or at least should be limited to the most serious offences under the *Criminal Code*.

Recommendation 7

The committee recommends that the Minister of Justice take steps to eliminate preliminary inquiries or limit their use.

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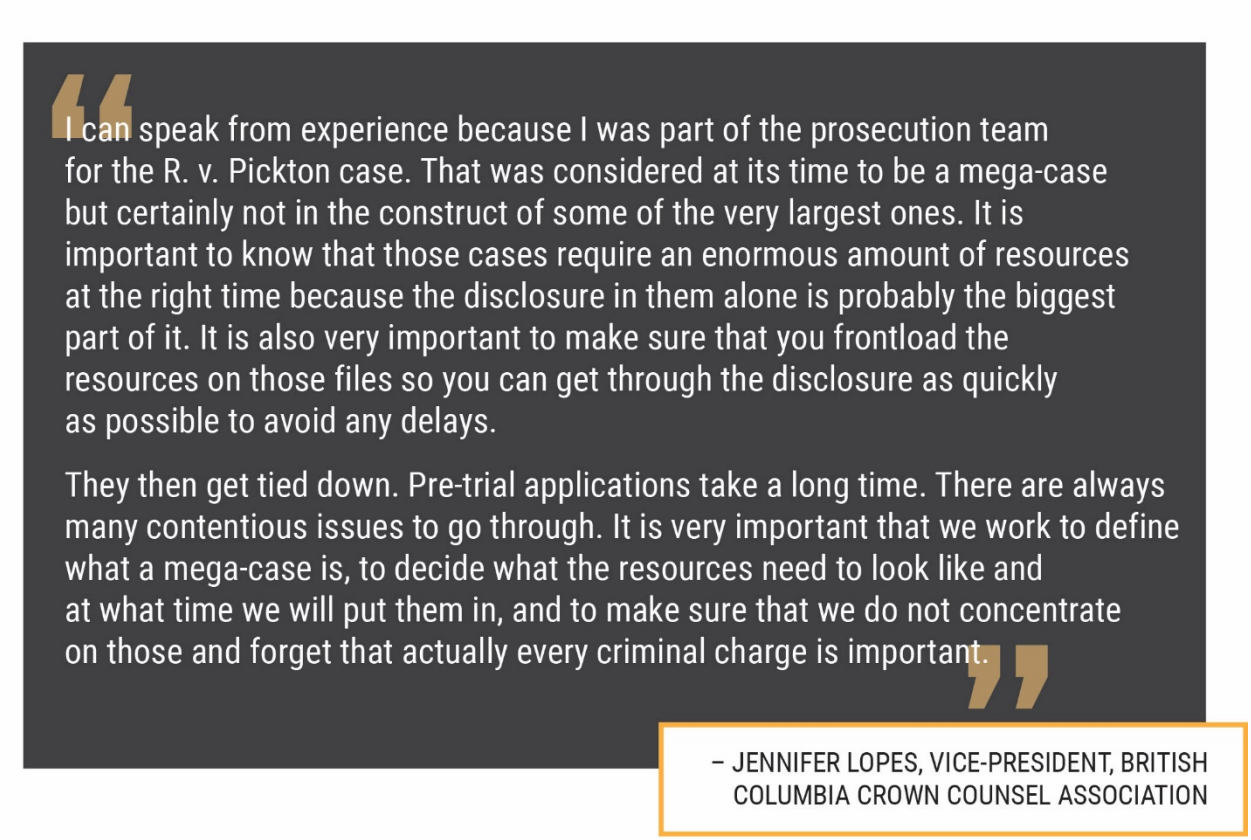
117 *Criminal Law Amendment Act*, 2001, S.C. 2002, c. 13.

118 *R. v. S.J.L.*, 2009 SCC 14, para. 24.

119 The wording of section 540(7) is as follows: "A justice acting under this Part may receive as evidence any information that would not otherwise be admissible but that the justice considers credible or trustworthy in the circumstances of the case, including a statement that is made by a witness in writing or otherwise recorded."

120 See the testimony of Kate Matthews, Ontario Crown Attorneys' Association (Evidence, 9 March 2016).

Mega-trials



In recent years, the criminal justice system has been confronted with the phenomenon of so-called "mega-trials." Mega-trials are generally understood as trials involving numerous charges against multiple accused persons and most often pertain to organized crime, gang-related activity or terrorism. The amount of evidence to disclose is generally very large and often the result of electronic surveillance. Mr. Knerr, a defence lawyer representing the Association des avocats de la défense de Montréal illustrated that reality:

> When it comes to evidence disclosure, especially in mega-trial cases or major projects, we often receive terabytes of information. We are talking about several hundred thousand pages, even millions of pages. That sometimes takes years to evaluate.

A proper review of the conduct of mega-trials in Canada is outside the scope of this particular study. We, however, had the occasion to learn about their impact on court proceedings through the testimony of witnesses who appeared before us and by reviewing previous reports and initiatives that studied mega-

trials.[121] The committee's first witness was the Honourable Patrick J. LeSage, former Chief Justice of the Ontario Superior Court of Justice and co-author of the 2008 *Report of the Review of Large and Complex Criminal Case Procedures*, (with then-Professor Michael Code, now a Justice of the Ontario Superior Court).[122] This report was intended to respond to the increase in trials lasting more than three weeks but the authors stressed that their recommendations could be applied to all trials. The authors start by identifying the causes of lengthier trials as the passage of the *Canadian Charter of Rights and Freedoms*, the reform of evidence law by the Supreme Court of Canada, and the addition of many new complex statutory provisions to the *Criminal Code* and other related statutes. They stressed the negative effects of delayed criminal trials, noting that every time a so-called "mega-trial" is seen to be "inordinately delayed or dysfunctional it has a significant impact on public confidence in the efficiency and effectiveness of the justice system." The committee also heard from the Honourable François Rolland, Retired Chief Justice of the Superior Court of Quebec, who discussed the 2009 Operation SharQc, a police investigation that resulted in 156 persons being charged with offences in Quebec.[123] The committee also briefly directed its attention to the Quebec Committee Reviewing the Management of Mega-trials, which tabled its final report in October 2016.[124]

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121 See for example Barreau du Quebec, Comité ad hoc du Comité en droit criminel sur les mégaprocès, *Rapport Final* [Available in French only], February 2004; Department of Justice Canada, *Final Report on Mega-trials of the Steering Committee on Justice Efficiencies and Access to the Criminal Justice System,* 2005; Patrick J. Lesage and Michael Code, *Report Of The Review Of Large And Complex Criminal Case Procedures*, Ministry of the Attorney General of Ontario, Toronto, November 2008; Michel Bouchard, Ad. E. (Chair), *« Pour que le procès se tienne et se termine »*, Report by the Committee Reviewing the Management of Mega-trials, 19 October 2016 [Available in French only].

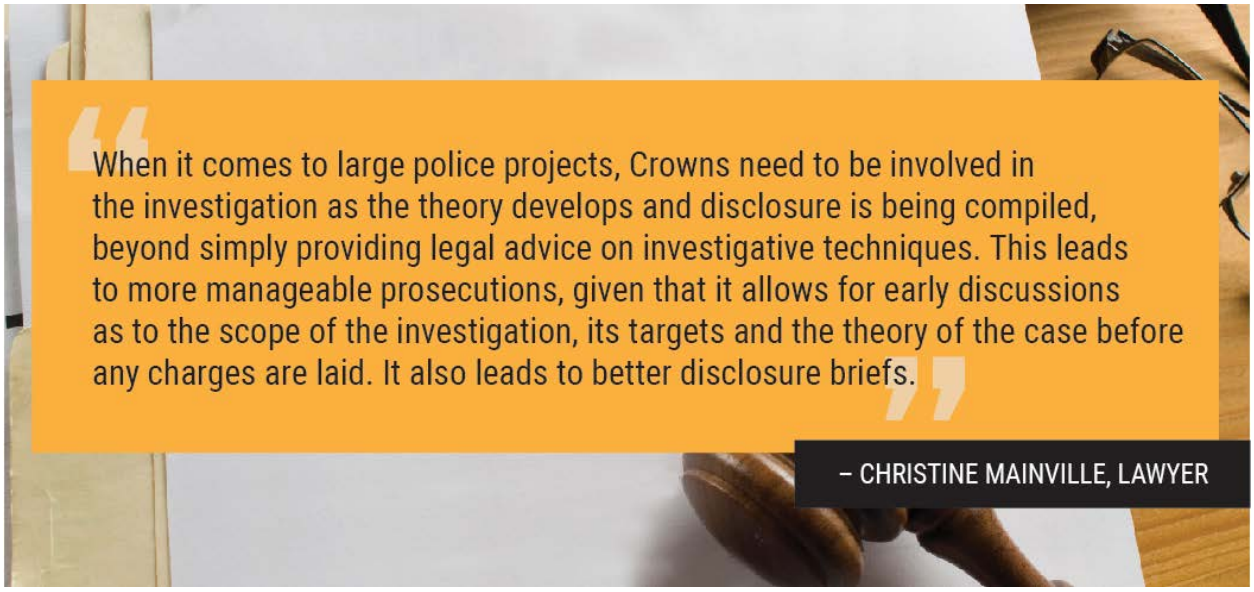
122 In February 2008, Patrick LeSage and Michael Code were mandated by the Attorney General of Ontario to identify issues and recommend solutions to move large, complex cases through the justice system faster and more effectively.

123 As members or associates of the Hells Angels, these individuals were charged with 29 different offences, including conspiracy to commit murder, murder, drug trafficking, and the commission of an indictable offence for the benefit of, at the direction of, or in association with a criminal organization. The hearings flowing from these arrests required significant resources and intensive administrative planning. While over 100 of those accused pleaded guilty, a stay of proceedings was ordered in October 2015 for five accused and 31 were released in 2011 because of unreasonable delays. In August 2016, a third decision reduced the sentences by six to eight years for 35 accused who pled guilty between 2012-2013. The Quebec Superior Court and the Quebec Court of Appeal were critical of the prosecutors in this case for their lack of preparation and for proceeding with all the charges without ensuring that Quebec's justice system could handle them efficiently. See *Auclair c. R.,* 2011 QCCS 2661; *R. c. Auclair*, 2013 QCCA 671; *R.* v. *Auclair*, 2014 SCC 6; *Berger c. R.*, 2015 QCCS 4666; and *Auclair c. R*. 2016 QCCA 1361.

124 Established by the Quebec Director of Criminal and Penal Prosecutions on 16 October 2015 following the collapse of the mega-trial resulting from the police operation SharQC, the Committee was mandated to conduct an exhaustive review of how mega-trials were managed by the prosecution in an effort to maintain and build public trust in the justice system. It was also mandated by the Quebec Minister of Justice to make recommendations for planning judicial resources to ensure that mega-trials are held within a reasonable timeframe. Chaired by Michel Bouchard, the report found that the phenomenon of mega-trials has become the ultimate manifestation of a criminal justice system in disarray. The final report includes 51 recommendations. See Michel Bouchard, Ad. E. (Chair), *« Pour que le procès se tienne et se termine »*, Report by the Committee Reviewing the Management of Mega-trials, 19 October 2016 [Available in French only].

As part of his testimony, former Chief Justice Rolland discussed the importance of proper planning and the commitment of sufficient resources prior to proceeding with large criminal cases. He emphasized the importance of facilitation conferences and coordination between Crown counsel and the judge in order to limit the number of charges being laid and evidence being brought forward in order to make trials more manageable. He said that:

> With regard to solutions, we need to encourage better coordination between the bench and the DPCP, the Crown and the bench, with regard to plans to lay charges. The bench needs to be notified more than one day in advance when charges are going to be laid so that it can plan. When we talk about a stay of proceedings, the clock starts ticking on the criminal statute of limitations as soon as charges are laid. If we wait to lay charges, the statute of limitations will not run out. No one can complain about delays when charges have not been laid. This would give the court time to prepare. There needs to be better communication between the DPCP and the bench. Better communication is also needed between police investigations and the DPCP.



Witnesses also mentioned several elements of the criminal justice system that are particularly problematic with regard to mega-trials, including legal aid. Marcus Pratt, representing Legal Aid Ontario, spoke about the "robust big-case management" in place in his province since the release of the LeSage-Code report. He informed the committee that:

> We have case managers who go to the early meetings where judicial pre-trials are set to determine appropriate funding. We are very careful of the costs of those cases and often will identify specific skilled lawyers who can bring the legal motions on behalf of all the defence; so it's not all lawyers paying to bring the motions.

Mr. Benton, representing Legal Aid BC, also informed the committee that Ontario, BC and Quebec each "has some kind of process in place to try to identify and address the range of challenges associated

with getting a large case from its inception in investigation through to its prosecution and its defence and finally decisions."

While important work has been done in recent years to address the challenges of mega-trials, understanding the lessons learned from past experiences, ensuring that provinces have sufficient resources and sharing best practices for proper planning for large trials is again where the Government of Canada can take a leadership role to ensure that properly managed mega-trials remain a viable option for provinces, if they determine these are an appropriate course of action.

Mandatory minimum sentences

> "The more mandatory minimums you have, the more matters go to trial, because it's more difficult to resolve them. That results in greater delays as court time is booked up. There's obviously a policy element to that in terms of what you want to do with those, but our position is that if you remove the mandatory minimums, it creates greater flexibility for resolving matters at an earlier stage and will free up more court time."
>
> – IAN CARTER, CANADIAN BAR ASSOCIATION

As set out below, certain *Criminal Code* provisions set out the minimum sentence that must be delivered when a person is found guilty of the crime in question. The committee is mindful of the divergent views on whether mandatory minimum sentences benefit or hinder the goals of our justice system: these have been voiced in our committee hearings over many years. While some perceive their value is in denouncing crime and holding offenders accountable, others believe they reduce flexibility in the justice system and contribute to over-incarceration. During this study, numerous witnesses shared their view that use of mandatory minimum sentences was one of the factors contributing to trial delays.[125]

[125] See the testimony of Leo Russomanno, Criminal Lawyers' Association (Evidence, 18 February 2016); Ian Carter, Canadian Bar Association (Evidence, 18 February 2016) and (Evidence, 19 October 2016); David Field, Legal Aid Ontario; and Karen Hudson, Nova Scotia Legal Aid Commission (Evidence, 25 February 2016); Kate Matthews, Ontario Crown Attorneys' Association (Evidence, 9 March 2016); Catherine Latimer, John Howard Society of Canada (Evidence, 10 March 2016); Josh Paterson, British Columbia Civil Liberties Association (Evidence, 23 March 2016); Margaret Keelaghan, Calgary Legal Guidance; and Graham Johnson, Criminal Trial Lawyers Association (Evidence, 28 September 2016); Michael W. Owens, Saskatoon Criminal Defence Lawyers Association Inc (Evidence, 29 September 2016); John H. Hale, Hale Criminal Law Office; and Mary Murphy, Murphy Toronto Lawyers (Evidence, 5 October 2016); and Claudia Prémont, Quebec Bar Association (Evidence, 28 October 2016), among others. The Honourable Patrick J. LeSage, former Chief Justice of the Ontario Superior Court of Justice also commented about the need for more discretion to Crown attorneys and said that: "There are some other things that need mandatory minimums, but a lot of the things that have mandatory minimums don't need to have mandatory minimums."

Lawyer John H. Hale explained that where there is a mandatory minimum sentence, accused persons feel they have nothing to lose by going to trial and everything to gain if they succeed at trial. As David Field from Legal Aid Ontario noted, this affects the ability of Crown prosecutors to plea bargain: "Mandatory minimums provide little room for front-end early resolution. It can prolong proceedings and it can result in pointless, nothing-to-lose trials." One example of such a sentence was the mandatory fine and criminal record for the offence of impaired driving. Many persons accused of this offence have no criminal record and have every incentive to go to trial to avoid getting one. This is a technical area of the law and some defences could present themselves.[126] Those with the means to dispute allegations of impaired driving have little reason not to do so.

The purposes and the principles of sentencing are set out in Part XXIII of the *Criminal Code*. Section 718 of the *Criminal Code* states that the fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

> **(a)** to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
> **(b)** to deter the offender and other persons from committing offences;
> **(c)** to separate offenders from society, where necessary;
> **(d)** to assist in rehabilitating offenders;
> **(e)** to provide reparations for harm done to victims or to the community; and
> **(f)** to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

Section 718.1 sets out the fundamental principle of sentencing which must also be considered, namely: "A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender."

Section 718.2 of the *Criminal Code* adds other criteria for judges to consider for increasing or reducing a sentence due to aggravating or mitigating circumstances. These pertain to such items as whether the offence was motivated by bias, prejudice or hate, whether there was evidence of abuse, the impact on the victim, if terrorism was involved, among others. Other key principles included in section 718.2 (b) to (e) include:

> **(b)** a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
> **(c)** where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;
> **(d)** an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
> **(e)** all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community

[126] See the testimony of Leo Russomanno, Criminal Lawyers' Association (Evidence, 18 February 2016).

should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

Manifestations of the principle found in section 718.2(e) are found in such measures as conditional sentences[127] and sentencing circles for Indigenous offenders, which may recommend sanctions other than imprisonment in appropriate cases. Furthermore, alternative measures or diversion programs which do not invoke the judicial procedure provided for in the *Criminal Code* are given statutory recognition in section 717 of the *Criminal Code* (which are discussed in Chapter Eight). These provisions, however, are part of a larger sentencing regime that contains numerous mandatory minimum sentences that do not allow for alternative punishments to imprisonment. Also, there are provisions such as section 718.01 of the *Criminal Code* which states: "When a court imposes a sentence for an offence that involved the abuse of a person under the age of eighteen years, it shall give primary consideration to the objectives of denunciation and deterrence of such conduct."

On its face, a mandatory minimum sentence would seem to violate the principle of proportionality in that it does not take into consideration the gravity of the offence and the degree of responsibility of the offender. There have been numerous challenges to mandatory minimum sentences as an alleged violation of section 12 of the Charter. That section states that: "Everyone has the right not to be subjected to any cruel and unusual treatment or punishment." When called upon to judge whether a punishment should be upheld, the Supreme Court said:

> The court's inquiry is focused not only on the purpose of the punishment, but also on its effect on the individual offender. Where a punishment is merely disproportionate, no remedy can be found under s. 12. Rather, the court must be satisfied that the punishment imposed is grossly disproportionate for the offender, such that Canadians would find the punishment abhorrent or intolerable.[128]

A degree of deference to the sentencing choices made by Parliament has been a theme of Supreme Court jurisprudence on sentencing for many years. In a 1987 case, the Supreme Court wrote: "We should be careful not to stigmatize every disproportionate or excessive sentence as being a constitutional violation, and should leave to the usual sentencing appeal process the task of reviewing the fitness of a sentence."[129] More recently, the Supreme Court reiterated a reluctance to constantly intervene in sentencing issues in these terms: "There is no need to turn to the Charter for relief against an unfit

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[127] A conditional sentence (*Criminal Code*, sections 742.1 to 742.7) is a sentence of imprisonment that may be served in the community. A number of conditions must be met before such a sentence may be imposed. Some of the conditions are that the sentence of imprisonment be for less than two years, that service of the sentence in the community would not endanger the safety of the community, and the offence is not an offence punishable by a minimum term of imprisonment.

[128] *R. v. Morrisey*, [2000] 2 S.C.R. 90, para. 26.

[129] *R. v. Smith*, [1987] 1 S.C.R. 1045, para. 55.

sentence. If imprisonment is not a fit sentence in a particular case it will not be imposed, and if imposed, it will be reversed on appeal."[130]

If a mandatory sentence were removed from consideration, there is greater flexibility for resolving matters at an early stage in the proceedings. This would, in turn, free up more court time. The committee was also warned about the increasing restrictions on the availability of conditional sentences. A conditional sentence is not available when a mandatory sentence applies to an offence. In addition, amendments to the *Criminal Code* have restricted the number of offences for which a conditional sentence can be imposed. This leads to more accused choosing to go to trial; there is nothing to lose by going to trial since, with no conditional sentence possible, imprisonment is a certainty whether one pleads guilty or is found guilty. If there is at least a hope of a conditional sentence being imposed, then there might be more guilty pleas being proferred.[131]

Another aspect of mandatory minimum sentences that was raised before the committee was the effect they can have on victims. A witness discussed the offence of sexual assault with a weapon against a young person which has a mandatory five-year sentence.[132] This is the type of case where a Crown attorney might like to spare a young complainant from the ordeal of re-living a traumatic event in a courtroom. Given the relatively lengthy mandatory period of imprisonment, however, this is the kind of matter that will proceed to trial.

The issue of accused persons with mental disorders and mandatory minimum sentences was also raised before the committee. One course of action for someone with a mental disorder facing a mandatory sentence noted by Professor Marie Manikis from McGill University is to bring a Charter challenge to the sentence on the basis that it is cruel and unusual punishment and so contrary to section 12. This, however, is a cumbersome procedure and contributes to delays. A suggestion was made that there could be an exemption clause whereby the judge could determine on a case-by-case basis whether it is advisable to lower a sentence given the facts of the case or to consider alternative measures that include treatment.[133]

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130 *R. v. Malmo-Levine; R. v. Caine*, 2003 SCC 74, para. 164.

131 See the testimony of Leo Russomanno, Criminal Lawyers' Association (Evidence, 18 February 2016); David Field, Legal Aid Ontario; and Karen Hudson, Nova Scotia Legal Aid Commission (Evidence, 25 February 2016); Josh Paterson, British Columbia Civil Liberties Association (Evidence, 23 March 2016); and Margaret Keelaghan, Calgary Legal Guidance Association; and Graham Johnson, Criminal Trial Lawyers Association (Evidence, 28 September 2016), among others.

132 See the testimony of Graham Johnson, Criminal Trial Lawyers Association (Evidence, 28 September 2016).

133 See the testimony of Ian Carter, Canadian Bar Association (Evidence, 19 October 2016); and Professor Marie Manikis, McGill University (Evidence, 28 October 2016), among others.

> Basically, mandatory minimums can prolong the proceedings, result in pointless, nothing-to-lose trials and sentences that are just plain wrong. We need to trust judges to do the right thing in sentencing.
>
> – KAREN HUDSON, NOVA SCOTIA LEGAL AID COMMISSION

A number of witnesses advocated for the restoration of judicial discretion when it comes to mandatory minimum sentencing. As for those having a mental health issue, there could be a sentencing provision that allows judges to depart from the mandated punishment if that would result in a disproportionate or otherwise unfit sentence. An alternative is to simply reduce the number of mandatory sentences. A number of offences that currently have mandatory minimums could be reviewed to assess their reasonableness. The committee notes that the mandate letter of November 2015, from the Office of the Prime Minister to the Minister of Justice, instructed her to "conduct a review of the changes in our criminal justice system and sentencing reforms over the past decade" with a view to increasing the "use of restorative justice processes and other initiatives to reduce the rate of incarceration amongst Indigenous Canadians."[134] The committee continues to look forward to seeing the results of the Minister's review and the plan of action she intends to take in addressing her findings.

Recommendation 8

The committee recommends that the Minister of Justice undertake a thorough review of existing mandatory minimum sentences in order to:

- **ensure a reasonable, evidence-based approach to when they are appropriate; and**
- **consider whether persons with mental health issues should be considered for alternative sentencing options or treatment when faced with mandatory minimum sentences.**

Alternatives in Provincial Offences

The committee explored various ideas for addressing delays with a view to reducing the demand on our criminal justice system. One alternative is to find ways to address social problems and anti-social behaviour by means other than criminal laws. There are many regulatory offences in Canada passed by provincial, territorial and federal governments that are dealt with by other procedures than those involving criminal court.

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[134] Office of the Prime Minister, Minister of Justice and Attorney General of Canada Mandate Letter.

The example discussed by witnesses that illustrates the potential benefits of having alternatives to *Criminal Code* offences pertained to how provinces deal with impaired driving. All provinces have provisions in their road and highway safety laws for imposing administrative sanctions on those who drive under the influence of drugs or alcohol. Permitting police to deal with drivers with lower levels of impairment by using provincial statutes (rather than the *Criminal Code*) could be providing the means to deal with this problem more efficiently. The committee heard evidence on this particular topic from several police representatives and defence lawyers, some of whom had a practice dedicated to impaired driving cases.[135] We also heard from British Columbia's Superintendent of Motor Vehicles as that province has adopted the Immediate Roadside Prohibition (IRP) program as an alternative to laying criminal charges.

As noted by Craig Fairbairn, Drug Treatment Court Liaison Officer at the Ottawa Police Service, these cases are "clogging up court systems." This is also recognized by Statistics Canada as these cases are reported to take longer to resolve.[136] Drug-impaired driving in particular are less likely to result in a guilty finding than cases of alcohol-impaired driving.[137]

Following recent legislative changes made in response to Supreme Court decisions, such as *R. v. St Onge Lamoureux*,[138] the investigation and prosecution of impaired driving offences has increased in complexity.[139] According to defence lawyer Paul Doroshenko:

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135 See the testimony of Paul Doroshenko, Acumen Law Corporation (Evidence, 27 September 2016) and David Genis, The Law Firm of David Genis (Evidence, 5 October 2016).

136 Depending on the Statistics Canada study looked at, the median time to complete an impaired driving case differs. The most recent data published in 2017 show that the median time for the year 2014-2015 was 105 days (a decrease from the previous year where it was reported to be 155 days) (Maxwell, Statistics Canada, 2017, p. 18). Another study published in 2016 reported that over the period from 2010/2011 to 2014/2015 the median time was reported to be 127 days for an alcohol-impaired driving case and 227 days for a drug-impaired driving case (see Samuel Perreault, Statistics Canada, *Impaired driving in Canada, 2015*, 2016, p. 15).

137 Perreault, Statistics Canada, 2016, p. 16. Rick Woodburn from the Canadian Association of Crown Counsel explained that "[o]ne of the reasons drinking and driving is so prolific is because it happens to middle-class people, also. You have all the law out there because the middle-class person and above — I'm just going to say — have the money to fight these things."

138 *R. v. St-Onge Lamoureux*, 2012 SCC 57. For more information on the history of criminal law with respect to impaired driving, see Maxime Charron-Tousignant and Dominique Valiquet, Legislative Summary of Bill C-73: An Act to amend the Criminal Code (offences in relation to conveyances) and the Criminal Records Act and to make consequential amendments to other Acts, Publication no. 41-2-C73-E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 1 September 2015, pp. 2-7.

139 According to defence lawyer David Genis, this is specifically true for cases where the blood alcohol concentration is over 0.08. Joseph Oliver, representing the Canadian Association of Chiefs of Police, explained that an analysis of policing in British Columbia completed in 2005 by the University College of Fraser Valley revealed that over the course of the last 30 years, the time required by police to complete an impaired driving investigation took 250 per cent more time. See University College of the Fraser Valley, A 30 Year Analysis of Police Service Delivery and Costing: "E' Division, Research Summary, 2005, p. 2. See also the testimonies of Tom Stamatakis, Canadian Police Association (Evidence, 23 March 2016); Chief Jean-Michel Blais, Halifax Regional Police (Evidence, 6 May 2016); and Jennifer Lopes, British Columbia Crown Counsel Association (Evidence, 27 September 2016), among others.

> … Defence lawyers now had to establish that the instrument [the breathalyser] was not properly maintained, or appeared not to function as intended for some reason, or that the technician failed to follow the procedure to the letter… As a result there have been increasing demands from defence lawyers like me for disclosure related to those issues…. This increased demand for disclosure increases the demand on the trial system.

As what appears to be a consequence of the *St-Onge Lamoureux* decision, several impaired driving cases were withdrawn or stayed because of late disclosure.[140] This was confirmed by Ian Carter, who said that applications for stays of proceedings for unreasonable delays are often successful in "impaired driving and over 80 cases without death or injury."[141]

As noted, several witnesses also referred to the lack of incentives for accused persons to plead guilty in impaired driving cases due to the consequences and the presence of mandatory minimum sentences. The consequences include having a criminal record; increased insurance premiums; and the loss of one's driver's licence, which is a significant challenge for those in rural areas where there is no public transportation.[142] As explained by defence lawyer John H. Hale: "The collateral consequences of a conviction last even longer, so all the more reason to fight charges."

A potential solution that could simplify and speed up the way impaired driving cases are handled is found in the British Columbian approach. The province has adopted an almost exclusively regulatory scheme under the *Motor Vehicle Act* that operates as an alternative route for cases with a low level of impairment. As explained by Sam MacLeod, Superintendent of Motor Vehicles, British Columbia Ministry of Public Safety and Solicitor General:

> To respond to this problem [the drinking and driving fatality rate] and the overload in the court system the IRP [Immediate Roadside Prohibition] was introduced in September 2010. On how it works, the IRP program delivers immediate and significant sanctions under the *Motor Vehicle Act*. These include monetary penalties, immediate

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[140] See the testimony of Paul Doroshenko, Acumen Law Corporation (Evidence, 27 September 2016), as he explained that "[e]arlier this year in Alberta, hundreds of impaired driving cases were withdrawn because proper maintenance records could not be produced". In addition, in January 2015, the Quebec Court (Gatineau district) ordered a stay of proceedings in more than 50 impaired driving cases due to unreasonable delays. (See CBC News, "50 criminal drunk driving cases stayed in Gatineau court," 30 January 2015.) See also the testimony of Donald Piragoff, Department of Justice Canada (Evidence, 4 February 2016).

[141] According to Scott Newark, author of the Macdonald-Laurier Institute report *Justice on Trial: Inefficiencies and ineffectiveness in the Canadian criminal justice system*, some of the requests for disclosure in impaired driving cases have been found by the Ontario Court of Appeal to be "frivolously being done and dragging things out and taking more time." See *R. v. Jackson*, 2015 ONCA 832, at para. 139: "It is critical for the efficient operation of trial courts, especially those in which alcohol-driving offences occupy a prominent place on the docket, that they be able to control their process. This includes the authority to discourage unmeritorious third party records applications that devour limited resources."

[142] See the testimony of Leo Russomanno, Criminal Lawyers' Association (Evidence, 18 February 2016); Rick Woodburn, Canadian Association of Crown Counsel (Evidence, 9 March 2016); John H. Hale, Hale Criminal Law Office (Evidence, 5 October 2016); and Ian M. Carter, Canadian Bar Association (Evidence, 19 October 2016).

> licence prohibitions, immediate vehicle impoundments, mandatory referrals to the remedial programs, and often times a requirement for an ignition interlock. The IRP model is designed to be efficient for police to use. It is done at roadside. There is no requirement to go back to a detachment with a driver for further breath screening.

Superintendent MacLeod also said that "[t]he police have the opportunity to use the pre-existing tools of *Criminal Code* charges for more significant offences or a driver with multiple IRPs." As a consequence of this approach, he further explained that the province witnessed a reduction in fatalities, injury collisions and property damage.[143]

According to Superintendent MacLeod, the introduction of the IRP model has resulted in approximately 7,300 fewer impaired driving cases (34,300 in total) before the courts each year (corresponding to a 83 per cent reduction since its inception in 2010). The reduction of court cases was also confirmed by Jennifer Lopes, Vice President of the British Columbia Crown Counsel Association: "Prosecutors no longer have to deal with impaired trials and the setting of those trial dates." Greg DelBigio, representing the Canadian Council of Criminal Defence Lawyers, also confirmed that it "has reduced the number of cases in the courts by thousands." Chief Constable Palmer of the Vancouver Police Department commented that he is a "big fan" of the program: "It has been a positive move for British Columbia. The Vancouver Police Department wholeheartedly supports it." Dominic Lamb, representing the Criminal Lawyers' Association, suggested adopting this model for simple impaired driving cases and leaving it to the discretion of the police to "determine what that line is." As such, several witnesses mentioned they supported the initiative, mostly to deal with lower levels of impairment.[144]

However, other witnesses expressed concerns. Rick Woodburn asked whether it is in the public interest to give the equivalent of a speeding ticket for drunk driving. Vancouver defence lawyer Paul Doroshenko expressed several strong concerns about the IRP program, saying that:

> The government essentially replaced impaired driving prosecutions with Immediate Roadside Prohibition based on approved screening device results. By creating this administrative scheme the government essentially opted out of the Charter and Charter rights, opted out of any meaningful disclosure process and opted out of any meaningful test of police evidence.

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143 According to Superintendent MacLeod the number of alcohol-related fatalities dropped from an average of 113 annually to 56. According to Joseph Oliver, representing the Canadian Association of Chiefs of Police and referring to a report published in 2015, studies suggest that roadside suspensions have contributed to an estimated reduction of 36 fatal collisions each year. See Sandi Wiggins, *Report on British Columbia's 2010 Impaired Driving Initiative (IDI)*, draft, January 2015, p. 44.

144 See the testimony of Dominic Lamb, Criminal Lawyers' Association; and Greg DelBigio, Canadian Council of Criminal Defence Lawyers (Evidence, 18 February 2016); Joseph Oliver, Canadian Association of Chiefs of Police (Evidence, 25 February 2016);Tom Stamatakis, Canadian Police Association (Evidence, 23 March 2016); Chief Constable Adam Palmer, Vancouver Police Department (Evidence, 27 September 2016); and John H. Hale, Hale Criminal Law Office (Evidence, 5 October 2016).

He added that when an individual contests their IRP, this can also take additional time. He also sees an issue with screening devices that are used to punish people, when their purpose was only to screen them for alcohol consumption.

Although the BC model has been challenged in the past and is not without its critics, this type of practical solution to use alternatives to the criminal justice system to deal with social problems is an example that Canadian governments should explore further in order to free up valuable court resources. This could be achieved by allowing opportunities for some infractions to be handled through provincial laws or at least through administrative systems outside of the traditional criminal court model. Joseph Oliver, speaking on behalf of the Canadian Association of Chiefs of Police, provided an example of a proposal along these lines. He noted how, prior to the federal government's announcement that it will legalize marijuana, his organization had sought to "expand the range of enforcement options available to police to more effectively and efficiently address the illicit possession of cannabis." In particular, they had proposed a ticketing offence for simple marijuana possession. Some witnesses also discussed ways of considering expanding the current use of the *Contraventions Act,*[145] which can allow for the use of ticketing instead of criminal charges.[146] We note also that in Part 2 of Bill C-45 a scheme is designed to treat some infractions of the proposed *Cannabis Act* as ticketable offences. A set fine in a ticket for a breach of the law that is not considered to be overly serious can be paid without the offender having to go to court. While a conviction is registered against the offender, he or she will not end up with a searchable criminal record for the offence.[147]

Considering these types of alternatives requires proceeding with care to ensure that procedural fairness and jurisdictional issues are properly considered. There is, however, merit in evaluating the potential to reduce the demand on our criminal justice system through provincial or other statutory offences. Realizing the full potential of these benefits will require cooperation between the federal government and the provinces to ensure that any legislative proposals are not only practical, but also respect the constitution.

Recommendation 9

> **The committee recommends that the Minister of Justice review the merits of designating offences for appropriate social issues to be dealt with as administrative penalties in order to reserve criminal law procedures for more serious crimes and thereby reduce the strain on limited court resources.**

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145 *Contraventions Act*, S.C. 1992, c. 47.

146 See the testimony of William Trudell, Canadian Council of Criminal Defence Lawyers (Evidence, 18 February 2016); Joseph Oliver, Canadian Association of Chiefs of Police (Evidence, 25 February 2016); and Didier Deramond, Montreal Police Service (SPVM) (Evidence, 28 October 2016), among others.

147 Bill C-45, An Act respecting cannabis and to amend the Controlled Drugs and Substances Act, the Criminal Code and other Acts, *LEGISinfo*.

Official languages

Concerns about delays were also raised by then Commissioner of Official Languages, Graham Fraser, who noted that a lack of access to court services in either official language can also contribute to lengthy trials. This is especially a concern in that section 19 (1) of the Charter guarantees Canadians the right to use English or French in any court established by Parliament, or in any pleading in or process issuing from one.

Mr. Fraser presented the results of a study his office published in 2013 in partnership with the Commissioner of Official Languages for New Brunswick and the French Language Services Commissioner of Ontario. Entitled *Access to Justice in Both Official Languages, Improving the Bilingual Capacity of the Superior Court Judiciary*,[148] this report examined the process for appointing Superior Court judges, as well as the language training that is offered to them. As Commissioner Fraser reported:

> We came to the conclusion that the process does not ensure the appointment of a sufficient number of judges with the language skills required to hear citizens in the official language of the minority without incurring delays or additional costs.

Mr. Fraser reported that this conclusion is based on two main findings:

> Firstly, there is no concerted effort to determine the needs of the superior courts in terms of bilingual capacity, or to ensure that a sufficient number of bilingual judges are appointed to these courts.

[148] Office of the Commissioner of Official Languages, *Access to Justice in Both Official Languages: Improving the Bilingual Capacity of the Superior Court Judiciary*, 2013.

> Secondly, there is no objective evaluation of the language skills of superior court judiciary candidates.

Another finding of the report is that the approximately two million Canadians belonging to an official language minority community who chose to be heard in their preferred official language may face longer court proceedings.

> The complaints we have received come from lawyers or judges who handled the problems related to the delays and the fact that, quite often, the judicial system does not have the capacity to hear a case in the accused's language in a timely manner.
>
> – GRAHAM FRASER, FORMER COMMISSIONER OF OFFICIAL LANGUAGES

The report makes ten recommendations to improve access to justice for those two million Canadians who speak a minority official language, including several intended to increase the bilingual capacity of Canada's superior court judiciary, as well as the judiciary's understanding of official language rights. The report calls for a concerted approach between the federal government, the provinces and the territories.

Before the committee, Mr. Fraser also presented two projects initiated by the provinces of Ontario and New Brunswick:

> In the spring of 2015, the Honourable Madeleine Meilleur, then Ontario's Attorney General and Minister Responsible for Francophone Affairs, launched a pilot project, based on an active offer of service strategy, to provide quality French services to French-speaking litigants and lawyers at the Ottawa courthouse.
>
> Meanwhile, since 2011, New Brunswick's provincial court judge, Yvette Finn, has been leading a language training program for provincially appointed judges from across Canada. At the beginning of this year, she also set up a language skills evaluation service for provincially appointed Canadian judges.

The committee agrees that all Canadians should be able to properly exercise their right to be heard in their preferred official language without facing court delays. The Minister of Justice must ensure that our criminal justice system is able to accommodate requests from accused persons to have matters proceed in the official language of their choice; in particular, this requires the availability of judges who are able to serve official language minority communities.

Recommendation 10

The committee recommends that the Minister of Justice:

- **give due consideration to recommendations made by the Commissioner of Official Languages in his 2013 report: *Access to Justice in Both Official Languages: Improving the Bilingual Capacity of the Superior Court Judiciary*; and**
- **ensure that appropriate judicial appointments are made to improve the bilingual capacity of the Canadian judiciary, particularly in regions with sizeable official language minority communities.**

CHAPTER FOUR - JUSTICE REQUIRES THAT WE SUPPORT VICTIMS

> [The impact of stay of proceedings on victims is] devastating. It's one of the worst things you have to do, because… there's no opportunity for that case to be decided on its merits. There's no sense of justice at all. They haven't had a chance to testify. They haven't had a chance to tell their experience. It's always at the end, of course, of the proceedings, so they have been strung along all the way through it … you have to look that person in the eye and say, "I am very sorry, but this ends here." It's one of the worst feelings in the world.
>
> – KATE MATTHEWS, ONTARIO CROWN ATTORNEYS' ASSOCIATION

The negative impact delays have on victims of crime was a key concern that was repeatedly voiced by witnesses throughout the committee's hearings. This was something we heard, not only from victims' service providers, but also police, lawyers and judges. Many victims carry an emotional burden with them that they hope will become lighter when the responsible person is found guilty of the crime and justice is done. The months and perhaps years of carrying that burden to court date after court date, during cross-examinations, and through adjournments, can take a heavy toll. If a stay of proceedings is ultimately entered, this can be devastating for victims. There is no resolution and no sense of justice being served. The criminal proceedings have simply ended without any finding on the merits of the case.

Canada's criminal justice system is not victim-centred. The main participants in a criminal trial are the judge and perhaps a jury, the Crown prosecutor, and the accused person and their lawyer (unless the accused person is unrepresented). If a victim is involved, it is usually as a witness who is there to provide evidence that will advance the Crown prosecutor's case. The Crown prosecutor does not "represent" the victim and is not "their counsel," as Brian Saunders, the then Director of Public Prosecutions, explained. The Crown prosecutor represents the interests of society at large. A crime is a breaking of the law, it is seen as injurious to society and it is in society's interest to see that crimes are appropriately punished. Recent efforts to better acknowledge the needs of victims and enhance their role in criminal proceedings have, in a sense, been tacked onto the traditional system. These efforts include the creation of the *Canadian Victims Bill of Rights* (CVBR)[149] and amendments to the *Criminal Code* requiring that victim and community impact statements be considered by the courts.[150] These measures offer much potential for greater victim involvement. The term "victim" is defined in the *Criminal Code* and the CVBR. In the latter,

[149] *Canadian Victims Bill of Rights*, S.C. 2015, c. 13, s. 2.

[150] *Criminal Code*, R.S.C., 1985, c. C-46, ss. 722-722.2.

victim it is defined as "an individual who has suffered physical or emotional harm, property damage or economic loss as the result of the commission or alleged commission of an offence."[151]

The process of determining whether an accused person is guilty or not proceeds without any requirement that the victim's sense of justice be considered. At the sentencing stage, however, a court must consider any victim and community impact statements. While such statements can influence the sentence given to an offender, the judge may prioritize other sentencing principles. The way a criminal trial is run, ushered along by the actions of judges and lawyers, may mean that, as described by Heidi Illingworth: "victims' interests, constraints and responsibilities are not often at the forefront, nor are they even considered in many cases when Crown and defence counsel are setting court dates." The plea bargaining process most often takes place without the victim even being aware it is happening, let alone being consulted.

A cultural shift within the justice system regarding the role of victims and how they are treated is already taking place, as advocates for victims' rights are making its participants realize that justice requires the needs of victims to be integrated into all stages of criminal proceedings. This shift needs to be pushed further, however. It requires greater support and resources to realize the full extent of change that is necessary. It requires a shift in thinking among parties to criminal proceedings to be mindful of the effects on victims. For instance, Jenny Charest, Executive Director of the Crime Victims Assistance Centre of Montreal for the CAVAC Network, who works with victims of crime, suggested that before an adjournment date is granted, the delays this causes "should be considered from the perspective of their impacts on the victims." The committee agrees that in order to fix the problems with delays in Canada, the role of victims and their needs must be a primary concern and not an afterthought. Justice demands nothing less.

The Impacts on Victims

> "It was a sexual assault trial, and the delay was actually the victim's fault. She had a significant heart condition that required her to have open heart surgery twice post-arrest. … Ultimately, it was well over four years by the time we got to a trial where she was well enough to testify. She was a very sympathetic person. She didn't have an ax to grind. She wasn't doing anything nefarious or wrong, but we lost it on the 11(b), and it was a strange one because it actually happened to be her "fault" that we lost it, and she was devastated."
>
> – LAURIE GONET, ONTARIO CROWN ATTORNEYS' ASSOCIATION

[151] *Canadian Victims Bill of Rights,* s. 2. A similar definition is found in section 2 of the *Criminal Code*.

Witnesses before this committee illustrated how hard criminal proceedings are on victims, especially when there are delays. They used such words as: devastating,[152] disrupting,[153] distress,[154] powerless,[155] revictimized,[156] extremely disappointing,[157] stress and anxiety,[158] terrible,[159] frustrating,[160] a hell,[161] and demoralizing,[162] among others. Trial length, the Honourable Patrick J. LeSage, former Chief Justice of the Ontario Superior Court of Justice and others agreed, is the biggest source of frustration for victims. The time that passes during delays can also affect a victim's ability to recall memories, which may become less reliable and impact the quality of the evidence the Crown prosecutor is able to put forward. This is another reason to avoid delays.

Four of the many testimonials the committee heard underscored how hard it can be for victims to participate in the criminal justice system. Firstly, Jenny Charest discussed frustrations felt by victims who:

> [R]egularly have the feeling that they are not heard. Moreover, even if they are heard, various measures are taken to which they have no access and they do not even have information…
>
> When proceedings last several years, this means that victims, who have summoned all their courage to denounce their aggressor, have to put their lives on hold for several years…So as long as proceedings are not over, this person has to try to remember, and

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152 See the testimony of Kate Matthews, Ontario Crown Attorneys' Association (Evidence, 9 March 2016); Heidi Illingworth, Canadian Resource Centre for Victims of Crime; and Frank Tremblay, Victimes d'agressions sexuelles au masculin (Evidence, 24 March 2016).

153 See the testimony of Joseph Oliver, Canadian Association of Chiefs of Police (Evidence, 25 February 2016).

154 See the testimony of Jean-Michel Blais, Halifax Regional Police (Evidence, 6 May 2016).

155 See the testimony of Heidi Illingworth, Canadian Resource Centre for Victims of Crime (Evidence, 24 March 2016).

156 See the testimony of Heidi Illingworth, Canadian Resource Centre for Victims of Crime; and Sue O'Sullivan, Federal Ombudsman for Victims of Crime (Evidence, 24 March 2016); and Tony Smith, Council of Parties for the Restorative Public Inquiry into the Home for Colored Children (Evidence, 6 May 2016).

157 See the testimony of Jennifer Lopes, British Columbia Crown Counsel Association (Evidence, 27 September 2016).

158 See the testimony of Heidi Illingworth, Canadian Resource Centre for Victims of Crime (Evidence, 24 March 2016); and Jennifer Lopes, British Columbia Crown Counsel Association and Chief Constable Adam Palmer, Vancouver Police Department (Evidence, 27 September 2016).

159 See the testimony of Leo Russomanno, Criminal Lawyers' Association (Evidence, 18 February 2016); and Jenny Charest, Crime victims assistance centre of Montreal for CAVAC Network (Evidence, 28 October 2016).

160 See the testimony of Joseph Oliver, Canadian Association of Chiefs of Police (Evidence, 25 February 2016); Tom Stamatakis, Canadian Police Association (Evidence, 23 March 2016); Sue O'Sullivan, Federal Ombudsman for Victims of Crime (Evidence, 24 March 2016); and Chief Constable Adam Palmer, Vancouver Police Department (Evidence, 27 September 2016).

161 See the testimony of Alain Fortier and Frank Tremblay, Victimes d'agressions sexuelles au masculin (Evidence, 24 March 2016).

162 See the testimony of Chief Constable Adam Palmer, Vancouver Police Department (Evidence, 27 September 2016).

> not move on. … The fact of having to return to court can sometimes cause them to have to relive their trauma.

Secondly, Sue O'Sullivan, Federal Ombudsman for Victims of Crime, added that:

> [E]motional and psychological burdens as a result of ongoing unresolved criminal trials; anxiety about their role in the trial process, including testifying as a witness; and the financial burden from lost wages, child or elder care, and travel costs … they are compounded the longer the trial goes on… Many other victims have shared feeling re-victimized by the unintended consequences of delays in criminal proceedings. They report feeling devalued and that their life is on hold until their case is concluded.

Thirdly, Heidi Illingworth, Executive Director of the Canadian Resource Centre for Victims of Crime, mentioned that:

> Delays and adjournments have a significant negative effect on the victim and their family members. They include… ongoing stress and anxiety; getting prepared to testify only to have a matter adjourned for one reason or another — for example, counsel is not available or a conflict in the judge's schedule, et cetera; an inability to move forward with their lives; and the longer that the charges are before the courts, the less connected the victim feels.
>
> The longer the criminal justice process is dragged out, the longer the victims have to suffer and are constantly reminded of the crime… Many have to travel quite some distance, sometimes inter-provincially, to attend court only to arrive to hear that it has been postponed. Sometimes, a trial begins and there are a number of adjournments, postponements or scheduling problems and victims learn they have to come back in a couple of weeks. It is costly to take time off work, travel, secure daycare and even park their vehicles at court houses during trials, and only some of these expenses are covered.

Lastly, Chief Jean-Michel Blais, Halifax Regional Police, explained that when the needs of victims are not met during criminal proceedings, this can lead to "secondary victimization," of which there are two types: injustice and indignity. He explained these as:

> Injustice includes fear of reprisal, lack of basic information about the judicial process, perceived lack of interest by the police, courts and/or correctional system, delays in the court process, lack of contact and response from appropriate players in the criminal justice system, and even loss of income or job resulting from court attendance and preparation.
>
> Indignity includes inability to pay funeral expenses for [a] departed loved one, physical sexual assault examination, police investigation and questioning and societal inferences of blame on the victim. Furthermore there is an institutional lack of support

for victims from victim service workers to testimonial aids, CCTVs, screens, and accommodating court scheduling.

These four testimonials and others heard during the study, or shared in news media in recent months,[163] underscore how hard it can be for victims to participate emotionally in the criminal justice system. There are also financial costs borne by victims, which can add to the challenges they are facing. Sue O'Sullivan mentioned that "83 per cent of the costs of crime in this country are borne by victims." Sheldon Kennedy, from the Sheldon Kennedy Child Advocacy Centre, noted that: "Victims of crime in this country cost our country $54 billion a year. Direct cost [of] child abuse in this country is $21.4 billion."

> "To give you an example, every time a victim receives a letter from the bailiff indicating that they must appear on a specific date, they start to go through the emotions attached to the sexual assaults. The victims receive the bailiff's letter two to three weeks before the trial begins, and they start getting anxious and having nightmares again. When it's time to appear in court, they are stressed out, defeated in advance and, all of a sudden, they are told that the trial has been postponed, often without even being told why. That is very traumatic for the victim, and it is enough to discourage many of them."
>
> – ALAIN FORTIER, PRESIDENT, VICTIMES D'AGRESSIONS SEXUELLES AU MASCULIN (VASAM)

When the victims are children, the effects of lengthy trials can have even "more serious repercussions," as Jenny Charest noted. Alain Fortier and Frank Tremblay from the Victimes d'agressions sexuelles au masculin (VASAM) bravely shared their own experiences as victims and discussed how lengthy trials impact children. Mr. Fortier said:

> Can you imagine a child waiting five years to move on to something else? To give you an idea, it's as if the child spent five years living in a perpetually cloudy world with an occasional ray of sunshine that lets them believe in a better life. Five years is a whole lifetime for a child.

Mr. Tremblay added that:

> In the case of children, among the consequences are problems in school, isolation, depression, substance abuse and addiction issues, and an inability to heal in therapy when they cannot erase traumatic memories. I should point out that it is very

[163] See for example: CBC News, "Family 'furious' with court after sexual assault charges stayed in home daycare case", 8 February 2017; CBC News, "Ottawa judge stays 1st-degree murder charge over trial delay", 15 November 2016; CBC News, "Sex assault cases in Alberta collapse due to excessive delays", 26 October 2016.

> important to preserve our memory in order to be credible during proceedings. That is pure psychological torture for the child, as well as for them when they reach adulthood.

Sheldon Kennedy, who also works closely with child victims, discussed how:

> [T]he science is clear on the developing brain of children. When kids have lived in sustained toxic stress environments, in situations long-term, no different than the court process, that changes the way their brain is developed. The science is clear today, yet our systems have not caught up with the science.

As a final comment on the impact of delays, it is worth mentioning Heidi Illingworth's articulation of how devastating a stay of proceedings can be for victims:

> Victims have been robbed of their day in court, and they will never know what the outcomes of their cases will be. They have done everything right by coming forward to the police, providing a video statement and often testifying at a preliminary hearing. After a lengthy period of time, it all stops with a stay due to a lack of available court time or judges. The victim feels powerless and is re-victimized by the criminal justice system.

A very worrisome concern raised by witnesses about the impacts of delays is how the experiences of victims in the justice system are having an impact on the willingness of others to step forward to report crime. Ms. Illingworth said this is especially true in cases of sexual assault. The impression created by witnesses during the committee's hearings is discouraging. "For anybody to get involved in the future in the court process," said Jennifer Lopes from the British Columbia Crown Counsel Association, "it is a huge barrier because people think, why would I? This didn't work last time. I am just going to give up."

Sue O'Sullivan made an important observation when she explained that: "Much research has been done on this that shows that if victims feel they have been respected and treated with dignity, they will be more satisfied with the criminal justice system." In the committee's view, this statement sets the goal for the justice system: to use evidence-based methods to make victims feel they have been respected and treated with dignity and are ultimately satisfied with how our criminal justice system is operating.

Victims' support and services

Support and services for victims in Canada have been improving. There are devoted and talented advocates for victims across Canada who are making a difference. Criminal procedures in the *Criminal Code* are better at addressing victims' needs now than those of previous generations. As mentioned above, victim impact statements are an integral part of the sentencing process. The ability for an accused to seek the production of a complainant's counselling records in a sexual assault case is tightly controlled.[164] Vulnerable witnesses may use various testimonial aids in court, such as having the public excluded or testifying from a remote location so they do not need to see the accused or others in the courtroom.[165] Provinces offer compensation, support programs and other services and have their own victims' rights legislation. Also, Crown witness coordinators may assist witnesses and help them understand the criminal process. Chief Constable Adam Palmer described how the Vancouver Police Department has specialized units for assisting victims to help them navigate the court process. The committee also learned about efforts that Canadian police are making to provide better services to victims. Chief Clive Weighill of the Saskatoon Police Service explained that, in his experience:

> …major crime detectives spend probably 20 to 25 per cent of their time not investigating files but actually working with the victims and making sure that they are going to feel safe to go to court and will attend court. We have been spending that extra time with the victims so that they attend court.

Marcus Pratt from Legal Aid Ontario also noted his organization provides services for victims and other witnesses when their privacy rights are at stake because the accused has requested access to certain personal records.

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164 *Criminal Code*, ss. 278.1-278.91, see also *R.* v. *O'Connor*, [1995] 4 S.C.R. 411.

165 *Criminal Code*, ss. 486 and 486.2

Since 2007, the Office of the Federal Ombudsman for Victims of Crime has been, according to Sue O'Sullivan, helping victims both "individually and collectively":

> We help victim issues individually by speaking with them every day, answering their questions and addressing their complaints about federal programs and services for victims of crime. We help victims collectively by reviewing important issues and making recommendations to the federal government on how to improve its laws, policies or programs to better support victims.

The CVBR[166] was passed by Parliament in April 2015. It amended the *Criminal Code* and the *Corrections and Conditional Release Act*[167] to enhance victims' rights to information and protection. It increased opportunities for victims to participate in criminal trials in the sentencing process. It also granted victims the right to have the court consider making a restitution order against the offender. Ms. O'Sullivan commented that the CVBR is "making a difference," adding, however, that: "It's not just about legislation; it's about the mobilization and sensitization of the key participants as well." Mr. Fortier, speaking on behalf of those working "in the field," said that many are not, in fact, comfortable with this law. He added that "we have experience and we are able to tell the individual to expect certain things. It's a lovely bill, but no real effort has been made to follow through on it thus far." The committee sees this mobilization and sensitization as pertaining to the much-needed cultural shift in the justice system, however, as elsewhere, this shift needs to be supported by Canadian governments so progress can be made faster.

There are several child advocacy centres across Canada, and in recent years funding for them has been increasing.[168] The committee visited the Sheldon Kennedy Child Advocacy Centre in Calgary and met with representatives from the Crime Victims' Assistance Centres in Quebec (CAVAC). Both of these organizations provide a variety of services to victims and help them navigate the criminal justice system. The committee was very impressed during its visit to the Sheldon Kennedy centre, where it met with Crown prosecutors, health service providers, police services and staff. CAVACs form a network of 17 centres operating throughout Quebec that, according to Jenny Charest, "have helped hundreds of thousands of people." They work with victims of any age, their families and other witnesses and guide "them through the court system" seeking "to ensure that victims know their rights, what recourse they have, and that they have access to complete information." Alain Fortier echoed how helpful these centres are, but noted, however, that while they are supportive, they are not able to help speed trials along.

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166 For more see Bill C-32, An Act to enact the Canadian Victims Bill of Rights and to amend certain Acts, 2nd Session, 41st Parliament; and Lyne Casavant, Christine Morris and Julia Nicol, *Legislative Summary of Bill C-32: An Act to enact the Canadian Victims Bill of Rights and to amend certain Acts*, Publication no. 41-2-C32-E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 18 December 2014.

167 *Corrections and Conditional Release Act*, S.C. 1992, c. 20.

168 Through the Victims Fund, the federal government has invested in Child Advocacy Centres across the country. See Department of Justice Canada, *Child Advocacy Centres Initiative*; Department of Justice Canada, "Archived - Federal Government Provides Funding to the Boost Child and Youth Advocacy Centre", News Release, 16 July 2015; Department of Justice Canada, "Archived - Child Advocacy Centres and Child and Youth Advocacy Centres", Backgrounder, July 2015.

The committee also notes that although there are good supports for victims in Canada, they are not always sufficiently available to serve all Canadians. Ms. O'Sullivan explained how some communities do not have these services in place, and: "[f]or the programs that do exist, we know that adequate resourcing is often an ongoing challenge." Marc Benton from Legal Aid British Columbia acknowledged that the province's victim assistance program is "limited", but added that this is "one area the province has identified as a priority." Kelly Kaip, President of the Saskatchewan Crown Attorneys Association, mentioned that often the infrastructure that could help victims have greater privacy in court is not available (and therefore the optimal level of privacy for victims cannot be offered).

In Chapter Five, the committee notes the importance of having up-to-date information supplied to victims and witnesses and recommends that the Minister of Justice take a leadership role in making a computer-based system that can serve this purpose available in Canada. Sue O'Sullivan explained that the computerized notification systems for victims in Canada are currently limited to specific information and services online from Correctional Service Canada (CSC) and the Parole Board of Canada (PBC).[169] The Victims Portal allows victims or their representatives to access information about the offender, submit victim impact statements and request copies of PBC decisions. There is nothing to notify victims about developments in criminal case proceedings. Sue O'Sullivan referenced a system that exists in the United States called SAVIN (Statewide Automated Victim Information and Notification)[170] and a pilot project in the United Kingdom called TrackMyCrime.[171] She explained that such a system in Canada:

> …would provide a single online source where multiple criminal justice practitioners upload information that can be disclosed to victims. This could be one tool to reduce efforts by police, Crown and corrections to keep victims informed, while providing victims with the information they need to determine if and when they will attend or participate in proceedings.

Several of the observations and recommendations made elsewhere in this report would help victims, including those pertaining to making restorative justice programs more widely available (Chapter Eight) and improving the data collected by the Canadian Centre for Justice Statistics regarding victimization (Chapter Two). The chief concern of the committee is that the momentum must continue to build for increasing services to victims and opportunities for their participation. The CVBR needs to be promoted by Canadian governments and it must be understood and applied by all participants in the justice system, who must not lose sight of the fact that achieving justice requires that victims' needs be respected.

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169 Correctional Service Canada, *Victims Portal*; Government of Canada, *Victims Portal*.

170 United States, Department of Justice, Bureau of Justice Assistance, *Statewide Automated Victim Information and Notification (SAVIN)*.

171 United Kingdom, Ministry of Justice, *TrackMyCrime*.

Recommendation 11

The committee recommends that the Minister of Justice work with the provinces and territories to develop a strategy to ensure a consistent and adequate level of services for victims across Canada, including:

- **expanding the availability of victims' integrated service and advocacy centres; and**
- **establishing computerized notification systems for victims concerning criminal case proceedings and the information they need to obtain services.**

Recommendation 12

The committee recommends that the Minister of Justice invite funding proposals from the provinces and territories to expand integrated services and advocacy centres for victims across Canada.

CHAPTER FIVE - THE JUDICIARY AND COURTHOUSE ADMINISTRATION

> "Because the courts possess a degree of impartiality and authority that no other stakeholder can claim, we have a very important leadership role to play in bringing all of the parties together in our joint efforts to improve case flow and to bring cases to trial as soon as possible."
>
> – THE HONOURABLE TERRENCE MATCHETT, CHIEF JUDGE, PROVINCIAL COURT OF ALBERTA

The Role of the Judiciary

Judges are the masters of their courtrooms. How they exercise control is determined and circumscribed by Canadian laws and common law principles. Their ability to speed a case along is, of course, limited by their reliance on key participants in the justice system who also have responsibilities in addressing delays. However, a judge with a strong understanding of case management tools and resources can have a significant impact on trial length. In post-*Jordan* criminal proceedings, the urgency to expedite matters means judges will need to be well-versed in how to use these tools effectively.

During its study, the committee learned that not all judges are familiar or confident enough in using the legislated rules and common law principles for ensuring proceedings move expeditiously through case management. The term "case management" is often used in reference to individual criminal proceedings, whereas "case flow management" may refer to the broader administration of criminal cases through the system. Our legal system is also perhaps placing unreasonable expectations on its judges, given that we heard repeatedly that there are not enough judges to effectively manage caseloads.[172] Alternative measures, or "appropriate measures" (as discussed in Chapter Eight), that might alleviate the pressures on courtrooms are not consistently available in every jurisdiction. Also, managing the flow of so many criminal cases is beyond the capacity of sitting judges on their own; they require sufficient staff and support. Delegating some of the court matters currently overseen by judges to other officers, such as a justice of the peace or other similar position, could help ensure that judges use their valuable time more efficiently.

A culture shift in the judiciary is already happening as judges like Chief Judge Pamela Williams of the Provincial and Family Court of Nova Scotia are exploring ways to track cases that are at risk of being dismissed for unreasonable delay. The committee learned about ways this provincial court seeks to place

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[172] See the testimony of Rick Woodburn, Canadian Association of Crown Counsel (Evidence, 9 March 2016); former Chief Justice of the Superior Court of Quebec, François Rolland (Evidence, 13 April 2016); Chief Justice Neil Wittmann, Court of Queen's Bench of Alberta (Evidence, 28 September 2016) and (Evidence, 3 November 2016); William MacKay, Government of Nunavut (Evidence, 20 October 2016); Claudia Prémont, Quebec Bar Association; and Professor Marie Manikis, McGill University (Evidence, 28 October 2016), among others.

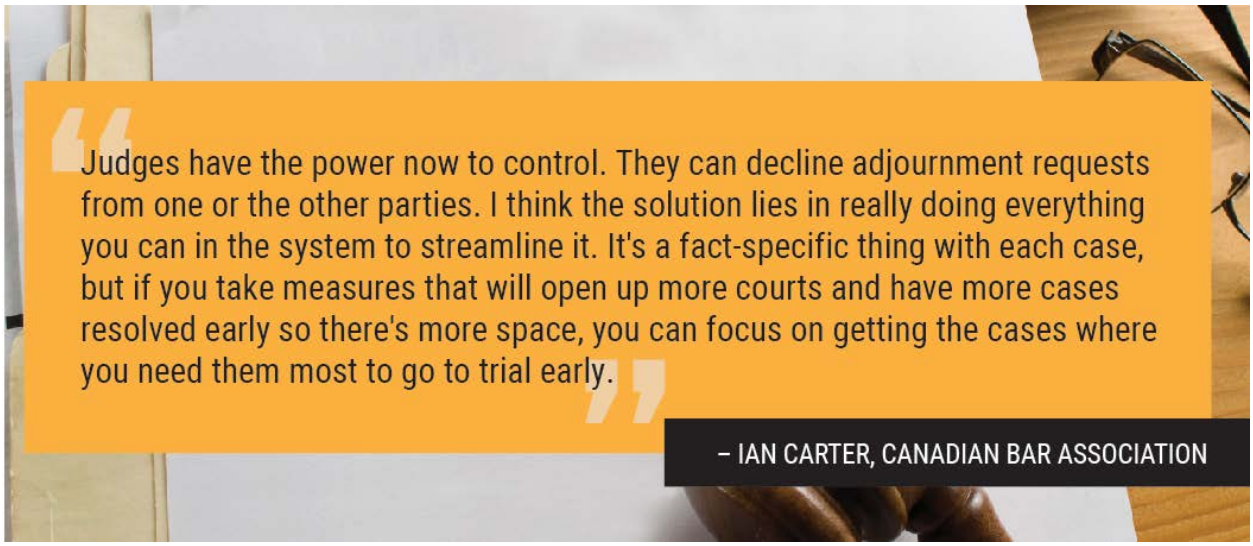
accused persons on a track that leads to the most appropriate measures. More judges will also need to familiarize themselves with the case management tools provided in the *Criminal Code* in order to speed matters along.[173] For example, under section 482.1 of the *Criminal Code*, a court may make rules for case management, including rules establishing case management schedules. If rules are made, a judge may issue a warrant to compel the presence of the accused at case management proceedings. Judges will also need to embrace technology: in the 21st century, all courts and courthouses should be using videoconferencing and computer file management systems in every aspect of their operations to improve efficiency and their interactions with counsel, unrepresented accused, victims and other witnesses. Most importantly, judges need to ensure that they are consistently receiving the most up-to-date training with regards to case management.

The lack of robust case and case flow management may be the single biggest contributing factor to court delays. Efforts must be made by all justice system participants to address this issue through better training, particularly of judges, the sharing of best practices and proactive legal and administrative reform. This committee respects judicial independence and the judiciary's role in applying the common law and federal, provincial, and territorial statutes, including the Constitution and the *Canadian Charter of Rights and Freedoms*. At this time of reform and cultural shift, however, judges need to make broad efforts to take stock of case management practices and the opportunities provided by technology to modernize the administration of cases and courtrooms across the country.

The independence of judges is a central pillar of our justice system. Judges are expected to be free to make decisions based solely on fact and law without being pressured or influenced. In order to do so, they need to be able to have the final say as to how a case proceeds through the court. Judicial independence allows judges to act as an impartial party in applying the criminal laws of Canada to determine the innocence or guilt of an accused person (or to assist the jury in arriving at this determination) and to impose appropriate sentences. Such independence is achieved by judges' security of tenure, financial independence, and administrative independence, all of which are designed to insulate them from undue influence by others and to ensure a fair trial. It is their administrative independence that permits them to control the legal process as case managers.

[173] These provisions are found in section 482.1 and Part XVIII.1 (sections 551.1 to 551.7) of the *Criminal Code.*

Case management



Judges are routinely faced with requests for adjournments during criminal trials. These can be for a number of reasons: more time is needed for the disclosure of evidence, a witness is not available, counsel are not able to meet to narrow the issues for trial, and the list can go on. As we discussed earlier in this report, the median length of time taken to complete a criminal case in a Canadian criminal court in 2014-2015 was 121 days and the median number of court appearances was five,[174] though that means that in many cases it is higher. Many of these court appearances are, to borrow words from Ian Carter, a lawyer from the Canadian Bar Association, "routine" and "non-consequential." Kevin Fenwick, then Deputy Minister and Deputy Attorney General for Saskatchewan's Ministry of Justice, explained that: "We now have a culture where there is almost an automatic adjournment with the first appearance in court." Witnesses agreed that most adjournments are granted as a matter of course, prompting Mr. Fenwick to add: "There is some responsibility on the courts to ask tougher questions about why they aren't ready to proceed that day and why there is that request for adjournment."

Each adjournment adds more time to the length of the proceedings and contributes to the potential for delays. Adjournments are also extremely hard on witnesses and victims, as explored in Chapter Four, since this can mean more wasted visits to the courthouse and more time spent waiting for a resolution.[175] Adjournments can also mean that court resources are being wasted, or at least being used up inefficiently. As Ian Carter noted, many routine appearances are "completely unnecessary," but they require that the judge, lawyers, witnesses and other court staff all be in attendance. The committee stresses that judges should be wary of applications that simply use standard template language and should insist on detailed facts and arguments before granting adjournments or additional court time for applications.

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174 Ashley Maxwell, Statistics Canada, *Adult criminal court statistics in Canada, 2014/2015*, 2017, p. 11.

175 See the testimony of Heidi Illingworth, Canadian Resource Centre for Victims of Crime (Evidence, 24 March 2016); and Jennifer Lopes, British Columbia Crown Counsel Association (Evidence, 27 September 2016), among others.

Deciding whether to grant an adjournment is just one of the many decisions that a judge will need to make in their capacity as case managers. Judges must be confident in using the tools they have to discipline Crown prosecutors, defence counsel and unrepresented accused persons who are not meeting deadlines set by the court to ensure cases are moving towards a timely conclusion. Judge Raymond Wyant, Senior Judge of the Manitoba Court and former Chief Judge of the Provincial Court of Manitoba, explained that what is required is "holding counsel's feet to the fire in appropriate cases, having them respect timelines, making sure that when they make an argument, for example, for an adjournment that it's a legitimate argument and that it's not just given…"

The committee heard from former and sitting judges, lawyers, police officers and legal experts that judges are not always effectively managing the cases in their courtrooms to ensure they move along efficiently.[176] As Judge Wyant added, "I think it is fair to say, that over the course of many years judges have, in some cases, not controlled the court proceedings as effectively as they should… I think judges, generally speaking as a profession, could do a lot better in terms of managing how things go in court."

Donald Piragoff, Senior Assistant Deputy Minister at the Department of Justice Canada, reviewed how the role of the judge in a criminal trial is "to ensure there is a fair trial and that the state is able to prove beyond a reasonable doubt that a person is guilty and therefore subject to penalty by the state and possibly even loss of liberty." Being skilled in ensuring the fairness of a trial and the proper application of the law is a key quality that Canadians expect from judges. Judges also need to have management skills, both in working with people and organizing efficient systems for handling cases. "There's a specialization in this kind of work," said William Trudell of the Canadian Council of Criminal Defence Lawyers. "Some judges just aren't trained or don't have the capability of saying, 'Sorry, ladies and gentlemen, this isn't going to wash.'"

Witnesses discussed many of the various means and tools that currently exist for judges to manage cases. Section 551.1 of the *Criminal Code*, for instance, provides a chief justice with the authority to appoint a case management judge for any trial when necessary for the proper administration of justice." These judges "assist in promoting a fair and efficient trial, including by ensuring that the evidence on the merits is presented, to the extent possible, without interruption."[177] Part XVIII.1 of the Code provides the judge with powers to establish schedules and impose deadlines on the parties as well as to decide preliminary issues such as Charter arguments, disclosure motions and the admissibility of evidence. The case management judge is acting as the trial judge when making these rulings and his or her rulings are binding on the parties. Any appeal from a ruling would take the normal appeal route following a conviction or acquittal. This appointment allows many issues to be dealt with prior to the trial beginning. Mathieu Rondeau-Poissant, a lawyer with the Association québécoise des avocats et avocates de la défense, noted that a case management judge may be able to assess "the futility of certain motions on both sides and

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[176] See the testimony of Patrick J. LeSage, former Chief Justice of the Ontario Superior Court of Justice (Evidence, 3 February 2016); William Trudell, Canadian Council of Criminal Defence Lawyers (Evidence, 18 February 2016); Joseph Oliver, Canadian Association of Chiefs of Police (Evidence, 25 February 2016); Tom Stamatakis, Canadian Police Association (Evidence, 23 March 2016); and Didier Deramond, Montreal Police Service (SPVM) (Evidence, 28 October 2016), among others.

[177] Section 551.2, *Criminal Code*.

ensure that we do not go from one *pro forma* to another without any communication, which prolongs the proceedings unnecessarily."

The *Criminal Code* allows other opportunities for pretrial conferences that can help "both sides narrow the issues," as Mr. Piragoff explained, by getting the parties to meet with a judge and determine what needs to be done to keep the case moving, to identify key issues that must be resolved during the hearings, to find out what issues counsel on both sides can agree upon so that witnesses do not need to be called, and to ensure that the disclosure of evidence is being fulfilled properly. In preliminary inquiries, he added, there are also focus hearings that help to identify "the key essential issues that the judge has to determine, as opposed to a shotgun approach or shotgun defence." These conversations can "reduce the number of witnesses and the amount of time required." Ian Carter noted that in Ottawa and in some other jurisdictions, defence counsel are mandated to meet with Crown counsel on every case, and if that does not provide a resolution and a judicial pretrial is set, then counsel will meet with the judge in his or her chambers to help try to resolve the matter or at least narrow the issues.

Around the time the committee's study began, Justice Cournoyer of the Superior Court of Quebec released his decision in *R. v. Bordo*[178] pertaining to the disclosure of evidence in a lengthy and complex series of proceedings in two cases involving charges of drug trafficking against four accused persons. Of particular interest for the committee's study was how Justice Cournoyer took a bold step and articulated the power of a court to establish schedules and impose deadlines on the parties before it. In referring to several Supreme Court cases,[179] he noted that a presiding judge has an inherent power to manage a trial and has "considerable" powers to intervene and make any orders necessary to ensure the trial is moving forward. He then considered section 551.3(1)(*d*) of the *Criminal Code*, related to the powers of the case management judge, which include establishing schedules and imposing deadlines on the parties. Afterwards, he provided a review of various principles to be applied in ensuring a fair and efficient criminal trial while establishing schedules, imposing deadlines or setting time limits for preliminary motions. These principles include the right of the prosecution, the accused and society to a fair hearing and a just determination of the case through accurate fact findings; the right of the prosecution to have a reasonable opportunity to present its evidence against the accused; and the right of the accused to make full answer and defence, including his or her right to present evidence, among others.

Justice Cournoyer added that "competent counsel" should be prepared to participate in these discussions and present "a proper foundation" to the judge, which would include: witness lists, proposed testimony, exhibits, and estimates of trial time. He added that the prosecution should have a "well thought-out plan" for bringing the case to completion and must have provided timely disclosure of the necessary evidence. Defence counsel should act responsibly in advocating for their clients and only bring Charter applications or make allegations of abuse of process or prosecutorial misconduct when it is responsible to do so.

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178 *R. v. Bordo*, 2016 QCCS 477.

179 *R. v. Auclair*, 2014 SCC 6; *R. v. Pires; R. v. Lising*, 2005 SCC 66; and *R. v. Cunningham*, 2010 SCC 10.

The *Bordo* decision demonstrates the potential for judges to take a stricter approach in setting deadlines and keeping proceedings moving forward efficiently. Several witnesses discussed this decision: Brian Saunders from the Public Prosecution Service of Canada noted it was "useful" and "comprehensive"; William Trudell saw it as an example of "meaningful case management;" and, Joseph Oliver from the Canadian Association of Chiefs of Police added that it demonstrates "what needs to occur in order for the system to move along a lot smoother."

Being strict can, however, produce its own concerns, since it risks compromising the right to a fair trial. The committee heeds the caution that Professor Ian Greene provided during his review of Ontario's efforts to deal with trial delay. He recalled a practice directive from the Chief Justice "whereby, when lawyers asked for delay, they would be denied it most of the time unless they had very good reasons." He noted that in some cases, lawyers who were denied the delay would use that as reasons for an appeal. Appeals do not speed up proceedings, but are a necessary part of ensuring that proper decisions are made in our justice system. Jurisprudence such as the *Bordo* decision clarifies how the *Criminal Code* can be used to manage cases, and how the articulation of case management principles by judges can help limit appeals and give other judges more confidence to be stricter with deadlines.

Some discussion with witnesses concerned legal reform in the context of case management. The Honourable François Rolland, former Chief Justice of the Superior Court of Quebec suggested that the *Criminal Code* could include stronger powers for judges to limit evidence, so long as evidence was not being obstructed in a manner that would generate appeals. Mr. Rondeau-Poissant cautioned, however, against further codifying case management powers of judges, noting that "pan-Canadian standardization" would "suit some places and not others." In discussing case management, the Honourable Patrick J. LeSage, former Chief Justice of the Ontario Superior Court of Justice, emphasized that what is most needed in the *Criminal Code* is allowing discretion. Most witnesses focused on the importance of judges using existing tools, but as this committee recommends in Chapter Eight, the *Criminal Code* should ensure a sufficient amount of discretion for judges. Along with case management provisions in the *Criminal Code*, this is something that could be reviewed to determine both whether the tools are sufficient and being properly used by judges in Canada and whether the *Criminal Code* requires any further amendment to make them most effective. Scott Newark, author of the recent Macdonald-Laurier Institute Report *Justice on Trial: Inefficiencies and ineffectiveness in the Canadian criminal justice system*, argued it would be valuable to have a review of various mandatory case resolution procedures to determine if they are producing results.

The committee believes that the Minister of Justice and her counterparts in the provinces and territories should be reviewing how case management is being developed through jurisprudence to determine when and if amendments to the *Criminal Code* provisions concerning case management need to be modified. Nevertheless, if the judiciary continues to make progress in how it is using the tools available in the *Code* and if judges are being properly trained in how to use them, then the committee recognizes that the principles of judicial independence should be respected in order to allow the judiciary to improve its case management practices. This being said, case management in Canada must be improved, it must be robust and efficient, and legislative changes may become necessary.

Case Flow Management and Scheduling

> When the judiciary plays a more active role in the governance of the courts, in managing the flow of cases from initiation to disposition in these courts and in leading delay reduction efforts, impressive gains result in promoting fairness and justice and enhancing public security and in reducing public and private costs.
>
> – PROFESSOR CARL BAAR, BROCK UNIVERSITY

When he appeared before the committee on 13 April 2016, former Chief Justice François Rolland informed the committee that it was not possible to get a Superior Court of Quebec date for a trial set in Montreal for over a year, with only a few dates available in 2018 and dates in 2019 already being booked. He also said that the state of affairs was similar in Quebec City. It is evidence such as this that has the committee very concerned about the challenges that lie ahead in dealing with delays. It is a clear sign that the court system is in need of urgent attention.

Judges must not only manage each individual case, but they also have to manage their caseloads. Chief Justices and Judges in particular play an important role in the broader management of the flow of all cases before their courts. They have the leadership and the authority to assign judges to cases, to set broad policy and assist other judges, though they are not to interfere with how a judge chooses to rule on a particular case.[180] Mr. Rolland told the committee that as a Chief Judge, "we have to find the right judge for the right files… Some are better than others at management, and others are better at trials. The chief justice's role is to determine who will be the best manager, but we cannot go further than that." Chief Judge Terrence Matchett added:

> I'm not the boss of the judges in Alberta. They're my colleagues, and I need to get their buy-in. I need to get their cooperation. I need to get every judge in every courtroom, every day, moving every case along as quickly as they possibly can, and to do that, I need to do it through consultation and I need to do it through their commitment.[181]

Over the course of this study, the committee heard from witnesses that work in courthouses across this country and visited courthouses in Dartmouth, Vancouver, Calgary, and Saskatoon.[182] Witnesses

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180 See the testimony of Patrick J. LeSage, former Chief Justice of the Ontario Superior Court of Justice (Evidence, 3 February 2016). He explained that in practice, the assignment of cases to judges is mostly done by trial coordinators under the direction of the Chief Justice.

181 Those comments were echoed by Chief Justice Wittmann (Evidence, 3 November 2016).

182 The committee visited the Mental Health Court in Dartmouth; the Provincial Court of British Columbia (Downtown Community Court and the Drug Treatment Court of Vancouver); the Provincial Courthouse of Calgary and heard about several initiative of Saskatoon's Provincial Courthouse (the Mental Health Strategy, the Domestic Violence Court, Shadow Courts and the adult bail court LEAN event).

identified many of the essential contributors to delays in Canada as occurring during the management of case flow and administration of the courthouse.[183] Institutional delays happen when courtrooms are overbooked, when they are understaffed, when there are more cases than available judges, when interpreters are unavailable, when time in court is wasted with unnecessary appearances, and this list can go on. These administrative factors add to the challenges facing chief judges in expediting criminal proceedings.

Many Canadian courts are already engaged in addressing their administrative challenges. The committee heard about the Government of Ontario's efforts in dealing with delays through the Justice on Target program.[184] The program began in 2008 with the goal of reducing the number of court appearances from the initiation of a case to its disposition by an average of 30 per cent within four years. As of 31 March 2012, it was reported that the program had achieved success in reversing a decades-long trend of increases, but it did not meet the 30 per cent reduction targets. Rather, court appearances had decreased by 7 per cent and the number of days to dispose of a charge by 2 per cent. Michael Waby, from the Ministry of the Attorney General of Ontario, explained that the program had "reversed what had been a troubling trend in an increase in both time to trial and the number of appearances," before being wrapped up.

Professor Greene also discussed his research in addressing delays in Ontario and discussed how important it is for all participants in the court system to be fully involved in reducing delays, whether they are lawyers, judges or courthouse personnel. He noted that his research had prompted the creation of Court Advisory Committees in Ontario, whose purpose is to bring these participants together to develop ways for courts to work more efficiently.[185] He added that their effectiveness can depend on the personalities involved.[186] The committee agrees that stakeholder collaboration is key, and would emphasize that the leadership of the judiciary in such dialogues is essential.

One key task for courthouse administration is to ensure the most efficient scheduling of courtrooms and in ensuring that all courthouse resources are being optimally used.[187] Kevin Fenwick explained Saskatchewan's "shadow court" initiative, which involves the practice of overbooking cases to avoid

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183 See the testimony of Leo Russomanno, Criminal Lawyers' Association (Evidence, 18 February 2016); Rick Woodburn, Canadian Association of Crown Counsel; and Kate Matthews, Ontario Crown Attorneys' Association (Evidence, 9 March 2016); and Jennifer Lopes, British Columbia Crown Counsel Association (Evidence, 27 September 2016), among others.

184 Ontario, Ministry of the Attorney General, *Justice on Target*, News release, 3 June 2008.

185 Michael Waby, Executive Director, Criminal Justice Modernization, Ministry of the Attorney General of Ontario (Evidence, 24 February 2016) also explained that the Justice on Target program had involved setting up collaborative teams at courthouses to address local issues from delays to bail proceedings, with representatives from the judiciary, the local the bar, court services, and police.

186 See also Ian Greene, "Ethics and Leadership in Times of Austerity: Ontario's Courts and 'Justice on Target'," *The Public Sector Innovation Journal*, 19(1), article 8, 2014.

187 See the testimony of George Dolhai, Public Prosecution Service of Canada (Evidence, 17 February 2016); Laurie Gonet, Ontario Crown Attorneys' Association; and Rick Woodburn, Canadian Association of Crown Counsel (Evidence, 9 March 2016); Tom Stamatakis, Canadian Police Association (Evidence, 23 March 2016); and Andrew Mason, Saskatoon Criminal Defence Lawyers Association Inc (Evidence, 29 September 2016), among others.

having empty courtrooms caused by many inevitable last-minute trial adjournments, stays of proceedings, and guilty pleas. He said that:

> [W]e would have five court parties scheduled for four courtrooms, and in the unusual circumstance where all five matters would be proceeding, we would find a way for that to happen. But rather than having one or two courtrooms sit empty, we found that we were increasing our capacity by 20 per cent, for example.

In Alberta, the committee was particularly impressed by the Calgary Courts Centre and the Alberta Provincial Court's "Court Case Management Program."[188] As explained by Chief Judge Matchett, this initiative includes the creation of a Case Management Office (CMO), where accused persons can make initial, routine administrative appearances and even enter guilty pleas at a designated counter, rather than in court.[189] He added that this has freed up judicial time for more substantial matters. Also, assignment courts have allowed more cases to be scheduled on a certain date and reduce the risk of people being sent away because of insufficient court time. A court appearance is still required and ensures judicial oversight when cases have not been set for trial within the timelines prescribed by the office. A computerized scheduling system interfaces with other applications to input witness availability, Crown elections, diversion eligibility and estimated times for trial. It also allows both Crown and defence counsel to schedule dates remotely. The committee hopes to see this increased level of flexibility and efficiency adopted in more courthouses across Canada.

Chief Justice Wittmann of the Court of Queen's Bench of Alberta pointed out one seemingly small but important step when he noted that the court had started offering summer trials:

> [T]he summers are lighter, but we do have trials. That's relatively new, I'd say in the last five years. Historically, our court did not have trials in the summer. They had a lot of motions, special applications, appeals from provincial courts and so on — all the rest of the court business, judicial reviews, but not trials. Now we offer summer trials.

Didier Deramond and Hélène Des Parois from the Montreal Police Service discussed how in Quebec during the summer months most courts slow down significantly and few criminal trials are held. The committee emphasizes that any courts that are carrying lighter loads in the summer will need to find ways to remain fully operational during this time to avoid contributing to delays. As a related point, the committee sees a need for having more courtrooms and courthouse services operating during hours that

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188 "The Court Case Management Program (CCM) is a judicially-led initiative designed to develop new and innovative ways to effectively manage cases in the Alberta Provincial Criminal Court. It is intended to increase public confidence in the justice system and improve access to justice." Alberta Courts, *Court Case Management Program*.

189 CMOs deal with administrative and non-contested matters outside the courtroom and reduce the time spent on court appearances, thereby increasing the ability of judges to focus on more substantive matters. They permit accused persons to appear outside regular work hours and to have access to duty counsel. See Court Case Management Program, *CCM 2015-2018 Handbook*, November 2015, pp. 5-6.

are outside the regular work day, since this could help accommodate the schedules of the accused and witnesses so they do not need to take time off work.

The committee also notes that Canadian jurisdictions may benefit from a review of the practice of paying supernumerary judges.[190] Under the *Judges Act* and applicable provincial legislation, supernumerary judges are judges who gave up their regular judicial duties but continue to hold office.[191] To be eligible, judges must be 65 and have served at least 15 years on the bench, or have 10 years of service by age 70. Supernumeraries account for over 20 per cent of all active federally appointed judges. Some jurisdictions use supernumerary judges as they can add some flexibility and assistance in the scheduling of cases by providing more judicial resources. In some courts, supernumerary judges are expected to work 50 per cent of a full-time judge's schedule,[192] but they do still require support staff, and access to other judicial resources. Furthermore, Section 29(4) of the *Judges Act* sets the salary for each supernumerary judge of a superior court to be the same as "the salary annexed to the office of a judge of that court other than a chief justice, senior associate chief justice, associate chief justice or senior judge." When a judge elects to go supernumerary, his or her position becomes vacant and the federal government can appoint a new judge.[193] The committee did not delve too deeply into examining the overall, long-term benefits of retaining supernumerary judges, but notes that the advantages of this practice merit further study.

Recommendation 13

The committee recommends that the Minister of Justice work with the provinces and territories and in particular with the judiciary to:

- **stress the need for judges to improve case management, such as by imposing deadlines and challenging unnecessary adjournments, using the tools that already exist; and**
- **consider making amendments to the *Criminal Code* to support better case management as necessary.**

Recommendation 14

The committee recommends that the Minister of Justice work with the provinces and territories:

- **to establish methods of measuring courthouse performance and efficiency and setting targets and benchmarks for criminal proceedings across Canada;**
- **to review scheduling practices across Canada and provide objective analysis and direction concerning best practices and outdated methods that should be replaced; and**

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190 For example, Ontario has 73 supernumerary judges and 200 Superior Court of Justice judges in office (excluding Court of Appeal and Family Court judges). See Office of the Commissioner for Federal Judicial Affairs Canada (as of May 1, 2017).

191 *Judges Act*, R.S.C., 1985, c. J-1, ss. 28-29.

192 See the testimony of Chief Justice Neil Wittmann, Court of Queen's Bench of Alberta (Evidence, 3 November 2016).

193 See the testimony of Stephen Zaluski, Department of Justice Canada (Evidence, 4 February 2016).

- **to create mechanisms to ensure that such analysis is performed and published as a regular, recurring practice.**

Recommendation 15

> **The committee recommends that the Minister of Justice take a leadership role in helping the provinces and territories develop scheduling practices and tools that ensure productive, optimal and efficient use of courtrooms, such as by implementing "shadow courts", summer trials, extended courthouse hours, and other related initiatives.**

Training of judges and continuing education

> Having proper people in that job is the responsibility of chief justices and regional senior justices across the country. This is not something that isn't happening; [our] national steering committee is looking at this very issue.
>
> - BILL TRUDELL, CANADIAN COUNCIL OF CRIMINAL DEFENCE LAWYERS

In order to ensure they are effectively managing the many proceedings in courtrooms and that cases are resolved without unreasonable delay, judges require the proper tools, sufficient resources (e.g. non-judicial supporting staff, adequate technological solutions and courtrooms) and they must have the skills and knowledge required to manage their cases, which can be gained through appropriate training and continuing education. As explained above, provisions in the *Criminal Code* already provide many tools for

judges to ensure timely resolutions of criminal cases; however, the committee is concerned that they may not be receiving sufficient training or guidance to achieve this. The committee heard differing views on this matter. While some witnesses referred to training and continuing education for judges in their region, such as through the National Judicial Institute,[194] we also heard that there is a broad need for more training to be available, specifically on case management.[195]

Chief Justice Wittmann of the Court of Queen's Bench of Alberta testified that there are education programs available for judges within Alberta and across Canada that "run a spectrum of almost any subject matter that we deal with as judges." Former Chief Justice Rolland mentioned that new judges in Quebec receive mandatory training, including three training courses in management, settlements or facilitation conferences and judgment writing. He added that he thinks the training being given is "appropriate." However, when speaking about chief judges, former Chief Judge Wyant of the Provincial Court of Manitoba and Senior Judge of the Manitoba Court noted there is no formal training:

> Essentially what happens when people are appointed to be chiefs, appointed hopefully for their expertise in and their knowledge of the law, there is nothing that says they have to have any experience in management, any ability to deal in human resources or even to look at a balance sheet…There is no formal, regularized, mandatory training for someone once they become a chief.

Donald Piragoff confirmed that, in fact, "there's significant variation, not only from province to province but even within provinces there is significant variation with respect to the amount of support that various courts have and the amount of training."

In addition to knowing how to manage cases and their court rooms, another concern raised during our study was whether judges presiding over criminal courts are sufficiently specialized in criminal law. In Canada, judges hearing criminal law matters are not always specialists, particularly in courthouses serving less populated regions. While in some parts of the country some judges may only handle criminal cases,[196] in others, judges may hear a range of matters. This is a concern that was articulated by former Chief Justice LeSage:

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[194] See the testimony of former Chief Justice of the Superior Court of Quebec, François Rolland (Evidence, 13 April 2016); Judge Raymond Wyant, Senior Judge of the Manitoba Court, Former Chief Judge of the Provincial Court of Manitoba (Evidence, 23 March 2016); and Chief Justice Neil Wittmann, Court of Queen's Bench of Alberta (Evidence, 16 November 2016), among others.

[195] See the testimony of Professor Ian Greene, York University (Evidence, 9 March 2016); Judge Raymond Wyant, Senior Judge of the Manitoba Court, Former Chief Judge of the Provincial Court of Manitoba (Evidence, 23 March 2016); and Christine Mainville, Henein Hutchison LLP (Evidence, 5 October 2016), among others.

[196] Former Chief Justice Rolland said that: "There are Quebec Superior Court judges that hear only criminal cases, who deal with nothing other than criminal law because a trial by jury resulting from the order of a retrial on appeal is very costly. Some judges have therefore been trained to deal exclusively in criminal matters and have worked in that area for many years."

> Because of the complexity of the criminal law today, if someone is going to be adjudicating in crime, they really need to have a fairly well-rounded experience in criminal law. Otherwise, they'll get lost in the complexities that now exist.

Chief Justice Wittmann explained that the issue of specialization "is quite controversial in a lot of superior courts in this country." He mentioned that the lawyers want specialization, but a lot of judges are resistant, saying, "We didn't sign up for that; we're a generalist court." He added his own view that "it's very difficult to keep up with developments on every aspect of every area of the law when you … are supposed to be handling every area of the law as a superior court." Geoffrey Cowper, Chair of the British Columbia Justice Reform Initiative, also discussed how "judicial management of a complex criminal prosecution today requires judges of the very best abilities in the criminal law. It is not something in the 21st century that we should depend upon learning on the job."

While respecting judicial independence, the committee hopes that the judiciary itself will demonstrate that appropriate and sufficient training in case and case flow management is being regularly provided to all judges. The Minister of Justice should work with the provinces and territories to monitor this situation and assess the extent to which such training is being properly delivered to and applied by judges.

The 2017 Budget provides the Canadian Judicial Council with $2.7 million over five years, and $0.5 million per year thereafter "to support programming on judicial education, ethics and conduct. This commitment will include targeted investments to upgrade information technology infrastructure, so that information can be managed accurately and effectively."[197]

Nomination Process and Appointment of Judges

While witnesses throughout the study stressed that a lack of resources across the justice system underlies delays, one of the most important resources is judges themselves. All of the concerns with the administration of courthouses and effective case flow management would be significantly alleviated if Canada had enough judges to handle the number of criminal cases awaiting trial. The committee also

[197] See Government of Canada, *Federal Budget 2017*, 22 March 2017, p. 189.

heard concerns raised by witnesses about the need to improve and expedite the nomination process of federally appointed judges.[198] Candidates must be nominated, then properly vetted and selected. The salary for federally appointed judges as of 1 April 2015 was $308,600 (as set by the independent Judicial Benefits and Compensation Commission).[199] Other resources required for judges include courtrooms to hear cases and staff to assist him or her.

Over the course of this study, the committee has twice expressed its concerns about the number of judicial vacancies across Canada that are not being filled.[200] The *Judges Act* sets out the number of federally appointed judges in sections 9 to 22. Section 24 allows for the appointment of more judges (up to a maximum of 50 superior court and 13 appeal court judges).[201] In the tallies on its website, the Office of the Commissioner for Federal Judicial Affairs Canada does not specify the total number of judges in office and how many were appointed under section 24 of the *Judges Act* or by the provinces themselves, so it is difficult to get an accurate number of permanent judicial appointments. However, as of 1 June 2017, there are 849 federally appointed judges and 285 supernumerary judges in Canada.

The Government of Canada has appointed a number of judges since our study began in February 2016, but at the time of writing this report, many more appointments are still necessary. Recent numbers are set out in the following table:

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198 Federal judicial appointments are made in accordance with section 96 of the *Constitution Act, 1867.* See the testimony of Professor Ian Greene, York University (Evidence, 9 March 2016); former Chief Justice of the Superior Court of Quebec, François Rolland (Evidence, 13 April 2016); Chief Justice Neil Wittmann, Court of Queen's Bench of Alberta (Evidence, 28 September 2016) and (Evidence, 3 November 2016); William MacKay, Government of Nunavut (Evidence, 20 October 2016); Claudia Prémont, Quebec Bar Association; and Professor Marie Manikis, McGill University (Evidence, 28 October 2016), among others.

199 Office of the Commissioner for Federal Judicial Affairs Canada, *Considerations Which Apply to an Application for Appointment*, 1 April 2015. Bill C-44, An Act to implement certain provisions of the budget tabled in Parliament on March 22, 2017 and other measures, 1st Session, 42nd Parliament, Division 10 of Part 4, would amend the *Judges Act* by raising the yearly salary of federally appointed judges to $314,100. See also Judicial Compensation and Benefits Commission, *Report and Recommendations*, 30 June 2016.

200 First in its Interim Report of August 2016 (Senate, Standing Senate Committee on Legal and Constitutional Affairs, *Delaying Justice is Denying Justice: An Urgent need to Address Lengthy Court Delays in Canada (Interim Report)*, Eighth Report, 1st Session, 42th Parliament, August 2016) and second in a news release in September 2016 (Senate of Canada, Standing Senate Committee on Legal and Constitutional Affairs, "Senators condemn federal government inaction on court delays" News Release, 29 September 2016.)

201 Bill C-44, An Act to implement certain provisions of the budget tabled in Parliament on March 22, 2017 and other measures, 1st Session, 42nd Parliament, Division 10 of Part 4, would increase these numbers to 16 judges appointed to appeal courts and 62 judges appointed to superior courts.

Number of vacancies, federally appointed judges

Date	Number of Vacancies
As of 1 June 2017	53
As of 1 May 2017	62
As of 1 April 2017	59
As of 1 March 2017	62
As of 1 February 2017	60
As of 5 January 2017	57
As of 1 December 2016	43
As of 1 November 2016	40
As of 1 October 2016	61
As of 1 September 2016	51
As of 1 August 2016	44
As of 1 July 2016	41
As of 1 June 2016	49
As of 1 May 2016	45
As of 1 April 2016	38
As of 1 March 2016	35
As of 1 February 2016	27

Source: Office of the Commissioner for Federal Judicial Affairs Canada

Judicial appointments made by the Government of Canada

Date	Number of appointments
19 May 2017	9 judicial appointments (7 new)[202]
12 May 2017	Four judicial appointments
4 May 2017	Four judicial appointments
12 April 2017	Four judicial appointments
7 April 2017	Two judicial appointments
24 March 2017	Five judicial appointments
9 March 2017	One judicial appointment
17 June 2016	15 judicial appointments (12 new)[203]
20 October 2016	24 judicial appointments (21 new)[204]
23 November 2016	22 Deputy Judges to the Supreme Court of the Northwest Territories, the Supreme Court of Yukon, and the Nunavut Court of Justice.[205]

Source: Department of Justice Canada, Judicial Appointments

[202] For two of these appointments, a new Regional Senior Judge was appointed from the regular complement of Superior Court judges and the former was transferred back to it; these two judges were therefore not newly appointed to the Superior Court of Justice in Ontario.

[203] There were two superior court judges appointed to a Court of Appeal and a Tax Court judge appointed to the Federal Court of Appeal.

[204] There were three superior court judges appointed to a Court of Appeal.

[205] The number of Deputy Judges in the territories does not count in the number of recognized vacancies of federally appointed judges.

On 20 October 2016, the Government of Canada announced reforms to the Superior Courts Judicial Appointments Process,[206] which included the reconstitution of the 17 Judicial Advisory Committees across the country.[207] Consequentially, many recommendations made under the older judicial appointment process are no longer valid and previous applicants must submit new questionnaires and necessary supporting documents. At the time of drafting this report, not all Judicial Advisory Committees members had been appointed. Following an announcement made on 19 January 2017, only the following jurisdictions had their membership fulfilled: British Columbia; Alberta; Ontario – East and North; Ontario – Greater Toronto Area; Quebec – West; Prince Edward Island; and Newfoundland and Labrador.[208] Appointments in the other jurisdictions cannot proceed until the memberships of the remaining Judicial Advisory Committees are completed.[209] On 13 April 2017, the membership of three additional Judicial Advisory Committees was announced (Quebec – East, Yukon and Nova Scotia).[210] The news release specified that "[a]ppointments to JACs in the remaining jurisdictions will be announced in the coming weeks." On 9 March 2017, the first judge selected under the new process was appointed to the Supreme Court of Prince Edward Island.[211] On 24 March 2017, 5 more appointments were made to the Court of Queen's Bench of Alberta (4) and to the Superior Court of Quebec (1).[212] On 7 and 12 April 2017, four judicial appointments were made to the Ontario Court of Appeal and to the Superior Court of Justice, in addition to two judicial appointments to the Court of Appeal and the Supreme Court of British Columbia.[213] On 4 and 12 May 2017, four judicial appointments were made to the Superior Court of Quebec, one to the Court of Queen's Bench of Alberta, one to the Supreme Court of British Columbia, and

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206 Department of Justice Canada, "Reforms to the Superior Courts Judicial Appointments Process," News release, 20 October 2016.

207 Department of Justice Canada, "Government of Canada announces judicial appointments and reforms the appointments process to increase openness and transparency," News release, 20 October 2016.

208 Department of Justice Canada, "Minister of Justice announces Judicial Advisory Committee appointments," News release, 19 January 2017.

209 The committee was surprised to hear from the President of the Quebec Bar, Claudia Prémont that the judicial advisory committees in Quebec have not been working since October 2015.

210 Department of Justice Canada, "Minister of Justice announces Judicial Advisory Committee appointments", News Release, 13 April 2017.

211 Department of Justice Canada, "Government of Canada announces judicial appointment in the province of Prince Edward Island," News release, 9 March 2017.

212 Department of Justice Canada, "Government of Canada announces judicial appointments in the province of Alberta", News Release, 24 March 2017; and Department of Justice Canada, "Government of Canada announces judicial appointments in the province of Quebec", News Release, 24 March 2017.

213 Department of Justice Canada, "Government of Canada announces judicial appointments in the province of Ontario", News Release, 7 April 2017; Department of Justice Canada, "Government of Canada announces judicial appointments in the province of Ontario", News Release, 12 April 2017; Department of Justice Canada, "Government of Canada announces judicial appointments in the province of British Columbia". News Release, 12 April 2017.

two to the Supreme Court of Newfoundland and Labrador.[214] Nine additional judicial appointments were made in Ontario on 19 May 2017.[215]

Without judging the necessity of reforming the judicial appointment process, the committee is deeply concerned that the reconstitution of the Judicial Advisory Committees and the new application process is causing important delays in the capacity of the federal government to appoint judges. Once fully reconstituted, the Judicial Advisory Committees must start working quickly in reviewing applications and making recommendations for appointments. However, as all applicants need to reapply under the new scheme, the committee shares Chief Justice Wittmann's concern that previous applicants may be discouraged by the lengthy and onerous process and not reapply.

The 2017 Budget includes an additional funding of $55 million over five years, and $15.5 million per year thereafter, and an announcement to make legislative amendments in order to create 28 new federally appointed judicial positions, particularly to "address immediate demographic pressures in Alberta and Yukon".[216]

Recommendation 16

The committee recommends that the Minister of Justice complete the process of nominating the remaining members for the Judicial Advisory Committees without further delay and provide them with the training and support they need to allow them to review applications and make recommendations for judicial appointments to the Minister.

Recommendation 17

The committee recommends that Superior Court Judges be appointed on the day of a known retirement of a Judge and the only exceptions to this immediate replacement would be an unexpected death or unexpected early retirement of a sitting judge.

In addition to the number of recognized judicial vacancies, several witnesses informed the committee that the number of judges set out in the *Judges Act* needs to be increased – particularly in provinces that have seen significant population growth.[217] Geoffrey Cowper explained that in setting the number of

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214 Department of Justice Canada, "Government of Canada announces judicial appointments in the province of Quebec", News Release, 4 May 2017; Department of Justice Canada, "Government of Canada announces judicial appointments in the province of Alberta", News Release, 12 May 2017; Department of Justice Canada, "Government of Canada announces judicial appointments in the province of British Columbia", News Release, 12 May 2017; and Department of Justice Canada, "Government of Canada announces judicial appointments in the province of Newfoundland and Labrador", News Release, 12 May 2017.

215 Department of Justice Canada, "Government of Canada announces judicial appointments in the province of Ontario", News Release, 19 May 2017.

216 See Federal Budget 2017, p. 190.

217 See the testimony of former Chief Justice of the Superior Court of Quebec, François Rolland (Evidence, 13 April 2016); Chief Justice Neil Wittmann, Court of Queen's Bench of Alberta (Evidence, 28 September 2016) and (Evidence, 3 November 2016); Claudia Prémont, Quebec Bar Association (Evidence, 28 October 2016), among others.

judges, it would "be of great assistance" if provincial and federal governments had a "rough understanding of the needs of the courts for the appointments of judges to process the number of cases." In other words, there needs to be a better assessment of the complexity of cases and workloads that judges are facing to determine where an increase in the number of judges is required.[218] The committee agrees that a more objective analysis would help bridge the differences of opinion between certain provinces and the federal government with regards to increasing the number of superior court judges in the provinces. One first step to prepare for such an analysis would be to have Statistics Canada collect and publicize the data for the number of judges per capita in all Canadian regions.

The committee discussed the appointments made to superior courts by provinces when meeting with witnesses from Alberta[219] and Quebec.[220] Both provinces have amended their own laws to increase the number of superior court and court of appeal judges, though these are not all recognized federal appointments pursuant to the *Judges Act*.[221] This is a sign that the Minister of Justice needs to seriously consider revising the number of judicial positions in the *Judges Act* to reflect the needs of the provinces. Also, with this mix of federal and provincial appointments, it is difficult for an interested party to track the full number of judges and where the appointments have been made. The Minister of Justice should ensure the clearer data is publicly available; this information could be gathered and posted on the Internet by the Office of the Commissioner for Federal Judicial Affairs Canada.

Recommendation 18

The committee recommends that the Minister of Justice work with the provinces and territories, in particular with the judiciary, to:

- **create and publish a full assessment of the caseload of superior courts across the country and the number of superior court judges required to meet the demands of all regions in Canada;**
- **determine the appropriate number of judicial positions that should be included under the *Judges Act* based on reliable evidence and analysis; and**

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218 See Mr. Cowper's report: D. Geoffrey Cowper QC, BC Justice Reform Initiative, *A Criminal Justice System for the 21st Century,* 27 August 2012 (see also the update to that report, from 19 October 2016).

219 In January 2013, the Government of Alberta increased the number of full time judges of the Court of Queen's Bench from 63 (61 puisne, plus a Chief Justice and one Associate Chief Justice) to 67 (65 puisne, plus two Associate Chief Justices). In 2014, the Government of Canada amended the *Judges Act* through Bill C-31to allow for salaries for only two of the four new puisne positions. According to a Court of Queen's Bench of Alberta report from January 2016, in order to meet the demands, the judicial complement shall be increased to 77 (including the Chief Justice, and two Associate Chief Justices). See The Court of Queen's Bench of Alberta, *A Proposal for an Increase to the Judicial Complement of the Court of Queen's Bench of Alberta*, January 2016, p. 2.

220 The Quebec National Assembly amended the *Courts of Justice Act* in December 2016 by adding two new positions in the Court of Appeal (passing it from 20 to 22) and five new positions in the Superior Court (passing it from 152 to 157). See Quebec, *An Act to amend the Courts of Justice Act*, SQ 2016, c 33.

221 Bill C-44, An Act to implement certain provisions of the budget tabled in Parliament on March 22, 2017 and other measures, 1st Session, 42nd Parliament, Division 10 of Part 4, would increase the number of judges in Yukon from one to two and the number of judges in Alberta from 57 to 68.

- **introduce legislation to amend the *Judges Act* accordingly.**

Recommendation 19

The committee recommends that the Office of the Commissioner for Federal Judicial Affairs Canada update the information it publishes on its website concerning judicial appointments and vacancies for each province and territory (in accordance with the *Judges Act*) with the number of additional superior court judges appointed pursuant to provincial legislation.

Judicial Officers

The committee explored an idea with witnesses regarding delegating judicial functions to officers other than a sitting judge in order to reduce costs and free up the workload of judges. In some provinces, justices of the peace sit in remand court, whereas in others they are presided over by judges. In addition to remand court, Mr. Waby explained that justices of the peace in Ontario are able to engage in a fairly wide variety of pre-trial, non-guilt determining processes. In the Federal Courts, prothonotaries are appointed under section 12 the *Federal Courts Act.*[222] As judicial officers, they can exercise the powers and functions of Federal Court judges in such procedural matters as mediation, case management, and practice motions, as well, as in trials of actions in which up to $50,000 is in issue.

When considering the possibility of removing a judge's exclusive role from certain criminal procedures, witnesses provided words of caution. Brian Saunders, the then Director of Public Prosecutions, noted that federal prothonotaries cannot rule on a motion that affects the liberty of the person. In the criminal system, judges are almost always making decisions that could affect the liberty of a person, and that therefore engage a person's legal rights under the Charter. Dominic Lamb of the Criminal Lawyers' Association, noted that such decisions could be "constitutionally vulnerable." He also noted that federal prothonotary decisions can be appealed without leave, directly to a Federal Court judge.

While witnesses such as lawyer Graham Johnson and Pascale Giguère were hesitant about considering the merits of creating new roles for judicial officers, the committee sees value in expanding the opportunities for judicial officers to handle appropriate tasks to free up judges to spend more time where they are most needed. As Parliament can make amendments to the *Criminal Code,* it could clearly indicate that certain matters be handled by a justice of the peace or other judicial officer, particularly regarding preliminary and procedural matters, and assistance with case management. Consideration would need to be given as to how appeals would be handled. Creating such an officer or expanding the roles that can be performed by justices of the peace will also require review and consultation with the broader justice community. Finding ways to delegate judicial functions, or to incorporate special officers of the court to assist with case management, could have a considerable impact on limited financial resources and the valuable time of judges. It would therefore merit further study.

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[222] *Federal Courts Act*, R.S.C., 1985, c. F-7 and Rules 50, 382, and 383 to 387, *Federal Courts Rules*, SOR/98-106 s. 50(1).

Recommendation 20

The committee recommends that the Minister of Justice amend the *Criminal Code* to allow certain procedural matters in criminal hearings to be performed by a judicial officer other than a judge.

Technology

Technology has been both a boon and a challenge for the judicial system. As we discuss in Chapter Six, the amount of electronic evidence that police, lawyers and judges must review in some cases can be overwhelming. Efforts to standardize electronic disclosure and have one system that can be used across the country must be supported by the Minister of Justice to ensure this process is completed as soon as possible. The minister can also assist the provinces and the territories by helping to develop technological solutions that will improve court efficiency.

As noted above, in Calgary technology already allows lawyers to schedule remotely using their computers. Reliable systems like this need to link all justice system participants. Several witnesses supported findings ways to avoid court appearances by having routine procedures managed using computer systems away from the courthouse.[223] The committee agrees that, wherever possible, routine appearances should be replaced by having the lawyers and judge log into a shared system and provide whatever key information will move the case forward. Courthouses can also be equipped with videoconferencing technology, as we discuss in Chapters Four, Seven and Eleven.

Sophia Rossi Lanthier, a lawyer representing the Young Bar of Montreal, warned that not everyone has access to the same technology, and so she encouraged the optimization of existing technologies that are available to everyone. And yet, making new technology available to everyone is possible. The Right Honourable Sir Brian Leveson, President of the Queen's Bench Division, Judiciary of England and Wales, also discussed how in England and Wales, a computer system for managing court proceedings is already in use.[224] It is being referred to as “the common platform,” and it will allow for filings, applications and other communications between counsel to be made online and reviewed by a judge. He said that while there are “wrinkles” to iron out, so far the system is “working quite well” and is being embrace by lawyers because “it saves so much time and money.”

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[223] See the testimony of Ian M. Carter, Canadian Bar Association (Evidence, 18 February 2016) and (Evidence, 19 October 2016); Kevin Fenwick, Ministry of Justice, Government of Saskatchewan (Evidence, 24 February 2016); Kate Matthews and Laurie Gonet, Ontario Crown Attorneys' Association (Evidence, 9 March 2016); Eric Gottardi, Peck and Company (Evidence, 27 September 2016); Chief Judge Terrence Matchett, Provincial Court of Alberta; and Ian Savage, Criminal Defence Lawyers Association of Alberta (Evidence, 28 September 2016); and Didier Deramond, Montreal Police Service (SPVM) (Evidence, 28 October 2016), among others.

[224] The common platform was included in recommendation 35 in the following report: The Right Honourable Sir Brian Leveson, President of the Queen’s Bench Division (England and Wales), *Review of Efficiency in Criminal Proceedings,* 2015.

The committee received detailed written submissions from RedMane Technology Canada Inc. describing ways that technology can help reduce delays in Canada.[225] One of its proposed solutions is to have citizen portals for victims and accused individuals to access information without reliance on requiring attendance in the courtroom. As we discuss in Chapter Seven, many accused persons cannot afford legal counsel and must navigate criminal proceedings and courthouse procedures on their own. A portal could therefore be of assistance in guiding them through certain procedures. These portals could be accessed wherever a computer is available. RedMane explained how a web-based (and therefore remotely accessible from any computer) case management system for the criminal justice system could be implemented to streamline the legal process, reduce time spent on administrative tasks, and make some procedural appearances unnecessary. Their proposal includes case management software that would serve as a centralized hub for all stakeholders in a legal case. It could also serve as the platform of the electronic disclosure of evidence (e-disclosure). While the committee is not in a position to evaluate or endorse this proposal, it demonstrates that technological solutions can be found to address many challenges faced by courthouses. Kevin Fenwick noted that a computer system could also be helpful for victims who wish to remain informed about the progress of a particular case and whether their attendance in the courtroom will be worthwhile on a particular date.

Witnesses also discussed how within the legal community there is often a reluctance to adopt computer-based systems and a continued reliance on traditional and paper-based practices. Accepting and integrating technological solutions to expedite proceedings and to improve efficiencies is a necessary part of the shift in legal culture. Canadian governments may need to think about the best ways to train users of any new systems that are adopted.

Recommendation 21

The committee recommends that the Minister of Justice take a leadership role and establish a program to design computerized systems that can be adopted by provinces and territories that will:

- **effectively manage criminal and courthouse proceedings;**
- **allow for more procedural matters to be addressed by computer to avoid unnecessary court appearances;**
- **permit the disclosure of evidence by a standard electronic system; and**
- **provide a user-friendly access portal to unrepresented accused persons, witnesses, victims and other affected parties concerning criminal proceedings in which they are involved.**

The better use of technology and case management practices will assist judges and their courthouses to address the challenges of delays. Canada has an excellent justice system that is presided over by a very professional and competent judiciary. The crisis in delays was not entirely of their making, but the

[225] RedMane Technology Canada Inc. *Brief Submitted to the Standing Senate Committee on Legal and Constitutional Affairs*, 30 January 2017.

responsibility to address it falls more heavily on judges' shoulders. To be successful, the judiciary must ensure that efficient case management is a priority and that judges across the country are properly versed in how to use case management tools. This is again part of a larger cultural shift that is needed throughout the justice system in order to avoid delays.

CHAPTER SIX – POLICING AND PROSECUTION

Police and Crown prosecutors have distinct roles in Canada's criminal justice system, though they both represent the state's interest in apprehending criminals and presenting the case that will prove their guilt. In this chapter, the committee examines the roles of the police and Crown and how they are both involved in the causes of delays and impacted by the effects of them. Various suggestions to improve efficiencies are explored with regard to such matters as the laying of charges, the collection of forensic and crime scene evidence, the maintenance of criminal records and databanks, and the disclosure of evidence. A discussion about how police officers and Crown prosecutors exercise discretion, in particular when considering alternatives measures to the traditional courthouse route, is taken up later in Chapter Eight.

The Role of Police Officers

> "Police are at the front end of the criminal justice system, and decisions made by the police directly impact criminal justice proceedings. These decisions include whether or not to investigate; the breadth, scope and timeliness of investigations; and exercising discretion regarding alternative measures or formal charges."
>
> – JOSEPH OLIVER, CANADIAN ASSOCIATION OF CHIEFS OF POLICE

> "Over the past several decades police investigations have become increasingly long and complex, providing challenges for both the police and the justice system. … Even the simple tasks that are required for a routine investigation can involve multiple hours of work by both police officers and a support network of civilian personnel to meet police obligations to Crown and the courts."
>
> – CHIEF CONSTABLE ADAM PALMER, VANCOUVER POLICE DEPARTMENT

The committee heard from several representatives of the police community, including national organizations[226] and local police services.[227] We also heard from the RCMP with regard to forensic and crime scene analysis and the management of criminal records.[228] These witnesses shared a view that police investigations have become increasingly more complex over recent decades, largely due to such factors as: the proliferation of cybercrime; the globalization of crime; the increased use of technology and social media platforms to commit crimes; and the increased disclosure obligations that have emerged in Charter jurisprudence.[229] As an example, Joseph Oliver from the Canadian Association of Chiefs of Police shared that:

> A 30-year analysis of policing in British Columbia completed in 2005 by the University College of Fraser Valley [*sic*] reveals that the time required by police to complete an investigation increased substantially. To complete domestic assault and impaired driving investigations took 964 per cent and 250 per cent more time, respectively. The analysis also determined that the number of procedural steps required to complete an investigation increased exponentially as well. For example, a drug trafficking investigation increased from 9 procedural steps to 65.

Chief Constable Roger Chaffin from the Calgary Police Service explained that police officers are becoming overwhelmed with the need to require judicial authorizations, for example, for technological searches "including something as simple as acquiring a customer name and address. … They're bogging down major investigations as well as small investigations."

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226 See the testimony of Joseph Oliver, Canadian Association of Chiefs of Police (Evidence, 25 February 2016); and Tom Stamatakis, Canadian Police Association (Evidence, 23 March 2016).

227 See the testimony of Craig Fairbairn, Ottawa Police Service (Evidence, 14 April 2016); Chief Jean-Michel Blais and Inspector James Butler, Halifax Regional Police (Evidence, 6 May 2016); Chief Constable Adam Palmer, Vancouver Police Department (Evidence, 27 September 2016); Chief Constable Roger Chaffin, Calgary Police Service (Evidence, 28 September 2016); Chief Clive Weighill, Saskatoon Police Service (Evidence, 29 September 2016); and Deputy Director Didier Deramond and Hélène Des Parois, Montreal Police Service (SPVM) (Evidence, 28 October 2016).

228 See the testimony of Assistant Commissioner François Bidal, Director Ron Fourney and Chief Superintendent Brendan Heffernan, Royal Canadian Mounted Police (Evidence, 26 October 2016).

229 See the testimony of Joseph Oliver, Canadian Association of Chiefs of Police (Evidence, 25 February 2016); Chief Jean-Michel Blais, Halifax Regional Police (Evidence, 6 May 2016); and Chief Constable Adam Palmer, Vancouver Police Department (Evidence, 27 September 2016), among others.

Several Chiefs of Police who appeared before the committee questioned whether our criminal justice system is effectively able to respond to crimes involving more complex investigations, such as cybercrimes, child pornography and Internet exploitation.[230] For instance, Mr. Oliver stated that:

Despite some successes, our assessment is that Canada's law enforcement agencies and its criminal justice system are ill-equipped to deal with criminality in cyberspace. Criminal use of strong encryption, anonymizing technologies and the Darknet, as well as the borderless nature of crime, make it extremely challenging and resource-intensive for police to detect, investigate, disrupt and prosecute these cases.

A consequence of this increasing complexity is that police departments must be diligent in how they allocate limited police resources and mindful of how officers spend their time. Police officers regularly appear in court to testify for cases they investigated or with which they were involved. When police officers must make court appearances, they are not active in other areas of policing. Time spent waiting or returning to court because of an adjournment is inefficient. Tom Stamatakis, President of the Canadian Police Association, shared this view:

> [W]alk through almost any provincial court facility and you'll be struck by the number of officers waiting their turn to testify in criminal matters only to see their appearance have to be rescheduled … This inefficiency places a significant burden on police budgets.

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[230] See the testimony of Joseph Oliver, Canadian Association of Chiefs of Police (Evidence, 25 February 2016); Chief Jean-Michel Blais, Halifax Regional Police (Evidence, 6 May 2016); Chief Constable Adam Palmer, Vancouver Police Department (Evidence, 27 September 2016); and Chief Constable Roger Chaffin, Calgary Police Service (Evidence, 28 September 2016), among others. Dale McFee, Deputy Minister, Corrections and Policing, Saskatchewan Ministry of Justice, informed the committee that cybercrime is one of the seven priorities of the Federal-Provincial-Territorial working groups. See also the testimony of Kate Matthews, Ontario Crown Attorneys' Association (Evidence, 9 March 2016).

Geoffrey Cowper, Chair of BC Justice Reform Initiatives, also questioned the utility of police officers spending their time in courthouses to appear for proceedings. Joseph Oliver explained that the Edmonton Police Service spends approximately $2.6 million annually in court overtime for officers. In a written submission, he added that during the period of May 2015 to February 2016, overtime compensation attributable to court duties for RCMP officers was approximately $5.2 million.[231] He also mentioned that this:

> [D]oes not include the cost of having to backfill the night shift that officer was pulled from in order to maintain minimum response standards so they can respond to emergencies during that shift, while the officer is off to testify in court, but then they don't testify.

In addition to the financial costs, courthouse appearances can impact the health of police officers, particularly when there are last-minute trial cancellations or last-minute plea agreements.[232] Chief Constable Chaffin illustrated this point:

> [I]n a shift work environment where an officer is working day and night and on odd shifts … trying to schedule court out in advance and trying to find ways to avoid the extra cost, but it's also the fatigue, where an officer could work a 12-hour night shift without sleep and be asked to be in court that morning to testify in a complicated matter, and then try to drive home in the afternoon after having been up for more than 24 hours. Those are the sort of real health complexities we deal with in policing.

There is clearly a need to address inefficiencies in how police are involved in criminal court proceedings. Scheduling systems for Crown prosecutors who are handling cases and the police who were involved in the investigation can be used to avoid wasted time. Chief Clive Weighill of the Saskatoon Police Service explained measures that have helped in his city:

> We have a very good relationship with the courts for the scheduling system. … We have a system set up in the major cities that if court is to be cancelled the prosecutor will phone and cancel the officers within a 24-hour notification so they do not show up for court. … We have not seen our overtime rising in the province very much over the past decade.

Deputy Director Deramond of the Montreal Police Service described computer software that allows police to adjust and identify dates in collaboration with the Crown prosecutor "in light of everyone's best interests and [to] try to avoid adjournments." Other witnesses suggested that alternate methods for

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231 Joseph Oliver (Canadian Association of Chiefs of Police), *Written response to the Standing Senate Committee on Legal and Constitutional Affairs*, 25 February 2016.

232 See the testimony of Joseph Oliver, Canadian Association of Chiefs of Police (Evidence, 25 February 2016); Tom Stamatakis, Canadian Police Association (Evidence, 23 March 2016); Geoffrey Cowper, BC Justice Reform Initiatives (Evidence, 27 September 2016); Chief Constable Roger Chaffin, Calgary Police Service (Evidence, 28 September 2016); Chief Clive Weighill, Saskatoon Police Service (Evidence, 29 September 2016); and Didier Deramond, Montreal Police Service (SPVM) (Evidence, 28 October 2016), among others.

allowing police officers to provide their testimony could help, such as by way of video conference[233] or by written statements (affidavits).[234] This is yet another example of how computerized systems can make the justice system more efficient and amenable to human needs. This is an area where the Minister of Justice and the Minister of Public Safety and Emergency Preparedness can show leadership by ensuring that all police services are fully linked through suitable technology with Crown prosecutors' offices to ensure the most efficient use of police officers' valuable time.

Recommendation 22

> **The committee recommends that the Ministers of Justice and Public Safety and Emergency Preparedness ensure that appropriate and standardized computer systems are made available to Crown prosecutors' offices and police departments across Canada in order to facilitate electronic communications and ensure the most efficient use of police officers' time spent attending criminal proceedings.**

Forensic and Crime Scene Analysis

> "There are delays caused by things like only having one forensic pathologist in Saskatchewan…. There was an eight-month delay in getting the pathologist report on a very complex head injury case. … It was very difficult for the defence to retain an expert to review it."
>
> – ANDREW MASON, PRESIDENT, SASKATOON CRIMINAL DEFENCE LAWYERS ASSOCIATION INC.

The time it can take to complete a police investigation and prepare the evidence for disclosure to the accused and for trial can also add to delays in criminal proceedings. The committee considered this issue with regard to forensic and DNA analysis. As explained by François Bidal, Assistant Commissioner with the RCMP's Forensic Science and Identification Services, DNA profiles taken at a crime scene or from a victim are used to identify a suspect, or to link someone to a crime, by comparing samples to those contained in

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[233] See the testimony of Chief Constable Roger Chaffin, Calgary Police Service (Evidence, 28 September 2016), among others.

[234] See the testimony of Tom Stamatakis, Canadian Police Association (Evidence, 23 March 2016). Mr. Paterson, Executive Director of the British Columbia Civil Liberties Association, however, expressed "grave concerns about a proposition that cross-examination of state witnesses should be limited, even on peripheral questions… there would have to be a way for a defendant to get behind the affidavits and cross-examine if necessary."

the National DNA Data Bank.[235] The National DNA Data Bank assists law enforcement agencies in solving crimes by identifying persons alleged to have committed designated offences.[236] The National DNA Data Bank is responsible for two principal indices, the Convicted Offender Index, which includes DNA profiles from offenders convicted of designated offences, and the Crime Scene Index, which includes DNA profiles from crime scene investigations.[237] Since it became operational in June 2000, there have been more than 49,000 investigations assisted by the DNA databank.[238]

Witnesses expressed concerns about the time it can take for the police to receive the results of DNA analyses.[239] Quebec and Ontario operate their own provincial forensic laboratories: the Laboratoire de sciences judiciaires et de médecine légale and the Centre of Forensic Sciences, respectively. The RCMP provides forensic services for the rest of Canada from Vancouver, Edmonton and Ottawa. Mr. Bidal explained to the committee that the average turnaround time for DNA and other similar laboratory services is 40 days for routine cases, 11 days for priority cases, and when urgent, it is possible to process results in 28 hours. Anthony Tessarolo, Director of the Ontario Centre of Forensic Sciences, said that his Centre's average turnaround time for DNA testing is 33 days for routine cases, 14 days for urgent cases and 24 to 48 hours when there is an urgent public safety issue.

Rick Woodburn of the Canadian Association of Crown Counsel informed the committee that lab closures in Canada[240] had an impact on the RCMP's capacity to conduct timely DNA analyses.[241] Mr. Woodburn explained that:

> The lab has decided to streamline what they want. So when they get a submission from the police, say 20 or so tests, they choose that they're only going to do seven. When they send them back, they say, "We didn't get anything." So they have to do another submission, which takes longer — 40 days upon 40 days upon 40 days.

Chief Constable Chaffin expressed similar concerns and noted that the turnaround time is often more than 60 days:

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235 Established by the *DNA Identification Act*, S.C. 1998, c. 37.

236 As defined at section 487.04 of the *Criminal Code*.

237 That index comprised profiles received from the *Laboratoire de sciences judiciaires et de médecine légale* in Montreal, the Centre of Forensic Sciences in Toronto and the RCMP forensic laboratories (located in Vancouver, Edmonton and Ottawa).

238 See the testimony of François Bidal, Royal Canadian Mounted Police (Evidence, 26 October 2016). See also RCMP, *Statistics for national DNA Data Bank*.

239 See the testimony of Rick Woodburn, Canadian Association of Crown Counsel (Evidence, 9 March 2016); Chief Constable Roger Chaffin, Calgary Police Service (Evidence, 28 September 2016); and Kelly Kaip, Saskatchewan Crown Attorneys Association (Evidence, 29 September 2016), among others.

240 In 2012, the RCMP Forensic Laboratory Services decided to consolidate its laboratory by closing the sites in Regina and Winnipeg (which closed on 31 March 2014) and in Halifax (which closed on 31 March 2015). See Royal Canadian Mounted Police, National DNA Data Bank Advisory Committee, *Annual Reports 2014-2015*.

241 This was echoed by Kelly Kaip of the Saskatchewan Crown Attorneys Association (Evidence, 29 September 2016).

> … it's very difficult with bringing DNA matters to court because it simply takes too long to have DNA analysed … The weeks and months and months it takes to get DNA analyzed means perpetrators are out there that we can't get a hold of until we can get that evidence back, and every week, day and month that delay happens puts people at risk.[242]

He added that it seems that the need for analysis may have "out-surpassed the capacity" and cases considered to be "less serious" are not getting sufficient attention.

Mr. Tessarolo mentioned that the demand for forensic testing (and DNA in particular) has significantly increased over the last 12 to 24 months:

> We have experienced a 25 per cent increase … That concerns me, because the improvements we've managed to achieve over the last 10 years are not sustainable in the face of increased demand without increased support.

He expressed concerns about whether sufficient funding was being put into the Ontario Centre of Forensic Sciences's budget. He explained funding from Public Safety's Biology Casework Analysis Contribution Program had expired in March 2015.[243] While there was a verbal commitment by the previous government to renew that funding for an additional five years, Ontario had not received it yet. Moreover, he also testified that following the creation of the DNA-based Missing Persons Index in 2015,[244] which (once fully implemented), would require the uploading of DNA profiles from unidentified human remains and missing persons and their families to the National DNA Data Bank, the Centre was advised that no new funding would be provided from the federal government to do this work.

The committee is concerned that wait-times for DNA analysis are adding to court delays and that sufficient funding is not being provided for DNA and forensic analysis in criminal matters. As an important tool to improve the efficiency, accuracy and reliability of criminal investigations, Canada should be increasing its capacity to conduct DNA and other forensic analyses and must ensure the resources and expertise are there to accomplish this.

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[242] In response, François Bidal said that: "I did see those comments in reviewing some of the minutes. I was surprised. I don't know what cases those were referring to because, as I cited in my opening remarks, the case we turned around in 28 hours was a Calgary case. I can tell you that our average for Alberta for DNA is below the national average at 36 days for routine and eight days for priority cases. I went digging with my own team and was not able to find the source of what was said, so I don't have the benefit of what the chief was referring to."

[243] Public Safety's Biology Casework Analysis Contribution Program ran from 2010 to 2014–2015 and it appears it has been renewed until 2019–2020. This program "provides financial contributions to the governments of Ontario and Quebec, which operate forensic laboratories that undertake biological casework analysis in support of criminal investigations and prosecutions, and encourages provincial contributions of crime scene DNA profiles to the National DNA Data Bank." See Public Safety Canada, *Details on Transfer Payment Programs of $5 Million or More*; and Public Safety Canada, Public Safety Canada Departmental Plan 2017-18, *Supplementary Information Tables*.

[244] *Economic Action Plan 2014 Act, No. 2*, S.C. 2014, c. 39, Division 17.

Recommendation 23

The committee recommends that the Government of Canada, through Public Safety Canada and the RCMP:

- **commit resources to ensure Canadian forensic laboratories are able to perform faster DNA analyses and updates to Canada's DNA Data Bank; and**
- **collaborate with the governments of Ontario and Quebec with regard to their provincial forensic laboratories to ensure they receive appropriate financial assistance.**

David Bird, a retired Department of Justice Canada counsel for the RCMP, who was involved with the creation of the National DNA Data Bank, read a letter that he personally sent to the Minister of Public Safety and Emergency Preparedness on 2 June 2016. In it, Mr. Bird urged the Minister to revisit two recommendations made in June 2010 by this committee and in June 2009 by the House of Commons Standing Committee on Public Safety and National Security, following their statutory review of the *DNA Identification Act*.[245] The two committees had recommended that DNA samples should be systematically taken upon conviction for all designated offences. As it stands, this procedure exists in the *Criminal Code* (section 487.051), but only for certain serious primary designated offences, such as several sexual offences, murder, manslaughter, aggravated assault, and robbery. However, as explained by Mr. Bird, the courts have the discretion to decide not to issue an order in certain circumstances for certain primary designated offences, such as those that are historical in nature.[246]

Mr. Bird explained that the federal government had responded to the committee reports by noting that the two committees were "in broad agreement". He noted that the government also claimed to have conducted its own consultations, which revealed widespread support for these changes, except from members of the defence bar. He added that no resources have since, in fact, been added to expand the National DNA Data Bank to be able to process an increased number of samples.

> [T]o be blunt, this refusal to make greater use of the NDDB may have caused thousands of Canadians to be murdered, raped, robbed and otherwise victimized by persons who would have been caught earlier in their criminal careers had there been automatic taking of DNA on conviction. I urge you to implement the recommendation.

The committee agrees with Mr. Bird that DNA evidence is often the best available evidence in courts and that it helps avoid wrongful convictions and shorten court times. Accordingly, the committee is reiterating its 2010 recommendation.

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[245] Senate, Standing Senate Committee on Legal and Constitutional Affairs, *Public Protection, Privacy and the Search for Balance: A Statutory Review of the DNA Identification Act*, final report, June 2010 (See recommendation 1); House of Commons, Standing Committee on Public Safety and National Security, *Statutory Review of the DNA Identification Act*, June 2009 (see recommendation three).

[246] Note that Section 487.051(2) of the *Criminal Code* states: "However, the court is not required to make the order if it is satisfied that the person has established that the impact of such an order on their privacy and security of the person would be grossly disproportionate to the public interest in the protection of society and the proper administration of justice, to be achieved through the early detection, arrest and conviction of offenders."

Recommendation 24

The committee recommends that the Minister of Justice introduce legislation to amend the *Criminal Code* to allow for the immediate and automatic collection of a DNA sample from any adult who has been convicted in Canada of a designated offence as defined in section 487.04 of the *Criminal Code.*

Criminal records and the Canadian Police Information Centre

Over the course of this study and our other committee work concerning various aspects of criminal law and public safety, a number of witnesses have raised questions concerning the efficiency with which criminal records are managed by the RCMP through the Canadian Police Information Centre (CPIC) have frequently been raised. [247] François Bidal provided a helpful overview of how CPIC operates:

> The CPIC System is an integrated, automated central repository of operational law enforcement information which allows for immediate storage and retrieval of current information on crimes and criminals. Administered by the RCMP on behalf of the Canadian law enforcement community, it is the only national information-sharing system that links criminal justice and law enforcement partners across Canada and internationally. The information contained in the data banks originates from law enforcement and public safety partners and is owned by the contributing agency. …
>
> CPIC contains four essential data banks … One of the CPIC databanks is the identification databank … which contains criminal-record data based on fingerprints obtained pursuant to the *Identification of Criminals Act*. Maintained by the RCMP, the national repository is a database of approximately 4.25 million criminal records. More than 600,000 criminal-record files are updated and maintained annually by CCRTIS [Canadian Criminal Real Time Identification Services]. … The identification of criminal records is prescriptive for conviction. Convictions are entered pursuant to offences that are prescribed, either hybrid offences or indictable offences. …
>
> But there are other areas in CPIC where you would find information related to anyone who is charged for any offence. A policing agency can enter a person into the system as being charged, not convicted, for any offence. There are other data banks that are investigative data banks that are used specifically to record investigation information that policing agencies may want to share among themselves. But in relation to a person being charged for a particular offence, that information is not restricted in any way.

[247] In the past, the Auditor General of Canada has twice sounded the alarm about the CPIC database: first in 2009, when there was a serious backlog; and again in 2011, when that backlog had grown far worse. Based on the Auditor General's 2011 report (see Exhibit 5.9), the average time to process a new criminal record in CPIC was 27 working days, whereas updating an existing criminal record took an average of 334 working days (for those that were completed). An RCMP policy from 2014 (Dissemination of Criminal Record Information policy), stated that "[d]elays do exist between a conviction being rendered in court, and the details being accessible on the RCMP National Repository of Criminal Records."

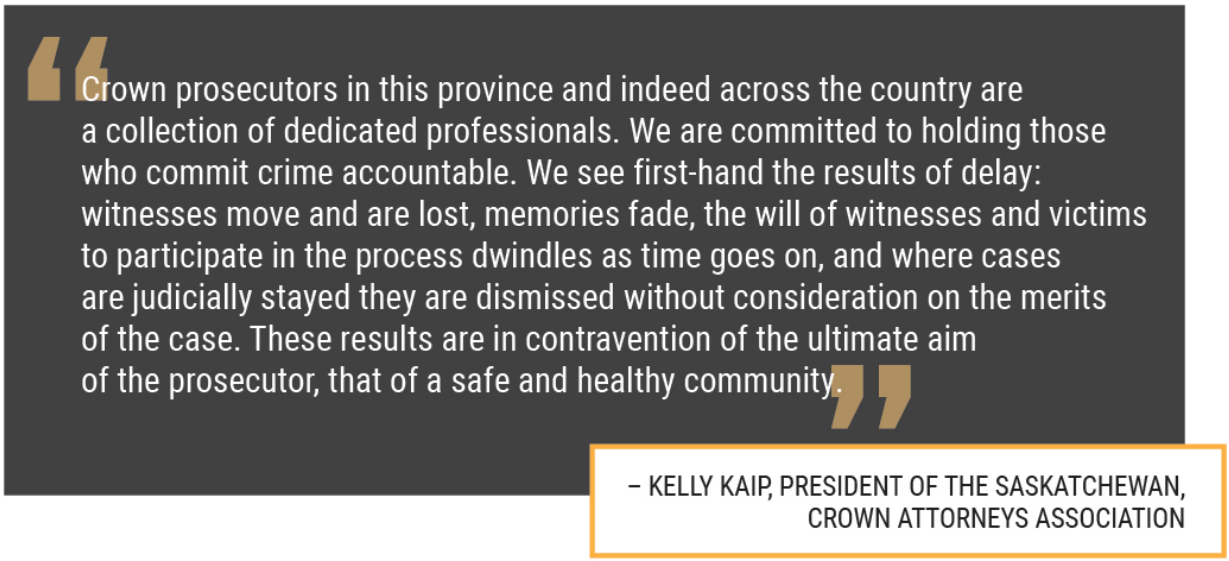
> Where you might find restrictions are with respect to the criminal records that are entered into the system.

The committee believes that the more efficient and timely CPIC and other information services are, the less likely there will be delays in criminal proceedings. Delays can be caused by trying to get up-to-date criminal records and by trying to correct mistakes that have been made using outdated records. When records are not up-to-date, correct decisions cannot be made in the laying of charges. There can also be a risk to public safety when people are released from custody based on a CPIC record that does not identify their recent interaction with the police. With incomplete information, a Crown prosecutor cannot make appropriate submissions on bail applications.

Mr. Bidal stated that, at the date of his appearance, there was a backlog (estimated at 558,000 criminal records in need of being updated), though he noted that this does not appear to be growing larger at this time. This backlog is the shared responsibility of the RCMP and their police partners. He said: "In many cases, that backlog was residing in the basements of police services across the country." There are measures in place to address the risks associated with this backlog; in particular, high-risk and prolific offenders are being prioritized. Since 2013, CPIC has also offered a streamlined service for Crown prosecutors and police services to expedite requests for criminal-record information in support of judicial processes, such as sentencing decisions and parole board hearings, and they "ensure that the most serious criminal records are updated immediately."[248] In addition, the committee learned that the RCMP is implementing a fully automated criminal-records program that should be ready by 2018, and this should help reduce the backlog. The committee will continue to monitor this situation and urges the Minister of Public Safety and Emergency Preparedness to take all steps to ensure that these efforts reduce the backlog.

[248] See the testimony of François Bidal, Royal Canadian Mounted Police (Evidence, 26 October 2016).

Role of Crown Prosecutors



As explained in Chapter Two, the responsibility for prosecuting criminal offences in Canada is shared between the federal government and the provinces. Most *Criminal Code* prosecutions are conducted by the provinces, but the Public Prosecution Service of Canada has jurisdiction to prosecute specific offences, including terrorism charges, those falling under the *Controlled Drugs and Substances Act*, and over 250 federal statutes. When an accused is alleged to have violated both the *Criminal Code* and the *Controlled Drugs and Substances Act*, this may result in two Crown prosecutors being assigned to charges for the same set of circumstances – a provincial one for the *Criminal Code* matter and a federal one for the *Controlled Drugs and Substances Act*. A suggestion was made during the committee's hearings that one Crown attorney should prosecute under multiple statutes.[249] Former Chief Justice of Ontario Patrick LeSage responded to this by saying: "When I was in charge of the Crown attorneys in Ontario, I recall giving an authorization to the federal Crowns to prosecute *Criminal Code* offences if they were ancillary to the drug charge." In Canada's Northern territories, the PPSC prosecutes all *Criminal Code* offences.

Crown prosecutors play a very important role in our adversarial criminal justice system, both as lawyers acting on behalf of the Crown and as "ministers of justice" who have "duties that require

[249] Brian Saunders, then Director of Public Prosecutions for the Public Prosecution Service of Canada, discussed arrangements, which are referred to as major-minors. They allow the prosecution service that is prosecuting an offence within its jurisdiction to also prosecute related, less serious offences against the same accused that fall under the jurisdiction of the other prosecution services (Evidence, 17 February 2016). See also the testimony of Professor Carissima Mathen who indicated that there is no division of powers barrier to the designation of prosecution services for certain offences (Evidence, 3 February 2016).

allegiance to the search for justice and this includes the efficient administration of justice."[250] In the Supreme Court decision of *R. v. Bain* it was reaffirmed that:

> [B]y reason of the nature of our adversary [*sic*] system of trial, a Crown prosecutor is an advocate; he is entitled to discharge his duties with industry, skill and vigour. Indeed, the public is entitled to expect excellence in a Crown prosecutor just as an accused person expects excellence in his counsel. But a Crown prosecutor is more than an advocate, he is a public officer engaged in the administration of justice...[251]

The Right Honourable Sir Brian Leveson, President of the Queen's Bench Division, Judiciary of England and Wales, emphasized that "as ministers of justice, it is no task of a prosecutor to seek a conviction at all or any inappropriate cost." As such, Crown prosecutors bear part of the responsibility to represent the public interest in achieving justice. In conducting their obligations, they must respect and take into account the accused's constitutional rights, but also have "a keen sense of proportion and substantive justice in pursuing a course of action that can have a significant impact on the liberty and reputation of the accused."[252]

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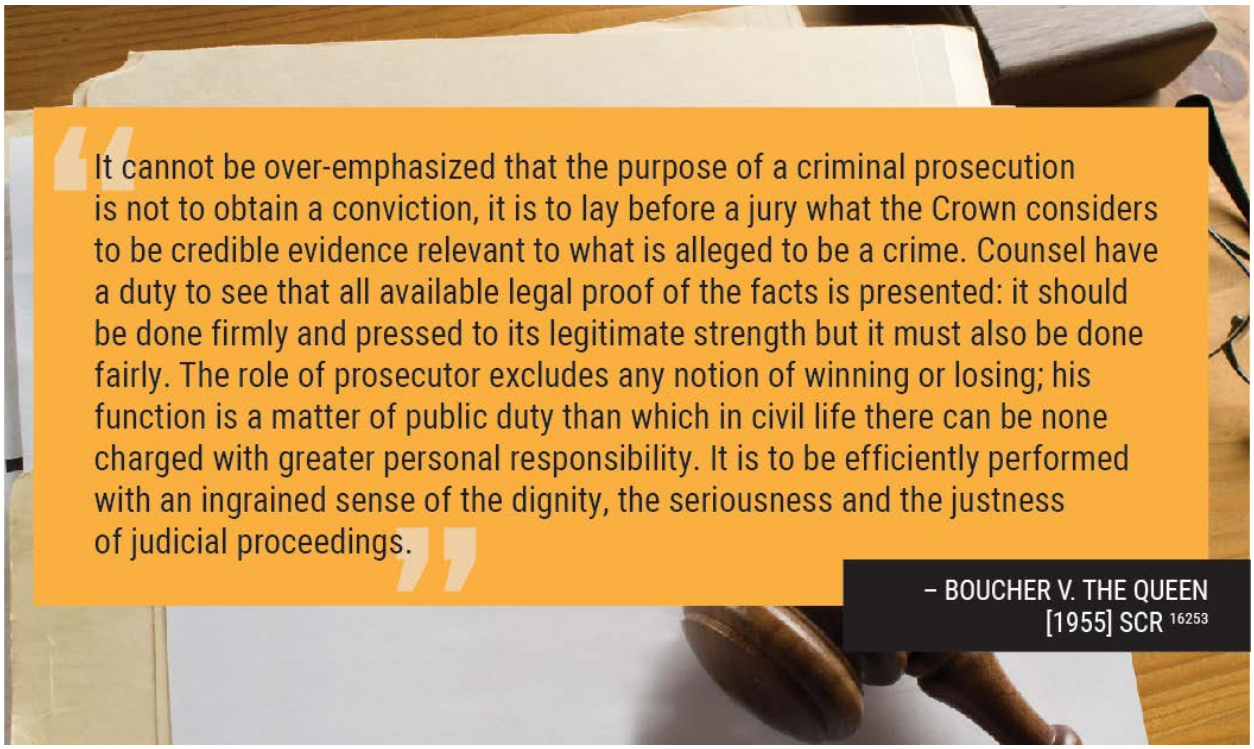
[250] Patrick J. Lesage and Michael Code, *Report Of The Review Of Large And Complex Criminal Case Procedures*, Ministry of the Attorney General of Ontario, Toronto, November 2008. According to the Supreme Court of Canada in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, "The tradition of Crown counsel in this country in carrying out their role as "ministers of justice" and not as adversaries has generally been very high." See also: *Boucher v. The Queen* [1955] SCR 16, at p. 23-24 (as quoted in a text box in this chapter).

[251] *R. v. Bain*, [1992] 1 S.C.R. 91, referring to *R. v. Savion and Mizrahi* (1980), 52 C.C.C. (2d) 276.

[252] Michel Proulx and David Layton, *Ethics and Canadian Criminal Law*, Irwin Law, 2001, pp. 641-642 and footnote 19, referring to S. Fisher, "In Search of the Virtuous Prosecutor: A Conceptual Framework" (1988) *Am. J. Crim. L.* 197, pp 236-237.



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Crown prosecutors must also be able to perform their duty independently, be secured from political or social pressures, and make sure that every case is treated fairly.[254] However, as advocates, "it is both permissible and desirable that [they] vigorously pursue a legitimate result to the best of [their] ability."[255]

253 *Boucher v. The Queen*, [1955] SCR 16, pp. 23-24.

254 As stated by Justices McLachlin and Major in their dissenting opinion in *R. v. Curragh Inc.*, [1997] 1 S.C.R. 537, para. 120: "In our society the Crown is charged with the duty to ensure that every accused person is treated with fairness. It is especially in high profile cases, where the justice system will be on display, that counsel must do their utmost to ensure that any resultant convictions are based on facts and not on emotions. When the Crown allows its actions to be influenced by public pressure the essential fairness and legitimacy of our system is lost. We sink to the level of a mob looking for a tree."

255 *R. v. Cook*, [1997] 1 S.C.R. 1113, para. 21.

> The truth is, the people who do this kind of work do it because they really believe in it. There isn't anywhere else, aside from the PPSC. If you want to be a prosecutor and work in the public interest in this area, this is the job. It's the only place to be, and we really love it. We're dedicated to it, and we stick with it.
>
> – KATE MATTHEWS, PRESIDENT OF THE ONTARIO CROWN ATTORNEYS' ASSOCIATION

The committee engaged in discussions with many Crown prosecutors, and representatives of related associations and organizations, about their role with respect to delay.[256] Brian Saunders, the then Director of Public Prosecutions, said:

> Prosecutors are always aware of and concerned about timeliness in prosecutions. Prosecutors must respect the constitutional right of an accused to be tried within a reasonable time. For this reason, we work with others in the criminal justice system to ensure that cases are dealt with in a timely manner.

Jennifer Lopes, representing the British Columbia Crown Counsel Association, had similar comments: "Crown counsel and prosecutors acknowledge our role and our constitutional obligation in ensuring that criminal matters proceed in a timely way."

Since the release of the *Jordan* decision in July 2016, prosecution services across Canada are facing great challenges and pressure to prevent their cases from being stayed for unreasonable delays.[257] In response, the PPSC has adopted a new guideline entitled *Ensuring Timely Prosecutions*, which "was built on successful prosecution strategies."[258] Most provinces are also taking steps to respond to the *Jordan* decision, which includes trying to reduce the number of preliminary inquiries by going straight to trial

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256 These associations included: The Canadian Association of Crown Counsel; the Ontario Crown Attorneys' Association; the British Columbia Crown Counsel Association; the Alberta Crown Attorneys Association; the Saskatchewan Crown Attorneys Association; and the Canadian Bar Association, among others.

257 According to *The Globe and Mail*, by early 2017, criminal defence lawyers had applied for stays in 800 criminal cases across Canada (including a dozen cases of murder, attempted murder and manslaughter). See: Sean Fine, "Courts shaken by search for solutions to delays", *The Globe and Mail*, 12 March 2017.

258 Public Prosecution Service of Canada, *2017-18 Departmental Plan*. See also Public Prosecution Service of Canada, Deskbook, Guideline of the Director issued under Section 3(3)(c) of the *Director of Public Prosecutions Act*, 3.17 Ensuring Timely Prosecutions, 25 August 2016. Among other things, this guideline provides that "[t]here must be timely, competent and effective review of each file to ensure that core disclosure is complete"; "Crown counsel must be prepared to set preliminary inquiry or trial dates at the earliest opportunity"; "Crown counsel should seek to identify in advance any issues which might be usefully canvassed at pre-trials"; and "Crown counsel must ensure that it is clearly indicated on the record who asked for the adjournment, the reasons and the effect upon time to trial".

through direct indictment;[259] prompt plea bargains on "relatively straightforward matters"; and, using a "triage approach" by assigning priority to cases in proportion to the seriousness of it, and hiring additional Crown attorneys (and supporting staff), among others.[260]

A significant concern shared by many Crown prosecutors and this committee is that, in many parts of the country, there are not enough prosecutors to properly handle the number of cases requiring their attention. This situation was explained by Kate Matthews from the Ontario Crown Attorneys' Association, who testified:

> Literally, on some days, we cannot find a Crown to go into a courtroom. We have to pull somebody on their very much needed one prep day — their one prep day when they have a major historical sexual assault that has just been assigned with no notice. That is the reality of life in the Crown's office. We have been pushing continuously to get more Crowns and more support staff, because that is a major problem.

The under-resourcing of Crown prosecutors is especially problematic in Quebec. Professor Marie Manikis from McGill University testified that "there's an estimate that 200 new prosecutors should be hired in order to reach the national average."[261]

In addition to hiring more prosecutors, lawyer Christine Mainville and Sir Brian Leveson emphasized there is also a need for better training, with Ms. Mainville suggesting this would be particularly useful in case management and the exercise of Crown discretion in such matters as "elections[262] and how many accused to put on an indictment, how many counts to include and overcharging and whatnot." Also, there is a need to prepare new prosecutors for their careers in a manner that ensures they do not fall in with the culture of complacency. This requires mentoring from senior counsel. Ms. Lopes of the British Columbia Crown Counsel Association mentioned the importance of retaining experienced prosecutors:

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259 This means that the Crown can avoid a preliminary inquiry by getting the Attorney General to approve a direct indictment under section 577 of the *Criminal Code*.

260 See for example: Nova Scotia, Nova Scotia Public Prosecution Service, Early Resolution Initiative of the Criminal Justice Transformation Group, News Release; Ontario, Ministry of the Attorney General, *Ontario Making Criminal Justice System Faster and Fairer*, News Release, 1 December 2016 and About Ontario's Plan for Faster, Fairer Criminal Justice, Backgrounder, 1 December 2016; Quebec, Table Justice-Québec, "Plan d'action de la Table Justice-Québec – Pour une justice en temps utile en matières criminelle et pénale," News release, 3 October 2016 and *Plan d'action 2016–2017, Pour une justice en temps utile en matières criminelle et pénale*, October 2016; and Manitoba, Court of Queen's Bench, Practice Direction, *Scheduling of Resolution Conferences, Pre-Trial Conferences, Pre-Trial Applications and Voir Dires, and Trial Dates in Criminal Matters*, 20 October 2016.

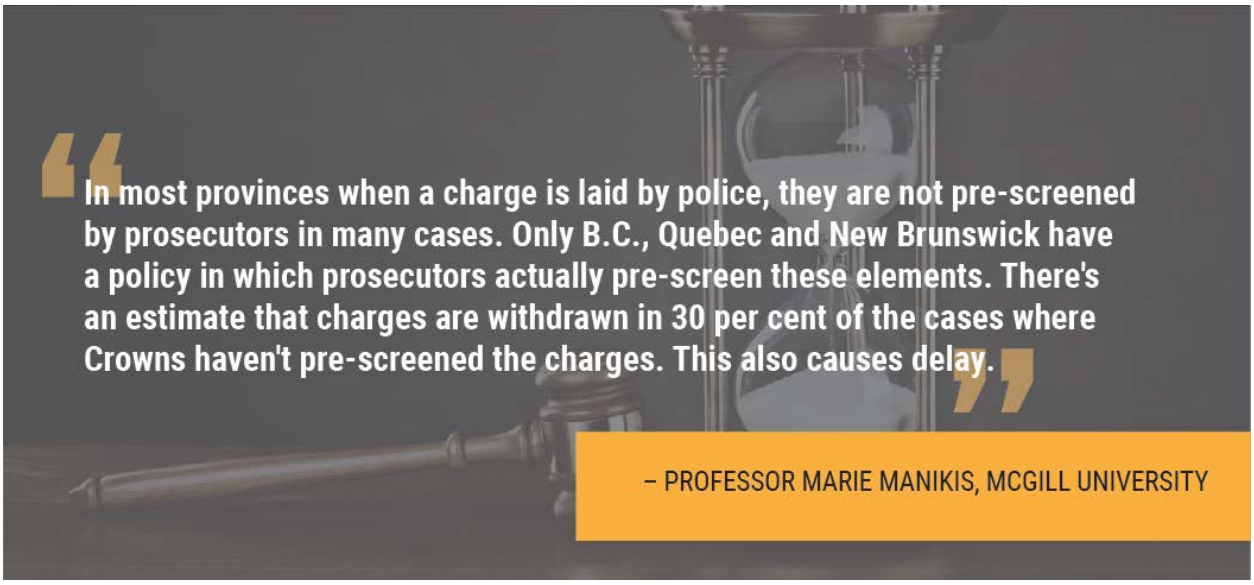
261 Since Professor Manikis testified, the Quebec Justice Minister announced the hiring of 69 additional prosecutors. See Gouvernement du Québec, *Délais en matières criminelle et pénale - Le gouvernement du Québec investit massivement dans le système de justice « Pour une justice en temps utile,»* News Release, 7 December 2016 [Available in French only].

262 Elections refer to the prosecutorial discretion in deciding whether to proceed summarily or by indictment in "hybrid" ("dual procedure") offences. See Public Prosecution Service of Canada, *Deskbook*, 3.10 Elections and Re-Elections.

> [I]n this province there is a senior judges program where senior judges can scale down the amount of work that they do but still be involved. We believe that if we had a similar program for prosecutors, for instance, we could call in that group of people when the need arises. We would have the most experienced people. They are able to do any level of work. We could utilize that great resource to deal with it.

Most importantly, Canadian jurisdictions must ensure that there are a sufficient number of Crown prosecutors to not only handle the workload, but also to ensure they can properly fufill their roles as ministers of justice.

The Need for Better Collaboration between Police and Prosecutors



The procedure for the laying of charges once the police have completed their investigation is different in each province.[263] In most provinces, the police lay charges, whereas in the provinces of British Columbia and Quebec, that decision is made by the Crown. In New Brunswick, that decision is made by the police after receiving advice from the Crown. The Supreme Court has stated in the past that:

> … police, not the Crown, have the ultimate responsibility for deciding which charges should be laid. This can still be true after the Crown has made its own pre-charge assessment, and when the two arms of the criminal justice system disagree on whether to lay charges.[264]

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[263] Department of Justice Canada, *A Handbook for Police and Crown Prosecutors on Criminal Harassment*, 2.11.5 Arrest and Charges.

[264] *R. v. Regan*, 2002 SCC 12, para. 67.

In Alberta,[265] the majority of charges are laid by the police and then reviewed by Crown prosecutors before they proceed. According to the Alberta Crown Prosecutors' Manual:

> [C]rown prosecutors generally do not become involved in cases prior to the initiation of the prosecution by the informant, usually a peace officer. Therefore, in most cases, the determination as to whether "reasonable grounds" exist for the laying of a charge is made independently of any assessment of the evidence by a prosecutor. As such, the usual issue for the prosecutor is whether to continue or to terminate proceedings.[266]

Legal advice may, however, be requested by the police from a Crown prosecutor. The Crown, though, ultimately decides what charges will proceed and will conduct the prosecution (based on the likelihood of conviction and taking into account the public interest).

In the province of British Columbia,[267] once a crime is reported and investigated, the police will send a Report to Crown Counsel, which details their findings and recommendations. Crown counsel will review the report based on the Crown counsel policy manual and make a charge-assessment decision based on whether there is a substantial likelihood of conviction based on the evidence presented in the report and whether a prosecution is required in the public interest.

> "In terms of charging or overcharging, again, we notice that when we do pre-trial conferences, sometimes there are many counts in an indictment that the Crown is probably either not going to pursue or decides not to pursue at a pre-trial conference."
>
> – THE HONOURABLE NEIL WITTMANN, CHIEF JUSTICE, COURT OF QUEEN'S BENCH OF ALBERTA

In this context, the issue of "Over-charging," refers to the practice by police of charging an offender with several counts for the same criminal activity in the hopes that one of them will help achieve a plea bargain or to improve the chances one will succeed in court. Some witnesses indicated that over-charging has had serious consequences and is a cause of delays.[268] Graham Johnson, representing the Alberta

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265 Alberta Justice and Solicitor General, *Prosecutors' roles and responsibilities*.

266 Alberta, *Alberta Crown Prosecutors' Manual, Decision to prosecute*.

267 British Columbia, *Laying Charges* and British Columbia, *Before Going to Court*. See also British Columbia, *Crown Counsel Policy Manual*.

268 See the testimony of Mark Benton, Legal Aid BC (Evidence, 25 February 2016); Graham Johnson, Criminal Trial Lawyers Association (Evidence, 28 September 2016); and Michael W. Owens, Saskatoon Criminal Defence Lawyers Association Inc. (Evidence, 29 September 2016).

Criminal Trial Lawyers Association said that the increase in charges or over-charging is a problem. He explained that:

> [P]art of it is because there have been a number of amendments to the *Criminal Code* to create very specific offences for things that were already caught by more general provisions…. It's much more cumbersome for the Crown to prove. They have to introduce each one of these things one by one if it goes to trial. It's much more inefficient. It was, in my view, largely unnecessary, because the same conduct was already caught by the general provision …

As set out in the recent Macdonald-Laurier Institute report, *Justice on Trial: Inefficiencies and Ineffectiveness in the Canadian Criminal Justice System*, by Scott Newark (who also appeared as a witness), "[t]he high number of cases stayed/withdrawn may indicate over charging by police to encourage a plea bargain, which could contribute to delays."[269] Another report, published by the Macdonald-Laurier Institute and co-authored by Richard Audas (another witness) and Benjamin Perrin, says that "whether Crown prosecutors have to approve criminal charges, or whether the police can simply lay them on their own, can have a major impact on the proportion of charges subsequently stayed or withdrawn."[270]

Pre-charge screening is defined by Statistics Canada as "a formal process whereby a Crown prosecutor (as opposed to police) determines whether a charge should officially be laid before proceeding to court. Currently in Canada, pre-charge screening systems are in place in New Brunswick, Quebec and British Columbia."[271] Statistics Canada notes that these provinces have some of the highest rates of guilty findings as compared to not guilty findings. In 2014/2015, the rate of guilty findings was 77 per cent in New Brunswick, 73 per cent in Quebec and 72 per cent in British Columbia. Ontario, which is not a pre-charge screening jurisdiction, reported the lowest proportion of guilty findings at 54 per cent. This significant difference between provinces merits further analysis, though the committee did not hear definitive views on whether these statistics can be interpreted to indicate that a particular province's approach is more efficient.

The committee did raise questions with witnesses about whether pre-charge screening by Crown prosecutors or leaving the laying of charges to the discretion of the police was a better approach. Many witnesses gave perspectives from different parts of the country, and some expressed their satisfaction with the model used in their province. For instance, Mr. Cowper said that British Columbia's charge approval system "is preferable". Jospeh Oliver's answer, based on canvassing opinions from others, was "that there is some value in a formal consultation process with the Crown, but pre-charge approval did not seem to be fully supported." Chief Jean-Michel Blais from the Halifax regional police service

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269 Scott Newark, *Justice on Trial: Inefficiencies and ineffectiveness in the Canadian criminal justice system*, Macdonald-Laurier Institute Report, September 2016, p. 16. When appearing before the committee, Mr. Newark said that he does not like the idea of the Crown having to approve charges.

270 Benjamin Perrin and Richard Audas, Macdonald-Laurier Institute Report, *Report Card on the Criminal Justice System: Evaluating Canada's Justice Deficit*, September 2016, p. 9.

271 Ashley Maxwell, Statistics Canada, *Adult criminal court statistics in Canada, 2014/2015*, 2017.

recognized that this question is an area of provincial jurisdiction. Having worked in four provinces (Quebec, Manitoba, Ontario and Nova Scotia), he was able to add:

> I have worked in investigations whereby Crowns have worked very closely with us. I have also worked in investigations where we did not really need a Crown until it was time to go for the prosecution.
>
> To answer your question, I don't think pre-charge screening is something that I could see having particular advantages for here, but I do see the absolute critical importance of the police working hand-in-hand with Crowns to be able to determine what is the best way to go during the investigation and not just after all the information has been obtained and the evidence has been sorted out. It is on a case-by-case basis.

Other witnesses agreed that more interaction, consultation and collaboration should be happening between the police and Crown prosecutors, especially at the pre-charge stage.[272] As Tom Stamatakis, President of the Canadian Police Association, said:

> I believe there needs to be a lot more interaction between the Crown and the police when it comes to files that are being forwarded for their consideration to charge, because that again would eliminate a lot of delay. … I think if there were better collaboration, we would have a more efficient system.

In their 2008 report on large and complex criminal procedures, Michael Code and the Honourable Patrick J. LeSage, former Chief Justice of the Ontario Superior Court of Justice, noted the increase in collaboration due to the complexities of criminal procedures:

> Police investigative procedures are now the subject of pre-trial motions to determine whether there has been a Charter violation, whether evidence will be admitted under the new "principled approach" and whether a statutory process, such as a wiretap authorization or search warrant, has been properly followed. The police have increasingly turned to Crown counsel for pre-charge legal advice in order to navigate these difficult waters… It is simply not feasible in the modern era to expect the police and Crown to work in entirely separate silos, as they once did. [273]

Based on the evidence we heard, the committee is not ready to recommend one approach over the other with regard to the laying of charges. We believe the Minister of Justice should produce a report

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[272] See the testimony of Leo Russomanno, Criminal Lawyers' Association; and William Trudell, Canadian Council of Criminal Defence Lawyers (Evidence, 18 February 2016); Joseph Oliver, Canadian Association of Chiefs of Police (Evidence, 25 February 2016); Tom Stamatakis, Canadian Police Association (Evidence, 23 March 2016); Chief Constable Adam Palmer, Vancouver Police Department; and Geoffrey Cowper, BC Justice Reform Initiatives (Evidence, 27 September 2016); Damian Rogers, Alberta Crown Attorneys Association (Evidence, 28 September 2016); and Professor Marie Manikis, McGill University (Evidence, 28 October 2016), among others.

[273] Patrick J. Lesage and Michael Code, *Report Of The Review Of Large And Complex Criminal Case Procedures*, Ministry of the Attorney General of Ontario, Toronto, November 2008, p. 25.

evaluating these questions and assisting the provinces by sharing data, analyses and information about best practices. The significant difference between findings of guilt in each province merits further study, particularly with regard to the efficient use of court resources to address delays. The committee agrees with witnesses who emphasized that consistent lines of communication and means of cooperation must exist between the police and prosecution and in particular with regard to the laying of charges. Of course, it is important to also recognize the independent roles of these occupations. In *R. v. Regan*, the Supreme Court quoted the *Royal Commission on the Donald Marshall, Jr., Prosecution* of 1989 where this separation of roles was emphasized:[274]

> We recognize that cooperative and effective consultation between the police and the Crown is also essential to the proper administration of justice. But under our system, the policing function -- that of investigation and law enforcement – is distinct from the prosecuting function. We believe the maintenance of a distinct line between these two functions is essential to the proper administration of justice.

In conclusion, the committee concurs with Mr. Stamatakis, who emphasized the importance of balancing independence and cooperation in policing and prosecution:

> [T]he Crown has to remain independent, but there's no reason why they can't play an advisory role in assisting the police to ensure that they've, like I said, provided the appropriate evidence to meet the elements of the offence and to assist with making sure they've taken all the appropriate investigative steps to assist with the prosecution. It should be a more collaborative effort.

Recommendation 25

The committee recommends that the Minister of Justice and the Minister of Public Safety and Emergency Preparedness work with the provinces and territories to:

- **conduct a review and analysis of the best practices concerning cooperation between police and Crown prosecutors as well as the merits of various models used for the laying of charges; and**
- **ensure that the outcome of this review is made public and that appropriate recommendations are made for police and prosecution services across Canada.**

[274] *R. v. Regan*, para. 66.

Disclosure

Cooperation between the police and the Crown prosecutor is equally important with regard to the assembly of evidence in preparation for trial. The Crown is responsible for disclosing to the accused all relevant evidence that has been considered in preparation for trying the charges brought against him or her. On this matter, the committee shares the assumption of Marcus Pratt representing Legal Aid Ontario, that "as the police investigate and develop information for the Crown, they will always be looking for the best way to provide that information to the Crown so they can make the best case prosecuting." Brian Saunders's comments confirmed such cooperation is happening. His office spends time assisting police and

> [g]iving advice during the course of investigation that could help ensure that the case is one where the evidence has been gathered in a way that respects the Charter and meets the law and rules of evidence that can help lead to fewer challenges to the evidence being produced later on.

It became clear to this committee that to reduce delays in criminal proceedings, early and regular cooperation between police and prosecutors in the preparation of evidence for trial is required. As defence lawyer Eric Gottardi added:

> One of the key causes of delays and adjournments is late disclosure. We can do a better job of collecting information, perhaps even collecting less of it, managing it and getting it out. Then we will have fewer adjournments and less delay.

Disclosure is an integral part of Canada's criminal justice framework because it engages an accused person's Charter rights. Section 7 of the Charter states that everyone has the "right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Furthermore, section 11(d) of the Charter states: "Any person charged with an offence has the right to be presumed innocent until proven guilty according to law." In Canada, the presumption of innocence has been interpreted as placing a burden upon the prosecution to disclose the evidence it intends to introduce to prove the accused's guilt. This is to ensure that a trial is "fair" and there is no "trial by ambush" or "trial by surprise." These rights have been interpreted as providing an accused

person with the right to make "full answer and defence." The Supreme Court has held that "full answer and defence" encompasses the right of the accused to have before him or her the full "case to meet" before answering the Crown's case by adducing defence evidence.[275]

The fruits of the investigation which are in the Crown's possession are not the property of the Crown for use in securing a conviction, but rather the property of the public to be used to ensure that justice is done. While this disclosure obligation should lead to a lower incidence of wrongful convictions, fulfilling it can lead to a delay in getting to trial. The right of accused persons to know the case they must meet imposes extensive disclosure obligations upon the Crown which can serve to lengthen the time before a matter can be tried. In *R. v. Stinchcombe,*[276] the Supreme Court held that the Crown has a legal duty to disclose all relevant information to the defence. Donald Priragoff commented on how with regards to disclosure obligations,

> Parliament's hands are quite limited in this area because the court has enunciated that there are certain constitutional rights to have the disclosure made. It becomes a practical matter of the police and the prosecutors trying to fulfill those duties.

Delays resulting from the disclosure process are more likely to occur in complex cases and those where there is a great deal of electronic evidence resulting from such things as wiretaps and searches of computer databases. For the more common, "run-of-the-mill" types of criminal cases, some witnesses were confident that disclosure is not an issue that contributes to delays.[277]

Several witnesses explained why the production of disclosure in some cases can be such an onerous task. Ms. Matthews, President of the Ontario Crown Attorneys' Association, noted that there had been a 75 per cent increase in the number of investigative videos prepared by the Toronto Police Service in the last five years and a "tremendous increase" in electronic data, such as the analysis of hard drives and cell phone records. She added: "They all take time to watch, time to prepare and time to present in court." She also explained that this increase allows "more opportunities for defence to challenge the admissibility of those types of evidence through their pretrial motions." Laurie Gonet from the Ontario Crown Attorneys' Association described how video evidence is useful, but takes a lot of time to review prior to and during court proceedings. Chief Constable Adam Palmer also discussed how much time can be spent reviewing electronic evidence and warned that as technology advances, "the amount of information required for disclosure will continue to increase."

Witnesses discussed many other contributors to delays that occur during the disclosure process. Marcus Pratt explained how "challenging" it is when defence counsel or legal aid who fund defence counsel receive a "data dump" from the Crown prosecutor. This means that disclosure must be sorted through in order for defence counsel to do their duty of examining it all, and it is either being received in an electronic format or as paper copies that are not searchable for key words. Given the amount of

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275 *R. v. Rose*, [1998] 3 S.C.R. 262, para. 102.

276 *R. v. Stinchcombe*, [1991] 3 S.C.R. 326.

277 See the testimony of George Dolhai, Public Prosecution Service of Canada (Evidence, 17 February 2016); and Rick Woodburn, Canadian Association of Crown Counsel (Evidence, 9 March 2016), among others.

evidence that can often be produced during criminal proceedings, it is consequently crucial that disclosure be produced in an efficient and timely manner and witnesses shared views about how to improve this process.

Some witnesses mentioned concerns about defence counsel making requests for disclosure that may perhaps be unnecessary and therefore add to delays. One particular application discussed was a "*McNeil* application." In *R. v. McNeil*,[278] the Supreme Court set a precedent that police organizations and police personnel must "disclose findings related to discipline or convictions around different offences that arise from a disciplinary proceeding or hearing" of police officers. The Supreme Court also said that the discipline had to be serious. In Tom Stamatakis' view, "most police organizations, frankly, defence lawyers and Crown have taken what the Supreme Court decided much further than [he believes] the Supreme Court intended." Chief Blais added that *McNeil* applications can be an issue on large operations, such as drug cases. The production of records that are in the possession of third parties can also be a slow process. In the case of *R. v. O'Connor*,[279] the Supreme Court of Canada set out the procedures to be observed when the accused requests records in the possession of third parties, which include the requirement for a judge to determine if the records are relevant and should be produced. All of this can take additional time, and therefore counsel and judges need to be mindful of ensuring that these requests are only made and granted when necessary.

> "[M]ost of our cases are flowing through fairly quickly with regard to disclosure. A lot of the bigger cases are going to take longer anyway; they're going to take a year or two, because they're large cases. There's just no way around that. Disclosure of large cases takes a long time to get it to defence sometimes, but that's understood. For the most part, much of it is getting through."
>
> – RICK WOODBURN, CANADIAN ASSOCIATION OF CROWN COUNSEL

The committee explored possible solutions with witnesses that could improve the disclosure process. Some ideas were practical, such as the Canadian Bar Association's recommendation to allow police services to hire trained staff to vet the disclosure as it is being prepared and compiled in order to speed up the process and reduce the work needed to be done by the Crown prosecutor. We also heard a wide range of opinions about finding ways to ensure that the evidence is delivered in a timely manner before the start of trial and when the accused person must enter their plea (since the accused is expected to know the case against him or her before deciding how to plead). The committee considered what practical steps might be implemented by judges without the need for broader legislative reform, such as the

[278] *R. v. McNeil*, 2009 SCC 3.

[279] *R. v. O'Connor*, [1995] 4 S.C.R. 411.

imposition of stricter time constraints on the Crown to disclose prior to trial all evidence the prosecutor intends to use at trial (which is also mentioned in Chapter Five).[280] Judges could use their case management powers, particularly at pre-trial conferences, to help the parties determine what evidence is necessary and establish deadlines.[281] Tony Paisana agreed that setting timelines is a useful idea and can "get everyone thinking about the case long before it comes along, which is always good for efficiency."

Jennifer Lopes from the British Columbia Crown Counsel Association discussed why it is important for Crown prosecutors to provide complete disclosure before a trial date is set:

> We do that because scheduling frankly is an art more than a science in trial work. Once full disclosure is done both sides are able to analyze the case and provide the best estimate to the court about the issues the trial is going to cover. Now that is not always possible or realistic. … Absolutely no prosecutor would ever want to be in the middle of the trial and have late disclosure happen.

Ms. Lopes also addressed the discussion the committee had been having about ways to ensure that disclosure is complete before the trial date. She said: "that is our goal and that would be a suggestion we would all heartily embrace." But she cautioned that: "The Crown has the problem in that we do not control the flow of information to us at all times."

When questioned about his views on requiring disclosure prior to trial, Rick Woodburn responded by pointing out the difficulty in prescribing what the consequences would be if disclosure is late, adding that disclosure is an "ongoing" process that continues right up to the end of trial. Ian Savage from the Criminal Defence Lawyers Association of Alberta mentioned that, as there are currently no penalties for Crown prosecutors for late disclosure, he thought that defence lawyers would be very much in favour of requiring the Crown to disclose evidence before a certain date. The consequence would be that any attempt to introduce evidence past that date would need to be justified before a judge. Greg DelBigio from the Canadian Council of Criminal Defence Lawyers agreed there should be incentives for timely disclosure, but was opposed to imposing deadlines on the defence for introducing evidence. Lawyer Mary Murphy cautioned that "there's an important need for flexibility in our court system on both sides." And, defence lawyer Christine Mainville noted that there would need to be distinctions made in respect of the complexities of a case.

The committee is in agreement that there needs to be flexibility in disclosure requirements so judges can evaluate the unique circumstances of each case. The committee believes there is merit in adding to the *Criminal Code* a general directive that if a deadline for disclosure is set by a judge, then any evidence that is introduced later would require explicit justification. A judge could thereby consider whether

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[280] See the testimony of Ian Carter and Tony Paisana, Canadian Bar Association (Evidence, 18 February 2016); Joseph Oliver, Canadian Association of Chiefs of Police (Evidence, 25 February 2016); and Anita Szigeti, Criminal Lawyers' Association (Evidence, 20 April 2016).

[281] See the testimony of Ian Carter, Canadian Bar Association (Evidence, 18 February 2016); former Chief Justice of the Superior Court of Quebec, François Rolland (Evidence, 13 April 2016); Graham Johnson, Criminal Trial Lawyers Association (Evidence, 28 September 2016), among others.

evidence disclosed late should be admitted or not (while of course being mindful of ensuring a fair trial). Scrutiny by the courts of late disclosure might help change the culture of complacency that the Supreme Court of Canada discussed in the *Jordan* decision (and explained in Chapter Two of this report). Even if this amendment did not produce an immediate shift in common disclosure practices, an emphasis on strict timelines as part of effective case management needs to be stressed throughout all stages of criminal proceedings. The principles outlining disclosure timelines could be included in amendments to the *Criminal Code*, along with those we have proposed in Chapter Three of this report that would set out the roles of the parties to proceedings in ensuring timely and efficient justice.

Recommendation 26

The committee recommends that the Minister of Justice introduce an amendment to the *Criminal Code* setting out a presumption that the Crown will disclose all evidence in accordance with any timelines set by the judge prior to trial and that any evidence introduced thereafter will need to be justified based on due diligence or previous unavailability.

> "It's a rather common occurrence, as Mr. Carter has pointed out, for Crown counsel or defence counsel to request multiple adjournments in order to properly obtain disclosure. Crown counsel will usually ask for this process to be undertaken so that they can vet disclosure. That refers to both counsel and the police painstakingly reviewing these disclosure packages to redact phone numbers, privileged information and other irrelevant items to defence counsel. As you can imagine with these large complex files, this is a time-consuming exercise that can take a very long time. Because the accused can't be expected to make any important intake decisions before receiving disclosure, these various adjournments become necessary."
>
> – TONY PAISANA, CANADIAN BAR ASSOCIATION

A recurring theme throughout the study has been the need to modernize criminal proceedings, particularly through technology. While some police officers and Crown prosecutors are using computer systems to manage disclosure, the different systems for managing evidence being used across Canada are not compatible for all users.[282] Many witnesses said that what is needed to modernize disclosure is the development of standard computer software that could be used to handle disclosure requirements and

[282] See the testimony of David Field and Marcus Pratt, Legal Aid Ontario; Joseph Oliver, Canadian Association of Chiefs of Police (Evidence, 25 February 2016); Tom Stamatakis, Canadian Police Association (Evidence, 23 March 2016), among others.

also reduce unnecessary court appearances.[283] Joseph Oliver noted that all material could be disclosed electronically since records can be scanned and indexed. Adam Palmer explained this more fully:

> Addressing some of these gaps could include standardized data storage and retention for telecommunication service providers and verification of subscriber information, standardized information sharing system between police and Crown, and technological resources and related training to the justice system with regard to receiving electronic disclosure that continues to grow in volume.

Canadian governments are developing and implementing computer systems for evidence disclosure, or "e-disclosure." For instance, Alberta has Criminal eFile and Ontario has the Scope system. RedMane Technology Canada noted that while some jurisdictions are taking these steps, there is "a lack of consistency, standardization, and integration between the different software platforms currently in use."[284] Creating a standard system across Canada would be more efficient and speed up disclosure processes. National coordination and leadership on this issue is therefore important in order to ensure that the systems are compatible among provinces. In particular, this is needed in order to assist in the transmission of evidence for any inter-provincial investigations. The various systems being used across the country to develop the types of records produced by police that may form part of the evidence for trial will need to be made compatible with a broader system. Redmane also explained how this disclosure system could be incorporated into case management software:

> First and foremost, an e-disclosure system should fit into a larger case management solution for the courts that automates aspects of the prosecution process from beginning to end. A case management system could receive investigative data from a police records management system, format it and organize it for the prosecution, generate documentation required for charge packages, compile and transmit disclosure packages to an e-disclosure portal, and notify defence counsel that evidence is ready for viewing.[285]

The Minister of Justice can play an important role in developing suitable software and making it available for use by the provinces and territories. The committee also notes that once information is available electronically, it will be possible to only permit electronic delivery of evidence. Since the production of copies of evidence requires additional time and resources, disclosure by means other than electronic delivery should only be granted when requested and absolutely necessary.

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283 See the testimony of Joseph Oliver, Canadian Association of Chiefs of Police (Evidence, 25 February 2016); Marcus Pratt, Legal Aid Ontario (Evidence, 25 February 2016); Kate Matthews, Ontario Crown Attorneys' Association (Evidence, 9 March 2016), among others.

284 RedMane Technology Canada Inc. *Brief Submitted to the Standing Senate Committee on Legal and Constitutional Affairs*, 30 January 2017.

285 Ibid.

Recommendation 27

The committee recommends that the Minister of Justice ensure that computer software and related technological solutions are developed for the management and disclosure of evidence that can be used as a uniform, searchable platform by the police, Crown prosecutors and defence counsel across Canada.

Another improvement for disclosure practices would be to create standard procedures for disclosure that would save parties the effort of having to make official requests for information and evidence. Philipe Knerr provided an example to illustrate this: "For instance, police notes in DUI files. It is inconceivable to me that we do not receive, as the first part of our disclosure, police notes. We don't have them. And, systematically, we have to ask for them." On this point, Kevin Fenwick added: "I don't see any reason why a prosecutor has to wait for a letter of request for disclosure from defence counsel. Why are we not more proactive with respect to disclosure and anticipate the request is going to come, and then proactively provide it rather than react?"

The committee also believes that it should be regular practice that prior to trial, sealed warrants and sworn information to obtain should be unsealed, vetted, edited and deemed to be part of normal Crown disclosure of evidence, unless there are valid reasons not to do so. Making this standard procedure could eliminate the need for additional special hearings on such matters later. As part of the *Criminal Code* review recommended in Chapter Three, the Minister of Justice could examine what types of evidence should be automatically disclosed in accordance with standard procedures, and make amendments accordingly.

Recommendation 28

The committee recommends that the Minister of Justice review the *Criminal Code* and other criminal laws in order to make appropriate amendments that indicate standard and routine types of evidence that should be automatically disclosed as part of criminal proceedings before the start of trial.

CHAPTER SEVEN - THE ACCUSED AND THEIR LEGAL COUNSEL, OR LACK THEREOF

The right to a fair trial is fundamental to Canadian justice. The integrity of our criminal law system rests on the notion that everyone is entitled to an independent and public hearing based on the rule of law for any criminal charge laid against him or her. Canada's criminal defence lawyers are consistently, and passionately, engaged in defending this right on behalf of their clients. And yet, not all accused persons can afford to hire a lawyer to defend their rights and help them navigate the complexities of criminal proceedings.

The costs of hiring a lawyer can be significant. Those who cannot afford a lawyer may qualify for legal aid, whereby the state covers all or some of the costs for their legal representation. In most provinces, legal aid eligibility criteria are generally quite restrictive and factors such as income, number of dependants, the type of offence and whether there is a risk of incarceration may all determine the support available.[286] Many accused persons do not qualify for legal aid, and yet cannot afford a lawyer. This is a cause of delays identified during the course of our study. Unrepresented accused persons face the complexities of the justice system on their own. Judges and Crown prosecutors must take more time to ensure that the accused person is not only treated fairly, but that he or she understands the procedures and decisions that must be made. Several witnesses underscored concerns about the impact of unrepresented accused persons on the efficiency of the justice system. For some, the solution is better funding in order to increase the number of people who qualify for legal aid.

There is no doubt that delays can be difficult for many accused persons. If they are not granted bail, then they are kept waiting in state custody for their trial to begin or for their liberty to be given back to them. Accused persons may be released under strict conditions that they must follow or face additional charges for breaching them. They endure public scrutiny and stigma, and this may affect their personal and professional relationships: they may have lost their job or their accommodations and spent considerable amounts of money on legal fees. Whether or not accused persons are guilty, they are still waiting for many months, presumably under high stress, to find out the outcome of their trial and the impact this will have on their life. That being said, some witnesses did raise the possibility that accused persons may see a benefit in delaying their trial, citing delaying tactics such as accused persons repeatedly firing their lawyers.[287]

In the *Jordan* decision, the Supreme Court of Canada made it clear that any delay attributable to the defence does not count towards the calculation of time for determining if there has been an unreasonable delay. In addition, the defence must show that they took active steps to make the case proceed towards

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[286] For examples, see Ontario, Legal Aid Ontario, *Am I eligible for a legal aid certificate?;* Quebec, Justice Quebec, *Legal aid eligibility thresholds*; and Saskatchewan, Legal Aid Saskatchewan, *Financial Eligibility*.

[287] See the testimony of Heidi Illingworth, Canadian Resource Centre for Victims of Crime; and Frank Tremblay, Victimes d'agressions sexuelles au masculin (Evidence, 24 March 2016); Kelly Kaip, Saskatchewan Crown Attorneys Association (Evidence, 29 September 2016); and Jenny Charest, Crime victims assistance centre of Montreal for CAVAC Network (Evidence, 28 October 2016), among others.

a final disposition. In theory at least, the accused should not be benefitting from delays caused by the defence.

In this chapter, the committee reviews the evidence we heard that describes the part played by accused persons and criminal defence lawyers in the challenges Canada is facing with delays. We also examine two significant contributors to these challenges that require urgent attention by Canadian governments: the high numbers of accused persons who are being held in detention on remand, and those who are appearing in court to deal with administration of justice offences.

The Role of Criminal Defence Lawyers

For those accused persons with legal representation, whether due to legal aid or because they can afford a lawyer, they are receiving the benefit of a person trained to help them navigate our justice system and ensure their rights are protected. Criminal defence lawyers play a vital role in our criminal justice system. They take on the responsibility of representing clients whose liberty is at stake. They are also bound by the ethical and professional obligations of their law society, and risk losing their licence to practice law if they do not meet them. The Federation of Law Societies of Canada's *Model Code of Professional Conduct* states that:

> When acting as an advocate, a lawyer must represent the client resolutely and honourably within the limits of the law, while treating the tribunal with candour, fairness, courtesy and respect.[288]

Defence lawyers must ensure that their clients' rights are respected, particularly the legal rights spelled out in sections 7 to 14 of the *Canadian Charter of Rights and Freedoms*. This grouping of rights begins with the "right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." These sections also include other key rights that apply on arrest or detention or that allow an accused person to make a full answer and defence to criminal charges, amongst others. These rights are the foundation of our justice system, and laws and actions by the state that violate them may be unconstitutional.

[288] Federation of Law Societies of Canada, *Model Code of Professional Conduct*, 10 March 2016, article 5.1-1. The commentary following this provision states that "[i]n adversarial proceedings, the lawyer has a duty to the client to raise fearlessly every issue, advance every argument and ask every question, however distasteful, that the lawyer thinks will help the client's case …."

Throughout its study, the committee heard from several national and local organizations representing criminal defence lawyers,[289] provincial legal aid organizations,[290] and defence lawyers with different types of practices.[291] The extent to which criminal defence lawyers are responsible for causing delays was discussed throughout the study. Some witnesses felt that some defence lawyers may use tactics to delay the proceedings in order to benefit their clients, or that an accused might do so on their own.[292] Leo Russomanno from the Criminal Lawyers' Association sought to assure the committee that:

> There's nothing to be gained from defence bringing late disclosure requests on the eve of trial or lengthening the proceedings. I think we need to keep that in mind: Delay does not assist an accused; it prejudices an accused…. I can say anecdotally that I've never, ever had a client say, "I want you to delay this as long as possible. I want to be on strict bail conditions for a very long period of time" or "I want to be in custody for a very long period of time and drag this out."

Other witnesses gave examples of tactics they had seen by lawyers who intentionally were delaying proceedings. Defence lawyer Adam Villeneuve stated frankly that he had seen "conversations in the corridors about delaying tactics, pure and simple." Kelly Kaip, President of the Saskatchewan Crown Attorneys Association, shared a similar view:

> Certainly I have seen firsthand what appears to be tactical delay. Oftentimes it is certainly not defence counsel's design. Sometimes we are dealing with sophisticated litigants who are well aware of the system.

While Ian Carter from the Canadian Bar Association acknowledged that a lawyer's role in delays "depends on the circumstances," he added that: "there's no question that counsel's conduct and behaviour in a certain case could lead to delays." In commenting on this issue, lawyer John H. Hale

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289 See the testimony of Leo Russomanno, Dominic Lamb and Anita Szigeti, Criminal Lawyers' Association (Evidence, 18 February 2016) and (Evidence, 20 April 2016); William Trudell and Dominic Lamb, Canadian Council of Criminal Defence Lawyers (Evidence, 18 February 2016); Richard Fowler, Trial Lawyers Association of British Columbia (Evidence, 27 September 2016); Graham Johnson, Criminal Trial Lawyers Association (of Alberta); and Ian Savage, Criminal Defence Lawyers Association of Alberta (Evidence, 28 September 2016); Andrew Mason and Michael W. Owens, Saskatoon Criminal Defence Lawyers Association Inc. (Evidence, 29 September 2016); Philipe Knerr, Association des avocats de la défense de Montréal; and Mathieu Rondeau-Poissant, Association Québécoise des avocats et avocates de la défense (Evidence, 28 October 2016).

290 See the testimony of David Field and Marcus Pratt, Legal Aid Ontario; Karen Hudson, Nova Scotia Legal Aid Commission; Mark Benton, Legal Aid BC (Evidence, 25 February 2016); Suzanne Polkosnik, Legal Aid Alberta (Evidence, 28 September 2016); and Craig Goebel, Legal Aid Saskatchewan (Evidence, 29 September 2016).

291 See the testimony of Paul Doroshenko, Acumen Law Corporation; and Eric Gottardi, Peck and Company (Evidence, 27 September 2016); David Genis, The Law Firm of David Genis; John H. Hale, Hale Criminal Law Office; Christine Mainville, Henein Hutchison LLP; and Mary Murphy, Murphy Toronto Lawyers (Evidence, 5 October 2016).

292 See the testimony of Heidi Illingworth, Canadian Resource Centre for Victims of Crime; Frank Tremblay, Victimes d'agressions sexuelles au masculin (Evidence, 24 March 2016); Kelly Kaip, Saskatchewan Crown Attorneys Association (Evidence, 29 September 2016); and Jenny Charest, Crime victims assistance centre of Montreal for CAVAC Network (Evidence, 28 October 2016), among others.

accepted that "there will be a few defence lawyers who may play loose with the Charter, but that's a tiny minority." In his view, defence counsel largely act "in good faith" when representing their clients' rights. Defence lawyer Philippe Knerr was cautious in noting that no one party can be blamed for "delays in our justice system." Whether or not defence lawyers are responsible for intentionally causing delays, the Supreme Court made it clear in *Jordan* that all parties were responsible for the culture of complacency that has permitted delays to become excessive. The committee believes that defence counsel should be helping to shift the culture of Canada's justice system so that all parties seek to "cooperate in achieving reasonably prompt justice."[293] For those who do cause delays, the courts will review their actions in accordance with the *Jordan* framework.

The Honourable François Rolland, Retired Chief Justice of the Superior Court of Quebec, raised one dynamic that exists within the criminal justice system that could prove a barrier to facilitating cooperation towards effective change. He described a climate of mistrust:

> Most defence lawyers have vast experience and the Crown attorneys mistrust them. I experienced that when I took part in facilitation conferences. I cannot reveal the content, but the tension was palpable. Often a chief justice would be called in to try to calm things down.[294]

To address Canada's delay problems and achieve "reasonably prompt justice," cooperation between Crown and defence counsel will be required. While some mistrust may be an inherent by-product of an adversarial system, our system should above all be focused on fairness and just outcomes. There are no easy solutions for producing a cultural shift in the legal system to develop this cooperation. And yet, this is the shift that must happen, and Canadian attorneys general and ministers of justice will need to make strong efforts to effect this change.

As we noted in Chapter Six, some witnesses underscored that if we want to change the culture of complacency and address the habits that cause delays, an investment should be made in training the next generation of lawyers – particularly in case management.[295] As Sophia Rossi Lanthier from the Young Bar of Montréal stated, it:

> …is important to introduce future lawyers to best practices in case management. They must also be made aware of the positive impact of good case management on reducing delays. … lawyers are hardly made aware of the impact that good case management can have on cases. We believe that lawyers should become aware of best practices during the École du Barreau and their articling.

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293 *R. v. Jordan,* para. 5.

294 Claudia Prémont, President of the Quebec Bar, also referred to the importance of improving the relationship between defence lawyers and Crown attorneys.

295 See the testimony of Richard Fowler, Trial Lawyers Association of British Columbia (Evidence, 27 September 2016); Ian Savage, Criminal Defence Lawyers Association of Alberta (Evidence, 28 September 2016); and Sophia Rossi Lanthier, The Young Bar of Montréal (Evidence, 28 October 2016), among others.

Others emphasized that mentoring by senior lawyers remains important since, as Richard Fowler of the Lawyers Association of British Columbia commented, "[e]xperienced skilful advocacy helps control the trial process and makes complex trials manageable and prevents trials from becoming unduly long." One barrier he identified for young lawyers was that the cost of continuing legal education can be very high. The committee would add that law societies across Canada should therefore be ensuring that educational courses are available to their members that are practical, affordable, and are geared towards promoting better case management and cooperative efficiency to avoid delays.

Legal Aid

> "Legal aid, in essence, promotes a society where everyone counts and everyone gets a chance. Legal aid is effective access to justice for the economically vulnerable, and that includes historically vulnerable groups."
>
> – KAREN HUDSON, NOVA SCOTIA LEGAL AID COMMISSION

Throughout our study, many witnesses were very concerned about the underfunding of legal aid in Canada, which the Canadian Bar Association has characterized as a "crisis … jeopardizing the efficiency and effectiveness of the entire system."[296] Legal aid is a form of social assistance provided to low-income Canadians who require legal services for criminal, civil and other matters. Most legal aid plans for those facing criminal charges have specific financial eligibility requirements and are restricted to cases where there is a likelihood of incarceration if there is a conviction.[297] However, for those who do not qualify for legal aid, many are still unable to afford a lawyer; if that is the case, they will need to represent themselves in court.

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296 Canadian Bar Association, "Study on matters pertaining to delays in Canada's criminal justice system", *Brief Submitted to the Standing Senate Committee on Legal and Constitutional Affairs*, 17 February 2016. See the testimony of Tony Paisana and Ian Carter, Canadian Bar Association, Leo Russomanno, Criminal Lawyers' Association (Evidence, 18 February 2016); Kevin Fenwick, Ministry of Justice, Government of Saskatchewan (Evidence, 24 February 2016); Mark Benton, Legal Aid BC, David Field and Marcus Pratt, Legal Aid Ontario, Karen Hudson, Nova Scotia Legal Aid Commission (Evidence, 25 February 2016); Rick Woodburn, Canadian Association of Crown Counsel, Kate Matthews, Ontario Crown Attorneys' Association (Evidence, 9 March 2016); and Josh Paterson, British Columbia Civil Liberties Association (Evidence, 23 March 2016); Suzanne Polkosnik, President and CEO, Legal Aid Alberta; Graham Johnson, Criminal Trial Lawyers Association; and Ian Savage, Criminal Defence Lawyers Association of Alberta (Evidence, 28 September 2016); Kelly Kaip, Saskatchewan Crown Attorneys Association; and Andrew Mason, Saskatoon Criminal Defence Lawyers Association Inc. (Evidence, 29 September 2016); and William MacKay, Government of Nunavut (Evidence, 20 October 2016), among others.

297 See the testimony of Karen Hudson, Nova Scotia Legal Aid Commission (Evidence, 25 February 2016).

When an accused person does not qualify for legal aid services, some will succeed in applying for a *Rowbotham*[298] order from a judge, which directs the Attorney General to pay for the cost of state-funded counsel.[299] Some accused persons may also be fortunate enough to gain access to *pro bono* representation.[300] Despite this, many accused persons will remain unrepresented in court.

The committee discussed the current state of legal aid in Canada with witnesses appearing for services offered in Ontario, Nova Scotia, British Columbia, Alberta and Saskatchewan and with federal and provincial government officials, defence lawyers, and Crown prosecutors.[301] Most of these witnesses stressed the important role played by legal aid in ensuring accused individuals have professional legal representation, in particular for those without the means to hire their own legal counsel.[302] Kevin Fenwick, then Deputy Minister and Deputy Attorney General, Ministry of Justice, Government of Saskatchewan, summarized the importance of legal aid:

> Legal aid plays a crucial role in providing accessible legal services in criminal and family matters. … Our studies tell us that economically disadvantaged individuals who are accused of criminal offences are among the most marginalized and most vulnerable members of the population, often suffering from other social issues such as low literacy, mental health issues and low education rates, as well as alcohol and drug addiction.

Legal services may be provided by counsel working directly for the legal aid porgram, although the use of private defence counsel, paid by the legal aid program, appears to be more common across Canada.[303] Legal aid services are designed and offered by the provinces, although funding is provided by

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298 Named after the Ontario Court of Appeal decision in *R v. Rowbotham*, [1988] OJ No 271, 41 CCC (3d) 1 (ONCA), Rowbotham orders provide that a judge can suspend the proceedings after concluding that a lawyer is essential to a fair trial for an unrepresented accused who cannot afford one.

299 See also the testimony of Marcus Pratt, Legal Aid Ontario (Evidence, 25 February 2016); and Graham Johnson, Criminal Trial Lawyers Association (Evidence, 28 September 2016). Karen Hudson, then Executive Director of the Nova Scotia Legal Aid Commission (Evidence, 25 February 2016) further explained that Alberta faced more than 300 Rowbotham applications "last year" because the province had restricted funding to legal aid.

300 See the testimony of Tony Paisana, Canadian Bar Association (Evidence, 18 February 2016); Margaret Keelaghan, Calgary Legal Guidance (Evidence, 28 September 2016); and see the testimony of Andrew Mason, Saskatoon Criminal Defence Lawyers Association Inc. (Evidence, 29 September 2016).

301 The committee also notes that the House of Commons Standing Committee on Justice and Human Rights, through its study on Access to the Justice System has been looking at the issue of legal aid, beginning on 13 December 2016.

302 See the testimony of Ian Carter, Canadian Bar Association (Evidence, 18 February 2016); David Field and Marcus Pratt Legal Aid Ontario; Karen Hudson Nova Scotia Legal Aid Commission; and Mark Benton Legal Aid BC (Evidence, 25 February 2016); Jennifer Lopes, British Columbia Crown Counsel Association (Evidence, 27 September 2016); Suzanne Polkosnik Legal Aid Alberta; Graham Johnson, Criminal Trial Lawyers Association; and Ian Savage, Criminal Defence Lawyers Association of Alberta (Evidence, 28 September 2016); Craig Goebel and Joanne Kahn Legal Aid Saskatchewan (Evidence, 29 September 2016); and William MacKay, Government of Nunavut (Evidence, 20 October 2016), among others.

303 Scott Newark, *Justice on Trial: Inefficiencies and ineffectiveness in the Canadian criminal justice system*, Macdonald-Laurier Institute Report, September 2016, p. 19.

federal, provincial, and territorial governments and also from client contributions, cost recoveries from legal settlements, from contributions from the legal profession and from other sources.[304] From the federal government, the Department of Justice Canada's Legal Aid Program contributes funding to the provinces and territories for the delivery of legal aid services.[305]

According to Statistics Canada, legal aid expenditures include direct costs for legal services (e.g. legal representation, legal advice and the provision of information for both criminal and civil cases) and other expenditures (e.g. administrative costs).[306] Most legal aid plans spend more on criminal matters than on civil matters.[307] The federal government provided $112.39 million to the provinces and territories for the delivery of criminal and civil legal aid for the year 2014-2015.[308] Provincial and territorial governments contribute a larger share: $666.03 million in total across Canada for the same period.[309] From the total funding received by legal aid services in Canada in 2014-2015, $789.354 million (or 92.2 per cent) came from government sources.[310]

304 Manon Diane Dupuis, Statistics Canada, *Legal aid in Canada, 2013/2014*, 2015.

305 Department of Justice Canada, *Legal Aid Program*. Legal aid funding to the territories is provided through the consolidated Access to Justice Services Agreements.

306 Dupuis, Statistics Canada, 2015.

307 Ibid., Statistics Canada, Legal Aid Survey, *Legal aid plan direct legal service expenditures, by staff and private lawyers and type of matter*, 2014-2015.

308 Statistics Canada, Legal Aid Survey, *Federal government contributions to provinces and territories for legal aid*, 2014-2015. See also the testimony of Donald Piragoff, Department of Justice Canada (Evidence, 21 April 2016).

309 Statistics Canada, Legal Aid Survey, *Provincial and territorial government contributions to legal aid plans*, 2014-2015.

310 Statistics Canada, Legal Aid Survey, *Legal aid plan revenues, by type of revenue*, 2014-2015.

Several witnesses were critical of the fact that federal contributions to legal aid have not increased in recent years, and its share has, therefore, been decreasing over time.[311] The committee notes that the federal government announced in the 2016 budget that $88 million would be spent over five years to increase funding in support of the provision of criminal legal aid in Canada.[312] We fear, however, that this will be insufficient to address the demand for legal aid services. Suzanne Polkosnik, President and CEO of Legal Aid Alberta, expressed her concern about this:

> [F]ederal funding has remained essentially flat since 2008. The announcement of new funding coming for Legal Aid programs, when you take a look at the dollars, the current funding formula, the number of years over which it will be spread and the amount of money that really is at stake, it translates into about an additional million dollars for Legal Aid Alberta on an annualized basis, which results in us being able to operate for an additional six days.

The Canadian Bar Association set out in their submissions that since 2012, they have been calling for a comprehensive review of federal funding for criminal legal aid.[313] Kevin Fenwick, then Deputy Minister and Deputy Attorney General of the Government of Saskatchewan, said he hoped that discussions would flow from the fact that the legal aid funding agreement with the federal government and the provinces was to expire in March 2017:

> What we are interested in is meaningful discussions about how legal aid services are delivered to make sure that the provinces and Canada are getting the best bang for our buck and, most importantly, that the best services possible are being delivered for those who are entitled to legal aid.

Several witnesses described how a consequence of the current situation is that many low-income individuals are not qualifying for legal aid, and yet they cannot afford a lawyer. Unrepresented accused persons, who are not familiar with how the Canadian legal system operates, inevitably slow down criminal proceedings[314] by increasing the need for adjournments. Also, Donald Piragoff added that they can

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311 See the testimony of Kevin Fenwick, Ministry of Justice, Government of Saskatchewan (Evidence, 24 February 2016); Karen Hudson, Nova Scotia Legal Aid Commission (Evidence, 25 February 2016); and Suzanne Polkosnik, Legal Aid Alberta (Evidence, 28 September 2016), among others.

312 Government of Canada, Budget 2016, Chapter 5 - An Inclusive and Fair Canada.

313 Canadian Bar Association, "Study on matters pertaining to delays in Canada's criminal justice system", *Brief Submitted to the Standing Senate Committee on Legal and Constitutional Affairs*, 17 February 2016.

314 See the testimony of Suzanne Polkosnik, Legal Aid Alberta (Evidence, 28 September 2016); and Andrew Mason, Saskatoon Criminal Defence Lawyers Association Inc. (Evidence, 29 September 2016). Rick Woodburn, President of the Canadian Association of Crown Counsel, also explained that some people choose to remain unrepresented. This point was underlined in a 2012 Department of Justice Canada report on Legal Aid Program Evaluation, p. iii: "According to key informants and criminal justice professionals, unrepresented accused cannot effectively present their case, an opinion that is corroborated by recent studies, showing unrepresented accused are less likely than accused with counsel to be granted interim release, be acquitted, receive a stay of proceedings, or have charges withdrawn or dismissed."

increase "the number of court delays, stays, court orders for funded defence counsel, wrongful convictions, and the likelihood that sentences will be challenged or overturned."

Ian Carter noted how "a judge has to bend over backwards" to make sure unrepresented accused are getting a fair trial. Kate Matthews, President of the Ontario Crown Attorney's Association, summarized this situation in these terms:

> If you were running a trial or any proceeding with a self-represented litigant, they cannot concede certain issues that trial counsel might, and you cannot ask them to. We can't narrow the scope of proceedings that we might otherwise do. We have to take great care to ensure they understand everything that's happening in the process and that their rights are respected.

Jennifer Lopes, Vice-President of the British Columbia Crown Counsel Association had similar views:

> Dealing with unrepresented accused causes delays in the proceedings due to our inability to engage in resolution discussions, the additional proceedings to deal with issues such as the appointment of counsel to cross-examine, and our inability to obtain admissions of fact which clearly reduces trial time.

There is not a lot of information available concerning the number of unrepresented accused persons appearing in courts in Canada.[315] As recommended in Chapter Two, there are many topics touched on in this study that would benefit from having Statistics Canada gather more information to build more comprehensive statistics.

One other negative consequence of underfunding legal aid worth noting was Richard Fowler's point that this is affecting senior counsel's ability to train junior lawyers. Fowler stated:

> The issue or the problem I would like you all to think about is this: The best way to train young lawyers is by having them attend in court with senior counsel to be mentored in the old traditional sense. The significant cuts to Legal Aid have greatly impacted the ability of senior counsel to take junior counsel to court. …

In conclusion on this matter, the committee strongly believes that having an adequately resourced legal aid system in criminal matters is an essential tool to prevent delays and to maintain the integrity of our justice system. Unrepresented accused persons face significant challenges when navigating the complexities of criminal law on their own. Canada's legal system should ensure access to justice, and legal aid is one of the important ways this can be achieved. Legal aid programs need to offer competitive rates to help defence lawyers accept cases.

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[315] Department of Justice Canada, *Legal Aid Program Evaluation, Final Report*, January 2012, p. 36: "Although there are reports of unrepresented accused increasing in Canada, these are largely anecdotal. There are no time series studies that would demonstrate any trends in the proportion of unrepresented accused."

Recommendation 29

The committee recommends that the Minister of Justice undertake a full-scale review of legal aid plans with a view to bringing access to legal aid up to acceptable levels across Canada.

Technological solutions

One of the themes raised throughout this report is creating technological solutions to speed up court proceedings. One important solution that needs to be integrated into the justice system is computer software that can assist accused persons, and unrepresented accused persons, in particular. As recommended in Chapter Five, criminal proceedings in Canada need to be managed with the assistance of computer systems that, among other things, facilitate interaction between parties and the courthouse. Software should be designed to be user-friendly for unrepresented accused persons. A computerized system could simplify the process with regard to setting dates and court appearances.[316] RedMane Technology Canada Inc., made the following recommendation:

> Increasingly the court is seeing individuals represent themselves in criminal matters. This can cause challenges for the court in ensuring that individuals have the information that they require in the court process and that communication with the accused is appropriate. A portal that is accessible to the accused through a secure website or mobile device will allow individuals to submit information to the case management system, receive e-disclosure and other relevant documentation. It also will allow for sharing court dates and collaboration with respect to scheduling and motions.[317]

Other technological solutions were raised during the study that would help accused persons who do have representation. Ian Carter, from the Canadian Bar Association, mentioned that in some regions, defence lawyers are reporting a lack of access to clients that could be improved with better videoconferencing aids:

> [T]his can come back to some of the things that are mentioned in the report about using technology such as video. It's not widely available right now, and so for instance in Whitehorse there is a brand new facility that was erected there, and it has only two meeting rooms in the entire facility, and that's for everybody, lawyers included.

Defence lawyer Philippe Knerr discussed a new video appearance system in Montreal which allows a defence lawyer to communicate “much faster” with inmates in Bordeaux prison. Michael Waby from the Ontario Ministry of the Attorney General talked about a pilot project that will allow defence counsel to

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316 See the testimony of Kate Matthews, Ontario Crown Attorneys' Association (Evidence, 9 March 2016), among others.

317 RedMane Technology Canada Inc. *Brief Submitted to the Standing Senate Committee on Legal and Constitutional Affairs*, 30 January 2017, p. 9.

communicate with clients from their computer. As already recommended in Chapter Five, the committee strongly supports the increased installation of videoconferencing in courthouses and detention facilities.

Recommendation 30

The committee recommends that the Minister of Justice ensure that better support is available for unrepresented accused persons across Canada; in particular, by working with the provinces and territories to facilitate the establishment of user-friendly computer portals for managing court appearances and understanding court procedures.

Pre-trial Detention (or Remand) and Bail Hearings

Many witnesses shared serious concerns that the number of persons held in pre-trial detention or remand has increased three-fold over the last 35 years.[318] Since 2004–05, the number of people held in remand has been larger than the number of offenders serving custodial sentences in a provincial or territorial correctional facility.[319] Being held on remand while awaiting trial is an option intended only to hold in custody those who pose a risk of not appearing for their trial dates or who pose a risk to society. Statistics Canada defines "remand" as a "[c]ourt ordered temporary detention of a person, pursuant to a Remand Warrant, while awaiting trial or sentencing, or prior to commencement of a custodial disposition."[320]

Under the *Criminal Code*, once a person has been arrested by the police and has not been conditionally released from custody (section 503(2)), that person must be brought before a justice of the peace or judge within 24 hours or "as soon as possible" (section 503(1)). In general, that person will be kept in custody until a bail hearing.[321] The procedures for bail hearings are determined by the provinces, and there is some variation among provinces and territories. In some provinces, it is generally only provincial court justices that conduct bail hearings while in others, such as Ontario, Alberta and British Columbia, bail hearings are presided over by justices of the peace.

Under the Charter, an accused has the right "not to be denied reasonable bail without just cause" (section 11(e)) and benefits from the presumption of innocence (section 11(d)). At the bail hearing, the

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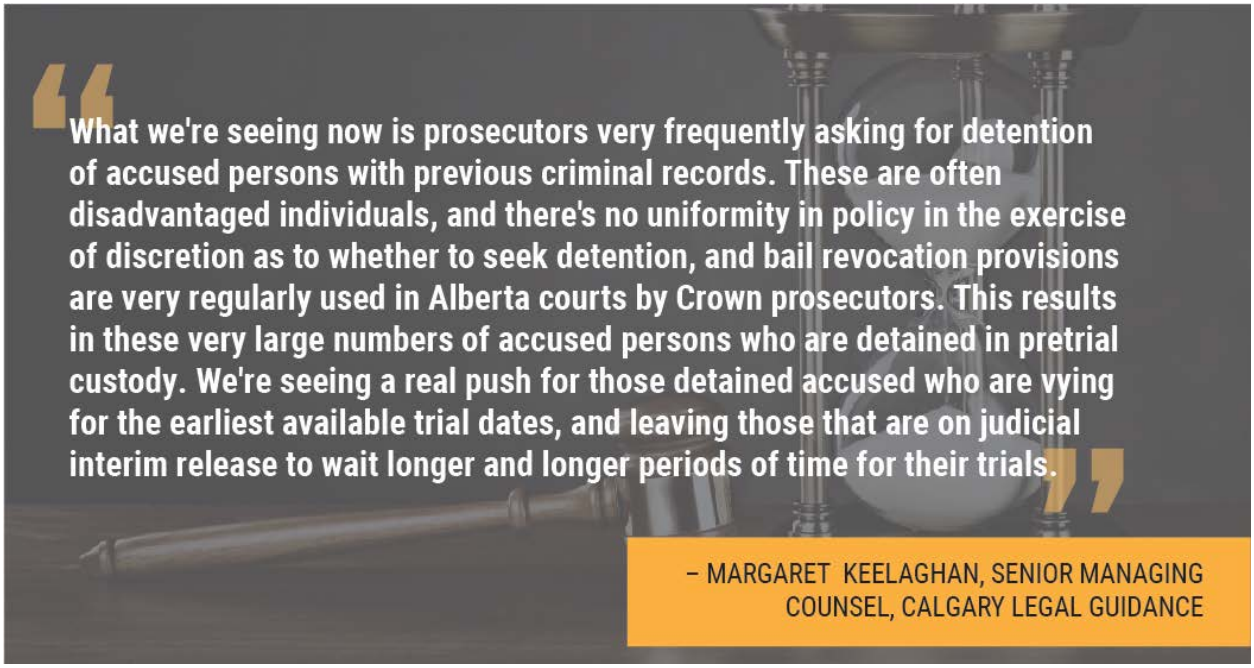
318 See the testimony of Patrick J. LeSage, former Chief Justice of the Ontario Superior Court of Justice (Evidence, 3 February 2016); Leo Russomanno, Criminal Lawyers' Association (Evidence, 18 February 2016); David Field, Legal Aid Ontario; and Mark Benton, Legal Aid BC (Evidence, 25 February 2016); Rebecca Bromwich, the Church Council on Justice and Corrections; and Catherine Latimer, John Howard Society of Canada (Evidence, 10 March 2016); Professor Cheryl Webster, University of Ottawa (Evidence, 13 April 2016); Dale McFee, Ministry of Justice, Government of Saskatchewan (Evidence, 21 April 2016); Ian Savage, Criminal Defence Lawyers Association of Alberta; and Margaret Keelaghan, Calgary Legal Guidance (Evidence, 28 September 2016); Chief Clive Weighill, Saskatoon Police Service; Joanne Khan, Legal Aid Saskatchewan; and Andrew Mason, Saskatoon Criminal Defence Lawyers Association Inc. (Evidence, 29 September 2016); Ian Carter, Canadian Bar Association (Evidence, 19 October 2016); and Kim Beaudin, Congress of Aboriginal Peoples (Evidence, 27 October 2016), among others.

319 Department of Justice Canada, Research and Statistics Division, Cheryl Marie Webster, *"Broken Bail" in Canada: How We Might Go About Fixing It*, June 2015, p. 2.

320 Statistics Canada, *Definitions*, "Remand".

321 The *Criminal Code* refers to "Judicial Interim Release" (s. 515) and does not refer to "bail" or "bail hearing".

general rule is that the prosecutor must provide justification for imposing release conditions or for keeping the accused in pre-trial detention.[322] Unless the detention can be properly justified, the justice of the peace or judge must release the accused after he or she has signed an undertaking to appear without conditions (section 515(1)). If the offence is one set out in section 469 (e.g. murder), detention is, however, automatically ordered (section 515(11)). In deciding whether to release an accused, numerous factors will be considered, such as ensuring the accused's attendance in court, the gravity of the offence, the severity of the penalty, the strength of the prosecution's case, and the circumstances surrounding the commission of the offence.



The Department of Justice is aware that there is a serious issue with bail and remand in Canada, having commissioned a report on this topic by University of Ottawa Professor Cheryl Webster, which is entitled *"Broken Bail" in Canada: How We Might Go About Fixing It*.[323] The report provides an overview of various challenges with the current state of pre-trial detention in Canada. The author notes that the increasingly high numbers of persons in remand over the past decades has strained limited resources and made managing the remand population difficult. It has also resulted in the bail process taking longer, with more adjournments. Accused persons are spending more time in remand awaiting a decision on their bail application. She concludes that isolated changes are unlikely to be particularly effective in the long run and, therefore, Canada's overall approach to bail needs to change the "risk-averse mentality [that] has permeated the bail process and translates into vigorous attempts to avoid releasing accused persons who might subsequently commit crimes while on bail." In other words, what is needed is "systemic change" or

[322] For certain specific offences, the *Criminal Code* provides for a reverse onus (ss. 515(6) and (11)) compelling the accused to prove that his or her detention is not justified in the circumstances (see s. 515(10)).

[323] Department of Justice Canada, Research and Statistics Division, Cheryl Marie Webster, *"Broken Bail" in Canada: How We Might Go About Fixing It*, June 2015.

a new bail regime that does not detain anyone unless the Crown demonstrates a need to do so. Professor Webster observes that:

> [A] different mindset is needed that will force the key players to reconceptualise bail as it was originally intended: a summary procedure which upholds and defends the presumption of innocence while ensuring – above all – the attendance of the accused in court.[324]

Professor Webster also explained to the committee that problems with the bail process and accused persons in remand, "while clearly interrelated phenomena," have different underlying causes and will require different solutions.

Professor Webster illustrated some of the aspects of the current situation using statistics from Ontario. In that province, a smaller number of accused people are detained on remand for a very long time. Approximately two-third of all remand prisoners (65.6 per cent) stayed in custody for one to seven days, while a smaller group of prisoners (7.5 per cent) were in remand for 61 days or more.[325] She concluded that "[t]he focus of attention should be on reducing delays in resolving in-custody cases with particularly long remand stays." She also added that particular attention should be given to the number of Indigenous people in remand.

Many witnesses expressed strong concerns about the remand problem. Rebecca Bromwich, representing The Church Council on Justice and Corrections, said that:

> It's notorious and unconscionable that Canada's crowded prisons are filling with ever-increasing numbers of our population who are on pretrial remand. It's a problem from both an ideological perspective and a practical one. We see huge problems with overcrowding in prisons as a result of this.

She added that it was her organization's view that this problem "is at the heart of the delay." Catherine Latimer from the John Howard Society of Canada said that "one of the most serious problems facing the criminal justice system today is the remand crisis." She added that "some people remain in detention for years before having charges against them adjudicated."

Whereas sentenced offenders are supervised and placed in rehabilitation programming that is intended to be appropriate for their needs, those on remand are unlikely to receive the type of attention that might address their needs for rehabilitation or treatment. Margaret Keelaghan from Calgary Legal Guidance and Patrick Baillie from the Mental Health Commission of Canada expressed concerns about the limited programming that is available in remand centres.

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[324] Ibid., p. 12.

[325] See also Webster, 2015, p. 10.

Michael Waby from the Ministry of the Attorney General of Ontario noted that his province is seeking to address this concern by opening two new correctional facilities (in Toronto and Windsor) that "place a premium" on programming, education and training:

> It is specifically tailored for the remand population so that where some offenders may need and require benefits of longer-term programming through a probation order or through a prison sentence, the remand programming at these two facilities is designed to be tailored more to the needs of a short-term remand inmate.

For others, the action that needs to be taken is to find better ways to keep people out of remand centres. One alternative to remand could simply be finding ways to grant bail under certain conditions that do not require detention in a facility. Another might be granting the police more discretion to exercise their powers to release an accused person that would still require that they appear in court to face their charges later. National Vice-Chief Kim Beaudin from the Congress of Aboriginal Peoples spoke about the need for accused person to have access to more bail options, especially for Indigenous peoples. He said that "[t]he justice system needs to consider options that would consider the ability of the accused if let out in the community." He called for an increase in funding for "bail beds," which give accused persons without a fixed address a place to stay while on bail that is less costly to operate and less restrictive to their liberty. Vice-Chief Beaudin also recommended an increase in the use of the release procedures available to the police, which would avoid the need for bail hearings. Professor Webster noted that in Ontario "[i]n 2012, police were sending almost one out of every two criminal cases to court for a bail hearing."

Delays in bail hearings are another issue that must be addressed, especially due to the fact that a person's liberty is restricted while they wait. Anita Szigeti, representing the Criminal Lawyers' Association, articulated how scheduling challenges impact accused persons:

> There are enormous problems with bail, obviously, and the right to have a bail hearing within a day is out of the window these days when we have to see trial scheduling officers to try and get a date and time for a bail hearing, which is not how the system is meant to operate. That is a systems issue in terms of availability of judges, courtrooms and resources.

Delays are also lengthened by adjournments during bail hearings, which Professor Webster noted occur frequently (often due to a request by the defence). She added that an adjournment "does not appear to necessarily ensure that the next appearance moves the case any closer to resolution." Professor Webster later added that "each of the main players in bail are delaying decision-making processes or passing it on to the next person."

The above-noted issues with legal aid funding also have an impact on bail hearings, as many accused persons may be unrepresented at this stage of their proceedings. Ms. Szigeti mentioned that, in her jurisdiction, "most of the defence bar has stopped providing that service to clients who are dependent on legal aid since the tariff was reduced to two hours, and none of the waiting time or other time is covered." Ian Carter from the Canadian Bar Association also mentioned the need to increase legal aid funding to assist accused persons in their bail applications. Andrew Mason, representing Saskatoon Criminal Defence

Lawyers Association Inc., noted that: “There is a huge glut of remand because we lack the resources to deal with it. A lot of people on remand probably could be released but did not have the resources at the time of their bail hearing.”

David Field, from Legal Aid Ontario, explained how Ontario has recognized this issue and is taking action to address it:

> We've developed and expanded coverage for bail variations, second bail hearings and bail reviews. We've improved and enhanced our support for test case work. We've increased our support for mentoring by funding new or mid-level lawyers to apply for mentoring on complicated cases. We've made billing improvements to reduce the administration burden on lawyers doing legal aid work, and we've enhanced our duty counsel services.

Mr. Waby spoke about how Ontario had “looked at how our bail process is going and tried to apply a technological lens to that.” He explained that technology to facilitate video bail hearings is being put into place in parts of Ontario.

Catherine Latimer presented the John Howard Society of Canada’s assessment of the bail process and where reform should focus:

> While more bail alternative programs and changes in policies could provide immediate relief for these problems, we think that the *Criminal Code* provisions that provide the legislative framework for pretrial detentions and release need to be overhauled. The grounds for detention need to be tightened, limits need to be placed on bail conditions, the reverse onus provisions need to be dropped, and there need to be strict limits on the duration of pretrial detention. This should really be legislated.

Patrick J. LeSage, former Chief Justice of the Ontario Superior Court of Justice, also talked about the need to reduce the number of reverse onus provisions for bail hearings, which make the process too complex. Ms. Bromwich suggested that: “Section 515 of the *Criminal Code* and the manner in which it interrelates with provincial and territorial interim release procedures and processes should be looked at in terms of simplifying and obviating delays in the criminal justice system.”

One other telling piece of evidence presented by witnesses came from Dale McFee from the Government of Saskatchewan, who noted that the remand population has grown by 97 per cent since 1998 in his province. He also discussed the need to improve the efficiency of how we use remand. Most importantly, he presented evidence of a study in Saskatchewan that determined that “there's no correlation between increased custody and crime reduction.” If there is little or no increase in community safety from a higher remand population, this underscores for the committee that current practices should be reconsidered.

The committee is in agreement that there is need for reform of the bail process and of the manner in which accused persons are detained on remand. The committee is encouraged by the efforts described

by witnesses from Ontario that show a willingness to invest in improving the infrastructure and support system for bail hearings so that they proceed more efficiently. Legal reform to simplify *Criminal Code* provisions that may be a barrier to decreasing the remand population should be considered by the Minister of Justice and be part of her own efforts at criminal law reform. Canadian governments should also ensure that treatment, rehabilitation and occupational programs are offered to those in remand so that their time in detention is well-spent. This is especially true for those with mental health issues and addictions.

Recommendation 31

The committee recommends that the Minister of Justice:

- **prioritize reducing the number of persons on remand across Canada; and**
- **work with the provinces and territories to establish a plan for proceeding with appropriate reforms to the current bail regime.**

The committee wishes to underscore again that technological solutions should be spearheaded by the federal Ministers of Justice and Public Safety so that they can be adopted across Canada by provincial and territorial governments. Videoconferencing is an easy fix that courtrooms can set up on their own, but the committee was particularly interested in a project described by Angela Connidis of Public Safety Canada. She informed the committee that projects are under way to test and improve electronic monitoring devices that could be worn by those on remand in order to track their location and allow a better alternative to incarceration. The federal ministers should be assisting in the development and distribution of this technology so all jurisdictions have it available for use as soon as possible.

Recommendation 32

The committee recommends that the Ministers of Justice and Public Safety and Emergency Preparedness prioritize the development and production of electronic monitoring mechanisms as an alternative to detention in remand for suitable accused persons.

Administration of Justice Offences

The first witness to appear before the committee during this study was the Honourable Patrick J. LeSage, former Chief Justice of the Ontario Superior Court of Justice. He flagged administrative offences – or administration of justice offences – as an issue that needs to be addressed in order to minimize delays:

> We see the issues of what I refer to and I think is statistically referred to as administrative offences so that now 40 per cent of the people charged with criminal offences also end up being charged with an administrative offence. That simply is an offence that has arisen because at some stage along the way in the process, which is often too long, they have failed to follow the restrictions that have been put on them, some of which were probably unnecessary and some of which do not really deserve to be in the criminal justice system. So there has been a dramatic increase in the administrative offence.

Administration of justice offences are set out in the *Criminal Code*, and include: failure to comply with conditions; failure to appear in court; breach of a probation order; being unlawfully at large; failure to comply with an order; and other offences against the administration of justice, such as corruption and disobedience, misleading justice, impersonating a peace officer and perjury, among others.[326] Donald Piragoff from the Department of Justice Canada described them as follows:

> Essentially, these offences occur when a person out on bail breaches the conditions of their bail. Some of the conditions have nothing to do with the substantive offence. For example, they might breach a curfew or consume alcohol when they're not supposed to consume alcohol. They're then brought back before the court with a new charge.

Offences against the administration of justice differ from other offences in that:

- they rarely involve harm to a victim, other than to the justice system itself;
- they do not involve behaviour that is popularly considered "criminal": rather they involve disobeying orders of the court or other parts of the justice system; and
- they are "secondary" offences in that they can be committed only after another offence has already been committed, or alleged.

According to Statistics Canada, these offences represented more than one in five cases (23 per cent) completed in adult criminal court in 2014-2015.[327] These cases had a median of four appearances and took over two months (73 days) to complete. In 2015, police reported 175,341 incidents of offences against the administration of justice.[328] In most cases, these offences are committed when an accused person breaches a pre-trial condition or the conditions included as part of a sentence imposed for a previous offence. Professor Webster mentioned that many accused persons "are frequently held for a bail hearing and, if released again, often have an even greater number of conditions, the cycle tends to repeat itself."

The high portion of court time being used to address these offences led many witnesses to question whether the conditions that are being imposed by judges on accused persons as part of their release are, in fact, appropriate and realistic. Catherine Latimer commented that "[t]hose who are ultimately released on bail may first appear in court many times, are often subject to conditions that are excessively onerous, and far too often they breach their conditions. We find that about 20 percent of adults in courts are there for administration of justice breaches."

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326 Ashley Maxwell, Statistics Canada, *Adult criminal court statistics in Canada, 2014/2015*, 2017; Marta Burczycka and Christopher Munch, Statistics Canada, *Trends in offences against the administration of justice*, 2015. See Appendix 1 and Appendix 2 (of the second Statistics Canada study) for a complete list of offences against the administration of justice listed under the *Criminal Code* that are included in the Uniform Crime Reporting Survey and the Integrated Criminal Court Survey.

327 Maxwell, Statistics Canada, 2017, p. 6

328 Mary Allen, Statistics Canada, *Police-reported crime statistics in Canada, 2015*, 2016, table 5.

Administrative offences do serve an important purpose. They are intended to allow accused persons to maintain their liberty, but under conditions that will ensure they keep the peace and appear in court to face the charges against them. Rick Woodburn from the Canadian Association of Crown Counsel explained the public safety aspect of administrative offences:

> Administrative offences are important because people say there are too many of them. Our entire bail regime is founded on the administration of justice, so if we let somebody out on bail, most of them are people who have breached their bail conditions. So if we're not going to punish them and monitor them but release them on bail, what happens then? They're just going to run free. I don't think the public would like that very much.

The committee does not question the value of administrative offences, but recognizes that the evidence indicates they are, to borrow words from William Trudell of the Canadian Council of Criminal Defence Lawyers, "clogging the courts." The status quo is using up valuable court time, which contributes to delays. Tony Paisana from the Canadian Bar Association noted that because accused persons appearing for administration of justice offences do not face the likelihood of jail, they are usually denied coverage for legal aid: "These impoverished and unrepresented accused then languish in the system. They request numerous adjournments to seek out low-cost or *pro bono* services, and when that fails, they haphazardly try to defend themselves." As noted above, unrepresented accused persons often contribute to delays in criminal proceedings.

To address the delay problems in Canada, it is necessary that the conditions imposed on accused persons are appropriate for the individual and evidence-based. They should also relate to the original charges. Questions of appropriateness arise in particular with regard to accused individuals who have mental health issues and addictions. For example, as articulated by Joseph Oliver from the Canadian Association of Chiefs of Police, requiring that alcoholic individuals abstain from alcohol as a condition of release from detention is likely to result in a breach of that condition and further interaction with the criminal justice system. .

Rebecca Jesseman from the Canadian Centre on Substance Abuse confirmed that "substance use also plays a role in administrative offences … Imposing bail or probation conditions requiring abstinence … has been deemed setting people up to fail." In Chapter Eight, we provide recommendations concerning how these accused persons with mental health challenges and substance abuse problems can be better "triaged" through our justice system. This evaluation of an accused person's circumstances and, as a result, determining whether they are best suited for detention, diversion programs or other appropriate measures should be part of bail hearings and the consideration of any conditions that might be imposed on a released accused person.

On their face, persons charged with administration of justice offences would appear to be good candidates for diversion, since they are not strictly indictable offences and involve no harm to a victim. Elsewhere in this report (see Chapter Eight) we have urged that consideration be given to diverting certain accused persons out of the traditional criminal justice system path. The area of administration of justice

offences also merits such consideration. Vice-Chief Beaudin was cited earlier in this chapter talking about the need to ensure that people released into the community are given the tools to succeed. This same concern applies to those who are diverted away from being charged with administration of justice offences. Many accused persons lack telephone numbers, fixed addresses, and other things that facilitate adhering to court dates or keeping in touch with justice system officials or defence counsel. Ensuring that these barriers can be overcome and that release conditions are tailored to the needs and abilities of accused persons will require the co-operative efforts of Crown and defence counsel, probation officers, service providers, and health care professionals.

Recommendation 33

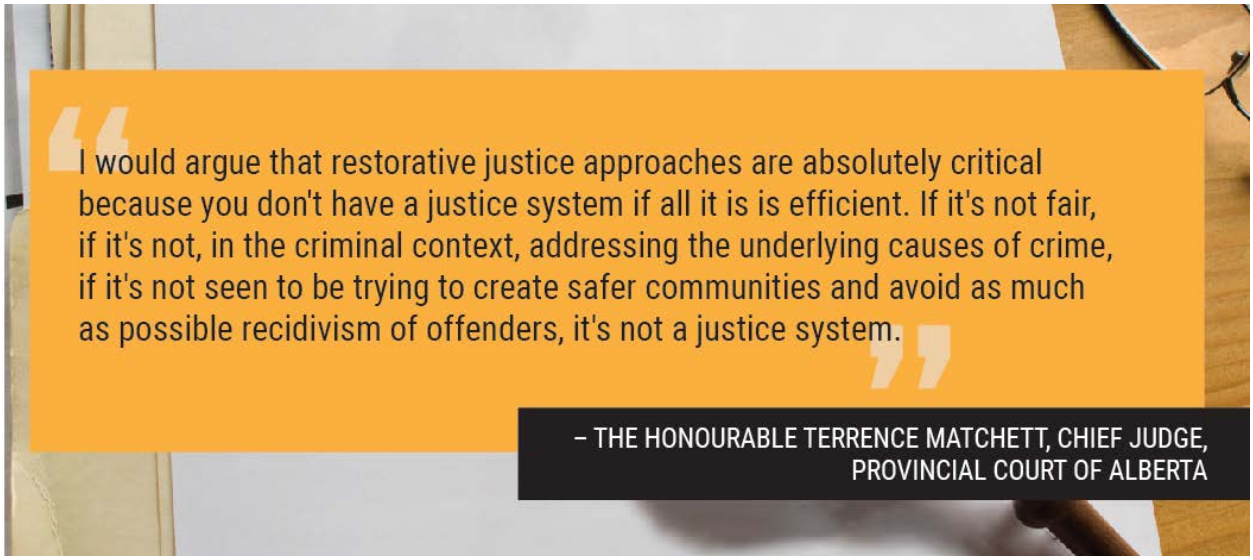
The committee recommends that the Minister of Justice prioritize the reduction of court time spent dealing with administration of justice offences and develop alternative means of dealing with such matters with the provinces and territories.

Recommendation 34

The committee recommends that the Minister of Justice work with the provinces and territories to craft conditions of release for accused persons that will serve to protect the public while at the same time reducing the number of administration of justice charges.

CHAPTER EIGHT - APPROPRIATE MEASURES: ALTERNATIVES TO THE TRADITIONAL CRIMINAL JUSTICE MODEL

> "[R]estorative justice does offer a range of alternative processes, policies and practices that seek to address and respond to harmful effects of crime on relationships and individuals, but restorative justice is about more than simply different mechanisms and ways of doing justice. I think it is at its core and the real potential it offers is as a different way of understanding what doing justice actually requires."
>
> – JENNIFER LLEWELLYN, PROFESSOR, SCHULICH SCHOOL OF LAW, DALHOUSIE UNIVERSITY



In Chapter Two, this report examined the traditional criminal justice system and how it handles proceedings from the laying of criminal charges against a person through to the final disposition of those charges. Solutions for improving the efficiency, expediency and fairness of this system must rightly look at which parts of this system can be fixed or improved. Many witnesses asked the committee to consider whether the traditional criminal justice model was itself appropriate for handling all the types of cases that pass through it, and to study alternatives to this model operating across Canada. During one of the first hearings for this study, the Honourable Patrick J. LeSage, former Chief Justice of the Ontario Superior Court of Justice, provided a quote that others returned to afterwards:

> I think that when starting your review, you must look at and consider whether the criminal justice system is really structured to handle much of what it receives. It receives the addicted, the homeless, the poverty stricken and the mentally ill, but the criminal justice system was not meant to really deal with those sorts of issues, and more and more they are taking up the time.

The evidence the committee heard on this question was quite clear: positive outcomes are being produced in Canada when it is possible to divert appropriate persons from the traditional court system to processes that are more suited not only to their rehabilitation, but also to the needs of society and victims of crime as well. The processes considered during our study included such measures as: restorative justice programs; specialized and therapeutic courts; pre-charge and post-charge diversion programs; court liaison programs; and integrated multi-agency teams, such as the Hub in Prince Albert, Saskatchewan. We also heard how the principles of restorative justice can and have influenced these measures in various ways, in particular with regard to the flexibility built into the criminal law for youths in Canada.

Section 717 of the *Criminal Code* provides for the use of "alternative measures," which are defined in section 716 as measures other than judicial proceedings under the *Criminal Code*. Such measures can be employed with adult accused persons "only if it is not inconsistent with the protection of society" and if a list of conditions is met. Some of these conditions are that the alternative measures be authorized by the Attorney General or other appropriately designated person, the accused person agrees to participate in them, and the accused person accepts responsibility for the act or omission that formed the basis of the offence allegedly committed. Alternative measures are not to be used if the accused person denies involvement in the commission of the offence or wishes to have any charge against him or her dealt with by the court. If an accused totally complies with the terms and conditions of the alternative measures, the court is to dismiss the charge.

An important point raised by Kevin Fenwick, then Deputy Minister and Deputy Attorney General with the Government of Saskatchewan's Ministry of Justice, was of the need to be wary of using the term "alternative" when talking about programs that divert accused persons and offenders away from the traditional courthouse route, saying that he preferred the term "appropriate measures." The committee concurs, since "alternative" suggests that such measures present a separate kind of justice or a different legal culture. What became clear from our study is that these measures have support across a diverse range of stakeholders in the justice system. And yet, many of these measures are still being tested and evaluated, rolled out in pilot projects, or are available only in certain parts of the country and they are still very much seen by many in the legal community as alternative streams.

Restorative justice programs, specialized courts, diversion programs and addictions treatment, among other initiatives, need to be more widely available to Canadians. They need to be brought into the mainstream of justice culture. They need to be recognized by justice system participants, whether lawyers, judges, police officers, social workers or other public servants, to be viable options that advance the goals of our justice system as much as the traditional courthouse can. Indeed, the measures explored in this chapter appear to work best when they are integrated as part of a range of options for dealing with accused persons, including the courthouse route. They require that justice system participants work

together to determine how accused persons, offenders and persons who are at-risk of criminal behaviour can best be treated and/or rehabilitated.

When witnesses advocated for appropriate measures, there was no suggestion that sentences should not reflect the severity of an offender's crimes, nor that such measures should detract from the value placed on the principles of denunciation and deterrence of crime. The justice community needs to be mindful that appropriate measures can improve the outcomes of our justice system, and, importantly for this study, improve the efficiency and fairness of our system, thereby reducing delays. Toronto lawyer Mary Murphy explained this further: "[A] system that is in place to effectively offer tools and strategies to rehabilitate individuals both promotes safety in the community and reduces the need for courts to allocate resources for trial time."

Various witnesses underscored that for many accused persons going through the court and detention systems, their unsuitability for traditional models not only hinders their rehabilitation, but also slows down and overburdens our court systems. "The adjudicative system can simply not meet the needs of the various issues we are facing in the provincial court," the Honourable Pamela Williams, Chief Judge of the Provincial and Family Courts of Nova Scotia, explained, "so we need to think about new, innovative and streamlined approaches." The "idea" therefore, is to divert suitable matters away from the courts before they get there, perhaps even before charges have been laid. As the Honourable Justice Terrence Matchett added: "Some of these cases can be diverted, not just to specialized courts, but it's time that the system started triaging the people who come before it."

The committee interprets "triaging" to mean the process of determining what type of attention a person requires, how urgently it must be given to them, and then, what option within the system is most suitable for them. Witnesses identified various categories of persons that could benefit from particular attention, including people with mental health issues and addictions, those involved in domestic violence, and sex offenders. Programs for youth and Indigenous Canadians are already in place to provide measures that reflect specific needs, as discussed further on in this chapter and Chapter Ten. Many Canadians have already benefitted from these appropriate measures, but for the most positive results to truly be realized, suitable programs need to be created across all regions. It is also significant that many of these programs are less costly than processing a person through the court system and then incarcerating them. It costs over $115,000 to maintain an offender in a CSC institution and almost $35,000 to maintain an offender in the community.[329] If a person can serve their debt to society and become rehabilitated by less expensive means, this could free up resources for other parts of the criminal justice system that, according to many witnesses, are in desperate need of funding. Of equal importance is that a more fulsome review and analysis of existing programs must be developed and shared broadly with justice system participants and the public to achieve real progress.

[329] Correctional Services Canada, *CSC Statistics – key facts and figures*, January 2017.

Mental illness and the Courtroom

> "I have three words that I use over and over again in describing the success of our therapeutic courts in Saskatchewan. The three words pertain, in particular, to our Drug Treatment Court in Regina, and those three words are "five clean babies." Over the past couple of years, five clean babies have been born to mothers who are in the Drug Treatment Court program. While we'll never know for sure whether those children or some of those children might become clients of the criminal justice system down the road, or certainly a cost to the taxpayer, I can pretty much guarantee you that if they had been born addicted they would certainly be a significant cost to the taxpayer."
>
> – KEVIN FENWICK, THEN DEPUTY MINISTER AND DEPUTY ATTORNEY GENERAL, MINISTRY OF JUSTICE, GOVERNMENT OF SASKATCHEWAN

The committee heard much about why persons with mental health concerns, who include those with addictions to legal or illegal drugs, are particularly unsuited for the traditional criminal justice model. The committee did not specifically address issues pertaining to those persons who are found not criminally responsible on account of a mental disorder.[330] A large number of witnesses held strong views that improving the way our criminal justice system treats those with mental health issues is imperative for it to be fair and efficient.[331] Greg DelBigio from the Canadian Council of Criminal Defence Lawyers explained why this is an issue requiring attention:

> The problem with dealing with certain individuals in the criminal justice system is that it does nothing to address the underlying cause of why that person is in the criminal justice system. It does not address the poverty, the mental illness or the substance abuse. In fact, for some of those people, when they get out of jail, if they had a house or home, it's gone. If they had employment, it's gone. When the home and

330 As set out in Part XX.1 of the *Criminal Code*.

331 See the testimony of Greg DelBigio, Canadian Council of Criminal Defence Lawyers (Evidence, 18 February 2016); Kevin Fenwick, Ministry of Justice, Government of Saskatchewan (Evidence, 24 February 2016); Catherine Latimer, John Howard Society of Canada (Evidence, 10 March 2016); Rebecca Jesseman, Canadian Centre on Substance Abuse; and Dr. Keith Ahamad, University of British Columbia (Evidence, 14 April 2016); Patrick Baillie, Alberta Health Services; Dr. John Bradford, Professor, University of Ottawa; Dr. Alexander Simpson, Centre for Addiction and Mental Health; Anita Szigeti, Criminal Lawyers' Association; and Louise Bradley, President and CEO, Mental Health Commission of Canada, (Evidence, 20 April 2016); Dale McFee, Ministry of Justice, Government of Saskatchewan (Evidence, 21 April 2016); Ian M. Carter, Canadian Bar Association (Evidence, 19 October 2016); Norman Taylor, Global Network for Community Safety Canada Inc; and Markus Winterberger, Analyst, Strategic Intelligence, Community Mobilization Prince Albert (Evidence, 29 September 2016), among others.

> employment are gone, that can affect families, and it cycles down. By keeping certain kinds of cases out of the system, the resources could better be used to address the cases that really should be in the system.

Mental illnesses and poverty are known risk factors that increase the likelihood that a person will end up in the criminal justice system. Or, as Marion Wright, Clinical Director at Rideauwood Addiction and Family Services, explained:

> The relationship between illegal drug use and criminal behaviour is well established and represents a continuing and costly problem in Canada… Research has concluded that those with substance use issues are more likely to have committed crimes, and those who have had contact with the criminal justice system are more likely to have substance abuse issues.

Rebecca Jesseman, Senior Policy Advisor with the Canadian Centre on Substance Abuse, also discussed the evidence concerning how problematic substance use itself predicts criminal recidivism, adding that generally hard drug use is often "associated with acquisitive crime such as theft, whereas alcohol use is more strongly associated with violent crime."

Some telling statistics were presented to the committee on this subject. Dale McFee, Deputy Minister of Corrections and Policing with the Government of Saskatchewan, said that: "Those with mental health and addictions are five times more likely to have three contacts with the police and represent up to 40 per cent of the police calls for service in some jurisdictions. They are the most vulnerable population to offend and to reoffend if they have offended already." William MacKay, a deputy minister with the Government of Nunavut's Department of Justice, added that in his territory: "the intake at our correctional facilities, 30 to 40 per cent of those offenders have indications or exhibit some form of mental disability or some other form of cognitive impairment. In terms of substance abuse and substance addiction, 90 to 95 per cent exhibit some form of alcohol or other drug addiction symptoms, so that is a significant problem for the offender population." Josh Paterson, Executive Director of the British Columbia Civil Liberties Association, noted estimates from the Vancouver police "that about 31 per cent of their calls involved people in poor mental health" and "[t]wenty-nine per cent of inmates in provincial jails in B.C. were considered mentally disordered, and recent statistics from the Correctional Investigator of Canada confirmed that the issues are the same in the federal correctional system for federal prisoners." Ms. Jesseman also noted that "[t]he majority of offenders in Canadian prisons have histories of substance use, and many have experienced trauma and mental health disorders."[332]

The Correctional Investigator of Canada has regularly reported on the high number of persons with mental health problems and addictions within the inmate population. The most recent annual report notes that over half of all women inmates and 26 per cent of male inmates have an identified mental health need. It reviews various studies and notes rates that "far exceed those found in the general

[332] See also Kai Pernanen, Marie-Marthe Cousineau, Serge Brochu, Fu Sun, *Proportions of Crimes Associated with Alcohol and Other Drugs in Canada*, Canadian Centre on Substance Abuse, April 2002.

population," such as: 16.9 per cent of inmates have mood disorders, 49.6 per cent have alcohol or substance use disorders, 29.5 per cent have anxiety disorders, 15.9 per cent have borderline personality disorder and 44.1 per cent have antisocial personality disorder. The report also adds that:

> We know that the rate of mental illness is higher in the inmate population compared to general society and recent research confirms that federal offenders are prescribed psychotropic drugs at a rate that is almost four times higher than the general Canadian population. Almost two-thirds of male offenders report using drugs or alcohol on the day of their current federal offence. For the seriously mentally disordered and addicted, a sentence of imprisonment has become the contemporary equivalent of being sent to the asylum.[333]

Those with mental health concerns and addictions in the justice system constitute a considerable population with pre-existing risk factors for crime. It stands to reason that if these root causes of crime are not properly addressed, then recidivism is the likely result. As explained by Dr. Keith Ahamad from the University of British Columbia, there is a "huge evidence base to support addiction as a chronic relapsing brain disease", and yet the "majority of clinical care is lacking and not keeping up with the science, and the care being provided in the correctional system is also indeed not evidence-based." The effect of inadequate programming for these offenders, he added, is "relapse and often re-incarceration."

A key element of the necessary cultural shift is for professionals within the justice system to see drug addictions as a mental health issue and to recognize that the rehabilitation and recovery of mentally ill persons depend on their participation in the appropriate programs. This does not mean that incarceration should not be part of an appropriate sentence for a drug-related crime, rather than the traditional justice model on its own will not serve to address the real problem of their addiction, and therefore will fail to reduce recidivism. "Processing people [with drug problems] through the justice system," explained Rick Audas, co-author of *Report Card on the Criminal Justice System: Evaluating Canada's Justice Deficit*:

> [I]s an extremely inefficient way of dealing with them and a much more efficient way … is to figure out what the underlying cause is and then to deal with that. …there's a significant shortage of resident facilities for individuals suffering from addiction. As a result, these are the recidivists that we see and these are the people who, while they're waiting to have one issue processed by the courts, are off committing more and more crimes.

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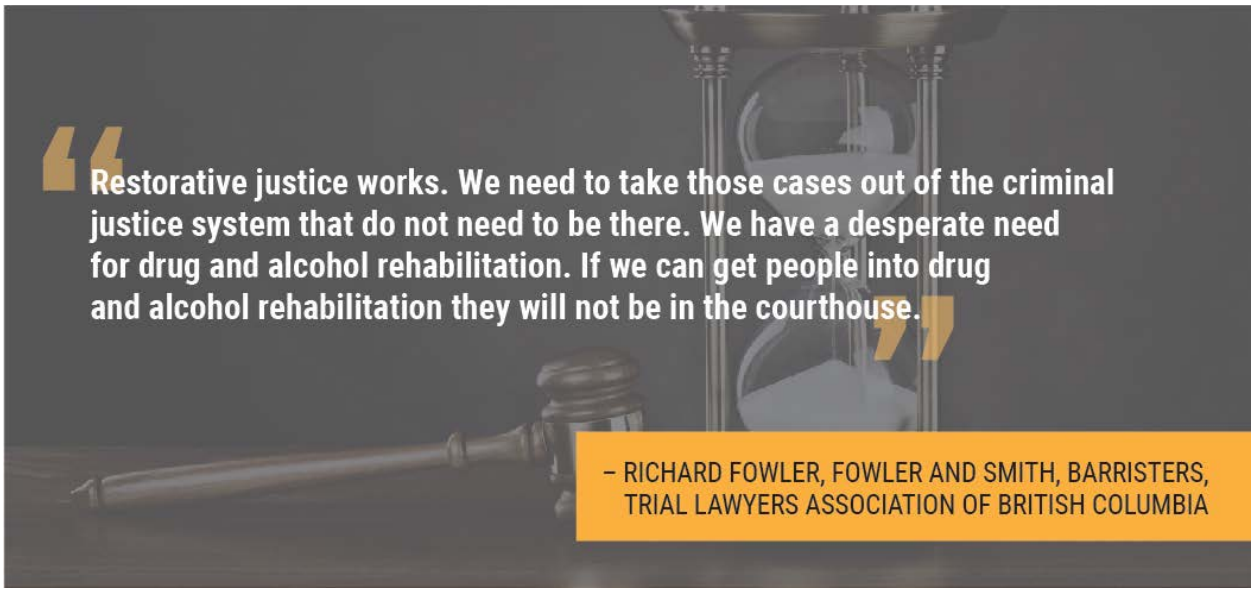
[333] Office of the Correctional Investigator, *Annual Report of the Office of the Correctional Investigator 2015-2016,* 30 June 2016. Also see, for instance, the internal report prepared by Crime Prevention, Corrections and Criminal Justice Directorate, Public Safety Canada, *Vulnerable Populations Over-represented in the Criminal Justice System: People with Mental Health Issues and Aboriginal People*, 2015.



Another concern identified by Dr. Alexander Simpson, Chief of Forensic Psychiatry, Centre for Addiction and Mental Health, is the capacity of mentally ill persons to navigate the demands of the court system:

> [A]ctive symptoms of illness can also impair the person's ability to defend themselves, to engage counsel and to arrange services to facilitate bail applications. The person's difficulty with the court setting and the circumstances of detention may worsen a person's mental state. It is not uncommon for counsel to have difficulty gaining instruction or for actively unwell defendants to fire their counsel, further delaying proceedings.

If a mentally ill person is not able to properly defend his or herself against criminal charges, the fairness of their trial could be affected.

Once in the system, witnesses explained that there are other challenges faced by persons with mental health issues. Dr. Ahamad explained a concern raised by other witnesses that when a person with addictions is released from detention, either on bail, probation or parole, the conditions that are imposed are often unrealistic, such as abstaining from drugs or alcohol: “they are often being set up to fail.” Scott Newark noted that this was only a matter of time:

> [T]he longer they're on those bail conditions, the more likely it is that they are going to breach their bail conditions. If they are detained in remand, there is often no programming or support to help them with their health concerns.”

In discussing this point, Joseph Oliver, Assistant Commissioner with the RCMP and representing the Canadian Association of Chiefs of Police provided some statistics and explained how persons with mental health issues and addictions who breach their release conditions then face administration of justice charges, such as breach of probation or failure to comply with an order:

> Adult criminal courts in Canada completed 360,640 cases in 2013/2014, of which 39% included at least one offence against the administration of justice among other charges. …
>
> When you look at these cases when it comes to offences against the administration of justice, often we are dealing with individuals who are prolific offenders or have addictions or mental health issues; and they are put on conditions when they are released, either a probation order or an undertaking, to abstain from the use of alcohol when they are alcoholics. What happens is they end up breaching or failing to comply, and then they get into the system for that.[334]

Dr. Patrick Baillie, from the Mental Health Commission of Canada, added that detention can impair a mentally ill person's chances for improvement: "We know that the biggest risk factor is not having a mental illness but having an untreated mental illness." Dr. John Bradford, a Professor at the University of Ottawa, expanded on this:

> [T]hey go to the local remand centre or the detention centre … to a place where there are almost no programs for mentally disordered people … They then deteriorate, their risk level increases, their chance of being released decreases, and that's part of the difficulty.

Anita Szigeti from the Criminal Lawyers' Association described the need to find appropriate supports for ill persons on remand: "For those individuals who are not getting bail because they're homeless and don't have housing or supports, we should have places for them to stay, if that's the only hole that needs filling for them to get bail." When mentally ill persons are finally released from detention, according to Dr. Ahamad, "there is no planning during their time in the criminal justice system thinking about their trajectory and health outcomes when they leave the criminal justice system."

This situation has impacts on other parts of the justice system as well. Police are being overburdened by responding to situations involving mentally ill persons. Police are regularly called upon to deal with persons going through mental health crises as a last resort when no other intervention has been successful. Joseph Oliver from the Canadian Association of Chiefs of Police noted that policing studies have addressed how "policing is increasingly being called upon to deal with these situations that are really not policing matters." He added that:

[334] For more recent statistics, see: Ashley Maxwell, Statistics Canada, *Adult criminal court statistics in Canada, 2014/2015*, 2017.

> As well, what happens is that once an individual comes to the attention of the police, often the only mechanism is that they end up in the court system and under some sort of conditions, and it keeps going round and round.[335]

It is not surprising given the challenges identified by witnesses that Dr. Patrick Baillie concluded that the "individuals who are experiencing the consequences of delays in the justice system are disproportionately those individuals who are already disadvantaged, in large part, due to mental health problems."

> "[U]nless we adopt and continue to advance our work at getting involved not after the fact but at the risk level and in a collaborative way we will just continue to see the same problem and it will get worse."
>
> – NORMAN TAYLOR, PRESIDENT OF GLOBAL NETWORK FOR COMMUNITY SAFETY CANADA INC.

Prevention

The best way to treat people at risk of becoming involved in crime, whether due to mental health concerns and addictions or other factors such as poverty, exploitation or abuse, is undoubtedly to provide assistance early. This can be achieve either through investing in prevention, that is, in services before they find themselves involved with the police, or at least in suitable programs to get them the assistance they need if they are apprehended by police. Chief Constable Adam Palmer of the Vancouver Police Department addressed "the well-known nexus between drug addiction" and crime when he explained why more needs to be invested in prevention and diversion programs:

> [I]t is important to recognize the value that comes from assisting people in a proactive manner before they become involved in the justice system … more needs to be done to support people trying to find treatment whether they have committed a crime or not. We need to look at other options such as treatment on demand whereby people are fast-tracked into detox and recovery when they come forward for help. This is not always the case today.

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[335] On 12 May 2014, the House of Commons Standing Committee on Public Safety and National Security reported on how mental health related issues are affecting policing in *Economics of Policing*. It reviewed relevant statistics from across Canada and concluded that: "The financial costs and resources invested as a result of the police becoming more and more engaged in social issues relating to mental health, addictions and homelessness are significant." Its first recommendation was "…that governments constitutionally responsible for health care work in collaboration with local police forces through the health care system to achieve better practices when dealing with persons having mental health problems and illnesses, outside of the police being the first and only line of response."

Some witnesses, such as Heidi Illingworth, Executive Director of the Canadian Resource Centre for Victims of Crime, stressed that investing in the prevention of crime might be the best investment the federal government could make towards improving the efficiency of the justice system and addressing delays. Dr. Ahamad made this point in financial terms, explaining that: "For every dollar we spend on evidence-based drug treatment, we save $4 to $7."

Determining the economic costs and benefits of investing in particular mental health services as a means to address lengthy criminal trials is beyond the scope of this report; however, it is clear that not adequately addressing mental health issues in Canada is having an impact on the efficiency of our criminal justice system. The committee agrees that increased resources must be invested in proper treatment for persons with mental health problems, including addictions.

While much of this investment will involve Canada's health system, there also need to be programs that involve justice system participants. The Ministries of Justice, Public Safety and Health, among others, must therefore coordinate their efforts and have a strategy for ensuring that adequate health services are available to persons with mental illnesses, including those with drug and alcohol addictions. There should be programs in place aimed at the prevention of crime by persons with mental illnesses. There also needs to be leaders in the criminal justice and mental health fields to develop effective programs and to train people to be aware of when these programs are appropriate. As Anita Szigeti explained, there needs to be "education of justice system participants to ensure knowledge of the law, of options, of resources, of how to interact with people in crisis and respecting their legal and procedural rights while respecting autonomy and self-determination as much as possible."

In addition to hearing witnesses' views on the need for more funding for mental health services in Canada, the committee is also aware of the report by one of these witnesses, the Mental Health Commission of Canada (MHCC), which in 2012 published the strategy document: *Changing Directions, Changing Lives*.[336] In that report, the MHCC recommended that the proportion of health spending that is devoted to mental health be increased from seven to nine per cent over 10 years and that the proportion of social spending that is devoted to mental health be increased by two percentage points from current levels. Determining the appropriate amounts for funding mental health services is a question for another study, but any increase in funding should have a positive impact in preventing crimes from being committed.

Recommendation 35

The committee recommends that the Government of Canada, in particular the Ministers of Justice, Health and Public Safety and Emergency Preparedness, coordinate an evidence-based strategy with clear targets to ensure that adequate health services are available for Canadians with mental health issues, including those with drug and alcohol addictions. In particular, funding should be provided

[336] Mental Health Commission of Canada, *Changing Directions Changing Lives: The Mental Health Strategy for Canada*, 2012.

for programs aimed at the prevention of crime by persons with mental health issues and for the treatment of such persons in detention.

Diversion and treatment programs

> We all know the benefits to diverting cases from the courts. This could be achieved by providing different options for summary and some dual offences versus indictable offences. Some dual offences would go to court and others simply wouldn't. This would require a stringent vetting process and result in criminal court being reserved for the most serious offences and greatest public safety concerns. As police, we know that prison tends to simply create better criminals instead of rehabilitating individuals.
>
> – CHIEF JEAN-MICHEL BLAIS, HALIFAX REGIONAL POLICE

> Tools to enable police services to exercise appropriate discretion to keep out [of] the mainstream court system individuals who don't need to be there is only a sensible and prudent course… putting more people into the system who don't need to be in the system is not desirable from anybody's perspective.
>
> – MICHAEL WABY, EXECUTIVE DIRECTOR, CRIMINAL JUSTICE MODERNIZATION, MINISTRY OF THE ATTORNEY GENERAL OF ONTARIO

Once a mentally ill person has come in contact with law enforcement due to an alleged crime, there are various opportunities to provide them with services appropriate to ensuring not only that their rights as an accused to a fair trial are protected, but also that they receive treatment to promote their health. It thereby better ensure they do not have further problems requiring police attention. The earliest opportunity to set these services in place is before charges have been laid. Leo Russomanno, a lawyer with the Criminal Lawyers' Association, suggested that "dealing with pre-charge diversion and basically giving the power to avoid the need for a criminal proceeding and have people go an alternate route would be one thing that should be the focus of this committee."

Witnesses such as Mr. Oliver, Ms. Jesseman and Dr. Ahamad discussed evidence-based treatment programs that are effective at reducing relapse and re-incarceration. Programs can be made available to

accused persons either before or after charges have been laid. Where possible, early identification of the need for treatment and intervention can be very helpful, though this can only happen if suitable programs are available. Court liaison programs in some jurisdictions seek to detect and offer assistance as early as possible. Dr. Simpson noted that: "Early detection and provision of treatment during the court processes may diminish [m]any of the delays that are of concern to the committee." In some jurisdictions, individuals may be able to have their case transferred to what are known as therapeutic courts, including mental health courts and drug treatment courts, which are discussed below.

If these diversion programs are effective, they can, to quote Chief Judge Pamela Williams, "off-ramp the low complexity matters" so that "the majority of the resources" can be directed towards:

> [T]he complex matters — the aggressive judicial pre-trials, resolution conferences, focus hearings and pre-trial motions — so that the majority of the resources in the system can really deal with those complicated cases or vulnerable cases involving children, the elderly, sexual offences and major serious violence.

In other words, cases can be appropriately triaged to where the most appropriate resources are available.

Many witnesses stressed that in order for treatment programs to be effective, they first require the use of discretion on the part of police, Crown counsel or judges to determine whether a person should be considered for appropriate measures. As Joseph Oliver explained, this could in fact be a "collective team [that] comes together to either deal with prolific offenders or earlier intervention that will actually try to divert individuals from getting into the court system at all." Before an accused can be sent to a drug treatment centre, for instance, an health professional needs to assess whether a person is, in fact, an addict in need of assistance, or whether a person is dealing with a mental illness that is at the root of the problem that has led to him or her being apprehended by the police. Many witnesses commented upon the importance of increasing the availability of pre- and post-charge diversion programs.[337]

Police officers must use their discretion to assess whether pursuing charges or diverting an accused person to an appropriate program would be in society's best interest. Of course, the nature of the alleged crime will also be a relevant factor: a charge involving violent crime will need to be dealt with differently than a minor property crime or the possession of a small amount of illegal drugs. The President of the Canadian Police Association, Tom Stamatakis, explained that:

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[337] See the testimony of Leo Russomanno, Criminal Lawyers' Association (Evidence, 18 February 2016); Kevin Fenwick, Ministry of Justice, Government of Saskatchewan (Evidence, 24 February 2016); Karen Hudson, Nova Scotia Legal Aid Commission; and Joseph Oliver, Canadian Association of Chiefs of Police (Evidence, 25 February 2016); Josh Paterson, British Columbia Civil Liberties Association; and Tom Stamatakis, Canadian Police Association (Evidence, 23 March 2016); Chief Jean-Michel Blais, Halifax Regional Police (Evidence, 6 May 2016); Geoffrey Cowper, BC Justice Reform Initiatives (Evidence, 27 September 2016); Denise Blair, Calgary Youth Justice Society; and Chief Constable Roger Chaffin, Calgary Police Service (Evidence, 28 September 2016); Chief Clive Weighill, Saskatoon Police Service (Evidence, 29 September 2016); and Professor Marie Manikis, McGill University (Evidence, 28 October 2016), among others.

> Police officers use their discretion every day to informally divert people from the criminal justice system. Frankly, if we didn't, the problem would be much more serious and acute. …I would support giving police officers even more formal discretion to divert in certain circumstances.

Kevin Fenwick, then Deputy Minister and Deputy Attorney General, Saskatchewan Ministry of Justice, also emphasised the importance of police and Crown counsel discretion in seeking to move suitable candidates towards alternative measures. He noted that, in Saskatchewan, 90 per cent of the cases that are diverted to alternative measures are post-charge, and asked:

> If you think you are going to recommend alternative measures, why do we lay the charge in almost every case? We could significantly reduce the number of cases before the courts if we were to divert pre-charge, and yet we do very little of that in our province. I can't speak for others, but I believe that the ratio is similar. We have provisions right now that require pre-charge screening by an agent of the Attorney General, by a prosecutor… There are good reasons to have it, but it certainly adds delay to the process when a police officer can't make the decision that this should be a pre-charge diversion. So that's another example of something we can look at.

In order for this use of discretion to be effective, police officers, Crown counsel and judges must feel confident in taking such action; they must know that their decisions will be supported. William Trudell, Chair of the Canadian Council of Criminal Defence Lawyers, explained that:

> If a police officer knows that he can ticket as opposed to arrest and his superiors will back him up, if a Crown knows he can withdraw and his superiors will back him up, if a judge knows he can give this type of sentence and know he will be backed up, defence counsel can do this and know there are no repercussions.

Over the course of this study and our other work studying various aspects of criminal law and public safety, the committee has become aware of the importance of ensuring that police, Crown counsel and the judiciary have the right level of discretion to be able to effectively manage the flow of cases through the justice system. As noted in Chapter Three, the *Criminal Code* already allows for alternative measures in section 717. Based on witnesses' testimonies, it appears to the committee that this is not sufficient on its own to ensure a broad enough confidence in the use of discretion to have had a sufficient impact. Discretion must be exercised with a foundation of sound principles, evidence-based methods and appropriate training. It must also be overseen by a system that continues to hold police, Crown counsel and the judiciary for their decisions, but also ensures that when they exercise their discretion properly, they will be supported for having done so. Accordingly, not only is sufficient instruction required for police, Crown counsel and judges in how to work with mentally ill persons, but there also needs to be sufficient evidence-based programming they can use.

> To the bigger questions that you are dealing with as a committee, anything that can help us improve those data connections and move us toward the level of analytics that allow us to cut across different sectors is what we will need. … [We need] to do anything we can do to advance those types of systems and encourage the administrative bodies that own the data to begin to move further and faster in sharing that data.
>
> – NORMAN TAYLOR, PRESIDENT , GLOBAL NETWORK FOR COMMUNITY SAFETY CANADA INC.

At present, the committee is concerned, in relation to mental health programs being offered in conjunction with the criminal justice system, that there is both a lack of resources and a lack of sufficient sharing of research, best practices, data and scientific evidence across Canada. Josh Paterson from the British Columbia Civil Liberties Association expressed a common concern that "in practice" such programs are insufficiently resourced and not available for all those who need them: "So we need to be taking a very hard look at the way in which we, as a society, are supporting those kinds of services," he added. As noted earlier in this report, Rick Audas and Scott Newark, the authors of the recent Macdonald-Laurier reports on the justice system,[338] underscored the need for better data and analysis thereof concerning recidivism and alternative dispute resolution.

Another part of the problem noted by Dr. Simpson, Chief of Forensic Psychiatry at the Centre for Addiction and Mental Health, is that there is "no consistent mental health screening at courts for mental health problems." His major concern is that, while good work is being done, there is a lot of variability in what is offered. He added that: "We do not know how comprehensive services are across the country or indeed within individual provinces." Other related concerns were emphasized by Joseph Oliver, who in noting police support for pre-charge diversion programs (and also for social and health programing to deal with administration of justice offences), added that he could not "overemphasize the need for them to be adequately resourced and competently staffed." Professor Marie Manikis from McGill University added to this discussion, noting that more than just training, there is a need for a broader transformation in how mental health issues are approached by the criminal justice system, since not all stakeholders have familiarity with how to handle them. She said:

> I think a lot of it has to do with a culture shift as well, even being able to identify who has a mental illness before they arrive at the first stage or a charge being laid against

[338] Scott Newark, Macdonald-Laurier Institute, *Justice on Trial: Inefficiencies and ineffectiveness in the Canadian criminal justice system*, 27 September 2016; and, Benjamin Perrin and Richard Audas, Macdonald-Laurier Institute, *Report Card on the Criminal Justice System: Evaluating Canada's Justice Deficit*, September 2016.

an individual. I think training in that respect is a good way to possibly change cultures, including psychologists and police departments. It is fundamental.

The committee understands the need for this cultural shift in how addictions and other mental health issues are treated in Canada when criminal behaviour is involved. There are very promising initiatives being developed in parts of the country that are spearheading this shift by bringing all of the stakeholders together to increase their base of evidence and knowledge and put it to use, such as the Hub in Prince Albert, Saskatchewan (which is discuss below).

Recommendation 36

The committee recommends that the Ministers of Justice and Health gather consistent data across Canada on how the screening for mental health issues is undertaken by the courts. The committee further recommends that an annual report on such screening and the efforts made by the courts to respond to it be published by the Mental Health Commission of Canada (or other appropriate body).

Recommendation 37

The committee recommends that the Minister of Justice work with the provinces and territories to:

- **ensure sufficient support for the development and promotion of pre-charge and post-charge diversion programs across Canada, and**
- **determine how the Minister of Justice can contribute resources to ensure that data and research is collected to track the performance of pre and post-charge diversion programs.**

Recommendation 38

The committee recommends that further to recommendation 37, the Minister of Justice invite the provinces and territories to submit funding applications for pre and post-charge diversion programs.

Recommendation 39

The committee recommends that the Minister of Justice review the *Criminal Code* and propose a suitable amendment to section 717 in order to:

- **add a statement of principles and objectives to the alternative measures provisions; and**
- **to provide greater clarity in this section to allow the police, Crown prosecutors and the judiciary to exercise appropriate discretion in recommending individuals as suitable candidates for pre-charge and post-charge diversion programs.**

The Hub

Often referred to as the "Prince Albert model", or the "Hub," this multi-agency initiative (multi-agency team or multi-agency service model) in Saskatchewan was highlighted by many witnesses for having positive impacts through making diversion programs and other services more available to the people who need them. The Hub exists as part of Community Mobilization Prince Albert[339] which is "a strategic alliance between multiple community agencies aiming at improving community well-being through cross-sector collaboration," as described by Norman Taylor, President of Global Network for Community Safety Canada Inc., who was instrumental in establishing the Hub. It began as an effort to "reduce those calls for service, those demands on the criminal justice system and those demands on policing that are not appropriately policing matters in the first place and owe their origins to other root causes…" The Hub seeks to provide "a whole of government solution … to mobilize all of the parts of the human service system designed to reduce those risks and serve the needs of individuals."

Markus Winterberger, an analyst with Community Mobilization Prince Albert, further explained that the Hub is "a multi-agency discussion, rapid intervention under a disciplined, safe environment, and a way to collaborate in getting health clients and their families the connection to services they may need." It provides the means for conversations to take place among frontline workers from multiple agencies in the human service delivery sector, including: Child Protection and Income Assistance, Mental Health and Addiction Services, Prince Albert Police Service, Bylaws, the Catholic and the Public School Divisions, Victim Services, the RCMP, the Prince Albert Fire Department, Mobile Crisis Unit and Community Corrections and the Prince Albert Grand Council. Cases remain under the management of the agencies involved, but they can increase support by connecting at-risk individuals to appropriate services. In support of the Hub, the Centre of Responsibility operates as a full-time centre for research and analysis and seeks to find long-term solutions to systemic issues and root causes of social problems. It seeks to work with the agencies involved to promote best practices and identify gaps in the system.

[339] Prince Albert Community Mobilization; Public Safety Canada, *Community Mobilization Prince Albert (Synopsis)*.

The committee learned from Mr. Winterberger that agencies at the Hub have brought forward 1,668 potential "discussions" in the past five years, with 1,498 of them being "accepted for discussion" and 170 rejected. Of those who were accepted he explained, "58 per cent were connected to services and 33 per cent were informed of services that they may not have known about before. Only four per cent rejected the offer of service." In discussing the impact of the Hub in reducing crime, Mr. Taylor added that in recent years, Prince Albert has seen a 39 per cent decrease in violent crime and a decrease in calls for police service. He noted that over 30 delegations from North American cities have come to learn about the model, and there are now over 75 replications of the model in Canada and four in the United States. He said that after the Prince Albert model was first launched in February 2011:

> Premier Brad Wall visited the site and announced a provincial strategy to embrace the Prince Albert model and make this a way of doing business in the province under the charter known as Building Partnerships to Reduce Crime. We are in the process of actually changing that to Building Partnerships for Community Safety and Wellbeing because the crime angle was the origin but we learned that this is so much more and cuts at many other issues.

The Hub model continues to undergo analytical reviews and training programs have been developed as the model, or variations of it, are set up across Canada. Mr. Taylor added that police have been "consistent leaders" in the proliferation of this model: "Among their reasons is the evident reduction in the crisis situations, the calls for service, the criminal events and ultimately those things that end up in the criminal justice system."

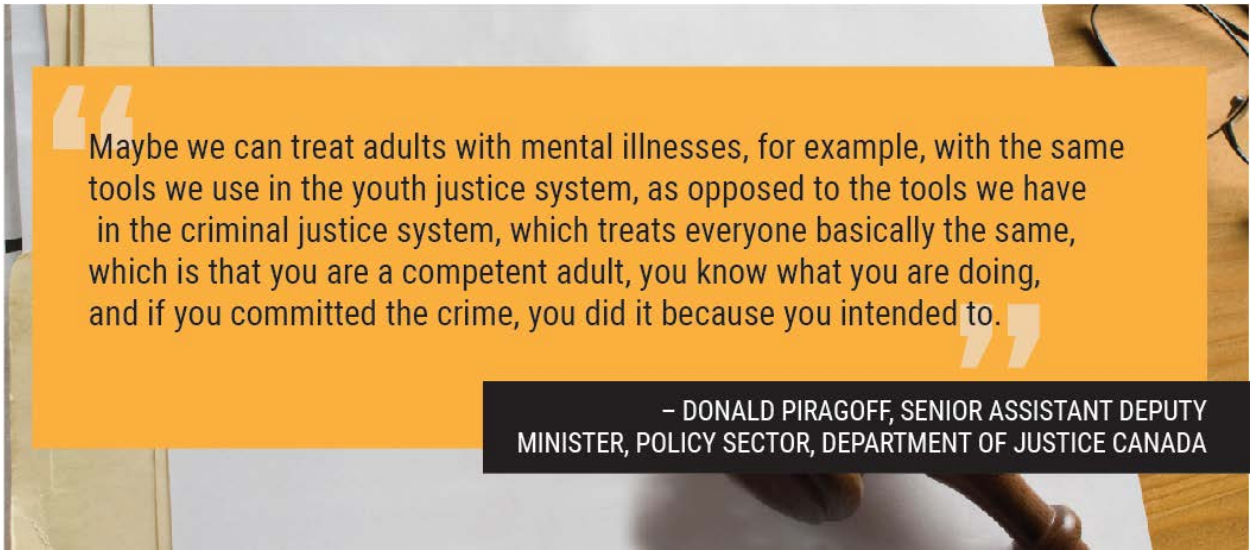
> "The marginalized circumstances that put many people in situations of compound and elevated risk mean that you will never have enough police if you approach it from a criminal justice perspective. Instead we argued that we needed a whole of government solution and that we needed to mobilize all of the parts of the human service system designed to reduce those risks and serve the needs of individuals."
>
> . – NORMAN TAYLOR, PRESIDENT, GLOBAL NETWORK FOR COMMUNITY SAFETY CANADA INC.

Recommendation 40

The committee recommends that the Ministers of Justice, Health, and Public Safety coordinate a strategy and invite the provinces and territories to submit funding applications in order to expand integrated multi-agency teams for offenders, accused persons and persons who are at risk of committing crimes, such as the Prince Albert model, in order to ensure they receive appropriate treatment and support and also to reduce the demands on police officers for matters that are better handled by health and social workers.

Specialized, Therapeutic and Alternative Courts

> "Specialized courts are very important because they recognize a special need without the revolving door. The problem is that they are not available everywhere; they're available in some big centres. But the resources to recognize there are people in the criminal justice system who have specialized needs is very important."
>
> – WILLIAM TRUDELL, CANADIAN COUNCIL OF CRIMINAL DEFENCE LAWYERS



During the committee's study, we travelled to Nova Scotia to learn more about that province's restorative justice programs, which are discussed below, and we visited the Mental Health Court[340] in Dartmouth. The Nova Scotia Mental Health Court Program is a voluntary offender-based program for

[340] Nova Scotia, The Courts of Nova Scotia, *Nova Scotia Mental Health Court Program*.

persons 18 years of age and older who have been charged with a criminal offence and have a mental disorder but are competent to participate in the criminal justice system. It is located in the same building as the Provincial Court in Dartmouth, within the Halifax Regional Municipality. It sits weekly and hears cases recommended by a Mental Health Court team. The team is comprised of a nurse, a social worker, a probation officer, a Crown Attorney, and a legal aid lawyer. A Provincial Court Judge presides in the Court.

Several requirements must be fulfilled to be admissible to the program, including: the accused was charged with an offence under the *Criminal Code* or the *Controlled Drugs and Substances Act*; the accused has a "mental disorder" (defined as a recognized, significant and persistent mental illness); there is a link between the criminal behaviour and the mental disorder; the accused voluntarily undertook a medical examination to determine and assess the mental disorder; the accused acknowledged responsibility for the act or omission; and, the Crown Attorney of the Mental Health Court consented.

The Dartmouth Mental Health Court held its first sitting in November 2009. A recent study of the Court indicated that case plans developed by the Mental Health Court team were better at meeting the responsivity needs of clients than case plans developed within the traditional correctional system. Responsivity needs refer to the tailoring or adjusting of an intervention to the unique strengths and challenges of a client, such as mental illness, motivation, and learning disabilities, and the use of evidence-based methods of criminal behaviour risk reduction.

Hosted by Chief Judge Pamela Williams of the Provincial and Family Courts of Nova Scotia, the committee met the various staff persons who are involved with the Mental Health Court and was given a behind-the-scenes look at how individuals arrive before the Court and how their cases proceed through it. Chief Judge Williams explained how:

> [T]he focus is on holding people accountable, establishing relationships, understanding what the root causes of the offending is, developing recovery or support plans … to help support those people, reconnect them and get them to better health thereby reducing their likelihood of being involved in the criminal justice system.

She described some of the "savings" offered by the Mental Health Court. For one, Chief Judge Williams noted how people with mental health issues often breach their release conditions (which can be "onerous"), whereas with the Court, they are seen regularly enough through the procedures to know how that individual is doing and whether the conditions should be modified. This reduces court time to deal with breaches of release conditions. She also added:

In terms of other savings those folks are less likely when they are with us to find themselves in emergency rooms, hospitalized, involved with the police or in jail and all those four things are very costly.

She also described an independent evaluation of the Court that was commissioned by the province, and while it showed that those who had been to the Court tended to reoffend less quickly and less substantively, rates of recidivism were "not terribly different" – although she did think the study was not ideally set up for making a reliable comparison. This being said, she noted that in the United States, where

drug treatment courts have existed for many years, studies have shown that "these types of problem solving courts do reduce recidivism rates."

The committee also heard in Ottawa from Craig Fairbairn, Drug Treatment Court Liaison Officer of the Ottawa Police, a strong supporter of the drug treatment court model. In providing the support, tools and therapy a participant needs to overcome drug addiction by closing the gap between the root causes and the judicial process, he explained how they can achieve a "a lower rate of recidivism among participants, while alleviating delays within court systems and saving the economy millions of dollars." For admission to Ottawa's drug court program, applicants must: be addicted to hard drugs (such as cocaine, opiates or methamphetamines); have committed a crime (generally, a non-violent one) in order to satisfy their drug addiction; not be subject to a conditional sentence; plead guilty to their charges; and, take responsibility for their actions and accept the consequences that may be imposed. Currently, the Ottawa program has room for only 20 to 25 hard drug users and does not have a specific alcohol addiction program. With more money, he considered it possible to "expand the program and have more participants come in."

Officer Fairbairn and Marion Wright, Clinical Director at Rideauwood Addiction and Family Services, discussed the Department of Justice's Drug Treatment Court Funding Program, which is a contribution funding program that provides financial support and administers funding agreements to six Drug Treatment Court (DTC) sites: Toronto, Vancouver, Edmonton, Winnipeg, Ottawa and Regina. Officer Fairbairn noted that yearly federal funding for Drug Treatment Court programs has been "static at 3.6 million for many years despite additional DTC programs starting up." Ms. Wright explained that:

> [T]he key elements of DTCs funding under the Department of Justice Canada's program include: a dedicated court that monitors the DTC participants' compliance and progress; the provision of appropriate drug treatment services and case management to assist the participant in overcoming drug addiction; community support through referrals to social services, such as housing and employment services, that can help stabilize and support the offender in making treatment progress; and complying with the conditions of the Drug Treatment Court.

She added that "[n]umerous studies have shown that Drug Treatment Courts achieve positive results in reducing recidivism," though she noted that the overall "graduation rate" from various programs is 35 per cent.

Officer Fairbairn discussed the results of the Department of Justice Canada's April 2015 *Drug Treatment Court Funding Program Evaluation,*[341] which concluded that the results for graduates of DTC programs are positive. This report is supportive of both drug treatment courts and the funding model that ensures these stay in operation. It notes the "well-established'" link between substance abuse issues and the likelihood a person will commit crime, and the fact that "numerous studies" present evidence that drug treatment courts can reduce recidivism. While the evidence appears to show that DTCs reduce

[341] Department of Justice Canada, *Drug Treatment Court Funding Program Evaluation, Final Report,* April 2015.

recidivism for drug-related offences, the report mentioned that more study is needed. The report also noted that for DTC program participants, there were cost savings varying from 20 per cent to 88 per cent per person when compared to an incarcerated individual. Fairbairn calculated that since 2011, Ottawa's 61 drug treatment court graduates had saved the court system approximately $1.2 million (based on the cost of processing one individual in a regular court system being $50,000 a year, while one year in a DTC program costs just under $30,000 per individual). Elizabeth Hendy from Justice Canada also noted that "on average, those who complete a drug court program are 20 to 30 per cent less likely to experience recidivism than those who did not, or did not finish the program." She concluded therefore that "they are beneficial in addressing the underlying causes that led to the criminality."

The committee was cautioned that specialized courts do not necessarily reduce the overall length of the time from charge to the final disposition of a case. As raised by Kelly Kaip, President of the Saskatchewan Crown Attorneys Association, "[i]t is important that we separate the issue of unnecessary delay from delay where the justice system participants may ultimately benefit from lengthy periods prior to the disposition of a charge." But, if the time is longer for appropriate cases because treatment is being provided, and if the benefits are reduced recidivism, then these courts can contribute to the larger goal of reducing delays: "We are taking a large portion of what normally would clog the court system out of the court system. We are trying to provide resources to people to address recidivism so that we do not have frequent flyers coming back." As alternatively summarized by Donald Piragoff:

> [D]rug treatment courts actually take longer to process a case because the court is not simply determining whether you trafficked or possessed drugs. It's actually looking at, "How I can ensure that you don't come back before me again?" So it actually takes longer. It's not geared simply to determining whether you're guilty or innocent; it's also geared to actually dealing with your social problem. …So some of the specialized courts may actually take longer, but in the end it may be more efficient for the justice system because the person may not reoffend and be back before the court again.

When explaining that the Canadian Bar Association is supportive of drug treatment courts for bringing "value to the system", Ian Carter also noted that the results of these courts have been mixed given that they can in fact create longer delays. Where the accused person fails to rehabilitate and ends up back in court, then they "have lost a year or so."

Several witnesses had other words of caution with regards to the specialized courts. Kim Pate, who appeared as Executive Director of the Canadian Association of Elizabeth Fry Societies,[342] explained her concern that DTCs may keep individuals in the court system who should be diverted out of the system instead:

> I'm not a fan of them [specialized courts] you tend to see more willingness to criminalize individuals, to put them into that court system, rather than to look at alternatives to the system. So that's the issue with specialized courts. It's not that you

[342] Since appearing as a witness on this study, Senator Pate was appointed to the Senate and is now a member of this committee.

> don't focus on those issues, per se; it's that that actually widens the net of who is likely to come into the criminal justice context as opposed to pushing the parameters of those other services and ensuring that they meet the needs of individuals.

Dr. Baillie noted another concern. While there is "very good work" in mental health courts, there is "no consistency of standard" in Canada, meaning that there is a large amount of variation between court programs. He referred to some of the research in this field[343] and summarized this as follows:

> Generally, the research shows decreased hospitalization for the people who go through the program, decreased incarceration and better treatment compliance. Where the numbers aren't quite so clear, depending on which study you look at, is whether or not there's actually decreased recidivism.

As noted above, the committee is supportive of diverting appropriate cases away from the traditional court system, as much of the evidence suggests this is beneficial to both persons with mental illnesses (again, including those with addictions) and to Canadian society. Our justice system should be moving towards a model whereby diversion programs, specialized courts and the traditional court system are all receiving the cases they are most suited to handle. Whether diversion programs are more suitable than drug treatment courts, or vice versa, is a question to which the Minister of Justice should be committing appropriate research tools and expertise in order to help Canadian jurisdictions make evidence-based decisions regarding them.

One other cautionary note was provided by Ms. Szigeti from the Criminal Lawyers' Association, who stated that it "must be remembered as well that diversion programs will link clients to supports; however, there are certainly some clients who really don't want those supports … For some people, forced treatment is worse than detention." The committee notes that with sufficient resources and expertise, our justice system should be ensuring that each individual is on the most appropriate track to best ensure their rehabilitation and to serve the interests of society: which would not include forcing a person into treatment they were reluctant to receive.

Specialized courts can represent an important step forward in dealing with the root causes of criminality and making the justice system more fair and efficient. However, specialized courts cannot operate in isolation from the broader justice and health systems. Chief Constable Chaffin of the Calgary Police Service raised an important consideration: specialized courts require specialized services to follow-up on the accused persons and offenders who pass through them and require appropriate funding and training to ensure these additional supports are properly managed. More broadly, this would entail coordination among various justice system participants. The committee supports expanding the

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[343] For one, he referred to Justice Richard D. Schneider's research on the effectiveness of mental health courts and diversion programs that, he claimed, "[tend] now to advocate more for diversion programs than mental health courts because the courts are more resource-intensive whereas the diversion programs can be set up in smaller settings and utilize existing resources." Justice Schneider prepared a report for the Department of Justice Canada: *The Mentally Ill: How they became enmeshed in the criminal justice system and how we might get them out*, March 2015.

specialized courts model where the evidence suggests it will be most useful. Other courts could be established to deal with other specific issues, such as domestic violence or child abuse.[344]

While the committee was presented with many opinions on specialized courts, Yvan Clermont, Director of the Canadian Centre for Justice Statistics, noted that in redesigning the criminal court survey, Statistics Canada hopes to get more information about specialized courts and whether they reduce delays. The committee strongly encourages this much-needed research and analysis necessary to get a clearer picture on the successes and challenges of these courts in Canada. Furthermore, Canadian governments will have to ensure that resources are allocated so that the benefits of specialized courts are available to more Canadians.

Recommendation 41

The committee recommends that the Minister of Justice work with the provinces and territories to:

- **conduct and publicize research and analysis into best practices, implementation procedures and the comparative effectiveness of therapeutic courts, such as drug treatment and mental health courts;**
- **develop a strategy for ensuring that effective therapeutic courts are made available throughout the country; and**
- **invite the provinces and territories to submit funding applications to establish evidence-based therapeutic courts suitable to meet local needs.**

Restorative Justice

> "[W]e have had several cases where we have used restorative practices. … We have used restorative justice in a case of employer/employee fraud. The employer and the employee sat down. The employee of course was our client. Once the employer had an understanding of the mental health issues faced by that employee he looked at the crime in a completely different way. We were able to work out repayment for restitution. He was able to say how her behaviour had affected his business. She was able to say how badly she felt and what could she do to repair that harm."
>
> – THE HONOURABLE PAMELA WILLIAMS, CHIEF JUDGE OF THE PROVINCIAL AND FAMILY COURTS OF NOVA SCOTIA

[344] Jennifer Lopes, Vice President of the British Columbia Crown Counsel Association, noted that recently a specialized court for domestic violence was created, "a significant area of concern in Surrey" and Sheldon Kennedy expressed a need for a "specific specialized child abuse court, modelled after the drug court" (Evidence, 27 September 2016).

Restorative justice is a broad term. It is based on the notion that crime and conflict is principally harm done to people and relationships. As explained by the Correctional Service Canada, "[i]t strives to provide support and safe opportunities for the voluntary participation and communication between those affected (victims, offenders, and community) to encourage accountability, reparation, and a movement towards understanding, feelings of satisfaction, healing, safety and a sense of closure."[345] It "is about giving all parties involved in a conflict the opportunity to take an active role in a safe and respectful process that allows for open dialogue between the victim, offender, and the community." Furthermore:

- restorative Justice provides victims with an opportunity to tell their story, address the harm caused, and find answers to questions that are important to them.
- restorative Justice provides offenders with an opportunity to take responsibility for their actions and to be held accountable by those they harmed.
- restorative Justice empowers communities to gain a better understanding of the root causes of crime and allows the community to express and reduce its fears.[346]

Rebecca Bromwich from the Church Council on Justice and Corrections explained that the purpose of restorative justice is to repair:

> [T]he harm caused by crime while holding the offender responsible for his or her actions, by providing an opportunity for the parties directly affected by a crime—victim(s), offender and community—to identify and address their needs in the aftermath of a crime, and seek a resolution that affords healing, reparation and reintegration, and prevents future harm.

She added that "[j]ustice requires that we restore those who have been injured. From a restorative justice perspective, the people injured include the whole community and even the offender." After noting that such restorative justice programs have been defunded recently, reinvigorating them nationwide was her organization's first recommendation to the committee.

Restorative justice can be used specifically for programs that involve various different types of justice initiatives, such as victim-offender mediation, restorative conferencing and circle processes (where individuals are encouraged to share their thoughts in a supportive circle-shaped seating plan). It is also a principle that is present within the traditional justice system and the *Criminal Code*. For instance, in the sentencing principles articulated in section 718, while some of these prioritize denunciation, deterrence and punishment, other principles are very much in the spirit of restorative justice and alternative measures. These include principles that the purposes of sentencing are to rehabilitate the offender, to provide reparations for the harm done to the victim and the community, and to promote a sense of responsibility in offenders through the acknowledgement of such harm. Section 718.2 adds that a person should not be deprived of liberty, if less restrictive sanctions are appropriate in the circumstances. Section

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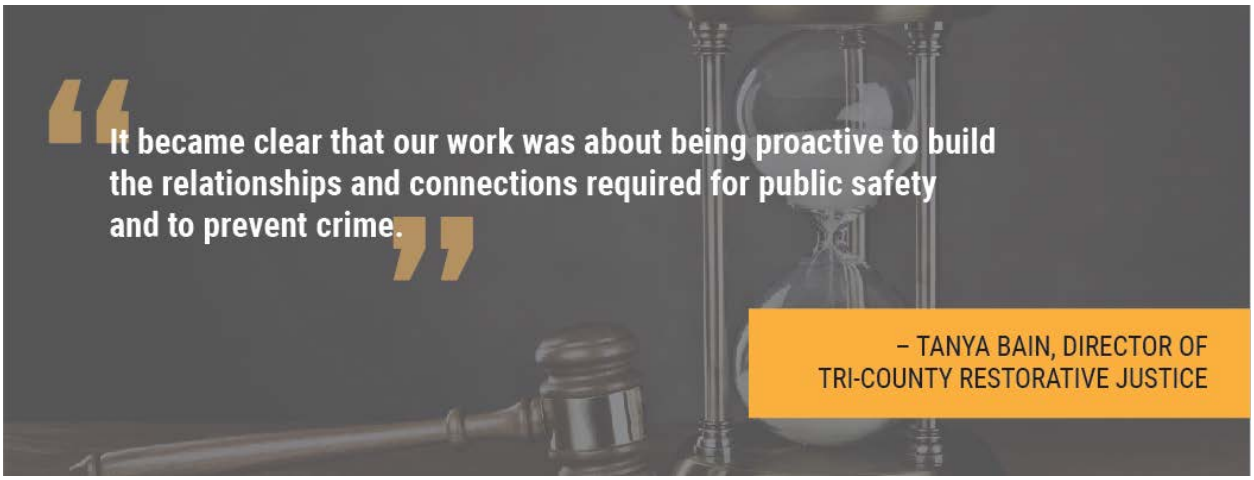
345 Government of Canada, Correctional Service Canada, *About Restorative Justice*, 13 January 2014.

346 Ibid., see also: Department of Justice Canada, *Restorative Justice*, 9 September 2016.

718.2(e), discussed in Chapter Ten, also emphasizes that particular attention should be focussed on avoiding incarceration for Indigenous offenders.

While many of the measures discussed in this chapter may therefore be broadly considered to have incorporated restorative justice principles, the committee heard much about the specific restorative justice initiatives in Nova Scotia during special hearings held in Halifax. Nova Scotia's Restorative Justice Program[347] is at the moment only available for youth 12 to 17 years old who are either referred by: a police officer (pre-charge); by a Crown attorney (post-charge); by a judge (post-conviction/pre-sentence); or Correctional Services or Victim Services staff (post-sentence). Pilot projects intended for adults are, however, currently being offered in specific locations. The program seeks to support the victim and ensure there are opportunities in the community for the offender to make amends, while focusing on the causes of crime and what can be done to address them. A network of eight community justice agencies and one indigenous organization deliver the Restorative Justice Program and Community Service Order Program services.



Tanya Bain, Director of Tri-County Restorative Justice in Yarmouth, Nova Scotia, which is one of the agencies affiliated with the program, explained that for the past 16 years, they have been assisting youth in understanding their responsibilities and consequences for their actions: "We also help them begin reflecting on who was affected and how their actions have impacted others." She explained that there are three components to the restorative justice process they use. The first is the pre-conference, which involves meeting individually with those who caused harm and then with those who were harmed:

> These conversations are a key component for caseworkers to explain the process, to listen to individual perspectives, to help identify root causes of the incident and begin to understand the web of relationships connected to each individual. Pre-conferences also provide an opportunity to begin identifying, describing and building connections with local resources that may be helpful in moving forward.

[347] Nova Scotia, *Nova Scotia Restorative Justice Program*; Program Executive summary.

Ms. Bain added that some victims will choose not to participate in person; it is their choice to determine what is right for them and what input they want to have. Some victims may choose a supportive friend or family member to represent them in the process. The committee supports the idea that justice programs should allow victims to engage in processes in accordance with their comfort level.

The second stage is the restorative justice conference, which "provides the opportunity to bring the individuals together in a facilitated voluntary process to discuss what has happened and what needs to happen to make things better for everyone affected by the incident. Everyone at the conference helps design an agreement on moving forward."

The third stage is the post-conference, which involves follow-up meetings to ensure agreements are honoured. In summary, she concluded that:

> Over the years, restorative justice processes have contributed to more meaningful outcomes for victims and referred clients but this work is more than just responding to restorative justice cases. The proactive work we now do contributes to the relationships that we have built over the years within restorative justice with individuals, groups and stakeholders.

She also described a "shift" that had taken place over the years, whereby the program has become more involved with other organizations and institutions, particularly schools. This has allowed great connections across sectors and an ability to ensure services are reaching appropriate persons.

As noted by the Department of Justice, restorative justice has its roots in Aboriginal justice traditions.[348] Paula Marshall of the Mi'kmaq Legal Support Network discussed how her program has also developed initiatives that incorporate the unique cultural dynamics of Indigenous communities and thereby responds to particular justice issues affecting them (as discussed further in Chapter Ten of this report). When the committee was in Halifax, our first panel was organized around the model of the sharing circle, which allowed the committee to experience how a facilitated discussion can create a supportive space for individuals to share their views.

There is much evidence to recommend the further expansion of restorative justice and of specific restorative justice programs across Canada – especially when there is a desire for participation of this sort by victims and when there are suitable candidates who have been accused of a crime. This will require not just additional resources to operate these programs, but also continued study and analysis to ensure they are effective. The committee recognizes that more needs to be done to provide Canadians with the research, evidence and best practices to ensure that the benefits of restorative justice, and the methods of achieving those benefits, are integrated throughout the justice system.

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[348] Department of Justice Canada, *Restorative Justice*, 9 September 2016.

Recommendation 42

The committee recommends that the Minister of Justice work with the provinces and territories to:

- **ensure that justice system participants are sufficiently educated and informed about the value of restorative justice principles and the ways to apply them;**
- **prioritize discussions about ways to expand restorative justice programs;**
- **generate applications to the Minister for funding from provincial and territorial governments in order to develop and expand restorative justice programs; and**
- **develop and make available research on best practices, implementation procedures and the comparative effectiveness of restorative justice programs.**

> [R]estorative justice processes have contributed to more meaningful outcomes for victims and referred clients but this work is more than just responding to restorative justice cases. The proactive work we now do contributes to the relationships that we have built over the years within restorative justice with individuals, groups and stakeholders.
>
> – TANYA BAIN, DIRECTOR OF TRI-COUNTY RESTORATIVE JUSTICE

Youth

> One area where it is done without court appearances is under the *Youth Criminal Justice Act*. Police officers have an ability to divert a young person without putting them in the system at all.
>
> I've dealt with police officers, and they're great to work with. I talk to them and they say, "Listen, this is what I want to do with your client. He has to accept responsibility and I'm going to give him a stern talking-to. You can come down to the station and be there if you want." It's all dealt with then and there. The young individual in this case is shaken up, learns his lesson and moves on, and we don't have five or six court appearances to end up at the same result down the line.
>
> – IAN CARTER, CANADIAN BAR ASSOCIATION

As discussed above, Nova Scotia's restorative justice program is largely focused on youth aged 12 to 17. This is in part made possible due to the flexibility permitted by the federal *Youth Criminal Justice Act*.[349] Sections 4 and 5 of this law provide for "extrajudicial measures", which allow for alternative measures and restorative justice principles to be used in fashioning solutions for youth outside the court system. The Act aims to promote their rehabilitation in a manner that is more suited to their age than the criminal procedures designed for adults. It encourages such measures as police warnings and referrals to social programs and alternative sentencing options. Donald Piragoff concluded that because of the Act, "the number of youth going to trial has significantly dropped because that system uses diversion and alternative measures. So you divert the small shoplifting case. You don't go to court; you don't prosecute that. You deal with it outside." Denise Blair, Executive Director, Calgary Youth Justice Society, summarized its benefits: "it's expedient, and less youth in court is fewer delays for those who are."

Chief Clive Weighill of the Saskatoon Police Service, explained further that under the Act, "police can utilize warnings, official warnings, pre-charge diversion and post-charge diversion." However, he was concerned that there is too little infrastructure and "limited programming options" to help youth escape "from marginalization"; the committee takes this to mean that at-risk youth who have come into contact with the justice system do not receive renough support to address the root causes that brought them to it in the first place. Chief Weighill, a self-proclaimed "firm believer in diversion," recommended that "the federal and provincial governments recognize the value of extrajudicial sanctions and funds sorely needed addiction centres and substantive programming." This value, in his view, is the potential for reducing "the number of youth progressing through the criminal justice system even further."

Canada's youth criminal justice system is a positive example to the rest of the world. There are many things Canada is doing well in recognizing the needs of young offenders and helping them avoid further criminal behaviour. But, there is more that can be done. Canada needs to expand its knowledge through program evaluation and research on best practices.

Part of what has made the *Youth Criminal Justice Act* successful is the flexibility that has been written into it to find the best rehabilitation for the offender and to allow restorative justice to help repair the harms to the victim and society. It can also help offenders understand the consequences of their actions. There are important reasons why children and youth are treated differently from adults; but much of what is working for youth will work well for adults as well – in particular, the flexibility to include differing routes to justice to suit the particular needs of an accused or an offender. The lessons from dealing with youth through extrajudicial measures should be considered with respect to adults.

The committee recommended above that the Minister of Justice review the *Criminal Code* and propose a suitable amendment to section 717 in order to add a statement of principles and objectives to the alternative measures provisions to assist the police, crown prosecutors and the judiciary in exercising discretion. In preparing for this amendment, the Minister should review the principles in sections 4 and 5

[349] *Youth Criminal Justice Act*, S.C. 2002, c. 1.

of the *Youth Criminal Justice Act*, how they have been used in Canada, and what lessons can be drawn from this for adult criminal proceedings.

> "I would encourage the committee to look at restorative justice programs across the country, especially those that are aimed at indigenous people, and look at best practices in terms of which reduce recidivism and help offenders reintegrate into communities, and look at funding levels."
>
> – WILLIAM MACKAY, DEPUTY MINISTER, DEPARTMENT OF JUSTICE (GOVERNMENT OF NUNAVUT)

Conclusion

The benefits of appropriate measures are clear. What is not yet as clear is the best way to ensure their efficacy. The emphasis needs to be on ensuring that they are in fact appropriate: the right people need to be admitted into the right programs or the right courtrooms. Many witnesses underscored the need for more funding and resources for these programs, and some argued that the cost savings would in the end justify the expense. One of the bigger barriers to making this happen is an insufficient recognition in the broader justice community of the value of diversion programs, specialized courts, and restorative justice programs, which prevents these measures from becoming a more common part of Canada's justice system. Creating this awareness and recognition will require promotion and the assignment of sufficient resources. It requires disseminating the relevant data, research and comparative analyses. It needs to form part of the educational measures recommended in Chapter Two to further the requisite cultural shift in the justice system.

CHAPTER NINE – OFFENDERS: REHABILITATION AND RECIDIVISM

> We have a revolving door to some extent. We have people who have great long histories of criminal justice cases that unnecessarily clog up the system because they are not treated.
>
> – ANDREW MASON, PRESIDENT, SASKATOON CRIMINAL DEFENCE LAWYERS ASSOCIATION INC.

In the preceding chapter, the committee examined the importance of using more appropriate measures and prioritizing prevention and mental health care as a means to not only reduce crime but also to improve the efficiency of the justice system and reduce delays. The focus of that chapter was on the justice system (and the various routes it can take) up to the end of trial. After criminal proceedings are completed, if a person has "been determined by a court to be guilty of an offence, whether on acceptance of a plea of guilty or on a finding of guilt," then they become an "offender," as defined by the *Criminal Code*.[350] Selecting the most appropriate measures within the justice system for offenders is another crucial component in addressing delays.

The key issue that was explored during this study with regard to offenders and delays was recidivism. A repeat offender passes through the court system once again, using more valuable court time and resources and, if incarcerated, incurring the high costs of our correction system. Witnesses who spoke on these matters agreed that more needs to be done to reduce recidivism and prevent individuals from becoming repeat offenders. The result would be a more efficient justice system, less court resources being devoted to one individual and a reduction in the demands on our justice system that prevent the courts from addressing delays.

When recidivism occurs, this means that an opportunity to rehabilitate an individual has been lost. While discussing his Macdonald-Laurier Institute's report, *Justice on Trial: Inefficiencies and Ineffectiveness in the Canadian Criminal Justice System* Scott Newark mentioned the value of considering repeat offenders when looking at delays:

> I don't think we have done a very good job over the last 15 years in dealing with repeat offenders because one of the realities of our justice system is there is a disproportionately large volume of crime committed by a disproportionately small number of offenders. When you target those people, operationally or by policy, you can get significant public safety results.

[350] *Criminal Code*, s. 2 « offender ».

Public Safety Canada produced some research summaries on recidivism in the early 2000s that attempted to gauge recidivism rates. One such document acknowledged that there is difficulty in creating reliable data on this topic:

> "Recidivism" can be measured in different ways for different purposes. There is no single measure of recidivism that does not have a disadvantage. The various measures that have been used (e.g., re-arrests, reincarceration) all have shortcomings but also certain advantages that justify their continued use.[351]

Rick Audas, co-author of *Report Card on the Criminal Justice System: Evaluating Canada's Justice Deficit*, commented that, in fact: "We know very little about repeat offending and recidivism. Again, those are two things we think are important to Canadians, and two areas where we think the justice system probably needs to do better, but the data allows us to say almost nothing at all about them." As we recommended in Chapter Two, Canada needs better data on recidivism.

The challenges lie in how a second offence is tracked and compared to a previous offence. Questions arise, such as: Does recidivism need to compare convictions for the same or a similar offence being repeated? Should any interaction with the justice system be tracked, regardless of the outcome? Does the time between the commission of offences matter? Some provinces do attempt to track recidivism rates. For instance, in Ontario these rates have been tracked for over a decade for the provincial correctional system. The Ministry of Community Safety & Correctional Services of Ontario provides the following definition for its statistics:

> Recidivism is defined in Ontario as a return to provincial correctional supervision on a new conviction within two years of completing:
>
> - probation, parole or conditional sentence or
> - a provincial jail sentence of six months or more. [352]

The 2013-2014 recidivism rate for those serving six months or more as a jail sentence in Ontario was 37.4 per cent, which was the lowest since 2001 – but the average was in the 40-45 per cent range over this time period. The Ministry's information also shows that recidivism rates are higher for those who have been assessed with a high level of risk, but this risk assessment is intended to steer offenders to the most appropriate rehabilitative services and programs.[353] These programs are key to best ensuring that offenders receive the assistance and treatment they need to not reoffend.

In its presentation of the above-noted statistics, the Ontario Ministry of Community Safety and Correctional Services also notes that:

> While the re-conviction rate has been fairly steady for incarcerated inmates over the past several years, for those serving community-based sentences, recidivism rates

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351 Public Safety Canada, *The recidivism of federal offenders*, Research summary, Vol. 8, No.4, July 2003.

352 Ontario, Ministry of Community Safety & Correctional Services, *Rates of recidivism (re-conviction) in Ontario*.

353 Ibid.

> have decreased. This trend may be a result of evidence-based, targeted interventions.[354]

"Evidence-based, targeted interventions" implies that appropriate measures are being provided to those serving community-based sentences. It is important to consider the most appropriate measures in sentencing an offender to not only denounce and deter criminal activity, but also to rehabilitate the offender with the goal of ensuring he or she does not reoffend. Like accused persons, offenders should be triaged onto the best possible route within the system to ensure efficiency and fairness and to reduce crime. It may be that the most appropriate measure for a particular individual is incarceration – or to have a person declared as a "dangerous offender" and impose strict limits on their liberty. It may also be that to ensure a person does not become a repeat offender he or she should be treated for an addiction or other mental health issue. There are many different considerations that can come into play when choosing the most appropriate measures for offenders: a "one-size-fits-all" approach is not going to produce the best results.

Other relevant statistics on this topic pertain to the high costs of incarceration. According to Statistics Canada, the average daily cost for an offender in the correctional system is $301.94 for federal inmates and $198.50 for inmates in the provinces and territories.[355] The agency also noted that it costs over $115,000 per year to maintain an offender in a Correctional Service of Canada institution. By comparison, it costs closer to $35,000 per year to maintain an offender in the community.[356] As was discussed in the previous chapter, the high cost of proceeding through the traditional court system is one of the reasons why alternative measures are worthy of further consideration, particularly if they can achieve the same goals as the traditional justice system at a lower cost.

As with many of the topics taken up in other chapters, addressing the challenges facing the correctional system to make it more efficient is beyond the scope of this report. What is relevant is the role offenders play in contributing to delays. Investing in crime prevention, rehabilitation and health treatment programs for all offenders – whether they are incarcerated or in the community – is a crucial element of the necessary reform of our justice system. Making such investments will ease the burden repeat offenders place on our court and correctional systems, free up resources better used elsewhere, and consequently allow Canadian governments to focus on reducing delays.

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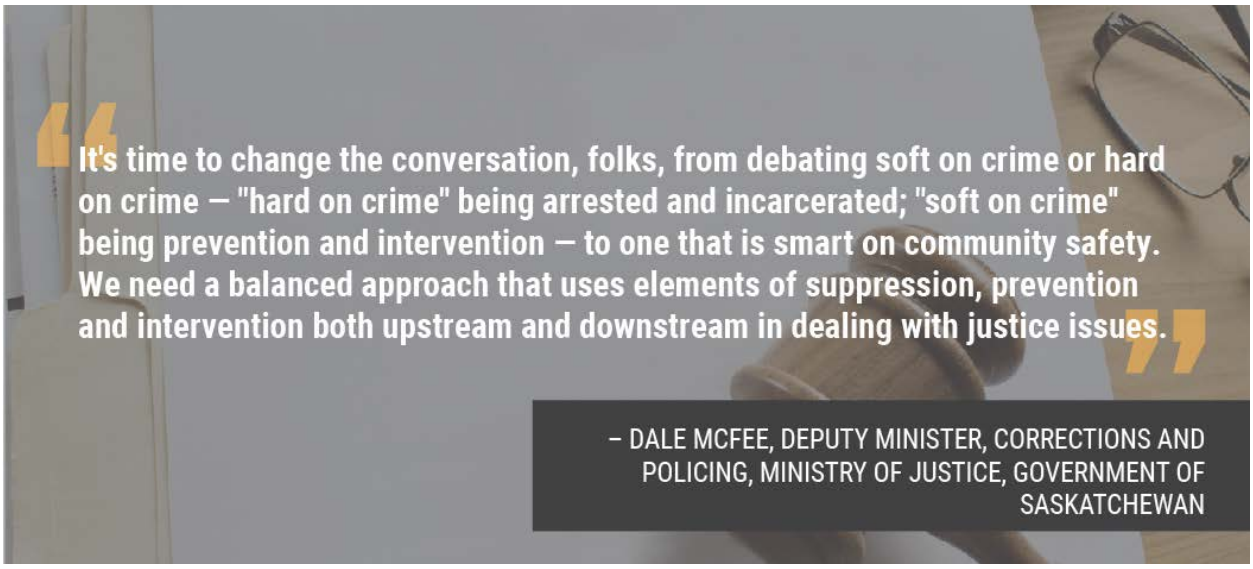
354 Ibid.

355 Ashley Maxwell, Statistics Canada, *Adult criminal court statistics in Canada, 2014/2015*, 2017, Table 6.

356 Correctional Service Canada, *CSC statistics – key facts and figures*.



Rehabilitation is Prevention

Heidi Illingworth, Executive Director of the Canadian Resource Centre for Victims of Crime, articulated a common view that investing in crime prevention has more value than dealing with crime after the fact:

> Rather than focus already strained fiscal resources on improving efficiency, we feel the federal government should address the delays in the criminal justice system through the prevention of crime in the first place. The most effective and cost-effective way to deal with crime is prevention.

In Chapter Eight, the committee discussed how providing integrated services to persons at-risk of becoming involved with crime is a key step in preventing crime, such as was demonstrated in our discussions of the Hub model in Prince Albert. Rehabilitation is also a form of prevention and offenders form a ready pool of candidates for prevention programs. As we also noted, many persons in the justice system are not being sufficiently treated for mental illness and addictions, with the result that Canada has a large population of incarcerated offenders with such challenges.[357] According to the Office of the Correctional Investigator, over half of all women inmates and 26 per cent of male inmates have an identified mental health need.[358]

In emphasizing the "desperate" need for treatment services for offenders, Elana Lamesse, President of the Probation Officers Association of Ontario, discussed the fact that when an offender is granted community release, it is "usual" for there to be a condition of treatment involved. However, she further explained the types of challenges offenders face in getting treatment:

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[357] Office of the Correctional Investigator, *Annual Report of the Office of the Correctional Investigator 2015-2016,* 30 June 2016.

[358] Ibid.

> This often is where the issues with offenders being supervised in the community arise. There is a definite lack of services in general, and when we are speaking about offenders who are typically non-compliant, unmotivated and perhaps dealing with mental health issues or otherwise disadvantaged, the situation is much, much worse. In order to get an offender into programming, particularly substance abuse programming, the wait lists often exceed the term of supervision.
>
> Some agencies have stopped accepting referrals from Probation Services. They now require a referral from a family doctor. Many of our offenders do not have family doctors. These people are expected to attend a drop-in clinic and ask a doctor who is a complete stranger to them for a referral. Again, these are typically unmotivated and non-compliant individuals who have suffered some form of abuse or trauma and have learned over time not to trust. We are essentially setting them up for failure by putting them in this circumstance.

Chief Weighill of the Saskatoon Police Service also recognized the need for services and recommended that "the federal and provincial government increase funding to provide services inmates require while incarcerated and provide them with a meaningful transition plan for their release." Andrew Mason, President of Saskatoon Criminal Defence Lawyers Association Inc., raised similar concerns:

> There is virtually no treatment in the provincial correctional system. When they are released they do not have interventions in a timely fashion. If they are on probation there is such a burden on the probation officers that they do not necessarily get the kind of attention they need… [T]here is a very strong correlation if we are able to intervene at the appropriate time in these high-risk cases. There is a great deal of reduction in the rate of recidivism.

Catherine Latimer added that the services provided to offenders are especially important to consider with regards to their release from incarceration. She also explained the value of parole in preparing the offender for life after their sentence is served:

> I think there are some real questions right now about the efficacy of the graduated-release process. I think it is probably not working nearly as well as it should be, and it has to do with the inability to provide effective programs in a timely manner so that people are prepared at the point of release and supported and supervised as they're coming out of the prisons. We're not seeing that.
>
> We're seeing a slight uptick of people coming back, having committed violent offences, within five years, and I think that may well have to do with the fact that fewer people are actually being released on parole and many are getting out later in their sentences.

Ms. Latimer also stressed the importance of evaluating existing treatment programs. As we have heard time and again during this study, program reviews and data analysis are needed to ensure that

Canada does not simply have isolated pockets of successful programming, but rather that all communities have access to the services that will best ensure public safety and fair and efficient criminal justice.

One example of a program for offenders after release that the committee discussed with Rebecca Bromwich from the Church Council on Justice and Corrections was the Circles of Support and Accountability (CoSA) project. This program, for which new funding was announced in May 2017,[359] is a "reintegration initiative based on restorative justice principles for federally sentenced, high-risk/high-needs sex offenders who have been held to the end of their sentence." As she explained:

> The view of the project is that although imprisoning offenders accomplishes a short-term goal of protecting the public, most are eventually released. The CoSA project is a way to intervene with these cases of very serious sex offenders who statistically are notoriously recidivist… Reports based on that project have actually shown that sexual recidivism rates for men who participate in CoSA are 80 percent lower than for men who do not participate. It had a tremendously beneficial impact on people who participated.

The committee sees such treatment and reintegration programs as an important means to prevent further crime in Canada and reduce the demand on our courts. Andrea Markowski, a District Director from Correctional Service Canada, noted that the *Corrections and Conditional Release Act*, which governs the administration of federal sentences and parole, "makes the protection of society the paramount consideration in the correctional process." The committee sees addressing recidivism through the promotion of rehabilitation programs as bolstering this purpose. The Committee is encouraged by the fact that the 2017 Federal Budget announced an additional $57.8 million over five years (starting in 2017–18) and $13.6 million per year thereafter to expand mental health care capacity for all inmates in federal correctional facilities.[360] As the Minister of Justice and Minister of Public Safety and Emergency Preparedness work with their provincial and territorial counterparts to address delays, the rehabilitation of offenders and reducing Canada's recidivism rate should be one of the topics they prioritize.

Recommendation 43

The committee recommends that the Minister of Justice work with the provinces and territories to develop strategies to rehabilitate offenders using the most appropriate measures and to reduce recidivism in Canada as a means of addressing delays in criminal proceedings.

Release and Sentencing Conditions

As noted above, offenders who are released from custody are often required to adhere to certain conditions. In Chapter Seven, we noted the high number of court cases that involve administration of justice offences, which may be for breach of conditions or failure to appear in court. The committee

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359 Public Safety Canada, *Funding announced for expansion of Circles of Support and Accountability model across Canada*, 5 May 2017.

360 See Government of Canada, *Federal Budget 2017*, p. 188.

emphasized that conditions imposed on persons on bail or other forms of release should ensure that they keep the peace, but also must avoid setting individuals up to fail by imposing conditions that they are unlikely to be able to keep if they have an addiction or other mental health challenge. The manner under which offenders are given conditions as part of their parole or probation is of course different than the procedures that apply to accused persons. The main issue that conditions should be tailored for the needs of the particular individual applies to both situations, however.

The committee did not delve too deeply into how release conditions affect offenders, particularly given that breaches of parole conditions are handled by the Parole Board of Canada and are therefore outside of the traditional court model. But, we did hear evidence that this issue can present a problem. In particular, the lack of treatment programs for persons with mental health issues and addictions is a concern that can be made worse when these individuals are given conditions to abstain from illicit drugs and alcohol.

Andrea Markowski discussed release conditions for offenders in her opening statement:

> Standard conditions apply to all conditionally released offenders and include an obligation to obey the law and keep the peace, to report to a parole officer and to police as required, and things like travel restrictions. In addition, special conditions may be imposed by the Parole Board of Canada. These conditions, which are usually recommended by Correctional Service Canada, are tailored to the specific circumstances of the offender's case, their crimes and the level of risk that they present.
>
> For example, an offender who committed sexual offences against children may be restricted from having contact with children or from attending places where children may congregate. Conditions to abstain from drugs and/or alcohol may be imposed on an offender when substance abuse was a factor contributing to the offence. Offenders may be required to reside at a specific place such as a community residential facility or a community correctional centre, and they may also be required to abide by a curfew.

Ms. Markowski also explained the process by which community parole officers "monitor conditionally released offenders and are responsible for ensuring access to a range of programs and services to facilitate their safe reintegration into the community." She added:

> We work very hard to recruit partners and to encourage the community to live up to its responsibility to address the needs of residents, including offenders, so they can access health, mental health and housing services, etcetera. Our goal, at warrant expiry, is to hand off to the community someone who is fully integrated, independent, employed, well, and able to carry on safely. In many cases we do that.

As noted above, Elana Lamesse explained that that it is usual for an offender's release condition to require that he or she abstain from using illicit drugs or alcohol and may require some kind of treatment. She also emphasized the lack of treatment programs for those with mental health issues and addictions,

a concern raised time and again throughout this study. This is an issue where the Minister of Public Safety and Emergency Preparedness must take action and work with the provinces to address it.

Recommendation 44

The committee recommends that the Minister of Public Safety and Emergency Preparedness ensure that federal programs for offenders with mental health issues and addictions are available to those in need of them and invite applications from the provinces and territories to fund such programs.

CHAPTER TEN - INDIGENOUS PEOPLES

> I suggest to the committee that one of the important factors is the marginalization faced by the Indigenous population in our province. Unfortunately a significant percentage of the Indigenous population is living in poverty, poor housing, facing racism and the continued residual effects of colonialism, residential schools and a restrictive Indian Act. Indigenous people living in such conditions are a criminologist's textbook explanation regarding the linkage of criminal activity to marginalization and social determinants that may lead to crime.
>
> – CHIEF CLIVE WEIGHILL, SASKATOON POLICE SERVICE

The distinct relationship Indigenous peoples[361] in Canada have with the justice system requires special attention in a study of delays in criminal proceedings. Indigenous Canadians are significantly over-represented as accused persons, as offenders and as victims. Canadian society's awareness of the root causes of this situation and the present-day challenges facing many Indigenous persons has been the subject of several major studies over the years[362] and appears to be improving, hopefully moving Canada closer towards reconciliation for historical wrongs. Canada marked an important milestone in this regard upon the completion of the Truth and Reconciliation Commission of Canada's[363] inquiry into the legacy of Indian Residential Schools, and the publication of its findings and recommendations – which were then accepted by the Prime Minister.[364] The report recognized that a "new vision" was necessary for the relationship between Indigenous and non-Indigenous Canadians that rejects the paternalistic and racist attitudes of the past. It also recognized that reconciliation will take some time and will be hard work.

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361 The committee has chosen to use the term "indigenous" over "aboriginal" in this report, though witnesses used both. See: Tonina Simeone, *Indigenous Peoples: Terminology and Identity*, HillNotes, Library of Parliament, 14 December 2015.

362 See for example: Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba*, 1991; The Royal Commission on Aboriginal Peoples, *The Report of the Royal Commission On Aboriginal Peoples*, 1996; The Joint Task Force on Improving Education and Employment Outcomes for First Nations and Métis People, *Voice, Vision and Leadership: A Place for All*, March 2013; and, Truth and Reconciliation Commission of Canada (TRC), Reports, 2015.

363 Truth and Reconciliation Commission of Canada.

364 Prime Minister of Canada, *Statement by Prime Minister on release of the Final Report of the Truth and Reconciliation Commission*, 15 December 2015.

Ensuring a fair and efficient justice system for Indigenous persons in Canada is one important part of this reconciliation (as discussed below, the Commission made recommendations targeting many of the same issues discussed in this report). To achieve this goal, the treatment of Indigenous accused persons, victims and offenders must be culturally sensitive to indigenous justice traditions, which tend to place a greater emphasis on relationships and personal and community healing.

The committee heard from several officials from federal, provincial and territorial governments who discussed the specific impact of delays on Indigenous peoples.[365] In our travels to Halifax, Vancouver and Saskatoon, we also met with representatives from Aboriginal Courtworkers services,[366] representatives from the Congress of Aboriginal Peoples and from the Honourable Shaun Nakatsuru, Justice at the *Gladue* Court of Toronto (Ontario Court of Justice).[367] In her testimony before the committee, Paula Marshall from the Mi'kmaq Legal Support Network summarized some of the challenges that Indigenous peoples face in Canada with regard to the criminal justice system:

- Indigenous peoples spend more time in pre-trial detention and that has to do with not being granted bail.
- Indigenous peoples are more likely to be accused of multiple offences.
- Indigenous peoples are more likely not to have legal representation at court proceedings.
- Indigenous offenders are twice as likely to be incarcerated.
- Indigenous peoples in Nova Scotia are less likely to testify in courts because it is not the responsibility of the victim to try to make things right, it is the responsibility of the community.

According to Statistics Canada, although Indigenous persons only represent 5 per cent of the Canadian population, they are over-represented as both offenders and victims of crime.[368] The 2014 General Social Survey on Victimization (GSS) states that 30 per cent of Indigenous people reported that they or their household had been the victim of at least one of the eight crimes measured by the GSS, as opposed to 19 per cent of non-Indigenous people. With regard to homicide in particular, Indigenous persons accounted for 25 per cent of homicide victims in 2015. (The Indigenous rate of being the victim of a homicide is about seven times the rate for non-Indigenous peoples.)

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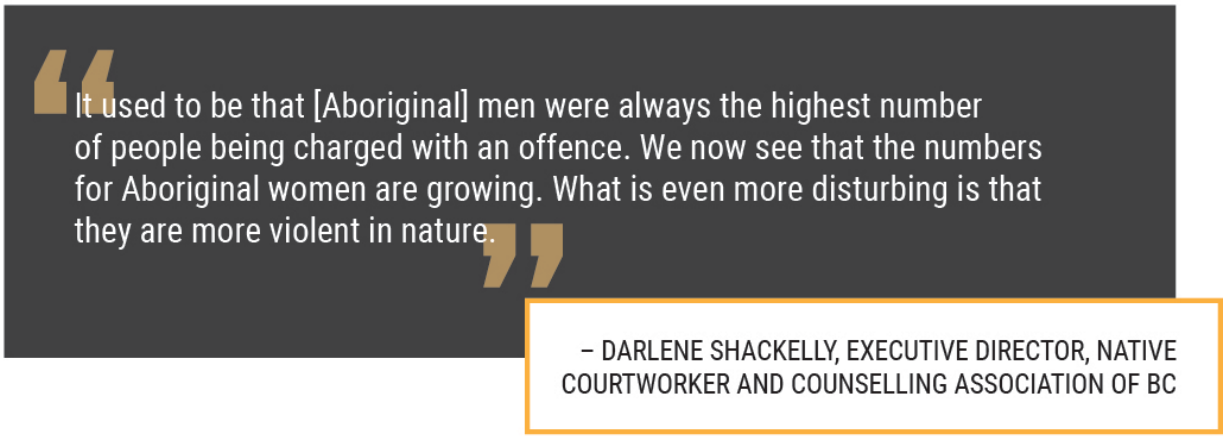
365 Including from Deputy Minister William MacKay, Department of Justice, Government of Nunavut (20 October 2016).

366 See the testimony of Paula Marshall, Mi'kmaq Legal Support Network (6 May 2016); Darlene Shackelly, Native Courtworker and Counselling Association of BC (27 September 2016); and Annette Ermine, Carol Lafonde and Kathleen Makela, Saskatchewan Aboriginal Courtworker Program (29 September 2016).

367 See the testimony of Kim Beaudin and Ron Swain, Congress of Aboriginal Peoples; and Justice Shaun Nakatsuru, Ontario Court of Justice (27 October 2016).

368 These statistics are taken from the following publications: Statistics Canada, "Justice," *Aboriginal Statistics at a Glance*, 30 November 2015; Leah Mulligan, Marsha Axford and André Solecki, Statistics Canada, *Homicide in Canada, 2015*, 23 November 2016; Statistics Canada, *Projections of the Aboriginal Population and Households in Canada, 2011 to 2036*, 17 September 2015; Samuel Perreault, Statistics Canada, *Criminal victimization in Canada, 2014*, 2015; Mary Allen, Statistics Canada, *Police-reported crime statistics in Canada, 2015*, 2016.

With regard to Indigenous offenders, Indigenous people accounted for 20 per cent of adults admitted to remand (detention while awaiting trial or sentencing); 25 per cent of adults admitted to provincial/territorial sentenced custody; and 18 per cent of all adults admitted to federal custody in 2007-2008.[369] In addition, the representation of Indigenous adults among female admissions is greater than among males. Indigenous women represented nearly one-third of females admitted to provincial/territorial custody in 2007-2008.[370] As of January 2016, 25 per cent of the total federal incarcerated population were Indigenous persons (for Indigenous women, it exceeded 35 per cent).[371] Also, according to the Office of the Correctional Investigator's 2015-2016 Annual Report: "Aboriginal people under federal sentence tend to be younger, less educated, and more likely to present a history of substance abuse, addictions and mental health concerns."[372] As a further illustration of these realities, David Field, President and CEO of Legal Aid Ontario, testified that Indigenous clients represent 20 per cent of the legal aid criminal law certificates; however, they only represent 2.4 per cent of Ontario's total population.



These numbers and statistics were also illustrated by National Vice-Chief Kim Beaudin from the Congress of Aboriginal Peoples with regard to Métis and non-status Indians:

> One of the sad facts is that Metis and non-status Indians have some of the highest rates of criminal records and interaction with the judicial system in every part of Canada. For example, family violence, drug and pill addictions and alcohol abuse have

369 Ibid.

370 Ibid. Also, Mr. Beaudin spoke about the impact on the families of accused indigenous women: "When they are gone, all of a sudden you have all these other issues pertaining to families and children. Children end up in foster care, and it's a huge, vicious circle. It's just not good."

371 Office of the Correctional Investigator, *Annual Report of the Office of the Correctional Investigator, 2015-2016*, 2016, p. 43. According to this report: "To put these numbers in perspective, between 2005 and 2015 the federal inmate population grew by 10 per cent. Over this same period, the Aboriginal inmate population increased by more than 50 per cent while the number of Aboriginal women inmates almost doubled."

372 Ibid.

> created a cycle of destruction that is devastating our communities. Poverty, poor health, education failure, family violence, addictions, lack of proper housing, personal and community indigenous culture alienation are factors that have put our indigenous members before the courts in disproportionately large numbers and frequency.

Vice-Chief Beaudin also talked about the "systemic racism in the justice system," the need for cultural training for federal and provincial employees and how the justice system "is really foreign to indigenous people." Related to this last point, Paula Marshall described how "Aboriginal people feel disconnected from the Canadian justice system. It is a very meaningful process but it is one that is very different. It is very punitive and very combative [compared] to the justice processes that we would typically have used within our communities."

A key component of resolving this disconnect is to ensure that the justice system is more adaptable to the unique needs of the Indigenous persons who enter it. Deputy Minister William MacKay from the Nunavut Department of Justice expressed his own views that capture this idea:

> [I]n my experience, the more reflective the justice system is of indigenous communities, the better it serves them. So I would say move to a system that's not necessarily separate but one that is within the current justice system, that better reflects indigenous culture and values and better reflects the indigenous people, so more indigenous lawyers, more indigenous police, more indigenous judges.

The committee heard testimony about many initiatives for Indigenous Canadians already in place that are helping to create change, including: victim support services programs; Aboriginal Courtworkers; *Gladue* reports (see below); and restorative justice programs focusing on healing, sentencing, and post-conviction support. In addition, Ms. Shackelly, Executive Director of the Native Courtworker and Counselling Association of BC, referred to the four First Nations courts in her own province, which are sentencing courts. In her view, these are "the types of initiatives … that actually can be quite supportive of the justice system in British Columbia. … First Nations courts are looking more at what exactly is bringing the individuals to the system and at how they can address those issues." Paula Marshall also agreed that a healing court "seems to be the best way to go" to address the special circumstances of Indigenous offenders. Vice-Chief Beaudin added that culture is really important for Indigenous people and healing plays an important part in that process.

In Chapter Eight, the committee reviewed the importance of choosing the most appropriate measures for accused persons, and in Chapter Nine, the importance of appropriate measures for offenders. The considerations set out in those chapters, of course, apply equally to Indigenous Canadians, with the addition that whatever measures are chosen should be culturally appropriate for Indigenous peoples. It is imperative that such measures are available to Indigenous Canadians throughout the country.

The committee notes that the 2017 Federal Budget announced several investments that specifically address some of the above mentioned issues. In particular, it announced:

- an additional funding of $204.2 million over five years to increase support for mental health services for First Nations and Inuit;[373]
- a $55.5 million investment over five years (starting in 2017–18) "which provides funding for community-based programs that use restorative justice approaches as an alternative to the mainstream justice system and corrections ";[374] and
- a $65.2 million investment over five years (starting in 2017-18) and $10.9 million per year thereafter "to help previously incarcerated Indigenous Peoples heal, rehabilitate and find good jobs" with the objective to "help reverse the trend of Indigenous overrepresentation in Canada's criminal justice system" [375]

The committee welcomes these announcements and the investments that will be made for these much-needed programs for Indigenous Canadians. Of course, this funding is just the beginning of the hard work that must follow. The programs that are invested in will need to be carefully reviewed and studied to ensure that they are effective and to allow for best practices and analytical data to be shared. The committee looks forward to learning more about the progress regarding these initiatives in the years ahead. We also look forward to hearing about how local Indigenous communities become engaged and are consulted as these programs take shape and are implemented.

Aboriginal Courtworkers

The role of Aboriginal Courtworkers was discussed by several witnesses. According to the Department of Justice, all provinces and territoires (except P.E.I., Newfoundland and Labrador and New Brunswick) and territories receive financial support to deliver court services through the Aboriginal Courtwork Program[376] (now the Indigenous Courtwork Program).[377] Federal funding of $5.5 million is provided to participating provinces and territories and services are delivered by aboriginal service delivery agencies.[378] Saskatchewan's then Deputy Minister of Justice, Kevin Fenwick explained that:

> This program assists Aboriginal adults and youth who are in conflict with the law. These court workers help ensure Aboriginal people who are alleged to have committed criminal offences receive fair and just treatment before the courts. This program is very successful. … Without this Aboriginal Courtworker Program, there would be many more costly court processes and further delays in the system.

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373 See Government of Canada, Federal Budget 2017, p. 165.

374 Ibid, p. 168.

375 Ibid, p. 169.

376 Department of Justice Canada, *Aboriginal Courtwork Program*. According to the Department of Justice "Nationally, over 180 Courtworkers provide services to approximately 60,000 Aboriginal clients in over 450 communities each year."

377 Department of Justice Canada, *2017-18 Departmental Plan – Supplementary Information Tables*, Sub-sub-program 1.1.2.5: Aboriginal and Northern Justice.

378 Department of Justice Canada, Evaluation Division, Office of Strategic Planning and Performance Management, Aboriginal Courtwork Program Evaluation, Final Report, March 2013, p. i.

Kathleen Makela from the Native Law Centre of the University of Saskatchewan further explained that:

> The courtworker program has always been aimed at addressing the unique challenges faced by Aboriginal people within the court system …Their job is to help Aboriginal people understand what is happening, literally what charges they are facing and how the court process will run. They also explain to the justice personnel how an Aboriginal person is situated within not only the court proceeding but also within Saskatchewan. The courtworker program therefore consists of trying to make sure that Aboriginal people are dealt with in a fair, just and culturally sensitive manner within our criminal justice system.

Andrew Mason, representing Saskatoon Criminal Defence Lawyers Association Inc., noted how courtworkers are helping ease the challenges of an under-funded legal aid system that is unable to meet the demands placed on it: "The courtworker program offloaded a lot of that burden by having courtworkers go in and talk with the accused in custody when they were arrested." Kelly Kaip from the Saskatchewan Crown Attorney's Association added that: "Aboriginal courtworkers have filled the gap where persons may not qualify for Legal Aid and cannot afford a lawyer or for those who wish to deal with their matters more expeditiously."

However, many witnesses raised a concern about lack of funding and resources for Aboriginal Courtworkers. This is unfortunate, because we also heard about the great benefits these programs offer, especially since they can prevent unnecessary delays.[379] Craig Goebel from Legal Aid Saskatchewan described how "the value of the native courtworkers program is immeasurable. Its having been cut back is a blow to everyone in the system: clients, Crown, judges and defence counsel. There is no question about that." Kevin Fenwick also mentioned that "the absence of federal funding does create questions for us about the continued viability of that program. Over the past decade, as is the case with legal aid, provincial funding has increased while federal funding has remained frozen." Ms. Makela added that as it has been under a federal funding cap since 2002: "the courtworker program is under extreme stress." To illustrate that reality, Annette Ermine, program manager of the Saskatchewan Aboriginal Courtworker Program, said that:

> With the reduction in the courtworker program budget right now we have 19 criminal courtworkers for the province, compared to the 35 that we had prior … The 19 courtworkers that are working throughout the province to deliver to 44 court points, only eight of them are full time.

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[379] See the testimony of Kevin Fenwick, Ministry of Justice, Government of Saskatchewan (24 February 2016); Darlene Shackelly, Native Courtworker and Counselling Association of BC (27 September 2016); Annette Ermine, Carol Lafonde and Kathleen Makela, Saskatchewan Aboriginal Courtworker Program; Craig Goebel, Legal Aid Saskatchewan; Andrew Mason, Saskatoon Criminal Defence Lawyers Association Inc; and Kelly Kaip, Saskatchewan Crown Attorneys Association (29 September 2016).

The committee believes that the value of Aboriginal Courtworker programs in making Canada's justice system fairer and more efficient is significant and should be sufficiently supported by Canadian governments. In addition, the committee believes that the work of those employed in Aboriginal Courtworker programs assists accused, counsel and the courts to the point that a reduction in their availability contributes to the issue of delay.

Recommendation 45

The committee recommends that the Minister of Justice provide adequate funding and resources to ensure that Aboriginal Courtworkers programs (now the Indigenous Courtwork Program) are sufficiently supported to provide the necessary assistance to Indigenous persons in the justice system.

Sentencing Principles (*Gladue*)

It is recognized in the *Criminal Code* and at common law that specific factors and principles must be taken into consideration during bail hearings and when a criminal court is sentencing an Indigenous person who has plead or been found guilty. Section 718.2(e) of the *Criminal Code* states:

> A court that imposes a sentence shall also take into consideration the following principles: …
>
> (e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

A previous version of this particular provision was examined by the Supreme Court of Canada in the case of *R v. Gladue* in 1999.[380] In that decision, the Supreme Court detailed how sentencing judges must pay particular attention to the circumstances of Indigenous offenders and consider alternatives to incarceration. The committee had the opportunity to hear the Honourable Justice Shaun Nakatsuru discuss how the *Gladue* Court in Toronto (Ontario Court of Justice) operates:

> We do basically three things. We do bail hearings, we do sentencing, and we do diversion. Anyone who self-identifies as indigenous has the opportunity to go into the *Gladue* Court here in Toronto. Wherever an indigenous person appears, in whichever court across this nation, of course, the presiding justice of the peace or judge must apply those *Gladue* principles. But anyone who wants to come to our *Gladue* Court for those purposes is free to do so once they self-identify. …
>
> [W]e try to take a restorative approach when it's appropriate to the case. In other words, we resort to issues of rehabilitation without, of course, ignoring deterrence and

[380] *R. v. Gladue*, [1999] 1 S.C.R. 688.

> denunciation when required, and we try to craft an appropriate resolution which addresses the concerns of the offender, the victim and the community in general. … [T]o try and develop a meaningful alternative to incarceration, there are a lot of steps that may need to be taken outside of the court, amongst the various parties, to get to the stage where that meaningful alternative can be implemented.

Justice Nakatsuru also noted that sometimes "meaningful justice, culturally appropriate justice or justice sensitive to the circumstances and needs of Indigenous peoples can take time." With this comment, he acknowledged that *Gladue* Court processes can take longer, but that extra time can help achieve better results.

In order to assist a judge when sentencing or considering a release plan during a bail hearing, a report can be submitted that outlines arguments for what an appropriate sentence would be in accordance with the principles of section 718.2(e). *Gladue* reports, as they are known, can also set out details about the individual's background and experiences as well as any underlying developmental or health issues, including mental health and substance abuse problems. Aboriginal Courtworkers help with the preparation of these reports. Paula Marshall explained how the Mi'kmaq Legal Support Network prepares these documents:

> We provide reports to the sentencing judges on the special circumstances of Aboriginal offenders in Nova Scotia. These reports are typically for those offenders that are looking at a period of custody and those offenders that require more support. … It documents three generations back and lists the resources available for the judge and the community. For some shoplifting charges it may be over-resourced to have something like that. We are typically looking at people who are going to be doing some serious time.

However, Darlene Schackelly from the Native Courtworker and Counselling Association of BC explained that these reports are in fact "highly underutilized" and underfunded in her province. She added that "This is an uphill battle regarding the issue of *Gladue*." In comparing the BC and Nova Scotia approaches, she said:

> They [the Mi'kmaq Legal Support Network] actually have a funny relationship with the province that when they do *Gladue* they bill the province and the province pays. Unfortunately that is not the case here in British Columbia which to me is a real flaw in the system.

The committee recognizes that in order for the purpose of section 718.2(e) to be fully realized – that is to give due attention to the unique circumstances of Indigenous offenders – assistance must be provided for the preparation of *Gladue* reports. The Minister of Justice should ensure that appropriate levels of funding are in place across the country. This will mean coordinating funding plans with the provincial governments. Given that section 91(24) of Canada's constitution specifically grants authority over "Indians" to the federal government, it falls to the minister to make up for any shortfall in provincial funding for providing court worker services for this task.

Recommendation 46

The committee recommends that the Minister of Justice ensure that funding and resources are available across Canada to provide the necessary programs to assist in the preparation of *Gladue* reports.

The Truth and Reconciliation Commission of Canada

The Truth and Reconciliation Commission of Canada (TRC) was a component of the Indian Residential Schools Settlement Agreement, which was the largest class-action settlement in Canadian history. It was established to facilitate reconciliation among former students, their families, their communities and all Canadians.[381] The TRC spent six years travelling across Canada, heard from more than 6,500 witnesses and hosted seven national events. It created an historical record of the residential schools system. Its final report was released in 2015 and contained 94 "calls to action" (or recommendations) directed most often at the federal, provincial and territorial governments but also at other institutions such as churches, law societies, and medical schools, among others. There are eighteen that pertain specifically justice matters.[382] These calls to action were mentioned by several witnesses.[383] In particular, the TRC's calls to action are for:

- lawyers and law students to receive appropriate training on Indigenous law and on the history and cultural realities of Indigenous peoples (#27-28);
- the elimination of the overrepresentation of Indigenous people in custody (and Indigenous youth in particular) (#30 and 38);
- alternatives to imprisonment for Indigenous offenders (including healing lodges) (#31 and 33);
- departing from mandatory minimum sentences and restrictions on the use of conditional sentences (#32);
- providing culturally relevant services to inmates (#36);
- supporting Aboriginal programming in halfway houses and parole services (#37);
- improving data on and services for Indigenous victims and victimization (#39-41); and

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381 Truth and Reconciliation Commission of Canada, *About Us*; Indigenous and Northern Affairs Canada, *Truth and Reconciliation Commission of Canada*.

382 Truth and Reconciliation Commission of Canada (TRC), *Calls to Action*, 2015. The three Commissioners of the TRC were Justice Murray Sinclair, Chair; Dr. Marie Wilson; and Chief Wilton Littlechild. Justice Sinclair has since been appointed to the Senate and is now a member of this committee.

383 See the testimony of Karen Hudson, Nova Scotia Legal Aid Commission (25 February 2016); Catherine Latimer, John Howard Society of Canada; and Kim Pate, Canadian Association of Elizabeth Fry Societies (10 March 2016); Dale McFee, Ministry of Justice, Government of Saskatchewan (21 April 2016); Darlene Shackelly, Native Courtworker and Counselling Association of BC (27 September 2016); Annette Ermine, Saskatchewan Aboriginal Courtworker Program (29 September 2016); Ian M. Carter, Canadian Bar Association (19 October 2016); Kim Beaudin, Congress of Aboriginal Peoples; and Justice Shaun Nakatsuru, Ontario Court of Justice (27 October 2016).

- the recognition and implementation of Aboriginal justice systems (#42).[384]

In particular, Kim Pate, representing the Canadian Association of Elizabeth Fry Societies at the time,[385] suggested that the committee consider Call to Action 30 of the TRC on de-incarceration strategies, especially for Indigenous women and those with mental health issues.

The committee takes this opportunity to commend the work of the TRC in documenting the stories of residential school survivors and their families and communities.

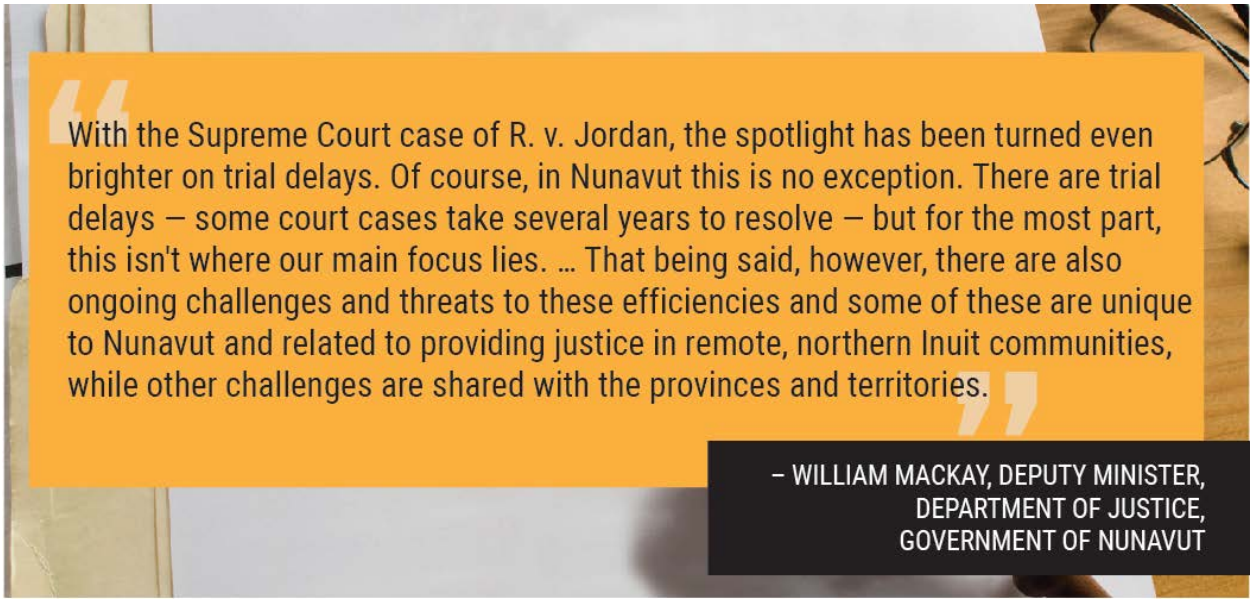
Recommendation 47

The committee recommends that the Minister of Justice expedite the Government of Canada's review and implementation plan in response to the Calls to Action pertaining to the justice system contained in the Truth and Reconciliation Commission of Canada's report.

[384] In the 2017 Federal Budget, the government committed to address each of the calls to action (falling under its purview). For example, it specifically mentions programming to reduce the overrepresentation of indigenous persons in the criminal justice and corrections systems. See Government of Canada, Federal Budget 2017, p. 166.

[385] Since appearing as a witness on this study, Senator Pate was appointed to the Senate and is now a member of this committee.

CHAPTER ELEVEN – NORTHERN TERRITORIES AND REMOTE COMMUNITIES



A special feature of the criminal justice system in Canada concerns the challenges of delivering justice services in remote communities and in the three northern territories. The committee heard from William MacKay, Deputy Minister of the Government of Nunavut's Department of Justice, about his territory's situation. Nunavut has circuit courts for 24 communities that are accessible only by airplane. The communities range in size from 130 to 2,500 residents. Each community is visited by a circuit court approximately one to five times per year. Despite the challenges presented by a scattered population over a wide area, the data indicate that the median criminal case times in the territories are lower than the median for the provinces. While the median length of a case in Canada in 2014/2015 was 121 days, in the three northern territories the median length of cases was: 103 (Yukon); 61 (Northwest Territories); and 71 (Nunavut).[386]

The number of persons in correctional services, however, tells a different story. According to Statistics Canada, the average daily count of persons in all correctional services[387] in the provinces and territories in 2015/2016 was 438 per 100,000 population.[388] In the territories, the average daily counts were: 1,445 (Yukon); 1,742 (Northwest Territories); and 3,797 (Nunavut). Another discrepancy between the territories and the rest of Canada lies in the costs of incarceration. The average daily inmate cost in all jurisdictions

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386 Ashley Maxwell, Canadian Centre for Justice Statistics, Statistics Canada, Adult criminal court statistics in Canada, 2014/2015, 21 February 2017, Table 2, Cases completed in adult criminal court, by province and territory, 2013/2014 and 2014/2015.

387 This is defined as being persons in sentenced custody or remand or as being persons under community supervision, which includes probation, conditional sentences, provincial parole, full parole, day parole, statutory release, and long-term supervision.

388 Julie Reitano, Canadian Centre for Justice Statistics, Statistics Canada, *Adult correctional statistics in Canada, 2015/2016*, 1 March 2017, Table 1, Average daily counts of adults in correctional services, by jurisdiction, 2015/2016.

in 2015/2016 was $128 per capita. In the territories the average daily per capita cost was: $363 (Yukon); $736 (Northwest Territories); and $1,007 (Nunavut).[389] While these figures should be read with caution given the small size of the population in the territories, they do indicate a large relative difference in numbers of persons in the criminal justice system and the costs this entails.

In northern and remote communities, judicial resources are scarce and there are little to no back-up resources available. So it was of some concern to the committee when Nunavut's Deputy Minister of Justice stated that, at the time of his appearance, out of six resident judicial positions, Nunavut had two vacancies. As such, it was missing 33 per cent of its judicial complement. In addition, the list of deputy judges had been cut in recent years through attrition and no new appointments were being made.[390] Deputy judges are judges that are non-resident but come to Nunavut and the other territories to serve as judges in the circuit courts.[391]

This lack of judicial resources has an impact on court scheduling. In 2016, due to a shortage of judges, two Superior Court circuits had to be canceled in Nunavut, delaying matters in those communities for several months until the next scheduled circuit. The concern expressed to the committee was that ongoing judicial shortages could result in similar occurrences.[392] As William MacKay testified: "deputy judges are sorely needed as well in the territory. … That's an important part of justice that the federal government needs to address as well."

Recommendation 48

The committee recommends that the Minister of Justice:

- **make appropriate judicial appointments in Canada's North as expeditiously as possible, particularly in Nunavut where judges are only federally appointed; and**
- **ensure that there is a sufficient complement of deputy judges that are available to serve in the territories.**

In a survey of its members, the Canadian Bar Association noted that the single largest concern in Canada's North was the problem with administration-of-justice offences (which are discussed in Chapters Seven and Nine). These are offences such as breaching bail and probation conditions, which often require the individual in question not to consume alcohol. The issue here is that each person consequently

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389 Ibid., Table 6, Operating expenditures of the adult correctional system, by jurisdiction, 2015/2016.

390 On 23 November 2016, the Minister of Justice announced that 22 Deputy Judges had been appointed to the Supreme Court of the Northwest Territories, the Supreme Court of Yukon, and the Nunavut Court of Justice. See Department of Justice Canada, "New Deputy Judge Appointments for the Territories", News Release, 23 November 2016.

391 Deputy judges are sitting, supernumerary or retired Superior Court Judges or lawyers of a least 10 years standing at the bar of a province, appointed by the Governor in Council and who exercise and perform all the powers, duties and functions of a judge of the Nunavut Court of Justice, the Supreme Court of the Northwest Territories and the Supreme Court of Yukon. See s. 33 of the *Nunavut Act*, S.C. 1993, c. 28; s. 41 of the *Yukon Act*, S.C. 2002, c. 7 and s. 47 of the *Northwest Territories Act*, S.C. 2014, c. 2, s. 2.

392 See the testimony of William MacKay, Government of Nunavut (Evidence, 20 October 2016).

arrested and processed for consuming alcohol takes up a large amount of court resources. According to the Canadian Bar Association, these offences overwhelm the dockets in the North.[393]

The Canadian Bar Association also indicated that lawyers in the North reported a lack of access to clients. One example it cited was a new facility in Whitehorse which has only two meeting rooms in the entire building that are for everyone's use, lawyers included.

Modern technologies, though, can help to overcome the difficulties presented by a small population scattered over a very large area. Technology was also cited as a potential aid in ensuring access to justice in Nunavut. The Deputy Minister of Justice said the government in that territory was looking at ways to deliver justice services by phone or by video conference:

> …[T]hat's a big priority for us in terms of trying to ensure that there is access to justice in Nunavut, and it's a cost savings as well. We're looking at ways to deliver our services, especially being able to hold not necessarily trials but show-cause hearings and interlocutory applications, those types of things that can be done over the phone or by video conference.

Access to broadband in the North, however, was described as being "fairly limited," so it is often difficult to be able to use video conferencing.

Recommendation 49

The committee recommends that the Minister of Justice ensure that resources are invested in technological solutions to the problems presented by small, scattered populations in remote and isolated communities, including:

- **secure, high-speed communication links between lawyers and their clients and between lawyers in the communities and any central judicial facility; and**
- **videoconferencing technology so that court appearances such as bail hearings and interlocutory applications can be conducted remotely and without the need for an accused person to be removed from his or her community.**

A number of witnesses discussed other ways in which remote locations present special challenges for the criminal justice system. One example was the imposition of a travel ban as a condition of release. This may not be a hardship for someone living in a large urban centre, but may prove to be one for someone from a small community. Justice Shaun Nakatsuru, *Gladue* Court Administrative Coordinator, Ontario Court of Justice, explained that care needs to be taken when imposing such a condition. Another example concerned the effects of delaying a court hearing. If a matter has to be adjourned, it might be another month before it is heard again. There are more resources available in larger urban centres to deal with

[393] See the testimony of Ian M. Carter, Treasurer, Criminal Justice Section, Canadian Bar Association (Evidence, 19 October 2016).

such delays.[394] A third example concerned the frequency of travel between remote communities and larger urban centres. Frequent travelling means that an offence can often be committed far from an alleged offender's home. This means that alleged offenders held without bail can find themselves far from family and community supports. If they do manage to return to their homes, as Kim Beaudin, National Vice-Chief of the Congress of Aboriginal Peoples, explained, they often lack the resources to come back to the city to face their charges.

One way that some of these special challenges can be managed is by ensuring that there is suitable judicial training for those working in northern and remote communities. The committee notes that this training should take advantage of the experience of those counsel who have represented individuals in such communities.

Finally, while northern and remote communities present unique challenges to the criminal justice system, they do share some challenges with other parts of that system. One of those is the availability (or lack of availability) of legal aid funding. The committee was told that Nunavut has the lowest percentage of federal assistance for legal aid as a proportion of actual legal costs in the country, combined with a population lacking in resources and needing such assistance. The goal of the territorial government for this cost-sharing program is equal territorial and federal funding.[395] As already recommended in Chapter Seven, the Minister of Justice should work with the provinces and territories to undertake a full-scale review of legal aid plans in Canada with a view to bringing funding levels to acceptable levels.

> "…in Northern Canada, it's time that we invested more in those kinds of assistance to the Aboriginal people. Really, that's diverting those cases, hopefully, out of the court and again reducing the incidence of crime and, by that manner, reducing the pressure on the courts."
>
> - THE HONOURABLE TERRENCE MATCHETT, CHIEF JUDGE, PROVINCIAL COURT OF ALBERTA

The territories also share with the provinces an interest in implementing restorative justice policies. The committee was told that Nunavut is 85 per cent Inuit and that restorative justice in the territory reflects Inuit culture, which is focused on healing and reconciliation. It was also told that restorative justice and alternative court models present great potential for Nunavut to address recidivism and reduce stress on the criminal justice system.[396] All 26 communities in Nunavut have a Community Justice Committee,

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394 See the testimony of Chief Clive Weighill, Saskatoon Police Service (Evidence, 29 September 2016).

395 See the testimony of William MacKay, Government of Nunavut (Evidence, 20 October 2016).

396 Ibid.

to which alleged offences may be diverted by police or prosecutors, pre- or post-charge. These committees meet with the offender, victims and members of the community to try to heal relationships damaged by criminal behaviour. The committees also help offenders reintegrate into their community after incarceration, through community-based counselling and guidance, in which all community members are invited to be involved.

Recommendation 50

The committee recommends that the Minister of Justice provide financial and administrative support for restorative justice initiatives in Canada's Northern territories in consultation with local Indigenous peoples.

APPENDIX A - List of Recommendations

1. The committee recommends that when Canada's federal, provincial and territorial ministers of justice meet to address issues pertaining to delays in criminal proceedings in September 2017, they:
    - develop and publish a national strategy for taking immediate action to address delays in criminal proceedings; and
    - create a funding plan for how the federal government can assist the provinces and territories in modernizing their justice systems.

2. The committee recommends that the Minister of Justice take a leadership role and assist Statistics Canada by working with the provinces and territories and other relevant stakeholders in the justice system to ensure that the data collected for the Integrated Criminal Court Survey is reliable and sufficient for Canadians to have as complete an understanding as possible of the criminal justice system. The statistics should better reflect, if possible, the number of cases in which a stay of proceedings has been ordered due to a violation of the right to be tried within a reasonable time.

3. The committee recommends that the Minister of Justice develop a national education and awareness strategy for the judiciary, the legal profession and other key stakeholders concerning ways to address delays and other inefficiencies in the justice system.

4. The Committee recommends that the remedy for unreasonable trial delay be found in sentencing and costs and that a reference to the Supreme Court of Canada be made by the Attorney General of Canada to ensure the constitutionality of the proposed changes to the *Criminal Code* to give effect to the remedy.

5. The committee recommends that the Government of Canada establish an independent body of experts with a mandate to undertake a comprehensive and impartial review of the *Criminal Code* and provide recommendations for the modernization and reform of this law.

6. The committee recommends that the Minister of Justice introduce legislation to amend the *Criminal Code* to add a principle to section 718.2 that when an accused person pleads guilty early in the proceedings, the court should consider it to be a mitigating factor for sentencing.

7. The committee recommends that the Minister of Justice take steps to eliminate preliminary inquiries or limit their use.

8. The committee recommends that the Minister of Justice undertake a thorough review of existing mandatory minimum sentences in order to:
    - ensure a reasonable, evidence-based approach to when they are appropriate; and
    - consider whether persons with mental health issues should be considered for alternative sentencing options or treatment when faced with mandatory minimum sentences.

9. The committee recommends that the Minister of Justice review the merits of designating offences for appropriate social issues to be dealt with as administrative penalties in order to reserve criminal law procedures for more serious crimes and thereby reduce the strain on limited court resources.

10. The committee recommends that the Minister of Justice:
    - give due consideration to recommendations made by the Commissioner of Official Languages in his 2013 report: *Access to Justice in Both Official Languages: Improving the Bilingual Capacity of the Superior Court Judiciary*; and
    - ensure that appropriate judicial appointments are made to improve the bilingual capacity of the Canadian judiciary, particularly in regions with sizeable official language minority communities.

11. The committee recommends that the Minister of Justice work with the provinces and territories to develop a strategy to ensure a consistent and adequate level of services for victims across Canada, including:
    - expanding the availability of victims' integrated service and advocacy centres; and
    - establishing computerized notification systems for victims concerning criminal case proceedings and the information they need to obtain services.

12. The committee recommends that the Minister of Justice invite funding proposals from the provinces and territories to expand integrated services and advocacy centres for victims across Canada.

13. The committee recommends that the Minister of Justice work with the provinces and territories and in particular with the judiciary to:
    - stress the need for judges to improve case management, such as by imposing deadlines and challenging unnecessary adjournments, using the tools that already exist; and
    - consider making amendments to the *Criminal Code* to support better case management as necessary.

14. The committee recommends that the Minister of Justice work with the provinces and territories:
    - to establish methods of measuring courthouse performance and efficiency and setting targets and benchmarks for criminal proceedings across Canada;
    - to review scheduling practices across Canada and provide objective analysis and direction concerning best practices and outdated methods that should be replaced; and
    - to create mechanisms to ensure that such analysis is performed and published as a regular, recurring practice.

15. The committee recommends that the Minister of Justice take a leadership role in helping the provinces and territories develop scheduling practices and tools that ensure productive, optimal and efficient use of courtrooms, such as by implementing "shadow courts", summer trials, extended courthouse hours, and other related initiatives.

16. The committee recommends that the Minister of Justice complete the process of nominating the remaining members for the Judicial Advisory Committees without further delay and provide them with the training and support they need to allow them to review applications and make recommendations for judicial appointments to the Minister.

17. The committee recommends that Superior Court Judges be appointed on the day of a known retirement of a Judge and the only exceptions to this immediate replacement would be an unexpected death or unexpected early retirement of a sitting judge.

18. The committee recommends that the Minister of Justice work with the provinces and territories, in particular with the judiciary, to:
    - create and publish a full assessment of the caseload of superior courts across the country and the number of superior court judges required to meet the demands of all regions in Canada;
    - determine the appropriate number of judicial positions that should be included under the *Judges Act* based on reliable evidence and analysis; and
    - introduce legislation to amend the *Judges Act* accordingly.

19. The committee recommends that the Office of the Commissioner for Federal Judicial Affairs Canada update the information it publishes on its website concerning judicial appointments and vacancies for each province and territory (in accordance with the *Judges Act*) with the number of additional superior court judges appointed pursuant to provincial legislation.

20. The committee recommends that the Minister of Justice amend the *Criminal Code* to allow certain procedural matters in criminal hearings to be performed by a judicial officer other than a judge.

21. The committee recommends that the Minister of Justice take a leadership role and establish a program to design computerized systems that can be adopted by provinces and territories that will:
    - effectively manage criminal and courthouse proceedings;
    - allow for more procedural matters to be addressed by computer to avoid unnecessary court appearances;
    - permit the disclosure of evidence by a standard electronic system; and
    - provide a user-friendly access portal to unrepresented accused persons, witnesses, victims and other affected parties concerning criminal proceedings in which they are involved.

22. The committee recommends that the Ministers of Justice and Public Safety and Emergency Preparedness ensure that appropriate and standardized computer systems are made available to Crown prosecutors' offices and police departments across Canada in order to facilitate electronic communications and ensure the most efficient use of police officers' time spent attending criminal proceedings.

23. The committee recommends that the Government of Canada, through Public Safety Canada and the RCMP:
    - commit resources to ensure Canadian forensic laboratories are able to perform faster DNA analyses and updates to Canada's DNA Data Bank; and
    - collaborate with the governments of Ontario and Quebec with regard to their provincial forensic laboratories to ensure they receive appropriate financial assistance.

24. The committee recommends that the Minister of Justice introduce legislation to amend the *Criminal Code* to allow for the immediate and automatic collection of a DNA sample from any adult who has been convicted in Canada of a designated offence as defined in section 487.04 of the *Criminal Code.*

25. The committee recommends that the Minister of Justice and the Minister of Public Safety and Emergency Preparedness work with the provinces and territories to:
    - conduct a review and analysis of the best practices concerning cooperation between police and Crown prosecutors as well as the merits of various models used for the laying of charges; and
    - ensure that the outcome of this review is made public and that appropriate recommendations are made for police and prosecution services across Canada.

26. The committee recommends that the Minister of Justice introduce an amendment to the *Criminal Code* setting out a presumption that the Crown will disclose all evidence in accordance with any timelines set by the judge prior to trial and that any evidence introduced thereafter will need to be justified based on due diligence or previous unavailability.

27. The committee recommends that the Minister of Justice ensure that computer software and related technological solutions are developed for the management and disclosure of evidence that can be used as a uniform, searchable platform by the police, Crown prosecutors and defence counsel across Canada.

28. The committee recommends that the Minister of Justice review the *Criminal Code* and other criminal laws in order to make appropriate amendments that indicate standard and routine types of evidence that should be automatically disclosed as part of criminal proceedings before the start of trial.

29. The committee recommends that the Minister of Justice undertake a full-scale review of legal aid plans with a view to bringing access to legal aid up to acceptable levels across Canada.

30. The committee recommends that the Minister of Justice ensure that better support is available for unrepresented accused persons across Canada; in particular, by working with the provinces and territories to facilitate the establishment of user-friendly computer portals for managing court appearances and understanding court procedures.

31. The committee recommends that the Minister of Justice:
    - prioritize reducing the number of persons on remand across Canada; and
    - work with the provinces and territories to establish a plan for proceeding with appropriate reforms to the current bail regime.

32. The committee recommends that the Ministers of Justice and Public Safety and Emergency Preparedness prioritize the development and production of electronic monitoring mechanisms as an alternative to detention in remand for suitable accused persons.

33. The committee recommends that the Minister of Justice prioritize the reduction of court time spent dealing with administration of justice offences and develop alternative means of dealing with such matters with the provinces and territories.

34. The committee recommends that the Minister of Justice work with the provinces and territories to craft conditions of release for accused persons that will serve to protect the public while at the same time reducing the number of administration of justice charges.

35. The committee recommends that the Government of Canada, in particular the Ministers of Justice, Health and Public Safety and Emergency Preparedness, coordinate an evidence-based strategy with clear targets to ensure that adequate health services are available for Canadians with mental health issues, including those with drug and alcohol addictions. In particular, funding should be provided for programs aimed at the prevention of crime by persons with mental health issues and for the treatment of such persons in detention.

36. The committee recommends that the Ministers of Justice and Health gather consistent data across Canada on how the screening for mental health issues is undertaken by the courts. The committee further recommends that an annual report on such screening and the efforts made by the courts to respond to it be published by the Mental Health Commission of Canada (or other appropriate body).

37. The committee recommends that the Minister of Justice work with the provinces and territories to:
    - ensure sufficient support for the development and promotion of pre-charge and post-charge diversion programs across Canada, and
    - determine how the Minister of Justice can contribute resources to ensure that data and research is collected to track the performance of pre and post-charge diversion programs.

38. The committee recommends that further to recommendation 37, the Minister of Justice invite the provinces and territories to submit funding applications for pre and post-charge diversion programs.

39. The committee recommends that the Minister of Justice review the *Criminal Code* and propose a suitable amendment to section 717 in order to:
    - add a statement of principles and objectives to the alternative measures provisions; and

- to provide greater clarity in this section to allow the police, Crown prosecutors and the judiciary to exercise appropriate discretion in recommending individuals as suitable candidates for pre-charge and post-charge diversion programs.

40. The committee recommends that the Ministers of Justice, Health, and Public Safety coordinate a strategy and invite the provinces and territories to submit funding applications in order to expand integrated multi-agency teams for offenders, accused persons and persons who are at risk of committing crimes, such as the Prince Albert model, in order to ensure they receive appropriate treatment and support and also to reduce the demands on police officers for matters that are better handled by health and social workers.

41. The committee recommends that the Minister of Justice work with the provinces and territories to:
    - conduct and publicize research and analysis into best practices, implementation procedures and the comparative effectiveness of therapeutic courts, such as drug treatment and mental health courts;
    - develop a strategy for ensuring that effective therapeutic courts are made available throughout the country; and
    - invite the provinces and territories to submit funding applications to establish evidence-based therapeutic courts suitable to meet local needs.

42. The committee recommends that the Minister of Justice work with the provinces and territories to:
    - ensure that justice system participants are sufficiently educated and informed about the value of restorative justice principles and the ways to apply them;
    - prioritize discussions about ways to expand restorative justice programs;
    - generate applications to the Minister for funding from provincial and territorial governments in order to develop and expand restorative justice programs; and
    - develop and make available research on best practices, implementation procedures and the comparative effectiveness of restorative justice programs.

43. The committee recommends that the Minister of Justice work with the provinces and territories to develop strategies to rehabilitate offenders using the most appropriate measures and to reduce recidivism in Canada as a means of addressing delays in criminal proceedings.

44. The committee recommends that the Minister of Public Safety and Emergency Preparedness ensure that federal programs for offenders with mental health issues and addictions are available to those in need of them and accept applications from the provinces and territories to fund such programs.

45. The committee recommends that the Minister of Justice provide adequate funding and resources to ensure that Aboriginal Courtworkers programs (now the Indigenous Courtwork Program) are sufficiently supported to provide the necessary assistance to Indigenous persons in the justice system.

46. The committee recommends that the Minister of Justice ensure that funding and resources are available across Canada to provide the necessary programs to assist in the preparation of *Gladue* reports.

47. The committee recommends that the Minister of Justice expedite the Government of Canada's review and implementation plan in response to the Calls to Action pertaining to the justice system contained in the Truth and Reconciliation Commission of Canada's report.

48. The committee recommends that the Minister of Justice:
    - make appropriate judicial appointments in Canada's North as expeditiously as possible, particularly in Nunavut where judges are only federally appointed; and
    - ensure that there is a sufficient complement of deputy judges that are available to serve in the territories.

49. The committee recommends that the Minister of Justice ensure that resources are invested in technological solutions to the problems presented by small, scattered populations in remote and isolated communities, including:
    - secure, high-speed communication links between lawyers and their clients and between lawyers in the communities and any central judicial facility; and
    - videoconferencing technology so that court appearances such as bail hearings and interlocutory applications can be conducted remotely and without the need for an accused person to be removed from his or her community.

50. The committee recommends that the Minister of Justice provide financial and administrative support for restorative justice initiatives in Canada's Northern territories in consultation with local Indigenous peoples.

APPENDIX B - List of Witnesses

Wednesday, February 3, 2016

As individuals
The Honourable Patrick J. LeSage, former Chief Justice of the Ontario Superior Court of Justice
Carissima Mathen, Associate Professor, Faculty of Law, University of Ottawa

Thursday, February 4, 2016

Statistics Canada
Yvan Clermont, Director, Canadian Centre for Justice Statistics
Josée Savoie, Chief, Courts Program, Canadian Centre for Justice Statistics
Department of Justice Canada
Donald Piragoff, Senior Assistant Deputy Minister, Policy Sector
Stephen Zaluski, General Counsel and Director, Judicial Affairs, Courts and Tribunal Policy
Anny Bernier, Counsel, Criminal Law Policy Section

Wednesday, February 17, 2016

Public Prosecution Service of Canada
Brian Saunders, Director of Public Prosecutions
George Dolhai, Deputy Director of Public Prosecutions

Thursday, February 18, 2016

Canadian Bar Association
Ian M. Carter, Treasurer, Criminal Justice Section
Tony Paisana, Executive Member, Criminal Justice Section
Gaylene Schellenberg, Lawyer, Legislation and Law Reform
Criminal Lawyers' Association
Leo Russomanno, Member and Criminal Defence Counsel
Dominic Lamb, Member
Canadian Council of Criminal Defence Lawyers
William Trudell, Chair
Greg DelBigio, Member

Wednesday, February 24, 2016

Ministry of the Attorney General of Ontario
Michael Waby, Executive Director, Criminal Justice Modernization
Agata Falkowski, Project Advisor, Criminal Justice Modernization
Government of Saskatchewan
Kevin Fenwick, Deputy Minister and Deputy Attorney General, Ministry of Justice

Thursday, February 25, 2016

Canadian Association of Chiefs of Police
Joseph Oliver, Assistant Commissioner, Technical Operations, RCMP
Legal Aid Ontario
David Field, President and CEO
Marcus Pratt, Acting Director General, Policy and Strategic Research
Nova Scotia Legal Aid Commission
Karen Hudson, Executive Director
Legal Aid BC
Mark Benton, Chief Executive Officer

Wednesday, March 9, 2016

Canadian Association of Crown Counsel
Rick Woodburn, President
Ontario Crown Attorneys' Association
Kate Matthews, President
Laurie Gonet, Vice-president
As an individual
Ian Greene, Professor, Political Science, York University
Department of Justice
The Honourable Jody Wilson-Raybould, P.C., M.P., Minister of Justice and Attorney General of Canada
William F. Pentney, Deputy Minister and Deputy Attorney General of Canada
Donald Piragoff, Senior Assistant Deputy Minister, Policy Sector

Wednesday, March 10, 2016

Canadian Association of Elizabeth Fry Societies
Kim Pate, Executive Director
John Howard Society of Canada
Catherine Latimer, Executive Director
The Church Council on Justice and Corrections
Rebecca Bromwich, Board Member and Treasurer
Correctional Service Canada
Andrea Markowski, District Director, Manitoba/Saskatchewan/North West Ontario District Office
Probation Officers Association of Ontario
Elana Lamesse, President

Wednesday, March 23, 2016

Canadian Police Association
Tom Stamatakis, President
As an individual
Judge Raymond Wyant, Senior Judge of the Manitoba Court, Former Chief Judge of the Provincial Court of Manitoba
British Columbia Civil Liberties Association
Josh Paterson, Executive Director

Thursday, March 24, 2016

Canadian Resource Centre for Victims of Crime
Heidi Illingworth, Executive Director
Office of the Federal Ombudsman for Victims of Crime
Sue O'Sullivan, Federal Ombudsman for Victims of Crime
Victimes d'agressions sexuelles au masculin (VASAM)
Alain Fortier, President
Frank Tremblay, Vice-president

Wednesday, April 13, 2016

As individuals
The Honourable François Rolland, Retired Chief Justice of the Superior Court of Quebec
Anthony Doob, Professor, Centre of Criminology, University of Toronto
Cheryl Webster, Associate Professor, Department of Criminology, University of Ottawa
Carl Baar, Professor Emeritus of Political Science, Brock University

Thursday, April 14, 2016

Ottawa Police Service
Craig Fairbairn, Drug Treatment Court Liaison Officer, Central Neighbourhood Unit
Rideauwood Addiction and Family Services
Marion Wright, Clinical Director
Canadian Centre on Substance Abuse
Rebecca Jesseman, Senior Policy Advisor
As an individual
Dr. Keith Ahamad, Clinical Assistant Professor, University of British Columbia

Wednesday, April 20, 2016

Centre for Addiction and Mental Health
Dr. Alexander Simpson, Chief of Forensic Psychiatry
Mental Health Commission of Canada
Louise Bradley, President and CEO
Patrick Baillie, Psychologist, Alberta Health Services
As an individual
Dr. John Bradford, Professor, University of Ottawa
Criminal Lawyers' Association
Anita Szigeti, Mental Disorder Portfolio

Thursday, April 21, 2016

Ministry of Justice, Government of Saskatchewan
Dale McFee, Deputy Minister, Corrections and Policing
Department of Justice Canada
Donald Piragoff, Senior Assistant Deputy Minister, Policy Sector
Lucie Angers, General Counsel, Criminal Law Policy Section
Public Safety Canada
Gina Wilson, Associate Deputy Minister
Angela Connidis, Director General, Corrections & Criminal Justice Directorate
Uniform Law Conference of Canada
Elizabeth Strange, Chair

Friday, May 6, 2016

Province of Nova Scotia
Jocelyn Yerxa, Acting Director, Department of Seniors
Nova Scotia Advisory Council on the Status of Women
Stephanie MacInnis-Langley, Executive Director
Nova Scotia Barristers' Society
Emma Halpern, Equity and Access Officer
Cumberland Restorative Justice Society
Jennifer Furlong, Executive Director
As an individual
Jennifer Llewellyn, Professor, Schulich School of Law, Dalhousie University
Council of Parties for the Restorative Public Inquiry into the Home for Colored Children
Tony Smith, Co-chair
Chignecto-Central Regional School Board
Scott Milner, Director, Education Services
As an individual
The Honourable Pamela Williams, Chief Judge, Provincial and Family Courts of Nova Scotia
Tri-County Restorative Justice
Tanya Bain, Director
Mi'kmaq Legal Support Network
Paula Marshall, Program Manager
Halifax Regional Police
Jean-Michel Blais, Chief of Police
James Butler, Inspector
As an individual
Michelle Williams, Director, IB&M Initiative, Schulich School of Law, Dalhousie University

Tuesday, September 27, 2016

Vancouver Police Department
Adam Palmer, Chief Constable
British Columbia Crown Counsel Association
Jennifer Lopes, Vice President
British Columbia Ministry of Public Safety and Solicitor General
Sam MacLeod, Superintendent of Motor Vehicles
BC Justice Reform Initiatives
Geoffrey Cowper, Chair
Native Courtworker and Counselling Association of BC
Darlene Shackelly, Executive Director
Acumen Law Corporation
Paul Doroshenko, Lawyer
Trial Lawyers Association of British Columbia
Richard Fowler, Fowler and Smith
Peck and Company
Eric Gottardi, Partner

Wednesday, September 28, 2016

As individuals
The Honourable Neil Wittmann, Chief Justice, Court of Queen's Bench of Alberta
The Honourable Terrence Matchett, Chief Judge, Provincial Court of Alberta
Sheldon Kennedy Child Advocacy Centre
Sheldon Kennedy, Lead Director
Calgary Police Service
Roger Chaffin, Chief Constable
Alberta Crown Attorneys Association
Damian Rogers, Treasurer
Legal Aid Alberta
Suzanne Poilkosnik, President and CEO
Calgary Youth Justice Society
Denise Blair, Executive Director
Criminal Trial Lawyers Association
Graham Johnson, Partner, Dawson, Duckett, Shaigec & Garcia
Calgary Legal Guidance
Margaret Keelaghan, Senior Managing Counsel
Criminal Defence Lawyers Association of Alberta
Ian Savage, President

Thursday, September 29, 2016

Saskatoon Police Service
Clive Weighill, Chief
Saskatchewan Crown Attorneys Association Rideauwood
Kelly Kaip, President
Ministry of Justice, Government of Saskatchewan
Matt Gray, Director, Building Partnerships to Reduce Crime
Community Mobilization Prince Albert
Troy Dumont, Interim Executive Director
Markus Winterberger, Analyst, Strategic Intelligence
Tamara Dunlop, Tactical Analyst
Global Network for Community Safety Canada Inc
Norman Taylor, President
Legal Aid Saskatchewan
Craig Goebel, Chief Executive Officer
Joanne Khan, Legal Director
Saskatchewan Aboriginal Courtworker Program
Annette Ermine, Program Manager
Kathleen Makela, Manager, Program of Legal Studies for Native people, Native Law Centre, College of Law, University of Saskatchewan
Carol Lafonde, Aboriginal Courtworker
Saskatoon Criminal Defence Lawyers Association Inc
Andrew Mason, President
Michael W. Owens, Vice-President

Wednesday, October 5, 2016

Office of the Commissioner of Official Languages
Graham Fraser, Commissioner
Pascale Giguère, General Counsel, Legal Affairs Branch
Murphy Toronto Lawyers
Mary Murphy, Lawyer
Henein Hutchison LLP
Christine Mainville, Lawyer
The Law Firm of David Genis
David Genis, Lawyer
Hale Criminal Law Office
John H. Hale, Lawyer

Wednesday, October 19, 2016

Canadian Bar Association
Ian M. Carter, Treasurer, Criminal Justice Section
Gaylene Schellenberg, Lawyer, Legislation and Law Reform

Thursday, October 20, 2016

Government of Nunavut
William MacKay, Deputy Minister, Department of Justice

Wednesday, October 26, 2016

Royal Canadian Mounted Police
François Bidal, Assistant Commissioner, Forensic Science and Identification Services
Chief Superintendent Brendan Heffernan, Director General, Canadian Criminal Real Time Identification Services, Forensic Science and Identification Services
Ron Fourney, Director, Science and Strategic Partnerships, Forensic Science and Identification Services
Public Safety Canada
Evan Travers, Acting Director General, Law Enforcement and Border Strategies Directorate

Thursday, October 27, 2016

Congress of Aboriginal Peoples
Kim Beaudin, National Vice-Chief
Ron Swain, Senior Policy Advisor
As an individual
The Honourable Shaun Nakatsuru, Justice, Gladue Court, Ontario Court of Justice

Friday, October 28, 2016

As individuals
Vincent Langlois, Legal Researcher, Criminology Department, University of Montreal, University of Montreal
Montreal Police Service (SPVM)
Didier Deramond, Deputy Director, Operations Command
Hélène Des Parois, Lawyer, Legal Services
Crime victims assistance centre of Montreal for CAVAC Network
Jenny Charest, Executive Director
Quebec Bar Association
Claudia Prémont, President of the Quebec Bar
Sylvie Champagne, Secretary of the Bar and Director of the Legal Department
The Young Bar of Montréal
Sophia Rossi Lanthier, Lawyer and Director on the Board
Adam Villeneuve, Lawyer
Association des avocats de la défense de Montréal
Philipe Knerr, Attorney
Association des avocats de la défense de Montréal
Mathieu Rondeau-Poissant, Lawyer, Longueuil District Representative

Wednesday, November 2, 2016

DSN Consulting
Scott Newark, Public Policy Consultant
As individuals
Rick Audas, Associate Professor Health Statistics and Economics, Memorial University
David Bird, Retired Counsel, Department of Justice Canada

Thursday, November 3, 2016

As an individual
The Honourable Neil Wittmann, Chief Justice, Court of Queen's Bench of Alberta
Ministry of Community Safety and Correctional Services
Anthony Tessarolo, Director, Centre of Forensic Sciences

Wednesday, November 16, 2016

As an individual
The Honourable Neil Wittmann, Chief Justice, Court of Queen's Bench of Alberta

Thursday, November 17, 2016

As an individual
The Right Honourable Sir Brian Leveson, President of the Queen's Bench Division, Judiciary of England and Wales

Thursday March 9, 2017

As individuals
Christopher Sherrin, Associate Professor, Faculty of Law, University of Western Ontario
Bruce MacFarlane, Professor, Faculty of Law, University of Manitoba
Peter Hogg, Scholar in Residence, Blake, Cassels & Graydon LLP

The Honourable Jody Wilson-Raybould, P.C., M.P., Minister of Justice and Attorney General of Canada

Department of Justice
William F. Pentney, Deputy Minister and Deputy Attorney General of Canada
Donald Piragoff, Senior Assistant Deputy Minister, Policy Sector

APPENDIX C – Order of Reference

Extract from the Journals of the Senate of Thursday, January 28, 2016:

The Honourable Senator Runciman moved, seconded by the Honourable Senator Marshall:

That the Standing Senate Committee on Legal and Constitutional Affairs be authorized to examine and report on matters pertaining to delays in Canada's criminal justice system and to review the roles of the Government of Canada and Parliament in addressing such delays; and

That the committee submit its final report no later than March 31, 2017 and that the committee retain all powers necessary to publicize its findings until 180 days after the tabling of the final report.

After debate,

The question being put on the motion, it was adopted.

Charles Robert
Clerk of the Senate

Extract from the *Journals of the Senate* of Thursday, March 2, 2017:

The Honourable Senator Baker, P.C., moved, seconded by the Honourable Senator Eggleton, P.C.:

That, notwithstanding the order of the Senate adopted on Thursday, January 28, 2016, the date for the final report of the Standing Senate Committee on Legal and Constitutional Affairs in relation to its study on matters pertaining to delays in Canada's criminal justice system be extended from March 31, 2017 to June 30, 2017.

The question being put on the motion, it was adopted.

Charles Robert
Clerk of the Senate

APPENDIX D – Members

The Honourable Bob Runciman, Chair
The Honourable George Baker, P.C., Deputy Chair

The Honourable Senators:
Denise Batters
Pierre-Hugues Boisvenu
Gwen Boniface
Jean-Guy Dagenais
Renée Dupuis
Mobina Jaffer
Serge Joyal, P.C.
Paul McIntyre
Ratna Omidvar
Kim Pate
André Pratte
Murray Sinclair
Vernon White

Ex Officio Members:
Peter Harder, P.C. (or Diane Bellemare) and The Honourable Senators Larry W. Smith. (or Yonah Martin).

Other Senators who have participated from time to time in the study:
The Honourable Senators Cowan, Fraser, MacDonald, Plett

Parliamentary Information and Research Services, Library of Parliament:
Julian Walker, Maxime Charron-Tousignant and Robin MacKay, Analysts.

Clerk of the Committee:
Jessica Richardson.

Senate Committees Directorate:
Diane McMartin, Administrative Assistant.