

**BC JUSTICE REFORM INITIATIVE**

# **A CRIMINAL JUSTICE SYSTEM FOR THE 21<sup>ST</sup> CENTURY**

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**Final Report to the Minister  
of Justice and Attorney General  
Honourable Shirley Bond**

D. Geoffrey Cowper QC, Chair  
BC Justice Reform Initiative  
August 27, 2012



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Honourable Shirley Bond  
Minister of Justice and Attorney General  
PO BOX 9044 Stn Prov Govt  
Victoria British Columbia V8W 9E2

Dear Madam Minister and Attorney,

### Final Report of the Chair of the BC Justice Reform Initiative

I am pleased to deliver this final report to you in accordance with the February 2012 terms of reference for the BC Justice Reform Initiative.

Thank you for the opportunity to review the criminal justice system in British Columbia over the past six months. The system faces great challenges, but I believe a great deal of progress is being made in our understanding of what can and should be done to improve its performance.

This report has focused on changes that will improve the operation of the system as a whole and enable us to better achieve the ends of criminal justice: safe communities and a fair and just system. I hope the report advances this ongoing conversation and encourages those responsible to make changes that will set us on the path to better serving the people of British Columbia.

Yours truly,

Geoffrey Cowper QC  
Chair, BC Justice Reform Initiative

Alison MacPhail, Project Adviser  
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# 1. INTRODUCTION AND EXECUTIVE SUMMARY

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Our criminal justice system is ready for systematic and wide-ranging change in the way it operates and how it achieves its goals. The threads of wide-ranging reform proposals have already been spun and are in various states of development. When properly gathered, these threads of reform can be knit together into a system that will more fully deserve our pride and support.

The best thinking within our justice community offers improved protection for the community and justice for the accused, the victim and the community. It also addresses the prevention of crime and the restoration of offenders to fulfilling, valued lives. Knitting together the best proposals and models will result in a well-managed system that will effectively achieve both improved public safety and fairness, a system that will respond to the dynamic changes in criminal conduct and that will operate with transparency and accountability.

Transparency is critical, not only so that the public understands what the justice system is doing, but also so that those working in the system can better understand the impact of what they do. In the course of the consultations for this review, I was struck by the number of times people referred to their own experience of the criminal justice system rather than to data about the system as a whole. While experience is vital to understanding data, data is essential to supplement experience. Information about how the system as a whole is functioning needs to be supplemented by information about individual offices and court locations, so that good practices can be identified and expanded while poor practices can be addressed.

Many ideas for reform have been suggested, and these fall across the entire system. They include a province-wide crime reduction plan, enhancement

of early resolution of criminal cases, reduction of delays and backlogged cases, improved use of data for planning and management, a major revision to how prosecutors handle cases, and improving the relationship with the public. Some of these proposals would affect all cases, while others focus on particular categories of cases, such as domestic violence, administration of justice offences, and offenders who suffer from mental illness or are addicted to substance abuse.

These ideas demonstrate that the leaders of the justice system recognize the need for systemic—and not just incremental—change.

These proposals are a fresh demonstration of the professionalism and determination of those who serve the public interest in British Columbia's justice system. Despite this, the concerns underlying the *Green Paper*<sup>1</sup> are very real. Frustration and anxiety have coloured many of the consultations. There is a general sense of frustration that previous reforms have not succeeded at delivering enduring change. Some have expressed frustration that worthwhile initiatives lie abandoned. There is an ongoing concern that there are persistent barriers within the legal culture to accomplishing substantial change. Committees, working groups and similar bodies have been created to bridge the independence of justice participants, but they appear to have largely failed to achieve sufficient coordination, and there is little evidence of true collaboration. Finally, there is a general sense of frustration and anxiety that there is not enough money, compounded by the obvious context that we are in a time of fiscal restraint and competing demands on public resources, which has no appearance of changing in the foreseeable future.

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1 British Columbia Minister of Justice and Attorney General, *Modernising British Columbia's Justice System: Green Paper* (February 2012), online: British Columbia Ministry of Justice <[www.ag.gov.bc.ca/public/JusticeSystemReviewGreenPaper.pdf](http://www.ag.gov.bc.ca/public/JusticeSystemReviewGreenPaper.pdf)>.

## 2 BC JUSTICE REFORM INITIATIVE

How can we be assured these reforms will provide enduring improvement?

In order to assure the public that these proposals will succeed and produce enduring change, I have concluded that a new means must be developed to overcome the fact that institutional independence can lead to silo thinking and approaches, even though everyone acknowledges their success is dependent on the co-operation of others within the system. Many of the previous disappointments in strategy or execution in criminal justice reform can be attributed to a failure to overcome these silos. I applaud the energy and commitment that has fuelled these deserving proposals, but more is needed.

What is fundamentally needed is a clear vision for the justice system as a whole, a true systems approach to reform and project management discipline across the board. This means at the start that there must be clear and accepted goals, disciplined execution, and clear performance measures that are monitored and evaluated.

We cannot expect project management discipline without equipping those responsible with the means and human resources to execute the plan. There must be clarity on where primary responsibility lies for any particular process. Lawyers or judges responsible for a complex project will likely need non-legal project management expertise. To avoid any suggestion of interference with judicial independence, this may mean the judiciary needs to have professional project managers working for them directly in areas related to judicial administration.

To overcome the problems related to institutional isolation, I recommend that the management of these interdependent processes take place under the oversight of a new cross-sectoral organization, which I propose be established within the Ministry of Justice, and which could be called the Criminal Justice and Public Safety Council (the Council). It would be responsible for the development of the overall strategy for the criminal justice system in

British Columbia, ensuring the effective collaboration and coordination of the various participants within the system and providing transparency and accountability to the public.

Underpinning all of my recommendations for reform is a recognition of the fundamental importance of timeliness in the criminal justice process.

Timeliness is a critical goal that can and must be achieved. The Supreme Court of Canada discussed in *R. v. Askov* the importance of timeliness in the criminal justice system, as summarised here:

The primary aim of s. 11(b) is to protect the individual's rights and to protect fundamental justice for the accused. A community or societal interest, however, is implicit in the section in that it ensures, first, that law breakers are brought to trial and dealt with according to the law and, second, that those on trial are treated fairly and justly. A quick resolution of the charges also has important practical benefits, since memories fade with time, and witnesses may move, become ill or die. Victims, too, have a special interest in having criminal trials take place within a reasonable time, and all members of the community are entitled to see that the justice system works fairly, efficiently and with reasonable dispatch. The failure of the justice system to do so inevitably leads to community frustration with the judicial system and eventually to a feeling of contempt for court procedures.<sup>2</sup>

Timeliness is fundamental to all aspects of a fair and effective criminal justice process which enjoys the confidence of the public and respects the rights and interests of all those affected by crime. During

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2 *R. v. Askov*, [1990] 2 SCR 1199, head note per Cory J, online: Supreme Court of Canada <<http://scc.lexum.org/en/1990/1990scr2-1199/1990scr2-1199.html>>. See "Purpose of s. 11(b)" at pp. 24–28 for the Court's detailed discussion.

consultations, all the professionals were confident positive changes would accrue if timeliness were achieved. Most importantly, these improvements would improve both the fairness of the system and public safety. Fewer cases would have to be stayed by the prosecution due to the loss of evidence or other problems associated with delay. Judicial stays of proceeding based on the *Askov* standard would be eliminated. Prosecutors will immediately assess the case and the appropriate sentence. Accused persons would decide how to respond to the charges, knowing that a trial date can be made available in the near future. The consequences of being refused bail pending trial will be less serious. Conditions for release into the community would only restrict an accused's liberty for a reasonable length of time. The very high volume of charges for breaches of conditions now being experienced should be substantially reduced. Victims will see their complaints dealt with in a reasonable time, while the communities will see serious crimes investigated and those implicated brought to justice.

## 1.1 EXECUTIVE SUMMARY

The purpose of the criminal law is to promote respect for the law and the maintenance of a just, peaceful and safe society. There are wonderful and inspiring elements to our justice system. Our trial system fundamentally does a sound job in upholding the rule of law in fairly determining guilt or innocence.

The criminal justice system is, however, failing to meet the public's expectations of a modern justice system in several respects, most importantly:

1. There is no integrated, province-wide plan for improving public safety;
2. Modern methods of management and administration, including modern information and communication systems, have not been incorporated into how the system is managed and how it presents itself to the public; and
3. The system fails to meet the public's reasonable expectations of timeliness.

### 1.1.1 Overview of the Criminal Justice System in British Columbia

The overall crime rate in British Columbia has been decreasing for some time, though there is room for improvement, since British Columbia's crime rate remains higher than the Canadian average. The youth crime rate, and particularly the number of incarcerated youth, has dropped dramatically over the past ten years.

The approach to policing and corrections practice has been dramatically transformed over the past twenty years—in particular, proactive policing strategies have focused on particular types of offences or offenders. These programs develop strategies to prevent crime or apprehend the offender based on an analysis of why certain crimes are committed or why certain criminals commit crime.

Corrections practice has for a long time been focused on an evidence-based analysis of the risk represented by a particular offender, and has the highest expertise in assessing the true correlates of risk to the community represented by a particular person and how that risk may be reduced by programs such as anger management or addiction counselling.

Over 98% of almost 100,000 criminal cases a year are dealt with by the Provincial Court. Almost all the cases filed in the Provincial Court are resolved without a trial—in fact, less than 2% of cases proceed to a full trial.

The Supreme Court of British Columbia, which held approximately 450 criminal trials last year, receives the most serious criminal offences, such as murder.

The number of cases in the Provincial Court has remained stable until recently, but dropped significantly in 2011/2012. The backlog was slowly being reduced until last year, but there was a substantial drop in 2011/12, and the volume of pending cases is now at the level it was in the early 1990s. The recent drop in new cases seems largely due to the diversion of impaired drivers out of the criminal system and into the Immediate Roadside Prohibition (IRP) program.

The volume of administration of justice offences for breaching the terms of release into the community or as a condition of sentence has significantly increased

over the decade. These cases now represent 40% of all the new cases in the system.

Although the caseload in Provincial Court has been decreasing, cases are still taking too long to get to trial. In general the time to trial for short criminal cases in the Provincial Court is longer than the performance measures set by the court.

The time to trial and length of trial in the Supreme Court both appear to be on the rise; the Court is struggling to effectively manage several very large and complex criminal cases.

### 1.1.2 A Criminal Justice System for the 21<sup>st</sup> Century

Over a decade ago Chief Judge Metzger expressed concern over what he termed the “culture of delay” in the criminal justice system. In my respectful view the facts show that such a culture remains today. To change this culture we must acknowledge both why it has proven so resistant to change and identify what is necessary to make timeliness possible.

Timeliness is perhaps the most obvious way in which the legal culture fails to understand or respond to the general public—despite the fact that lawyers and judges alike recognize the advantages of a timely system.

The culture of delay in the court system is resistant to change because there are several benefits to those working within the system that are gained from delay and no accepted means of enforcing timeliness as a priority. To change this culture we must fundamentally change the incentives that apply to the parties and provide the right tools to the right participants to make timeliness a necessity and not an option.

During the review there was a general sense that judges and lawyers have their own, insulated sense of what constitutes timeliness and responsiveness. The fact that the progress of a case is broken down into several different subsystems, many of which do not have clear or enforced deadlines, means that the public is often mystified about whether there is any attempt at timeliness—despite there being some settled measures that are in some cases made public. The public cares about how long a

case takes from the initial event until its resolution. The system does not track or report to the public on this measure of performance by the system. To add to the tension around this issue, the public judges the system on its exceptional cases. Even a small number of cases that take an unconscionable amount of time will frame the public perception that such delay is tolerated.

Finally, the public no longer accepts the etiquette and professional understandings that frequently interfere with timeliness in our system. Frequent adjournments, cases which run on, the absence of a date when a result will be known, the seeming absence of any correcting mechanism when cases become bogged down—all frustrate victims, witnesses, the community and, on some occasions, the accused.

There also remains a sense in the public and even among informed observers that the goals for timeliness we set within the system are modest, are not taken terribly seriously, and exceed what the general public would consider reasonable. To help achieve real timeliness, new standards and expectations are required, as well as new structures to help them be achieved.

### 1.1.3 Judicial Independence

The rule of law requires that we have a truly independent judiciary. Judicial independence includes those administrative decisions that bear directly and immediately on the exercise of the judicial function.

There are important potential areas of reform that relate to matters that fall squarely within judicial independence, such as judicial case assignments and trial management.

There are also other areas, such as general court administration, where the executive branch of government and the judiciary must depend on one another to fully discharge the public interest. There are also areas of the system where judicial independence is not engaged. Even in areas of exclusive authority, a successful justice system will require collaboration and coordination between the judiciary and executive branches of government.

Successful reform will not be achieved by greater clarity over the boundaries between areas of exclusive or shared judicial or executive authority, and absolute clarity is not available on the basis of the jurisprudence. Clarity is also not necessary to achieve the reforms that have been identified, particularly in light of the important reforms under development with the agreement and active leadership of the judiciary.

The importance of regular communication and collaboration between the judiciary and the executive should be recognized through the statutory establishment of a Justice Summit, including the Chief Justices, the Chief Judge and senior executives from the Ministry of Justice.

#### 1.1.4 Criminal Justice and Public Safety Council

Previous efforts to reform criminal case process have been disappointing. In my view their failures occurred for primarily two reasons: the failure to successfully collaborate with other justice participants in framing the reform, and the failure to ensure that needed changes would work across the system. There are many worthwhile proposals which will be reviewed and recommended, but success will depend greatly on effective collaboration in the detailed planning and introduction of new reforms.

To this end I have concluded that the Ministry of Justice should be reformed so as to better carry out these fundamental needs for system-wide planning, collaboration and discipline.

In this report I recommend the establishment of the Council within the Ministry of Justice. It will be responsible for:

- A Criminal Justice and Public Safety Plan for British Columbia (the plan);
- Coordination of efforts by the justice participants generally, and particularly for specific multi-sectoral projects;
- Recommendations to the Minister of Justice concerning the allocation of resources across the system; and
- Management of system data and oversight of reports to the public on performance of the system.

A body which focuses on the interface between the independent participants in the system and can influence the allocation of resources has been missing to date. The Council will be able to speak across the sector, hold participants responsible, and husband and capture savings for the system.

I would expect the Council to be the strategic manager of the governmental aspects of the criminal justice system. It would establish concrete timelines for the management of the criminal cases going through the system, and it would collaborate with the various justice participants to ensure their execution is coordinated and that their separate performance measures are compatible, monitored and reported on. There will doubtless be problems that arise, and unforeseen difficulties encountered; the Council should be a common meeting place of senior justice leaders for the airing and resolution of these concerns, and an effective means by which direction can be determined and obstacles overcome.

#### 1.1.5 The Role of Data and Transparency

All the justice participants are becoming accustomed to the application of modern business process analysis and business intelligence. There have been substantial and sustained investments in technology that have produced substantial assets in data systems, and a fuller understanding of the system—for example, the five-year program to develop a complex simulation model with the Simon Fraser University (SFU) Complex Systems Modelling group. The provision of accurate information about the functioning of the criminal justice system, broken down by individual office and court location, is indispensable to a properly managed justice system and vital to creating an informed discussion about how to achieve the necessary reforms.

Thus the Ministry is just starting to incorporate business systems analysis and discipline. The Provincial Court has already obtained business consultancy advice respecting its reform considerations and intends to use a similar advisory service to help finalize any new model. Police forces have contracted business-process systems analysts to help refine

their processes. The Legal Services Society (LSS) has an advanced technology platform to manage legal aid and intends to develop a new complex case management platform. Defence counsel have become familiar with terabytes of disclosure and modern database management. The information and business intelligence revolution may have come late to the justice system, but it has definitely arrived.

These developments provide a substantial reason to expect that the various proposals for reform will be well organized, capable of being executed with discipline and able to provide enduring change.

This also means that more and more information is available for public distribution—which has increased the public’s expectation for transparency in both the operation of and outcomes achieved by the criminal justice system. Recent developments in making data such as the BC Dashboard available to the public demonstrate that the facility exists. The data made available to this review offer more insight into the actual operation of the system than previously released publicly, and this in my view is an irreversible process. As a result, the metrics for success need to be set at levels the public will accept as reasonable, and systems need to be in place to report on progress so as to be accountable for the expenditure of public funds and to ensure that the public has the opportunity to be well informed.

### 1.1.6 Crime Prevention and Investigation

In many ways the development of proactive policing strategies over the past 20 years is a remarkable success story. What is clear is that the public supports these new approaches to crime prevention and reduction and expects that the system as a whole will perform in ways that are complementary to the fundamentals of public safety.

The BC Association of Chiefs of Police (BCACP) has recommended that a province-wide crime reduction plan be developed, and this has obvious advantages that should be acted upon in concert with the other improvements recommended in this report. During consultations the complex reality of overlapping policing jurisdictions and the mobility of

both criminals and crime supported the development of such a plan. Furthermore, the scaling of success from one location to another and the evaluation that has become routine for police forces should now be applied to the province as a whole.

### 1.1.7 Early Case Resolution

Justice leaders have long sought to find ways to promote early case resolutions to achieve efficiencies and better match resources with demand for professional and judicial services. Almost all cases are in fact resolved by guilty plea or stay of proceeding, yet the system is still organized based on the assumption that all cases will proceed to trial.

The current rules were the result of a wholesale change made over a decade ago to involve judges more actively in the pre-trial phase of proceedings to encourage early resolutions and reduce the high proportion of cases that collapse on the first day of trial. Despite the best of intentions, judges, prosecutors and defence counsel were not able to create the conditions for early resolution. Neither prosecutors nor defence counsel changed their practices in order to realize the potential of the new rules.

There are several reasons why this would be the case, but it is both timely and necessary to revisit the approach to the pre-trial resolution of cases.

I agree with the sentiment expressed by some stakeholders during consultations that administrative appearances within the system are effectively “bring forward” reminders for prosecutors and defence counsel alike, and that the court has limited impact in obtaining early resolutions.

The chief result of this analysis is that responsibility for pre-trial resolutions needs to be firmly relocated and invested in the parties. The prosecution service of course has the principal obligation to advance the case, and to persuade the defence of the reasonableness of any proposed resolution. Defence counsel must have a real opportunity to access and seek to persuade the responsible prosecutor that a charge is unlikely to succeed and should be withdrawn or amended.

The professional incentives to enable this to occur are not in place, but proposals from the prosecution



service and LSS will go a long way towards achieving early case resolution. The prosecution service has proposed a number of important changes to the way in which they manage cases to obtain early resolution. Perhaps most importantly, a proposed change in case assignment will assign cases to specific prosecutors, thus enhancing “file ownership.” When a prosecutor is responsible for a case throughout its life, that prosecutor will then have both the opportunity and responsibility to seek resolutions in appropriate cases, and to take matters to trial when that is necessary.

LSS has proposed further enhancements to legal aid services to help achieve early principled resolutions, specifically: assigning duty counsel to the same court on a continuing basis to permit them to retain conduct of matters which can be resolved in a reasonable period of time, and changes to the legal aid tariff to facilitate the availability of legal assistance in disposition courts. As well, it would be beneficial if advice services could be funded very early in the process (i.e. pre-charge) to advise an accused as to the potential or actual charges, and their best options for resolution or obtaining counsel for the case.

I am confident that the complementary proposals advanced by the prosecution service and legal aid will make it possible for resolutions to occur earlier and on a principled basis. It will of course be fundamental to success that members of the Bar engaged in defence work be consulted regarding the information they need to advise their clients as to what is in their best interests. The criminal bar in British Columbia benefits from generally good relationships between prosecution and defence. This goodwill must now be developed in a different fashion and forge new means of communication and negotiation outside of court hearings. Similarly, the already challenging task of dealing with self-represented litigants will need to be addressed in this new procedural setting.

Moving responsibility for early resolution out of the courtroom is a systemic change that, if successful, will produce a more effective resolution culture that will better serve victims, the community and accused persons. This shift will require the development

of new timelines and procedures, but should also enable greater innovation around pre-charge resolution. Many prosecutors and defence counsel identified the need to facilitate early and substantive discussions based on adequate but not perfect disclosure, with clear and appropriate incentives for an accused to plead guilty early rather than late, and for a prosecutor to be realistic in the first instance about the chances of conviction and sentence.

### 1.1.8 Pre-Trial and Trial

The fundamental inefficiency that has long plagued trial scheduling and trial processing in Provincial Court has been a high collapse rate on the first day of trial. Only a minority of cases are ever assigned a trial date, and only a minority of those cases ever proceed to trial. Of the 4.5% of all charges that have a trial date scheduled, 70% of them collapse at the outset of trial by reason of stays of proceedings (approximately 15%), guilty pleas (approximately 40%) and a variety of other causes. The collapse rate is influenced by the absence of incentives on the part of the accused to plead guilty earlier in the process, and the inevitable last-minute realization by some accused that the case against them will be proven by witnesses who are present and ready to proceed. Similarly, since the natural administrative response is to schedule several cases for the same courtroom, prosecutors have an incentive to reconsider the strength of their case and, because witnesses have failed to appear or because of other last-minute changes, cases can become clearly unprovable.

The Provincial Court Process and Scheduling Project (Court Scheduling Project) described in [Schedule 5](#) is intended to adapt successful initiatives from Manitoba, Saskatchewan and Alberta that have improved judicial utilization, although without having a marked effect on collapsed cases. The collapse rate naturally varies from day to day and from place to place, meaning that there is often a poor alignment between available judicial time and cases ready for trial. As a result there continues to be a significant under-utilization of available judicial time. From the

work carried out by the review, it appears clear that significantly increasing effective judicial utilization would contribute to the elimination of the backlog and a dramatically shorter time to trial.

The Court Scheduling Project may use an Urban Fare rather than Safeway approach to courtrooms.<sup>3</sup> In multiple courtroom locations, an assignment court receives all the trials for a particular courthouse and those cases are then selected and assigned courtrooms based on their availability for trial.

One hoped-for function of the new scheduling process may be that much earlier trial dates are able to be set. In my view a dramatically more ambitious approach to setting trial dates within a very short time after arraignment offers the greatest potential to reduce the collapse rate, as well as to address the concerns associated with a lack of timeliness.

The Court Scheduling Project, coupled with early trial dates, offers a real opportunity for improvements to the effective use of available judicial resources. Resources should be focused on enabling this process to be finalized and implemented as soon as possible. Pending the detailed development and introduction of this system, resources should be immediately marshalled and focused on reducing the backlog of cases.

### 1.1.9 Role for Risk Assessment

BC Corrections can contribute its developed expertise and understanding of risk to the public and opportunities for rehabilitation more generally across the system. This should be facilitated under the direction of the Council.

Corrections has proposed that they share their expertise with the other sectors through training and education. While this would be the least expensive way of sharing their expertise, I am concerned that it may not be sufficiently effective. Subject to being able to make additional resources available, I recommend that consideration be given to identifying ways in which corrections expertise could

be used directly to inform early release decisions, the use of alternative measures, and those cases which would benefit from a pre-sentence report.

### 1.1.10 Provincial Court Reform

Leaders of the Provincial Court have advanced farsighted and significant reforms over the past 15 years. These proposals and initiatives have included rules to promote early resolutions, the reduction of backlogs, the development of public performance measures for the Court, the development of problem-solving and specialized courts such as the Downtown Community Court (DCC) and the Victoria Integrated Court (VIC), and the development of a vision and mission statement for the Court. As discussed, the current leadership of the Court has identified that a new approach to criminal process and trial scheduling is necessary. To better enable the Provincial Court to fulfil its important role, I recommend changes to the ways in which its judicial complement are determined and enhancements to its governance and managerial capacity.

I recommend that there be a definite judicial complement based on the best available evidence of the current and expected workload of the Court. This process needs to be founded on accepted measures of judicial utilization, effectiveness and anticipated workload and adjusted to account for changes resulting from efficiencies or improved service to the public. Such an approach should reduce the tension between the Court and the government, and enable both to focus on the challenges at hand. The complement can then be reviewed on the basis of objective factors on a regular period of three to four years.

The Provincial Court's capacity to expertly manage its court, including use of modern information and communication systems, modern business process analysis and other modern management techniques should be enhanced through a more clear and modern governance structure within

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<sup>3</sup> The check out at Urban Fare aggregates all customers into one line-up for several cashiers, whereas Safeway generally uses several line-ups before individual cashiers.

the court. The Canadian Association of Provincial Court Judges' suggestions of clarification of the managerial role of the Chief Judge is a good one. It is also recommended that consideration be given to statutory recognition of a role for the management and executive committee of the Court, to enable the institutional independence of the court to be exercised in a more clear and effective manner.

### 1.1.11 Criminal Justice Branch and Charge Approval

The approval of charges is made by the prosecution service on the basis, principally, of a report to Crown counsel (RCC) by police officers. The government commissioned an independent review of this arrangement to consider whether police officers should be permitted to bring charges themselves. Gary McCuaig, QC, delivered a report (attached as [Schedule 11](#) to this report) that recommends not changing the charge approval standard or moving the charge approval function to police. I agree with that recommendation. From a systems perspective the approval of charges by police would create unhelpful duplication of effort and would result in a far higher level of stays of proceedings.

In my view police concerns over the charge approval procedure and standard stem from a general concern over the absence of common goals and strategies to improve public safety. That underlying concern needs to be addressed, but I do not accept that a change to the charge approval process would alleviate the underlying frustration felt by police officers with the criminal legal system.

In response to the concerns raised in the *Green Paper*, the Criminal Justice Branch, developed a suite of proposals described in [Schedule 6](#) to this report for reforming key elements of how they do business and perhaps more than any other justice institution, showed a clear determination to pursue improvements in their process without delay. These are an impressive collection of proposals that have scope, insight and, for the most part, reflect modern notions of systems management to improve the effectiveness of the system.

### 1.1.12 The Role of the Public

Achieving better performance will help the relationship between the criminal justice system and the public.

In the consultations two things became clear: victims, witnesses and the community are concerned not only with their own case but with the criminal justice system's performance as a whole, and better means must be found to allow them to express and contribute to the criminal justice system's ongoing review of its service.

Much progress has been made through technology in providing access to the public for such things as notable judgments, the scheduling of cases, and case status online in the courthouses. The criminal justice system can better exploit technology, and particularly electronic communications, to coordinate witnesses, schedules and cases.

### 1.1.13 Particular Issues

During the consultations particular issues arose time and again. These concerned principally the system's handling of domestic violence cases, the handling of administration of justice offences, and the use of restorative justice methods to complement the work of the court system. Some important issues, such as First Nations and the specific challenges raised by mental illness and substance addiction, could not be explored in sufficient detail in the time available.

Domestic violence needs a well-considered plan to improve safety for intimate partners and their children, one that is grounded in the best available evidence and results from recent initiatives. There is a legitimate controversy surrounding the current handling of these cases. In the course of developing a strategic plan to reduce domestic violence in the province, the broad scope of disagreement in the community should be addressed on the basis of the best evidence available from the new Provincial Office of Domestic Violence.

Administration of justice offences need an integrated, collaborative approach that includes the participation of police, corrections, prosecutors, defence counsel and judges. All participants need

to share insights as to how the terms of release are understood by the accused, what is and is not working with respect to terms, how best to address breaches, and whether current practices are or are not serving any general goal. These insights should inform the development of best practices in the interests of improving public safety and also permitting, where appropriate, accused persons to live in the community subject to conditions on their actions.

#### **1.1.14 Resources and Priorities**

Resourcing decisions within the justice system have produced some notable variations in funding bills over the recent past. Expenditures for policing services have increased significantly. Expenditures for prosecutors and the courts have increased, but principally they have been used to fund salary and benefit increases and not increases in capacity.

As a result of the government's core services review several years ago, non-governmental organizations had substantial cuts made to their funding. In my view it is critical that resources to non-governmental organizations be made available where doing so is important to the effective performance of the system. In some senses, they are part of the system and need to be treated as such.

Legal aid has been under constraint since the mid-1990s, and apart from large case funding, has received very little incremental funding. Despite this it has actively led in producing innovative programs and services. The submissions which touched on resources almost universally called for priority to increases in legal aid funding. In my view, in order for legal aid to play an active and necessary role in the achievement of Provincial Court reforms, incremental legal aid resources would be money well spent.

The Provincial Court has suggested that in order to bring about a reduction in the backlog of cases and to keep pace with the work in the system, approximately 18 new judicial appointments should be made. In my view, the evidence respecting judicial utilization and the recent declines in caseload do not support a general increase in judicial complement.

However, the project started by the Court and proposals by other justice participants, and in this Report, will have implications for judicial complement that should be addressed. In particular, I agree with the Court's suggestion that the appointment of five judges would add to the immediate capacity and enable an aggressive reduction of the case backlog. There may also be particular regional needs for appointments.

## 2. LIST OF RECOMMENDATIONS

### 2.1 CRIMINAL JUSTICE AND PUBLIC SAFETY COUNCIL (SECTION 7)

- A Criminal Justice and Public Safety Council should be established within the Ministry of Justice and Attorney General.
- The Criminal Justice and Public Safety Council should include the senior leaders of the Ministry, assisted by a secretariat.
- The Criminal Justice and Public Safety Council should have responsibility for overall management of the criminal justice system, including preparing, under the direction of the Minister and in consultation with other justice participants, a Criminal Justice and Public Safety Plan for the province. The plan should also include
  - A recognition that all of the criminal justice sectors have responsibility for achieving the overall goals of the justice system of both public safety and justice;
  - A recognition that timeliness is fundamental to both public safety and justice;
  - System-wide performance measures for timeliness based on the interval from the reporting of a complaint until its resolution. Each sector in addition will need to frame targets within this overall framework; and
  - The development of performance measures for the criminal justice system as a whole.
- The Criminal Justice and Public Safety Council should also have responsibility for
  - Oversight of multi-sectoral initiatives; and
  - Public reporting on criminal justice data and progress reports.
- A Justice Summit including all levels of court and justice system leaders should be created by statute as a means to facilitate collaboration among all justice participants, to consider

progress in the process of reform, and to discuss changes in direction or new initiatives.

#### 2.1.1 Secretariat

- The Criminal Justice and Public Safety Council should be supported by a secretariat to assist in the development of the Criminal Justice and Public Safety Plan, as well as the development of appropriate performance measures and generally carrying out directions of the Criminal Justice and Public Safety Council.
- The secretariat should include responsibility for criminal justice policy as well as project management expertise to improve the rigour with which projects endorsed by the Criminal Justice and Public Safety Council are implemented.
- The secretariat should have an advisory board with independent academic or outside expert representation, as well as police, victim and broader public representation.

### 2.2 THE ROLE OF DATA AND TRANSPARENCY (SECTION 8)

- The Criminal Justice and Public Safety Council secretariat should be responsible for the acquisition, analysis and reporting of criminal justice data.
- The secretariat should establish methods to systematically gather data respecting performance measures and other useful data which can be regularly reported on and featured as part of the Criminal Justice and Public Safety Council's annual report.
- The Ministry should distribute key business intelligence information, related to both the strategic system goals as well as branch-specific goals, to local professionals and staff and encourage discussion and debate on the information.

## 2.3 CRIME PREVENTION AND INVESTIGATION (SECTION 9)

- A province-wide crime reduction plan should be developed under the direction of the BC Association of Chiefs of Police in collaboration with the Criminal Justice and Public Safety Council.
- Statistics Canada should be asked to increase the frequency of the General Social Survey to better understand trends in self-reported victimization that are particular to British Columbia, and the survey should provide information respecting regional and cultural concerns as well as particular offences.
- A province-wide plan for diversion, including restorative justice, should be developed to include education, quality assurance and control, performance measures, reporting, and evaluation.

## 2.4 EARLY RESOLUTION (SECTION 10)

- A new approach to pre-charge resolution should be taken that maximizes the opportunity to resolve matters before formal charge approval is complete.
- An abbreviated report to Crown counsel form should be considered for appropriate cases by the Police/Prosecution Liaison Committee in consultation with Legal Services Society and the defence bar.
- The prosecution service should adopt file ownership as the default administrative process for the handling of criminal matters.
- The Legal Services Society should be supported to provide legal services to promote early resolution by
  - Assigning duty counsel to the same court on a continuing basis;
  - Changing the legal aid tariff to facilitate legal assistance in disposition courts; and
  - Providing advice and other services pre-charge to facilitate resolution at that point.
- Police should advise all persons who are given

a notice to appear in court on a future date of the possible availability of legal assistance and how to access it.

## 2.5 PRE-TRIAL AND TRIAL (SECTION 11)

- The Criminal Justice and Public Safety Council should support initiatives to
  - Create timelines for early resolutions;
  - Implement the Provincial Court Process and Scheduling Project;
  - Substantially reduce the time to trial; and
  - Reduce the current case backlog to bring all pending cases into compliance with the new standards being developed by the Provincial Court.
- Broader use of judicial justices should be considered by the Provincial Court for the hearing of all preliminary inquiries and expansion of their use for bail applications.
- The Supreme Court Criminal Committee should be resourced to retain project management expertise to assist in developing best practices in pre-trial and trial management.

## 2.6 ROLE FOR RISK ASSESSMENT AND BEHAVIOUR MANAGEMENT (SECTION 12)

- The BC Corrections proposal outlined in [Schedule 8](#) to educate and inform other justice participants of best practices in the assessment of risk should be implemented, and subject to resources, consideration should also be given to enhancing the role of corrections staff in providing relevant advice on risk and behaviour management in relation to release and sentencing decisions and conditions.

## 2.7 PROVINCIAL COURT REFORM (SECTION 13)

- In consultation with the Provincial Court, the Provincial Court Act should be amended to

- Clarify and affirm the role, powers and duties of the Chief Judge and amend the term of office to seven years;
  - Recognize and clarify the role of the Executive Committee and the Management Committee of the Provincial Court;
  - Provide for a specific judicial complement, subject to review every three to five years;
  - Permit the attorney general to refer questions concerning judicial administration to the Court; and
  - Provide for a professional judicial administration officer with a defined role and responsibility.
- The Court should establish a voluntary Advisory Committee on Judicial Administration, including people with expertise in private and public management.

## 2.8 CRIMINAL JUSTICE BRANCH (SECTION 14)

- The Criminal Justice Branch Reform initiatives in [Schedule 6](#) should be implemented.
- The charge approval function and responsibility should remain with the prosecution service.

## 2.9 THE ROLE OF THE PUBLIC (SECTION 15)

- In order to improve transparency of Provincial Court processes, consideration should be given to
  - Providing a Web-based service to remind subscribers of developments and resolutions in particular cases; and
  - Providing online and courthouse user surveys that focus on service standards and ideas for improvement.
- Improved scheduling of witnesses via modern information technology should be considered.
- Victims should receive online exit surveys after the resolution of a complaint.

## 2.10 PARTICULAR ISSUES (SECTION 16)

### 2.10.1 Domestic Violence

- The new Provincial Office of Domestic Violence, working collaboratively with the Criminal Justice and Public Safety Council, should prepare a plan to reduce domestic violence, including an integrated and cross-sectoral approach that includes an informed role for the victim, diversion if appropriate, and early resolution, timely hearings, innovative sentencing, and transparency in the goals and progress towards achievement.

### 2.10.2 Administration of Justice Offences

- An administration of justice Offence cross-sectoral working group should be established (under the direction of the Criminal Justice and Public Safety Council) to
  - Better understand the trends and outcomes of administration of justice offences;
  - Identify best practices for determining the terms of release into the community pending trial, and the best practices in enforcement and supervision of those conditions, with the goal of achieving the best outcomes for the victim, the community and the offender; and
  - Develop a pilot to test the strategies.

### 2.10.3 Mental Health and Addiction

- New approaches such as that taken by the Victoria Integrated Court should be fully evaluated to determine whether they improve outcomes for offenders with mental illness and addictions, so that they can be considered for broader implementation.

### 2.10.4 Restorative Justice

- The Criminal Justice and Public Safety Plan for the Province should include a performance goal for increased use of restorative justice programs.
- Expanded funding for restorative justice programs should be made available, and innovative methods of funding, such as funding referrals, should be assessed in cases where

the offender would otherwise be subject to a significant criminal penalty.

## 2.11 RESOURCES AND PRIORITIES (SECTION 17)

- No recommendation is made as to the general level of funding for the criminal justice system.
- Within the scope of available funding, priority should be considered for reducing the backload of cases, enhancing the managerial capacity of the courts, and enabling the full realization of the early case-resolution process.
- To enable the aggressive resolution of the backlog of cases, an additional five judges should be appointed to the Provincial Court.



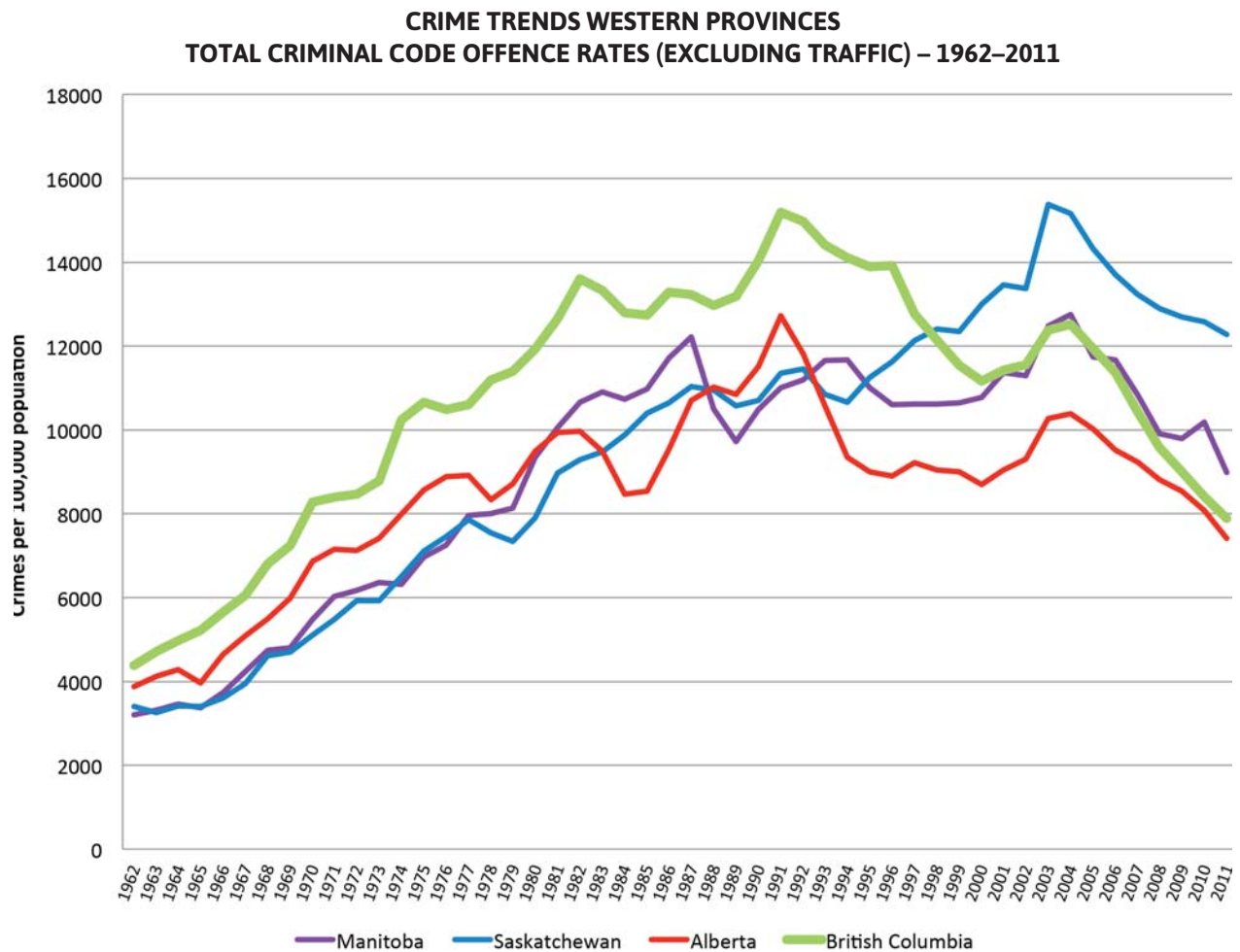
# 3. OVERVIEW OF THE CRIMINAL JUSTICE SYSTEM IN BC

This section provides some general information and data regarding the current operation of the criminal justice system in British Columbia, as well as citing some of the key statistical trends that inform the issues discussed in this report. Unless otherwise specified, the data comes from the Ministry of Justice at the request of the review, usually showing trends from 2001/02 to 2011/12, based on data either from the Ministry databases Justice Information System (JUSTIN), CORIN or Corrections Network (CORNET) or the Canadian Centre for Justice Statistics (CCJS).

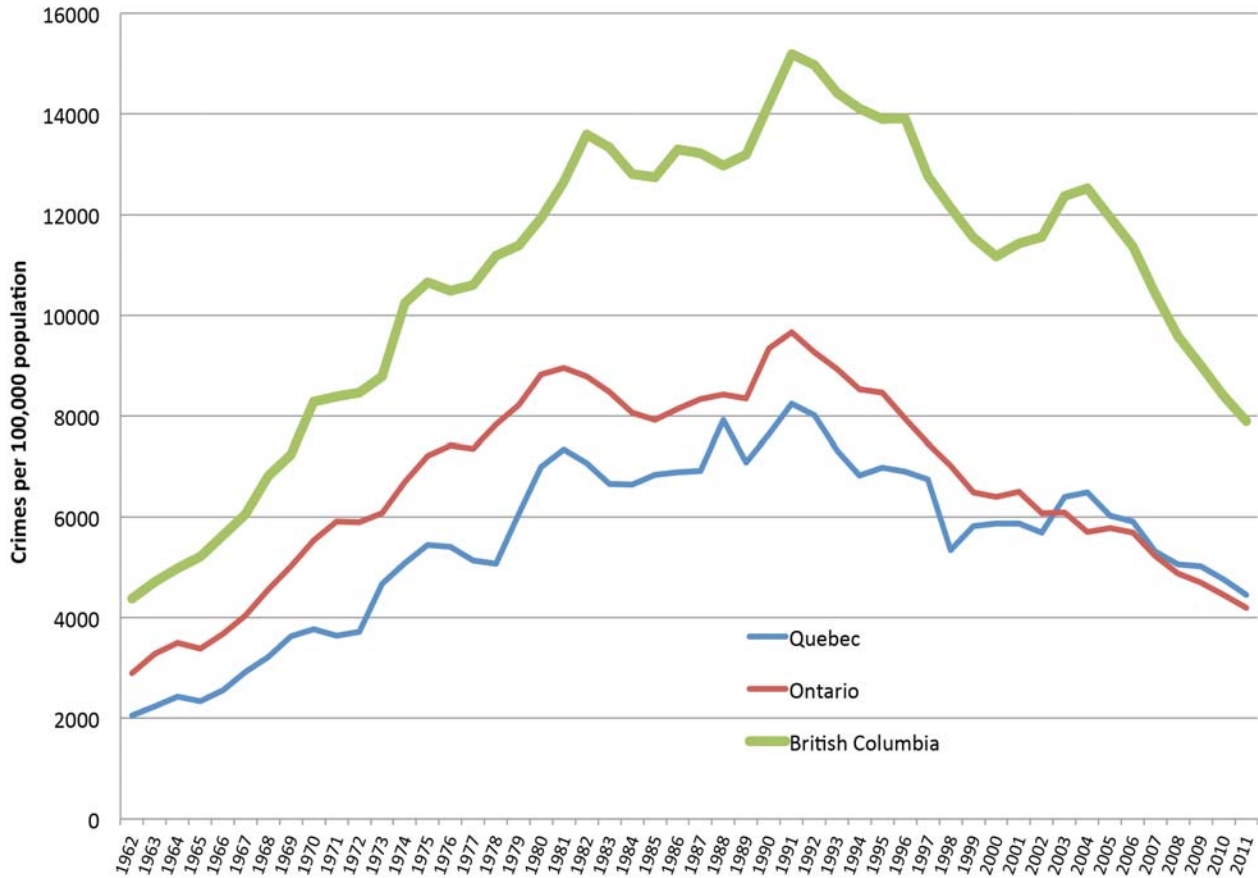
## 3.1 OFFENCES COMMITTED IN BRITISH COLUMBIA

The crime rate in British Columbia has been dropping steadily over the last 10 years, and at a faster rate than in the rest of Canada. Historically, the crime rate in British Columbia has always been significantly above the national average. However, the rate is now closer to the average and is now very close to the rate in Alberta.

The crime rate remains above the average crime rate in central Canada.



**CRIME TRENDS QUEBEC, ONTARIO AND BRITISH COLUMBIA  
TOTAL CRIMINAL CODE OFFENCE RATES (EXCLUDING TRAFFIC) – 1962–2011**



Source: CCJS UCR database. 1962–2008 UCR1. 2009 begins UCR2

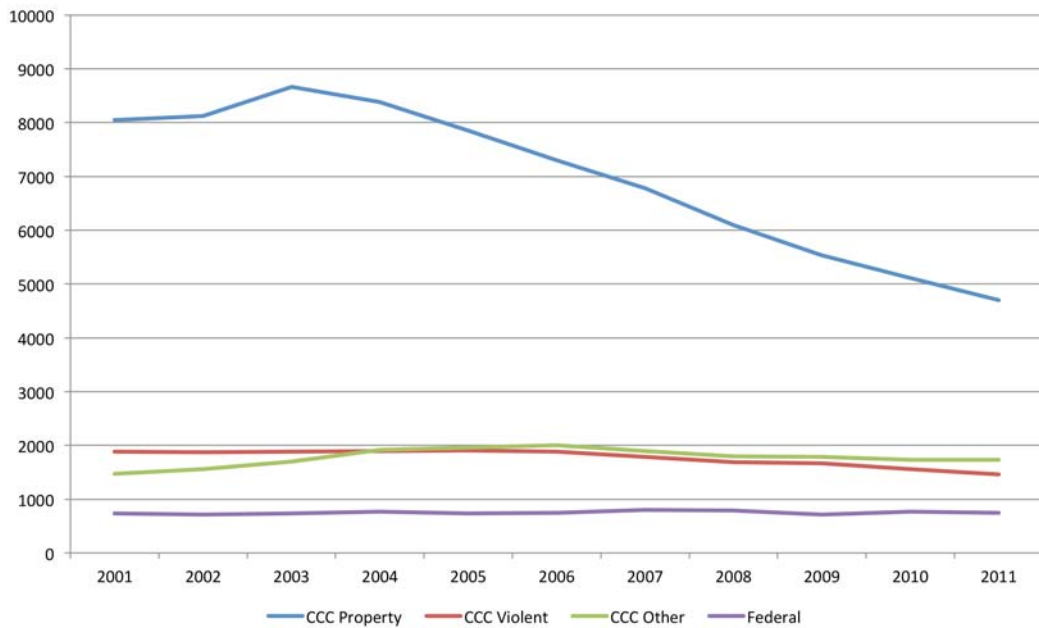
As the chart on the next page shows, the drop in reported crime is almost entirely due to a substantial drop in property crime, which constitutes the largest category of offences and has been dropping sharply since 2003. Violent offences have declined slightly; federal offences, primarily drug offences, have remained stable; and “Criminal Code other”

have increased slightly. Within the category of violent offences, although homicide increased 4% between 2010 and 2011, it was still the second-lowest rate reported in British Columbia since 1964.<sup>4</sup> Nonetheless, public opinion polls continue to report that the public is anxious about crime and perceives it to be on the rise.<sup>5</sup>

4 Statistics Canada, *Police Reported Crime Statistics in Canada 2011* (24 July 2012), at p. 14, online: Statistics Canada <<http://www.statcan.gc.ca/pub/85-002-x/2012001/article/11692-eng.pdf>>.

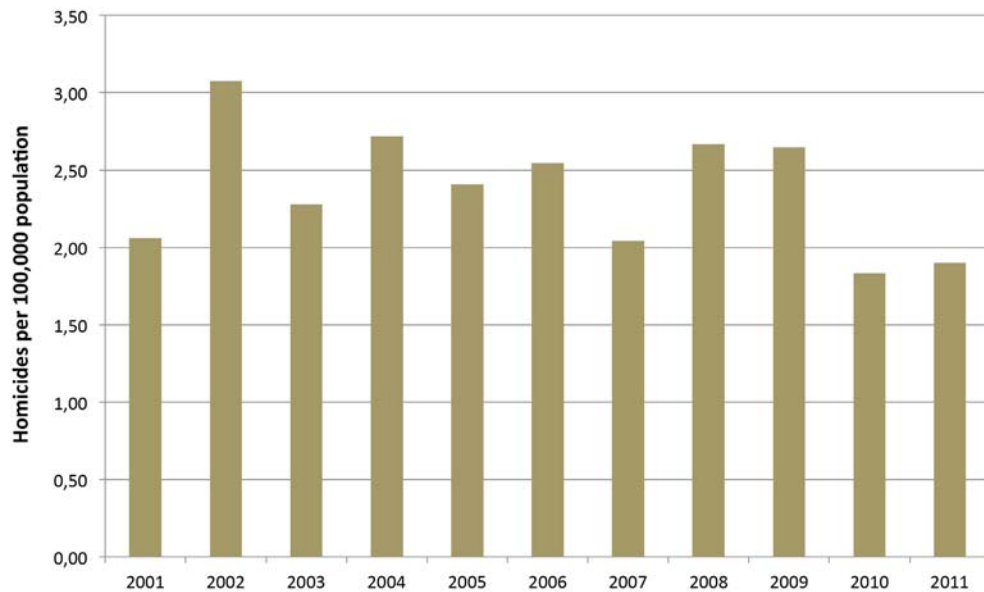
5 Jake Edmiston, “Canada’s Inexplicable Anxiety Over Violent Crime”, *National Post* (4 August 2012), online: National Post <<http://news.nationalpost.com/2012/08/04/canadas-inexplicable-anxiety-over-violent-crime/#1>>.

**DROP IN BC CRIME LARGELY DUE TO PROPERTY CRIME**  
**CRIME BY MAJOR CATEGORY**



Source: CCJS UCR database. 1962–2008 UCR1. 2009 begins UCR2

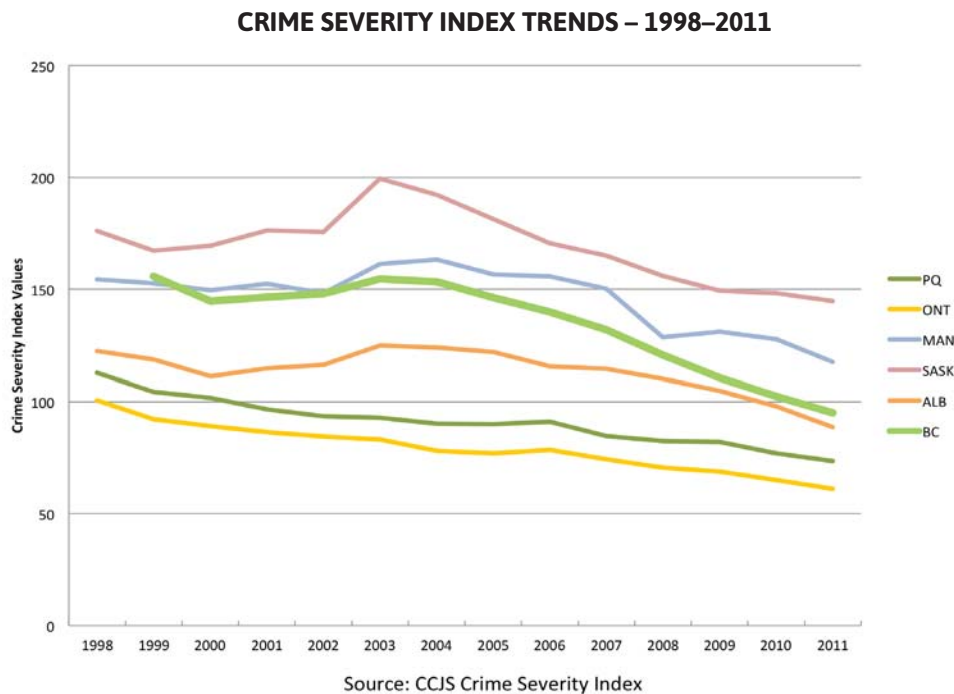
**HOMICIDE**



Source: CCJS UCR database. 1962–2008 UCR1. 2009 begins UCR2  
 NB: data includes significant numbers of founded/alleged serial homicide victims

Recognizing that the crime rate is a composite of all offences reported to the police and that the mix of crimes might vary from province to province, CCJS has developed what they call a “crime severity index” to ensure that interprovincial comparisons are more meaningful. The index is “designed to measure change in the overall seriousness of crime from one year to the next, as well as relative differences in the seriousness of crime across the country.”<sup>6</sup> Without such an index, the crime rate simply measures the total number of criminal incidents reported to the police. Since violent crime is relatively infrequent,

even a significant percentage increase in the violent crime rate will not involve a large number of new offences. This can be readily offset by even a small percentage in property crime that may still involve a large number of crimes. Thus the crime rate may decrease while the crimes that people care most about may increase. The crime severity index was designed to provide a more accurate picture of the overall severity of crime in a province. When the severity index is applied, the crime rate in British Columbia is even closer to the national average than it has been at any time in the last decade.



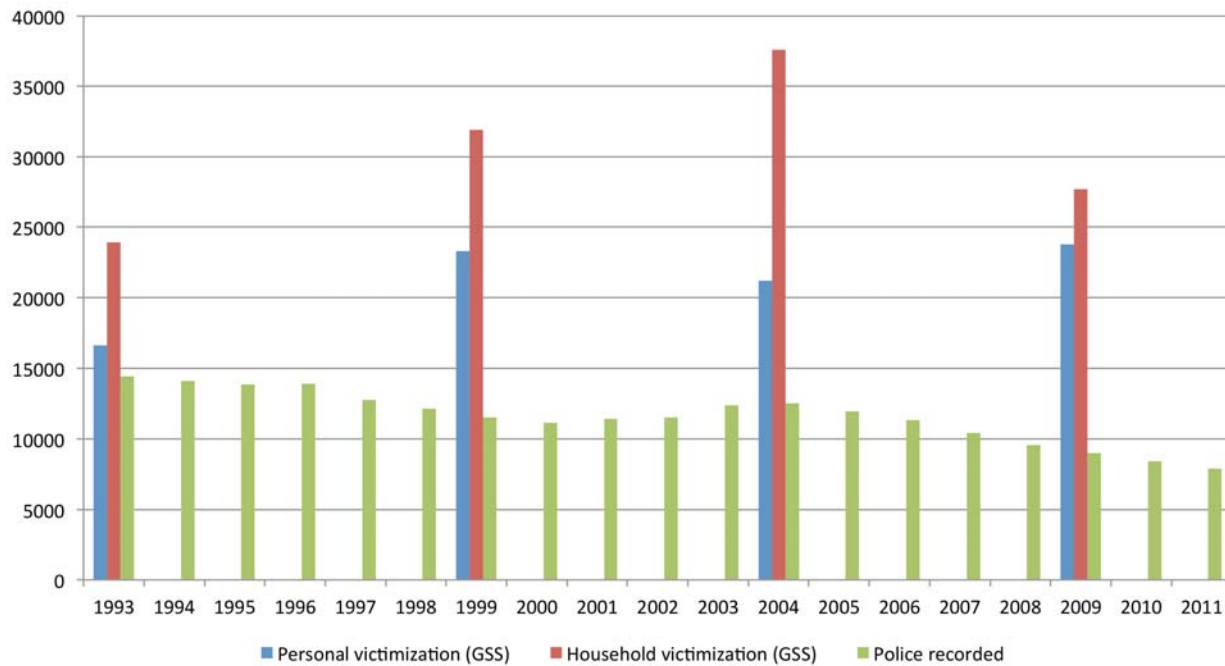
### 3.2 VICTIMIZATION RATES VS. REPORTED CRIME

Because we know that not all crime is reported, it could be suggested that the only drop is in reporting, not in the actual crime rate. It is of course difficult to know whether something exists when it is not reported.

However, as part of the General Social Survey (GSS) that is conducted by Statistics Canada every five years,<sup>7</sup> there are a number of questions on criminal victimization. It appears that while actual crime is always greater than reported crime, the relative proportion remains fairly constant.

<sup>6</sup> Statistics Canada, *Measuring Crime in Canada: Introducing the Crime Severity Index and Improvements to the Uniform Crime Reporting Survey 2009* (April 2009), at p. 6, online: Statistics Canada <[www.statcan.gc.ca/pub/85-004-x/85-004-x2009001-eng.pdf](http://www.statcan.gc.ca/pub/85-004-x/85-004-x2009001-eng.pdf)>.  
<sup>7</sup> For an overview of recent Statistics Canada General Social Surveys, see: <<http://www5.statcan.gc.ca/bsolc/olc-cel/olc-cel?catno=89F0115X&CHROPG=1&lang=eng>>.

**ACTUAL CRIME > REPORTED,  
BUT AT RELATIVELY CONSTANT RATE  
RECORDED CRIME VS. PERSONAL AND HOUSEHOLD  
VICTIMIZATION (SELF-REPORT): BC**



**Personal** = Assault, sexual assault, robbery, theft of personal property **Household** = B&E, MV theft, theft of household property, vandalism

Source: CCJS UCR database & GSS victimization data

This suggests that the drop in reported property crime does reflect a real and significant drop in actual criminal victimization. However, there does appear to be a growing gap between victimization and reporting of violent crime.<sup>8</sup>

### 3.3 YOUTH CRIME

While the crime rate generally is going down, youth crime in British Columbia has dropped dramatically over the last decade, including a

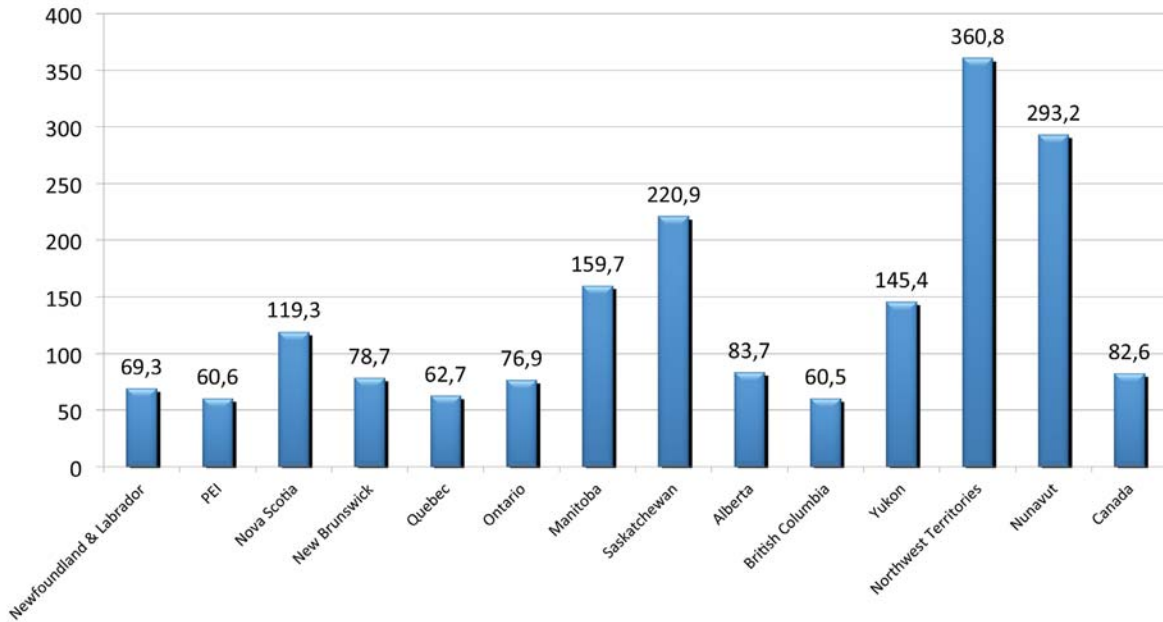
further 15% reduction from 2010 to 2011. Violent crime dropped by 6%, but when the CCJS severity index was applied, the youth crime severity rate actually dropped by 16%. British Columbia used to have a youth crime rate that was substantially higher than the national average, but now has the third-lowest youth crime rate in the country, after Quebec and Ontario. It has the lowest youth violent crime rate in the country, and using the youth crime severity index, the lowest youth crime rate in the country in 2011.<sup>9,10</sup>

8 Statistics Canada, *Criminal Victimization in Canada, 2009*, (Summer 2010 Vol. 30, No. 2), at p. 14, online: Statistics Canada <<http://www.statcan.gc.ca/pub/85-002-x/2010002/article/11340-eng.pdf>>.

9 Statistics Canada, *Police Reported Crime Statistics in Canada 2011* (24 July 2012), at p. 22, online: Statistics Canada <<http://www.statcan.gc.ca/pub/85-002-x/2012001/article/11692-eng.htm#a5>>.

10 Youth Crime tables provided to the BC Justice Reform Initiative by the British Columbia Ministry of Children and Family Development on 24 July 2012.

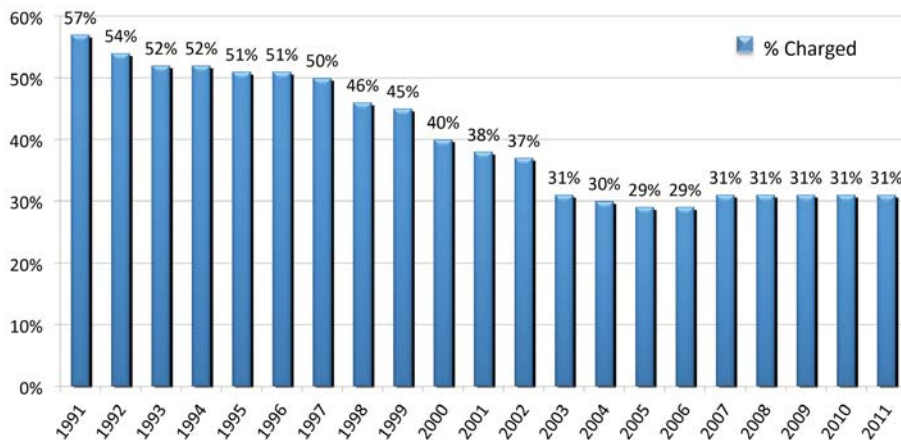
**YOUTH CRIME SEVERITY INDEX, BY PROVINCE, 2011**



A significant change over the last decade has been in how police respond to young people they believe have committed an offence. The use of informal diversion, rather than laying charges and using the formal court system, has grown

dramatically. As the chart below shows, the percentage of young people who are found by police to have committed an offence and who are then charged has dropped from 57% in 1991 to around 30% since 2003.<sup>11</sup>

**PERCENTAGE OF YOUNG PERSONS FOUND BY POLICE TO HAVE COMMITTED AN OFFENCE WHO WERE CHARGED BY THE POLICE – BC**

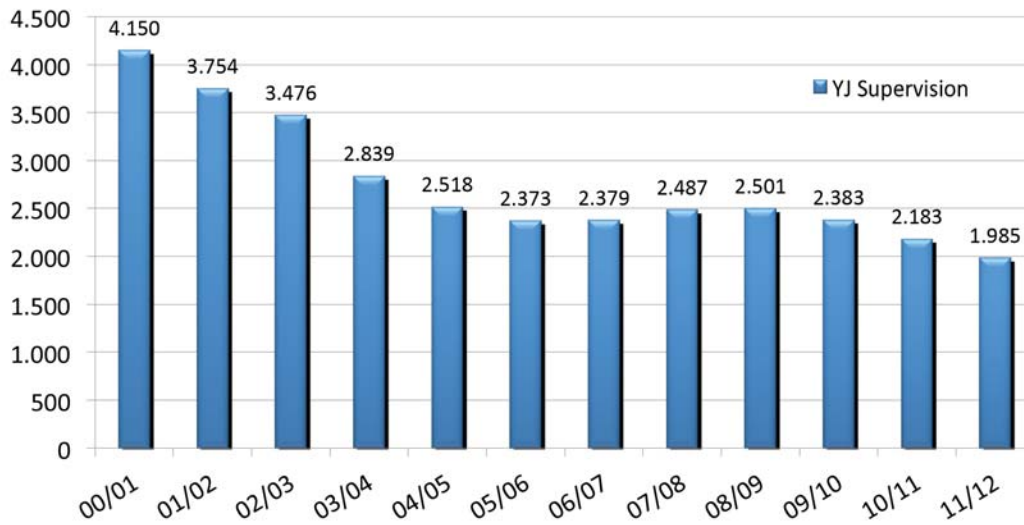


11 Note that chart does not show that 60% of all young persons in 1991 were charged with an offence, but rather that 60% of young persons who were found by police to have committed an offence were charged by police.

As you would expect, the numbers of youth sentenced to community or imprisonment has also dropped. Since 2001, the number of youth under community supervision has dropped by 50%, from over 4,000 on average to about 2,000 in 2011/12.

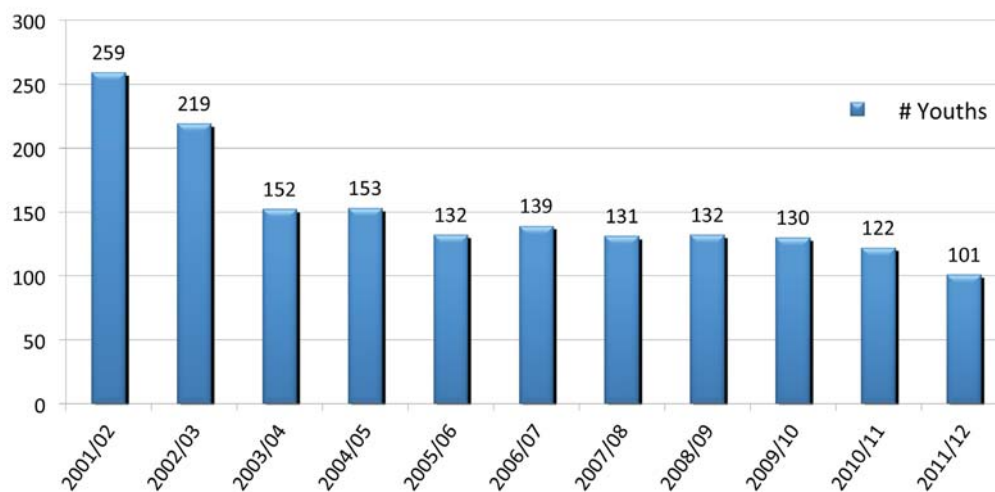
Similarly, youth incarceration has dropped even more dramatically, from almost 300 youth in custody on average in 2001 to about 100 now, both in remand and sentenced.

**AVERAGE NUMBER OF YOUTH UNDER COMMUNITY YOUTH JUSTICE SUPERVISION – BC**



Includes all forms of community youth justice supervision, e.g. probation, bail, ISSP, conditional supervision, etc.

**AVERAGE NUMBER OF YOUTH IN CUSTODY – BC**





### 3.4 POLICING

In British Columbia, policing services are provided by the Royal Canadian Mounted Police (RCMP) (federal, provincial and municipal forces), independent municipal police departments, and a First Nations–administered force.<sup>12</sup> On April 1, 2012, the provision of provincial and municipal police services by the RCMP to the Province of British Columbia was continued for a further 20 years, with the coming into effect of three new memoranda of agreement.<sup>13</sup>

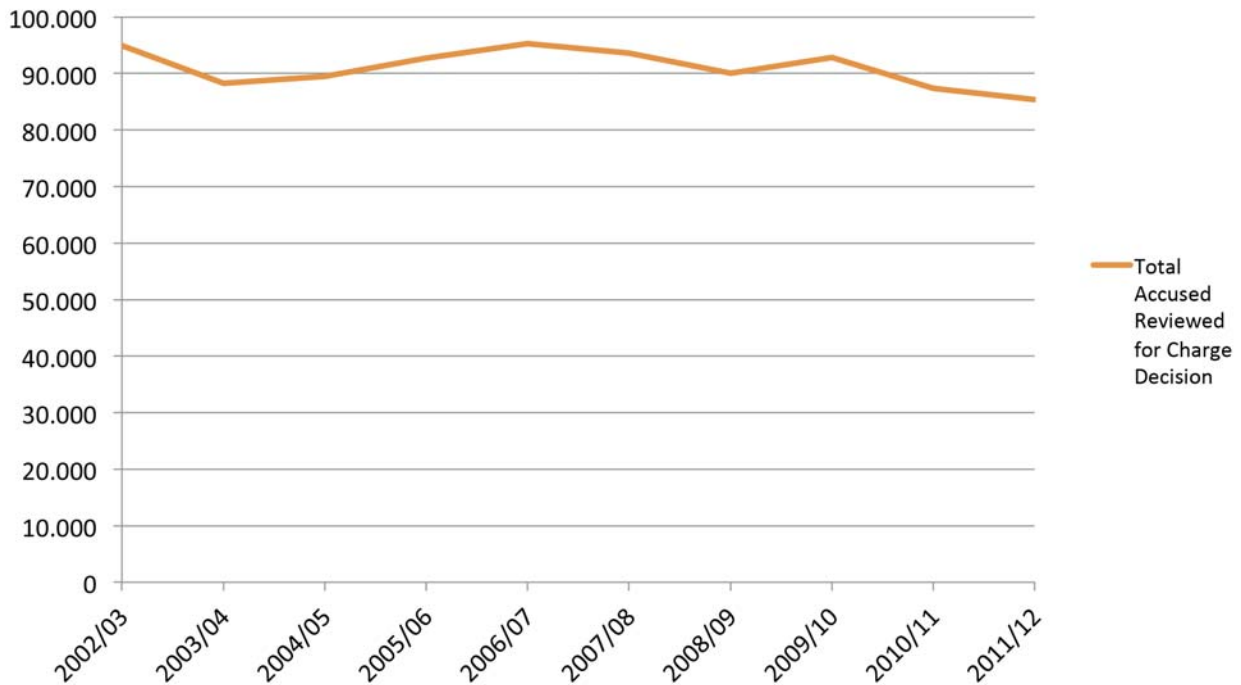
Among other things, the police are responsible for gathering evidence and investigating whether a crime has been committed. In circumstances where the police recommend charges be laid, they

will prepare an RCC. In British Columbia it is Crown counsel (also referred to as prosecutors) who make the ultimate decision on charges.<sup>14</sup>

Although the crime rate has been dropping steadily in BC, the number of RCCs sent to Crown counsel has been stable, at least until 2010/11. However in 2011/12 there was a drop of 8,000 in the number of impaired-driving RCCs referred to Crown counsel as a result of the IRP program.<sup>15</sup>

One reason for this trend is that over the last decade police in British Columbia, as in the rest of Canada, have been solving more of the crimes reported to them.<sup>16</sup> Another reason is that police are recommending an increasing number of charges for breach of court orders.

REPORTS TO CROWN COUNSEL



12 British Columbia Ministry of Justice, *Policing in British Columbia*, online: Ministry of Justice <<http://www.pssg.gov.bc.ca/policeservices/>>. For further information on Policing in BC, see <<http://www.pssg.gov.bc.ca/policeservices/description/index.htm>>.  
 13 Copies of those agreements and further information can be found at <<http://www.pssg.gov.bc.ca/policeservices/police-agreements/index.htm#rcmpagreements>>.  
 14 For further information on this process, see: <[http://www.justicebc.ca/en/cjis/understanding/how\\_it\\_works/crime/index.html](http://www.justicebc.ca/en/cjis/understanding/how_it_works/crime/index.html)> and <[http://www.justicebc.ca/en/cjis/you/accused/investigating/police\\_crown\\_counsel.html](http://www.justicebc.ca/en/cjis/you/accused/investigating/police_crown_counsel.html)>.  
 15 See chart in Section 3.5 below. For further discussion of the IRP, see Section 1.1 of the Annex to this Report.  
 16 Statistics Canada, *Table 1: Police-reported weighted clearance rate, by province and territory, 2000 to 2010*, (7 June 2012), online: Statistics Canada <<http://www.statcan.gc.ca/pub/85-002-x/2012001/article/11647/tbl/tbl01-eng.htm>>.

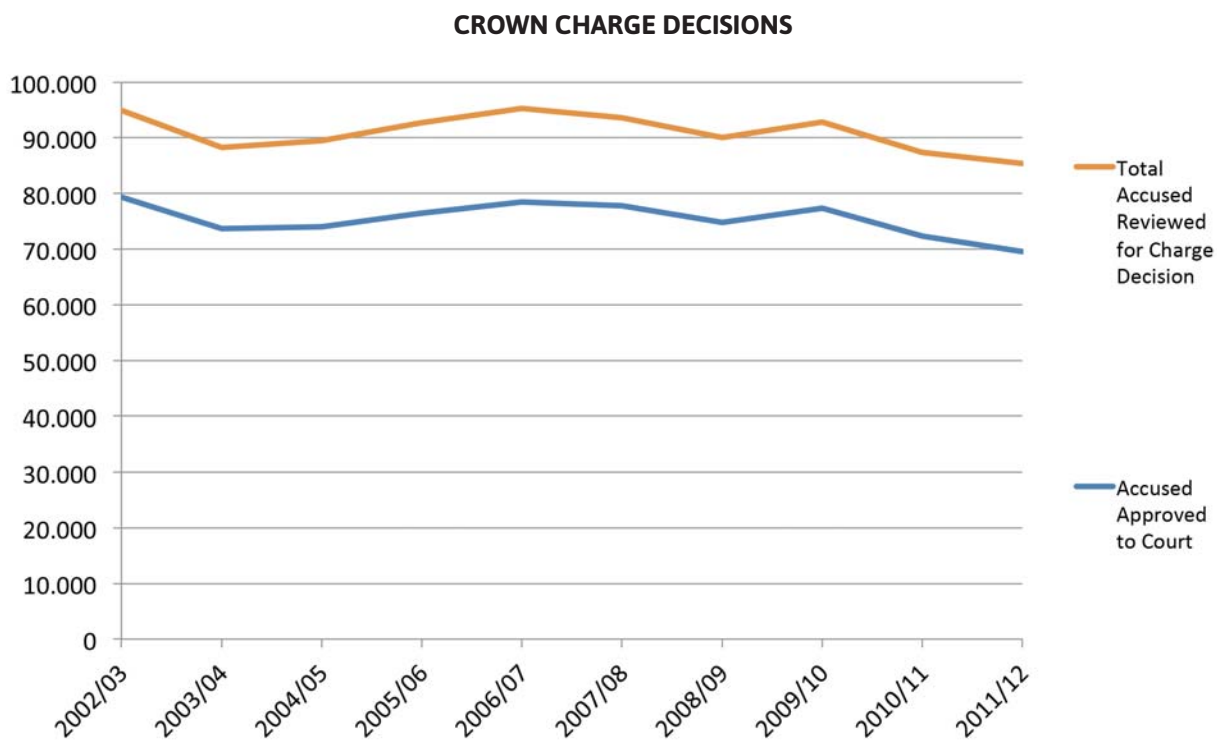


### 3.5 LAYING CHARGES

As outlined above, Crown counsel working in the Prosecution service within the Criminal Justice Branch of the Ministry of Justice have sole responsibility for laying criminal charges in British Columbia. Prosecutors will consider RCCs from police and conduct a charge assessment. This is generally the responsibility of an individual prosecutor exercising

his or her prosecutorial independence. It is also the role of prosecutors to prosecute offences and appeals in British Columbia related to the Criminal Code of Canada and provincial regulatory offences.<sup>17</sup>

The percentage of charges approved by Crown counsel has remained relatively consistent over the last 10 years, at approximately 85% of all RCCs filed by police, as shown in the chart below.



### 3.6 CASES BROUGHT BEFORE THE PROVINCIAL COURT

Between 2003/04 and 2009/10, despite the drop in the crime rate, the Provincial Court criminal caseload was fairly constant at just over 100,000 cases a year. As noted above, this appears to be in part due to the increase in police clearance rates, but also due to the steady increase in the numbers of charges laid by

police for what are termed “administration of justice” offences—breaches of conditions placed on release of a person by either a court or by the police themselves.

The caseload started to decline significantly in 2010 and dropped even more sharply, by 8,000 cases, in 2011/12, primarily as a result of the introduction of the Integrated Roadside Prohibition (IRP) program in September 2010.<sup>18</sup>

17 British Columbia Ministry of Justice, *Role of Crown Counsel*, online: British Columbia Ministry of Justice <<http://www.ag.gov.bc.ca/prosecution-service/BC-prosecution/crown-counsel.htm>>.

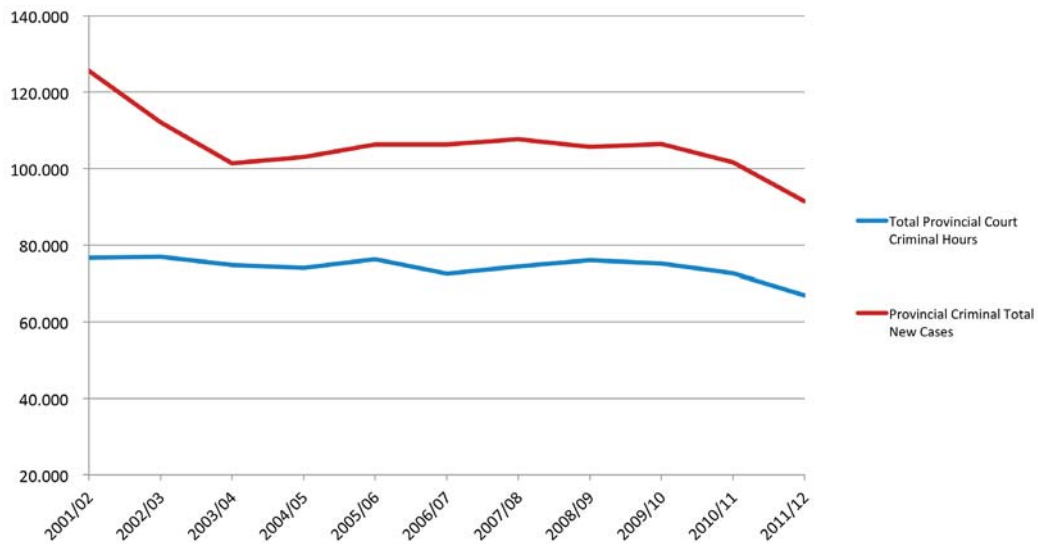
18 For further discussion of the IRP, see Section 1.1 of the Annex to this Report.

Since 2006/07, the Provincial Court has been concluding slightly more cases than the number of new cases coming into the system, so the backlog has not been growing.

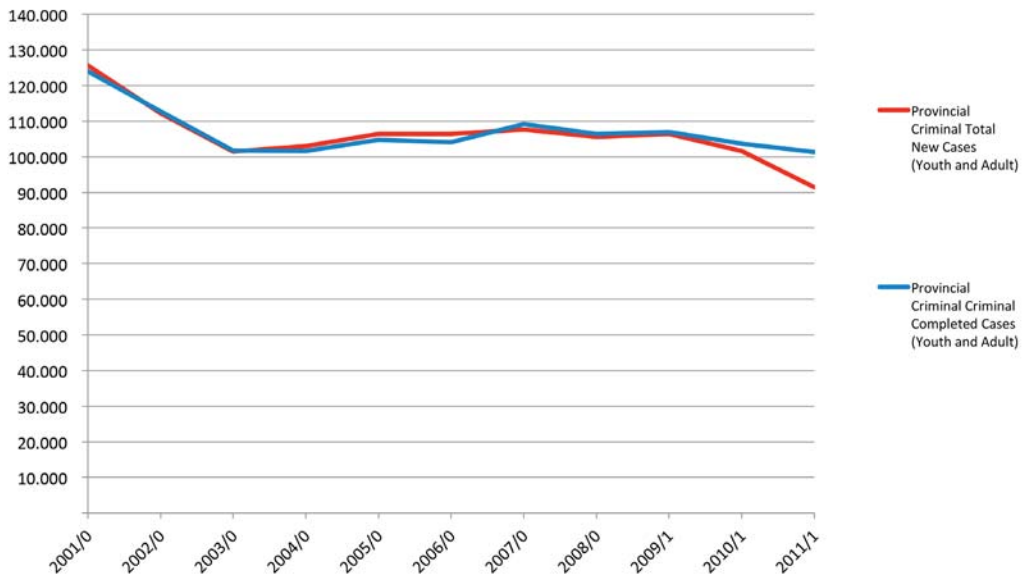
However, with the substantial drop of 8,000 cases in

2011/12, even with 1,000 fewer cases completed than in the previous year, the backlog, or pending cases, was reduced substantially, from almost 33,000 to just over 25,000 for adults, a reduction of 23%, and from 1,900 to about 1,500 for youth, a reduction of 22%.

**PROVINCIAL CRIMINAL COURT HOURS AND CASE VOLUMES**



**PROVINCIAL COURT NEW CASES AND CONCLUDED CASES**



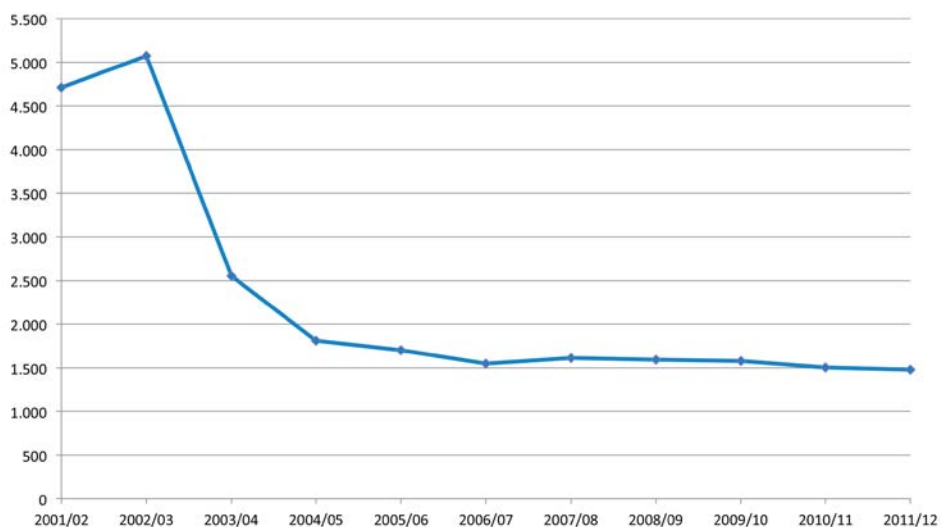
### 3.7 CASES BROUGHT BEFORE THE SUPREME COURT OF BRITISH COLUMBIA

Over 98% of all criminal cases are dealt with in Provincial Court.<sup>19</sup> The Supreme Court, which deals with the most serious criminal offences such as murder, has seen its criminal caseload drop by 300 cases, from 1,691 cases in 2005 to 1,368 cases in 2011. This includes criminal matters such as bail

reviews, wiretap authorizations, and Extradition Act matters, as well as criminal trials and sentencing.<sup>20</sup>

In 2011, there were 415 criminal trials in the Supreme Court,<sup>21</sup> compared with 433 the prior year.<sup>22</sup> The significant drop in cases in 2003/04 was as a result of a change in provincial legislation, so that applications for more time to dispute traffic tickets no longer went to the Supreme Court.

**SUPREME COURT NEW CRIMINAL CASES**



### 3.8 CRIMINAL CASES IN THE COURT OF APPEAL

The Court of Appeal is the last court for almost all criminal cases in the province and may hear cases that were first decided in the Provincial Court or the Supreme Court.

In 2011 the Court of Appeal received filings for approximately 110 appeals from sentence and

163 appeals from conviction, acquittal, summary conviction or other matters such as bail.

The types of underlying offences include all types, but the most frequently heard include drug offences (approx. 40%), assault, murder, sexual, property, motor vehicle and fraud offences.<sup>23</sup>

In 2011, 17% of criminal appeals involved self-represented litigants.

19 For information on filings, see the Annual Reports of the British Columbia Supreme Court at <[http://www.courts.gov.bc.ca/supreme\\_court/about\\_the\\_supreme\\_court/annual\\_reports/index.aspx](http://www.courts.gov.bc.ca/supreme_court/about_the_supreme_court/annual_reports/index.aspx)> and the Annual Reports of the Provincial Court of British Columbia at <<http://www.provincialcourt.bc.ca/news-reports/court-reports>>.

20 Supreme Court of British Columbia, *Annual Report 2011* (Vancouver: Supreme Court of British Columbia, 2011), at p. 48, online: Courts of British Columbia <[http://www.courts.gov.bc.ca/supreme\\_court/about\\_the\\_supreme\\_court/annual\\_reports/2011%20Annual%20Report.pdf](http://www.courts.gov.bc.ca/supreme_court/about_the_supreme_court/annual_reports/2011%20Annual%20Report.pdf)>

21 Supreme Court of British Columbia, *Annual Report 2011* (Vancouver: Supreme Court of British Columbia, 2011), at p. 55, online: Courts of British Columbia <[http://www.courts.gov.bc.ca/supreme\\_court/about\\_the\\_supreme\\_court/annual\\_reports/2011%20Annual%20Report.pdf](http://www.courts.gov.bc.ca/supreme_court/about_the_supreme_court/annual_reports/2011%20Annual%20Report.pdf)>.

22 Supreme Court of British Columbia, *Annual Report 2010* (Vancouver: Supreme Court of British Columbia, 2010), at p. 53, online: Courts of British Columbia <[http://www.courts.gov.bc.ca/supreme\\_court/about\\_the\\_supreme\\_court/annual\\_reports/2010%20Annual%20Report.pdf](http://www.courts.gov.bc.ca/supreme_court/about_the_supreme_court/annual_reports/2010%20Annual%20Report.pdf)>.

23 British Columbia Court of Appeal, *Annual Report 2011* (Vancouver: British Columbia Court of Appeal, 2011), at p. 41, online: Courts of British Columbia <[http://www.courts.gov.bc.ca/Court\\_of\\_Appeal/about\\_the\\_court\\_of\\_appeal/annual\\_report/2011%20ANNUAL%20REPORT.pdf](http://www.courts.gov.bc.ca/Court_of_Appeal/about_the_court_of_appeal/annual_report/2011%20ANNUAL%20REPORT.pdf)>

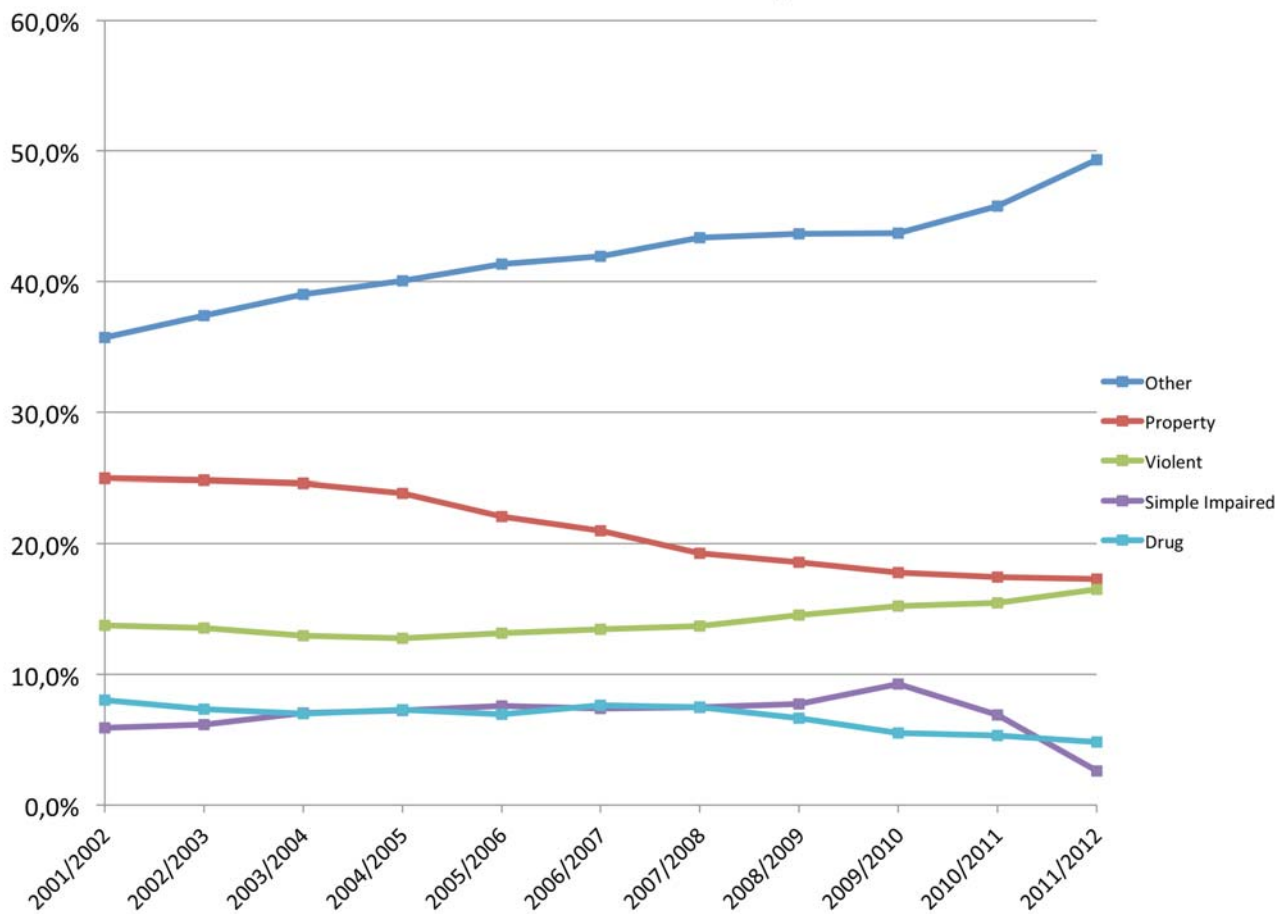
The Court of Appeal has been conducting a pilot to expedite the hearing of all conviction and acquittal appeals, which has included collaboration with the bar and efforts to facilitate the necessary logistical steps to making appeals ready for hearing by the Court.

The stated goal of the pilot is to have the majority of all conviction and acquittal appeals heard within a year. The results will likely be incorporated in new Criminal Appeal Rules. The pilot is underway, is being monitored and will be evaluated, and the results will be available sometime in 2013.<sup>24</sup>

### 3.9 TYPES OF CASES IN THE PROVINCIAL COURT

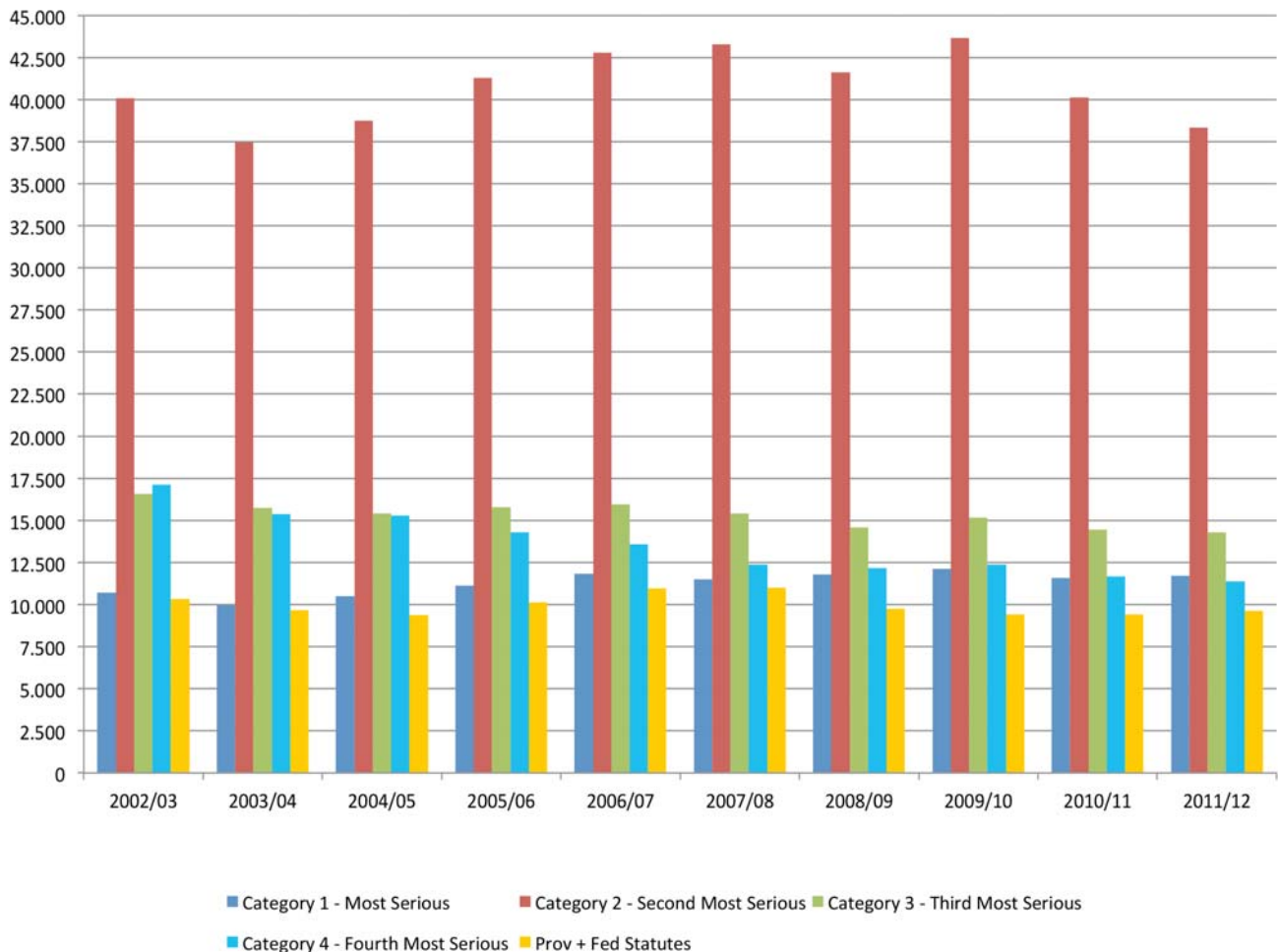
Although the caseload was relatively constant in Provincial Court for a number of years, the last two years have seen a marked decrease. As well, the makeup of the charges has changed significantly. Property offences have dropped dramatically, so the “other” category, which largely comprises what are termed administration of justice offences, primarily breaches of probation and breaches of bail, now comprise an even larger percentage of the caseload, up to 45%.

**% OF COURT CASE VOLUME BY OFFENCE**



24 British Columbia Court of Appeal, *Annual Report 2011* (Vancouver: British Columbia Court of Appeal, 2011), at p. 23, online: Courts of British Columbia <[http://www.courts.gov.bc.ca/Court\\_of\\_Appeal/about\\_the\\_court\\_of\\_appeal/annual\\_report/2011%20ANNUAL%20REPORT.pdf](http://www.courts.gov.bc.ca/Court_of_Appeal/about_the_court_of_appeal/annual_report/2011%20ANNUAL%20REPORT.pdf)>

VOLUME OF OFFENCES BY CATEGORY



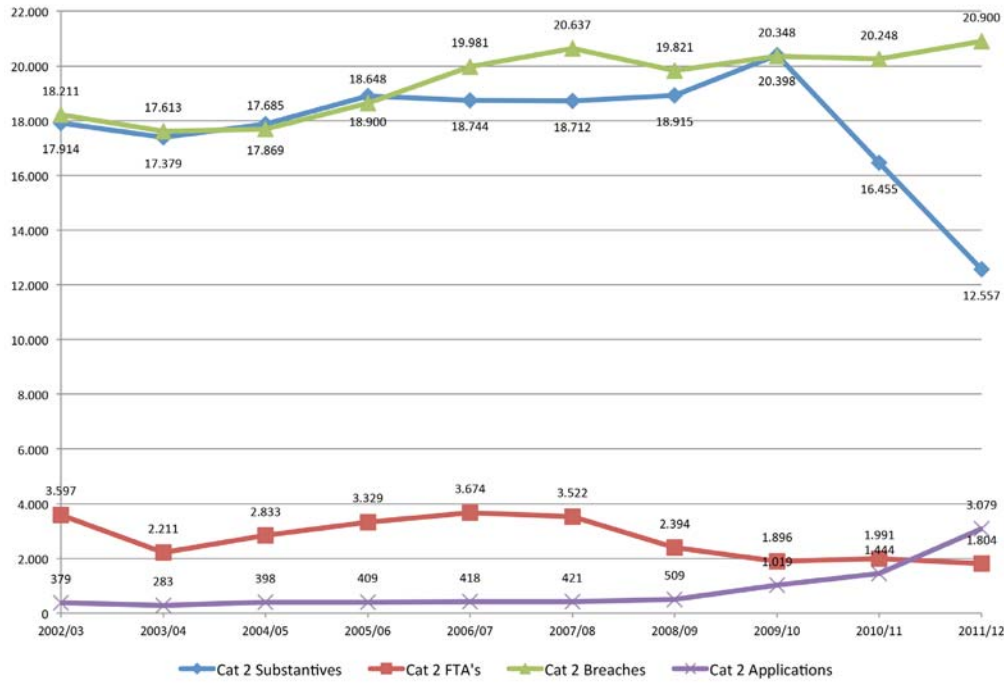
In the above chart, category 2 offences are considered to be the second most serious. They include impaired driving, serious assault, break and enter of a dwelling, and weapons offences, among others. However, this category also includes breach of probation or other court order, which make up an increasing percentage of this category.

Within the category of administration of justice offences, there has been an increase in breaches of various types of orders that are recommended for charge by police officers rather than by probation officers.

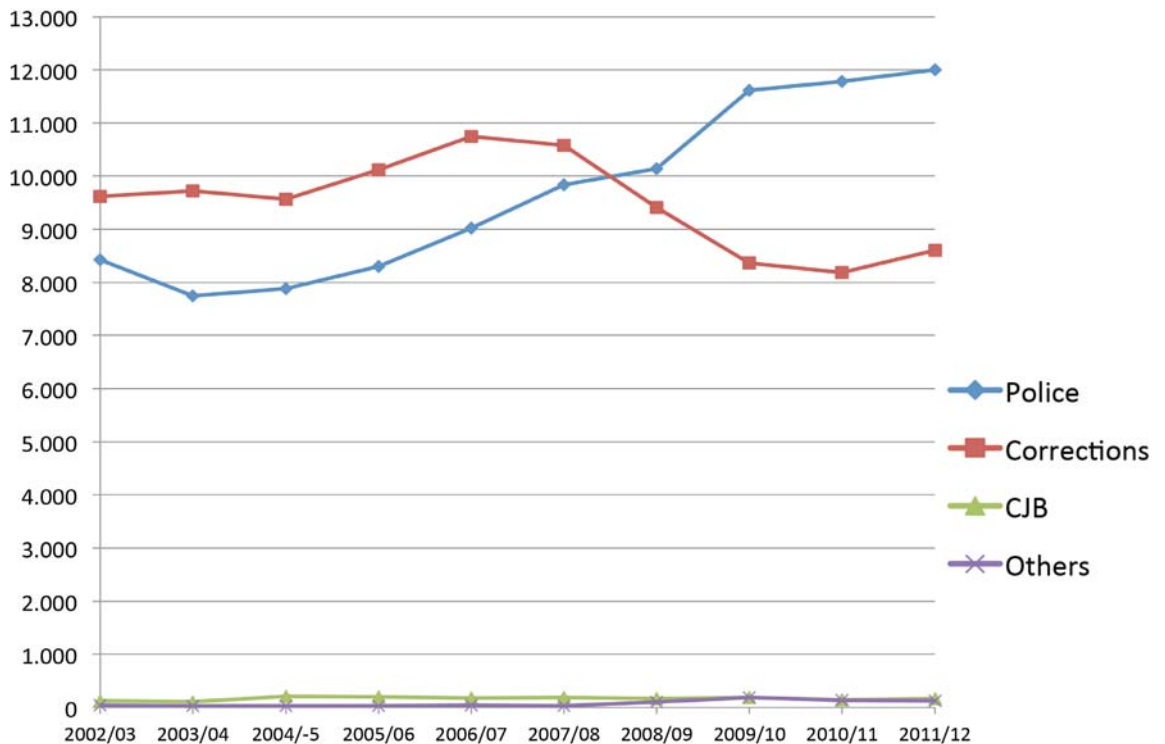
The reasons for this have not been documented. Explanations may include

- New police policies to pursue administration of justice charges aggressively as a way to manage offender behaviour, improve public safety and encourage respect for orders of the court;
- Delay in time to trial, which creates a longer period of time within which an accused can fail to comply with conditions; and
- Unrealistic conditions, not involving further criminal behaviour, which accused are unwilling or unable to comply with.

**CATEGORY 2 – FEWER IMPAIRED, INCREASED BREACHES**



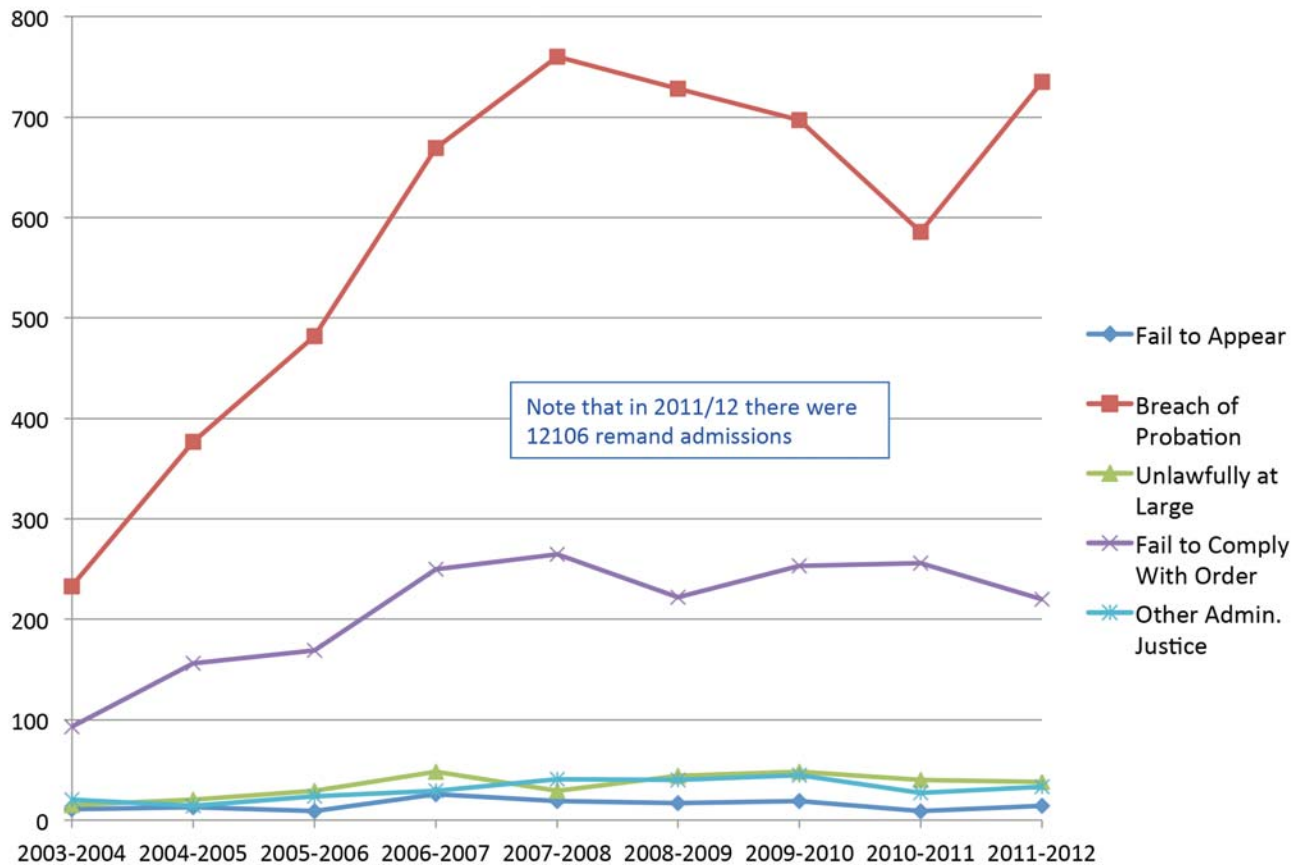
**CATEGORY 2 BREACHES BY INVESTIGATOR**



However, as the charts below indicate, there is a difference in the outcomes for breaches of probation as compared with other kinds of breaches. Offenders charged with breach of probation are

somewhat more likely to be remanded in custody and ultimately sentenced to custody than are offenders charged with other kinds of breaches, such as bail.

**REMAND ADMISSIONS FOR ADMINISTRATION OF JUSTICE CHARGES**



**3.10 TIMELINESS**

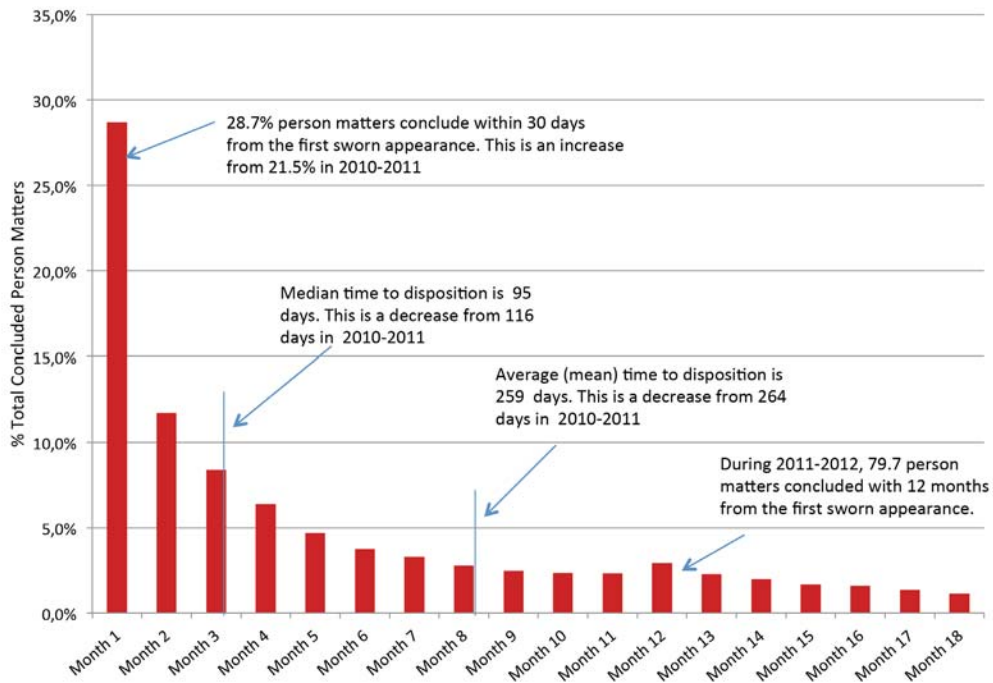
In Provincial Court, while there are real concerns about delay, it is important to remember that significant delay does not affect all cases. In 2011/12, almost 30% of cases resolved within 30 days of their

first appearance in court, 50% resolved in just over 3 months, and 80% of cases resolved within 12 months from the first sworn appearance.<sup>25</sup> However, six to eight weeks will pass between many criminal events and the first day of appearance in court.

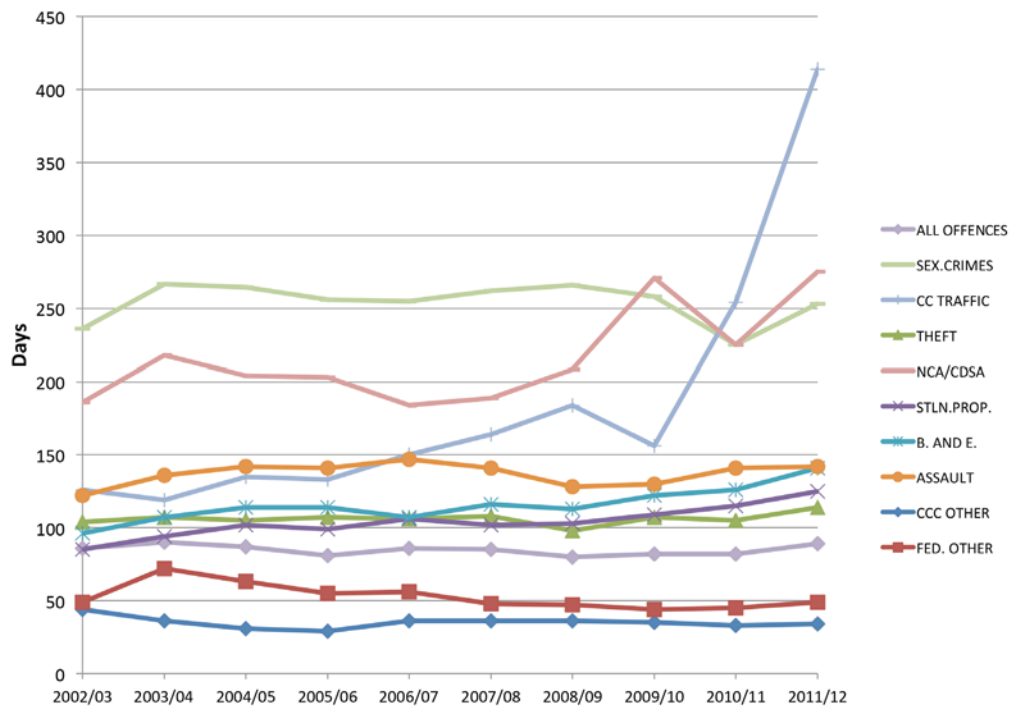
25 Information and chart provided to the BC Justice Reform Initiative by the British Columbia Ministry of Justice, 27 July 2012.



### MEDIAN TIME TO DISPOSITION 2011/2012



### CONCLUDED CASE MEDIAN TIME TO DISPOSITION BY OFFENCE TYPE





Similarly, the majority of cases do not in fact consume a significant amount of court time, with 73% of concluded cases using half a day or less of court time and 26% of cases using between half a day and two days of total court time.

The remaining 1%, though, can consume many days of court time. Some cases can become so delayed that they are stayed by the Crown or court because the delay has unduly interfered with the accused’s right to a trial within a reasonable period of time—commonly known as becoming subject to *Askov*<sup>26</sup>.

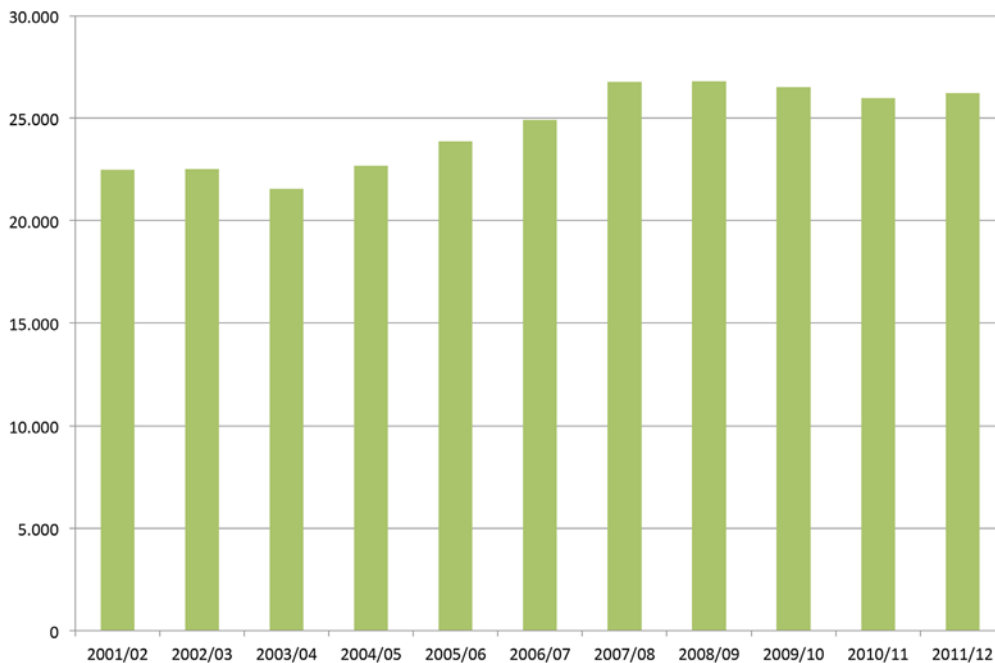
As well, when we look at the makeup of appearances in court, we see that the majority of appearances are either administrative or for bail. There are slightly more sentencing appearances now than 10 years ago, but first appearances are down, reflecting the smaller number of cases in the system. Trial appearances have been slowly reducing. This

is an area where the government’s data system is weak; while it counts individual trial appearances, it is not possible to determine from the data how long individual trials are, or how length may differ for different kinds of offences. It could be that trials are not in fact getting longer, or that, while trials are getting longer there are significantly fewer of them, or, most likely, some combination of the two.

There are no specific performance measures for the hearing or determination of criminal matters in the Supreme Court. The nature of the work in Supreme Court means that there is a wide range of times taken up by pre-trial procedures, trials and reserved judgments.

Apart from the time to bring appeals to hearing, in 2011 the Court of Appeal delivered 94% of its judgments within the six-month period suggested by the Canadian Judicial Council.<sup>27</sup>

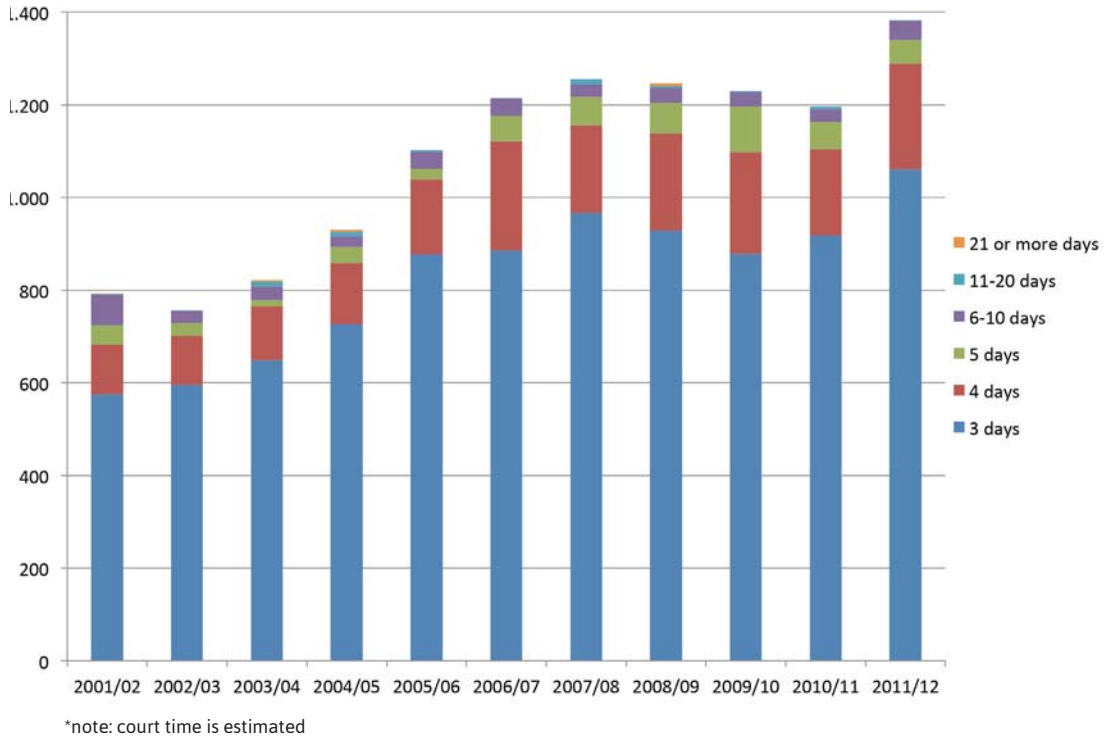
**26% OF COURT CASES USE BETWEEN 1/2 DAY TO 2 DAYS TOTAL COURT TIME**



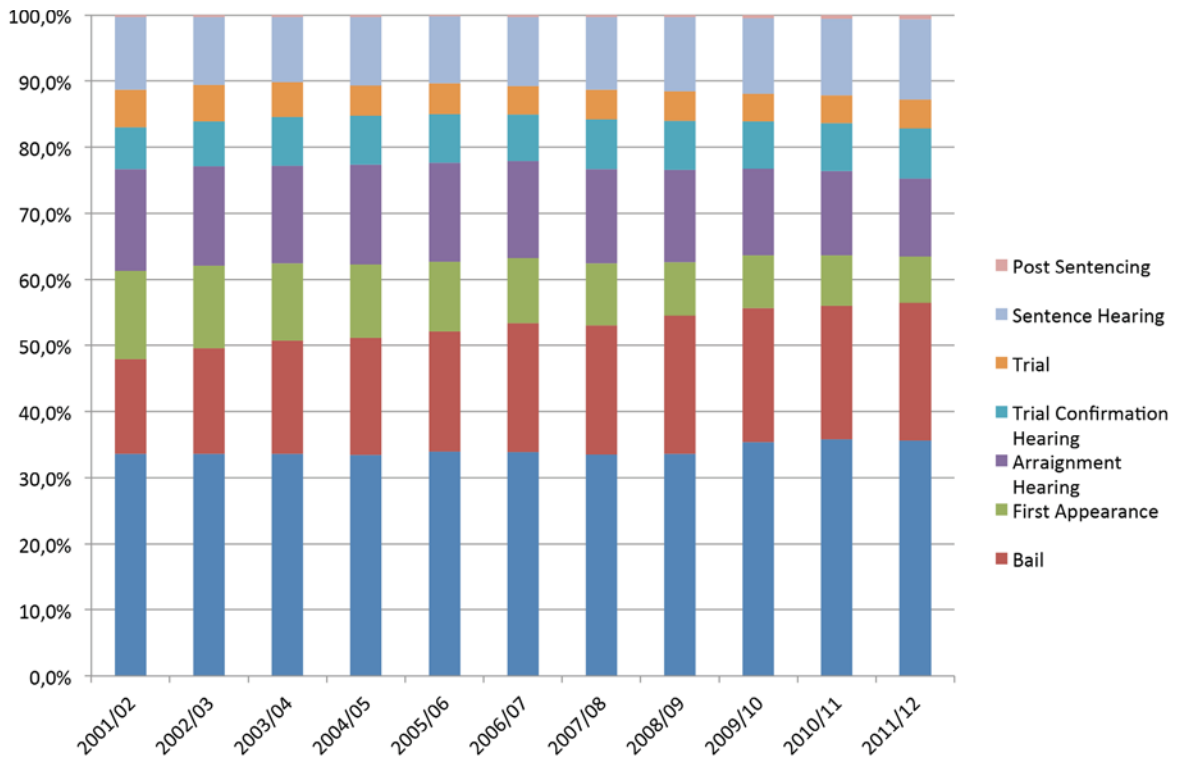
\*note: court time is estimated

26 R. v. Askov, [1990] 2 SCR 1199, online: Supreme Court of Canada <<http://scc.lexum.org/en/1990/1990scr2-1199/1990scr2-1199.html>>. 27 British Columbia Court of Appeal, *Annual Report 2011* (Vancouver: British Columbia Court of Appeal, 2011), at p. 14, online: Courts of British Columbia <[http://www.courts.gov.bc.ca/Court\\_of\\_Appeal/about\\_the\\_court\\_of\\_appeal/annual\\_report/2011%20ANNUAL%20REPORT.pdf](http://www.courts.gov.bc.ca/Court_of_Appeal/about_the_court_of_appeal/annual_report/2011%20ANNUAL%20REPORT.pdf)>.

1% OF COURT CASES USE 3 DAYS OR MORE OF COURT TIME



MOST APPEARANCES ARE ADMINISTRATIVE AND BAIL



### 3.11 CASES WHICH PROCEED TO TRIAL AND TRIAL APPEARANCES

One of the interesting things about the criminal justice system is that there is such a focus on trials. And yet the vast majority of cases are resolved without even a single trial appearance being scheduled, let alone a trial actually being held. As the chart below shows, a trial appearance is scheduled in approximately 16% of cases. The level was relatively constant at about 18% until 2009/10, but then dropped in 2010/11.<sup>28</sup>

There are a number of reasons why cases do not proceed to trial. As noted earlier, over 80% of cases resolve without a trial date being scheduled. The matter may be resolved early as a result of a guilty plea by the accused.<sup>29</sup>

Alternatively, criminal charges against an accused may be stayed for a number of reasons:

- Crown counsel may form the view that there are particular charges that no longer meet the charge assessment standard;
- In circumstances where there are a number of

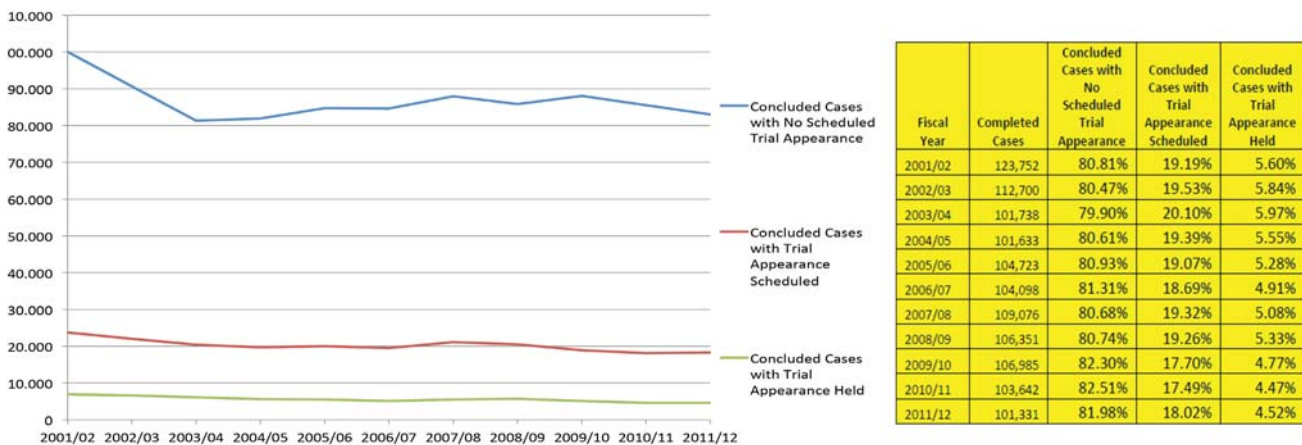
charges against an individual, Crown counsel may direct a stay of proceedings on a particular charge and accept a plea to a reduced number of charges or to included offences;<sup>30</sup>

- It may be that Crown counsel is unable to proceed with a hearing of the criminal trial, due, for example, to the unavailability of witnesses; and
- In relatively few cases, and as mentioned above, the court may decide that the delay in a particular case is so long that it has undermined the accused's right to a trial within a reasonable period of time, and accordingly stays the charges.

An actual trial appearance is only held in approximately 4.5% of cases.<sup>31</sup> Unfortunately, the provincial data system cannot tell us what happens on that first trial appearance; that is, it cannot give us the percentage of cases where there is a guilty plea, whether the charge is stayed or adjourned, or whether the trial actually proceeds.

In the 2005 Report on Backlog in Vancouver Adult Criminal Court,<sup>32</sup> it was noted that the Vancouver

**MOST CASES: NO TRIAL APPEARANCES**



28 Table provided to the BC Justice Reform Initiative by the British Columbia Ministry of Justice.

29 See British Columbia Ministry of Attorney General, Criminal Justice Branch, *Crown Counsel Policy Manual: Resolution Discussions and Stays of Proceedings* (2 October 2009), p. 2, online: <[http://www.ag.gov.bc.ca/prosecution-service/policy-man/pdf/RES1-ResolutionDiscns\\_SOPs-2Oct2009.pdf](http://www.ag.gov.bc.ca/prosecution-service/policy-man/pdf/RES1-ResolutionDiscns_SOPs-2Oct2009.pdf)>.

30 See British Columbia Ministry of Attorney General, Criminal Justice Branch, *Crown Counsel Policy Manual: Resolution Discussions and Stays of Proceedings* (2 October 2009), p. 2, online: <[http://www.ag.gov.bc.ca/prosecution-service/policy-man/pdf/RES1-ResolutionDiscns\\_SOPs-2Oct2009.pdf](http://www.ag.gov.bc.ca/prosecution-service/policy-man/pdf/RES1-ResolutionDiscns_SOPs-2Oct2009.pdf)>.

31 There is some uncertainty respecting this figure, but the range appears to be approximately 4.5–7.0%. Whatever the precise figure it is a very small portion of the total.

32 Provincial Court of British Columbia, *Main Street Criminal Procedure Committee Backlog Reduction Initiative: Report on Backlog in Vancouver Adult Criminal Court* (January 2005), online: Provincial Court of British Columbia <<http://www.provincialcourt.bc.ca/downloads/pdf/MainStreetCriminalProcedureCommitteeReportonBacklog.pdf>>.

Court experienced a trial collapse rate of 70%, both before and after the implementation of the Criminal Case Flow Management (CCFM) rules.

The Office of the Chief Judge (OCJ) conducts regular surveys to determine how many of the cases scheduled for trial actually go to trial. We were provided with information about the six-month period from January to June 2011 and from January to June 2012. The study found that, of the cases that have even a single trial appearance, only 30% proceeded to trial. Of the remainder, 40% pleaded guilty, 13% were stays of proceedings by the prosecution, bench warrants were issued in 4% of cases, the prosecution requested an adjournment in 3% of cases, defence requested an adjournment in 6% of cases and there was no court time to proceed in 3% of cases. This is a trial collapse rate of 70%, which seems to hold fairly constant over the years, regardless of initiatives to reduce it.

There is a strong view that trials are substantially longer than they used to be and that this is a significant contributor to court workload. It is clearly the case that some trials indeed take longer, but overall the number of appearances in Provincial Court for trials has declined somewhat over the last decade.

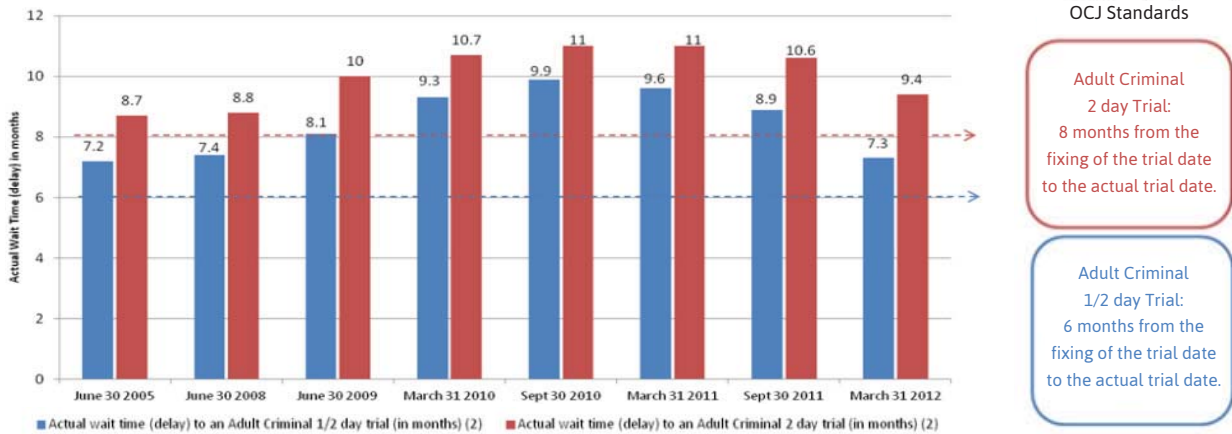
### 3.12 HOW LONG DOES IT TAKE TO GET TO TRIAL?

The “time to trial” specifically refers to the period of time that passes from when the accused indicates he or she will plead not guilty, to the next available trial date—which varies depending on the anticipated length of trial and court location. These are assessments by the court, as the actual time to trial is not recorded in a way that can be broken down. The time to trial for a two-day trial in 10 different court locations varies from 12 to 16 months, despite the standard set by the OCJ of the Provincial Court of eight months.<sup>33</sup>

Generally speaking, delay is longer in our biggest court locations, and this is a phenomenon that we see in other jurisdictions as well. For example, in Ontario’s Justice On Target (JOT) project, there were significantly more problems in their largest court locations, and these court locations typically made less progress towards the stated efficiency goals than the smallest locations.<sup>34</sup>

Data from the most recent *Justice Delayed: Update* issued by the Provincial Court of British Columbia<sup>35</sup> is shown in the following figure.

**PROVINCE-WIDE DELAYS FOR ADULT CRIMINAL TRIALS – COMPARING 2005 AND 2008–2012**



33 There is some uncertainty concerning the precise standard. The measure is achieved in many of the Court’s registries.

34 For further information on Justice on Target, see Section 2.3 of the Annex to this report, or see: Ontario Ministry of the Attorney General <<http://www.attorneygeneral.jus.gov.on.ca/english/jot/>>.

35 Provincial Court of British Columbia, Court Report, *Justice Delayed: Update* (as 31 March, 2012), at p. 4, online: Provincial Court of British Columbia <<http://www.provincialcourt.bc.ca/downloads/pdf/Justice%20Delayed%20-%20Update%20March%202012.pdf>>.

### 3.13 WHAT IS THE BACKLOG?

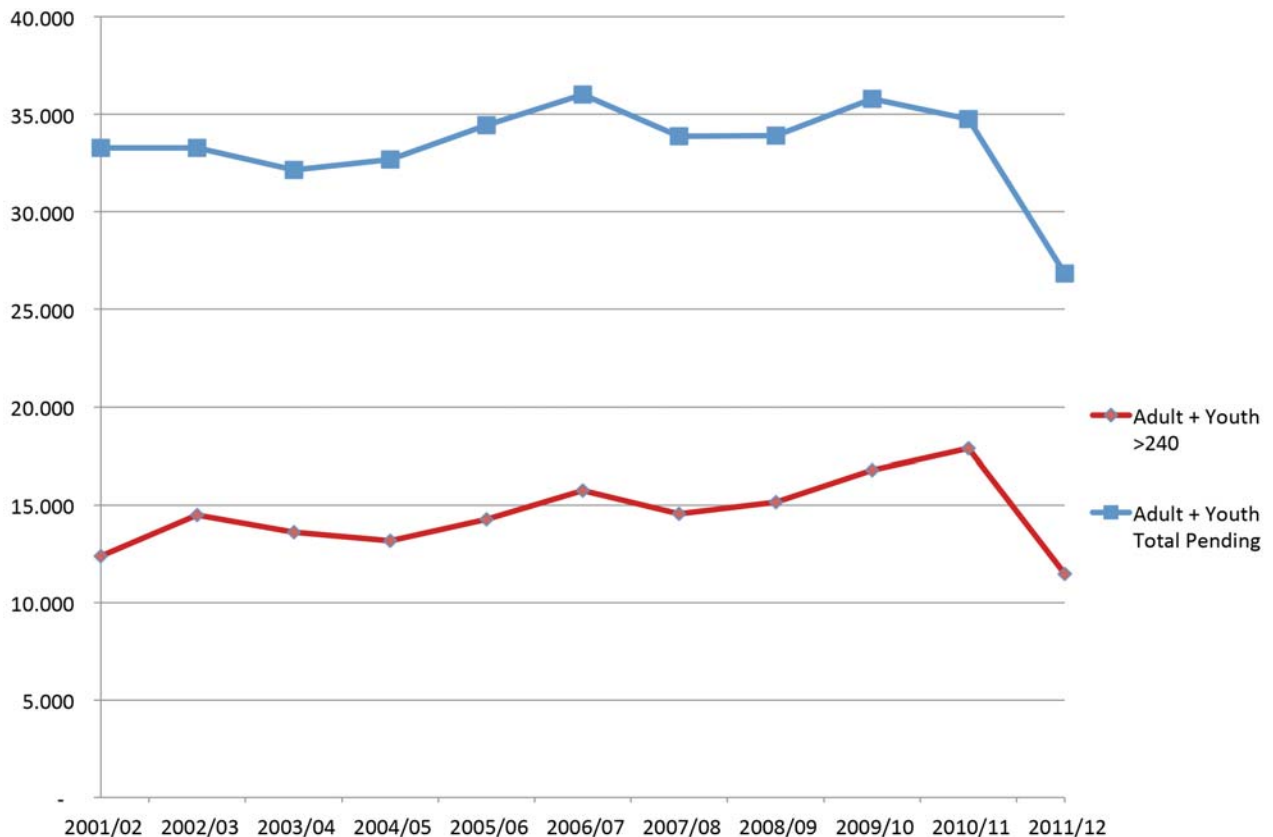
Backlog generally refers to those cases which have been in the system for longer than the benchmark, or more than 240 days.

For the last five years the Provincial Court has been concluding slightly more cases than the number of new cases coming into the system each year, so the number of cases in the system, often referred to as pending cases, has slowly been coming down. However, as a result of the introduction of the IRP program in 2010, there was a significant reduction in new cases coming into the Provincial Court in 2011/12, and consequently a significant reduction in pending cases. As the chart below shows, in 2011/12, pending cases dropped

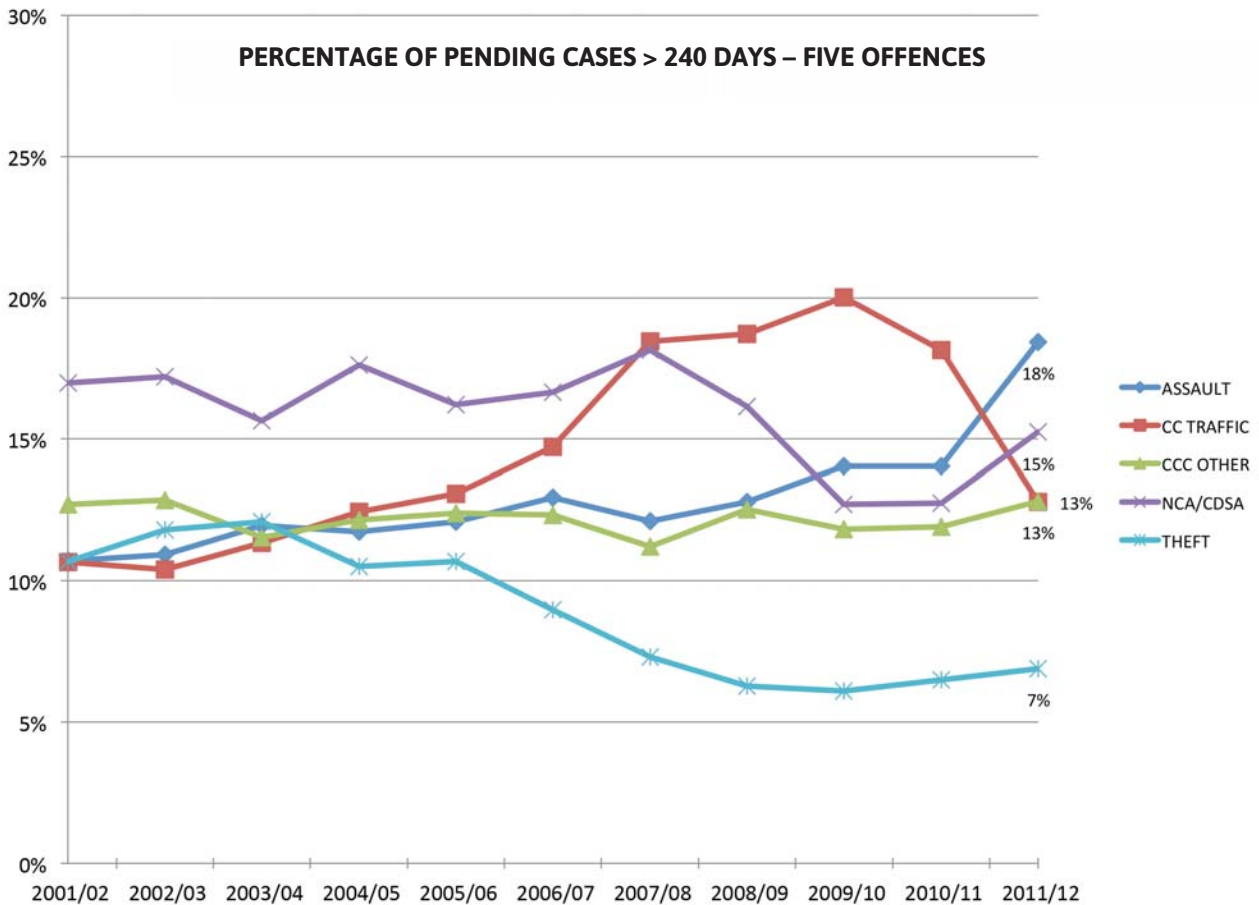
dramatically, from about 33,000 to just over 26,000, a level that has not been seen in the Provincial Court since the early 1990s. For the last decade, pending cases have varied between 32,000 and almost 36,000.

However, even though the number of pending cases has been declining, the age of those cases has risen, so that for the last few years, almost 50% of pending cases have been in the system for more than 240 days, or eight months. Within that 50%, there has been a decrease in cases in the system for eight months to one year, and an increase in cases pending for between one and two years.<sup>36</sup> Four percent of pending cases have now been in the system for more than two years.

**TOTAL PENDING CASES VS. PENDING CASES > 240 DAYS**



36 British Columbia Court Services Branch Criminal Management Information System (CORIN) on 1 November 2011.



Within the group of cases pending for more than 240 days, there are some significant differences among offence types, and this has changed dramatically over the last year, with the sharp reduction in the numbers of impaired driving cases entering the system. While the backlog of cases of drug offences and assaults has increased, the percentage of Criminal Code traffic, primarily impaired driving, has dropped sharply.

- Court registry services;
- Court clerk services; and
- Sheriff’s services.

The Court Services Branch is headed by an assistant deputy minister (ADM), who co-reports to the Chief Justices and Chief Judge, and to the deputy attorney general.<sup>37</sup>

### 3.14 COURT ADMINISTRATION SERVICES

Court Administration services in British Columbia are delivered by the Court Services Branch of the Ministry. These services include:

### 3.15 BC CORRECTIONS

BC Corrections is responsible for adult offender management and control on behalf of the province. Federally incarcerated individuals (those persons serving sentences longer than two years) are the

<sup>37</sup> For further information on court administration in British Columbia, see: British Columbia Ministry of Justice <<http://www.ag.gov.bc.ca/courts/>>.

responsibility of the Correctional Service of Canada. The Adult Custody Division operates nine correctional centres across British Columbia, which house individuals awaiting trial, in immigration detention, or serving a custody sentence of less than two years. The Community Corrections and Corporate Programs Division operates 55 community corrections offices, which supervise individuals on bail, recognizance, probation or conditional sentences.<sup>38</sup>

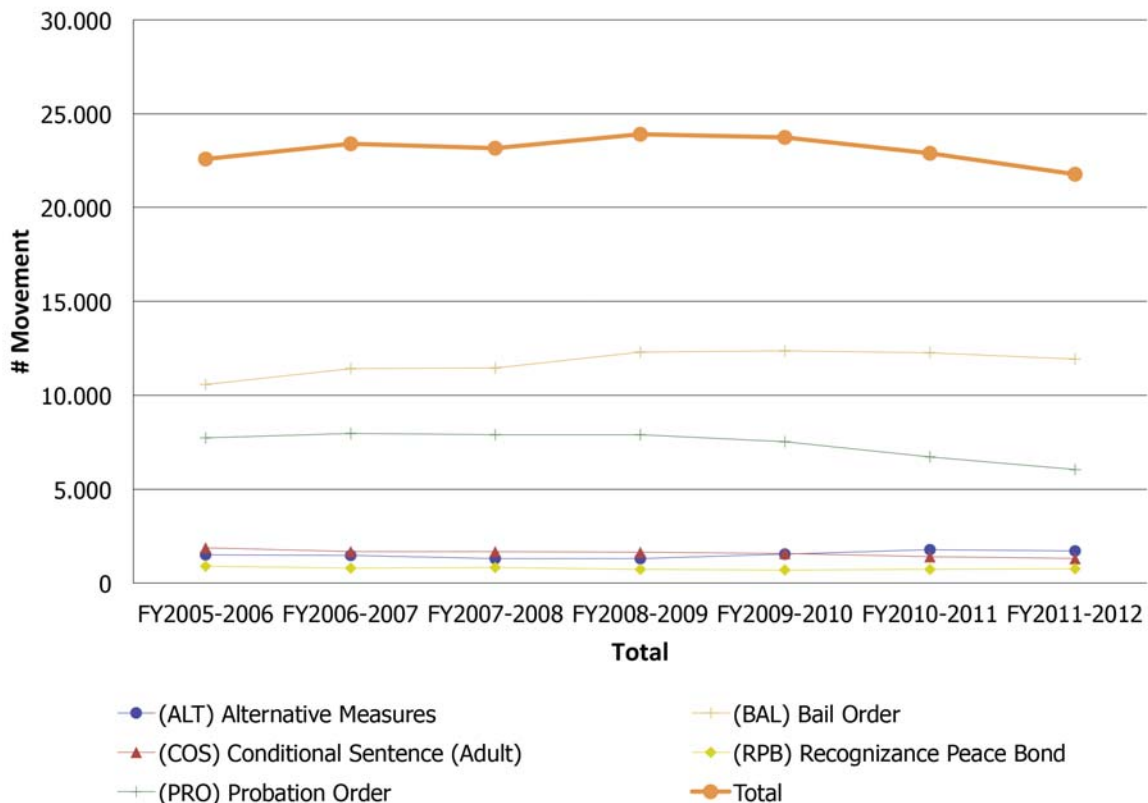
As discussed in 3.16, corrections has seen a steady increase in person counts over the last decade.<sup>39</sup> This has arisen because of longer periods under pre-trial and sentenced supervision, both in custody and in community corrections.

### 3.16 ADMISSIONS TO COMMUNITY CORRECTIONS

Annual admissions to community corrections (which refers to supervision of persons in the community) have remained relatively stable in the past seven years, ranging from approximately 21,800 to 23,900.<sup>40</sup>

Despite the stability in admissions, the population of people under supervision has grown, from about 20,000 to around 24,000. The increase in the population under supervision is driven by increases in the length of all orders—sentenced community supervision orders as well as bail supervision orders.

ADMISSIONS TO COMMUNITY CORRECTIONS



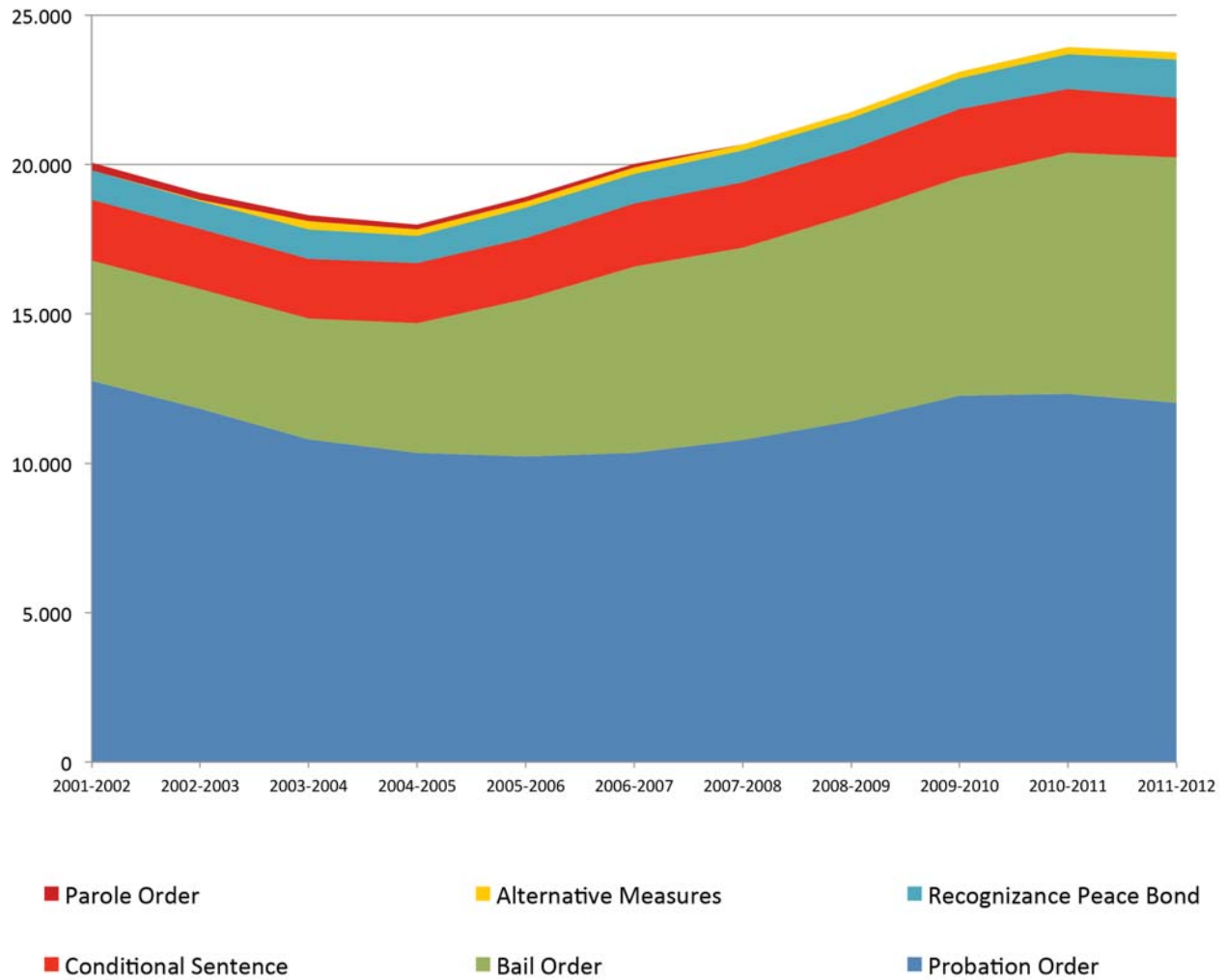
38 British Columbia Ministry of Public Safety and Solicitor General, Corrections Branch, *Strategic Plan BC Corrections 2010-2013*, at p. 2, online: British Columbia Ministry of Justice <[www.pssg.gov.bc.ca/corrections/pdf/strategic-plan-2010-2013.pdf](http://www.pssg.gov.bc.ca/corrections/pdf/strategic-plan-2010-2013.pdf)>.

39 See: British Columbia Ministry of Justice, “Criminal Justice Trends 2011/12” (August 2012) [unpublished], Slides 37, 38, 63 and 65.

40 Chart provided to the BC Justice Reform Initiative by Corrections Branch.



COMMUNITY CORRECTIONS CASELOAD BY ORDER TYPE



### 3.17 ADMISSIONS TO CUSTODY

In the last seven years, annual admissions to custody (i.e., incarceration) increased to a peak of about 19,000 in 07/08, but have since decreased to around 12,000, about the level they were in 05/06. This trend, both up and down, is due to a

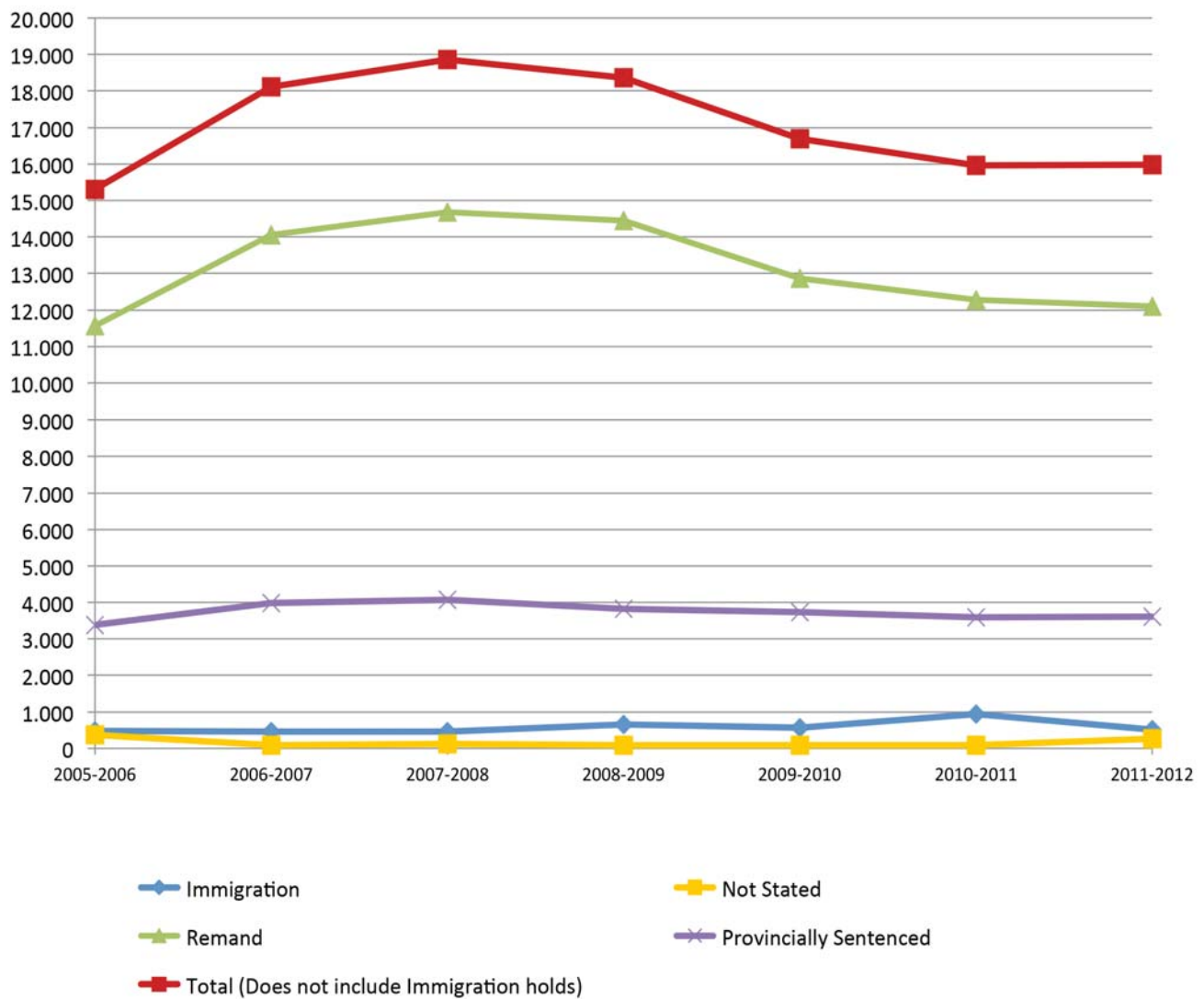
number of issues, including the flux in remand admissions and the arrivals of illegal migrants. The remand population used to account for one-third of inmates, but is now half. In addition, the majority of inmates who receive a jail sentence are initially admitted through remand: this comprises about 75% of admissions to custody.



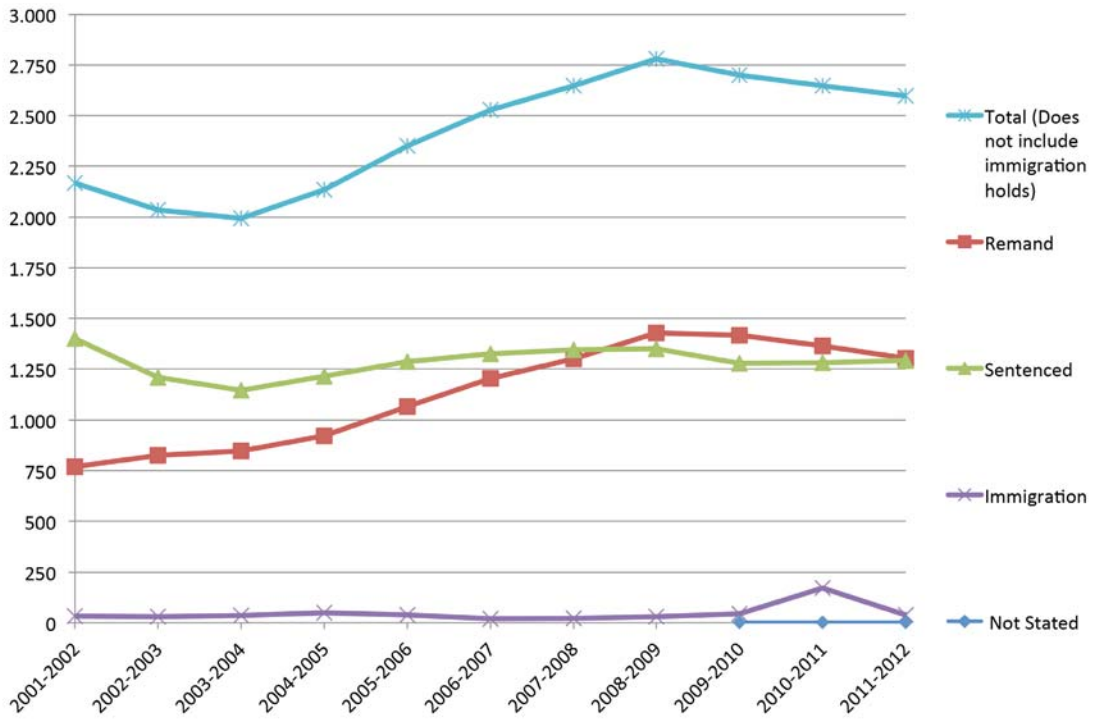
Despite the drop in admissions, the corrections population continued to grow until 08/09, when it began to drop slightly. This was the year that the percentage of remanded inmates in our provincial prisons exceeded the percentage of sentenced offenders in prison. The average

length of custodial stay for both remand prisoners and sentenced offenders has increased: in the case of sentenced offenders, from an average of 60 days to 70 days, while for remand prisoners the stay increased from around 30 days to about 38 days.

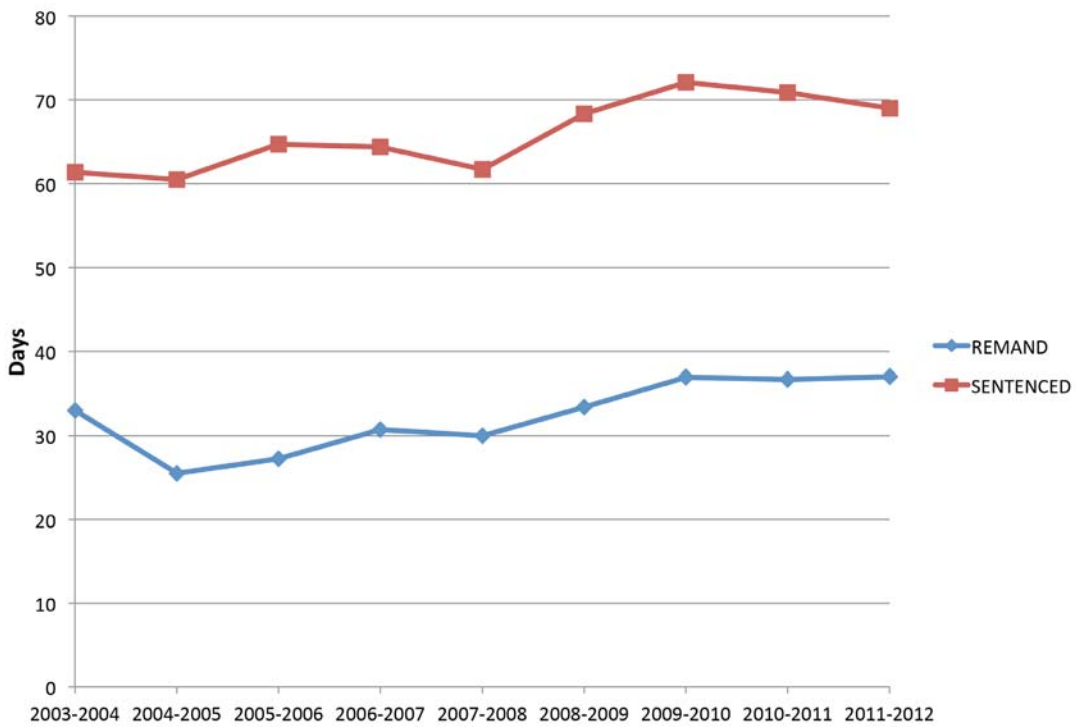
### CUSTODY ADMISSIONS



AVERAGE DAILY CUSTODY CENTRE INMATE COUNT



AVERAGE LENGTH OF CUSTODIAL STAY



### 3.18 USE OF ALTERNATIVE MEASURES

Alternative measures programs that accept referrals from the prosecution are run by corrections staff in communities across the province. In addition, there are 32 restorative justice programs funded jointly by the province and the federal government, run by First Nations justice organizations, primarily in northern remote communities.<sup>41</sup>

Over the last six years, referrals from Crown to alternative measures have been stable, at 4% to 5% of cases coming into the system—despite widespread support for the use of alternative measures, including restorative justice, for less serious offenders and those who present a low risk of re-offending. However, the rate of matters actually resolved through alternative measures has remained at 2% to 3% of cases. The reasons for this lower rate include assessment by corrections that the accused is not suitable for alternative measures, or refusal by the offender to participate, or new evidence that causes Crown to withdraw their referral.<sup>42</sup>

There have been a variety of initiatives to increase the appropriate use of alternative measures, most recently a pilot project to provide early corrections risk assessment to prosecutors considering the possibility of alternative measures.<sup>43</sup> Generally we understand that referrals have not increased significantly, but further work is warranted to understand the reasons for this.

Although the provincial average rate of referrals and resolution has remained relatively stable over the last six years at least, it has been suggested that there are a few communities that have managed higher referral rates, and that the reasons for this warrant study. Understanding these differences and the reasons for them may help ensure that cases appropriate for alternative measures are diverted at an early stage of the criminal process.

There are also approximately 45 community programs, known as community accountability

programs (CAPs). These are volunteer-driven programs which receive minimal support from the province—\$2,500 a year—to support training and administrative support for the delivery of restorative justice services. These programs are primarily police diversion programs, and their clients are primarily youth, although some accept adult referrals.<sup>44</sup>

### 3.19 ARE CASES BECOMING MORE COMPLEX?

There is a strong belief among criminal justice system participants that cases and offenders are becoming more complex, and that this is the principal reason that cases seem to be taking more time and are becoming more expensive. In order to better understand the complexity of cases, the Criminal Justice Branch has undertaken a substantial project to analyse criminal cases and to identify the factors that may be associated with complexity.<sup>45</sup>

The analysis to date has attempted to measure the complexity of cases in relation to three different elements of a criminal case: the charge assessment process; the characteristics of the participants involved—accused, witnesses and victims; and the complexity of in-court work. The work includes all criminal cases except “mega cases” and Court of Appeal files.

The index measures the “weight,” or amount of work required of each file associated with each RCC received from police and other investigators. It takes into account a variety of different factors associated with the file, which are available in the Court Services database known as JUSTIN. Not all factors thought to be relevant are captured in JUSTIN, which is a limitation with the index developed to date. The complexity index is a set of formulas based on a combination of objective JUSTIN data and subjective weighting provided by senior prosecutors. The

41 Justice BC, *Restorative Justice*, online: Justice BC <<http://www.justicebc.ca/en/cjis/understanding/restorative/index.html>>.

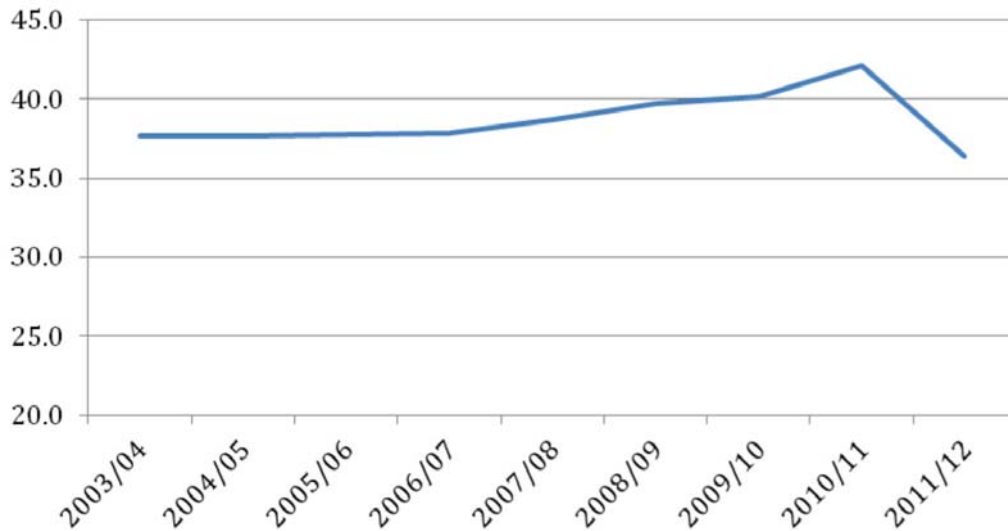
42 Information provided to the BC Justice Reform Initiative by the British Columbia Ministry of Justice, 26 July 2012.

43 British Columbia Ministry of Justice Evaluation Report to be finalized and available by Fall 2012.

44 For further information in relation to CAP, visit: <<http://www.pssg.gov.bc.ca/crimeprevention/justice/index.htm>>.

45 Information provided to the BC Justice Reform Initiative by the British Columbia Ministry of Justice (Criminal Justice Branch), 26 July 2012.

### AVERAGE COMPLEXITY WEIGHT PER REPORT TO CROWN



Source: Criminal Justice Branch MIS, data updated at August 07, 2012

formulas are then applied to each file to calculate the weight of complexity of individual files.

Potentially significant factors not recorded in JUSTIN, and thus not available for inclusion in the model, include Charter challenges and arguments, wiretaps, disclosure, and the number and size of documents and exhibits sent from police.

The index includes a substantial number of factors, but as an example, the characteristics of the accused considered relevant include gang affiliation, criminal record, custody status, adult/youth, psychiatric exam, residence and whether an interpreter will be required.

The results of applying the index to criminal cases since 2003/04 is shown in the graph above, which shows a slight increase in complexity until 2010/11, and then a decrease in 2011/12. The data from 2011/12 is considered less reliable than earlier years, as there may be information about a case,

as it progresses, that will be relevant to complexity, but not available until later in the process.

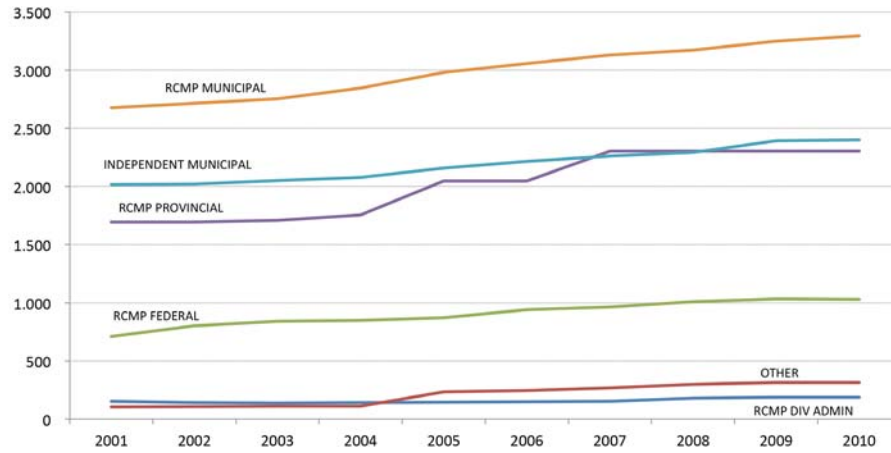
### 3.20 RESOURCES

The *Green Paper* produced by the Ministry of Justice in February of 2012 suggested that resources in the justice system have been steadily increasing, while the workload of the system has been stable or has actually decreased.

The increase in resources is most noticeable in relation to police, where authorized police strength in British Columbia has risen by 2,172 FTEs (full-time equivalents) in the past decade, for an absolute growth rate of 30% and a population-adjusted growth rate of 17%.

The budgets for both parts of the new Ministry of Justice saw significant increases starting in 2004/05. However, in the former Ministry of Attorney General (MAG), 80% of the budget increase funded required

**ALL POLICE FORCES HAVE INCREASED IN STRENGTH  
AUTHORIZED POLICE STRENGTH BY LEVEL OF GOVERNMENT, BC 2001–2010**



Source: PSSG - Police Services Division

OTHER includes FNPS, FN-administered police services, transit police & international airport resources (YVR + YYJ); RCMP DIV ADMIN funded by three levels of government

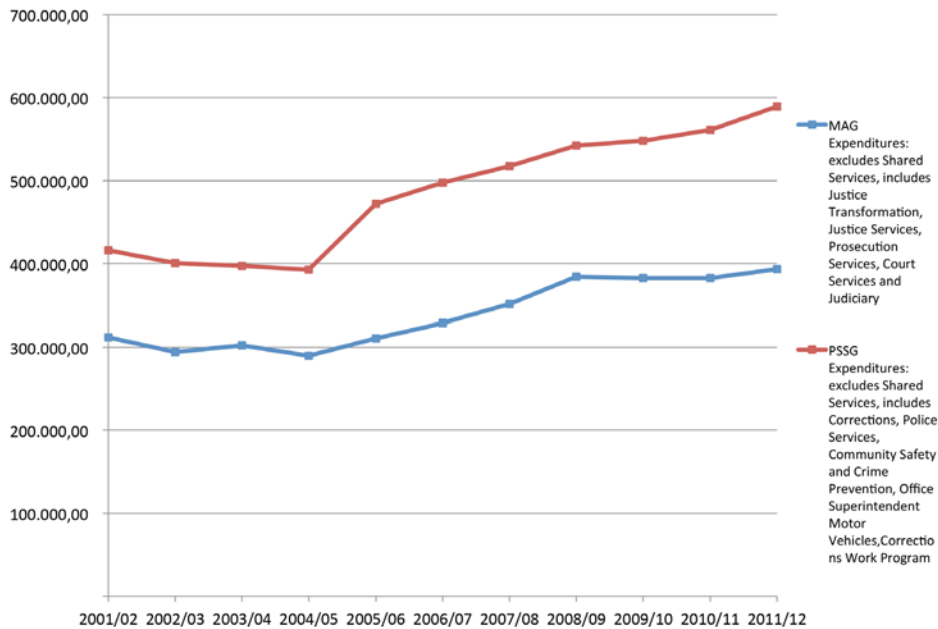
compensation increases rather than additional hiring.

Both the Court Services Branch and the Criminal Justice Branch have seen slight increases in their FTEs.

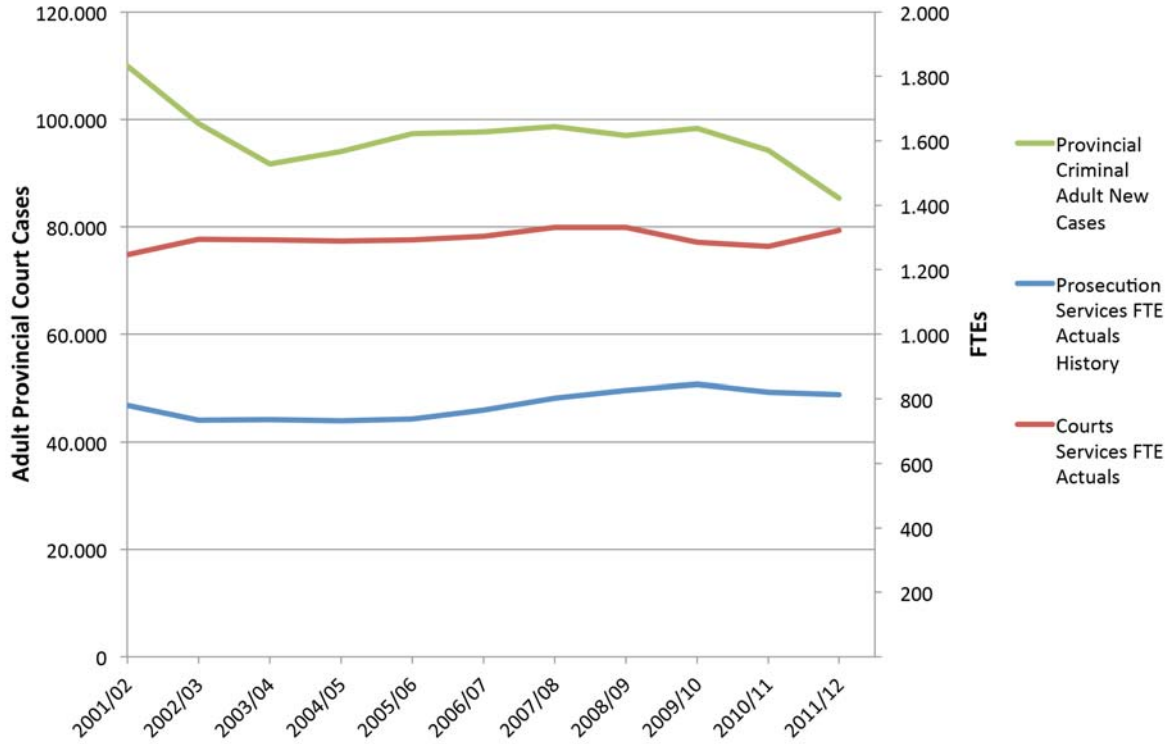
However, judicial FTEs declined in 2008/09 and have since declined marginally.

As has been well-documented, the funding for legal aid generally and criminal legal aid has been constrained since the mid-1990s. This chart shows the trend in core criminal legal aid and major trial funding since 2001/02 (see chart on p. 45).

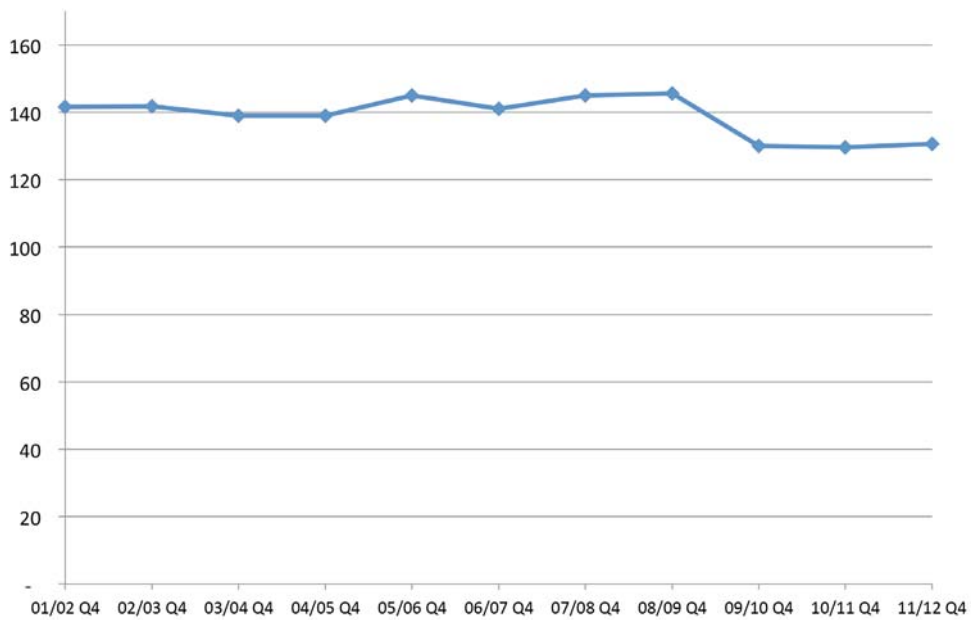
**JUSTICE SECTOR EXPENDITURE TRENDS**



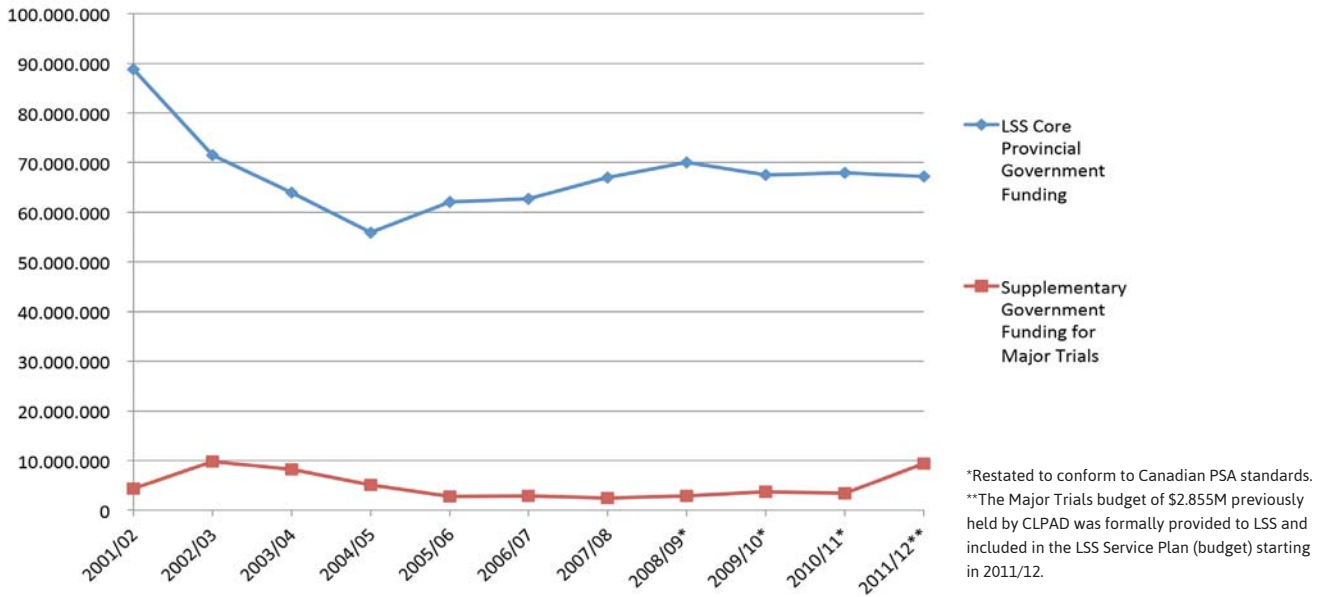
**CRIMINAL JUSTICE AND COURT SERVICES FTES & ADULT PROVINCIAL COURT CRIMINAL CASES**



**JUDICIAL FTE USAGE**



LEGAL AID FUNDING HISTORY



3.21 CONCLUSION

In summary, the following observations may be made about the current criminal justice system in British Columbia:

- The crime rate is decreasing, though it still remains higher than the central provinces and the Canadian average;
- The youth crime rate, and the use of incarceration for youth, has dropped dramatically over the last decade;
- The number of police in the province has increased significantly over the decade;
- The number of RCCs has remained relatively stable;
- The percentage of charges approved by Crown counsel has remained relatively consistent over the last 10 years;
- The Provincial Court criminal caseload, though previously stable, started to decline significantly in 2010 and dropped even more sharply in 2011/12. The makeup of those cases has changed significantly;
- The complexity of the Provincial Court caseload may have decreased in 2010/11, largely as a result of the introduction of the IRP initiative;
- The backlog of pending cases in the Provincial Court has fallen dramatically; however, the age of cases within the backlog remains of concern;
- The Supreme Court criminal caseload has dropped slightly in recent years;
- There has been a significant increase in administration of justice offences;
- Delays in the Provincial Court do not affect all cases, and delay tends to be longer in the highest-volume court locations;
- The majority of cases do not in fact consume a significant amount of court time;
- The number of trial appearances in Provincial Court has declined somewhat over the last decade;
- The majority of appearances are either administrative or for bail;
- The vast majority of cases are resolved without a trial appearance being scheduled;
- While the number of admissions to community supervision has remained stable, and admissions to custody have returned to previous levels, the population being supervised or incarcerated has increased; and
- The average length of stay in custody is increasing.





## 4. A CRIMINAL JUSTICE SYSTEM FOR THE 21<sup>ST</sup> CENTURY

What do we expect from our criminal justice system in this second decade of the 21<sup>st</sup> century? The demands for improvement identified during the consultations and from a review of current performance and recent experience here and elsewhere can all be related to expectations we have from a modern, high-performing system. What then would be the central characteristics of a 21<sup>st</sup> century model?

### 4.1 JUSTICE, FAIRNESS AND PUBLIC SAFETY

The accepted purpose of the criminal law is to uphold respect for the law and the maintenance of a just, peaceful, and safe society. We have a well-developed, highly professional system with several independent parts that aim at achieving these purposes by fulfilling their own roles within the system.

There is no debate about whether British Columbia's criminal justice system should be just and fair. We expect that all those involved in the justice system will act in a fair manner that is consistent with the ends of justice. That includes not only lawyers and judges but police officers, corrections professionals, community service providers and others. The rights reflected in the *Charter of Rights and Freedoms* are constitutional guarantees against government interference with central individual rights. They also reflect broader commitments to the rule of law, which include not only seeking redress but also shaping the social conditions that permit the flourishing of human potential for all citizens.

The public has a reasonable expectation that its desire for the safest possible community will be central to the goals of the criminal justice system. This includes

but extends beyond punishment of offenders and extends to the goal of promoting a safe and peaceful society. Most importantly, this goal is measured not in the outputs of judgments or closed files processed by the system but in the restoration of peace and good order in the community and the reconciliation of offenders with crime-free and fulfilling lives.

During consultations it was often observed that "Everyone wants justice and fairness, *BUT...*" Many lawyers worry that seeking efficiencies or improved timeliness will undermine justice and fairness. Many are suspicious of management systems or a systems approach because they worry that these are merely disguises for cost-cutting. On the other hand, many within the system raised serious concerns about the lack of proportionality in the system, the lack of managerial capacity and authority, and the absence of system-wide goals and values.

One source of tension in the legal community arises from the expectation that the court system complement the pursuit of a safe community. After all, the fundamental commitment of our court system is that a person will be treated individually in respect of the proof of any charge brought against them by the state. But despite this tension, criminal law has long recognized outcome goals in the overall system. Sentences need to reflect not only public denunciation and specific deterrence, but also general deterrence, as well as the prospects for rehabilitation and reintegration into the community.<sup>46</sup>

A 21<sup>st</sup> century criminal justice system must therefore be managed effectively not only to be just and fair but to achieve the highest possible safety for our province.

46 *Criminal Code*, RSC 1985, c C-46, s 718; see *R. v. Proulx*, [2000] SCC 5, [2000] 1 SCR 61.

## 4.2 TIMELINESS

Timeliness affects everything. Not only does delay undermine public confidence in the system, but a culture of delay 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. The justice system's struggle with achieving timeliness in the criminal process is the most obvious concern underlying this review. This is seemingly a potential source of friction between any legal system and members of the public and their representatives. The English puritan John Cook, for example, observed in 1641 that the English court system was rife with long delays that frustrated justice in a host of manners. His proposals included faster decisions and structural reform of the courts.<sup>47</sup>

It is important, however, at the outset to recognize that delays in the criminal justice system are not all about delays in court processes. One initiative in the United Kingdom, for instance, was directed at reducing the time required for preparing police investigative reports from 54 days to two!<sup>48</sup>

Similarly, it is important to recognize that delays come in different shapes and sizes within the court system itself. A delay in a guilty plea is not, from a systems perspective, the same thing as delays resulting from multiple continuations of an ongoing trial. A delay in the trial process may be as keenly felt as a delay in the investigation.

A 21<sup>st</sup> century criminal justice system must therefore achieve timeliness in the resolution of criminal events. Timely resolution addresses the need for both victim and community to see justice done. It demonstrates to the victim and community that their concerns are taken seriously and the system can be trusted with their complaint and concern for safety. It heeds the rights of the accused persons to have their guilt or innocence fairly established by law, without losing

or undermining, through delay, opportunities for rehabilitation and reintegration.

An important question is what timeliness would look like in British Columbia's justice system. As I noted in section 3.10 of this report, almost 30% of cases in Provincial Court are resolved within 30 days of their first appearance in court, while 50% are resolved in a little more than three months. However, the rest take longer, sometimes much longer, and cases in Supreme Court—certainly the ones in the media—can take years to complete.

It is my view that the criminal justice system needs to set some much more ambitious targets for the resolution of criminal matters. The recent White Paper released in the UK, *Swift and Sure Justice*,<sup>49</sup> proposed targets of only days between the reporting of minor offences and their resolution. This compares with our common practice of a period of six to eight weeks between the alleged commission of the offence and the first court appearance for all offences where the accused is not detained in custody. It is certainly the case that some matters are resolved before the first court appearance, but this is not the norm. It is all too common for nothing to happen until that first court appearance.

I do not propose to set out timeliness targets for the justice system. That would require much more focused and detailed consultation than I was able to undertake within the limits of this review. But I recommend that a priority of the criminal justice system be to systematically set much more ambitious targets for the timely resolution of criminal cases, taking into account the recognition that some cases will necessarily require more time than others.

## 4.3 EXPERTISE

The public has a reasonable expectation that the criminal justice system will be managed to achieve

47 See: Geoffrey Robertson, *The Regicide Brief* (London: Oxford University Press, 2009).

48 KPMG Briefing to the BC Justice Reform Initiative.

49 UK Ministry of Justice, *Swift and Sure Justice: The Government's Plans for Reform of the Criminal Justice System* (London: Ministry of Justice, 2012), online: UK Ministry of Justice <<http://www.justice.gov.uk/downloads/publications/policy/moj/swift-and-sure-justice.pdf>>.

its goals with suitable expertise. That expectation has been transformed by our modern understanding of how particular expertise can better address problems and manage systems. Outside the legal system people have become accustomed to clearly identified expertise in almost every facet of life, in virtually every profession, from people selling mountain bikes to those performing cardiac surgery.

Another source of friction in the justice community arises from the fact that these expectations of expertise in subject matter and management have only just entered the threshold of the criminal justice system. The challenge of introducing change to a legal system cannot be understated. One leading commentator on technology and the law titled his most recent book, concerning the challenges technology represents for the practice of law, *The End of Lawyers?*<sup>50</sup> A leading legal management consultant authored an article “Are Law Firms Manageable?”<sup>51</sup>

This modern expectation of expertise is often received by the justice system as a demand for specialization, but it is not limited to specialization. It frames the public’s response to the justice system’s handling of specific problems as well as its service standards. There is a generalized expectation in our society that particular problems will benefit from particular solutions and processes. The public expects that those entrusted with addressing problems will address them with particularity and effectiveness. We can no longer expect the public to passively accept the orthodoxies of our legal culture. Thus one woman, frustrated by a long-running criminal matter, asked me: “What profession can operate today without deadlines or any method of requiring a decision?”

One central orthodoxy that is now challenged by the public and those charged with making the system work is the effectiveness of structuring the system of justice around the aggregate effort of several independent but interdependent actors: the police, the prosecutors, the courts and the defence counsel.

The expectation of expertise is not limited to deciding cases properly; it extends to meeting reasonable goals of service to the public and demonstrating expertise in management of the system as a whole.

Although controversial, these concerns have not gone unheeded. Many initiatives aimed at meeting modern expectations of expertise and management have been tried and are ongoing. The leadership within the justice system has not been blind to these new expectations, nor to the dangers to public confidence. Each of the justice participants have moved towards meeting these expectations, and as should be apparent from this report, many are striving to meet them with new approaches.

Any 21<sup>st</sup> century system of criminal justice must therefore deliver expertise appropriate to the system’s need for management and the need for effective and appropriately crafted solutions.

#### 4.4 ACCOUNTABILITY AND TRANSPARENCY

Many changes in our society have come together to create an increased demand for accountability on the part of all public institutions discharging the public interest. This demand for accountability has not gone unnoticed, and significant changes to the system have been made. Nevertheless, the ongoing profile of criminal events and criminal process means that the system is continually being held to account by the public.

The openness of the courts and the justice system to the public is an essential component of public trust and confidence. Modern information systems coupled with modern communication platforms have now created a high social expectation of transparency.

The recognition of the social dimensions of crime has increased the demand for fit punishments, effective rehabilitation, and restorative justice. The

50 Richard Susskind, *The End of Lawyers?* (Oxford: Oxford University Press, 2008). For more information, see: <<http://www.susskind.com/endoflawyers.html>>.

51 David Maister, “Are Law Firms Manageable?” (April 2006), online: David Maister <<http://davidmaister.com/articles/1/92/index.html>>.

recognition of the special relationship of victims to a proceeding has diminished the distance the system once placed between victims and criminal proceedings.

A modern criminal justice system has to address and meet the demands of the public to have their concerns taken into account. These concerns must be transparently reflected in the management of our justice institutions.

Similarly, a fully functioning criminal justice system must acknowledge that some of its necessary resources reside in the general community. Many features of the social dimension of both the detection and proof of crime, as well as its reduction and the reintegration of offenders, depend on effective work with and within the community.

For many reasons, a modern criminal justice system must frame a measured and appropriate role for the public in relation to its operations and goals.

Lawyers and judges alike can express distrust and fear of measures to improve accountability. One of the central features of our justice system is to have an independent bench and bar uphold the rule of law, even in the face of demands that it be dispensed with in the interests of socially popular ends, retribution or vengeance. However, there has never been a time or place where the rule of law has not ultimately depended on public support. There will never be a time again when one could be confident that most matters could be addressed within the system without the manner or timing being noticed. The explosion of transparency wrought by modern technology and information systems will not be reversed.

A 21<sup>st</sup> century criminal justice system will be accountable and transparent in meeting the public's expectations on all those measures critical to its performance of the public interest in justice.

# 5. CONTEXT FOR REFORM

The report has thus far reviewed some of the important facts concerning the criminal justice system and the characteristics a modern system should have. We will now review the context within which any reforms must take place.

The context for reform is best addressed by answering the following questions:

- What can be learned from the experience in other provinces or other jurisdictions addressing the same issues?
- What can we learn from the general trend in legal reforms?
- Where are the gaps between performance and expectations?

## 5.1 POLICY CONTEXT FOR REFORM

The policy context for reform includes the general trend in policy concerning court-based adjudication, the recent experiences in British Columbia in seeking better outcomes and improved processes, and the most salient lessons from the experiences elsewhere with respect to criminal justice reform. These are addressed here summarily and with greater detail in the annex to this report.

### 5.1.1 Lessons Learned from Previous Justice Reform Initiatives in Canada and Internationally

The 2009 study by Professor Dandurand on inefficiencies in the criminal justice process<sup>52</sup> is a helpful summary of lessons learned from reform initiatives. The review also looked at a substantial volume of materials gathered to directly review successes and disappointments here and elsewhere.

Justice systems across Canada and around the world have been concerned for many years that they are not functioning as well as they could and should, and are not meeting the expectations of an increasingly concerned public. Concerns have included

- Issues of delay;
- Lack of predictability and consistency in process;
- Insufficient attention to the concerns of victims and witnesses;
- Inefficient work processes, including multiple court appearances for administrative rather than substantive reasons;
- Work required on files which ultimately do not proceed to trial because the case collapses;
- Courtrooms booked but ultimately not used because of case collapse;
- Failure of the criminal justice system to be sufficiently concerned about outcomes, particularly in relation to mentally disordered or drug-addicted offenders; and
- General lack of concern about the public interest in the criminal process.

These concerns have led to a proliferation of reform initiatives designed to improve one or more elements of the criminal process, but unfortunately the problems have proven relatively intractable. The research has not been as comprehensive and compelling as one would like to see. However, there are some common elements in the research Professor Dandurand has identified, which I believe are important considerations in developing an effective agenda for reform. Interestingly, these common elements are not directly related to justice reform strategies. Rather, they are the critical factors that

52 Yvon Dandurand, *Addressing Inefficiencies in the Criminal Justice Process: A Preliminary Review* (June 2009), online: International Centre for Criminal Law Reform and Criminal Justice Policy <[www.icclr.law.ubc.ca/files/2009/InefficienciesPreliminaryReport.pdf](http://www.icclr.law.ubc.ca/files/2009/InefficienciesPreliminaryReport.pdf)>.

must underpin substantial reform and culture change in any field of endeavour.<sup>53</sup> They include

- Ensuring that there is a good understanding of the roles of all of the participants in the criminal justice process, that all are involved in the development of the strategy and that they commit to working collaboratively across the system;
- An appreciation of the need for “systems thinking,” which requires an understanding of the intricate ways in which the actions of one part of the system can affect the others. Not appreciating this leads to ineffective reform initiatives, with one part of the system inadvertently creating costs for the other parts or actually undermining program objectives in other areas;
- A clear statement of the goals and objectives to be achieved collectively and by each agency, preferably with explicit and measurable performance targets and expected timeframes;
- An implementation plan which provides for the precise strategic actions to be undertaken, precise timelines and a clear delineation of the respective responsibilities and undertakings of the agencies and people involved;
- Firm and committed leadership, which may be judicial leadership, but leaders may come from other sectors;
- Joint performance management groups created and supported at the local level, with their progress monitored centrally;
- The collection and timely analysis of relevant data to permit the ongoing monitoring of the performance of the system and the specific actions undertaken. Data on key performance indicators are generated on a regular basis and provided to all front-line professionals, managers and agencies as feedback;
- A process put in place to monitor changes that

are achieved, manage their impact, make sure they are sustained, and deal with any resistance to change that may emerge; and

- The results achieved (or lack thereof) being made public to ensure that the criminal justice system remains accountable and transparent about its performance.<sup>54</sup>

Observations from the literature about factors in the criminal justice process that contribute to inefficiency include the following:

- Uncertainty about the process, rules, procedures and future decisions. These all seem to adversely affect efficiency, and the effectiveness with which the various actors in the system perform their function. Strategies to address this involve looking at the various points in the system where there is uncertainty: for example, where information is not properly transferred from one part of the system to another, where uncertainties are responsible for delays, where discretionary powers make the system less predictable, where tensions exist between competing objectives, where co-operation between agencies and individuals is most critical, and at the point at which the process has a regular tendency to become disjointed or disarticulated.<sup>55</sup>
- Uncertainties about the trial process were identified by the Australian Institute of Criminology as major contributors to trial collapse. These included uncertainties about the timelines within which the process is expected to take place, uncertainties about the pre-trial process and about when the trial will actually get started, and uncertainties related to the approach of both the prosecution and the defence, including the availability of legal aid funding.<sup>56</sup>
- The common practice of double or triple booking trials to try to ensure maximum judicial utilization—

53 Indeed, the article “Becoming a High Performance Court” published by the U.S. National Judicial Institute employs an approach that could be used for any complex system. See: See Brian Ostrom et al, “Becoming a High Performance Court”, *The Court Manager* 26:4 at p. 39.

54 Yvon Dandurand, *Addressing Inefficiencies in the Criminal Justice Process: A Preliminary Review* (June 2009), online: International Centre for Criminal Law Reform and Criminal Justice Policy <[www.icclr.law.ubc.ca/files/2009/InefficienciesPreliminaryReport.pdf](http://www.icclr.law.ubc.ca/files/2009/InefficienciesPreliminaryReport.pdf)>.

55 Yvon Dandurand, *Addressing Inefficiencies in the Criminal Justice Process: A Preliminary Review* (June 2009), at p. 11, online: International Centre for Criminal Law Reform and Criminal Justice Policy <[www.icclr.law.ubc.ca/files/2009/InefficienciesPreliminaryReport.pdf](http://www.icclr.law.ubc.ca/files/2009/InefficienciesPreliminaryReport.pdf)>.

56 Yvon Dandurand, *Addressing Inefficiencies in the Criminal Justice Process: A Preliminary Review* (June 2009), online: International Centre for Criminal Law Reform and Criminal Justice Policy <[www.icclr.law.ubc.ca/files/2009/InefficienciesPreliminaryReport.pdf](http://www.icclr.law.ubc.ca/files/2009/InefficienciesPreliminaryReport.pdf)>.

generally recognized as increasing inefficiency for other participants of the system who must prepare and attend court for cases which will not proceed.

- Effective case management or case supervision—generally seen as important to increase the certainty of a case proceeding effectively. However, a more refined view is emerging in the literature, and in the experience in British Columbia with the CCFM rules, that it is important to distinguish the cases that will benefit from case management from those that will proceed expeditiously in any event, in which case management is likely to add process rather than streamline it.
- Many commentators have noted the need to change legal culture from a culture of delay to one of timely case completion. The expectations of lawyers and judges have “profound effects on how long cases actually take to resolve.”<sup>57</sup>

### 5.1.2 The Policy Trend Away from Court-Based Systems

In my view one of the most awkward facts facing our system is the general and continuing trend away from court-based systems of adjudication. The most recent example of this is the development of the IRP initiative in 2010, which was reinstated during this review.<sup>58</sup> In order to fully understand the nature and depth of the challenges facing the criminal justice system, we need to acknowledge this historical trend, and any set of reforms needs to address the underlying concerns which have produced this trend away from courts.

### 5.1.3 Modern Growth in Tribunals

During the course of this review, amendments to the IRP provisions came into effect. The earlier

introduction of this program had dramatic impact on the workload of the Provincial Court, and there is no reason to think that impaired-driving cases in the courts will ever return to previous levels.

This trend towards managing problems outside the courts has for a very long time been the dominant trend in policy. Before World War II, there were few tribunals in Canada, and they “operated essentially as branches of government” departments.<sup>59</sup> Shortly after the war, however, an increasing number of independent tribunals were established. They had a number of functions: to regulate the expanding economy, to adjudicate disputes arising from the administration of new social programs, to bring expertise to complex issues, and to remove certain matters from the courts.<sup>60</sup> As late as the 1980s, the province of Ontario saw the creation of 10 new tribunals every year,<sup>61</sup> and there are now approximately 700 adjudicative and regulatory agencies in Canada.<sup>62</sup> Disputes regarding securities regulation, workplace safety and compensation, labour relations, rental agreements, government licences, human rights complaints and a myriad of other disputes are regularly resolved through tribunals rather than courts. As former Chief Justice Antonio Lamer of the Supreme Court of Canada noted, “[T]he impact of administrative agencies on the lives of individuals is great and likely surpasses the direct impact of the judiciary.”<sup>63</sup>

This long-running trend is important to this review because arguments in support of transferring subject matters from courts to tribunals are often based on a perceived inability by the court system to deal with matters benefiting from specialized attention. The courts also have to compete with the speed, economy, informality and expertise that

57 Ostrom and Hanson as quoted in Yvon Dandurand, *Addressing Inefficiencies in the Criminal Justice Process: A Preliminary Review* (June 2009), at p. 13, online: International Centre for Criminal Law Reform and Criminal Justice Policy <[www.icclr.law.ubc.ca/files/2009/InefficienciesPreliminaryReport.pdf](http://www.icclr.law.ubc.ca/files/2009/InefficienciesPreliminaryReport.pdf)>.

58 See further discussion of the IRP Program in Section 1.1 of the Annex to this Report.

59 Robin Creyke, ed, *Tribunals in the Common Law World* (New South Wales, Australia: The Federation Press, 2009), p. 7.

60 Creyke, *Tribunals in the Common Law World*, p. 9.

61 R. Macaulay, *Directions – Report on a Review of Ontario’s Regulatory Agencies* (Toronto: Queen’s Printer, 1989), p. 15, as cited in Creyke, *Tribunals in the Common Law World*, p.13.

62 Creyke, *Tribunals in the Common Law World*, p. 7.

63 Antonio Lamer, “Administrative Tribunals: Future Prospects and Possibilities” (1991-92) 5 Can J Admin L & Prac 107, as cited in Creyke, *Tribunals in the Common Law World*, p. 8.



tribunals may provide.<sup>64</sup> When serving as chair of the Ontario Labour Relations Board, Rosalie Abella (now a judge of the Supreme Court of Canada) described the expansion of tribunals this way:

We arose, of course, full panoplied from the forehead of the legislatures, who recognized that neither the courts nor bureaucracies were able to handle the volume of decision-making law and policy required. And so was born the administrative tribunal—part law, part policy, a push-me-pull-you two-headed creature designed to alleviate the burden of judges and bureaucrats.<sup>65</sup>

Procedures in tribunals are often intended to be less formal and technical than those of courts, and this may allow tribunals to operate in a more efficient manner that is also accessible to the average citizen. In addition, tribunal decision-makers may develop subject-matter expertise beyond what is held by judges, who are generally tasked with hearing a broader range of disputes. This special expertise was recognized by the Supreme Court of Canada when it described the deference that judges should grant to decisions of specialized tribunals.<sup>66</sup>

Critics of this trend point to the threat to the rule of law in effacing the difference between policy and law, in transferring adjudicative responsibility to non-lawyers, and in failing to provide the security of tenure and compensation provided constitutionally to the judicial branch. Critics suggest that administrative tribunals are attractive to government more for their responsiveness to direction by the executive branch of government than any supposed increase in expertise or efficiency.

This is an important debate, and one that I need not attempt to resolve here. For present purposes, however, I suggest that failing to measure up to the modern expectations already outlined will leave policy-makers unconvinced that the court system is capable of the type of change needed to make it a branch of government that meets legitimate expectations of quality and performance.

## 5.2 ARE THERE GAPS BETWEEN SYSTEM PERFORMANCE AND EXPECTATIONS?

As discussed in Section 4, a criminal justice system for the 21<sup>st</sup> century will

- Deliver a just and fair process;
- Seek the highest possible level of public safety;
- Engage appropriate expertise;
- Provide timely results; and
- Be accountable to the public.

How is our system in British Columbia performing towards meeting these demanding expectations?

The consultation process was critical to understanding how people within the system and members of the public view the current challenges.

### 5.2.1 Justice and Fair Process

Public opinion surveys show that the public believes the system does a good job of providing accused people with a fair trial and respecting their rights. Those same surveys also show that people do not believe that the criminal justice system does a good job of responding to the interests of victims and including them appropriately in the criminal process. For the most part, little information is provided to victims, witnesses, people working in

64 Hazel Genn, "Tribunals and Informal Justice," *Modern Law Review* 56, 3 (1993) at p. 395.

65 Rosalie Abella, "Canadian Administrative Tribunals: Towards Judicialization or Dejudicialization" (1988-89) 2 Can J Admin L & Prac at p. 2, as cited in Creyke, *Tribunals in the Common Law World*, pp. 9–10.

66 CUPE. *New Brunswick Liquor Corp*, [1979] 2 SCR 227 [CUPE]. See also Justice Iacobucci's description of the reasoning in *CUPE*: Frank Iacobucci, "Judicial Deference", (Address to the Conference of Ontario Boards and Agencies at Toronto, Ontario, 19 November 1998), at p. 10, "For further discussion of judicial deference to tribunals, see *Tribunals of the Common Law World*, at p. 10", online: Society of Ontario Adjudicators & Regulators <[https://www.soar.on.ca/docs/speaker\\_docs/COBA-98\\_Iacobucci.pdf](https://www.soar.on.ca/docs/speaker_docs/COBA-98_Iacobucci.pdf)>. For further discussion of judicial deference to tribunals, see *Tribunals of the Common Law World*, at p. 10.



and around the justice system, or the general public.

Prosecutors are right to be proud of the fact that people are not charged with offences where, objectively, there is insufficient likelihood of being able to prove the offence. However, despite charge approval resting with the prosecution service, British Columbia still has a significant level of stays of proceedings (approximately 25%),<sup>67</sup> a level that has remained stable for a very long time. Stays can be entered at any point in the process, as information or circumstances change. However, on matters that are scheduled for trial, a significant percentage of stays are entered on the first day of trial. A far more timely system may see fewer stays of proceedings.

A wide range of views were expressed regarding disclosure. Substantial strides have been made in regularizing and planning for disclosure in larger criminal trials and complex investigations. It is widely accepted that any early resolution system will need to address disclosure to the defence.

### 5.2.2 Public Safety

Policing has become focused on strategies for reducing crime and affecting offender behaviour. These efforts, such as the prolific offender management strategy, attempt to intervene strategically to prevent and deter crime, and are based on a population analysis which focuses on crimes and likely offenders. However, there is no province-wide public safety strategy, nor is there a common vision for the kind of justice system that we want.

Generally I heard in the consultations that no one thinks the criminal justice system operates effectively as a system, and there is no common understanding of the overall goals of the justice system and the role that each participant in the process plays in relation to achieving those goals.

### 5.2.3 Expertise

The quality and dedication of people working within British Columbia's criminal justice system

is very high. People are determined and willing to work hard in the public interest. However, generally speaking, the criminal justice system has not benefited from modern thinking about how to change systems and organizational culture.

This is certainly starting to change. In addition to the traditional litigation skills, there is a growing recognition that other skills are also valuable, such as resolution and managerial skills. The courts have responded to the expectations of expertise in a variety of ways, though without creating a new specialized criminal court or division. In many respects the Provincial Court is a specialized criminal court in fact if not in form. The Supreme Court Criminal Law Sub-Committee has a Criminal Pre-Trial Conference Pilot Project, which has now been extended to all Supreme Court registries.

During the consultations there was widespread support and several suggestions for specialized or problem-solving courts. There are a number of initiatives and projects ongoing which offer particular solutions to different problems and which are addressed in the Annex.

Both institutional participants and members of the bar expressed concern over the management of large and "mega" cases that consume a huge amount of resources across the criminal justice system. In large and complex criminal cases, meeting modern expectations of performance is challenging.

Many years ago there were dramatic differences from one region to another and one courthouse to another as to atmosphere, procedure and approach. Indeed, a high degree of autonomy was exercised by individual judges, particularly in those courthouses which had a small number of resident judges. There remain significant regional differences, although the process of achieving province-wide consistency has been successfully pursued by the prosecution service, the Provincial Court and LSS. British Columbia has been well-served by this modern attention to quality and consistency in all regions of the province. Current

67 Statistics Canada, *Adult Criminal Court Statistics, 2008/2009* (Summer 2010, Vol. 30, No. 2), at p. 28, Table 3, online: Statistics Canada <<http://www.statcan.gc.ca/pub/85-002-x/2010002/article/11293-eng.pdf>>.

concerns over regional differences understandably revolve around differences in the type and level of crime, and local resource decisions concerning municipal police priorities. In local communities, relationships between the prosecution service and the defence bar significantly influence the pattern and character of demands for judicial and court resources.

### 5.2.4 Timeliness: A Culture of Delay

There is a widespread perception that timeliness is a problem throughout the system. However, it is clear on any analysis that concerns differ significantly between the different courts and different types of cases.

In the course of the review it became apparent from many conversations around this topic that our legal and judicial culture sends a variety of signals that reinforce the sense of an overall culture of delay—the absence of regard for starting times at the beginning or during the course of a court day, for example, repeatedly referred to as a relatively recent and unfortunate signal. The number of unproductive appearances, which may not in fact delay matters, but leave the impression that nothing worthwhile has occurred while time is passing. Incomplete hearings which are continued to another time also signal a lack of discipline around management of the length of a hearing. The appearance of disproportionate process for less important matters can convey an underlying value that judicial time is freely available. Finally, the sense that an adjournment is granted in some circumstances when it can be reasonably inferred that it is being sought for its own sake sends the signal that many other values take priority over timeliness.

While there can be a legitimate debate over how often any or all of these occur, I can report that delay is a common feature in candid conversations with those who care deeply about the delivery of justice

in the province and are hopeful for improvement.

Any prescription for improving British Columbia's experience should proceed from a diagnosis of why this would occur in so many common law (and other) jurisdictions and over such a long period of history.

The public criticism of British Columbia's handling of the Stanley Cup riots was energized in no small part by the reports of British courts sitting overnight during their extensive riots in the summer of 2011, with offenders being tried and sentenced within hours or days of their arrest.<sup>68</sup> Without going into the detail of the advantages and disadvantages of British Columbia's approach, it is notable that the very same example raised concerns about the normal performance of the British system!<sup>69</sup> Indeed, the recently released British white paper strongly criticizes the relatively short time period required to resolve minor offences in the British system as still being too long.

It remains fair to say, as did Chief Judge Metzger in 1998,<sup>70</sup> that we have a culture of delay within the justice system. However, during the consultations it was repeatedly observed that to be effective the proposed goals need to be aligned with incentives for the professionals within the system. But for those of us who are frequent users of the court system, a clear analysis of delays reveals an awkward fact: longer timelines have more immediate benefits than burdens for all the professionals within the system—prosecutors, defence counsel, judges and staff.

Members of the public and many of those involved in the system frequently observed that we have permitted the growth of a culture which has little regard for the sitting hours of the court, time limits required for stages of the process, or other time-related matters. Several veterans at the bar expressed frustration that court does not

68 For example, see: Sunny Dhillon, "BC Public Points to Britain to Slam Vancouver's Riot Response", *The Globe and Mail* (2 January 2012), online: The Globe and Mail <<http://m.theglobeandmail.com/news/british-columbia/bc-public-points-to-britain-to-slam-vancouver-riot-response/article1357328/?service=mobile>>.

69 UK Ministry of Justice, *Swift and Sure Justice: The Government's Plans for Reform of the Criminal Justice System* (London: Ministry of Justice, 2012), at p. 3, online: UK Ministry of Justice <<http://www.justice.gov.uk/downloads/publications/policy/moj/swift-and-sure-justice.pdf>>.

70 Chief Judge Robert W Metzger, *The Report of the Chief Judge: Delay and Backlog in the Provincial Court* (Victoria: Ministry of Attorney General, 1998), online: Legislative Library of British Columbia <[http://www.llbc.leg.bc.ca/public/pubdocs/bcdocs2012/319602/delay\\_and\\_backlog\\_in\\_the\\_provincial\\_court\\_of\\_british\\_columbia.pdf](http://www.llbc.leg.bc.ca/public/pubdocs/bcdocs2012/319602/delay_and_backlog_in_the_provincial_court_of_british_columbia.pdf)>.

appear to start on time, run on time or remain busy throughout the court day.

For counsel an extended court calendar makes the management of a large practice far easier. For private lawyers a higher number of cases can be managed within one practice. One can offer one's services to more clients, and in return clients can more easily secure counsel of their choice. For prosecutors, the benefits of delay appear more related to managing a heavy caseload. Some prosecutors acknowledged that a delay in a case may ease the workload that day, or put off a difficult decision to another day—and most likely to another prosecutor.

For courts, growing delays are the standard tool of dealing with growing case lists or other demands on the system. This is quite understandable in a system in which the extent of judicial time required for a matter is considered within the effective control of counsel. Where there are more demands than existing capacity, then either timeliness must be sacrificed or managerial tools must be developed to manage matters within the available judicial capacity—which would be largely contrary to our professional culture and expectations of a judge<sup>71</sup>. In general terms our existing culture treats judicial time as freely available to the parties, with the result that it is not treated as something that must be applied with economy. In some respects the system rations judicial time by delaying its availability to the parties, rather than by demanding it be used well and efficiently.

Increasing the length of time to trial is one of the few tools the court has to cope with increases in demand, evidenced in the number or length of cases. The amount of judicial capacity to adjudicate is regarded as relatively inflexible. During our consultations many people suggested that it would be counter-productive for many of the justice participants to search for new ways of addressing workload volumes, when the backdrop of every conversation seems to be increasing the number of judges, prosecutors and police officers.

### 5.2.5 Timeliness in the Different Courts

Timeliness raises very different issues in the different courts of British Columbia. The Provincial court needs to provide for a very high level of resolutions, with tens of thousands of cases requiring the determination of fit and appropriate sentences. Only a very small percentage of all cases proceed to trial in the Provincial Court, and very few trials are lengthy. Judgments are in most cases delivered on the spot.

In contrast, in the Supreme Court, most trials are far longer than in the Provincial Court and concern the most serious criminal offences. That Court has of course to deal with timeliness in the context of complex pre-trial proceedings, sits frequently with juries, and must deal with complexities arising from changes in the substantive law and procedures required to address disclosure and other multi-party issues.

In the Court of Appeal, the Court oversees a process which requires the completion of appeal materials, including transcripts and the consideration and determination of complex legal and procedural questions.

Over the course of the consultations the review often heard from members of the public and lawyers that those affected by criminal charges care about the time taken from the event to its resolution, and there is little or no information provided to people about when the case they are involved in might be expected to be completed.

### 5.2.6 Accountability

There have been substantial strides in making the work of the courts more transparent through greater openness, the use of modern technology and many other measures.

Despite the efforts of victim service organizations and victim advocacy groups, some victims still report being treated as an afterthought rather than a customer of the system.

There is a wide-spread perception that the system

71 For an excellent discussion of the assessment of judges and judging, see the recent speech by former judge The Honourable Ian Binnie,, "Judging the Judges: May they boldly go where Justice Rand went before", *Western Law* (16 February 2012), online: [http://www.law.uwo.ca/News/2012/02/justice\\_ian\\_binnie\\_delivers\\_the\\_4th\\_annual\\_coxford\\_lecture.html](http://www.law.uwo.ca/News/2012/02/justice_ian_binnie_delivers_the_4th_annual_coxford_lecture.html).

allows some defence counsel, in their client's interest, to successfully game the system and achieve dismissals or stays of cases by successfully manoeuvring the opportunities of delay to the point where the charges become unprovable.

Despite the many initiatives to improve the system and the relative rarity of outrageous results, the public has low confidence in the system as a whole. During consultations the ongoing problem of delay was overwhelmingly the factor mentioned as lowering respect for the system.

The main points emerging from the review include

- Public opinion surveys show that the public believes that the system does a good job of respecting the rights of the accused and of providing them with a fair trial;
- Those same surveys also show that people do not believe that the criminal justice system does a good job of responding to the interests of victims and of including them appropriately in the criminal process;
- No one thinks the system is working as effectively and efficiently as it could and should;
- There is no common understanding of the overall goals of the justice system and the role that each participant in the process plays in relation to achieving those goals;
- There is no integrated plan for the criminal justice system and no coordinated plan for improving public safety;
- The system has not benefited from modern thinking about how to change systems and organizational culture;
- No one thinks that the system achieves results in a timely way overall, even though the majority of cases do resolve in a reasonable time period; and
- There is no common vision for the kind of justice system that we want.

## 6. JUDICIAL INDEPENDENCE

It is important to address at the outset the boundaries of judicial independence and its role in the reform process. The terms of reference direct me to report and make recommendations on the roles of the various justice system participants and on how collaboration and co-operation among them can be fostered. Specifically, I am directed to report on those matters in which each institution, for reasons of independence, should have exclusive decision-making authority.

At its core, judicial independence ensures that the judge will decide every case by the impartial application of the law to the facts. The centrality of the public interest in defining judicial independence was recognized by the Supreme Court in *Ell v. Alberta*: “if the conditions of independence are not interpreted in light of the public interests they were intended to serve, there is a danger that their application will wind up hurting rather than enhancing public confidence in the courts.”<sup>72</sup>

In order to ensure that decisional independence is not undermined or blunted by indirect or administrative means, the arrangements for the hearing of a case—directly and immediately related to its disposition—must lie within the direction of the judiciary. Reasonable differences of opinion regarding what falls within this broader realm of judicial independence are significant to this review.

The manner in which judicial independence is exercised will influence the system’s efficiency, however it is defined. There are a number of reasons for this. In broad terms, judicial decisions establish expectations for all parties concerned. The court’s decisions guide defence counsel, who in turn advise accused persons deciding whether—and to which offence—they should plead guilty. Crown

counsel, in deciding whether they can prove guilt to the required standard, are also guided in part by the decisions made by judges in other cases. Sentencing is similarly influenced by the sentences handed down by judges in similar cases.

Further, even the disposition of cases without trial requires judicial approval. The court retains jurisdiction to refuse a guilty plea, a joint submission on sentence, and even a stay of proceedings. This jurisdiction is for the protection of the accused and the public, and ensures that the disposition process is in accordance with the law.

Finally, the process expectations in place in the court play an important role in framing the parties’ decisions. Many people agreed during the consultations that the court has become in effect an administrative “bring forward” system for both Crown and defence. For example, appearance dates are often selected without specific expectations, but with the hope that periodic judicial attention will move matters along. As already mentioned, the Provincial Court has a project to develop a significant reform to this approach to criminal process, which also implies a change to the culture within the system. A change to this culture requires firm and determined direction by the Provincial Court in an area that lies at the heart of judicial independence: the direction of matters before a judge.

The fact that delay may in any particular case favour one or the other party means that process decisions must be made impartially and in accordance with predictable rules overseen by an independent judiciary. An accused facing trial after a lengthy interval faces a long period of uncertainty. However, for some defendants delay puts off the inevitable and raises the prospects of

72 *Mackin v. New Brunswick (Minister of Finance)*, [2002] 1 SCR 405, at para 116, Binnie J, dissenting, as cited in *Ell v. Alberta*, 2003 SCC 35, [2003] 1 SCR 657, at para 29.

a defence that may only arise because of delay. In some circumstances delay by the prosecution may be construed as inimical to the interests of the accused. Indeed, process rights occupy a central role in our tradition, from the Great Writ of habeas corpus to the modern Charter guarantees, such as the right to a timely trial. At the heart of our system there is recognition that the behaviour of all parties before the court is influenced by its process expectations.

Thus judicial independence properly plays a role in any discussion of reform of the criminal justice system, even if it is often largely in the background.

The issue of the *interpretation* of independence has a prominent place in the *Green Paper* and in various public statements made during the term of the review, including the joint statement made by the three chief judges in the province. The implication is that some interpretations of independence are an obstacle to productive change and go beyond the accepted meaning of those terms. Given the importance of the issue and the profile of the topic in the public discussion concerning the review, it bears careful discussion before we turn to discussing recommendations for reform.

## 6.1 BACKGROUND

The central distinctiveness of judicial independence arises from the fact that our system of government is divided into three branches: the legislature, the executive and the judiciary. Judicial independence in this context refers to the independent nature of the relationship between the court and other branches of government.<sup>73</sup> In this role, courts are tasked with adjudicating disputes between the federal and provincial governments,

safeguarding constitutional requirements, and ensuring that the power of the state is exercised in accordance with the rule of law.<sup>74</sup> It is this constitutional mandate that gives rise to the need to maintain the independence of courts, as an institution, from the executive and legislative branches of government.<sup>75</sup>

Despite the high value placed on judicial independence, it remains an unwritten constitutional principle. Judicial independence has roots in the requirement for an “independent and impartial tribunal” in s. 11(d) of the *Charter*, and in the preamble of the *Constitution Act, 1867*, which states that the Constitution of Canada shall be “similar in Principle to that of the United Kingdom.” As such, it has been implied by the courts from these constitutional roots and explained in several decisions of the Supreme Court of Canada concerning provincially constituted courts.

Judicial independence has both individual and institutional dimensions. Individual judicial independence is the independence accorded an individual judge. Institutional independence is a form of collective independence that relates to the status of the judiciary as an institution.<sup>76</sup>

There are three elements to ensuring judicial independence: security of tenure, financial independence and administrative independence.<sup>77</sup>

Security of tenure means that judges can only be removed for causes related to their capacity to perform judicial functions, and only after strict procedural requirements have been met.<sup>78</sup>

Financial independence means that the salary of judges must be secured by law and not be subject to arbitrary interference by the executive.<sup>79</sup> Specifically, financial independence requires that an independent body be interposed between the judiciary and other branches of government to set or recommend the level

73 *Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick*, 2002 SCC 13, at para 37, [2002] 1 SCR 405.

74 *Ell v. Alberta*, [2003] SCC 35, at para 22, [2002] 1 SCR 857.

75 *Beauregard v. Canada*, [1986] 2 SCR 56, at p. 70.

76 *Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick*, 2002 SCC 13, at para 39, [2002] 1 SCR 405.

77 *Reference re Remuneration of Judges of the Provincial Court (PEI)*, [1997] 3 SCR 3 [*Reference re Provincial Court Judges*].

78 *Valente v. The Queen*, [1985] 2 SCR 673, 1985 CanLII 25, at paras 30-31 [*Valente*]; *Reference re Provincial Court Judges*, at para 115.

79 *Valente*, at para 40.

of judicial remunerations,<sup>80</sup> that under no circumstances may the judiciary engage in negotiations over remuneration with the executive or representatives of the legislature;<sup>81</sup> and that any reductions to judicial remuneration cannot take salaries below a basic minimum level required for the office of a judge.<sup>82</sup>

Administrative independence—most importantly for the purpose of considering reform—is defined as control by the courts “over the administrative decisions that bear directly and immediately on the exercise of the judicial function.”<sup>83</sup> Administrative independence only attaches to the court as an institution, although it may sometimes be exercised on behalf of a court by its chief judge or chief justice.<sup>84</sup>

## 6.2 ADMINISTRATIVE INDEPENDENCE

Determining the precise content of administrative independence is not straightforward. As noted by the Supreme Court of Canada in *Valente*, opinions differ on what is necessary, desirable or feasible. The substance and procedure required to maintain judicial independence applies in particular to administrative independence.<sup>85</sup>

If administrative independence refers to decisions that bear “directly and immediately on the exercise of the judicial function,”<sup>86</sup> what decisions are protected? Several cases have considered what “judicial function” includes. They identify the following activities as within the “essential or minimum requirement” for administrative independence.<sup>87</sup>

- Assignment of judges;<sup>88</sup>
- Sittings of the court;<sup>89</sup>
- Court lists;
- Allocation of courtrooms; and
- Direction of administrative staff engaged in carrying out the above functions.

Administrative functions that fall outside the administrative independence of the judiciary have been established. Financial aspects of court administration (budget preparation, and the presentation and allocation of expenditures) and the personnel aspects of administration (recruitment, classification, promotion, remuneration and supervision of support staff) go beyond the administrative independence of the courts.<sup>90</sup> These financial and personnel aspects of administration do not fall within the scope of administrative independence because they do not bear directly and immediately on the exercise of judicial function.<sup>91</sup>

Administrative functions that fall outside the administrative independence of the court properly remain for direction by the legislative or executive branches of government. It is important to remember that judicial administrative independence is an exception to the general authority of the provincial legislature with regard to the administration of justice in the province. Section 92(14) of the *Constitution Act, 1867*, grants this power, stating that in each province the legislature may exclusively make laws in relation to:

80 This body is intended to depoliticize decisions regarding judicial remuneration. Its decisions are not binding on the executive or legislature but the executive or legislature have to justify departing from them: *Reference re Provincial Court Judges* at para 133.

81 This does not preclude chief justices or judges, or bodies representing judges from expressing concerns or making representations to governments regarding judicial remuneration: *Reference re Provincial Court Judges*, at para 134.

82 *Reference re Provincial Court Judges*, at para 135.

83 *Valente*, at 709.

84 *Reference re Provincial Court Judges*, at para 120. Note, however, that “important decisions regarding administrative independence cannot be made by the Chief Judge alone”: *Reference re Provincial Court Judges* at para 275.

85 *Valente*, at para 25.

86 *Valente*, at para 52.

87 *Valente*, at para 49.

88 Also, *MacKeigan v. Hickman*, [1989] 2 SCR 796. This includes the re-location of judges to other geographic areas: *Reference re Provincial Court Judges*, at para 266.

89 This includes the days on which the Court shall hold sittings: *Reference re Provincial Court Judges*, at para 267.

90 *Valente*, at para 50.

91 *Reference re Provincial Court Judges*, at para 253.



(14) The administration of justice in the province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

Although the provincial legislative assemblies must exercise their jurisdiction over the administration of justice in the province in accordance with the principle of judicial independence,<sup>92</sup> “it is inevitable and necessary” that relations exist between the judicial and legislative branches of government in carrying out judicial administration.<sup>93</sup> The authority of the province over administrative matters relevant to the court includes, but is not limited to

- Enactment of laws governing procedure in civil matters in Provincial Courts;<sup>94</sup>
- Organization of the province into judicial districts, including the definition of the territorial limits of judicial districts in both civil and criminal matters;<sup>95</sup>
- Initial appointment of judges and their assignment to particular jurisdictions;<sup>96</sup>
- Enactment of laws governing the appointment and retirement of judges and the number of judges required for a quorum;<sup>97</sup>
- Full control over the appointment and regulation of judicial officers such as justices of the peace;<sup>98</sup> and
- Other matters respecting the purely administrative functions of the court.<sup>99</sup>

On March 15, 2012, the Chief Judge and Chief Justices of the province issued a joint statement

on “Judicial Independence (and What Everyone Should Know About It).”<sup>100</sup> The statement is a timely and important reminder of the importance of judicial independence, and it is useful that in the context of the review the public is reminded of its importance.

The assurance that the courts were willing to participate in reforms has received little attention but, as already mentioned, the courts have actively participated in addressing the concerns raised, and have sought input from some of the key stakeholders.

In two respects I believe the Supreme Court of Canada’s decisions indicate important limitations on interpreting judicial independence as it relates to the subject matters of the review. First, the preservation of independence is in respect of decisions that “bear directly and immediately on the judicial function.” This indicates clearly that the general administrative structure is not preserved constitutionally for exclusive management by judges.

Secondly, the concern that the courts must remain separate from other branches of government is not absolute, and refers to the “authority and function” of the courts. As McLachlin J. (as she then was) stated in *MacKeigan*:

I do not say that the power in the courts to control their own administration is absolute, if by absolute what is meant is that in no circumstances can the Legislature or Parliament enact laws relating to the functioning of the courts or enquire into the conduct of particular judges.<sup>101</sup>

92 *Mackin v. New Brunswick (Minister of Finance); Rice v New Brunswick*, 2002 SCC 13, at para 70, [2002] 1 SCR 405.

93 *MacKeigan v. Hickman*, [1989] 2 SCR 796.

94 *AG (Canada) v. Can Nat Transportation, Ltd*, [1983] 2 SCR 206. Note that the provincial legislature does not hold authority over procedure in criminal matters: See also *Knox Contracting Ltd v. Canada*, [1990] 2 SCR 338.

95 *R. v. Gagne*, [1990] 59 CCC (3d) 282, 1990 CanLII 5393 (QC CA), at para 56.

96 *Reference re Provincial Court Judges*, at para 266.

97 *MacKeigan v. Hickman*, [1989] 2 SCR 796.

98 *R. v. Bush* (1888), 15 OR 398 (QB), at p. 405, as cited in *Reference re Adoption Act*, [1938] SCR 398, at 406 (available on CanLII), as cited in *Ell v. Alberta*, 2003 SCC 35, at para 4, [2003] 1 SCR 857: “The administration of justice could not be carried on in the Provinces effectually without the appointment of justices of the peace and police magistrates, and the conclusion seems to me to be irresistible that it was intended that the appointment of these and other officers, whose duty it should be to aid in the administration of justice, should be left in the hands of the Provincial Legislatures.”

99 *MacKeigan v. Hickman*, [1989] 2 SCR 796.

100 Courts of British Columbia, *Judicial Independence (And What Everyone Should Know About It)* (15 March 2012), online: Courts of British Columbia <[http://www.courts.gov.bc.ca/about\\_the\\_courts/Judicial%20Independence%20Final%20Release.pdf](http://www.courts.gov.bc.ca/about_the_courts/Judicial%20Independence%20Final%20Release.pdf)>.

101 *MacKeigan v. Hickman*, [1989] 2 SCR 796, 1989 CanLII 40 at p. 40; clarifying a broader statement in *Beauregard v. Canada*, [1986] 2 SCR 56.



In order to ensure that relations between the judiciary and other branches of government do not impinge on this “authority and function,” the justice system must be set up in a way that avoids “incidents and relationships which could affect the independence of the judiciary in relation to the two critical judicial functions—judicial impartiality in adjudication and the judiciary’s role as arbiter and protector of the constitution.”<sup>102</sup> That is, judicial independence does not require separation of the courts and other branches of government in all ways, but only in so far as such a relationship may impact the core elements of judicial function. Indeed, the Supreme Court of Canada has repeatedly emphasized the importance of the three branches of government forming relationships and working together:

- “The heads of the judiciary have to work closely with the representatives of the Executive unless the judiciary is given full responsibility for judicial administration.”<sup>103</sup>
- “It is impossible to conceive of a judiciary devoid of any relationship to the legislative and executive branches of government.”<sup>104</sup>
- “The separation of powers does not prevent the different branches of government from communicating with each other.”<sup>105</sup>
- “Our Constitution does not separate the legislative, executive and judicial functions and insists that each branch of the government exercise only its own function.”<sup>106</sup>

It might be expected that the comparatively recent constitutional recognition of judicial independence in such matters as judicial compensation and elements

of administration would occasion friction, and there has been some public conflict over matters such as the Provincial Courthouse closures in 2002.<sup>107</sup>

Even matters of judicial administrative independence (for example the allocation of courtrooms) is influenced by the financial and personnel decisions of the executive branch. In practical terms, the construction of courthouses depends on obtaining substantial capital from the public treasury.

By providing that the ADM of Court Services Branch co-report to the Chief Judge and Chief Justices and the deputy minister, provincial legislation acknowledges the wisdom and necessity of judicial involvement in administration.<sup>108</sup>

There are a number of measures that have been used to bridge this separation of powers. The Ministry of Justice and the judiciary regularly work together in seeking improvements to the administration of justice in this province. Two examples should serve to illustrate this point. In April 2002, the Ministry of Attorney General and the Provincial Court signed a memorandum of understanding whose preamble acknowledges that “the Ministry and the Judiciary must work together to fulfill their respective roles and responsibilities in the administration of Justice in British Columbia”.<sup>109</sup> The two institutions agreed, among other things, to “enter into a protocol regarding a process for consultation on matters of administration affecting the Provincial Court.”<sup>110</sup> This protocol acknowledged the important role that both the Attorney General and the Provincial Court play in the administration of justice, and committed the two institutions to working together. In particular, the protocol sought regular meetings to discuss matters of court administration, including

102 *MacKeigan v. Hickman*, [1989] 2 S.C.R. 796, 1989 CanLII 40 at p. 36.

103 *R v. Valente (No 2)*, (1983), 2 CCC (3d) 417 (ON CA) at pp. 432–433 as cited in *Valente* (SCC) at para 47.

104 *MacKeigan v. Hickman*, [1989] 2 SCR 796.

105 *Reference re Provincial Court Judges*, at para 256.

106 *Re Residential Tenancies Act, 1979*, [1981] 1 SCR 714.

107 On that occasion, there was litigation commenced by the Law Society of B.C. against the proposed closures on the basis of inadequate consultation with the Court. The litigation was settled and a revised number of courthouses were closed.

108 See: *Court of Appeal Act*, RSBC 1996 c 77, s 32; *Supreme Court Act*, RSBC 1996, c 433, s 10; *Provincial Court Act*, RSBC 1996 c 379, s 41.

109 *Memorandum of Understanding Between the British Columbia Ministry of Attorney General and Provincial Court Judiciary* (19 April 2002), online: Provincial Court of British Columbia <<http://www.provincialcourt.bc.ca/downloads/pdf/MemorandumofUnderstanding.pdf>>.

110 *Memorandum of Understanding Between the British Columbia Ministry of Attorney General and Provincial Court Judiciary*, (19 April 2002), s 7.

facilities and staff planning, budget planning, technology, and management of court records.<sup>111</sup> This protocol continues to govern the holding of regular “protocol meetings.”

In the last 20 years, the Ministry of the Attorney General and both the Supreme and Provincial Courts have jointly embarked on a variety of initiatives to improve criminal case processing and to reduce or eliminate delays.

### 6.3 WHAT JUDICIAL INDEPENDENCE MEANS TO JUSTICE REFORM

There are some matters that lie at the heart of decisional independence, such as the judicial management of cases. There is widespread agreement that the approach to case management needs changes, and judicial leaders have spoken out forcefully on the need for different approaches. Although we all have the right to offer comments or criticisms, we have constitutionally agreed to leave the determination of those matters to the judiciary.

With respect to those matters that are not squarely within administrative independence, the best approach is one that is collaborative and co-operative—for the simple reason that constructive change cannot be accomplished unilaterally by any of the participants. During consultations all the justice participants expressed the desire to be collaborative and co-operative, when that was compatible with their institutional independence.

We are fortunate that the Court has shown judicial leadership in this province. This includes the development of the CCFM rules (which has a recent counterpart in the civil rule reforms), performance measures for the Provincial Court, various backlog initiatives from the 1970s to the DCC, various problem-solving courts, and now the revised Court Scheduling Project. It is equally important that all the participants in the system, including the judges,

work together to build on the successes of the past and learn from the disappointments.

### 6.4 JUDICIAL INDEPENDENCE: CONCLUSIONS

In framing the recommendations in this report, I have been guided by the following conclusions regarding judicial independence:

- Judicial leadership through its adjudicative role provides the legal framework and influences the decisions and actions of all other participants in the justice system.
- Some of the important areas of potential reform, such as judicial case assignment and trial management, fall squarely within the constitutional scope of judicial independence; judicial leadership and agreement are necessary to achieve reforms in these areas.
- Court administration is both constitutionally and appropriately an area of shared responsibility that needs to be managed in a co-operative and collaborative fashion.
- Judicial training and expertise has limited application in determining which cases belong in the system, or how best to influence the conditions of safety in the community, the needs of the victims, and the relationship between the community and the offender.
- The determination of outcomes from the justice system is primarily a matter for the executive working with the non-judicial justice participants and the resources of the community.
- Judges must carry out their tasks in ways that enhance rather than impair the achievement of outcomes for the community, the victims and the offenders. This must be compatible with the law and evidence in individual cases.

The principal consequence of these conclusions is that the judiciary is appropriately responsible

111 *Protocol Between Ministry of Attorney General and Provincial Court Judiciary* (19 April 2002), online: Provincial Court of British Columbia <<http://www.provincialcourt.bc.ca/downloads/pdf/ProtocoldocumentApril19.pdf>>.

for the discharge of their important adjudicative functions. But in relation to the achievement of broader outcomes, they are best engaged in a persuasive and facilitative role. The Ministry of Justice must be held primarily responsible for the achievement of outcomes from the system.

Judicial leadership is important, and in some cases indispensable, in reforming both the criminal justice system and in reforming the legal culture. No other participant has the same persuasive influence on the participants. The recommendations here are intended to facilitate a setting within which judicial leadership can thrive and all the judges can feel fulfilled in contributing to improved results which uphold the rule of law and also advance the public interest in improved public safety.

#### 6.4.1 Formal Participation in a System-Wide Planning Process

To bring about co-ordinated improvements to the justice system, reform initiatives in other jurisdictions have included participation by representatives of the judiciary. The UK National Criminal Justice Board (NCBJ), for example, included judicial representatives on the general strategic planning committee. Judicial participation on that board was seen as critical:

The active support and participation of the judiciary, in the magistrates' courts and in the higher courts, are crucial to the delivery of this strategy, as they have been in delivering the improvements achieved so far. Issues in which they have played a major role are: ... improving joint working between criminal justice agencies, particularly through membership on the National Criminal Justice Board...<sup>112</sup>

I am encouraged that the Chief Justices and Chief Judge of the courts in British Columbia have expressed recently that "the judiciary is always open to discussing ways to improve the administration of justice."<sup>113</sup> I am hopeful that this willingness to participate in open discussions will include conversations regarding the general administration of the courts, particularly where this requires coordination between the Ministry, the judiciary and others.

In Ontario, such meetings have occurred on an annual basis for several years. The Office of the Auditor General Ontario noted in its 2008 annual report that, with regard to the administrative structure of the courts, representatives of the Ministry, judiciary, Bar and other justice partners and stakeholders have attended a "Justice Summit" held annually since 2002. These summits "make possible an improved discussion of key issues affecting the courts and have established several working groups and joint committees to respond to identified concerns." Outcomes from these meetings included the implementation of criminal case management protocols and the development of best practices for child protection cases.<sup>114</sup>

In Ontario, the institutional relationship between the judiciary and the Ministry in relation to the administration of justice has also been formalized through statutory recognition of the "Ontario Courts Management Advisory Committee." Pursuant to the *Ontario Courts of Justice Act*,<sup>115</sup> this committee is composed of:

- The Chief Justice and Associate Chief Justice of Ontario, the Chief Justice and Associate Chief Justice of the Superior Court of Justice, the senior judge of the Family Court, and the Chief Justice and Associate Chief Justices of the Ontario Court of Justice;

112 UK Office for Criminal Justice Reform, *Cutting Crime, Delivering Justice: A strategic plan for criminal justice 2004-2008* (London: Her Majesty's Stationary Office, 2004), at p. 19, online: Official Documents Archive 2 <<http://www.archive2.official-documents.co.uk/document/cm62/6288/6288.pdf>>

113 Courts of British Columbia, *Judicial Independence (And What Everyone Should Know About It)* (15 March 2012), online: Courts of British Columbia <[http://www.courts.gov.bc.ca/about\\_the\\_courts/Judicial%20Independence%20Final%20Release.pdf](http://www.courts.gov.bc.ca/about_the_courts/Judicial%20Independence%20Final%20Release.pdf)>.

114 Office of the Auditor General of Ontario, *2008 Annual Report*, ch 3 (Ontario: OAG, 2008), at p. 215-216.

- The attorney general, the deputy attorney general, the assistant deputy attorney general responsible for courts administration, the assistant deputy attorney general responsible for criminal law, and two other public servants chosen by the attorney general;
- Three lawyers appointed by the Law Society of Upper Canada and three lawyers appointed by the County and District Law Presidents' Association; and
- Not more than six other persons, appointed by the attorney general with the concurrence of the judges mentioned in clause (a) and the lawyers appointed under clause (c).<sup>116</sup>

The statutorily mandated function of the Ontario Courts Management Advisory Committee is to “consider and recommend to the relevant bodies or authorities policies and procedures to promote the better administration of justice and the effective use of human and other resources in the public interest.”<sup>117</sup> In essence, the Ontario *Courts*

*of Justice Act* has created a statutorily recognized relationship between the judiciary, the Ministry and others on matters of administration.

I recognize, however, that the success of a multi-institutional committee such as was attempted in Ontario will depend not on the strength of the statute, but on the willingness of participants to commit to co-operative and coordinated approaches to the administration of justice. What I find appealing in the Ontario example is that the composition, mandate and reporting relationships of such an organization can be clearly articulated through legislation, contributing a sense of permanence and statutory recognition to such a committee, which may well be beneficial to its long-term operation.

In my view the statutory creation of a formal Justice Summit may help to improve relationships and to facilitate the transparency respecting progress of reform which I consider important to success. I address this recommendation as part of those arising out of the next topic.

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115 *Courts of Justice Act*, RSO 1990, c 43.

116 *Courts of Justice Act*, RSO 1990, c 43, s 79.

117 *Courts of Justice Act*, RSO 1990, c 43, s 79(4).

## 7. CRIMINAL JUSTICE AND PUBLIC SAFETY COUNCIL

Section 4 outlined the modern expectations of a well-performing criminal justice system. How can we make those enduring features of our system in the context of our history, existing institutional structures and culture?

The reform must take place on two fronts. First, responsibility and accountability for the performance of the criminal justice system as a whole needs to be more clearly discharged by the Ministry of Justice. Second, institutional reforms should be considered within the mandate and organizations of the other justice participants in order to better align their organizations with the overall justice and public safety plan for the province.

In this section, I propose the establishment of a Criminal Justice and Public Safety Council. In order to obtain enduring systemic reform, a body such as the one I propose would be a better means than what is presently available.

This recommendation stems from the conclusion that there should be one principal management body operating under the Minister of Justice and attorney general. It should be responsible for overall planning, establishing performance standards, recommending resource allocation, overseeing institutional reform, overseeing cross-sectoral reform initiatives, and ensuring the Ministry is accountable to the public.

In making these recommendations I regard as the first priority the identification and articulation of system-wide goals and clear assignment of responsibilities to ensure they are achieved. In my view clarity and rationalization of duties and responsibilities within the Ministry are critical to achieving a better-functioning system. The details

of public administration are important and may be vital to success, but are largely beyond my expertise. The final structures may well have to be framed differently than I suggest in this review.

### 7.1 CONTEXT

The Ministry of Justice was recently created in 2012 through the merger of the Ministry of the Attorney General and the Ministry of the Solicitor General and Public Safety.<sup>118</sup> The structure of the Ministry is set out in the organizational chart in [Schedule 10](#). Although it is a single Ministry, there continue to be two deputy ministers. This recognizes the separate role of the attorney general, but makes provision for an additional role of chief operating officer, with responsibility for justice reform across the entire Ministry (and an associated cross-ministry reporting relationship). The chief operating officer role has been assigned to the deputy minister of justice and solicitor general. In addition, there are a number of committees and working groups used to help carry out the work of the Ministry. These include the Justice Reform Council (essentially the portion of the Ministry Executive Committee responsible for the criminal justice system), the Police/Crown Liaison Committee, and the Protocol Committee, which is the formal coordinating committee between the Ministry and the judiciary. Numerous other committees have been set up to deal with various issues of coordination.

As already noted, the Internal Audit & Advisory Services (IAAS) of the BC Ministry of Finance recently reviewed the provincial justice system, and in September 2011 reported that “it is clear that an

118 British Columbia Order in Council 51/2012 (8 February 2012), online: Queen’s Printer <<http://www.qp.gov.bc.ca/statreg/oic/2012/resume03.htm>>. These functions are together in one Ministry in some provinces but are separated in others (generally the larger ones).

overall justice system perspective is lacking.” Instead, according to the IAAS report published in February 2012, there is a “largely fragmented approach”<sup>119</sup> in the justice system. The paper also asserted that one of the barriers to constructive reform was a widespread “resistance to systems thinking.”

There is no doubt that the justice system presents particular challenges to a systems approach by virtue of the nature of the various sectors. The relationship between the Ministry and the prosecution service is governed by the *Crown Counsel Act*,<sup>120</sup> which was amended in 1990 to provide a statutory separation between the prosecution service and the other parts of the Ministry. The assistant deputy attorney general is responsible for the prosecution service. In the event the deputy or attorney general wishes to provide direction as to the conduct of any individual matter, the direction must be in writing and gazetted. As well, in the event that the deputy or attorney general wishes to direct the prosecution service on a matter of policy, the assistant deputy attorney general is entitled to require that it be put in writing.<sup>121</sup>

The relationship between the Ministry and policing in the province is complicated by the existence of multiple organizations and funding sources. The province itself does not deliver policing services.

Under the *Police Act*,<sup>122</sup> the Ministry must ensure that an adequate and effective level of policing and law enforcement is maintained throughout British Columbia. Policing in the province is provided mainly by the RCMP (federal, provincial and municipal forces) and independent police departments, including one First Nations–administered police service.

There are also several agencies that provide supplemental policing in British Columbia. For example, in the Lower Mainland area of the province,

the South Coast British Columbia Transit Authority Police Service provides policing on and around the transit system—this police service is supplemental to jurisdictional police. Similarly, the Canadian National and Canadian Pacific railway police forces provide specialized law enforcement within the province. There are also enhanced police services at the Vancouver and Victoria International Airports, enhanced First Nations police services operating in numerous communities, and a number of integrated teams operating throughout the province.<sup>123</sup>

Although the province only directly funds the RCMP provincial contract, the ADM of Policing and Security Programs is responsible for ensuring the central oversight of all policing in the province, which (among other responsibilities) includes

- Monitoring the financial and operational accountability of provincial and municipal RCMP through policing agreements;
- Managing the contract with the RCMP for provincial policing;
- Establishing provincial policing standards for police service delivery and monitoring the quality and standards of police service delivery; and
- Providing leadership to facilitate innovative, proactive, evidence-based police service through restructured service delivery and technological advances.<sup>124</sup>

The BCACP serves an organizing function for the various police forces, but given the various funding streams and local priorities, it is fair to say that this is a positive but fragmented body of investigative agencies.

The Ministry is also responsible for the administration of the Provincial and Supreme Courts

119 Internal Audit & Advisory Services, British Columbia Ministry of Finance, *Review of the Provincial Justice System in British Columbia*, (September 2011), p. 1–3, online: British Columbia Ministry of Justice <[www.ag.gov.bc.ca/public/JusticeSystemReview.pdf](http://www.ag.gov.bc.ca/public/JusticeSystemReview.pdf)>.

120 RSBC 1999, c 87.

121 *Crown Counsel Act*, RSBC 1999, c 87 ss 5, 6.

122 RSBC 1996, c 367.

123 British Columbia Ministry of Justice, *Description of Policing in BC*, online: British Columbia Ministry of Justice <<http://www.pssg.gov.bc.ca/policeservices/description/index.htm>>.

124 British Columbia Ministry of Justice, *About Us*, online: British Columbia Ministry of Justice <<http://www.pssg.gov.bc.ca/policeservices/about/index.htm>>.

and the Court of Appeal, under the ADM of Court Services. The ADM of Court Services also reports to the Chief Judge and Chief Justices in relation to matters of judicial administration and related services.

Finally the Ministry is responsible for community and institutional corrections under the ADM of Corrections.

There are existing efforts to reduce the silo effect of independent justice participants who consider themselves primarily responsible for the discharge of the public trust in their area of the system. For example, the Ministry Service Plan states various province-wide goals and is updated regularly.<sup>125</sup> Each branch of the Ministry has its own strategic plan that feeds into the Ministry plan and is reported on annually.

In general it would appear that there is a sophisticated and well-thought-out structure for the articulation of planning and reporting for each aspect of Ministry work.

I am by no means the first reviewer to suggest that greater strategy and coordination would be desirable in the justice system. Previous attempts to achieve several of these characteristics have been attempted and, in my view, offer valuable insights on what elements will be necessary for successful reform.

### 7.1.1 BC Provincial Community Safety Steering Committee

In 2007, the BC government established the Provincial Community Safety Steering Committee (the Committee) in response to “unacceptable crime and victimization rates” in British Columbia.<sup>126</sup> The Committee was intended to exploit synergies between partnering agencies.

The Committee was created in 2007 and included the deputy ministers attorney general for Public Safety

and solicitor general, Health, Children and Family Development, Education, and Employment and Income Assistance.<sup>127</sup> It also included the provincial health officer and representatives from the Office of Housing and Construction Standards, the Federal Prosecution service, Correctional Services Canada, the Union of British Columbia Municipalities (UBCM), the RCMP, municipal police and a criminology professor from Simon Fraser University.<sup>128</sup>

The Committee was supported by the Criminal Justice Reform Secretariat, which included a leader and members from corrections, the RCMP, victims’ services, police services, the prosecution service, courts, youth justice and Justice Services Branch (JSB).

Despite the broad involvement of many groups both within and linked to the justice system, the Committee is generally not viewed as a success. In the course of my research and consultations, several aspects of this project, which I review below, offer guidance for the future.

In order to produce systemic change, a committee such as this one would appear to require a broad mandate that contemplates more than incremental advances. In this case, a discussion paper describing priorities for the Committee limited its scope from the outset:

With limited infusion of new money it is important to identify a small number of problems of common interest which can be realistically improved through the application of collaborative and evidence-based practices.<sup>129</sup>

The priority targets selected by the Committee led to projects in support of the following: local priority setting, planning and public engagement;

125 See: British Columbia Ministry of Justice, *2012/13 – 2014/15 Service Plan* (British Columbia Ministry of Finance, February 2012), online: British Columbia Ministry of Finance <<http://www.bcbudget.gov.bc.ca/2012/sp/pdf/ministry/jag.pdf>>.

126 British Columbia, Criminal Justice Reform Secretariat, “Discussion Paper: Priority Setting in the Provincial Community Safety Steering Committee” (21 January 2008), at p. 1.

127 Now the Ministry of Social Development.

128 Professor Raymond R. Corrado; BA (Mich State), MA, PhD (Northwestern).

129 British Columbia, Criminal Justice Reform Secretariat, “Discussion Paper: Priority Setting in the Provincial Community Safety Steering Committee” (21 January 2008), at p. 2.



healthy babies; assisting 10- to 14-year-olds at risk of criminal involvement; prevention and reduction of violence against women; prevention and reduction of child abuse; reducing activity of harmful offenders; and reducing street disorder.<sup>130</sup> These are valid and important priorities, and the Committee may well have advanced progress in relation to them.

However, in my view, one of the lessons learned from the Committee is that in order to effect systemic change, a committee such as this must be mandated to think beyond incremental changes. It must be tasked with proposing a vision for the justice system that goes beyond progress on a small number of problems of common interest. Without such a higher-level mandate or vision, progress may be limited to smaller, incremental improvements that do not achieve the ultimate agenda of ensuring a safe community.

It also appears that the Committee had no authority to influence the allocation of resources among justice system components, or to share accountability among its members. Rather, a description of the Committee states that members “remain accountable to their political or executive authorities, and make decisions within the policy and budget parameters determined for their position.”<sup>131</sup>

During consultations, I often heard of the need to break down silos that exist in the justice system. Institutional participants need to work together. This includes discussion of how their various responsibilities and accountabilities relate and how their budgets may be applied synergistically. Building integration and strategic coordination into the criminal justice system requires consideration of how resources may best be shared among justice system participants. There must also be a frank dialogue among participants as to how their policies affect

each other and how their actions should be held to account by the system as a whole.

Another lesson learned from the Committee is that, in order to achieve systems-level change, a multiparty planning structure must be encouraged to develop integrated plans from a budgetary, policy and accountability perspective. By restricting the accountability of committee members to their existing superiors, and by keeping the scope of their decisions within existing (and independent) policy and budget parameters, it is possible that Committee members were not sufficiently motivated to coordinate their funds and activities.

Finally, this Committee was never considered as the principal means by which senior Ministry leadership would carry on their work in relation to criminal law. In my view, its distance from the central work of senior leaders limited its effectiveness.

### 7.1.2 BC Criminal Justice Executive Committee<sup>132</sup>

The BC Criminal Justice Executive Committee, formerly the Criminal Justice Reform and Operations Committee, was a subset of the executive committees of the ministries of Attorney General, Public Safety and Solicitor General, and Children and Family Development (youth justice).<sup>133</sup> It comprised the deputy attorney general, the deputy solicitor general, and the ADMs responsible for the prosecution service, court services, legal aid, policing, corrections, community safety and crime prevention, youth justice and management services.

Although the Criminal Justice Executive Committee was designed to improve coordination and planning across the criminal justice system, in the end each ministry was responsible for creating its own strategic plan and incorporating all of the various ministry program areas—with each branch responsible for

130 British Columbia, Criminal Justice Reform Secretariat, “Discussion Paper: Priority Setting in the Provincial Community Safety Steering Committee” (21 January 2008), at p. 7.

131 Provincial Community Safety Steering Committee, “Terms of Reference and Mandate” (October 2009), at p. 1.

132 The current executive committee of the merged Ministry responsible for the criminal justice system is called the Justice Reform Council.

133 British Columbia Ministry of Finance, Internal Audit & Advisory Services, *Review of the Provincial Justice System in British Columbia* (September 2011), at p. 2, online: British Columbia Ministry of Justice <[www.ag.gov.bc.ca/public/JusticeSystemReview.pdf](http://www.ag.gov.bc.ca/public/JusticeSystemReview.pdf)>.



identifying its own strategic priorities and performance targets. The Internal Audit and Advisory Service of the BC Ministry of Finance reports that:

It is unclear whether decisions made by the Criminal Justice Executive Committee ... consider system-wide impacts. Steps should be taken to ensure clearer direction and accountability for strategic results are communicated across ministries and that an overarching, comprehensive strategic plan for the justice system is developed and implemented....

There is no clear accountability for justice system-wide results in one place as each branch has their own accountability "framework" resulting in fragmentation.<sup>134</sup>

Although the creation of the new Ministry of Justice now facilitates the development of a strategic plan for the criminal justice system with integrated performance targets, the Ministry Service Plan for 2012/13 to 2013/14 has not yet achieved this goal. The performance targets remain largely focused on individual branches.<sup>135</sup>

To obtain systemic change, it is necessary to set system-wide performance targets and then ensure that both monitoring and evaluation are rigorously carried out. Performance in relation to the targets needs to be discussed collectively and publicly.

In the course of the consultation process it quickly became apparent that there is both a recognized need and a desire for a more strategic and coordinated approach to criminal justice and public safety in British Columbia. I also held focused consultations with senior leaders within the Ministry to explore how best to respond to this expectation for improved performance.

In summary, a strategic and coordinated approach to delivering criminal justice and public safety will require understanding the criminal justice system as a system; developing a strategic vision; setting priorities and responding to trends; coordinating resources; basing decisions on comprehensive, accurate and transparent data; regular reporting on performance back to local offices, and even down to the individual level; and regularly evaluating and reporting to the public. Past experiences teach us that in order to succeed, a broad range of government and non-government participants (including the judiciary) should be included in developing a strategic plan. The strategy ought to involve systemic rather than incremental change. Close linkages to local and issue-specific expertise must be fostered, and reform initiatives must be reported on and evaluated from a systems-wide perspective.

## 7.2 CONSULTATIONS

The general themes in the consultations concerning overall planning and direction included the following:

- There is no overall plan for the criminal justice system;
- The criminal justice system is highly complex and includes many stakeholders, participants, service providers and an interested public;
- The institutional and constitutional independence of the investigative, prosecutorial, judicial and defence participants in the system make coordination and collaboration challenging;
- Different professional cultures reward and value behaviours differently;
- While there are a number of informal cross-sectoral committees and working groups, these are not central to the work of any participants, and despite a great deal of goodwill, their inability to overcome perennial silo thinking creates a general sense of frustration.

<sup>134</sup> British Columbia Ministry of Finance, Internal Audit & Advisory Services, *Review of the Provincial Justice System in British Columbia* (September 2011), p. 2, online: British Columbia Ministry of Justice <[www.ag.gov.bc.ca/public/JusticeSystemReview.pdf](http://www.ag.gov.bc.ca/public/JusticeSystemReview.pdf)>.

<sup>135</sup> British Columbia Ministry of Justice, *2012/13 – 2014/15 Service Plan* (February 2012), online: British Columbia Ministry of Finance, <<http://www.bcbudget.gov.bc.ca/2012/sp/pdf/ministry/jag.pdf>>.

A number of submissions and people in the course of consultations suggested that there was a need for an overall plan for the criminal justice system in British Columbia.<sup>136</sup> This was observed by members of the public, independent observers, expert consultants, police representatives and prosecutors. For example, the BC Civil Liberties Association noted:

The Canadian criminal justice system is a complex machine, requiring the participation and co-operation of a vast array of actors, including the provincial government, the judiciary, the legal bar and the staff who administer its operations. In BC, that machine is showing signs of malfunction.<sup>137</sup>

Business people understand the need for an organization to have an overall plan. This was reflected in the submission made by the Vancouver Board of Trade that “virtually all organizations ... can derive benefit from identifying and pursuing a strong central vision.” Doing so “creates a common focus for all involved” and “helps ensure operational transparency, accountability and that the individual parts and/or people in a system are contributing to a desired common end.”<sup>138</sup>

The BCACP has recommended that a Provincial Crime Reduction Initiative be created, to commence in 2013, with province-wide goals, metrics and targets.<sup>139</sup> During consultations police officers expressed the hope that an overall plan would be put in place that would permit an alignment of goals in the public interest, without sacrificing necessary and important institutional independence.

A number of submissions commented on the need for better coordination and collaboration within the system.

This was also identified as a need in the *Green Paper*.

Some of the suggestions for improvement imply the existence of an overall plan. Thus, for example, the suggestion that public goals for the reduction of crime be established and publicly reported across the province implies that system-wide information gathering and reporting exists alongside system-wide goals.

Two broad consultation tables were held to discuss what structures might be put in place to achieve better overall system planning and execution. One was a full-day session with all the senior ministry officials, the other a consultation table including input from the CBA, the Trial Lawyers Association, LSS and Ministry officials.

A number of people urged the creation of a central body that would have influence over the rational allocation of resources within the entire justice system. This would include non-governmental providers such as the John Howard Society and others who are crucial to providing community assistance to victims and offenders.

There are some who debated whether the criminal justice system should operate as a system at all. In this view, the aggregate effect of properly running components would achieve the ends of justice for British Columbians. The system participants cannot be members of a “team,” for the obvious reason that they are independent and their roles are not lived out in concert with one another.

I have already stated my reasons for concluding that this approach is unlikely to result in a well-performing system of criminal justice. Any reform program, however, must recognize that a significant number of independent professionals operating within it will have to be persuaded that changing their approach is consistent with their service as professionals, and with the values they hold.

136 While the Ministry Service Plan does state some broad goals, it does not reflect a system-wide plan in material respects.

137 British Columbia Civil Liberties Association, *Justice Denied: The causes of BC's criminal justice system crisis* (2012), at p. 9., online: British Columbia Civil Liberties Association <<http://bccla.org/wp-content/uploads/2012/05/20120401-Justice-Denied-report1.pdf>>.

138 Submission to the BC Justice Reform Initiative of the Vancouver Board of Trade, Wendy Lisogar-Cocchia (Chair) (12 June 2012), p. 2 [unpublished].

139 BC Association of Chiefs of Police, Resolution 21 June 2012. See: [Schedule 7](#).

I would summarize the professional hesitancy I heard during consultations around systems thinking as follows:

- Systems thinking is bound to sacrifice individual interests to collective goals and purposes; and
- Systems thinking is inapplicable to those engaged in criminal law who are duty-bound to act independently in discharging their roles, and in many respects their duties legitimately run against a governmental desire to achieve social compliance and efficiency.

I also heard a variety of views about resources:

- As a core function of democratic government, a criminal justice system should receive whatever reasonable resources are needed to operate a fair and just system; and
- The aggregate costs of the system of justice are a product of factors beyond any reasonable control.

Efforts to achieve efficiency and cost reduction can at least potentially undermine core justice values such as the presumption of innocence, the right of disclosure, the right to require the state to prove the case against an accused beyond reasonable doubt, and the right to a free and independent judiciary.

Similarly, most people trained as lawyers view workload as determined by the general level of crime in the community. Timeliness is a product of capacity within the system and the requirements of the standards of process, and very little can be done about these inputs other than working even harder than already expected, or achieving greater resources from treasury.

During the many consultations I held, no commonly held vision for the justice system emerged. It became apparent that many groups operate as if independent of each other. Without an overall strategy to guide and coordinate system participants, there was also no overarching approach to reconciling policy among the various groups to ensure that they always acted towards a common outcome.

One topic on which police had strong opinions was that priorities vary as between justice participants. At present, priorities are established within each institutional sector. Although there are efforts to communicate those priorities to other participants, it is generally acknowledged that there is little reconciliation of those priorities across the system.

As situations change and emerging demographic, ethnic, economic and other trends occur, priorities and needs within the system are expected to change. Therefore, the system must also be managed in a way that is dynamic and can respond to those changing priorities and needs. As the LSS notes, responsiveness will require justice system participants to communicate and work together as part of a “larger discussion...about the importance of an affordable, accessible justice system, and what it might look like in a changing society.”<sup>140</sup>

The establishment of priorities must also, of course, be conducted in light of the priorities that emerge from the overall plan for the criminal justice system. Finally, prioritization of cases for disposition is itself a process that may require developing a common approach for responding to the forensic risk associated with certain cases—such as child witnesses and domestic violence cases—and system priorities for particular types of offences; for example, responses to an increase in home invasions. Despite the existence of some exceptions and stated policies, the general culture remains one of chronological priority and equality between cases. As one prosecutor observed: “Who is to say that the other charge is less important than this one?”

## 7.3 ANALYSIS AND RECOMMENDATIONS

### 7.3.1 Reconciling Criminal Justice Goals with Systems Thinking

Systems thinking and improvements based on business process models are met with resistance from justice professionals largely because they

140 Legal Services Society, “Making Justice Work : Improving Access and Outcomes for British Columbians,” *Report to the Minister of Justice and Attorney General The Honourable Shirley Bond* (1 July 2012), [unpublished] at p.11.

are perceived as flowing strictly from cost-saving concerns. Most justice professionals entered the justice field because they thought they could serve the community by pursuing justice goals. But few have any background in management or administration. Reconciling the very different cultures of modern management and justice is a real challenge.

Another challenge is that even when both business managers and justice professionals are addressing processes, they speak in quite different languages. In various consultations it was reported that justice professionals were uncomfortable with assuming or exercising managerial authority, defining targets, developing strategies to achieve targets, engaging in discussions that required significant change, and accepting data that contradicted what people within the system considered true. It is also true that justice culture has a long history of valuing subject-matter expertise over measurement and testing.

Though adapting managerial insights to the justice setting is challenging, there are clear signs of progress, with a growing recognition that the business process approach does not seek to substitute business values for core justice system values. Rather it is a question of using insights into how processes can be fundamentally reformed in order to focus on those core values while eliminating unnecessary elements. So, during the course of this review, the Provincial Court independently retained a business process consulting firm to review its criminal process issues. Similarly, senior justice officials have been actively seeking to apply business process methodology to the Ministry on a priority basis.

### 7.3.1.1 Justice Goals

There is a growing recognition that systems thinking can assist in advancing justice goals apart from questions of costs and efficiencies. Lawyers in particular are coming to appreciate more fully the impact of systematic dysfunction on the justice values we cherish. A number of the proposals advanced to the review stem from a systems approach but are aimed at achieving justice goals rather than cost savings or efficiencies. These include:

- Systematic reforms to permit speedy and predictable trial dates;
- Proposals to change the priority for hearing cases from the largely chronological to establishing priorities based on the particulars of the case, including the impact of time on the evidence, the victim's needs, the type of witnesses and the characteristics of the offender;
- Seeking a new role for victims within the system through restorative justice approaches that become engaged when victims voluntarily seek to assist in the offender being accountable while at the same time having hope of restoration to the community;
- Early, principled resolutions, including increasing opportunities for diversion and alternative measures where appropriate; and
- Better engagement with the particular problems of the mentally ill and those addicted to substances, as well as other medical and social conditions that would benefit from special expertise.

I am satisfied that there is a growing appreciation for the processes of applying modern management techniques and systems thinking in the justice system, and that the challenge is now to consistently implement these approaches system-wide. I believe that they will, when consistently applied, accrue benefits to both the justice goals and the financial accountability of the system.

### 7.3.1.2 Achieving Outcomes

Police forces in British Columbia have for some time been aggressively seeking to reduce the incidence of crime through proactive policing strategies. That approach has been particularly successful with property crime and with the general level of crime committed by prolific offenders.

As already discussed, corrections policy has been very successfully using objective data and experience to identify the risks of re-offending and to reduce recidivism through various supports to offenders.

Youth justice is an area of notable success. Levels of youth crime declined by over 50% over the past

two decades.<sup>141</sup> This coincides with the federal *Young Offenders Act* in 1994, with its reframing of the approach to young offenders. Other significant impacts have been the transfer of responsibility of youth justice to the Ministry of Children and Family Development (MCFD) in 1995 and the increasing use of police diversion rather than relying on the formal justice system to respond to all criminal acts. Underlying this success story is the success of interventions in the lives of young offenders. Not only have these interventions improved public safety, they have also helped youth at risk lead crime-free lives.

As already noted, the IRP program is another recent initiative that has achieved dramatic improvements in improving outcomes. That program has

- Reduced driving fatalities by 40%;
- Improved police investigative efficiencies dramatically; and
- Reduced the overall level of drinking and driving in the province.

Taken together, these and other successes, support the following conclusions:

- Behaviour can be changed through proactive and modern programs.
- Offenders can be successfully helped to lead crime-free lives.
- Immediate sanctions are far more effective than delayed and unpredictable sanctions.
- Problem-solving benefits from informed expertise.

### 7.3.1.3 Reconciling Justice and Outcome Goals

Criminal law jurisprudence has always recognized the need for courts to have regard for broad social trends in the execution of their work, and in particular in determining fit and appropriate sentences. The sentencing part of the Criminal Code articulates the purpose of sentencing as being “to contribute ... to respect for the law and to a just, peaceful and safe society.”<sup>142</sup> This

articulation of the purpose of the criminal law and sentencing makes it clear that we have to be concerned about both justice and safety goals.

### 7.3.1.4 Timeliness

Finally, in the course of the consultations all the prosecutors, defence lawyers and judges expressed frustration and a strong determination to change the culture that has already been discussed. Many commented on how much more professionally rewarding it was to be defence counsel or prosecutor or a judge when early and certain trial dates were the rule rather than the exception.

It was also recognized in the consultations that a strong case can be made that fundamental justice goals are imperilled by delay and complexity. In particular:

- Many of the very large criminal prosecutions over the past decade have at one time or another been at risk of collapse;
- Approximately 15% of cases set for trial are stayed on the first day of trial, and many of these stays are the product of delay making the case unprovable;
- Approximately 40% of the cases set for trial have a guilty plea entered on the first day of trial, with the result that the accused is not being held accountable during the interval and has been unable to access programs which might influence or help the underlying conditions contributing to his or her criminal behaviour; and
- Public confidence is undermined when victims and witnesses, including interested members of the community, have to participate or watch as many cases come to resolution far too slowly.

In short, the widely perceived conflict between justice and efficiency goals is not based in reason or sound analysis. The real experience of the system is that both must be pursued in order for each to be realised: they are, in practice, interdependent.

141 See discussion in Section 3.3 of this report.

142 *Criminal Code* RSC 1985, c C-46, s 178.

### 7.3.2 Factors Related to Success

Before turning to the mandate and related recommendations concerning the Council, it is worthwhile to summarize some of the elements that I believe are critical for success.

#### 7.3.2.1 Collaboration and Coordination

There is an important difference between coordination and collaboration. Collaboration includes involving other sectors in the development and framing of one's own services and initiatives. It has been said that coordination without collaboration can easily become merely conversation. Most importantly, a system-wide approach will not be truly excellent unless it also includes collaboration around the establishment of goals, performance measures and other means to support the system's overall performance.

The degree of management that is both needed and appropriate on a system-wide basis is a difficult public administration question.

The recent merger of the two principal justice ministries into one Ministry of Justice with two deputy ministers introduces a new reality that should facilitate both coordination and collaboration. How this new ministry manages its relationship with stakeholders such as other ministries, municipally funded police forces and non-governmental organizations is an important topic deserving careful attention.

#### 7.3.2.2 Expertise

The public expects professional expertise. Any new organization must encourage taking advantage of the increase in legal specialization of the last 30 years. Using expert and specialized prosecutors, judges and defence counsel is an important consideration in any future plan aimed at achieving better outcomes.

#### 7.3.2.3 Institutional Reform

As noted, we already have several highly expert and well-developed institutions. Reforms to align their

planning, priorities, management and cultures must be complementary to the goals of the overall justice system and must accompany any general reform. The recommendations for some complementary institutional reforms are discussed and set out below.

#### 7.3.2.4 Comprehensive, Accurate and Transparent Use of Data

In order to properly assess trends, set priorities and allocate resources in a strategic and coordinated manner, management decisions for the justice system must be evidence-based. Managers of the system, as well as participants, need to have a solid foundation of factual knowledge to inform their decisions—moving beyond reliance on anecdotal or subjective observation. The data must be comprehensive, objective and accurate. The data must also be accessible to those both inside and outside the system, and it should be presented in an impartial manner.

In British Columbia, the collection of criminal justice system data is in fairly good shape. The Court Services Branch has developed a number of performance measures, such as court results, timelines and revenue targets on which it collects data.<sup>143</sup> The *Green Paper* similarly notes that “significant information has already been made available regarding the work of the courts” and pledges the further release of “substantial amounts of new justice system data” into 2013.<sup>144</sup> The Ministry has also made available to the review considerable information concerning criminal justice system trends (available at <http://www.bcjusticereform.ca>).

However, there is still much room for improving the way in which data is collected, presented and shared across our criminal justice system. As Yvon Dandurand notes, Canada, like England and other countries, may collect a great deal of performance information. However, most of it focuses on the performance of individual agencies, and not of

143 British Columbia Ministry of Finance, Internal Audit & Advisory Services *Review of the Provincial Justice System in British Columbia* (September 2011), at p. 23, online: British Columbia Ministry of Justice <[www.ag.gov.bc.ca/public/JusticeSystemReview.pdf](http://www.ag.gov.bc.ca/public/JusticeSystemReview.pdf)>.

144 British Columbia Ministry of Justice and Attorney General, *Modernizing British Columbia's Justice System: Green Paper* (February 2012), at p. 18, online: Ministry of Justice <[www.ag.gov.bc.ca/public/JusticeSystemReviewGreenPaper.pdf](http://www.ag.gov.bc.ca/public/JusticeSystemReviewGreenPaper.pdf)>.



the system as a whole.<sup>145</sup> While data on individual agencies is useful, it may not be sufficient to inform system-wide strategic planning and coordination.

Some justice system participants are suspicious of data presented by others. In consultations, submissions and statements made to the media during this review, there were often disagreements as to what the data showed regarding important aspects of the criminal justice system. Internally generated statistics were disregarded by some as partial, and in many cases not all participants had the same access to data. Without agreement on the basic information required to make management decisions or to assess proposals for change, it is not surprising that existing decisions are criticized and initiatives fail to succeed.

A strategic and coordinated approach to the criminal justice system can only succeed if it proceeds on the basis of comprehensive, accurate and transparent data that is accepted as impartial by all participants to the system. The culture needs to be one where information about the performance of the system is routinely provided to staff and stakeholders, and the questioning and discussion of the data is encouraged. This will not only facilitate an understanding of the data but will ultimately bring operational improvements. There should also be a forum that facilitates coordinated data collection, and discussions on the evaluation of the less tangible performance measures that do not readily lend themselves to statistical presentation.

### 7.3.3 Criminal Justice and Public Safety Council

From the review of similar and previous initiatives seeking system-wide influence, I would draw the following conclusions:

- A body needs to be responsible for establishing an overall plan, obtaining resources for that plan, monitoring and reporting on progress to the public, and managing the efforts between justice participants and non-governmental organizations.

- This organization must be a part of the Ministry and the central body through which senior Ministry leadership carry out their work.
- To be effective, this body must have strong influence over the resources which flow to justice participants, and it must be able to reallocate resources that are added to the system, or which are made available through savings resulting from efficiencies or improvements in productivity.
- The organization needs to have an ongoing institutional life and an external profile such that the public understands there is a governmental body responsible for providing continuity, planning and accountability.
- To be effective, the organization must have effective and collaborative relationships with those parts of the system which lie outside the executive branch of government, chiefly the courts and non-governmental organizations.

In the pages that follow, I set out what the Council might look like, how it would operate and what topics it might focus on.

### 7.3.4 Membership

Initially I considered recommending a council with membership beyond the Ministry of Justice, including other key stakeholders such as the judiciary, police, LSS and the Bar, as well as members of the public and the academic community. In the end, however, I am of the view that the Council must remain within government. It must be the central body through which senior ministry leadership carry out their work, that is, the Ministry Executive Committee.

In reaching this decision I concluded that it would not be sufficient to create an advisory body to government, no matter how influential such a body might be. At the heart of this challenge is the need to take a different approach to the management of the criminal justice system, one where the requirements of the system take priority

145 Yvon Dandurand, *Addressing Inefficiencies in the Criminal Justice Process: A Preliminary Review* (June 2009), at p. 44, online: International Centre for Criminal Law Reform and Criminal Justice Policy <[www.icclr.law.ubc.ca/files/2009/InefficienciesPreliminaryReport.pdf](http://www.icclr.law.ubc.ca/files/2009/InefficienciesPreliminaryReport.pdf)>.

over the interests of the individual sectors. I was also influenced by the need for this body to have budget responsibility in order to direct resources to areas of strategic priority for the system.

I have therefore concluded that the Justice Reform Council should be reformed and given an expanded mandate, role and profile. The new Council, which I call the Criminal Justice and Public Safety Council, should consist of the two Deputy Ministers and all of the ADMs with responsibility for the criminal justice system, as is currently the case for the Justice Reform Council, which includes the person responsible for youth justice in MCFD. However, this structure is not only to be responsible for justice system reform; it will also be responsible for the management of the entire criminal justice system (or the parts of it within the purview of the provincial government) through system-level strategic planning and coordination.

I am aware that this may be seen as a continuation of an existing approach that has not proven successful, and is thus itself not likely to succeed. Nonetheless, if the thoughtful leaders in the Ministry turn their minds to creating a structure which requires coordination and a systemic approach, and create disincentives for operating in silos, they will be able to move to a fully integrated approach to management.

Without prejudging the strategies that might be found helpful, changes to budget policies that enforce a strategic approach to the implementation of strategic objectives, as well as job descriptions and performance agreements that prioritize systemic goals over operational goals, might all prove helpful.

This proposal will require effective collaboration and commitment from all participants in the justice system. Groups must be willing to communicate with each other and to overcome institutional isolation that currently exists. Change will not come easily, but in my view such a systemic approach is necessary to support transformative change.

The prosecution will of course need continued respect for decisions made within their core discretion.<sup>146</sup> However, if an overall plan is going to be developed by the Council, a more flexible and less distant relationship needs to be developed.

### 7.3.5 Relationship With the Judiciary

In my view it would not be appropriate to have the judiciary as members of the Council, because it should have management and budget responsibility for the justice system. However, their active involvement is critical to effective and coordinated reform of the justice system. Later, in [Section 7.3.14](#) I recommend the statutory establishment of a formal Justice Summit to bring together justice participants, including the Chief Justices, Chief Judge and the senior executive of the Ministry of Justice. In my view this Summit will be a vital part of effective reform and should be prepared to meet on a frequent basis to ensure collaboration among justice participants.

### 7.3.6 Overall Mandate – the Development of a Criminal Justice and Public Safety Plan

The Council's overarching mandate would be to establish, oversee and report on a Criminal Justice and Public Safety Plan for the Province of British Columbia. In order to carry out this mandate, Council will have to bring together all the necessary inputs for a province-wide plan, establish the means by which execution by the institutions responsible for direct operations can be reviewed, and apply and report on performance measures appropriate to the system as a whole.

In my view this objective has three subcomponents: articulating a strategic vision for the criminal justice system; establishing a systems-level plan to implement that vision; and measuring the performance of the justice system (including new initiatives) while reporting on those measures to the public.

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<sup>146</sup> See: M. Joyce DeWitt-Van Oosten, then Deputy Director, Prosecution Support, Criminal Appeals and Special Prosecutions, Criminal Justice Branch British Columbia, "Balancing Independence with Accountability: A Legal Framework for the exercise of Prosecutorial Discretion in British Columbia (Revised and Updated July 2011) [unpublished].



Transformative change requires systems-level thinking and not simply incremental change effected within the separate institutions of the justice system. As discussed earlier in this report, experience tells us that institutions implementing initiatives on their own simply have not been successful in bringing change to the justice system as a whole. In his report on inefficiencies in the criminal justice system, Yvon Dandurand notes:

Few of the efficiency improvement initiatives considered so far seem to have had a sustained impact on the system. This seems to have led many to conclude that the only truly successful initiatives to improve efficiency of the criminal justice process will be those which adopt a comprehensive and integrated approach to performance enhancement.<sup>147</sup>

An overarching vision is needed for the justice system, and it must be a vision to which participants and senior managers within government can subscribe. In this regard, what was particularly encouraging during the course of consultations is that it is not only participants who thirst for meaningful and systemic changes to the system. The provincial government appears to also be willing to consider systemic change. In fact, the *Green Paper* states that my review should “not be designed to deliver short term answers on how to fix immediate challenges in the system,” but should rather “be focused on what structural or institutional changes should be made to enable the system to work together and make improvements, in ways that are constitutionally appropriate.”<sup>148</sup>

In my view, the Council should be tasked with establishing the plan for the justice system. To have credibility, this strategic plan must be seen as the product of a process that has included consultation

throughout the sector, with the judiciary and all the key stakeholders. It must align performance measures with goals that professionals within the system embrace as important to both justice and effectiveness, and it must assure the public that it will report both where it succeeds and where it falls short.

### 7.3.7 Establishing a Province-Wide Implementation Plan

The second objective of the Council would be to establish a systems-level implementation plan based on broad input from justice system participants. Such an implementation plan would be directed at achieving the overall vision for the justice system. Establishing an implementation plan will require tackling several issues, including

- Focusing on meaningful outcomes rather than processes;
- Building on participants’ understanding of the interrelationships they have with each other to better recognize the justice system as a system and to coordinate their efforts;
- Establishing long-term linkages for communication and information sharing among participants;
- Identifying resources that can be shared among participants to maximize value;
- Clarifying the responsibilities and expectations of each justice system participant group regarding implementation at the local or institutional levels;
- Building and analysing the data necessary to support solid decision-making; and
- Identifying short-term and long-term goals and performance measures to be used in evaluating the justice system.

### 7.3.8 Timeliness

I have talked earlier about the critical role of timeliness in a well-functioning justice system. A comprehensive view of the justice system must

147 Yvon Dandurand, *Addressing Inefficiencies in the Criminal Justice Process: A Preliminary Review* (June 2009), at p. 46, online: International Centre for Criminal Law Reform and Criminal Justice Policy <[www.icclr.law.ubc.ca/files/2009/InefficienciesPreliminaryReport.pdf](http://www.icclr.law.ubc.ca/files/2009/InefficienciesPreliminaryReport.pdf)>.

148 British Columbia Minister of Justice and Attorney General, *Modernizing British Columbia’s Justice System: Green Paper* (February 2012), at p. 20, online: British Columbia Ministry of Justice <[www.ag.gov.bc.ca/public/JusticeSystemReviewGreenPaper.pdf](http://www.ag.gov.bc.ca/public/JusticeSystemReviewGreenPaper.pdf)>.

start with the criminal event. At that time the victim will begin to form his or her expectations of the system. It is from that date that victims consider the system to have taken over the investigation and management of the case.

This is also the first opportunity for reported events to be directed away from the criminal system. While a sound system will encourage the principled early diversion of cases, it should also monitor what is not being included within the system.

A systematic approach to the criminal justice system requires looking at the question of timeliness from an overall perspective. That is the perspective of a victim and the community, and is what matters to them as well as to offenders. Indeed, the maxim “justice delayed is justice denied” does not discriminate between delays at different stages. So timeliness must be measured from the time of the complaint or the report until the matter is resolved, whether through diversion, guilty plea, stay, conviction or appeal.

Making ourselves accountable for timeliness from the outset (the reporting of a potentially criminal event) raises a number of challenges: What are the right performance measures for different cohorts of cases? How should the results be gathered and reported? And how can the participants work together to minimise overall delays? Indeed, the existence of delay in one part of the system may be cause for a subsequent process to grant priority to enhance overall timeliness. It is important that the definitions of what is being measured align with the performance that is being pursued.

Despite these challenges, changing the way we view timeliness is a good place to start in re-framing the system and encouraging system-wide performance and excellence.

### 7.3.9 Evaluating and Reporting on Justice System Performance

As previous attempts to reform the justice system have shown, meaningful progress rarely

occurs without regular monitoring and evaluation of reform initiatives. As noted by Yvon Dandurand:

.... most attempts to influence the behaviour of the participants [in the criminal justice system] and to introduce procedural refinements and to increase the performance of the system are going to be largely futile, unless they are accompanied by an ability to monitor the performance of the system and its many components and assess the impact of reforms.<sup>149</sup>

The key to Mr. Dandurand’s observations is that there must be some ability to monitor the performance “of the system and its many components.” That is, when implementing system level changes, it is not sufficient to monitor the progress made by initiatives within individual institutions. System-level evaluation is critical and should be conducted routinely. In order to ensure the success of ongoing reform initiatives, evaluation results must be examined in light of their contribution to the desired outcomes of the justice system as a whole.

An equally important task is the public reporting of system-level evaluations of the justice system and ongoing reform initiatives. Rarely are projects initiated in perfect form from the outset. Evaluations fed back to justice system participants are necessary to allow for responsiveness and improvements to ongoing initiatives, and to better ensure that they achieve desired outcomes.

An important role of the Council would therefore be to oversee the evaluation of justice system performance (including the performance of reform initiatives) and to report its evaluations to participants and the public. Not only would open and transparent evaluations and reporting assist in building a common understanding of justice system goals, it would also improve the public’s

149 Yvon Dandurand, *Addressing Inefficiencies in the Criminal Justice Process: A Preliminary Review* (June 2009), at p. 46, online: International Centre for Criminal Law Reform and Criminal Justice Policy <[www.icclr.law.ubc.ca/files/2009/InefficienciesPreliminaryReport.pdf](http://www.icclr.law.ubc.ca/files/2009/InefficienciesPreliminaryReport.pdf)>.

confidence that needs in the justice system are indeed being addressed.

### 7.3.10 Performance Measures and Judicial Independence

I have proposed system-wide performance measures be established, made public, and reported on. Establishing and reporting on carefully considered expectations of the times we expect criminal matters to be resolved is a critical matter of public confidence for all elements of the justice system.

A system-wide timeliness measure, such as the time from report to resolution, takes into consideration the contributions of all participants in the justice system: police and prosecution during the investigative stages, counsel during the pre-trial and trial stages, and judges during pre-trial and trial stages and while completing reserved judgements.

The measurement of a case from offence to resolution will necessarily include phases in a case's progression which are subject to judicial control. As such, applying the performance measure of offence-to-resolution raises the consideration of whether this proposal impacts judicial independence. Any reforms around timeliness must respect the principle that judges must remain free "to render decisions based solely on the requirements of law and justice."<sup>150</sup>

The proposal for system-wide performance measures has different aspects that need separate consideration. The proposal that there be greater transparency around the times that cases take to resolve is a question of transparency and not performance. Similarly, overall system performance measures for resolution of categories of cases do not imply criticism of the treatment of any particular case or the work of any individual judge. Performance measures by other justice participants such as the prosecution service for work performed by them in the court system is also something that does not give rise to judicial independence concerns.

I have recommended that all the justice participants

have consistent performance measures related to timeliness, and that recommendation is intended for the courts as well. I am confident that the courts can develop performance measures that are consistent with a system-wide effort to achieve timeliness, without intruding on institutional or individual judicial independence. I agree that the format of any performance measure settled on by the courts needs to be free of any potential to influence or condition the exercise of judgment according to law.

I understand that the courts have concerns about this recommendation. One concern is that the time required for a particular case—in particular, the time required to deliver a reserved judgment—varies from case to case and judge to judge. Another concern is that British Columbia's courts already deliver timely justice in the majority of cases and it is only exceptional that criminal cases take too long. Concerns have been expressed that performance measures treat the delivery of justice too much like an assembly line. There is also a concern that in difficult cases of substantial complexity, such as those in the Supreme Court and the Court of Appeal, the public may not readily understand the amount of time required to reach resolution, and may therefore have less confidence in the system than they might otherwise have.

In general I believe that the public will have greater confidence in a system that has greater transparency, and that they will understand that there are legitimate differences between cases and that no single rule can be settled that would be just or appropriate in every case. The public will accept there are exceptional cases. I also think that if the public was assured, through transparent standards, that timeliness is one of the goals of everybody, including the judiciary, and that these standards are fair and appropriate, it would have greater confidence in the system.

I note that there are already statutory requirements here and elsewhere for the conduct of certain

150 *Mackin v. New Brunswick (Minister of Finance)*, [2002] 1 SCR 405, at para 37.

hearings within stipulated timelines, and in Ontario and Quebec there are statutory requirements for the delivery of judgment in reserved cases within a stipulated time.<sup>151</sup> The United Kingdom apparently already assesses judicial performance by reference to the time from offence to sentence.

It is my recommendation that the courts themselves develop and make available reports on timeliness; for that purpose I need only be satisfied that performance measures are possible, not what performance measures should be settled on. There are a number of ways those measures could be stated—for example, the recognition that not all cases are alike could be addressed by different timelines for different types of cases.

Massachusetts offers an example of a judicially led development of standard time frames for the disposition of every type of case in trial courts. To account for the individuality of cases, a series of time frames were developed to take into account case types and complexity, creating “objective benchmarks for determining whether cases move along in a timely manner.”<sup>152</sup> According to the Massachusetts Supreme Judicial Court Report, “time standards allow court leaders to study case flow management techniques to enable the disposition of cases within the standards” and the analysis of factors such as staffing, courtroom space and support “identifies ways to eliminate delays and ensure that scheduled court events actually move forward.”<sup>153</sup>

I do not agree that performance measures reduce the justice system to an assembly line. I also do not agree that general performance measures are made impossible by the differences between cases. These concerns need to be addressed in the development of particular measures and in provision for exceptional cases. I do, however, encourage the development of ambitious measures that seek excellence in timeliness and that are understandable to the public as well as consistent with the overall goals set for the system.

To be clear, this recommendation is not intended to address the internal management of the courts or how individual judges may need assistance in meeting measures set by their court as a whole. The recommendation is founded on three conclusions: that the public would benefit from greater transparency regarding timeliness in criminal cases; that the public needs assurance the system as a whole will perform to modern expectations of performance; and that it has a legitimate expectation that all justice participants, including the courts, will contribute appropriately to achieving these goals.

### 7.3.11 Institutional Life

The Council should have a distinctive institutional life and profile. Senior leadership within the Ministry should regard their participation in the Council as critical to the execution of their jobs.

To support the Council in carrying out its mandate, I suggest that there needs to be a body, such as a secretariat, created to support the Council, to carry out consultations with stakeholders, develop a draft criminal justice and safety plan, develop key performance measures, and ensure that data is gathered to monitor and evaluate the implementation of the plan.

A challenge will be to ensure that the views of key stakeholders are fully reflected in any plan and endorsed by the leaders of all of the sectors. One approach would be to staff a secretariat by seconding in staff from the various branches as well as others with particular expertise. However, I am advised that this approach can lead to the secretariat being isolated from the operational priorities of the various branches, and this may result in a lack of acceptance of their recommendations at the executive level.

There are at least two models within the Ministry of inter-branch work which seem to hold promise and might be considered as models for supporting the

151 Quebec *Code of Civil Procedure*, RSQ c C-25, s. 465; Ontario *Courts of Justice Act*, RSO 1990, c. 42, ss. 95(2) and 123 (5).

152 Massachusetts Supreme Judicial Court, “Striving for Excellence in Judicial Administration,” 2002, at p. 5.

153 Massachusetts Supreme Judicial Court, “Striving for Excellence in Judicial Administration,” 2002, at p. 5.

Council. The first is the working group leading the new ICON II project, a system that will in a variety of ways improve the functioning of the justice system. The ICON II project, led by the Corrections Branch, has representation from stakeholders within the Ministry and within government who are on the steering committee and in the project work groups, and who remain in their branches. The members of that working group have worked collectively over more than a decade to promote the development of innovative technology and improve criminal justice processes and public safety, with the full support of their branches.

The other model was the Criminal Justice Reform Secretariat. Although a distinct organization, it was staffed with senior staff who were not seconded away from their branches, but who remained as members of their respective branches while working on agreed reform priorities. I understand that this arrangement worked well, keeping the senior management of the branches connected to, and supportive of, the reform initiatives. It also assisted with the implementation of the initiatives on the ground.

Some other means for enhancing effectiveness of the secretariat would include

- Making good use of business intelligence and the analysis of justice data;
- Locating criminal policy and reform expertise within the secretariat; and
- Ensuring that the secretariat has strong and senior leadership, with representation on the Council.

Questions of public administration tend to attract broad and legitimate disagreement. I have little direct experience or expertise in the area, but I can confidently say that the lessons from the experience we have already referred to support the proposals I have made. It will be critical for the Council to consult broadly with the stakeholders in developing the key performance measures and to have ongoing discussions around managing to achieve those objectives. This will

include other ministries and authorities, such as health authorities, which are particularly important given the large role mental illness and substance abuse plays in certain criminal behaviours.<sup>154</sup>

### 7.3.12 Non-Governmental Organizations

There is a widespread view among non-governmental organizations that the financial discipline required by the current world economic troubles have fallen unevenly on the budgets of organizations outside government.

Put simply, the criminal justice system includes more than the Ministry of Justice. Any systemic analysis must include non-governmental participants. A full and rational plan for the justice system, in order for it to achieve its identified goals, must include providing sufficient resources for community-based resources.

### 7.3.13 Resource Allocation

One of the principal reasons that I have not recommended that non-governmental representatives be placed on the Council is the need, in my view, for a coherent and principled voice on the subject of system-wide resources.

In my view the system needs to put a priority on demonstrating to the central agencies of government that it is utilizing its existing resources fully—that it is performing in a way that is expert, properly managed, and producing outcomes that serve the ultimate public interests in justice and safety. Further, advances in managerial skill and a track record of success will reassure central agencies that investments made in the justice sector will be well-managed and deliver promised results.

I am confident that once this happens, any required resources will be found to fund the system as a whole. Justice is a central and high-profile aspect of government, along with the social licence to operate it, and it should command both respect and necessary resources.

154 For further information, see: Inspector Scott Thompson, Vancouver Police Department, *Policing Vancouver's Mentally Ill: The Disturbing Truth* (September 2010), online: Vancouver Police Department <<http://vancouver.ca/police/assets/pdf/reports-policies/vpd-lost-in-transition-part-2-draft.pdf>>.

### 7.3.14 Recommendations

**Recommendation:** A Criminal Justice and Public Safety Council should be established within the Ministry of Justice and Attorney General.

**Recommendation:** The Criminal Justice and Public Safety Council should include the senior leaders of the Ministry, assisted by a secretariat.

**Recommendation:** The Criminal Justice and Public Safety Council should have responsibility for overall management of the criminal justice system, including preparing, under the direction of the Minister and in consultation with other justice participants, a Criminal Justice and Public Safety Plan for the province. The plan should also include

- A recognition that all of the criminal justice sectors have responsibility for achieving the overall goals of the justice system of both public safety and justice;
- A recognition that timeliness is fundamental to both public safety and justice;
- System-wide performance measures for timeliness based on the interval from the reporting of a complaint until its resolution. Each sector in addition will need to frame targets within this overall framework; and
- The development of performance measures for the justice system as a whole.

**Recommendation:** The Criminal Justice and Public Safety Council should also have responsibility for

- Oversight of multi-sectoral initiatives; and
- Public reporting on criminal justice data and progress reports.

**Recommendation:** A Justice Summit including all levels of court and justice system leaders should be created by statute as a means to facilitate collaboration among all justice participants, to consider progress in the process of reform, and to discuss changes in direction or new initiatives.

#### 7.3.14.1 Secretariat

**Recommendation:** The Criminal Justice and Public Safety Council should be supported by a secretariat to assist in the development of the Criminal Justice and Public Safety Plan, as well as the development of appropriate performance measures and generally carrying out directions of the Criminal Justice and Public Safety Council.

**Recommendation:** The secretariat should include responsibility for criminal justice policy as well as project management expertise to improve the rigour with which projects endorsed by the Criminal Justice and Public Safety Council are implemented.

**Recommendation:** The secretariat should have an advisory board with independent academic or outside expert representation, as well as police, victim and broader public representation.

# 8. THE ROLE OF DATA AND TRANSPARENCY

The province has sustained an ongoing investment in the modernization of records management systems over the last decade. As result, British Columbia enjoys a more unified and common technological and data environment than most other comparable jurisdictions.

From our consultations, the priorities include

- The most effective use of the existing system;
- The cultural changes necessary to bring about an improved approach to data acquisition and management; and
- Changes required to encourage development of an accepted database from which the public may become better informed and which forms a sound foundation for public discourse and policy development.

There is substantial justification for hope in the achievement of improved system performance in the technology platform that has been built over several years. This offers a basis for sound and informed management decisions and accurate reporting of results.

## 8.1 FACTUAL CONTEXT

There are in place at least four major systems for the tracking of information, criminal events, justice processes and outcomes in British Columbia.

### 8.1.1 JUSTIN

JUSTIN forms the backbone of the court process. It records (among other things) police reports to Crown and police scheduling, charges, Crown victim and witness notification, court cases and scheduling,

individual appearances, document production, the duration of particular events, information on accused persons and the output from the system in the form of guilty pleas, verdicts and stay of proceedings.<sup>155</sup> It does not record the outcome of criminal justice process in that it does not connect ultimately to the outcome of the process for victims or offenders beyond recording the disposition.

The benefits of JUSTIN are described by the Ministry of Justice as enhanced public safety, victim support, enhanced scheduling for law enforcement, and timely, accurate and quality information.<sup>156</sup>

While there is some limited public access to JUSTIN for basic court case-related information, access is primarily restricted to specific organizations and agencies which demonstrate an operational need and satisfy the established criteria.<sup>157</sup>

### 8.1.2 CORNET

CORNET performs a similar function to JUSTIN within the mandate of the Corrections Branch. Introduced first as CARE in 1982, then amalgamated with the Prison Records System as PRS in CORNET in the early 1990s, and finally upgraded in February 2005, CORNET 2 focuses upon the people within the mandate of Corrections and thus records the status of all pre-trial and sentenced offenders supervised in jail or by probation officers, including a broad range of data fields such as sentencing details, bail status, location, release conditions and risk assessments. The integration of CORNET and JUSTIN links information on offenders with information on court process.<sup>158</sup>

155 Further information about JUSTIN can be accessed at <<http://www.ag.gov.bc.ca/justin/>>.

156 *Benefits of JUSTIN*, online: British Columbia Ministry of Justice <<http://www.ag.gov.bc.ca/justin/benefits.htm>>.

157 *Requesting Access to JUSTIN*, online: British Columbia Ministry of Justice <<http://www.ag.gov.bc.ca/justin/request-access.htm>>.

158 Office of the Auditor General of British Columbia, *Managing Access to the Corrections Case Management System* (March 2008), at p. 17, online: Office of the Auditor General of British Columbia <<http://www.bcauditor.com/files/publications/2008/report8/report/managing-access-corrections-case-management-system.pdf>>.



### 8.1.3 PRIME

Police Records Information Management Environment (PRIME) is the core of the records system for all British Columbia police agencies. PRIME's basic focus is not on processes or people, but on criminal incidents. British Columbia enjoys the benefit of having one record system for all police agencies and thus has made substantial progress in overcoming the operational limitations and gaps of multiple police data systems. PRIME records founded instances of crime reported to police, information on suspects, victims, locations, times and persons of interest, and includes categories of offence. This information may well be supplemented by CAD (computer aided dispatch) systems, which record police responses to calls for service by type, duration and range of other variables.

### 8.1.4 CMS

Case Management System (CMS) is a system maintained by LSS. It records legal aid data such as requests for legal aid, referrals to lawyers and costs by tariff category. It permits the forecasting of demand for legal aid services based upon a multi-year averaging algorithm and has facilitated the matching of resources to services.

### 8.1.5 New Systems

Integrated Corrections Operations Network (ICON) was introduced in 2007 as a new project to provide business intelligence analytic reporting. It was developed by Corrections but has provided the broader justice sector with the ability to develop better business intelligence.

Phase II of ICON will enable "persons awaiting trial in custody to have reasonable access to their confidential electronic evidence (eDisclosure). Additionally, it will provide both custody and community offenders with access to aspects of their personal data. When complete, [it] will ensure the confidentiality of sensitive legal information,

protect the rights of accused persons in custody, and streamline internal processes."<sup>159</sup> It is intended that ICON will ultimately be made available to other justice participants and, in particular, the Court Services Branch for court process analysis and potentially other justice participants.

#### 8.1.5.1 Business Intelligence

An enhanced ability to use the data from the case management systems for business intelligence purposes is growing. Business intelligence analysis is intended to better inform decision-making through well-thought-out data analysis. It is fair to say that the ability to analyze and assess patterns within justice data is in its early stages of development. Similarly, linking the aggregate patterns between the major data repositories is still in its early stages. However, the recent creation of a business intelligence group within the Ministry of Justice, and a director of business intelligence, is an important step towards institutionalizing the role of business intelligence in the criminal justice system.

#### 8.1.5.2 Business Process Re-engineering

Business process system analysis is generally aimed at eliminating unnecessary or unhelpful processes and realigning resources, the better to meet both demand and reasonable approaches to operations.

As discussed elsewhere, the province has mandated the application of business process system analysis across provincial government services. In the course of consultations, I met and reviewed similar projects, offered by Deloitte LLP and KPMG LLP, which have been successfully implemented in various justice settings.

The application of business process thinking to eliminate unnecessary or unhelpful processes has to date been used by the Provincial Court to review its process and scheduling system, and it offers great promise there and elsewhere.

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159 British Columbia Ministry of Justice, *2012/13 – 2014/15 Service Plan* (February 2012), at p. 28, online: British Columbia Ministry of Finance <[www.bcbudget.gov.bc.ca/2012/sp/pdf/ministry/jag.pdf](http://www.bcbudget.gov.bc.ca/2012/sp/pdf/ministry/jag.pdf)>.



I further understand that some municipal police forces, in order to achieve greater efficiency and effectiveness, have received the authority to retain business process system advisors to analyze their processes.

## 8.2 POLICY CONTEXT

The principal challenges remaining for the best use of the new information and business systems in place are cultural and organizational.

There is a general cultural resistance to the use of these approaches—particularly those aspects peopled and managed by lawyers. The cultural preference for the anecdotal views of working professionals over data, the tendency of professional and institutional independence to isolate decision-makers, and the general suspicion attached to information distributed respecting governmental operations are all added to the general challenges of measuring the right things, being open to contradiction, and being open to innovation.

### 8.2.1 Cultural Resistance

It is commonly observed that legal systems are resistant to the acquisition and use of data. In no small part, this is due to the professional pride lawyers take in treating each individual case on its own merits. This tension between the generality required of categorization and the needs of the justice system to treat individuals on the merits of their own cases represents a challenging environment for these emerging systems.

We need to acknowledge the natural tendency of lawyers to be distrustful of management, sceptical of systems information and reluctant to accept goals which would impact decision-making. The means must be found to persuade the culture of the right place for these new approaches within a justice system.

One important value that needs to be better reflected within the system is the importance of transparency.

Within the Ministry of Justice, the distribution of business intelligence about core operations and key performance metrics to local offices as well

as management is not standard practice, except within the Corrections Branch, which has been using business intelligence as part of its performance management approach since 2000.

The Corrections experience with the introduction of the regular distribution of management information was that initially staff were suspicious of the data, particularly where there were unfavourable comparisons to be drawn between offices. However, over time, the transparency of the data led to improvements in the entering of data at the office level, since there were public consequences to improper data entry, while the questioning and discussion of the data led to improvements in analysis and presentation of the data as well as greater understanding of the data. These reactions ultimately led to improved performance due to the feedback to individual offices about their performance in relation to standards and the performance of other offices.

It is not routine in other parts of the Ministry to provide significant business intelligence to local offices, nor is information regularly made publicly available in an accessible form.

The Ministry has recently made a principled and significant step in the direction of providing information first through the DataBC site, and now on the Ministry website.

Like all new attempts there will be an element of learning. From the experience of the review with its website and blog, I would offer the observation that what is important is not only what people want to communicate, but also what information people are interested in. Government websites appear most occupied with the former, but they are not as informed by the latter.

It must also be said that the public generally, not just lawyers, are understandably sceptical of government publications in any form that are purely restatements of policy and put facts in the public square to support that policy.

So, for example, the use of performance measures must be linked with accurate and regular reports of results: Ontario's JOT site is an excellent example in this regard.

### 8.2.2 AnecData

During consultations it was very encouraging that one thread of conversation concerned the frequent use in justice system decision-making of data that was in substance anecdote: AnecData. The common information system challenges of knowing whether what is being measured is the correct thing and whether the results can be trusted apply particularly when unexpected results conflict with the strongly held views of participants. All human beings approach the world with the hope and expectation that our views will be confirmed by our experience.<sup>160</sup> Most people experience contradiction as a rude and unpleasant surprise.<sup>161</sup>

One example of such a conflict is the strong belief that a big factor in the increasing workload in the justice system is the perceived increasing length of trials. There is no question that there are some trials which are extremely long, but certainly the data on cases in Provincial Court tells us that only between 1% and 2% of cases actually have a trial, and there are actually fewer trial appearances as a percentage of overall appearance in Provincial Court now than a decade ago.

There is substantial reason to be hopeful in respect of the tension between our own experience and system data. During consultations there were very few who rejected the potential insights offered by modern information technology or suggested that it should not be employed fully. Although there is a long history of scepticism around measurement in the legal world, it can be overcome by improving trust in the information and building on the goodwill and professional desire for excellence. That process will be advanced by regular reporting and openness about the results of the information.

### 8.2.3 Judicial Independence

Particular issues arise respecting the institutional independence of the court and the necessity for its consent to the release of information gathered respecting certain events within the courtroom. This is so even respecting facts that are lived out in the public arena.

Various protocols have been established to identify data that, though contained in JUSTIN and managed by the Court Services Branch, is designated as exclusively for the use of the judiciary, and which requires judicial approval before it can be accessed or disclosed.<sup>162</sup> Specifically, all judicial administrative information and all court record information is expressly within the control of the judiciary.<sup>163</sup> Such data includes

- Scheduling of judges, trials, hearings and ROTA information;
- Content of judicial training programs;
- Statistics of judicial activity;
- Court sitting time that is related to specific judges;
- A record of the Judicial Council of the Provincial Court; and
- Any case delay indices and/or data reports that have been developed by the judiciary.<sup>164</sup>

In practice, the judiciary ultimately approves and controls access to the courts module of JUSTIN (as that module contains court record information).

British Columbia is not alone in its restrictive approach to access to judicial data. I was told by Professor Anthony Doob at the University of Toronto that in order to get access to files of Ontario court data used by Statistics Canada to produce national court data (for example, their regular Juristat reports on courts), permission would have to be given by both the Ministry of the Attorney General and the

160 Daniel Kahneman, *Thinking, Fast and Slow* (New York: Farrar, Straus and Giroux, 2011).

161 Karl Popper's famous definition of science as the testing of falsifiable theories has little currency in legal systems. See Sir Karl Popper, *Conjectures and Refutations: The Growth of Scientific Knowledge* (London: Routledge & Kegan Paul, 1963).

162 *Protocol Agreement Between Court Services Branch, Ministry of Attorney General and Provincial Court Judiciary Related to the Confidentiality of Judicial Data* (March 1999); *Statistical Information Protocol Document* (29 October 2002).

163 *Statistical Information Protocol Document* (29 October 2002).

164 *Protocol Agreement Between Court Services Branch, Ministry of Attorney General and Provincial Court Judiciary Related to the Confidentiality of Judicial Data* (March 1999).

courts. But as far as he was aware, even these “case” files do not contain any information about the actual use of courtrooms (such as how many hours the court was in session). Indeed, in studying bail in Ontario, in order to find out how long courtrooms were used, why cases were adjourned to another day (rather than being held down until later in the day), who asked for an adjournment, and similar kinds of questions, one of Professor Doob’s graduate students had to sit in on court hearings. In other words, on the most mundane “efficiency” questions of all—how many hours a week judges or justices of the peace are in court hearing cases—data did not seem to be available anywhere.

Similar frustrations have been expressed by other academics seeking to better understand criminal justice processes.

This problem becomes all the more daunting when the ultimate goal is improved outcomes for the community, the victim and the offender, since apart from disposition and ultimately recidivism rates in relation to offenders, very little information is gathered about outcomes for either.

### 8.3 CONSULTATIONS

It is fair to say that during the consultations there was general agreement on the need to improve the system’s relationship with modern information and business systems. There was also general agreement on the need for greater and assured transparency in the statement of goals for the system and regular reporting of results.

During consultations the views of a large variety of people and organizations were obtained. Meetings were held with academics from the University of Victoria, Simon Fraser University, the University of the Fraser Valley and the University of Toronto. Meetings were held with business process experts from Deloitte LLP and KPMG LLP. A number of Ministry of Justice

staff made themselves generously available and provided tremendous assistance in gathering data for the review. The Provincial Court made their data available on important questions.

LSS has urged the Ministry to develop more robust metrics to facilitate research on the interrelationship of the savings captured by withholding publicly funded legal services and the consequential costs to other justice and governmental services. It also urged the continuation of the modelling of justice system capacity with SFU’s Complex Systems Modelling Group.<sup>165</sup>

The Representative for Children and Youth has very recently recommended that the Ministry produce an annual aggregate report on the outcomes of criminal prosecutions where a child has been a victim of violence, including cases that are stayed or otherwise terminated prior to trial.<sup>166</sup>

## 8.4 ANALYSIS AND RECOMMENDATIONS

It is clear that progress will not be made unless the analysis and inferences regarding system data are accepted within the criminal justice system and can be reported with credibility to the public. In a highly charged disputatious environment, there is a need for information which is gathered on a basis that is neutral to the interests of the participants and where disclosure is mandatory and regular, with a respected repository for the data and where its reporting is assured.

Part of the variability in information disclosure arises not only from the refining of inquiries over time and the development of research ideas, but also the need to ensure that all of the justice sectors understand and have no reservations about the data before its public release, as well as the natural desire to present information which supports the appearance of progress.

165 Legal Services Society, “Making Justice Work : Improving Access and Outcomes for British Columbians,” *Report to the Minister of Justice and Attorney General The Honourable Shirley Bond* (1 July 2012), [unpublished].

166 Representative of Children and Youth, *The Impact of Criminal Justice Funding Decisions on Children in B.C. Special Report* (March 2012), online: Representative for Children and Youth <<http://www.rcybc.ca/Images/PDFs/Reports/RCY%20Special%20Rpt%20Final%20.pdf>>.

This is particularly true when the reporting of results is the province of those with managerial oversight of the project, program or department.

In order to overcome this shortcoming, some means must be found to provide discipline over the acquisition, management and regular publication of the results.

In my view the lack of regularity in publication of information related to performance is a major cause of the distrust of information about the justice system when it is released. Not only do people inside and outside of the Ministry wonder where the information comes from, they wonder why it wasn't released earlier and what other information might be available that might provide a different perspective.

The best way to create a greater understanding and acceptance of the data is to commit to regular reporting on key justice system data, and thus to facilitate ongoing discussion and questioning of the data. This discussion is vital for stakeholders and others to understand how the data is gathered and what it demonstrates, and at the same time, the discussion can also identify potential problems with the data itself, the analysis of the data or even the presentation of the data.

It has been suggested that to overcome the suspicion with which criminal justice system data is viewed, responsibility for the data needs to be given to a credible external third party. While this idea holds some attraction, in my view it cannot achieve the desired result. The information which underpins business intelligence comes from the actual operations of the system. It is then translated into a form that is suitable for analysis and to support decision-making. However, the necessary ongoing questioning and discussion necessarily involves those who understand

the business and how the data is collected, to inform an understanding of its strengths and limitations.

After careful consideration, I do not think that it is desirable or even possible to simply give over responsibility for data gathering, analysis and reporting to some body independent of the operation of the Ministry. That is not to say that there is no room for getting external expert advice on each of the above elements. But the end goal is to create ministry capacity for credible data management and regular reporting.

However, the collection and distribution of information relevant to corporate performance targets and policy development is critical. It ought to be considered an important branch responsibility along with the production of all information relevant to branch operations.

**Recommendation: The Criminal Justice and Public Safety Council secretariat should be responsible for the acquisition, analysis and reporting of criminal justice data.**

**Recommendation: The secretariat should establish methods to systematically gather data respecting performance measures and other useful data which can be regularly reported on and featured as part of the Criminal Justice and Public Safety Council's annual report.**

**Recommendation: The Ministry should distribute key business intelligence information, related to both the strategic system goals as well as branch-specific goals, to local professionals and staff and encourage discussion and debate on the information.**

# 9. CRIME PREVENTION AND INVESTIGATION

This section discusses crime prevention, reporting and investigation.

lack of co-ordination and collaboration between the police and prosecutors.

## 9.1 CONTEXT

Understanding and maintaining public confidence in the system is largely dependent on two factors: a full understanding of the public's views of potential criminal events and the public's priorities for investigation and response by way of diversion, enforcement or other measures. Providing timely, accessible and credible information to the public so that their expectations are as informed as possible is critical to narrowing the gap between expert and public perceptions of crime. Enhancing the relationship with the public requires that better means be found to both ascertain the views of the public and communicate the system's public interest strategies.

The policy context for criminal investigation is vast, and this Review was not created to include a comprehensive review of policing policy and practice. We focus here on the relationship between criminal investigation and the other participants in the system.

The risk of investigatory independence and prosecutorial independence undermining the functioning of the system (that is, police and prosecutors working independently and potentially at cross-purposes) was recognized some time ago; in part to address this risk the Crown-Police Liaison Committee was created in the mid-1990s. The importance of that relationship and the clear professional respect held by the participants support a focused approach to this area. As a result this Review focuses on the proposal for changes to the charge approval process and concerns over the

## 9.2 CONSULTATIONS

There were a number of submissions from the public that were sceptical about the lowering levels of reported crime. The scepticism was based on perceptions that people were not reporting crime out of a sense that nothing could be done, or their concerns would not be respected, or their lives would be disturbed and possibly made less safe by the making of a complaint.

Most alarming were suggestions that the under-reporting of domestic violence has not declined and that people, out of a fear of the system, fail to report such violence—and as a result continue to suffer in silence. Women's and children's advocates strongly raised concerns that reported domestic violence events in particular must be taken seriously, because of the view that the first report is likely not the first event of abuse.<sup>167</sup> Similarly, concerns were expressed that sexual assault allegations were being deterred by the stresses that the justice system places on complainants.

Defence counsel raised the opposite concern—that there is now substantial over-reporting and that the accused (usually but not always men) faces an inflexible system that fails to distinguish between criminal abuse and less serious events in relationships. A concern was also raised that the current inflexible policy ties the hands of police and prosecutors and burdens the courts with cases that the complainants no longer wish pursued.

Entirely opposing views were offered for the high rates of stays of proceedings in these types

167 For example, See: reports by the Representative for Children and Youth, British Columbia. Available online: <<http://www.rcybc.ca/content/publications/reports.asp>>.

of cases. Women's advocates say that the system trivializes women's complaints and that they recant their complaints because, with the passage of time required for the commencement of trial, pressures on them continue to mount. Others say that complainants in many cases decide freely to remain or return to their partners and that the system in many cases is unhelpfully criminalizing arguments. This view reports that some women are afraid to seek help for troubled relationships out of fear that the system will criminalize the dispute and prevent them from managing the issue without ending the relationship. Another concern raised was the question of regional and cultural differences in under-reporting. In this respect concern was raised that in rural areas, distance and the intimacy of small communities might lead to under-reporting. In respect of First Nations communities, concern was expressed that distrust and misunderstanding of the system might lead to under-reporting.

The policing perspective on the general issues was received from both leadership and members throughout the province. A degree of frustration was expressed by some police officers towards the absence of a common strategy between police and prosecutors towards improving public safety. In my view this general frustration over lack of a shared strategy and goals has led to proposals that police officers be permitted to lay charges without obtaining the approval of prosecutors. In short, the thinking goes, if charges could be laid by police officers then they could at least have a better sense of control up to that point in the process, and they could then leave the resolution of the matters largely to other participants in the system.

The complex structure of policing in the province obviously raises challenges for the development of a coherent overall strategy that successfully incorporates local and regional priorities and concerns. With both municipal and provincial police forces in the province, local culture and priorities must play a dominant role.

The Review received a number of submissions that urged encouragement of the increasing use

of community-based diversion throughout the province, including restorative justice programs. In the general sense diversion includes police-based diversion, both formal and informal, Crown-based diversion, and Court-based diversion attached to the sentencing process.

Two obvious challenges exist for expansion of these approaches. First is the challenge of obtaining referrals from police and prosecutors where there is inadequate understanding of the goals and disciplines relating, for example, to restorative justice. As expressed by the Abbotsford restorative justice and Advocacy Association (ARJAA), it is important that police officers understand that restorative justice only becomes possible when the victim makes an unforced voluntary agreement to participate and that the process is rigorous and effective in both achieving reconciliation and reducing the risk of reoffending in particular cases. As stated during consultations: "We are not the Hug a Thug Society." The Minister's Advisory Council on Aboriginal Women impressed on me that their belief is the criminal justice system remains resistant in general to the effectiveness of these programs in achieving reconciliation and in improving safety in communities. This is largely an educational and culture change project that is well underway and in my opinion needs to be encouraged to be successful. The second challenge is the differential resourcing of these programs. While I was urged by various community organizations that more could be done with existing resources, it is also true that the funding of these programs is very modest and overly depends on volunteers and municipal funding. The concern is that poorly resourced programs may not realize the full potential of these alternative approaches and will then fail to win over other participants to the usefulness of the programs.

A greater degree of province-wide training and quality control, as well as focused reporting and evaluation, is critical to the disciplined development of these approaches.

According to many submissions to the Review, applying restorative justice to more serious cases



represents its most promising future application. In cases involving serious assaults and even more serious criminal events, for example, restorative justice could produce results, not attainable through enforcement or other measures, for both victim and community. However, a broader application of restorative justice to more serious charges would require an even greater change of the culture of police and prosecutors and may well require significant policy development.

### 9.3 ANALYSIS AND RECOMMENDATIONS

It is important that any criminal justice policy for British Columbia include consideration of the question of under-reporting. Similarly, meeting the demands of the public for attention and solutions to their problems requires better means of receiving those concerns and informing people both of the goals being pursued and the information relevant to their particular concern.

The BCACP strongly urged the Review to recommend the development of a Provincial Safety Plan.<sup>168</sup> This seemingly straightforward recommendation clearly springs from a desire to assure the public that there are shared strategies across the province in relation to seeking public safety. There are many other advantages to the preparation and publication of such a plan: making best practices apparent and scalable across the province; seeking areas of joint co-operation that would drive cost savings and efficiencies; and facilitating greater inter-agency co-operation and collaboration around problems that go beyond the local jurisdiction.

**Recommendation: A province-wide crime reduction plan should be developed under the direction of the BC Association of Chiefs of Police in collaboration with the Criminal Justice and Public Safety Council.**

Domestic violence cases raise a number of issues in relation to different aspects of their treatment under the current system. They are discussed in more detail in [Section 16](#), but for present purposes any review of domestic violence, in my opinion, requires a disciplined review of the facts including the question of under-reporting.

Finally, addressing the intake of cases into the system with the best possible framework has implications for public confidence, cost-effectiveness, community safety, victim engagement and positive outcomes for individuals likely to offend. The most effective time and place in the system to consider diversion is at the outset; it saves costs at the very beginning and is clearly the easiest point to achieve timely results. Furthermore, there has never been more evidence showing the potential for rehabilitative and other measures to affect criminal behaviour. Perhaps the best example is our experience with dramatically lowered levels of youth crime. Although diversion has a place throughout the system, it is here that the greatest progress can be made.

#### 9.3.1 Need for More Disciplined Estimates of the Under-Reporting of Crime

The General Social Survey (GSS) is conducted by Statistics Canada every five years. Among a number of questions, the survey asks people whether they have been the victim of a criminal offence in the past year or the past five years, what kind of offence, whether they reported it and if not, why. The information can be analyzed by province and can be provided for the largest metropolitan areas in Canada but not for most municipalities.

In the consultations, police and others said that while the GSS is helpful, in order to properly understand crime trends we need victimization information on an annual basis. The information needs to be broken down by community as well as by province, to permit the development of effective and targeted crime reduction strategies.

168 See [Schedule 7](#).

The GSS also provides information on the reasons people do not report. While there are clearly many situations that are so minor that there is no need to involve the criminal justice system, it is important to understand other reasons that people may not report offences. For example, while young people between ages 15 and 24 are 15 times more likely to have been the victims of a violent offence than people over 65, young people are significantly less likely to report offences than older people, with only 20% of young victims reporting a violent offence compared to almost half of victims aged 55 or more.<sup>169</sup> This may be an indication of a particular problem in public confidence which should be explored.

**Recommendation: Statistics Canada should be asked to increase the frequency of the General Social Survey to better understand trends in self-reported victimization that are particular to British Columbia, and the survey provide information respecting regional and cultural concerns as well as particular offences.**

### 9.3.2 Taking Cases Out of the Justice System – Police Diversion<sup>170</sup>

Although we know that there is a substantial amount of diversion, there is no information about what percentage of cases are diverted by police province-wide, or what people are diverted to. Substantially increased levels of referrals occur when there is confidence the diversion will work, especially if the confidence is based on having experienced positive results through effective working relationships. Understandably this seems to have happened more regularly in smaller communities.

restorative justice advocates also urged the growth of these programs through enhanced education and improved relationships between investigators and providers.

**Recommendation: A province-wide plan for diversion, including restorative justice, should be developed to include education, quality assurance and control, performance measures, reporting, and evaluation.**

169 Statistics Canada, *Criminal Victimization in Canada, 2009* (Summer 2010, Vol 30, No. 2), at p. 10, online: Statistics Canada <<http://www.statcan.gc.ca/pub/85-002-x/2010002/article/11340-eng.pdf>>.

170 The recent 2012 report by the Minnesota Department of Public Safety entitled *Minnesota Juvenile Diversion: A Summary of Statewide Practices and Programming* nicely summarises an approach to planning an effective diversion program. Even though the planning steps are developed in the context of juvenile diversion, they provide a workable framework for more general diversion programs as well. See the full report at: US, Minnesota Department of Public Safety, *Minnesota Juvenile Diversion: A Summary of Statewide Practices and Programming* (June 2012), online: Minnesota Department of Public Safety <[https://dps.mn.gov/divisions/ojp/forms-documents/Documents/Juvenile%20Justice%20Reports/MINNESOTA%20JUV\\_DIV%20REPORT\\_Final.pdf](https://dps.mn.gov/divisions/ojp/forms-documents/Documents/Juvenile%20Justice%20Reports/MINNESOTA%20JUV_DIV%20REPORT_Final.pdf)>.



# 10. EARLY CASE RESOLUTION

Encouraging early principled resolution of criminal cases—the subject of almost every recent commentary on the criminal justice system—has long been a goal of administrators, policy makers and judges. There are two components of this goal: timeliness and principled resolution.

The most significant recent initiative to encourage early resolution in criminal matters was the development and implementation of the CCFM rules in 1999.<sup>171</sup> As discussed in greater detail in the Annex, the central features of the CCFM rules are the development of an arraignment court to encourage early resolution and a trial readiness hearing to increase the likelihood that trials will proceed and not collapse on the first day of hearing. Both were intended to encourage prosecutors and defence to assess their case, and for the accused to have an offer in relation to a sentence that is realistic and attractive compared to the likely sentence after trial. This initiative is widely acknowledged to have failed to produce earlier resolutions and to have perhaps made the system less efficient by adding appearances in every case.

## 10.1 CONTEXT

The majority of all criminal cases in Provincial Court are resolved in just over three months of the first appearance. Only 16% of cases are actually set for trial, and only 4.5% of cases have even a single trial appearance. Of that appearance, 30% of the 4.5% actually proceed to trial. About 40% of accused plead guilty at that time. The remainder

are stayed or, in a relatively small number of cases, are adjourned to another date. In a few cases a bench warrant for the arrest of the accused is issued for failing to attend.<sup>172</sup>

Broadly speaking, there appears to be an initial period in which many cases are resolved. Then, in a substantial number of cases there is a period that may span many months before the matter is resolved or a trial date is set. Even when a trial date is set, a further 11% of cases still settle without actually having a trial appearance, and approximately 70% of the few remaining cases then resolve on the date of trial.

Although the high resolution rate is well known and reported on, the resolution rate and timing of resolution for different categories of offences and by region may vary. There is no easily available data that segregates patterns of resolution by category of case, court location or other variables such as individual prosecutor.

As discussed earlier, the prosecution service is responsible for approving charges in British Columbia. There is a single standard for written RCCs, irrespective of the nature or type of alleged offence. This standard is that there should be a substantial likelihood of conviction and that prosecution is in the public interest. It requires full disclosure of the facts and evidence sufficient to support the laying of criminal charges and must meet the criminal standard of proof beyond a reasonable doubt. There will be a substantial likelihood of conviction where there is a strong, solid case of substance to present to the court.<sup>173</sup>

171 For further information, see: Associate Chief Judge Anthony J. Spence, Provincial Court of British Columbia, *Report to the Chief Judge on Criminal Caseflow Management Rules* (April 2002), online: Provincial Court of British Columbia <<http://www.provincialcourt.bc.ca/types-of-cases/criminal-and-youth/report-on-caseflow>>.

172 This is described in greater detail above in Section 3.

173 British Columbia Ministry of Attorney General, Criminal Justice Branch, *Charge Assessment Guidelines*, CHA 1 (2 October 2009), at p. 1, online: Ministry of Justice <<http://www.ag.gov.bc.ca/prosecution-service/policy-man/pdf/CHA1-ChargeAssessmentGuidelines-2Oct2009.pdf>>.

Only in exceptional cases is it contemplated that charges may be laid where the standard evidentiary test has not been met. In these exceptional cases, the standard is a reasonable prospect of conviction.<sup>174</sup>

Presently, the Charge Assessment Guidelines mandate that the basic requirements for every RCC are as follows:

1. A comprehensive description of the evidence supporting each element of the suggested charge(s);
2. Where the evidence of a civilian witness is necessary to prove an essential element of the charge (except for minor offences), a copy of that person's written statement;
3. Necessary evidence check sheets;
4. Copies of all documents required to prove the charge(s);
5. A detailed summary or written copy of the accused's statement(s), if any;
6. The accused's criminal record, if any; and
7. An indexed and organized report for complex cases.<sup>175</sup>

While Gary McCuaig, QC, has recommended in his report that responsibility for charge approval remain with the prosecution service, he has also recommended that an abbreviated RCC be considered in specified circumstances.<sup>176</sup>

Existing Crown counsel policy requires that a prosecutor is to explore resolution only after being satisfied that the charge approval standard has been met. This is a continuing responsibility which applies to the consideration of alternative measures and to accepting a plea of guilty. If for any reason the prosecution forms the view that the case no longer meets the charge approval standard, the appropriate response is to enter a stay of proceedings rather than

negotiate a guilty plea with a reduced sentence.<sup>177</sup> This departs from the approach taken in television crime shows but assures Canadians that prosecutors approach each case with an individualized concern that persons not face charges that cannot be proven to the criminal standard.

## 10.2 CONSULTATIONS

Although the majority of all cases in the Provincial Court are resolved without a trial appearance even being scheduled, these resolutions may take many months to achieve. There was widespread agreement throughout the consultations that there are insufficient incentives to encourage early, principled resolutions.

Thinking within the community has also undergone dramatic change with the consideration of a redesign of Provincial Court criminal process and scheduling. This initiative will place more clear responsibility on the parties to obtain resolutions in the initial phase of a case. One possible lesson of the past decade may well be judicial involvement in this resolution phase should be reserved to adjudicating disputes and reserving case management to particular cases and only if a matter has had a clear opportunity to resolve.

The prosecution service has determined that to facilitate early resolutions and other management improvements, transition to a file ownership system will be made.

It was also suggested that late resolutions appear to be clustered around impaired driving and domestic violence cases. The Kelowna Domestic Violence Project suggests that this may be due to accused in both cases hoping that the delay in the system rebounds to their advantage, the case against them becoming unprovable. It was also suggested that the current system failed to incentivize prosecutors

174 British Columbia Ministry of Attorney General, Criminal Justice Branch, *Charge Assessment Guidelines*, CHA 1 (2 October 2009), at p. 1, online: Ministry of Justice <<http://www.ag.gov.bc.ca/prosecution-service/policy-man/pdf/CHA1-ChargeAssessmentGuidelines-2Oct2009.pdf>>.

175 British Columbia Ministry of Attorney General, Criminal Justice Branch, *Charge Assessment Guidelines*, CHA 1 (2 October 2009), at p. 6, online: Ministry of Justice <<http://www.ag.gov.bc.ca/prosecution-service/policy-man/pdf/CHA1-ChargeAssessmentGuidelines-2Oct2009.pdf>>.

176 See Schedule 11.

177 British Columbia Ministry of Attorney General, Criminal Justice Branch, *Charge Assessment Guidelines*, CHA 1 (2 October 2009), at p. 3, online: Ministry of Justice <<http://www.ag.gov.bc.ca/prosecution-service/policy-man/pdf/CHA1-ChargeAssessmentGuidelines-2Oct2009.pdf>>.

to seriously assess the likelihood of conviction in cases set for trial at an earlier point, rather than waiting until the last minute.

It was observed that administration of justice offences rarely interfere with resolution of the underlying offense. They are often settled by way of stay or other similar agreement as part of the resolution of the underlying offence. Administration of justice offences are often resolved summarily but rarely occupy much trial time on their own.

The interplay of mental health and addiction issues with socially disruptive behaviour and demands on police has now become widely understood. Police leadership has expressed a strong preference for managing people dealing with mental illness or addictions through means other than enforcement.

Early resolution for these people frequently involves the offender accessing health or social programs. Virtually all of these programs are provided by organizations outside the Ministry of Justice and are provided by, or funded by, health authorities. Programs and services include both residential and day programs, as well as integrated supervision teams that aim to keep individuals with mental illness and substance abuse problems stable in the community.

Defence counsel report that the willingness of prosecutors to seek alternate measures varies dramatically from prosecutor to prosecutor. Prosecution service leadership reaffirmed the policy commitment to seeking alternate measures where appropriate. This appears to be an issue of persuading individual prosecutors of the soundness of this approach.

Finally, restorative justice advocates strongly argue that the system as a whole has to enable victims and offenders to access restorative justice programs for more serious cases and to liberate restorative justice from the perception that it is only appropriate in extremely minor offences such as shoplifting.

### 10.2.1 Police/Prosecution Interface

During consultations, many police officers expressed considerable frustration with the existing charge approval system, and this frustration no doubt underlay the request to Gary McCuaig, QC,

to review the charge approval system generally. I agree with Gary McCuaig, QC, that the suggestion that charge approval be permitted by police officers is a proxy for other frustrations with their relationship to the Crown.

In the consultations, it became apparent that most police officers would not wish to have the authority to charge individuals, particularly in light of the very high rate of stays of proceedings experienced in those jurisdictions, such as Ontario where the charging authority rests with police officers.

Put simply, there appears to be no system efficiencies or clarity gained by authorizing police officers to lay charges. The better approach would appear to be to identify and address the underlying sources of frustration with the current system.

During consultations, these other frustrations were expressed in a variety of ways, including:

- The sense that all RCCs must be perfect before they are considered by Crown counsel, even in cases where resolution can be predicted. An extreme and unusual but often cited example would be an accused who is aware of the investigation, acknowledges responsibility, and offers to plead guilty but must await the completion of a RCC and the consideration of charges by Crown counsel before having that request resolved;
- Frustration with perceived low charge approval rates, particularly in complex investigations;
- Frustration with the absence of consultation around stays of proceedings being entered, particularly where there is a perception that the prosecution was forced to choose between cases;
- Perceived low charge approval rates for minor offences and administration of justice offences; and
- The general sense that the prosecution's sense of independence interferes with joint strategic direction.

The prosecution service for its part acknowledges and accepts its constitutional independence from the police investigative function. This will of necessity create tensions in the relationship from time to time.

The prosecution service would maintain that:

- Crown counsel must exercise the core of prosecutorial discretion whether to charge an individual on an individualized basis and must similarly make decisions as to resolution on an individual basis.
- Efforts to provide advice during a course of investigations to improve the quality of the RCC and the likelihood of meeting the charge approval standard have improved in recent years, particularly with respect to complex investigations where dedicated Crown have provided ongoing and strategic advice with respect to the investigation.
- It is a prosecutor's duty to disappoint the police from time to time where a case is no longer viable, notwithstanding the police view that the accused is a person who represents a risk to the community or that the category of offence is particularly important.

Both prosecutors and police reported that excellent working relationships existed between the leaders at the Crown/Police Liaison Committee, and there was substantial progress towards addressing friction in the broader relationships in the justice community.

It is also clear from consultations that many of the frictions likely to arise can be reduced through effective and ongoing communication between prosecutors and police.

In considering the data available from the system, the frequently expressed observation that there is a low approval rate for administration of justice offences does not seem borne out by the evidence. It may rather be a frustration rooted in the common bundling of these offences with the underlying substantive offence in a common sentencing submission to the Court. Police officers are frustrated that respect for the law appears to be trivialized in the system's treatment of these offences.

### 10.2.2 Supervision

Corrections must of course supervise persons in the community who are subject to court orders as part of the terms of their release by the police or the court or as a term of their probation.

The Corrections Branch, during consultations, raised the suggestion that evidence-based information on risk assessment is currently under-utilized by the other justice participants. They have proposed that information related to the theory and application of evidence-based risk assessment be made more readily available and that it would assist among other things in better informed terms of release and sentences.

## 10.3 ANALYSIS AND RECOMMENDATIONS

Our current system tends to organize itself around the timing of trials, and yet we know that in fact over 84% of cases are resolved without a trial date being scheduled and 98% are resolved without trial.<sup>178</sup> Resolutions can occur at any time in the process, up to and including the first day to trial, with the existing processes to support early resolution appearing less effective than needed.

Some of this is in the execution of what is otherwise sound policy. It seems clear that providing early sentencing positions that are reasonable does indeed enhance resolution rates. There is general agreement that the absence of file ownership means that prosecutors do not have to account for the sentencing positions they take earlier in the course of the case. Similarly, there is widespread agreement that despite jurisprudence that supports the imposition of stiffer penalties where an accused unreasonably delays pleading guilty, judges are rarely seen as discouraging later pleas.

Delay in reaching early resolutions can be attributed to a variety of causes, including:

- No process to encourage resolution before the first court appearance of those who are given a

178 This is described in greater detail above in [Section 3](#).

notice to appear in court by the police, currently about six to eight weeks after the alleged commission of the offence;

- Lack of file ownership by the prosecutor, so he or she may not be ready to engage in early discussions leading to resolution;
- Delay in accused retaining counsel or getting access to duty counsel, so the accused may not be ready to enter into resolution discussions;
- Lack of incentives for early resolution;
- Disincentives to early resolution, including defence recognition that the prosecution's case will often deteriorate over time;
- No clear timelines for completion of discussions regarding resolution; and
- Trial dates which are sufficiently far in the future to increase uncertainty about the viability of prosecution on that date.

The challenge in this area is to learn from past efforts and put in place changes that will encourage principled early resolution, preferably before a trial date is set.

In my view, the central elements that are required in order for this to be accomplished are

- Multi-sectoral recognition that the vast majority of cases can, should and will be resolved rather than tried;
- Aligning the investigation and charge approval process in such fashion as to encourage exploration of resolution with the accused at the earliest possible date;
- Timely disclosure of the prosecution's case to enable defence counsel to professionally and properly advise the accused on resolution;
- Developing court scheduling methods to support and encourage resolution and to provide principled, predictable and clear incentives which favour resolution; and,
- More effective use of the risk assessment skills within Corrections to identify and inform proposals for resolution.

It is apparent that the professionals engaged in the system recognize that incentives must be in

place to encourage an individual suspected of an offence to take accountability for his or her actions and to seek reconciliation with the victim and the community. The defence counsel in this context are serving their client's interest in a system in which delay may interfere with the prosecution's proof of the case in a host of ways. Defence counsel readily acknowledge that there would be a higher percentage of resolutions if early predictable trial dates were generally applied and if appropriate incentives existed to encourage and inform the accused to instruct his counsel to seek resolution.

During the consultations, it was reluctantly agreed that the incentives intended to be put in place by the CCFM rules simply did not materialize. The hope then was that the prosecutors would offer a sentencing position which would not be improved if it was declined by the accused and the case then proceeded to trial. To the contrary, the case docket has become so dependent on last minute resolutions that both prosecutors and judges appear relieved when an accused pleads guilty on the first day of trial, and they are reluctant to carry through on the assurance that the initial sentencing position was the best on offer. Indeed, defence counsel routinely observed that in most cases they were highly confident that the sentence available on the first day of trial would be less severe than that made available on the initial sentencing position, at arraignment or at the trial readiness hearing. This is compounded by the obvious risks that prosecution's witnesses may not appear at trial or other gaps in the prosecution appear and require a stay of proceedings.

Prosecutors are reluctant to accept abbreviated RCCs for a number of reasons, including:

- A reasonable concern that once the case is cleared by charge under the police system, it is difficult to secure follow-up investigative efforts if the case is not resolved.
- The cases of individuals willing to plead in the absence of a full investigation and charge approval consideration are rare, and no guilty plea should be accepted unless the charge or charges would have been well founded.

- There is a reasonable concern that, unless there is full disclosure of the investigation at the outset, unnecessary defences may arise respecting disclosure, and incomplete disclosure will prevent defence counsel from knowing enough to fully advise their clients as to resolution.

### 10.3.1 Early Resolution

The proposals for enhancing early resolution made by the prosecution service, Legal Services Society (LSS) and the Provincial Court build on current practices and redirect the focus away from court-based process. To a substantial degree the means by which this is enabled—through changes in the prosecution service management systems, changes to legal aid and by the defence bar—have not been identified and need to be developed by those stakeholders working co-operatively. There is little that I can add to the task they have already set for themselves. I do think, however, that one opportunity for improvement in this area arises from the consultations that deserves brief mention: expanding the use of pre-charge resolution.

### 10.3.2 Pre-Charge Resolution Process

The current period of time between the commission of an offence and the expected first appearance in court, usually six to eight weeks, opens opportunities for creative approaches to early resolution that have not been fully utilized. The suggestion that the Court should rely on the parties to seek resolution outside of court in the majority of cases raises the question of whether resolution can and should take place before charges are approved in a substantial number of cases. While I am advised that this indeed happens now in some cases, I believe that its significant expansion is worth consideration.

During consultations police urged greater flexibility and co-operation respecting the disposition of cases; this can be most easily done before the charge approval process is completed. Similarly difficulties around the completeness of an investigation and/or the completeness of an RCC for the purpose of

laying a charge can be dealt with more flexibly if the individual and counsel are involved in resolution discussions from the outset.

There are potentially many advantages to enhancing this process. It would encourage joint consideration by police and prosecutors to seek appropriate alternatives to enforcement. It would open opportunities for defence counsel to advance their clients' interests before positions have hardened in the prosecution service. In effect it would create a resolution phase that would operate before the "pre-trial" phase of proceedings before the courts.

Finally, such a process would need to provide for transparency in results and reporting to the public.

**Recommendation: A new approach to pre-charge resolution should be taken that maximizes the opportunity to resolve matters before formal charge approval is complete.**

### 10.3.3 Early Resolution and an Abbreviated RCC

Various police representatives proposed that an abbreviated RCC be made available in appropriate circumstances. That proposal has been endorsed for serious consideration by Gary McCuaig, QC, and I add my endorsement of this proposal with some comments and concerns.

The duty not to approve charges against persons who could not be proven guilty is a solemn duty. Though it is important to respect the rule of law, it is nevertheless obvious that the current system fails in several respects, and one of these is its failure to systematically pursue early resolutions.

As I understand the possible approach, it would, in appropriate cases, involve delivery of an abbreviated RCC to the prosecution service, with the intent that sufficient evidence would be gathered to meet the charge approval standard and make resolution clearly attractive to the potential accused.

The concern raised by prosecutors is that in their experience police members place a great deal of administrative importance on a file having been



“cleared by charge,” and that obtaining follow-up investigative work after charge approval to ensure a trial-ready brief is regularly difficult.

Success with this approach depends heavily on police investigators remaining available and properly motivated when resolution is not reached. The file must also be made trial ready. I am confident that could be achieved if the police saw a more rational upfront approach to resolution by the others in the system.

This is an area already identified for reform by the prosecution service, and several of its projects are aimed at enhancing this important means of resolving cases. The significant changes implied in the revised court process means that substantial work needs to be undertaken by the prosecution service. I have little substantively to offer, apart from these brief observations to this important work.

Similarly, it is important that LSS ensure its policies support such an initiative and provide appropriate support for people who would benefit from early advice.

**Recommendation: An abbreviated report to Crown counsel form should be considered for appropriate cases by the Police/Prosecution Liaison Committee in consultation with Legal Services Society and the defence bar.**

### 10.3.4 Crown File Ownership

The prosecution service has decided to seek to reform its assignment methods so as to have individual prosecutors responsible for a case from beginning to end, or at least for a larger portion of the management of the file—colloquially known as file ownership. It is expected that file ownership will provide the right type of incentives to prosecutors to seek resolution of what is now “their case,” and that continuity will assist in relationship with police, witnesses, victims, defence counsel and the community. Put simply, the prosecution service will have identified a person responsible for that case.

The significance of this administrative change should not be understated. I commend the leadership of the prosecution service for being willing to undertake such a major administrative change in its work for the

public good. During consultations, I heard very little dissent from this proposal, which I believe reflects the conclusion that the professional community as a whole recognizes that, in order for the prosecution service to improve its performance, this change is necessary.

**Recommendation: The prosecution service should adopt file ownership as the default administrative process for the handling of criminal matters.**

### 10.3.5 Expanded Role for Duty Counsel or Other Forms of Early Advice

To expand the effectiveness of early resolution procedures including the use of pre-charge resolution, accused people need to know how to get early access to legal advice. Early principled resolution is best achieved when an accused has an opportunity to obtain legal advice that is proportional and timely but above all delivered in his or her own interest.

The LSS has proposed an expanded model of service to facilitate early resolution. In particular, they have suggested that they could change the model of how duty counsel services are currently provided, so that duty counsel would be assigned to the same court on a continuing basis. This would permit them to retain conduct of matters that can be resolved in a reasonable period of time. This would also avoid the current situation where an accused person might have to speak to a number of different lawyers prior to the resolution of their matter.

LSS has also proposed changes to the legal aid tariff to facilitate the availability of legal assistance in disposition courts.

As well, to advise an accused as to the charges and their best options for resolving or obtaining counsel for the case, it would be beneficial if advice services could be funded, which would be available very early in the process (i.e., pre-charge).

With respect to pre-charge resolution, as noted above, it is critical that there be early access to legal advice. This should begin with police giving people information about how to access legal advice at the same time that they give them their notice to appear in court.

Consideration should be given to how best provide early access to legal advice, but it seems to me that this might be achieved most cost-effectively if some form of centralized telephone advice were implemented. Those providing the advice would need to be able to get information from the prosecution service about the potential charge, as well as the police report. This would be a good opportunity to explore the potential of internet transfer of key information from the prosecution service to duty counsel and the private bar, to facilitate the provision of early, informed advice at the pre-charge stage.

**Recommendation: The Legal Services Society should be supported to provide legal services to promote early resolution by**

- **Assigning duty counsel to the same court on a continuing basis;**
- **Changing the legal aid tariff to facilitate legal assistance in disposition courts; and**
- **Providing advice and other services pre-charge to facilitate resolution at that point.**

**Recommendation: Police should advise all persons who are given a notice to appear in court on a future date of the possible availability of legal assistance and how to access it.**



# 11. PRE-TRIAL AND TRIAL

Currently, the Provincial Court supervises cases from first appearance until final disposition. Accused appear in court as directed while they apply for legal aid, retain and instruct counsel, have their counsel discuss possible resolution of the matter with the prosecutor, plead not guilty or guilty, and set the matter down for trial or for sentencing. There are no timelines or time limits for the completion of any of these stages of the process, although judges do what they can to encourage the timely completion of each of these steps. If an accused pleads not guilty, a trial date will be set which may be many months away, depending on the court location.

In this section I discuss the Provincial Court's project to make better use of judicial time and improve the timeliness of the process. I also deal here with other selected aspects of case management in the Provincial Court. In particular I make recommendations in relation to the use of other professionals such as judicial justices, justices of the peace and judicial case managers (JCMs) to assist in the work of the Court.

I also address to a modest extent the significant issue of complex case management, which is the central question facing the Supreme Court in its management of its criminal caseload.

## 11.1 CONTEXT

As already noted, over 98% of the approximately 100,000 criminal cases are filed and determined in the Provincial Court. The remaining 1%–2% are filed and determined within the Supreme Court of British Columbia.<sup>179</sup> The information system is not

able to indicate how many trials were actually held in Provincial Court, but based on the information in the figure in [Section 3.11](#) above, a reasonable estimate is about 1,500 trials a year. Approximately 415 criminal trials were held in 2011/12 in the Supreme Court.<sup>180</sup>

Most decisions in the Provincial Court are rendered orally; there were 111 criminal case decisions posted to the Provincial Court website in 2011/12. There were 239 decisions posted to the Supreme Court website in 2011.

Data on the length of trials in both courts is extremely limited. Although there is a view that criminal trials have lengthened in the Provincial Court, most trials are still scheduled for half a day or less. Supreme Court trials are much longer but again there is no data about the length of trials, whether they are getting longer, and whether trial length is exceeding estimates.

The costs associated with longer Supreme Court trials appear to have escalated dramatically in recent years. The prosecution service reports that approximately 24% of its prosecutors are focused on cases in the Supreme Court of British Columbia.<sup>181</sup>

The time to trial in the Supreme Court is not a significant issue for shorter trials, and dates can be obtained for criminal trials of 10 or fewer days in just a few months. Delay in that Court is associated with lengthy periods of pre-trial motions and other hearings that defer the setting down of the matter to trial. Several cases have recently been engaged for more than a year in pre-trial motions.

Outside of the largest Supreme Court registries in the province, criminal trials now dominate the trial work of the Court. In eight Supreme Court

<sup>179</sup> See discussion in [Sections 3.6](#) and [3.7](#) of this Report.

<sup>180</sup> Supreme Court of British Columbia, *Annual Report 2011* (Vancouver: Supreme Court of British Columbia, 2011), at p. 55, online: Courts of British Columbia <[http://www.courts.gov.bc.ca/supreme\\_court/about\\_the\\_supreme\\_court/annual\\_reports/2011%20Annual%20Report.pdf](http://www.courts.gov.bc.ca/supreme_court/about_the_supreme_court/annual_reports/2011%20Annual%20Report.pdf)>.

<sup>181</sup> Major cases (or those which would likely fall within the scope of the Criminal Justice Branch's Major Case Management Model) would ordinarily be tried in the Supreme Court of British Columbia.

registries in the province there were no civil trials in 2010/11.<sup>182</sup> The substantial majority of all trials held outside of the three busiest registries—Vancouver, New Westminster and Victoria—were criminal trials.<sup>186</sup> The predominance of criminal trials in the trial work for the Supreme Court Registries outside of the major centres may increase with the passage of the new *Family Law Act* and the further diversion of family law matters away from court.

The make-up of criminal work outside the largest Supreme Court registries may well be different as it may include not only cases that must proceed to trial in the Supreme Court but also elections for Supreme Court trial by accused for a variety of reasons, including the availability of earlier trial dates.

### 11.1.1 Provincial Court

The Provincial Court has, on an accelerated basis, investigated the implementation of a new caseload management system and court scheduling process. That project is described briefly in [Schedule 5](#).

The goal of the project is to reduce the number of administrative appearances in court through the reconfiguration of both the court's processes and systems. The proposal, as I understand it at this early stage in the project development process, is exploring a system where administrative matters will normally be dealt with outside of the courtroom. This will be supported by the prosecution service changing its method of managing files so that there is much greater continuity with respect to individual files, an approach known as Crown file ownership. This will permit defence counsel to have discussions at an early stage with a prosecutor who is fully informed about the case. At the same time, responsibility for ensuring that administrative matters are completed will be transferred to judicial officers outside of the courtroom. These may be judicial justices, JCMs or court services justices of the peace. In some locations disposition

courts may also be established so that those who plead guilty are able to have their matters heard.

With respect to matters set for trial, they would not be assigned to a particular courtroom or a particular judge. Instead, on the day set for trial, every case would be considered by a judge and only those matters deemed by that judge as being ready to proceed would be assigned to a fully staffed court. Although the use of assignment court will not in itself reduce the collapse rate overall (which remains quite consistently at about 70%) it should ensure greater utilization of judicial capacity by ensuring that matters set before a judge will not collapse.

The project objectives are to enhance citizens' access to timely justice by

- Developing and implementing new scheduling practices and file management that will make the best use of justice system resources;
- Moving administrative (criminal case) appearances out of the courtroom where feasible;
- Improving scheduling of criminal, family and civil trials in the Provincial Court through the use of an assignment court and/or other vehicles designed to address the high rate by which cases set for trial fail to proceed;
- Creating an enabling technical infrastructure and application to allow for the integrated scheduling of trials; and
- Engaging partners across the justice system where reasonably necessary to ensure systemic change.

In my opinion this approach has many attractions:

- It builds on the success already experienced in Manitoba and Alberta, with similar approaches.
- It recognizes that the efforts to involve the court in improving early resolution rates through the arraignment court and related processes have been unsuccessful.

182 Supreme Court of British Columbia, *Annual Report 2011* (Vancouver: Supreme Court of British Columbia, 2011), at p. 55, online: Courts of British Columbia <[http://www.courts.gov.bc.ca/supreme\\_court/about\\_the\\_supreme\\_court/annual\\_reports/2011%20Annual%20Report.pdf](http://www.courts.gov.bc.ca/supreme_court/about_the_supreme_court/annual_reports/2011%20Annual%20Report.pdf)>.

183 Supreme Court of British Columbia, *Annual Report 2011* (Vancouver: Supreme Court of British Columbia, 2011), at p. 55, online: Courts of British Columbia <[http://www.courts.gov.bc.ca/supreme\\_court/about\\_the\\_supreme\\_court/annual\\_reports/2011%20Annual%20Report.pdf](http://www.courts.gov.bc.ca/supreme_court/about_the_supreme_court/annual_reports/2011%20Annual%20Report.pdf)>.

- It recognizes the advantages of predictable early trial dates to enable counsel for the Crown and counsel for the defence to carry out their work on a timely and informed basis.
- It recognizes that the majority of cases can be resolved without significant judicial input or time.
- It recognizes the need for a new type of judicial case management for those cases which do not become resolved initially.

### 11.1.2 Early Trial Dates

Revisions to the assignment of trials may not by themselves reduce the collapse rate, although they should significantly increase the use of judicial time. As noted, a high collapse rate has long been a feature of criminal process in the Provincial Court, and it has eluded remedy for a long time. There are some indications that dramatically reduced times to trial may well have the sought after effect of encouraging early pleas and other resolutions to cases. To dramatically reduce times to trial the implementation of the new scheduling system may need to start fresh, with the cases in the system being gradually run out. Similarly, other influences on trial scheduling such as choice of defence counsel and prosecutorial scheduling will undoubtedly need to be addressed. The Kelowna pilot, with a small number of a particular type of offence, made only one hour of trial time available on the first appearance for trial. Whether that approach is scalable or desirable would need to be addressed.

From the work carried out by the Review, it would not appear likely that modest changes to the times to trial or other improvements that are worthwhile but incremental will budge the collapse rate. A well thought-out and co-ordinated approach that emerges from consultations across the system is required.

I do not underestimate the challenges of making this change in terms of the practice of law, the management of cases in the court and the expectations of all those affected by the process,

but I do believe that it is essential to meet legitimate public expectations of the justice system.

### 11.1.3 Backlog Reduction Project in the Provincial Court

The Provincial Court reforms contemplate the assignment of early trial dates to new cases. This of course raises the question of how to address the cases already in the system. A project will have to be undertaken to permit the handling of both streams of cases while they overlap for a period of time. Pending the introduction of the new system, the reduction of the backlog of older cases should be given a high priority. Fortunately, the circumstances exist that should make this possible.

The backlog of older cases has in fact been slowly decreasing since 2006/07, as the Court has disposed of more cases than it has been receiving for several years. Despite this, the age of the cases in the backlog has been increasing. Apparently, the efforts to reduce the caseload to date have not previously given priority to dealing with the oldest cases.

The chart in [Section 3.13](#) shows the slight upward trend in pending cases over the last decade. It also shows a substantial drop in 2011/12 because of the expedited resolution of 8,000 impaired driving cases. Within the pending cases, however, the percentage of cases older than 240 days, or eight months, was slowly growing, to a high of almost 18,000 cases in 2010/11. That trend sharply reversed in 2011/12, with cases older than 240 days dropping to about 11,000 out of a total pending caseload of just over 26,000.

Although the number of pending cases is lower, the average time to trial actually increased slightly in 2011/12. Thus the decline in total pending cases and the decline in the number of oldest cases in the system did not result in a reduction in the time to trial.<sup>184</sup>

Nonetheless, the decrease in pending cases and percentage of cases older than 240 days broaden the choices available for judicial administration. Existing

184 For further discussion, see Sections 3.12 and 3.13 of this report.

resources will permit the Court to continue the trend of reducing pending caseloads, even if the Court reallocates some judicial resources from criminal to child protection, family and civil cases. This also means that the introduction of a new scheduling system will not occur in an environment of increasing caseloads and pressure on the system.

There is no reason to wait until the introduction of the new system to start working on the older cases. Indeed, the recognition by all the justice participants of the need to give priority to the older cases provides an opportunity to collaborate on the best means of achieving that goal.

I recommend that a working group be constituted with representatives from the judiciary, Crown counsel, LSS, court services, policing and Corrections supported by a project management office. The working group would be comprised of senior operations rather than executive or policy people, with the expectation that members will have the confidence of their organizations. Consideration should be given to having the working group co-chaired by a Crown and Judicial representative.

The working group should identify measures that can be implemented immediately.

This is intended to be a working group, rather than a pilot or policy development body. Members would carry recommendations to their institutions and report to the working group on decisions and progress.

Priority should be given to strategic intervention in cases that can be resolved on a principled basis, cases that are particularly vulnerable to problems arising from delay, and those that, absent of active intervention, would raise legitimate public concerns over the timeliness of the disposition. The approach might focus on age, type of case or regional considerations.

Disciplined measurement of performance should be included from the outset and a business intelligence

component should be included in the work plan. There need to be clear goals set and reporting on achievements toward those goals.

#### 11.1.4 Possible Approaches

Since this working group will be performing a short-term intervention in the system it must be flexible and willing to adopt innovative approaches. It would not be appropriate to dictate how the working group approaches its task, but here follow some suggestions made by participants in various contexts:

- Crown analysis of outstanding cases to assess appropriateness for early disposition by way of plea or stay of proceedings;
- Use of temporary Crown disposition teams working in resolution courts in co-ordination with LSS and expanded duty counsel;
- Assessment of what temporary incremental judicial resources, such as increased use of senior judges, or increased use of judicial justices, can be found;
- Use of corrections personnel for early risk assessment for cases which appear appropriate for early resolution; and
- Involvement of community organizations that could enhance use of alternative measures.

#### 11.1.5 Supreme Court

It is obvious that large and 'mega' cases are consuming huge resources and represent a different challenge than those facing the Provincial Court.

The challenges raised by large cases were addressed by the Code-Lesage Report in November 2008<sup>185</sup> and by several conferences and working groups.

Most recently, the Supreme Court Criminal Committee has carried out a pilot program to enhance the effectiveness of pre-trial management of large criminal cases in the Supreme Court of British Columbia. That committee reported on

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185 The Honourable Patrick J. Lesage, CM, QC & Professor Michael Code, *Report of the Review of Large and Complex Criminal Case Procedures* (November 2008), online: Ontario Ministry of Attorney General <[http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/lesage\\_code/lesage\\_code\\_report\\_en.pdf](http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/lesage_code/lesage_code_report_en.pdf)>. In several respects it urged the adoption in Ontario of measures already taken in British Columbia.

the outcome of the pilot program<sup>186</sup> and recently announced the extension of the pilot to all Supreme Court registries throughout the province.

The pre-trial sub-Committee of the Supreme Court has declined to this point to recommend new criminal rules in relation to pre-trial management, and trial management lies outside its mandate.

### 11.1.6 Court of Appeal

As noted, the Court of Appeal has been conducting a pilot project with the goal of having all hearings in criminal appeals take place within a year.<sup>187</sup> That pilot has been extended a year until the end of 2012, and no data on results are yet available.

## 11.2 CONSULTATIONS

There was universal agreement during consultations that an early, certain trial date has many advantages. The results of a recent pilot project in Kelowna demonstrates this potential.<sup>188</sup> On the initiative of the Administrative Judge, a selection of 68 domestic violence cases were assigned very early trial dates within 60 days. They were each scheduled for one hour of hearing and notice was given that the complainant would be expected to testify during that period of time. The parties were not assured of when the trial could be completed, and the court specifically noted that normal accommodations of counsel's calendars might have to give way to the early trial date.

All but two of the cases resolved prior to the first trial appearance. It is unknown whether the other two proceeded to judgment. This limited pilot suggests that the existence of a very early trial date at least for this body of cases facilitated the early resolution of the matters.

The Review received a large number of submissions that contained various suggestions as to how the Provincial Court should change its processes, most of which are eclipsed by the Court's own project. Submissions were received that more reliance should be placed on professionals other than judges. It was also suggested that appropriate work needs to be provided to judicial justices, justices of the peace and JCMs for the obvious advantages of cost-effectiveness and, in the case of JCMs, the more effective development and use of managerial expertise.

## 11.3 ANALYSIS AND RECOMMENDATIONS

The Provincial Court is developing an innovative approach to rethinking the scheduling of criminal cases and trials as already described.

This project has benefited from an assessment of strengths and weaknesses of previous reform initiatives in British Columbia, as well as reform in other jurisdictions. It is also proceeding in a collaborative fashion with both the Criminal Justice Branch and the Court Services Branch. However there is an opportunity here for this project to demonstrate a truly systemic approach to criminal justice reform, with the sort of project management rigour that is usually lacking in justice reform projects.

The significance of culture and the importance of involving everyone who will be affected by the reform are important lessons of the past. Sometimes it is not clear at the outset how a particular change might affect another organization—"we don't know what we don't know." So it is critical to involve a wide range of partners early on to ensure that there is a full understanding of how the reforms impact all of the

186 The Supreme Court of British Columbia, *Criminal Pre-Trial Conference Pilot Project Evaluation Report* (18 January 2012), online: Courts of British Columbia <[http://www.courts.gov.bc.ca/supreme\\_court/about\\_the\\_supreme\\_court/Criminal%20Pre-Trial%20Conference%20Pilot%20Project%20Evaluation%20Report%20-%20January%2018,%202012.pdf](http://www.courts.gov.bc.ca/supreme_court/about_the_supreme_court/Criminal%20Pre-Trial%20Conference%20Pilot%20Project%20Evaluation%20Report%20-%20January%2018,%202012.pdf)>.

187 British Columbia Court of Appeal, *Annual Report 2011* (Vancouver: British Columbia Court of Appeal, 2011), at p. 23, online: Courts of British Columbia <[http://www.courts.gov.bc.ca/court\\_of\\_appeal/about\\_the\\_court\\_of\\_appeal/annual\\_report/2011%20ANNUAL%20REPORT.pdf](http://www.courts.gov.bc.ca/court_of_appeal/about_the_court_of_appeal/annual_report/2011%20ANNUAL%20REPORT.pdf)>; and British Columbia Court of Appeal, Practice Directive (Criminal), *Pilot Project Regarding Criminal Conviction/Acquittal Appeals* (28 March 2012), online: Courts of British Columbia <[http://www.courts.gov.bc.ca/court\\_of\\_appeal/practice\\_and\\_procedure/criminal\\_practice\\_directives\\_/Criminal%20Pilot%20Project%20Regarding%20Criminal%20Conviction%20Acquittal%20Appeals.htm](http://www.courts.gov.bc.ca/court_of_appeal/practice_and_procedure/criminal_practice_directives_/Criminal%20Pilot%20Project%20Regarding%20Criminal%20Conviction%20Acquittal%20Appeals.htm)>.

188 Information provided to the BC Justice Reform Initiative by the Office of the Chief Judge, Provincial Court of British Columbia.

participants, giving them an opportunity to contribute to the solutions. The nature of the justice system is such that each of the participants has the unfortunate ability to undermine the carefully developed plans of any of the others.

I would encourage the Provincial Court and the Ministry to consider how this project might benefit from expertise on project management and systemic analysis, such that it achieves the significant culture change it seeks.

**Recommendation: The Criminal Justice and Public Safety Council support initiatives to**

- **Create timelines for early resolutions;**
- **Implement the Provincial Court Process and Scheduling Project;**
- **Substantially reduce the normal time to trial; and**
- **Reduce the current case backlog to bring all pending cases into compliance with the new standards being developed by the Provincial Court.**

### 11.3.1 Use of Judicial Justices and Other Professionals in the Provincial Court

While serving as Chief Judge, the late Hugh Stansfield expanded the management of cases by professionals operating under judicial supervision rather than by the judges themselves. The effective use of JCMs will, in my opinion, remain an important part of any successful Court Scheduling Project. The question naturally arises as to whether that process should be taken further.

The availability of services from qualified professionals other than tenured judges can help to improve efficiency, while allowing judicial skills to be concentrated on the most important judicial work.

There are a number of judicial justices working part-time with contract terms of several years available for assignment by the OCJ. Transferring responsibility away from sitting judicial justices into an administrative body (in relation to provincial ticketing offences) may potentially free a number of judicial justices for other work. These individuals have years of experience that can be made available for other

duties in the system. There is a wide variety of judicial duties which can be discharged by a judicial justice.

#### 11.3.1.1 Bail Applications and Preliminary Inquiries

Provinces vary dramatically in their use of judicial justices for hearing bail applications. In British Columbia all after-hours applications (particularly weekend applications) are heard via video by judicial justices centred in Burnaby. Most other applications are heard by Provincial Court judges. In Ontario virtually all bail applications are heard by a judicial justice.

There are several potential advantages to using judicial justices for bail applications:

- The use of judicial justices may bring greater flexibility in service standards and methodology.
- The use of judicial justices may focus and permit increasing standards of performance in relation to bail applications.

There are clear cost savings in the use of judicial justices for bail applications.

Concerns regarding the concentration of bail applications before judicial justices include:

- The view that bail applications—as they involve the liberty of the subject—can be as important as the determination of guilt or innocence, and may result in greater detention rates and unnecessary incarceration.
- The consequences of unnecessary incarceration pending trial are very serious and include demonstrably higher sentences for offenders, potential disruption in an innocent person's life and in some cases an increase in the likelihood to re-offend.
- There is a general sense that the quality of bail decisions are high in British Columbia and that other jurisdictions have problems with bail that we do not share.

One advantage for employing judicial justices for the hearing of bail applications is that the core of judicial resources will be focused on trial and sentencing. In this sense, the system would more



clearly be divided between the management of the early phase of a criminal matter by judicial justices and justices of the peace and the management of trials and sentence hearings by judges.

I agree that a bail decision is an important one that deserves careful and expert consideration. However, we already have a system that uses both judges and judicial justices in relation to bail, since all out-of-hour applications are heard by judicial justices. Although it was reported that complex bail applications raised during the weekend are most often held over for judicial consideration, I do not see why a similar process could not be held during normal working hours.

Concerns over the quality of bail decisions by judicial justices appear to me to be amenable to remedy through the use of careful oversight and training, rather than by continuing the current system. The advantages of greater flexibility also commend themselves to bail applications where timely availability of a bail hearing is at a premium for those in detention. The availability of appeal from the decision of a judicial justice to a judge, in cases deserving reconsideration, should reassure those who are concerned with inappropriate detention rates. Indeed, the broader development of an appeal jurisprudence in respect of bail within the Provincial Court may enhance rather than reduce consistency of practice in bail decisions.

A preliminary inquiry is held where an accused has elected a Supreme Court trial. Revised rules have now encouraged the conduct of focused hearings at which only certain witnesses or issues are addressed. The committal of the accused for trial is rarely an issue in these hearings. In all the consultations in which the conduct of preliminary inquiries was raised, there were very few, if any, who considered that Provincial Court judges should continue to be involved now that judicial justices can conduct them.<sup>189</sup> Based on these discussions it would appear that under the new rules, preliminary inquiries are insufficiently important

to merit applying senior judicial resources to them.

I understand that the number of preliminary inquiries is down dramatically; when held, they are focused on particular witnesses or issues. It was reported that some preliminary inquiries are apparently conducted out of preference for trial before a Supreme Court judge, rather than for the benefit of the preliminary inquiry itself. Assignment of all preliminary inquiries to judicial justices would minimize the number of unnecessary preliminary inquiries, and there appears no reason, from a quality point of view, to continue to have Provincial Court judges hear preliminary inquiries.

These are properly questions for the Chief Judge to resolve, in consultation with the Court, but there appear to be compelling reasons to consider changes to the ways in which these aspects of the Court's workload are handled.

**Recommendation: Broader use of judicial justices should be considered by the Provincial Court for the hearing of all preliminary inquiries and expansion of their use for bail applications.**

### 11.3.2 Complex Case Management in the Supreme Court

The importance of effective management of large cases to the criminal justice system requires that it be addressed here. However, a great deal of work has been done and is presently underway with respect to the challenges of large case management. Accordingly, I have focused in this part of the work on encouraging worthwhile initiatives already underway and on providing limited comments that may be helpful.

Many of the mega criminal trials of the past decade were at one stage or another at risk of collapse. Although the public is rightly concerned with the costs and complexity of mega trials, in my view the loss of confidence in the event of a collapsed prosecution or mistrial of a mega case would be substantial.

189 *Criminal Code*, RSC 1985, c C-46 s 535.



The growing complexity of investigations (including the use of informants and modern surveillance) and the allegation of criminal organization offences in concert with other criminal charges has dramatically escalated the management task facing the Supreme Court, even since this problem was originally identified.

In our consultations, the Chief Justice of the Supreme Court and representatives of the criminal committee of the Court expressed the view that large criminal cases now require active judicial case management, both prior to and during the course of trial. I agree whole heartedly with this conclusion and my recommendations here are intended only to encourage a more ambitious pace and goals for this project. The Pilot program for pre-trial management has been continued and extended to all Supreme Court Registries in the province.<sup>190</sup> I understand however, that progress in the management of these large cases has been slow and uneven. There is a substantial debate over whether the approach taken thus far will produce the necessary changes to help order these cases.

One issue raised during consultations was the Court's decision not to pass criminal rules as provided for under the Criminal Code of Canada.

The effective management of long criminal cases is critical to the effective use of resources within the system. This concern extends not only to the mega trials but applies particularly to the complexity and length of trials that now take six months which not long ago would occupy no more than one month of judicial time. Despite the common observation in all our consultations that every type of case takes far longer than it used to, the public has received very little institutional response by the Supreme Court to these concerns, in particular the expenditure of public funds, the risk of miscarriage of justice and the general appearance of inadequate management.

To the degree that this Review has applicable insights, I would offer that gradual change runs the risk of failing to achieve the culture change that is

needed. Efforts at changing culture through small incremental steps have rarely succeeded. There is a need to see more clear evidence that the Court is determined to effectively manage the time to trial and the time for trial. A wholesale change of approach may well be necessary to achieve the needed scale of change.

I am familiar with all the many reasons why the current, differentiated responsibility continues to be the basic premise of the system. In this view, active case management is an extension of the question-and-answer process that counsel has long been accustomed to with judges. I suggest that something dramatically different is required and that although it carries risks for the Court and the system, no other route has the potential of genuinely delivering fair, timely and effective justice in these complex matters. I am concerned that unless the Court takes more explicit responsibility for the length of time to trial, and length of trial, the very differentiated responsibility that currently dominates the system will continue to limit or prevent the necessary scale of improvement.

I also note that both the prosecution service and Legal Services Society are active and engaged in developing improved managerial capacity and policies in relation to large case management in the Supreme Court.

Based on the work and consultations conducted, I do not make any specific recommendations as to how this process should occur in the Supreme Court. I have concentrated on the question of whether improvements can be made to capacity and focus on the issues.

Virtually every other justice participant, including the Provincial Court, is in the course of obtaining insights from professional management organizations. In consultation with the Court, I understand that there would be an interest in gaining a better understanding of project management as it relates to large criminal cases. In

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<sup>190</sup> Supreme Court of British Columbia, *Annual Report 2011* (Vancouver: Supreme Court of British Columbia, 2011), at p. 23, online: Courts of British Columbia <[http://www.courts.gov.bc.ca/supreme\\_court/about\\_the\\_supreme\\_court/annual\\_reports/2011%20Annual%20Report.pdf](http://www.courts.gov.bc.ca/supreme_court/about_the_supreme_court/annual_reports/2011%20Annual%20Report.pdf)>.

my view the Court would be assisted by retaining the services of a project manager with experience and skills in project management. Should those be made available then in my view it would unduly hamper that insight to confine the project to pre-trial issues alone. Accordingly I would recommend that the Court be enabled to retain the services of a project manager to consider the adoption of project

management principles, in the management of pre-trial issues and complex trials.

**Recommendation: The Supreme Court Criminal Committee should be resourced to retain project management expertise to assist in developing best practices in pre-trial and trial management.**



# 12. ROLE FOR RISK ASSESSMENT AND BEHAVIOUR MANAGEMENT

A feature what is frequently called “thinking in silos” is that there is a tendency to think of the different sectors in terms of responsibility for the different parts of the criminal justice process. Thus police are responsible for investigation, Crown is responsible for the prosecution of offences and Corrections is responsible for supervision and custody. However this focus on responsibility overlooks the potential for one sector to assist the others in critical ways. Although largely unnoticed by the general community, Corrections has used evidence-based policy approaches to enhance its skills and confidence in managing persons in the community under conditions restricting their conduct.

The question raised by any systematic review is whether these skills can and should be applied elsewhere in the system.

## 12.1 CONTEXT

BC Corrections manages persons within a variety of restrictions, both in custody and in the community. The former may be in remand or sentenced. The latter may have been released under various set conditions: from bail pending trial, within terms imposed by police, or by the judiciary with a sentence of probation or a conditional sentence.

BC Corrections has undergone a dramatic shift in its organizational culture—from enforcing court orders to marshalling its resources around an evidence-based risk assessment of offenders. This includes programs and supervision strategies designed and implemented with the goal of improving safety to the community and rehabilitation of the offender. There has been an enormous increase in scientific understanding of the cognitive and psychological factors that cause and influence criminal behaviour. This has led to applying the true correlates of risk to the community, using the best available science to

enhance the likelihood of improved behaviour, and to help realize an offender’s human potential.

This culture change has taken place over more than 15 years commencing in 1994. BC Corrections believes that its current approach is far more effective in achieving safety for BC’s communities, far more effective in helping offenders change their behaviour and realize their potential and far more efficient in the expenditure of public funds.

## 12.2 CONSULTATIONS

The central tool employed by BC Corrections in its supervision of sentenced persons in the community is a disciplined risk assessment. That risk assessment is a product of many years of research into the correlates of risk in relation to an individual. Contrary to our traditional thinking, the risk of safety is not directly correlated to the characteristics of the particular offence but rather the history, circumstances and characteristics of the individual.

In our consultations with BC Corrections, they identified the potential for taking a similar approach to the management of risk elsewhere in the system. From their perspective, Corrections’ successful use of risk management has not been adequately incorporated into the risk management of persons released under terms by police officers, or those released under bail or under terms imposed by prosecutors or judges.

The role of Corrections now is limited to providing the Criminal Justice Branch with risk assessments of potential candidates for domestic violence alternative measures. They have also expanded their role in the recent alternative measures pilot. As well, when requested, they prepare a pre-sentence report. I would suggest, however, that there is room for expanding this role.

## 12.3 ANALYSIS AND RECOMMENDATIONS

BC Corrections provided me with a proposal, attached to this Report as [Schedule 8](#) which reviews the work they do in relation to risk assessment and how information about risk might improve certain decisions at different points in the criminal justice process. I had the opportunity to discuss this proposal with police officers, prosecutors, defence counsel and judges, both in the context of the terms of release into the community and Corrections' observation concerning their own risk assessment tools.

The concerns raised with respect to employing BC Corrections' insights into other terms of release include the following:

- The risk of an offender re-offending is viewed as a different risk than the risks being managed by prosecution policy or through the bail system;
- The goals of the terms of interim release may include a policing strategy focused on the offender and not focused on risk to the community; and
- Risk assessment is not the only consideration in prosecution and sentencing which must take into account such things as the denunciation of the alleged conduct.

No one disputed the need for improvement in the process by which someone is released into the community pending trial or has conditions placed upon their release into the community as a condition of their sentence. There is a sense that these outcomes are too often a product of legal traditions and could benefit from an effective use of social science insights into human cognition and behaviour.

Recent efforts have indeed been made to improve these systems, including:

- Standardization of some of the terms of release;
- Increased education of police officers.

The differences between the objectives of police, the prosecution, the judiciary and Corrections (and indeed of defence counsel) are real, but there are

sufficient similarities for the system to benefit from the knowledge and experience that has been developed within Corrections. Knowing which circumstances are truly correlated to the risk of an accused re-offending while awaiting trial could inform the selection of conditions intended to ensure public safety. To the extent that the police are seeking public safety by closely supervising conditions on prolific offenders, their efforts would be best focused on using the results of a disciplined risk assessment. Similarly, judges, prosecutors and defence considering the best conditions for release into the community would make far better decisions if they were informed by a disciplined risk assessment, which would take into account the similarities as well as the differences of the existing risk assessment protocol.

This exercise would be very different than the traditional pre-sentence report provided for in the Criminal Code, which focuses on an individual's circumstances relevant to a fit and appropriate sentence. Corrections emphasized that the traditional pre-sentence report, however helpful for the determination of a fit sentence, was not directed—neither during the sentence nor afterwards—to the needs of the individual, nor to the best terms likely to secure his or her rehabilitation, nor to the safety of the community.

As discussed elsewhere there is a wide spectrum of views as to the goals and purposes of the terms of release and the related volume of administration of justice offences. In my view, the traditional thinking that focuses on the accused's respect for the court and the system of justice detracts from essential outcomes—which should be the goals for this aspect of the criminal justice system. Put simply, these similar functions should be fully informed by our improved understanding of human psychology and by both the opportunities and limitations of affecting behaviour.

The fundamental goal should be to apply the best learning available to the question of managing the behaviour of those placed under conditions by the justice system. The long term goal for both the offender and the public is his or

her integration into the community as a law abiding and fulfilled individual. Release into the community under conditions informed by the best available evidence may well facilitate that process in a way that improves public safety and enhances public confidence in the justice system.

It is suggested in the proposal that the use of a pre-trial assessment tool which identified lower risk offenders could result in

- Reductions in the numbers of court cases through more early resolutions;
- Reductions in “over-supervision” of offenders;
- Appropriate placement of accused waiting for trial;
- Consistent and appropriate use of pre-sentence reports; and
- Sentences and conditions that are matched to an offender’s criminogenic needs and risk, which would ultimately reduce re-offending.

Although the Corrections’ proposal is aimed at transferring knowledge to other participants within the system and at the development of

specific tools for use at the different points in the process, I suggest that consideration should be given to using Corrections expertise directly wherever possible, recognizing that Corrections would require additional resources to take on this additional role. There may be a variety of options to maximize the benefit of broader utilization of Corrections knowledge and expertise in a cost-effective way. I recognize that this has important funding, human resource and public administration questions, which are best addressed by a deliberate and careful public administration process.

**Recommendation: The BC Corrections proposal outlined in [Schedule 8](#) to educate and inform other justice participants of best practices in the assessment of risk should be implemented, and subject to resources, consideration should also be given to enhancing the role of corrections staff in providing relevant advice on risk and behaviour management in relation to release and sentencing decisions and conditions.**





# 13. PROVINCIAL COURT REFORM

This section addresses the recommendations for Provincial Court reforms.

The Court has initiated a substantial project described in [Schedule 5](#) which I endorse and recommend for development and implementation. It has responded positively to the challenges raised in the *Green Paper*.

In a professional working environment, such as one where individual professionals exercise their judgment and skill, the success of any recommendations depends on their acceptance by the professionals who must make them work. Some initiatives in the past were not accepted by those who were expected to carry out the changes. Conversely, when those concerned are anxious and willing to see the system improved, there is no reason to impose solutions. This does not mean that every change needs to be popular with every stakeholder and individual professional, but in a system that is deeply committed to fair process, thorough consultation is more likely to lead to success.

The public's view of the criminal justice system is formed not only on the basis of its aggregate outcomes but also on the perception of how each participant performs. When one institution fails, the public's confidence in that participant and in the system as a whole suffers. Although this makes management all the more difficult, a recognition of both aggregate outcomes and public perception is important in framing recommendations for the separate institutions.

## 13.1 CONTEXT

The concentration of the Review on matters of criminal process and the issues of delay naturally resulted in a focus on the Provincial Court. For that reason the Review has only considered recommendations relating to that Court's structure and workings.

## 13.2 CONSULTATIONS

In the course of the Review the principal issues discussed respecting the Provincial Court were:

- How does the Court best organize its process to assist in the resolution of cases within its system?
- Does the Court and the OCJ have the necessary managerial expertise and capacity to effect change?
- Is there a need for more judges, and what is the best approach to judicial complement?

During the consultations there was a wide spread of views respecting judicial leadership in justice reform. Some of these views were very critical of the Court and others were very supportive. Some regarded judicial leadership essential and others considered it marginal to the need to focus on justice outcomes rather than case outcomes. Satisfaction at the Bar with the work of the Court varied widely from region to region.

There was a general consensus that we enjoy a high level of quality in our judges and that overall the results in cases are of a very high quality. In particular members of the Bar were generally satisfied with the degree of criminal law expertise demonstrated by Provincial Court judges. Very few suggestions relating to the actual conduct of trials were made.

Criticism of inefficiencies in the work of the Court was frequently expressed, but this criticism was almost always accompanied with the observation that it was a system failure rather than a want of willingness or energy on the part of individual judges. A wide variety of suggestions related to the Court's internal work assignments were offered by lawyers generally with the observation that the Court should work more creatively to match demand with judicial sitting hours.

It is clear that the Court enjoys broad support for the quality of its judges and their judging, and I am thus very confident that if improvements can be made to its systems, public confidence in all aspects of the Court's work can be achieved.

### 13.3 ANALYSIS AND RECOMMENDATIONS

Earlier in this Report, I discussed the need for improvements to the scheduling of criminal cases, judicial case management and greater coordination between the courts and other institutions within the justice system. Many of these recommendations will require the leadership and commitment of the Provincial Court in order to be achieved. Success may also require willingness on the part of the judiciary to explore new options for its organization. And to better coordinate the administration of justice, the collaborative working relationships between the executive branch and the judiciary will need to be formalized. In this section of the Report, I discuss aspects of the Provincial Court's organization.

On reviewing the recent history of the relationship between the executive and the judiciary in British Columbia, it is apparent there are several possible sources of friction between the executive and the judiciary that should be acknowledged. These include:

- Alternative models of resolving issues, such as the use of tribunals, are easier for the executive to engage since they are directly amenable to process reform and direction.
- Because of their special status, it is difficult for the Courts to obtain candid input from the general public and other participants. Deference from other legal professionals, social isolation from the general public and focus on the adjudicative aspects of their work may all restrict useful input and criticism.
- The lack of managerial background or experience for most Chief Judges may undermine their confidence and ability to be effective managers.
- The collegial nature of court governance means that judicial leaders may feel restrained in what they can undertake on behalf of the Court as a whole.
- The tradition of leadership through a Chief Judge may have hampered the institutionalization of

changes and led to the changes being dropped by successive office holders.

- Court culture places a substantial emphasis on each judge's authority which can mean that the Chief Judge is considered to have only a limited and delegated authority.

There is abundant evidence for these challenges in the recent history of the Courts. I have considered what recommendations might assist in helping the Courts exercise their independence in a setting that has access to greater managerial expertise, has more clear managerial authority and obtains better and more helpful input from the public.

#### 13.3.1 Mission and Vision of the Provincial Court

The importance of having a clear mission statement, vision and goals is spreading from other organizations to the Court. Their role in a Court needs to be adjusted appropriately, but in this respect, courts have needs similar to other organizations.<sup>191</sup>

The Provincial Court's Annual Report 2010–2011 contained a Mission statement, Vision and Goals for the BC Provincial Court. This was an important step forward in applying modern principles of management to the Court. The Mission, Vision and Goals of the Provincial Court are as follows:

##### **Mission**

As an independent judiciary, our mission as the Provincial Court of British Columbia is to impartially and consistently provide a forum for justice that assumes equal access for all, enhances respect for the rule of law and confidence in the administration of justice.

##### **Vision**

To provide an accessible, fair, efficient, and innovative system of justice for the benefit of the public.

191 The literature concerning judicial performance mirrors the business and public administration literature in most respects. See Brian Ostrom et al. "Becoming a High Performance Court", *The Court Manager* 26:4 at p. 39.

### Goals

1. Excel in the delivery of justice;
2. Enhance meaningful public access to the Court, its facilities and processes;
3. Anticipate and meet the needs of society through continuing judicial innovations and reform; and
4. Ensure that administration and management of the Court is transparent, fair, effective and efficient, consistent with the principles of judicial independence.<sup>192</sup>

The Court has demonstrated leadership in introducing a mission statement, vision and goals in 2010. These principles establish a sound foundation for the Court's ongoing operation and reforms that should be supported by every British Columbian.

These goals are of course very general and for their full realization require sound implementation plans that address performance goals for the Court and the particular means by which these goals will be realized in the work of the Court. An annual implementation plan available to the public, which afforded people the means to better understand how these goals are guiding the Court's work and reforms, would be valuable and helpful to the Court itself.

### 13.3.2 Powers and Duties of the Chief Judge

There is a surprising degree of uncertainty around the powers and responsibilities of the Chief Judge and how they are to be exercised. The Court itself characterizes the OCJ as "the administrative headquarters for the Provincial Court ... responsible

for engaging with government agencies, individuals and organizations that wish to communicate with the Court."<sup>193</sup> The Chief Judge is expected to "set the direction for the Court" on matters of strategic planning.<sup>194</sup>

Despite the Chief Judge's statutory right and duty to be responsible for the "supervision" of the Court, the Supreme Court of Canada has stated that the Chief "enjoys no particular authority over other judges, save an administrative one" and that "a chief justice is responsible for the expeditious progress of cases through his or her court and may under certain circumstances be obligated to take steps to correct tardiness."<sup>195</sup> These statements support the limited influence of a Chief Judge over the decisional independence afforded every judge, but it is important they not be taken as understating the importance of leadership in any organization, including a court.

In its 2004 report titled "Judicial Independence and Judicial Governance in the Provincial Courts," the Canadian Association of Provincial Court Judges suggested that the role of Chief Judge needs to be clarified and that "one way to do this is through legislation which deals much more specifically with what the Chief Judge is to do and how he or she is to do it – that is to say, a tight, carefully worded and easily operationalized list."<sup>196</sup>

Although administrative leadership and oversight is expected from the OCJ, the specific administrative powers and duties of the Chief Judge are less clear.<sup>197</sup> These powers and duties are often articulated in provincial legislation that grants

192 Provincial Court of British Columbia, *Annual Report 2010-2011 Fiscal Year* (Vancouver: Provincial Court of British Columbia, 2011), at p. 4, online: Provincial Court of British Columbia <<http://www.provincialcourt.bc.ca/downloads/pdf/annualreport2010-2011.pdf>>.

193 Provincial Court of British Columbia, *Annual Report 2010-2011 Fiscal Year* (Vancouver: Provincial Court of British Columbia, 2011), at p. 9, online: Provincial Court of British Columbia <<http://www.provincialcourt.bc.ca/downloads/pdf/annualreport2010-2011.pdf>>.

194 Provincial Court of British Columbia, *Annual Report 2009-2010 Fiscal Year* (Vancouver: Provincial Court of British Columbia, 2010), at p. 44, online: Provincial Court of British Columbia <<http://www.provincialcourt.bc.ca/downloads/pdf/annualreport2009-2010.pdf>>.

195 *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 SCR 391.

196 Peter J. McCormick, *The Canadian Association of Provincial Court Judges, Judicial Independence and Judicial Governance in Provincial Courts* (April 2004), at p. 73, online: Canadian Association of Provincial Court Judges <<http://www.judges-juges.ca/en/publications/pubdocs/JudgeBook.pdf>>.

197 For a description of various options for the Office of the Chief Judge, see: Peter J. McCormick, *The Canadian Association of Provincial Court Judges, Judicial Independence and Judicial Governance in Provincial Courts* (April 2004), online: Canadian Association of Provincial Court Judges <<http://www.judges-juges.ca/en/publications/pubdocs/JudgeBook.pdf>>.

jurisdiction to the Court.<sup>198</sup> The contents of these statutes, however, vary greatly across Canada in characterizing the OCJ's role.

In British Columbia, the *Provincial Court Act* sets out the powers and duties of the Chief Judge as follows:

The chief judge has the power and duty to supervise the judges and justices and, without limiting those powers and duties, may do one or more of the following:

- (a) designate the case or matter, or class of cases or matters, in which a judge or justice is to act;
- (b) designate the court facility where a judge or justice is to act;
- (c) assign a judge or justice to the duties the chief judge considers advisable;
- (d) exercise the other powers and perform other duties prescribed by the Lieutenant Governor in Council.<sup>199</sup>

In addition, the Chief Judge of the BC Provincial Court has specific responsibilities related to the investigation of complaints made against judges.

In other provinces the statutory powers and duties of the Chief Judge differ. The Ontario *Courts of Justice Act* states that the "Chief Justice of the Ontario Court of Justice shall direct and supervise the sittings of the Ontario Court of Justice and the assignment of its judicial duties."<sup>200</sup> In 2006, the *Courts of Justice Act* was amended to clarify that the powers of the Chief Judge include the following specific functions:

1. Determining the sittings of the court.
2. Assigning judges to the sittings.
3. Assigning cases and other judicial duties to individual judges.
4. Determining the sitting schedules and

- places of sitting for individual judges.
5. Determining the total annual, monthly and weekly workload of individual judges.
6. Preparing trial lists and assigning courtrooms, to the extent necessary to control the determination of who is assigned to hear particular cases.<sup>201</sup>

The Saskatchewan *Provincial Court Act* contains an even longer list of powers and duties for the Chief Judge in that province. In Saskatchewan, the Chief Judge may

- a) designate a particular case or matter, or category of cases or matters, with respect to which a particular judge or particular justices of the peace must act;
- b) after consultation with the minister, designate court facilities at which the court shall sit;
- c) designate particular court facilities and offices that are to be used by particular judges and justices of the peace;
- d) designate the time at which judges or justices of the peace must hold court at any place;
- e) delegate any functions that the chief judge considers appropriate to an associate chief judge;
- f) assign to another judge any duties that, in the opinion of the chief judge, are administrative duties;
- g) assign duties to judges and justices of the peace;
- h) direct a judge to act in the place and exercise the powers of another judge who is or expects to be absent, during the period of that judge's absence;
- i) direct and supervise generally the duties and sittings of justices of the peace;

198 The jurisdiction of Provincial Courts is established by statute and they do not exercise the inherent jurisdiction conveyed to federally appointed judges under s. 96 of the Constitution.

199 *Provincial Court Act*, RSBC 1996, c 379, s 11(1).

200 *Courts of Justice Act*, RSO 1990, c C43, s 36(1).

201 *Courts of Justice Act*, RSO 1990, c C43, s 75(1). The legislative authority granted to the Chief Justice in relation to these administrative tasks extends to the authority to determine the venue of a trial in the region over which he or she presides: *R. v. Jeffries*, [2010] OJ No 457, at para 61.

- j) exercise any other powers and perform any other duties that are prescribed in the regulations.<sup>202</sup>

As can be seen in the selected provincial acts above, the statutory powers and duties of Provincial Court Chief Judges differ considerably across the provinces.

British Columbia's statutory description of the Chief Judge's powers and duties falls short of the description contained in Ontario and Saskatchewan in several respects. The Ontario legislation, for example, explicitly affirms the Chief's authority to determine the sittings of the court, to determine sitting schedules for individual judges and, importantly, to determine the total annual, monthly and weekly workload of individual judges. These are significant administrative functions that are not clearly articulated, within the powers and duties of the Chief Judge of British Columbia under the present legislation.

Section 78(3) of the Ontario *Courts of Justice Act* also provides that the attorney general may refer questions of court administration for consideration by the Ontario Courts Advisory Council. In my view this provides a potentially useful and transparent means of communication on questions of court administration between the executive and judiciary and should be available in British Columbia. In the BC context, that reference should be to the Chief Judge, unless there is a preferable body, such as the Executive Committee, to receive and consider such a request.

The Saskatchewan legislation also goes further in affirming the powers of the Chief Judge as compared to the BC legislation. Specifically the Saskatchewan legislation provides that the Chief Judge may designate the time at which judges must hold court and may assign administrative duties to judges. These are also important administrative oversight functions that are not presently clear under the BC legislation.

It is important to note that the current Chief Judge did not raise any complaint respecting the current statute; nevertheless, in my mind the need for clarification is clear and compelling. It is both necessary and helpful to clearly identify the roles and responsibilities of the Chief Judge and the OCJ.

### 13.3.3 Judicial Executive Committee

In British Columbia the administrative work of the Provincial Court is conducted by an Executive Committee and a Management Committee. According to the Provincial Court Annual Report, the Executive Committee, chaired by the Chief Judge and including the three Associate Chief Judges, "provides strategic direction and decision-making for the Court on administrative and management matters as well as issues touching on the administrative independence of the Court."<sup>203</sup> The Management Committee, which consists of the Chief Judge and various administrative judges, "provides advice to the Chief Judge on emerging issues in judicial districts, policy proposals and administrative matters."<sup>204</sup>

In my view, the formal recognition of internal committees to provide strategic direction on the administration of the courts is necessary to enable better management of the Court's business. As articulated by Brian Ostrom, Roger Hanson and Judge Kevin Burke in their essay "Becoming a High Performance Court," one of the key strategies for achieving high court performance is approaching the delivery of justice as a group enterprise. Instead of approaching the judicial administrative function as isolated individuals, they argue that the performance of judges is strengthened when administrative routines and processes support the work of every judge in a coherent fashion. The way to achieve this, they say, is through building consensus among as many judges as possible.<sup>205</sup> To the extent that the

202 *The Provincial Court Act, 1998*, SS 1998, c P-30.11, s 8.

203 Provincial Court of British Columbia, *Annual Report 2010-2011 Fiscal Year* (Vancouver: Provincial Court of British Columbia, 2011), at p. 9, online: Provincial Court of British Columbia <<http://www.provinciacourt.bc.ca/downloads/pdf/annualreport2010-2011.pdf>>.

204 Provincial Court of British Columbia, *Annual Report 2010-2011 Fiscal Year* (Vancouver: Provincial Court of British Columbia, 2011), at p. 9, online: Provincial Court of British Columbia <<http://www.provinciacourt.bc.ca/downloads/pdf/annualreport2010-2011.pdf>>.

205 Brian Ostrom et al. "Becoming a High Performance Court," *The Court Manager* 26:4 at p. 41.

use of administrative committees assists in building consensus on administrative issues, it strengthens the ability of the Court to deliver justice in an efficient and effective manner.

In addition to building consensus and increasing administrative efficiency however, an internal court committee can play another important role—focusing responsibility for making decisions concerning administrative issues on behalf of the Court.

Since administrative independence attaches to the court as an institution, an institutional body should be given the power and responsibility to make such administrative decisions. In this respect the statutory governance of the court does not reflect a clear means to enable the discharge of its collective authority and responsibility over judicial administration.<sup>206</sup>

In order to facilitate the exercise of administrative independence, the Canadian Association of Provincial Court Judges suggests that a “collegial approach” is preferred, where the Chief Judge would act after listening to advisory committees.<sup>207</sup> In my view, this approach has the potential to provide sound support for an individual Chief Judge exercising institutionally-held administrative independence.

In British Columbia, the *Provincial Court Act* does not include any provision analogous to that in Ontario, which would mandate the Provincial Court Executive Committee or Management Committee to consider administrative issues put to it or to make recommendations to the BC Attorney General on matters of court administration. This may provide a useful means of ascertaining the Court’s views on questions in the future.

### 13.3.4 Chief Executive Officer for Judicial Administration

As described in the section of this Report on judicial independence, administrative independence requires

that judges hold authority over administrative decisions that bear directly and immediately on their judicial function. This means that judges necessarily carry both adjudicative and administrative responsibilities. Judges, however, are not necessarily trained administrators, and their expertise and time may not be best utilized attending to administrative functions. Administrative independence does not require that judges themselves carry out administrative duties, but simply that they maintain authority over administrative decisions that directly affect their judicial functions. That is, judicial administration may be delegated.

The Provincial Court already has a position of Executive Director of Judicial Administration, but it is unclear whether this role, in support of the OCJ, is as well defined as it might be. To the extent that this represents a senior executive role within the governance structure of the Court under the direction of the Chief Judge, it should be considered within the governance provisions of the statute. This is not intended to detract from, or alter, the current statutory role of the ADM Court Services pursuant to s. 41(2) of the *Provincial Court Act*.

I suggest that, as part of the development of a clearer governance structure, the roles and responsibilities of the executive director responsible for judicial administration be more clearly defined.

### 13.3.5 Management Expertise

Although not all business models are applicable to judicial administration, there are some models and concepts that could be beneficial. It is notable that the Court along with Court Services directly engaged a business process consultant to review the scheduling process and to assist in developing the proposed revised scheduling program. Almost every successful industry and organization in the present century has adopted aspects of modern

206 Peter J. McCormick, *The Canadian Association of Provincial Court Judges, Judicial Independence and Judicial Governance in Provincial Courts* (April 2004), at p. 74, online: Canadian Association of Provincial Court Judges <<http://www.judges-juges.ca/en/publications/pubdocs/JudgeBook.pdf>>.

207 Peter J. McCormick, *The Canadian Association of Provincial Court Judges, Judicial Independence and Judicial Governance in Provincial Courts* (April 2004), at p. 74, online: Canadian Association of Provincial Court Judges <<http://www.judges-juges.ca/en/publications/pubdocs/JudgeBook.pdf>>.



business analysis. Although there are distinctions, the parameters of professional efficiency, the use of new technology and the need for management leadership are common to both courts and business.

Although in a different constitutional and administrative context, the Massachusetts Supreme Court offers an example of the improvements that can be made to judicial administration with the use of external advisors with business and technological expertise.<sup>208</sup>

On the basis of the consultations, every justice participant is seeking to apply business analysis to its operations. The Provincial Court has already obtained the advice of business process improvement experts to assist it in improving Court administration. However, in my view, the Provincial Court should be encouraged to continue improving its operations with the input of experts in the fields of business organizations, management and technology. I believe excellent people would be prepared to serve on such a board as a public service to the community.

I have made similar recommendations to add to the managerial input available to the Supreme Court, and it may be that such a board would be of assistance to all three Courts and potentially help with respect to judicial management and court administration.

The courts are high-profile public institutions that matter to the community, and I am confident that expert people with management expertise could be found to be of assistance to one or more of the courts.

### 13.3.6 Judicial Complement

The question of the proper judicial complement has had a high profile and been a matter of considerable concern for several years. The most obvious feature of the current situation is that virtually every participant is engaged in considerable reform, and these reforms may have a significant effect on the question of allocation of resources within the system, even apart from any question of increasing resources. In almost every respect, therefore, this question now faces an entirely different factual and policy context.

In 2010, the Provincial Court issued a report titled “Justice Delayed”, addressing the advisability of increasing the complement of judges from 126.3<sup>209</sup> to what it was in 2005, 143.65 judges.<sup>210</sup> The Court used the 2005 number of judges as a baseline for its request because “with that number of judges the Court in 2005 was able to keep pace with the volume of new cases.”<sup>211</sup> In addition to recommending that the 2005 level of judges be restored, however, the Court “also recommends that a determination be made as to the necessary level of the Court’s judicial complement, and that this complement be allocated to the Court”, suggesting that more work needs to be done to derive a more fully supported estimate of the number of judges required.<sup>212</sup>

During my consultations, several other groups also recommended that the judicial complement be increased. For example, the BC Civil Liberties Association strongly recommended that the government “continue to increase the complement of provincial judges to match the level required to reduce the current backlog and restore public

208 Massachusetts Supreme Judicial Court, *Striving for Excellence in Judicial Administration* (February 2008), online: Massachusetts Court System <<http://www.mass.gov/courts/sjc-report-feb-08.pdf>>.

209 Numbers are provided as FTEs or “full-time equivalents”. The majority of judges work full-time but some work part-time as part of the Provincial Court Senior Judge Program.

210 Provincial Court of British Columbia, Court Report, *Justice Delayed: A Report of the Provincial Court of British Columbia Concerning Judicial Resources* (14 September 2010), at p. 3, online: Provincial Court of British Columbia <[http://www.provincialcourt.bc.ca/downloads/pdf/Justice\\_Delayed\\_-\\_A\\_Report\\_of\\_the\\_Provincial\\_Court\\_of\\_British\\_Columbia\\_Concerning\\_Judicial\\_Resource.pdf](http://www.provincialcourt.bc.ca/downloads/pdf/Justice_Delayed_-_A_Report_of_the_Provincial_Court_of_British_Columbia_Concerning_Judicial_Resource.pdf)>.

211 Provincial Court of British Columbia, Court Report, *Justice Delayed: A Report of the Provincial Court of British Columbia Concerning Judicial Resources* (14 September 2010), at p. 8, online: Provincial Court of British Columbia <[http://www.provincialcourt.bc.ca/downloads/pdf/Justice\\_Delayed\\_-\\_A\\_Report\\_of\\_the\\_Provincial\\_Court\\_of\\_British\\_Columbia\\_Concerning\\_Judicial\\_Resource.pdf](http://www.provincialcourt.bc.ca/downloads/pdf/Justice_Delayed_-_A_Report_of_the_Provincial_Court_of_British_Columbia_Concerning_Judicial_Resource.pdf)>.

212 Provincial Court of British Columbia, Court Report, *Justice Delayed: A Report of the Provincial Court of British Columbia Concerning Judicial Resources* (14 September 2010), at p. 4, online: Provincial Court of British Columbia <[http://www.provincialcourt.bc.ca/downloads/pdf/Justice\\_Delayed\\_-\\_A\\_Report\\_of\\_the\\_Provincial\\_Court\\_of\\_British\\_Columbia\\_Concerning\\_Judicial\\_Resource.pdf](http://www.provincialcourt.bc.ca/downloads/pdf/Justice_Delayed_-_A_Report_of_the_Provincial_Court_of_British_Columbia_Concerning_Judicial_Resource.pdf)>.



confidence” and accepted the BC Provincial Court’s articulation of what that number of judges should be.<sup>213</sup> Similarly, the Canadian Bar Association made a forceful and well-considered submission that there was a broad public interest in providing greater certainty and reducing the potential for confusion or friction and that these goals would be better achieved with a definite complement.<sup>214</sup>

Following the BC Provincial Court’s “Justice Delayed Report,” the judicial complement was marginally increased from 126.3 in September 2010 to 128 as of September 2011.<sup>215</sup> As of July 31, 2012, the complement fell slightly to 126.80.<sup>216</sup>

I agree with the BC Provincial Court’s recommendation that a determination ought to be made as to the necessary level of the Court’s judicial complement and that this complement be allocated to the Court. I also agree with the CBA and the BC Civil Liberties Association that the judicial complement should be a number sufficient to address backlogs in the court system and to ensure public confidence.

However, I do not agree that the number of judges present in 2005 represents the necessary judicial complement level or that this number should be used as a baseline for calculations. Rather, in my view the analysis needs to accommodate the recently received information respecting the downward trend in cases and the many shifting processes being put in place by the Court and the other justice participants.

It is apparent from the decline in cases that, should that trend continue, the Court has sufficient resources to reduce the backlog and to eventually be able to set matters down for trial in an acceptable time. A similar process has in fact occurred in the Supreme Court, as a result of declining case volumes and without additional judges, although

the increasing demands of mega trials are uncertain and growing.<sup>217</sup>

In determining what the appropriate judicial complement level ought to be, it seems that one should consider several basic factors:

- Whether the existing complement of judges are being utilized to their full capacity,
- Trends in judicial workload (including predictable increases in workload flowing from trends in policing or legislative policy), and
- Regional and special needs for judicial capacity.

These are factors that, in my view, are required to support a reasoned assessment of how many judges are required. They should be considered before any change to the existing judicial complement is made.

I understand that the overall utilization rate of judges based on judicial sitting days is approximately 90%. This means that judges sit in court for at least some time on 90% of the days that they are scheduled to do so. The gap I understand is due to days on which the entire caseload has collapsed.

In consultation with members of the Bar, however, I was told that although judges sit on their scheduled days, such sittings are too often limited to the morning session with many courtrooms empty for substantial parts of the day. This raises the importance of measuring actual sitting hours as the principal factor in judicial utilization.

The primary measurement of judicial utilization should be based, in my view, on actual judicial sitting hours. I understand that the target for actual sitting hours per day is four and a half.

An inadequate matching of case demand with judicial capacity has the significant potential for under-utilization. I understand that elsewhere in

213 British Columbia Civil Liberties Association, *Justice Denied: The causes of BC’s criminal justice system crisis* (2012), at p. 25, online: British Columbia Civil Liberties Association <<http://bccla.org/wp-content/uploads/2012/05/20120401-Justice-Denied-report1.pdf>>.

214 *Justice In Time*, Canadian Bar Association Submission (6 June 2012).

215 Provincial Court of British Columbia, Court Report, *Justice Delayed: Update* (as at September 11, 2011), at p. 1, online: Provincial Court of British Columbia <<http://www.provincialcourt.bc.ca/downloads/pdf/Justice%20Delayed%20-%20Update%20September%202011.pdf>>.

216 Provincial Court of British Columbia, Court Report, *Provincial Court Complement* (30 June 2012), at p. 1, online: Provincial Court of British Columbia: <<http://www.provincialcourt.bc.ca/downloads/pdf/Provincial%20Court%20Judge%20Complement%20Requirements.pdf>>

217 See: Supreme Court of British Columbia, *Supreme Court Annual Reports, 2000–2011*, online: Courts of British Columbia: <[http://www.courts.gov.bc.ca/supreme\\_court/about\\_the\\_supreme\\_court/annual\\_reports/index.aspx](http://www.courts.gov.bc.ca/supreme_court/about_the_supreme_court/annual_reports/index.aspx)>.

Canada actual judicial sitting hours have averaged as low as two hours per day.

In Newfoundland and Labrador, Chief Judge Reid and others sitting on a “Task Force on Criminal Justice Efficiencies” reported in 2008 on judicial sitting hours in that province. The report concluded that:

Throughout 2006 and 2007, the sitting time of the St. John’s Court is on average 40% below the [4.5 hour] standard set by Ontario and British Columbia. This suggests that with a system that better utilizes judicial resources, significant improvements can be made in trial times at minimal cost.<sup>218</sup>

Given that other Provincial Courts are admittedly falling short of the standard four and a half hours sitting per day, it is necessary to assess whether British Columbia’s Provincial Court faces any similar challenge. Although BC Provincial Court judges may sit on 90% of available days, if they are not sitting for a full four and a half-hour day then the existing complement of judges may not be utilized to their full capacity, representing a significant mismatch in demand and judicial resources. This is an important factor that needs to be assessed by the province and the judiciary.

Trends in the workload of judges ought also to be considered in determining the necessary judicial complement. The BC Provincial Court has articulated the 2005 level of judges as a baseline and target because in 2005 they were able to keep pace with new cases. However, if the number of new cases has decreased, then fewer judges may be required.

Based on data from the MAG, crime has decreased since 2005, and this may have contributed to the recent reduction in the number of new criminal

cases. For example, in 2005/06 the Provincial Court received 106,363 new criminal cases, and in 2011/12 it received only 91,389 new criminal cases (a decrease of about 14%).<sup>219</sup> This is a significant decrease in overall workload considering that three-quarters of the Provincial Court’s work involves adult criminal prosecutions.<sup>220</sup>

Further analysis is required since the variation may be largely explained by the dramatic reduction in impaired driving charges. However, based on the new data, even though there are fewer judges now than in 2005, there are actually more judges per new criminal case than in 2005. An assessment of the workload of Provincial Court judges in terms of the number of new cases should also be considered as part of a determination of the necessary judicial complement. This may require input from policing and corrections agencies as well.

The forecasting of trends may also benefit from information available from other participants. LSS carries out a regular forecast of its cases. Since it administers the funding of a significant majority of violent crime charges in the province, its forecasts can and should be referenced in predicting volumes of new cases.

A third factor to be considered is whether any part of the judicial workload will be delegated to judicial justices or other professional staff. In this Review, delegation of preliminary inquiries to judicial justices is recommended. Therefore the amount of saved judicial time achieved needs to be accounted for in any agreement on judicial complement.

A submission from the Native Courtworker and Counselling Association of BC similarly suggests that other court staff could complete certain tasks currently performed by judges. Specifically, this organization suggests that simple adjournments could be completed at the Registry desk, with the

218 Newfoundland and Labrador, *Report of the Task force on Criminal Justice Efficiencies* (February 2008), at p. 18, online: Newfoundland and Labrador Ministry of Justice <[http://www.justice.gov.nl.ca/just/publications/report\\_on\\_criminal\\_justice\\_efficiencies.pdf](http://www.justice.gov.nl.ca/just/publications/report_on_criminal_justice_efficiencies.pdf)>.

219 See discussion in Section 3.6 of this Report.

220 Provincial Court of British Columbia, Court Report, *Justice Delayed: A Report of the Provincial Court of British Columbia Concerning Judicial Resources* (14 September 2010), at p. 38, online: Provincial Court of British Columbia <[http://www.provincialcourt.bc.ca/downloads/pdf/Justice\\_Delayed\\_-\\_A\\_Report\\_of\\_the\\_Provincial\\_Court\\_of\\_British\\_Columbia\\_Concerning\\_Judicial\\_Resource.pdf](http://www.provincialcourt.bc.ca/downloads/pdf/Justice_Delayed_-_A_Report_of_the_Provincial_Court_of_British_Columbia_Concerning_Judicial_Resource.pdf)>.

option of being sent to a courtroom when necessary.<sup>221</sup> In another submission, the LSS suggests that judicial workload could be reduced by “addressing judicial case management to reduce the number of purely administrative appearances.”<sup>222</sup> Since the Court Scheduling Project anticipates a significant reduction in administrative appearances in court, this too will need to be taken into account. These are factors that I believe should be carefully considered in determining the level of judicial workload that must be addressed by judges and therefore the number of judges that are required.

I note that the Court has, in the past, reduced the workload of judges by transferring work to other court staff. For example, the Court reports that in 2010 it implemented a number of reforms including “the transfer of the equivalent of 5.5 judge years of workload to JCMs, lawyers and mediators.”<sup>223</sup>

To summarize, I agree that the government and judiciary must work together to determine the level of judicial complement necessary to meet the goals of the justice system, including the timely delivery of justice and maintaining public confidence in the administration of justice. However, I do not agree that the 2005 complement level necessarily represents the appropriate judicial complement for 2012 and beyond. In determining what the appropriate judicial complement level ought to be, several factors require consideration: whether the existing complement of judges is being fully utilized; whether the judicial workload has increased or decreased; and whether any of this workload can be delegated to others or otherwise reduced.

In the context of limited government resources, a prudent approach to determining the judicial

complement should first include an assessment of the factors articulated above and I recommend that the MAG work closely with the judiciary in doing so.

In my view, however, a means must be found to remove uncertainty around the question of judicial complement. That uncertainty is corrosive of relationships and renders the Chief Judge’s administrative role difficult to fulfill. It also focuses everyone’s attention on judicial capacity and away from means to improve performance based on existing resources.

In this regard, the Provincial Court has stated that “the current uncertainty regarding the size of the complement and the delay in filling positions has undermined the Court’s ability to effectively use and allocate its resources throughout the province.”<sup>224</sup> In this Report, I have recommended that the courts, as well as other institutions within the justice system, engage in strategic and co-ordinated planning. This involves planning to maximize the effective use of personnel resources. To do so, I conclude that the filling of judicial vacancies within a pre-determined complement should be done in a timely way.

However, in order for the application of judicial resources to remain dynamic and responsive to trends in the justice system, the pre-determined complement ought to be reassessed on a regular basis (for example, every three to five years). This will require taking into account the factors articulated above. I note that the Court has also expressed the view that delay and backlog should continue to be monitored and that the judicial complement be adjusted accordingly, after sufficient notice to the Court.<sup>225</sup>

The Provincial Court has suggested that in order to bring about an aggressive reduction in the backlog

221 Native Courtworker and Counselling Association of BC Submission (27 April 2012) at p. 6.

222 Legal Services Society, “Making Justice Work : Improving Access and Outcomes for British Columbians,” *Report to the Minister of Justice and Attorney General The Honourable Shirley Bond* (1 July 2012), [unpublished] at p. 15.

223 Provincial Court of British Columbia, Court Report, *Justice Delayed: A Report of the Provincial Court of British Columbia Concerning Judicial Resources* (14 September 2010), at p. 3, online: Provincial Court of British Columbia <[http://www.provincialcourt.bc.ca/downloads/pdf/Justice\\_Delayed\\_-\\_A\\_Report\\_of\\_the\\_Provincial\\_Court\\_of\\_British\\_Columbia\\_Concerning\\_Judicial\\_Resource.pdf](http://www.provincialcourt.bc.ca/downloads/pdf/Justice_Delayed_-_A_Report_of_the_Provincial_Court_of_British_Columbia_Concerning_Judicial_Resource.pdf)>.

224 Provincial Court of British Columbia, Court Report, *Justice Delayed: A Report of the Provincial Court of British Columbia Concerning Judicial Resources* (14 September 2010), at p. 4, online: Provincial Court of British Columbia <[http://www.provincialcourt.bc.ca/downloads/pdf/Justice\\_Delayed\\_-\\_A\\_Report\\_of\\_the\\_Provincial\\_Court\\_of\\_British\\_Columbia\\_Concerning\\_Judicial\\_Resource.pdf](http://www.provincialcourt.bc.ca/downloads/pdf/Justice_Delayed_-_A_Report_of_the_Provincial_Court_of_British_Columbia_Concerning_Judicial_Resource.pdf)>.

225 Provincial Court of British Columbia, Court Report, *Justice Delayed: A Report of the Provincial Court of British Columbia Concerning Judicial Resources* (14 September 2010), at p. 39, online: Provincial Court of British Columbia <[http://www.provincialcourt.bc.ca/downloads/pdf/Justice\\_Delayed\\_-\\_A\\_Report\\_of\\_the\\_Provincial\\_Court\\_of\\_British\\_Columbia\\_Concerning\\_Judicial\\_Resource.pdf](http://www.provincialcourt.bc.ca/downloads/pdf/Justice_Delayed_-_A_Report_of_the_Provincial_Court_of_British_Columbia_Concerning_Judicial_Resource.pdf)>.

of cases and to keep pace with the work in the system, approximately 18 new judicial appointments should be made. This would return the court to the complement it enjoyed in 2005. In my view, the evidence respecting judicial utilization and the recent declines in caseload does not support a general increase in judicial complement of this magnitude.

The proposals made in this Review and by the Court and justice participants will have implications for judicial complement that should be addressed. In particular, I agree with the Court's suggestion that the appointment of five judges would add to the immediate capacity and enable an aggressive reduction of the case backload. There may also be particular regional needs for appointments.

### 13.3.7 Performance Measurement and Reporting

The Provincial Court pioneered the establishment of performance measures in 2005. These performance measures have not been updated, nor do they appear to have formed a central role in planning or management of the Court.

In order to become a high performance court, Ostrom, Hanson and Burke suggest that judges need to share the results of their work and get feedback on it. They say:

Judges need regular systematic feedback if they are to get better at their craft. Courts need regular and systematic feedback if the court as a whole is to improve performance .... Because customer satisfaction is a focal point of performance, the sharing of performance results among judges, managers, staff members and the public is a sign of respect.<sup>226</sup>

Throughout this Report I have emphasized the importance of transparency and accountability in management of the justice system. These characteristics are important not only in achieving better results in terms of efficiency and effectiveness but also in building public confidence in our system of justice. As such, I agree that performance measurement and reporting, in a transparent manner, is as important for judges as it is for other institutions in the criminal justice system. Indeed, as the Supreme Court of Canada has stated, the important role that the courts play in our democratic society demands that their operations be open to public scrutiny.<sup>227</sup>

There are many approaches to judicial performance measurement and reporting in other jurisdictions, in Canada and around the world. Most methods use systematic data collection and reporting by some central agency (whether independent or a part of government). For example, the Council of Europe has established a Commission on the Efficiency of Justice with the mandate of collecting data and evaluating the judicial systems of all Council of Europe members. This involves reporting on quality indicators of the court system, including for some countries the "productivity of judges and court staff."<sup>228</sup> In Europe, performance targets are generally expressed and evaluated at the court level and, in some countries, at the level of individual judges also.<sup>229</sup> (I note, however that a Protocol Agreement Between the Provincial Court Judiciary and the Court Services Branch related to the Confidentiality of Judicial Data, signed in 1999, restricts the use of some data related to the performance of individual judges.)

In the United Kingdom, the Ministry of Justice issues an annual Judicial and Court Statistics Report, which provides significant detail on the performance of the UK justice system.<sup>230</sup> For example, this Report states the

226 Brian Ostrom et al, "Becoming a High Performance Court", *The Court Manager* 26:4 at p. 44.

227 *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326.

228 European Commission for the Efficiency of Justice, "European Judicial Systems, Edition 2010 (2008 Data): Efficiency and Quality of Justice," at p. 99.

229 European Commission for the Efficiency of Justice, "European Judicial Systems, Edition 2010 (2008 Data): Efficiency and Quality of Justice," at p. 100.

230 For an example, see: UK Ministry of Justice, *UK Judicial and Court Statistics 2011* (28 June 2012), online: UK Ministry of Justice <<http://www.justice.gov.uk/downloads/statistics/courts-and-sentencing/jcs-2011/judicial-court-stats-2011.pdf>>.

number of days each judge sits in court and chambers per year, identified by level of court, and the number of trials disposed of.<sup>231</sup> It also states the number of days required to complete a criminal case counting from the date of the offence, which in the UK Magistrates Court, was only 144 days on average in 2011 (about five months).<sup>232</sup> Even this time has come under criticism in the recent White Paper already discussed.

The Report also provides detailed information on the average number of hearings per defendant (1.78 in 2011).<sup>233</sup> In my view, the detailed reporting of court statistics in the United Kingdom offers an excellent example of transparency and accountability for justice system performance. The public has easy access to information on how well the justice system is functioning or not, where improvements are possible and what reforms are planned.

Similarly, in Massachusetts, the Court has reported a series of standard time-frames for every type of case in every trial court, in order to focus the court's efforts on timely case management. These time standards, based on case type and complexity, offer objective benchmarks against which the court's performance can be held to account.<sup>234</sup> The Massachusetts Court has publicly expressed support for the old adage "what gets measured gets done" and its performance against metrics such as case clearance rate, time to disposition, age of pending cases and trial date certainty are reviewed and reported on annually (quarterly results are also posted on the Court's website).<sup>235</sup>

In British Columbia, the Ministry of Justice issues an Annual Service Plan Report which compares the actual results to the expected results identified in the Ministry's Annual "Service Plans."<sup>236</sup> In addition, the

BC Provincial Court issues its own Annual Report. These reports, however, do not offer consistent and detailed metrics of court performance each year. They are informative but could be more so. For example, these reports do not provide (or do not consistently provide) information on the average number of appearances, the average judicial sitting days and hours, time to disposition nor, importantly, information on whether there are standard targets for such metrics against which the Court's performance is measured. The annual reports do provide some information, but without consistent and comparable measurements from year to year, it may be difficult for the public to build an informed opinion on how the Court's performance has progressed over time.

I therefore recommend that the Ministry of Justice, together with the Judiciary, establish a list of performance metrics for the Court that can be measured and reported on annually. The Ontario *Courts of Justice Act* includes a provision requiring the Attorney General, in consultation with the Chief Justices, to issue an annual report on the administration of courts in that province within six months of every fiscal year-end.<sup>237</sup> The key to effective and transparent accounting is that the metrics provide detailed information on court functions, are made known to the public and are consistently reported on from year to year.

### 13.3.8 Term of Office for the Chief Judge

The Chief Judge serves a term of five years. There is no fixed term for the office of Chief Justices of the Supreme Court or of the Court of Appeal.

In my view there is good sense in having a term of office, but the term of five years should be revisited.

231 UK Ministry of Justice, *UK Judicial and Court Statistics 2011* (28 June 2012), at pp. 76-77, online: UK Ministry of Justice <<http://www.justice.gov.uk/downloads/statistics/courts-and-sentencing/jcs-2011/judicial-court-stats-2011.pdf>>.

232 UK Ministry of Justice, *UK Judicial and Court Statistics 2011* (28 June 2012), at p. 36, online: UK Ministry of Justice <<http://www.justice.gov.uk/downloads/statistics/courts-and-sentencing/jcs-2011/judicial-court-stats-2011.pdf>>.

233 UK Ministry of Justice, *UK Judicial and Court Statistics 2011* (28 June 2012), at p. 37, online: UK Ministry of Justice <<http://www.justice.gov.uk/downloads/statistics/courts-and-sentencing/jcs-2011/judicial-court-stats-2011.pdf>>.

234 Massachusetts Supreme Judicial Court, *Striving for Excellence in Judicial Administration* (February 2008), at p. 5, online: Massachusetts Court System <<http://www.mass.gov/courts/sjc-report-feb-08.pdf>>.

235 Massachusetts Supreme Judicial Court, *Striving for Excellence in Judicial Administration* (February 2008), at pp. 5-6, online: Massachusetts Court System <<http://www.mass.gov/courts/sjc-report-feb-08.pdf>>.

236 For an example Ministry of Attorney General Annual Service Plan Report, see: [www.bcbudget.gov.bc.ca/Annual\\_Reports/2010\\_2011/pdf/ag.pdf](http://www.bcbudget.gov.bc.ca/Annual_Reports/2010_2011/pdf/ag.pdf).

237 *Courts of Justice Act*, RSO 1990, c 43, s 79.3.

I observe that recent experience suggests that this time is simply inadequate for a Chief Judge to carry out a reform initiative of any significance given the time frames required for the development, consultation and rollout of such reforms.

For example, the current reform program might not be completely implemented during the term of the current Chief Judge.

In my view a term of office of seven years would be appropriate.

**Recommendations: In consultation with the Provincial Court, the Provincial Court Act should be amended to:**

- Clarify and affirm the role, powers and duties of the Chief Judge and that the term of office

**to seven years;**

- **Recognize and clarify the role of the Executive Committee and the Management Committee of the Provincial Court;**
- **Provide for a specific judicial complement, subject to review every three to five years;**
- **Permit the Attorney General to refer questions concerning judicial administration to the Court; and**
- **Provide for a professional judicial administration officer with a defined role and responsibility.**

**Recommendation: The Court establish a voluntary Advisory Committee on Judicial Administration, including people with expertise in private and public management.**





# 14. CRIMINAL JUSTICE BRANCH

The approval of charges in British Columbia requires the approval of a prosecutor operating within the Charge Assessment Guidelines of the Branch.<sup>238</sup> The prosecution service and individual prosecutors possess both individual and institutional independence. The prosecutor's core independence preserves his or her discretion in relation to charging decisions—which is the decision to approve a charge, to refuse a charge, to enter a stay or to accept a guilty plea.<sup>239</sup> As already noted, the service has two statutory guarantors of independence: independence from direction as to a particular decision and independence with respect to administration and policy. Although a Deputy or Attorney General may direct the service as to conduct of a specific case or administration or policy, a direction in relation to a specific case must be gazetted. The prosecution service can require a policy direction to be gazetted.<sup>240</sup>

The Ministry commissioned a separate and independent review of the charge approval process by Gary McCuaig, QC (Schedule 11). That review concluded that no change should be made to the authority of the prosecution service to approve charges in British Columbia.

It is clear that in its institutional life the Branch regards its independence as central to its identity as a prosecution service and to its value within the justice system. This section addresses whether independence outside of core prosecutorial discretion should be clarified or amended, to better facilitate the system-wide goals that need to be pursued.

## 14.1 CONTEXT

The prosecution service employs some 450 lawyers and generally oversees the prosecution of all criminal charges in British Columbia, save for federal prosecutions which are carried out by the Federal Prosecution service of Canada.<sup>241</sup>

The prosecution service operates under the *Crown counsel Act*, which provides explicitly for independence in decision-making and policy.<sup>242</sup>

As already noted, the prosecution service has identified a number of initiatives that it has determined to carry out in response to the concerns raised by the *Green Paper*. The list of 15 measures is a very impressive response to virtually every concern raised during the review (see Schedule 6). Some of the more important of these initiatives include:

- Working with the Provincial Court of British Columbia and the Court Services Branch (Ministry of Justice) to redesign the scheduling of criminal cases in high volume locations to optimize judicial and prosecution resources, decrease delay to trial, and streamline the process;
- Crown “file ownership” of prosecution files expanded to reduce duplication of effort, achieve continuity of conduct and facilitate proactive case management;
- Front-end Crown counsel disposition teams established where feasible, with increased flexibility for early resolution of prosecution files;
- A province-wide Criminal Justice Branch tracking system with standardized timelines and other

238 See: British Columbia Ministry of Attorney General, Criminal Justice Branch, CHA 1, “Charge Assessment Guidelines”, *Crown Counsel Policy Manual* (9 March 2011), online: British Columbia Ministry of Justice <<http://www.ag.gov.bc.ca/prosecution-service/policy-man/pdf/CHA1-ChargeAssessmentGuidelines-2Oct2009.pdf>>.

239 *Krieger v. Law Society of Alberta*, [2002] SCC 65, at para 46. For a full discussion, see: M. Joyce DeWitt-Van Oosten, QC, then Deputy Director, Prosecution Support, Criminal Appeals and Special Prosecutions, Criminal Justice Branch British Columbia, “Balancing Independence with Accountability: A Legal Framework for the exercise of Prosecutorial Discretion in British Columbia (Revised and Updated July 2011) [unpublished]. See also *British Columbia (Attorney General) v. Davies*, [2008] BCSC 817, aff’d 2009 BCCA 337.

240 *Crown Counsel Act*, RSBC 1999, c 87 s 6.

241 For further information, see the Public Prosecution Service of Canada website, <<http://www.ppsc-sppc.gc.ca/eng/index.html>>.

242 *Crown Counsel Act*, RSBC 1996, c 87.

quality control measures institutionalized in the Branch, to ensure file completeness for purposes of charge assessment, disclosure compliance, witness availability and trial readiness;

- Enhancing use of alternative measures across the province, including a risk information tool where available, and other approaches to ensure the most effective model for appropriate referrals to non-court options;
- A Major Case Management Model implemented with a project-management approach for the efficient and effective conduct of the Branch's largest, high profile cases;
- Police liaison officers embedded within Crown offices to enhance communication and training with police on charge assessment and case-management issues.

It is my view that this list is both comprehensive and appropriate. The only question remaining is whether the achievement of these goals, or the other work required, is hampered by any structural impediments in the relationship between the Criminal Justice Branch and the rest of the system.

## 14.2 CONSULTATIONS

A roundtable consultation was held on the subject of the Prosecution–Police interface. At that table it was generally agreed that, in the larger prosecutions, there was excellent advice and alignment by prosecutors. For the regular and less serious criminal cases, there was the understandable challenge of effectively communicating police strategies and goals to prosecutors.

Concern over the isolation of the prosecution service from the strategies of the police or the Ministry was a recurrent theme during consultations. This concern surfaced in discussions around prosecution advice and certain decisions made about stays of proceedings in cases police felt significant to strategic policing

objectives. The prosecution service has now agreed to explore having liaison officers embedded within prosecution offices to enhance communication and to assist in training officers on charge-assessment and case-management issues. Concern was expressed in consultations that Ministry leadership was deterred from having an effective senior relationship with the prosecution service because of a broad interpretation of the independence reflected in the statute.

The Memorandum of Agreement between the prosecution office and police forces addressing disclosure issues was revised and updated in 2011. The general sense was that frustration around disclosure obligations was lessening.

The list of initiatives already referred to demonstrates that the leadership of the prosecution service has listened to these concerns and is determined to work towards facilitating system-wide goals and performance improvements—subject to the necessary independence of prosecutors in relation to individual cases. The statutory structures of independence is not traditional and was adopted as part of the reform process leading to Stephen Owen's report on the prosecution service in 1990.<sup>243</sup>

I met with Gary McCuaig several times to understand the process he undertook to consider the question of charge approval. I also discussed the issue with both police officers and prosecutors.

## 14.3 ANALYSIS AND RECOMMENDATIONS

The guarantee of independence in exercising the core prosecutorial discretion in relation to particular offences has in my opinion proven to be a safeguard against ill-advised or potentially abusive charges. I agree with the observation made repeatedly by prosecutors in my consultations that one of the most important duties they must fulfill is to refuse to approve charges recommended by police officers where the charge fails to meet the charge

243 See: British Columbia, Discretion to Prosecute Inquiry, *Commissioner's Report*, (Vancouver: Queen's Printer, 1990) (Chair: Stephen Owen).

approval standard. My conversations with police officers and prosecutors alike support the existing system. Their different approaches to laying charges requires an independent and disciplined review before charges are approved.

The very high level of stays of proceedings in jurisdictions such as Ontario demonstrates that under different systems many thousands of charges are laid when they cannot be proven. To the extent that members of the public fail to understand this aspect of our system of justice, greater education is required—rather than a change to this important protection against unjustified interference in the liberties of the people of British Columbia. From an efficiency and systems perspective, it makes little sense to give charge approval responsibility to police when a prosecutor will then have to decide whether to proceed with the charge. That, by necessity, would involve a duplication of effort and a confusing assignment of responsibilities.

Different considerations apply in respect to general policy (unconnected to specific cases) and the administration of the Branch. In my view an integrated approach to policy and administration

can and should be taken, and it need not have an intrusive effect on prosecutorial discretion. In order for operational implications to be fully known and understood, the policy process needs to be informed by the Branch. However, the distance created by the statute is unique to British Columbia and may have contributed to an unnecessary distance between the Branch and the rest of the Ministry. Similarly, the Justice and Safety Council needs to be able to influence the policy and administration of the Branch.

One final consideration is that the leadership of the Branch is undergoing a transition and the new leader will have a full reform agenda. Unless there is a compelling case that the Branch's proposals cannot be accomplished within the current structure, I would not recommend any change to the statute as it relates to administration and policy.

**Recommendation: The Criminal Justice Branch Reform initiatives at [Schedule 6](#) be implemented.**

**Recommendation: The charge approval function and responsibility should remain with the prosecution service.**



# 15. THE ROLE OF THE PUBLIC

Many projects are underway to enhance the transparency of the justice system. In this section, I focus on a few ideas that may be complementary to the need for the system to seek improved outcomes and timeliness.

We are heirs to a tradition in which a trial was a solemn public undertaking that took priority over other matters and where it was important that all those involved be engaged publicly, in front of the community. Professor Judith Resnick has tracked the change in courthouse architecture over the past few centuries and observed the decline of the use of courthouses as central civic meeting places.<sup>244</sup>

We all recognize that the criminal justice system's social licence ultimately depends on public confidence in the system. Indeed, securing high levels of public confidence was identified by the Ministry of the Attorney General in 2005 as the central performance measure goal of the justice system.<sup>245</sup>

Most recently, access to court proceedings has vastly increased through the development of the Web and modern communications. We now have a myriad of law and justice information sources, including world media, cable, video, blogs, special websites, and online audio and video. People can now review transcripts and exhibits and watch oral arguments in the Supreme Court of Canada live on Cable Public Affairs Channel.<sup>246</sup> Our system is in the middle of reconciling these older traditions with the inclusiveness and efficiencies made possible by technology and modern communication systems.

The central importance of public confidence has supported numerous efforts to make the courts

and their processes more accessible and better understood. British Columbia has long been a leader in public legal education.<sup>247</sup> Many innovative programs such as the use of Web technology by the Courts make the legal system accessible to the public. For example, in any Provincial Courthouse you can now search criminal court files online without cost. Proceedings are now uniformly recorded by digital recorders and can be listened to by members of the public.

There are many proposals under consideration to make further use of technology. Some of those mentioned in the course of the Review include the use of mobile devices to marshal witnesses and update people interested in the course of a criminal matter. Some suggested the online filing of criminal complaints. Court Services is in the course of developing "virtual court rooms" where everyone appears by video.

Yet it is still commonly observed by members of the public that features of the system are organized around the convenience of lawyers and the judge. Frustration was frequently expressed by police officers who observed that large numbers of officers regularly attend court, only to find their attendance unnecessary. Indeed, Translink estimates that a significant number of their police officers are at any one time waiting to testify in court.

Similarly, members of the public observed that the lack of predictability around when and how long they were required to testify makes the system unfriendly and rigid.

Significant steps have been taken to include victims and the community in a more sensitive and appreciative way. Starting from the time an offence is

244 See: Judith Resnick and Dennis Curtis, *Representing Justice: Invention, Controversy, and Rights in City-States and Democratic Courtrooms* (New Haven: Yale University Press, 2011).

245 Public confidence as a specific performance measure was adopted by the UK government in 2002.

246 I observe the new Supreme Court of the United Kingdom now broadcasts its hearings and the US Supreme Court makes audio recordings of the oral argument available online.

247 The Justice Education Society is a unique British Columbia institution which has influenced thinking and practices around access to legal information and education here and internationally. See: <<http://www.justiceeducation.ca/>>.

first reported to the police, victim service programs provide emotional support, information, referrals, court support, orientation and practical assistance. In the case of community-based victim programs, programs are available if a victim has not engaged with the criminal justice system or wants to discuss options and services. In a limited but growing number of cases, support is provided to a victim during the court process if the matter goes to court. Financial support or compensation is also available to victims of violent crime through the Crime Victim Assistance Program.

The expanding use of restorative justice programs offers a means outside the traditional court process by which victims can voluntarily seek accountability by the offender through a process that focuses on the future and achieves reconciliation in a fashion chosen by the participants.

But there is also considerable frustration by justice participants with the low results from public confidence surveys. Sincere and extended efforts to engage the public have been made, but too often leaders hear only from people who have a particular grievance or are driven by personal issues.

There also appears to be an underlying fear that engaging the public in a transparent way may lead to misleading results, further criticism and a further loss of confidence.

## 15.1 FACTUAL CONTEXT

### 15.1.1 Public Confidence

Public confidence is commonly seen as an indicator of the overall effectiveness of the justice system. This confidence is vital to ensuring the legitimacy of the justice system and encouraging the public's participation in the administration of justice (for example, those lacking confidence in the system are often reluctant to come forward or co-operate as witnesses or litigants).<sup>248</sup> As such, promoting public confidence in the justice system has been described as one of the primary goals of good government.<sup>249</sup>

Canadians are generally more positive than negative when it comes to their level of confidence in the justice system.<sup>250</sup> However, the public has less confidence in the justice system than in most other public institutions such as healthcare or education.<sup>251</sup> British Columbians, in particular, express less confidence in the justice system, on average, than other Canadians.<sup>252</sup> A Public Perceptions Survey conducted by the BC MAG indicates that each year from 2007 to 2009 more than half of survey respondents expressed either "not very much confidence" or "no confidence at all" in the justice system and the courts.<sup>253</sup>

Respondents who had actual experience with the criminal court system were less likely to have a positive view of the court's ability to provide justice

248 Julian V. Roberts, *Report for Public Safety and Emergency Preparedness Canada* (November 2004), at p. 1, online: Public Safety Canada <[http://www.publicsafety.gc.ca/res/cor/rep/\\_fl/2004-05-pub-conf-eng.pdf](http://www.publicsafety.gc.ca/res/cor/rep/_fl/2004-05-pub-conf-eng.pdf)>.

249 Julian V. Roberts, *Report for Public Safety and Emergency Preparedness Canada* (November 2004), at p. 1, online: Public Safety Canada <[http://www.publicsafety.gc.ca/res/cor/rep/\\_fl/2004-05-pub-conf-eng.pdf](http://www.publicsafety.gc.ca/res/cor/rep/_fl/2004-05-pub-conf-eng.pdf)>.

250 Julian V. Roberts, *Report for Public Safety and Emergency Preparedness Canada* (November 2004), p. 5, online: Public Safety Canada <[http://www.publicsafety.gc.ca/res/cor/rep/\\_fl/2004-05-pub-conf-eng.pdf](http://www.publicsafety.gc.ca/res/cor/rep/_fl/2004-05-pub-conf-eng.pdf)>.

251 Julian V. Roberts, *Report for Public Safety and Emergency Preparedness Canada* (November 2004), p. 8, online: Public Safety Canada <[http://www.publicsafety.gc.ca/res/cor/rep/\\_fl/2004-05-pub-conf-eng.pdf](http://www.publicsafety.gc.ca/res/cor/rep/_fl/2004-05-pub-conf-eng.pdf)>.

252 Neil Boyd, *British Columbia Branch of the Canadian Bar Association, Confidence in the Justice System in British Columbia: The Problem, Consequences and Potential Remedies* (2010), at p.5, online: British Columbia Branch of the Canadian Bar Association <[www.cba.org/bc/initiatives/pdf/boyd\\_report.pdf](http://www.cba.org/bc/initiatives/pdf/boyd_report.pdf)>. See also: British Columbia Ministry of Attorney General, *2008–2009 Public Perceptions Survey, Executive Summary Report* (September 2008–2009), at p. 16.

253 Ministry of Attorney General, *2008–2009 Public Perceptions Survey, Executive Summary Report* (September 2008–2009), Figure 1, p. 11. In this survey, respondents were asked whether they felt that the criminal courts did a good job in the following areas:

- Providing justice quickly;
- Helping Victims;
- Determining whether the accused person is guilty or not; and
- Ensuring a fair trial for the accused.

Over 40 percent of respondents felt that the criminal courts do a "poor job" on providing justice quickly and helping the victim; 12 to 13 percent of respondents felt that the criminal courts were doing a "good job" and the remainder said that they were doing an "average job." (see: p. 14–15) Over half of respondents perceived the criminal courts as doing an "average job" on determining guilt; roughly a quarter said the criminal courts did a "poor job" and another quarter said they did a "good job." (see: p. 15) About half of respondents said that criminal courts do a "good job" of ensuring a fair trial (see: p. 15).

quickly.<sup>254</sup> How a respondent felt about the criminal justice system overall also appeared to be linked to their perception of delay.<sup>255</sup>

The observations found in the MAG Public Perception Survey are in line with the long-standing view of legal critics that delay in the delivery of justice is one of the greatest potential causes for loss of faith in the justice system.

### 15.1.2 Transparency and the Role of the Media

While there is a tremendous amount of public legal information about the law, and how people can advance legal issues, there is less information available (or at least not easily accessible) about how the justice system itself functions.

There is certainly some information available. Virtually every part of the justice system produces an annual report that is publicly available, with key statistics about the operation of its area of responsibility. As well, the government has recently made a significant amount of courts-related data available online. Unfortunately annual reports are not bestsellers, and online data can be impenetrable to users who are not familiar with it. Nonetheless, this is a big step forward. In our unscientific online survey (which clearly self-selected for people within the system), we asked how people got their information about the justice system. For 37% of the respondents, media was their only source for justice-related information, while 46% said they used Open Data and Ministry of Justice Data, and 42% reviewed evaluations and other Ministry reports. Annual reports were a source of information for 20% of the respondents.

The Ministry made a significant amount of data available for this Review and provided it in a format that

was very straightforward to read and to understand. That information is now available on the Ministry website. Its availability should contribute to greater transparency about what goes on in our justice system.

#### 15.1.2.1 The Role of the Media

There is a widespread perception that the public concern over levels of crime is the product of media attention to high-profile cases. But it should be remembered that although the means have changed, intense public interest in criminal trials is hardly a new phenomenon: in 19<sup>th</sup> century London court reporters sold daily accounts of murder trials. A 2001 report prepared for the Department of Justice Canada found that “Canadians overwhelmingly reject the notion that public concern over crime rate is the result of media publicity surrounding high-profile cases. Seventy-five percent of Canadians perceive that crime really is worse now than it was in the past.”<sup>256</sup>

The same report also registered that television and print news media spokespersons were considered less credible in relation to crime, and solutions to crime, than other sources, such as police chiefs, victims groups and academics.<sup>257</sup>

The Courts have made a number of changes to facilitate the media’s work, although no doubt the work is ongoing. The Court’s new practice note<sup>258</sup> regarding social media devices in courtrooms is one example of the courts keeping pace with developments in the community.

For a number of years the Supreme Court enjoyed the volunteer services of a retired justice the Hon. Lloyd McKenzie, who served as Information Officer to the Court. There is no similar position at present in British Columbia for any of the Courts. Other parts of the justice system do have their own spokespeople

254 British Columbia Ministry of Attorney General, *2008-2009 Public Perceptions Survey, Executive Summary Report* (September 2008-2009), at p. 1. Over half of British Columbians who responded having contact with the criminal courts said that the criminal court system does a poor job of providing justice quickly, compared to less than 40 percent for respondents who had not had contact with the criminal courts.

255 For example, in 2009, 86.4 percent of respondents who thought that the courts did a good job of providing justice quickly were also confident in the justice system and the courts overall. In comparison, only 16.7 percent of respondents who felt that the criminal courts do a poor job of providing justice quickly expressed confidence in the justice system and the courts. (See: p. 17).

256 Karen Stein, *Public Perception of Crime and Justice in Canada: A Review of Opinion Polls* (Ottawa: DOJ, 2001), at p.7, online: Department of Justice <[http://www.justice.gc.ca/eng/pi/rs/rep-rap/2001/rr01\\_1/rr01\\_1.pdf](http://www.justice.gc.ca/eng/pi/rs/rep-rap/2001/rr01_1/rr01_1.pdf)>.

257 Karen Stein, *Public Perception of Crime and Justice in Canada: A Review of Opinion Polls* by Karen Stein (Ottawa: DOJ, 2001), at p.13, online: Department of Justice <[http://www.justice.gc.ca/eng/pi/rs/rep-rap/2001/rr01\\_1/rr01\\_1.pdf](http://www.justice.gc.ca/eng/pi/rs/rep-rap/2001/rr01_1/rr01_1.pdf)>.



who are available to talk to the media and respond to questions. However, it is my observation that generally people in the justice system are very cautious about talking to the media. There are a variety of reasons for this, not least a concern about being misquoted and somehow creating more of an issue than they solve or explain. As well, the growing trend to centralization in government generally means that individuals do not feel free to respond to media questions. While it is clearly important that accurate information be provided to the media and hence to the public, there is also value in having a quick response to an issue while it is still a matter of public concern. A public response need not necessarily be “the answer.” It might also be the explanation of a complex problem or simply a discussion of the factors that are being, or were taken, into consideration.

## 15.2 POLICY CONTEXT

### 15.2.1 Public Confidence and Timeliness

There is considerable evidence from history and other sources that the public’s views of the system are heavily influenced by their view of its timeliness. John Cook in 1641 authored a scathing critique of England’s Court system, and the problems of delay featured prominently. Roscoe Pound in a famous address in 1906 looked forward to the time when courts would become “swift and certain agents of justice.”<sup>259</sup> As Chief Justice Warren Burger of the United States Supreme Court noted over forty years ago, “a sense of confidence in the courts is essential to maintain the fabric of ordered liberty for a free people” and

things that “could destroy that confidence and do incalculable damage to society” include “that people come to believe that inefficiency and delay will drain even a just judgement of its value.”<sup>260</sup>

As well, the informal survey we conducted for this Review found that lack of timeliness was the most frequently identified reason for lack of confidence in the justice system.

### 15.2.2 Access to Justice Information

In its 2010 report on the Canadian Justice System and the Media, the Canadian Judicial Council quoted Jeremy Bentham when he observed that “Publicity is the very soul of justice” and recognized “the pivotal role journalists play in informing the public about what happens in courtrooms throughout the country.”<sup>261</sup>

The Provincial and Supreme Court Records Access Policies also pursued initiatives with a view to enhancing access to justice by the media and the general public.<sup>262</sup> On February 28, 2011, the BC Supreme and Provincial Courts established new records access policies which are publicly available on the Courts’ websites.<sup>263</sup> The \$6 criminal search fee for Court Services Online was eliminated August 31, 2010.

Prior to the policy directions from the Provincial and Supreme Court on how to provide access to court documents, guidance to the public—found in a variety of materials including circulars, manuals, practice directions and court rules—was incomplete.

The new policies provide clarification and direction for Court staff on access to criminal, family and civil court records, as well as guidelines for access to digital audio recordings and search warrant documents.

258 The Courts of British Columbia, *Police on Use of Electronic Devices in Courtrooms* (Effective 17 September), online: The Courts of British Columbia <[http://www.courts.gov.bc.ca/supreme\\_court/media/PDF/Policy%20on%20Use%20of%20Electronic%20Devices%20in%20Courtrooms%20-%20FINAL.pdf](http://www.courts.gov.bc.ca/supreme_court/media/PDF/Policy%20on%20Use%20of%20Electronic%20Devices%20in%20Courtrooms%20-%20FINAL.pdf)>.

259 Roscoe Pound, “The Causes of Popular Satisfaction with the Administration of Justice” (1906) 29 ABA Rep, pt I at 395-417, reprinted in *West’s Encyclopedia of American Law*, Online: Answers <<http://www.answers.com/topic/the-causes-of-popular-dissatisfaction-with-the-administration-of-justice>>.

260 Warren E. Burger, Chief Justice of the United States, “What’s wrong with the courts: The Chief Justice speaks out”, *US News & World Report* 69:8 (24 August 1970) at p. 68, 71 (address to ABA meeting, 10 August 1970) cited in “Justice Delayed is Justice Denied”, online: Wikipedia <[http://en.wikipedia.org/wiki/Justice\\_delayed\\_is\\_justice\\_denied](http://en.wikipedia.org/wiki/Justice_delayed_is_justice_denied)>.

261 Canadian Judicial Council, *The Canadian Justice System and the Media* (April 2010), at p.1, online: Canadian Judicial Council <[www.cjc-ccm.gc.ca/cmslib/general/media-2010-E.pdf](http://www.cjc-ccm.gc.ca/cmslib/general/media-2010-E.pdf)>.

262 Prepared by Janet Donald from the Court Services Branch on 8 June 2012 in response to concerns expressed by the media through a series of articles on access to court records in 2010.

263 See: <<http://www.provincialcourt.bc.ca/news-reports/media-access-policy>> and <[http://www.courts.gov.bc.ca/supreme\\_court/media](http://www.courts.gov.bc.ca/supreme_court/media)>.

The new policies are consistent with approaches adopted by other Canadian jurisdictions and reflect increased openness, accessibility and individual accountability in the handling of the court record. A number of policy changes were made to ease public access to such things as digital audio recordings, Court Orders and search warrants.

### 15.2.3 Victim Services

The Ministry of Justice recognizes the importance of service to victims through the Victim Services and Crime Prevention Division within the Community Safety and Crime Prevention Branch (CSCP).<sup>264</sup> Victim impact statements, particularly in cases involving serious injury or loss of life, have become part of sentencing. These permit the public airing and expression of the consequences on the victim and his or her community. In serious cases, victim impact statements are almost always featured as part of the media coverage, and as a consequence, this important voice for victims is now a regular part of our community discourse.

Despite the significant array of services in British Columbia, Victim Services workers expressed frustration with the limitations of their capacity.

In July 2012, the Office of The Federal Ombudsman for Victims of Crime issued its third special report “Shifting the Conversation,” which looks into how the needs of victims of crime can be better met. In particular, the Report made specific recommendations in the areas of information for victims, meaningful participation and tangible supports.<sup>265</sup>

Restorative justice programs also achieve higher victim satisfaction. Research supports the view that victims experience very high levels of satisfaction after a restorative justice process. There is also reason to believe that community satisfaction is also greater when victim and offender are reconciled and practical measures such as restitution are achieved.

I expect these results are in part the result of self-selection, since victims must volunteer to participate in a restorative justice program. But that is quite appropriate since those may well be people who would otherwise be less satisfied with the restraints of the traditional court-based system.

Restorative justice lacks a specific set of professional criteria and by its nature may require flexible approaches. Funding for restorative justice programs in the province have been cut-back quite dramatically in recent years, and most programs receive very little provincial funding. They depend on volunteers, municipal funding and grants from other sources.

## 15.3 CONSULTATIONS

During the course of consultations, the Review received over 150 submissions from institutional stakeholders and the public through its website and other means. The website attracted in excess of 6,000 unique visitors, approximately 150 people filled out the online survey, and approximately 120 meetings with individuals and groups were held. Many people reported to me that they had followed the Chair’s blog, and dozens of comments were made during the life of the Review.

Like all such efforts, the members of the public who engaged with the Review had a variety of perspectives, different levels of knowledge and different reasons for becoming involved. There were a significant number of people who contacted the Review to address a particular grievance or to share an adverse experience that shed no light on systemic issues.

We met with representatives of the CSCP, of the Ministry of Justice and victims services workers working with community organizations. I visited several courthouses and observed hearings and trials.

A number of people noted that in a world dominated by US television, educating the public

<sup>264</sup> For further information, see the Victim Services website: British Columbia Ministry of Justice <<http://www.pssg.gov.bc.ca/victimservices/index.htm>>.

<sup>265</sup> Canada, Federal Ombudsman For Victims of Crime, *Shifting the Conversation: Special Report* (Ottawa: OFOVC, 2012), online: Federal Ombudsman For Victims of Crime <<http://www.victimfirst.gc.ca/pdf/ShiftingConversation.pdf>>.

about BC's criminal system is becoming increasingly important. There are a number of programs involved in the public school system, including and a Court visiting program which hosts some 21,000 students each year in British Columbia.<sup>266</sup> It was suggested that more education on the legal system be made available to the public as well as taught in school.

The experience of Victim Services workers is that victims and their families not only are concerned with the impact on their lives and a just outcome of the particular charge but also are particularly anxious to see that the system works to reduce the reoccurrence and victimization of others by the same conduct.

One recent example is the creative project developed by Laurel and Michael Middelaer, whose daughter Alexa was killed in 2008 on the roadside by an out-of-control vehicle. They have championed the development of Alexa's Bus, which is a mobile blood testing facility. They seek to honour their daughter's memory by reducing roadside fatalities, by making it far easier for police officers to obtain confirmatory blood alcohol readings in cases of suspected impaired driving.<sup>267</sup>

During my consultations with victims of crime and relatives of such victims, I quickly learned that there is a very wide spectrum of expectations regarding the ways they want and expect the system to treat victims.

Some stated that the judges' acknowledgment of the victim in the courtroom significantly helps victims mitigate the re-victimization feelings they often suffer in the course of a trial. Others stated that a meaningful relationship between the victim and judges requires more than acknowledgment. They hope that a judge's statistical understanding of the crime's context would produce, through the Court's judgement, a positive impact on society. In other words, they want to see change championed by the Court so others do not suffer their same loss. Michael Middelaer strongly desired that the court's goals of offender accountability be aligned with the outcomes being sought for the community.

## 15.4 ANALYSIS AND RECOMMENDATIONS

### 15.4.1 Improved Transparency and Accountability

I sympathize with leaders within the system who are frustrated with the difficulty in engaging with the general public. However, if better means can be found to obtain those views, I believe they will improve decisions concerning judicial administration.

Our experience during the Review is that raw statistics and general information concerning the system is of far less interest to people than information that is directly relevant to their experience or an issue that is currently of interest to them.

Obtaining public feedback on the performance of the system will more likely be successful if they are contacted while interacting with the system, such as when they are seeking information from websites, or participating as witnesses, victims or members of the community. As many of these people will be biased by the particular matters that bring them to the website or courthouse, adjustments may need to be made for the occasion and source of the information. Although I make no recommendation in this regard, I observe that the position of Information Officer, once filled by the Hon. Lloyd MacKenzie, appeared to fill a need for explanation and afforded access to improved understanding by the media and the public at a level that did not require or necessarily merit the time and attention of the Chief Justice.

**Recommendation: In order to improve transparency of Provincial Court processes, consideration should be given to**

- **Providing a Web-based service to remind subscribers of developments and resolutions in particular cases; and**
- **Providing online and courthouse user surveys that focus on service standards and ideas for improvement.**

266 Justice Education Society, *2010-2011 Annual Report* (2011), at p. 2, online: Justice Education Society <[http://www.justiceeducation.ca/sites/default/files/2010-2011%20Annual%20Report%20FINAL\\_0.pdf](http://www.justiceeducation.ca/sites/default/files/2010-2011%20Annual%20Report%20FINAL_0.pdf)>.

267 See: Alexa's Bus Website: <<http://alexasbus.com>>.

### 15.4.2 Use of Technology

Court scheduling represents an inconvenience in the lives of all concerned and particularly those of victims, witnesses and engaged members of the community.

There is no system in place for the automatic updating or communication of scheduling for individuals by email or texting.

**Recommendation: Improved scheduling of witnesses via modern information technology should be considered.**

### 15.4.3 The Relationship with Victims

The fundamental premise of the modern criminal justice system is that by reporting a criminal event the victim surrenders management of the charge to public officers.

In our system of justice, when a crime is committed against a victim, it is also a crime against our society as a whole. Therefore, prosecutors do not represent

individual victims; they perform their function on behalf of the community.<sup>268</sup>

It was not always so. Until the late 1890s the vast majority of criminal cases in England were controlled by private litigants, who directly retained and paid counsel to be prosecutors.

This complete displacement of private interests runs the risk of creating a culture in which the victim is seen as merely a witness and someone so heavily biased that they must be excluded from participating in the process.

Victims and their families have concerns about the reoccurrence of criminal behaviour and the protection of others in the community which offers the system an opportunity to look beyond the treatment and handling of an individual case. Feedback from the victims themselves may also, by facilitating their contribution to public safety through their own insights, raise the levels of satisfaction victims take from the process.

**Recommendation: Victims should receive online exit surveys after the resolution of a complaint.**

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<sup>268</sup> British Columbia Ministry of Justice, *Role of Crown Counsel*, online: British Columbia Ministry of Justice <<http://www.ag.gov.bc.ca/prosecution-service/BC-prosecution/crown-counsel.htm>>.



# 16. PARTICULAR ISSUES

In the course of the Review, it became apparent that some challenges confronting the system would benefit from a system-wide co-ordinated approach directed at achieving improved outcomes, assuring timely process and applying expertise particular to the individual problems. The most obvious of these are domestic violence, administration of justice, mental health and addiction, First Nations, and restorative justice.

This Section addresses these areas and suggests certain approaches for consideration by the Council.

## 16.1 DOMESTIC VIOLENCE

There is a beehive of activity around the goal of reducing domestic violence in British Columbia. It has a high priority in the policies of the criminal justice system, in the social goals of the government and in the community. Like for impaired driving, the criminal justice system has processed many thousands of domestic violence cases without apparently having influenced outcomes as much as one would hope. Unlike for impaired driving, no one has yet proposed moving these incidents from the courts to a different administrative or tribunal scheme. It is timely for the criminal justice system to demonstrate its ability to respond in a co-ordinated and effective way to these cases.

The management of domestic violence complaints raises many of the systemic issues raised in the consultations. Furthermore, there is evidence that may be particularly responsive to innovations which would achieve timely trial scheduling.

Women's advocates are calling on the criminal justice system to help facilitate a change in our

culture as it relates to domestic violence. They look to criminal sanctions as one means by which people will come to understand that society categorically rejects and condemns domestic violence. They hope this collective denunciation will deter all men from domestic violence, reduce repeated violence and help keep women and their children safe. The criminal justice system, in their view, is a critical social force that will support other measures to help women and their children live their lives free of the coercive and disabling effects of domestic violence.

In the view of most women's advocates, the criminal justice system's management of domestic violence has largely been a failure. Many others share this view but from very different perspectives. Indeed, many defence counsel expressed the view that the system is routinely criminalizing domestic arguments and not helping people enjoy violent-free intimate relationships. While society's goals are to reduce violence and increase safety, there is substantial debate about the best means to achieve these goals.

### 16.1.1 Factual Context

Understanding domestic violence requires us to look at both self-reported victimization and reported offences. The General Social Survey, 2009, found that in Canada overall the incidence of self-reported domestic violence incidents remained at the same level as reported in 2004, after a drop in 1999.<sup>269</sup> However, the survey also found that the rate of reporting nationally has dropped, from 28% reporting in 2004 to only 22% reporting in 2009.<sup>270</sup>

This doesn't seem entirely consistent with the situation in British Columbia, where yearly domestic

269 Statistics Canada, *Family Violence in Canada: A Statistical Profile* (Ottawa: StatCan, 27 January 2011), s 1, online: Statistics Canada <<http://www.statcan.gc.ca/pub/85-224-x/2010000/part-partie1-eng.htm>>.

270 Statistics Canada, *Family Violence in Canada: A Statistical Profile* (Ottawa: StatCan, 27 January 2011), s 1, online: Statistics Canada <<http://www.statcan.gc.ca/pub/85-224-x/2010000/part-partie1-eng.htm>>.

violence charges of adults have increased steadily from about 9,000 in 2002/03 to about 12,000 in each of the last three years.<sup>271</sup> The approval rate, for charges submitted by the police, in every year except 2011/12, is between 98 and 99%. The conviction rate for these offences has averaged 49% over the decade, while the average for non-domestic violence cases has been 70%. However, in domestic violence cases, a significantly higher rate, a difference on average of 11%. As well, stays of proceedings in domestic violence cases are on average 11% higher than non-domestic violence cases.<sup>272</sup>

When we compare cases set for trial with those in which a trial date is never set, we see that in the latter cases there is a higher rate of peace bonds and a lower stay rate—much closer to the rate for non-domestic violence cases. In those cases set for trial, the stay rate for domestic violence cases is higher while the rate of peace bonds is lower. This does tend to confirm the general view that domestic violence trials tend to end in stays more frequently than other cases.

Over the same period, we know that homicides associated with domestic violence have declined. The Coroner's Study on deaths associated with domestic violence provides a useful breakdown.<sup>273</sup> It also points out that approximately 20% of the victims are males, although perhaps half of those are the result of same-sex violence. In an analysis in the United States, increased safety for women has been associated with a decline in opposite-sex homicides with male victims.<sup>274</sup> Thus safety for women can help reduce homicide rates both for male and female victims. The homicide statistics demonstrate that the most accurate descriptor of the overall social problem is intimate partner violence.

It may be that the degree of under-reporting of domestic violence has decreased over the past several decades. It was universally agreed that reporting of domestic violence was shockingly low when it was first studied. There has for a generation been a concerted effort to encourage women to report domestic violence as soon as it occurs. Further, the development of women's support groups, shelters and other support mechanisms has hopefully reduced the barriers to reporting.

Still, there remains a concern that the first report of domestic violence may well not be the first that has occurred in the relationship. Advocates for victims of domestic violence report that only very rarely is the first report the first actual incident. While defence counsel questioned this sense that there is no "first-time offender" in the domestic violence context, it is clear from the early risk assessments performed by corrections that it remains common for women to report only after several acts of violence have occurred.

If indeed reporting has increased, it would appear that less serious cases are being referred for prosecution, since the total numbers have been stable for some time. There appears to be no comparative data over time as to the seriousness of injuries suffered by the complainants.

Other factors such as variability by region, ethnic background, age or socio-economic status may also affect the best strategies to reduce violence and increase safety for victims.

In general terms these cases represent a sizable portion of all cases in the system, similar in size to impaired driving cases. They have remained stable (and indeed increased in number recently) for several years, and whatever is being done currently does not appear to be making enough of a difference in safety outcomes.

271 Information provided by the Criminal Justice Branch.

272 For the purpose of this Review, we use the Ministry of Justice's tracking of "K" files as the best measure of domestic violence cases. They are not all assault cases but may include other charges related to a domestic assault, or associated with a risk of domestic assault, i.e., weapons charges in a domestic situation.

273 See: British Columbia Ministry of Justice, BC Coroners Service, *Intimate Partner Violence in British Columbia, 2003-2011* (Burnaby: BC Ministry of Justice, 16 April 2012), online: British Columbia Ministry of Justice <<http://www.pssg.gov.bc.ca/coroners/publications/docs/stats-domestic-violence.pdf>>.

274 See: Silent Witness National Initiative, "Statistics on Domestic Violence", online: Silent Witness National Initiative <<http://www.silentwitness.net/sub/violences.htm>>.



### 16.1.2 Policy Context

There are a significant number of initiatives throughout the system in relation to domestic violence.

The province has a cross-agency domestic violence policy in this area: the Violence Against Women in Relationships (VAWIR) Policy. This policy was recently updated and set out the role and responsibilities of each service providers, including police, Crown, Victim Services, Corrections, Court Services and Child Protection Workers. It was developed with participation from the affected Ministries and police forces and provides information and context to how justice and child welfare partners respond to domestic violence cases in British Columbia.

In response to the Representative for Children and Youth report, "Honouring Kaitlynn, Max and Cordon: Making Their Voices Heard Now," the government recently opened a new Provincial Office of Domestic Violence, which is part of the MCFD. It is accountable for ensuring that all government policies, programs and services are delivered in a co-ordinated manner. It is also charged with developing a comprehensive multi-year plan to address domestic violence in the province<sup>275</sup> and has just begun to be fully staffed and operational.

A Minister's Advisory Council on Aboriginal Women was also formed in 2012 to develop strategies that address the particularities of domestic violence in First Nations communities. During the consultations they spoke forcefully of encouraging the use of restorative justice programs that take advantage of community resources and First Nations traditions, to bring about reconciliation and healing in a community with many members recovering from abuse and violence in their past.

The Representative for Children and Youth has issued several reports calling for reforms to improve safety for women and children in the province. In particular the

Representative is calling on the system to learn and apply the lessons that should be learned from the tragic deaths of the Lee and Schoenborn children.<sup>276</sup>

In many communities, such as Surrey, there are efforts to address ethnically associated domestic violence in ways suited to particular ethnic communities.

Some restorative justice advocates maintain that intimate partner violence can be successfully addressed through restorative justice programs that respect uncoerced victim choice, require accountability be taken by the offender, and seek reconciliation and rehabilitation of underlying conditions.

Domestic violence policies within the police forces and prosecution service have been in place for some time.<sup>277</sup> It seems quite apparent that these policies have succeeded in increasing the rates of apprehension and detention, as well as the percentage of complaints that proceed to charges.

### 16.1.3 Consultations

Although all stakeholders on this issue are dissatisfied, they are each dissatisfied in their own way.

Women's advocates are concerned that these cases fail to receive sufficient priority from the system; they suffer disproportionately from delay; women are insufficiently supported to stand by their original complaints of assault; and convictions are too rarely obtained.

Some police officers often report that the law appears at odds with the complex reality of troubled intimate relationships. They feel constrained by policy to detain and charge men, even when it seems most likely their partners will want to resume the relationship and be opposed to criminal sanction, or even when the relationship has been brought to an end. While this restriction on police discretion appears to have worked because it increases the number of cases recommended

275 See: Ministry of Children and Family Development and Ministry of Justice, News Release, 2012CFD0029-000614, "Province invests in new domestic violence office" (5 May 2012), online: Government of British Columbia <[http://www2.news.gov.bc.ca/news\\_releases\\_2009-2013/2012CFD0029-000614.htm](http://www2.news.gov.bc.ca/news_releases_2009-2013/2012CFD0029-000614.htm)>.

276 For copies of those reports, see: Representative for Children and Youth, British Columbia <<http://www.rcybc.ca/content/Publications/Reports.asp>>.

277 See: British Columbia Ministry of Attorney General, Criminal Justice Branch, SPO 1, "Spousal Violence", *Crown Counsel Policy Manual* (9 March 2011), online: British Columbia Ministry of Justice <<http://www.ag.gov.bc.ca/prosecution-service/policy-man/pdf/SPO1-SpousalViolence.pdf>>.

for charge, many police believe it has failed to produce better outcomes for women and families.

Some prosecutors expressed dissatisfaction with a policy that requires that such cases be taken forward. In practice, if not in theory, the policy is seen as reducing individual prosecutor discretion. Many prosecutors express frustration that critics fail to recognize that the likelihood of conviction almost always depends on the complainant's evidence and that in these cases complainants frequently recant their complaints. Frustration was expressed with the concern that these cases—at least anecdotally—suffer unduly from late stays required by reluctant complainants and low corresponding conviction rates.

The statistics do not bear out these various perceptions of how the system is functioning. The policy seems to have succeeded in producing much higher arrests, much higher charge approvals and comparable overall conviction levels.

I heard repeated criticism by defence counsel regarding the entire treatment of these cases by the system. Some experienced defence counsel stated during consultations that the current policy is driven by outdated social theories, in many cases trivial events are criminalized beyond any reasonable interpretation, and the police are constrained to detain and prosecutors are constrained to charge—when, in other comparable situations, they would be able to exercise their discretion and not do so. It was stated several times that in many cases where men proceed to trial, no woman would have been charged with assault in the same circumstances. Some defence counsel urged upon me the approach taken in Brooklyn, where first-time offenders, in the absence of significant injury to the complainant, are in essence given no criminal sanction and where repeat offenders are ordered to take programs to deal with their underlying social or psychological problems.<sup>278</sup>

These positions are contrary in many ways to the current policy and the positions taken by other key stakeholders. It is important, however, to acknowledge

that others within the system do not regard the goal of safety as being defeated purely by delay and have criticisms that should be systematically addressed.

#### 16.1.4 Analysis and Recommendations

The fundamental goal of domestic violence policy is to increase the safety of those vulnerable to domestic violence.

Key stakeholders have forcefully expressed their view that important policy goals are being frustrated by the delays in the system.

The multiplicity of public and community organizations seeking to intervene in domestic violence raises obvious risks of inconsistency, lack of co-ordination and confusion. This has been recognized and the new Provincial Office of Domestic Violence is mandated to address these risks.

There also appear to be clear needs for data that are neutral to the observer and relevant to both the scope of the problem and the success of interventions. Particularly with the multiple approaches being taken to the problem, a sound data approach is important.

For those of us seeking to maintain the relevance of the Courts to such pressing social issues, this is an opportunity in an area of grave concern to everyone. Substantial governmental attention can demonstrate that the court system is able to apply the law consistently in a timely fashion, while addressing stable resolutions that improve the best outcomes for the victim, the community and the offender.

What would successful approaches look like? The IRP has been considered a success because of its timeliness, immediacy of sanctions and forward-looking focus on programs for underlying problems. Discussing possible approaches within the court system on the same themes may prove helpful.

##### 16.1.4.1 Timeliness

It was regularly reported that the window for successful intervention in some domestic violence

278 For further information regarding the Brooklyn Domestic Violence Court, see online: Centre for Court Innovation <<http://www.courtinnovation.org/project/brooklyn-domestic-violence-court>>.

situations may be measured in days and not weeks or months. The key question is what timeliness is required—not just for resolutions of complaints but for improved outcomes.

A longer response often results in the assailant denying the original circumstances, blaming others for the event, and withdrawing from possible treatment for an underlying substance abuse or anger condition. It may also result in the victim recanting her testimony either because she feels coerced by her economic dependency on the assailant or simply because she does not want criminal sanctions applied to the event. In many cases the victim can indirectly control whether sanctions are possible.

Improving timeliness for these cases could benefit from the examination of charge approval procedures. Since almost 100% are approved under the current policy, the timeliness of the investigation and disclosure may be critical.

#### 16.1.4.2 Diversion

There are deep differences of opinion among stakeholders respecting whether domestic violence cases should be considered suitable for diversion. Existing policy strictly limits the diversion of these cases.

Restorative justice advocates agree that any use of restorative justice principles would require significant training and quality control to address the particular risks and safety concerns associated with the dynamics of domestic violence.

Any change in policy would also require that there be extensive stakeholder engagement. I would encourage such engagement, which should include the broad array of professionals and organizations who have an interest in this policy area.

The different approach offered by restorative justice programs may be particularly appropriate for victims whose fundamental goal is to preserve their families but free them of violence. These approaches may use community resources that are effective for particular ethnic or religious communities and that offer insights into family dynamics.

#### 16.1.4.3 Innovative Sentencing

Innovative sentencing approaches like those used in Alberta for some offenders should be considered. There, the delivery of sentence is deferred for a stated period, during which the accused agrees to take an appropriate program and remain violence-free. After satisfactory performance of the conditions, the court enters an unconditional discharge. Breach of the conditions is treated very seriously.

#### 16.1.4.4 New Role for Victims

This may be an area where the integrity and transparency of the system would be improved by accepting the victim's desire, in appropriate cases, to withdraw her complaint. This would require a significant departure from current criminal justice policy. Although this is an area fraught with challenges—one would need to ensure against coercion and other unacceptable behaviours—the current policy suggests artificially that sometimes victims who don't attend have forgotten the event, and as a result the charge is no longer provable. This may be an area where, in appropriate circumstances, victims have a legitimate right, free of coercive influences, to legitimately influence the course of the proceedings.

#### 16.1.4.5 Data

Tracking the time that passes from the initial reporting of the event to its resolution will help drive true timely justice. Tracking the outcomes for accused persons will assist in learning what works. Ensuring transparency of the data should better educate all British Columbians about the nature of the problem and help us progress towards its reduction.

#### 16.1.4.6 The Council

Improved outcomes are more likely when the skills of police officers, corrections and prosecutors are utilized in co-ordination with community resources. Such a co-ordinated approach would be overseen by the Council. Having a central manager in charge of priorities and resources should improve efficiencies, encourage collaboration and most of

all raise the likelihood of progress towards safer and healthier families.

**Recommendation: The new Provincial Office of Domestic Violence, working collaboratively with the Criminal Justice and Public Safety Council, should prepare a plan to reduce domestic violence, including an integrated and cross-sectoral approach that includes an informed role for the victim, diversion if appropriate, and early resolution, timely hearings, innovative sentencing, and transparency in the goals and progress towards achievement.**

## 16.2 ADMINISTRATION OF JUSTICE OFFENCES

The treatment of administration of justice offences should be high on the agenda for investigation, consideration and reform. In the course of the consultations, it became apparent that there is a wide variety of views respecting the goals and outcomes of administration of justice cases.

These offences generally arise during the course of another criminal file and constitute violations of restrictive terms on a person's liberty. They include failure to appear, breach of a condition of release on bail, breach of recognizance and breach of probation.

We know that administration of justice offences have been increasing both in absolute numbers and as a percentage of new criminal cases over the past decade. They have gone from approximately 32% of cases filed at the beginning of the decade to 42% in 2011/12<sup>279</sup>.

We also know that the number of offences recommended for prosecution by Corrections for breach of probation has remained relatively constant for the same decade. Accordingly, the increase has come from charges recommended by police.

### 16.2.1 Factual Context

Administration of justice offences can arise in a variety of circumstances but all concern breach of a restriction

on a person's behaviour while in the community, pending trial or completion of their sentence for an offence. The breach can come to the attention of either the police or Corrections in the course of their supervision of an offender in the community.

These charges can relate to the terms of release imposed by police, prosecution or the Court. There are many types of terms, although many are standard when thought applicable. They include keeping the peace and being of good behaviour, abstaining from alcohol, staying outside a particular area of the community, not being in contact with certain people, etc.

We know that there has been a trend to increasing numbers of administration of justice charges. In the past 10 years the total number of these offences has risen. In 2011/12 they represented over 40% of all adult criminal cases in British Columbia. There has also been a substantial increase in the number of people remanded in custody pending their trials as a result of administration of justice offences.

Are more administration of justice offences occurring, or has there simply been an increase in enforcement by the police? There is evidence for both. The increase in time pending trial is generally felt to raise the risk of breach by an accused, since the persons released into the community must comply for a longer time. Police have also identified the enforcement of conditions of release as a proactive strategy to affect offender behaviour—in particular with prolific offenders. The substantial increase in police resources and the general decline in crime levels may also have freed police resources for these strategies. It is unclear whether this trend reflects increased reporting by police. The number of charges laid by Corrections has not increased, which may reflect their different roles or different policies towards the discretion over whether to seek a charge approval.

As the number of recommendations for charges from corrections has remained stable for several years, it would appear clear that there has not been an increase in enforcement by Corrections.

279 British Columbia Ministry of Justice, "Criminal Justice Trends 2011/12" (August 2012) [unpublished], slide 55.

The percentage of charges attributable to specific strategies is unclear, although the large total would appear to exclude prolific offender strategies.

The reports to Crown counsel in relation to these offences are typically very straightforward, as they do not arise from complicated investigations or have multiple witnesses. These cases reportedly occupy very little court time.

The charge approval rates for these offences by the prosecution service are slightly lower than other offences, but are comparable, and have been stable throughout the growth in the caseload.

### 16.2.2 Policy Context

There is no system-wide policy for what terms are to be sought, what terms will be imposed or what breaches will be enforced. These questions are addressed through the general exercise of professional discretion by police, corrections, prosecutors and the courts.

Efforts to standardize orders have been made in recent years to enhance consistency and efficiency in their processing.

### 16.2.3 Consultations

What are we seeking to accomplish with these prosecutions, and are we succeeding? These questions were frequently the topics of our consultations with justice participants from across the system. The answers varied dramatically, and there is certainly no system-wide consensus as to what should be done. There was consensus that they deserve separate and expert attention, apart from the underlying offences themselves. This would encourage respect for the system, have a positive role in ensuring safety for the community and seek to have a positive influence on the underlying conditions which may have given rise to the charge or offence.

Many police officers and police leaders assert that the growth in administration of justice offences relates to a policing strategy to focus on offender management. In essence, when police perceive a high risk exists that an accused will commit a further offence, they will proactively employ the restrictions on his or her terms of release, thereby intensively

assisting the accused to change his or her behaviour. Failing that, the police can then seek the help of the Court in obtaining compliance and/or incarceration, for the safety of the community.

From the policing perspective, it was regularly reported that prosecutors failed to take the administration of justice offences as seriously as the policing strategy would justify. The same criticism was made by police officers of the treatment of these offences by sentencing judges. The practices that attracted the greatest criticism from the policing perspective were low levels of charge approval; high levels of stays of proceedings; the accumulation by an individual of large numbers of administration of justice offences without resolution during the pendency of the principal criminal offence; and little effect on overall sentencing for individuals who chronically violated the terms of their release into the community.

Prosecutors generally acknowledge that there is a large number of these charges and that there is little or no overall policy governing their handling and disposition. While there is a sincere effort to craft conditions which are tailored to the circumstances of the offence and offender, some prosecutors acknowledged that they lack the expertise to know what is or is not the correct approach.

Both defence and prosecution acknowledged that many people released are certain to breach one or more of their conditions before their trial. There is a mix of frustration and philosophical resignation in the community concerning this fact. As administration of justice offences are very frequently related to less serious substantive offences, there appears to be little enthusiasm for spending a great deal of time or effort on them.

Defence counsel and other veterans within the system regularly questioned whether the terms of release are appropriate in many cases. In particular, it is questioned whether the number and wide variety of terms of release are comprehensible to the people to whom they are intended to apply. Although there has been some standardization of the terms of release for the ease of the court and staff in preparing orders,

that has not translated into more comprehensible orders for many of those affected. Even a casual observation of court proceedings reveals any number of persons for whom the terms and conditions of their release do not appear to be comprehensible. Some of the language, such as “keep the peace and be of good behaviour,” is reflected in the Criminal Code but is so general as to be unhelpful and distracting. Some terms of release are seen as impractical: the often-referred-to example is the chronic alcoholic awaiting trial for a minor criminal offence whose terms of release include not drinking alcohol. When everyone expects the terms of release to be breached, according to those concerned, respect for the system is undermined.

Hugh Braker of the Native Courtworker and Counselling Association of British Columbia related the story of an accused he advised who was eventually charged with 16 administration of justice offences for visiting her boyfriend elsewhere in the province, while awaiting trial for her first charge of shoplifting.

Defence counsel expressed their common dilemma: their clients obviously wish to secure their liberty and are willing to accept unrealistic conditions to achieve it.

Some judges, and some police, prosecutors and others were of the opinion that administration of justice offences represent a rejection of the moral authority of the Court to impose restrictions on the liberty of the accused. The Provincial Court has in some locations created a compliance court, with a view to concentrating these offences in one place and enhancing the likelihood of compliance through stricter enforcement. And indeed for a significant percentage of offenders, the administration of justice offence becomes the most serious offence. Many others view the concern for respect for the Court and its orders as misplaced and unhelpful, in that the majority of people affected by these orders have multiple problems in their lives and generally lack respect for authority. On this view, we are elevating our concern for respect in a manner that leads to its opposite: the proliferation of orders that are destined to be breached and the enforcement of which depends on the priority given to investigation and police enforcement.

#### 16.2.4 Analysis and Recommendations

This is a complex problem that requires a system-wide response. It needs to be informed by an evidence-based approach, and the skills of all the justice participants need to be engaged to improve outcomes.

The data do not support some of the concerns raised by police officers. The prosecution service is certainly charging these offences with increasing frequency and obtaining convictions for them. In my view, the frustration expressed by the police is that they do not consider that the system is cooperating with the goal of influencing behaviour through enforcing the terms of release. It is certainly true that little enthusiasm was expressed during the Review by prosecutors or judges for a different approach to these charges.

The data do not support the frequently made criticism concerning levels of charge approvals for administration of justice: they have a comparable level of charge approval to other categories of crime.

Although there is a general sense in the legal community that administration of justice offences are frequently resolved as part of the background when the substantive offence is determined, this behaviour doesn't appear to be reflected in lower conviction rates. It may well be reflected in sentencing submissions, but the data maintained don't assist with answering this question. Certainly there are individuals with large numbers of administration of justice offences who remain at large in the community, but there are increasing numbers of people in custody as a result of these charges. There appears to be little data on when or why these different treatments of frequent breaches are occurring.

Prosecutors did not disagree that it is commonplace to accept a plea of guilty for the underlying offence, in return for stays of proceeding relating to the administration of justice offence component.

It may be a fair inference from the treatment of these cases by Crown and judges alike that they do not agree with the proposition that these charges



have an overall effect on the behaviour of offenders. More study would be needed to reach definitive or even reasonable conclusions.

It would also appear difficult to justify the high volume of administration of justice offences—some 38,000 cases in 2011 alone—as all related to prolific offender management. One inference may be that increased policing resources has permitted a closer oversight of the terms of release of those in the community who come to the attention of patrol constables. Coupled with the lengthening periods of time to trial on the underlying offences, it is only natural that there be an increase in administration of justice offences.

Perhaps most importantly we have a much larger prison population serving custodial time because of breaches of the terms of their release. There seems to be very little evidence that this incarceration has improved compliance with court orders. Better approaches to achieving improved outcomes are certainly needed.

This area is ripe for consideration and development of an overall plan for the system. The policy and operational development needs to be performed by the justice participants. Elements of a new approach might include

- Gathering existing system data and/or commissioning research;
- Considering what impact increased timeliness will have on these cases;
- Learning from experience in the field with proactive enforcement of orders;
- Reducing the number of conditions and simplifying terms by interviewing those affected about their understanding of the conditions of their release;
- Considering better ways of engaging defence counsel or other professionals regarding what terms are likely to be successful;
- Developing a pilot program under the direction of the Council which seeks to identify the best

strategies to achieve both safety for the community and improved outcomes for offenders;

- Considering whether there are technologies that might be better used to help accused comply, such as email or online systems, GPS trackers etc.
- Educating and training police and prosecutors in the most effective behaviour interventions, with input from corrections.

**Recommendation: An administration of justice Offence cross-sectoral working group should be established (under the direction of the Criminal Justice and Public Safety Council) to**

- **Better understand the trends and outcomes of administration of justice offences;**
- **Identify best practices for determining the terms of release into the community pending trial, and the best practices in enforcement and supervision of those conditions, with the goal of achieving the best outcomes for the victim, the community and the offender; and**
- **Develop a pilot to test the strategies.**

## 16.3 MENTAL HEALTH AND ADDICTION

Mental illness and addiction in British Columbia's criminal justice system was identified during the consultations as a significant and systemic issue. It also illustrates the interdependence between the justice system and other government and community services. There are a number of initiatives underway and undergoing evaluation.

### 16.3.1 Factual Context

A shift from institutionalized care to community-based care has increased police interactions with the mentally ill, simply due to the higher number of people with mental illnesses in the community<sup>280</sup>. This shift, along with the lack of programs and support dedicated to dealing with those suffering

280 Canadian Mental Health Association, *Police and Mental Illness: Increased Interactions* (March 2005), online: Canadian Mental Health Association <[http://www.cmha.bc.ca/files/policesheets\\_all.pdf](http://www.cmha.bc.ca/files/policesheets_all.pdf)>.



from mental illnesses, has resulted in estimates that 56% of people in the corrections system suffer from diagnosed substance abuse or some form of mental illness, both serious and less serious.<sup>281</sup> It is not clear how many others are undiagnosed, particularly those who may be suffering from foetal alcohol spectrum disorder. This percent is disproportionate to the occurrence of mental illness in the population at large.

The mentally ill are more likely to be arrested for disturbance, mischief, minor theft and failure to appear in court, than non-ill people.<sup>282</sup> Their illness makes it more difficult to address the factors that bring them into conflict with society and the law. Although minor, these offences take up significant court time. The mentally ill may be less likely to appear in court or be unable to comply with conditions of release and thus contribute to the “churn” which has been observed in our courts. The misunderstanding and confusion that often surrounds people with mental illness may cause people to fear and view them as dangerous, when they may in fact represent no risk to public safety.

Factors contributing to a high number of mentally ill persons in the prison system include a lack of sufficient community support. People with mental illness have a harder time maintaining employment, which leads to difficulties paying rent—many also lose contact with friends and relatives<sup>283</sup>. This lack of community support is one of

the reasons why an estimated 35% of the homeless in shelters are mentally ill, and 36% of unsheltered homeless suffer from mental illness<sup>284</sup>. In a survey of Vancouver’s homeless, 19% cited mental health as a barrier to finding housing<sup>285</sup>. Another factor is the high rate of substance abuse among the mentally ill. In downtown Vancouver, 47% of homeless in shelters are addicts, and 63% of unsheltered homeless suffer from addiction.<sup>286</sup> Over 50% of homeless people suffering from mental illness have a co-occurring substance abuse addiction. People who are both mentally ill and suffering from an addiction are much harder to treat than either mental illness or addiction alone, and there are not enough programs available to address the growing demand of people with both problems.<sup>287</sup>

To complicate matters further, the medical and social interventions to assist people suffering from schizophrenia will be quite different than those suffering from foetal alcohol syndrome. The cost and delay of obtaining some diagnoses, such as foetal alcohol spectrum disorder, can represent practical barriers to effective intervention.

Individuals with mental health issues are more likely to breach conditions on their being at liberty in the community. This may in part be due to the lack of mental capacity needed to understand and remember new rules and regulations.<sup>288</sup> Although the foundation for system-wide support is in place, it is not used

281 British Columbia Ministry of Public Safety and Solicitor General, *Strategic Plan of BC Corrections*, online: British Columbia Ministry of Justice <<http://www.pssg.gov.bc.ca/corrections/pdf/strategic-plan-2010-2013.pdf>>

282 Canadian Mental Health Association, *Police and Mental Illness: Increased Interactions* (March 2005), online: Canadian Mental Health Association <[http://www.cmha.bc.ca/files/policesheets\\_all.pdf](http://www.cmha.bc.ca/files/policesheets_all.pdf)>.

283 Vancouver Regional Steering Committee on Homelessness, *One Step Forward: Results of the 2011 Metro Vancouver Homeless Count* (28 February 2012) (Chair: Alice Sundberg and Susan Papadionissu), online: Metro Vancouver <<http://www.metrovancouver.org/planning/homelessness/ResourcesPage/2011HomelessCountFinalReport28Feb2012-FinalVersion-Tuesday.pdf>>.

284 Vancouver Regional Steering Committee on Homelessness, *One Step Forward: Results of the 2011 Metro Vancouver Homeless Count* (28 February 2012) at pp. 26–27 (Chair: Alice Sundberg and Susan Papadionissu), online: Metro Vancouver <<http://www.metrovancouver.org/planning/homelessness/ResourcesPage/2011HomelessCountFinalReport28Feb2012-FinalVersion-Tuesday.pdf>>.

285 Vancouver Regional Steering Committee on Homelessness, *One Step Forward: Results of the 2011 Metro Vancouver Homeless Count* (28 February 2012) at pp. 37–38 (Chair: Alice Sundberg and Susan Papadionissu), online: Metro Vancouver <<http://www.metrovancouver.org/planning/homelessness/ResourcesPage/2011HomelessCountFinalReport28Feb2012-FinalVersion-Tuesday.pdf>>.

286 Vancouver Regional Steering Committee on Homelessness, *One Step Forward: Results of the 2011 Metro Vancouver Homeless Count* (28 February 2012) (Chair: Alice Sundberg and Susan Papadionissu), online: Metro Vancouver <<http://www.metrovancouver.org/planning/homelessness/ResourcesPage/2011HomelessCountFinalReport28Feb2012-FinalVersion-Tuesday.pdf>>.

287 Canadian Mental Health Association, *Police and Mental Illness: Increased Interactions* (March 2005), online: Canadian Mental Health Association <[http://www.cmha.bc.ca/files/policesheets\\_all.pdf](http://www.cmha.bc.ca/files/policesheets_all.pdf)>.

288 Information provided to the BC Justice Reform Initiative by the RICHER (Responsive Intersectoral Children’s Health, Education and Research) Initiative.

consistently across the system.<sup>289</sup> This decreases the effectiveness of the system as a whole, keeping more people with mental illness in the court system.

The institutional settings and emergency shelters used to aid the mentally ill or addicted are much more expensive than supportive housing. In one program, once mentally ill clients were in housing, the use of police detoxification by program recipients was reduced by 75%, arrests were reduced by 56% and jail admittances were reduced by 68%.<sup>290</sup>

More training and communication between police officers and mental health workers could make a big difference in the treatment of individuals with mental illness. It would enable police officers to better handle situations involving the mentally ill and would allow mental health workers to realize that although the patient has a criminal record, the individual may not be violent and should be able to receive treatment<sup>291</sup>. In effect, an individual experiencing a psychotic break would not automatically be arrested. The police officer would have the ability to better understand the situation from a mental health perspective and be able to proceed in a way that both ensures public safety and is beneficial to the individual and the court system.

### 16.3.2 Policy Context

The Prolific Offender Management Project started in six BC communities in February 2008. This project focuses on the small number of chronic offenders who commit a disproportionate number of crimes. Law enforcement specifically focuses on these chronic

offenders, then where appropriate, refers them to specific services to help them address and resolve underlying conditions related to their offending.<sup>292</sup>

The project achieved greater collaboration and communication across justice system partners. Police and chronic offenders are communicating more, some offenders have entered into the programs available for them, such as mental health facilities, rehabilitation centres, and housing and job referrals.<sup>293</sup>

In Vancouver, the Downtown Community Court (DCC) was established in 2008 after an extensive planning process. It is a resolution court for summary conviction offences committed in downtown Vancouver, with justice and non-justice services co-located in the court building. Health and social service agencies work together in an integrated approach to manage offenders and address the underlying health and social problems that often lead to crime. Sentences in the community court focus on managing the offender's risk of re-offending and compensating the community for harm caused by the crime. The Court is currently being evaluated.

In Victoria, as a result of judicial leadership, the Victoria Integration Court (VIC) opened in 2010, focusing on accused and offenders with mental illness and homelessness issues.<sup>294</sup> The Court sits once a week, in a courtroom in the Victoria courthouse. Probation staff co-ordinate with health authority staff to provide integrated supervision of offenders with mental health or addiction problems and to provide advice to the court with respect to appropriate conditions of release. The conditions

289 Information provided to the BC Justice Reform Initiative by the RICHER (Responsive Intersectoral Children's Health, Education and Research) Initiative.

290 Information provided to the BC Justice Reform Initiative by the RICHER (Responsive Intersectoral Children's Health, Education and Research) Initiative.

291 Canadian Mental Health Association, *Police and Mental Illness: Increased Interactions* (March 2005), online: Canadian Mental Health Association <[http://www.cmha.bc.ca/files/policesheets\\_all.pdf](http://www.cmha.bc.ca/files/policesheets_all.pdf)>.

292 For further information regarding the Prolific Offender Management Project, see: British Columbia Criminal Justice Reform, *Prolific Offender Management Project*, online: British Columbia Criminal Justice Reform <[http://www.criminaljusticereform.gov.bc.ca/en/justice\\_reform\\_projects/prolific\\_offender\\_management/index.html](http://www.criminaljusticereform.gov.bc.ca/en/justice_reform_projects/prolific_offender_management/index.html)>.

293 British Columbia Criminal Justice Reform, *Prolific Offender Management Project Update* (March 2009) online: Criminal Justice Reform <[http://www.criminaljusticereform.gov.bc.ca/en/justice\\_reform\\_projects/prolific\\_offender\\_management/pdf/POMsNewsletterMar2009.pdf](http://www.criminaljusticereform.gov.bc.ca/en/justice_reform_projects/prolific_offender_management/pdf/POMsNewsletterMar2009.pdf)>

294 For further information on the Victoria Integrated Court, see: Provincial Court of British Columbia, *Victoria Integrated Court: Integration of Health, Social and Justice Services in our Community* (28 July 2011), online: Provincial Court of British Columbia <<http://www.provincialcourt.bc.ca/downloads/pdf/Victoria%20Integrated%20Court%20Report.pdf>> and Provincial Court of British Columbia, *Victoria Integrated Court in its Second Year: Continuity and Progress* (26, June 2012), online: Provincial Court of British Columbia <<http://www.provincialcourt.bc.ca/downloads/pdf/Victoria%20Integrated%20Court%20In%20Its%20Second%20Year.pdf>>.

will often include seeking treatment and remaining in contact with support workers, whose aim is to assist with their reintegration into the community. This initiative was implemented with no new resources but was designed to complement the existing integrated health and justice services to this client group.

Individuals with complex histories and conditions would obviously benefit from fully informed community support. These individuals often have many admissions to several different institutions, and there are barriers to sharing information between the medical system, social services and the legal system. There is now a plan to make BC's medical data available to better inform the treatment of chronic offenders, but the obvious privacy and consent issues have not yet been navigated<sup>295</sup>.

### 16.3.3 Consultations

Generally there was a view that we are not doing enough to ensure that people with mental illness do not end up enmeshed in the court system. The Canadian Mental Health Association believes the issue needs the most attention is collaboration between police officers and mental health providers. If this collaboration succeeds, then the other proposals to lessen the incarceration of the mentally ill will also succeed.

For those individuals who do come into contact with the court system, the most promising approach appears to be an integrated triaging of offenders, involving both health and justice personnel<sup>296</sup>.

### 16.3.4 Analysis and Recommendations

The convergence of social services interventions and judicial adjudication of criminal behaviour will require a careful assessment of needs and a determination of where the best skills are located to improve outcomes and to ensure public safety. The proper mix of delivering justice to the community,

respecting the victim and reducing the risk from an offence will always be a challenge. The VIC has benefited from the active engagement of the health authority, which would be necessary in other communities. To a degree, the court once again becomes a civic meeting place. Using skilled professionals, the community utilizes the legal system's right to control an individual's behaviour as a way of facilitating that individual's access to services, which is likelier to lead to a safer more fulfilling life.

**Recommendation: New approaches such as that taken by the Victoria Integrated Court should be fully evaluated to determine whether they improve outcomes for offenders with mental illness and addictions, so that they can be considered for broader implementation.**

## 16.4 FIRST NATIONS

There was no specific mandate for the Review to inquire into the First Nations dimension of the criminal justice system in British Columbia. Nevertheless, the over-representation of First Nations people among those who are victimized by crime and who are engaged in the system—as accused, as people at liberty in the community subject to restrictions, as incarcerated—is obvious and a concern for everyone.

### 16.4.1 Consultations

The Review met with a number of First Nations people who expressed the concern that the distinctive needs of First Nations required separate and careful consideration. The Minister's Advisory Council on Aboriginal Women urged me to recommend a review into the distinct needs and opportunities for innovation in criminal justice in First Nations communities. One example cited

295 Rod Mickleburgh, "Plan to Unlock B.C.'s Trove of Medical Data Raises Privacy Concerns," *The Globe and Mail* (18 April 2012) online: <http://www.theglobeandmail.com/news/british-columbia/bc-politics/plan-to-unlock-bcs-trove-of-medical-data-raises-privacy-concerns/article2407111/>.

296 British Columbia Street Crime Working Group, *Beyond the Revolving Doors: A New Response to Chronic Offenders* (29 September 2005) (Chair: Elizabeth A L Burgess J), online: British Columbia Justice Review Task Force <[http://www.bcjusticereview.org/working\\_groups/street\\_crime/scwg\\_report\\_09\\_29\\_05.pdf](http://www.bcjusticereview.org/working_groups/street_crime/scwg_report_09_29_05.pdf)>.

was that some First Nations have been more than willing to employ restorative justice approaches to serious offences, in the interests of healing and supporting the entire community to ensure the safety of vulnerable persons.

It was pointed out repeatedly that there are many differences between First Nations communities; what would be successful in one community might not be appropriate for another.

The Prince George Aboriginal Justice Society pointed out that there is a large seasonal urban population of First Nations people who have a two-way relationship with urban and reserve communities, as they pursue education and other opportunities in centres like Prince George. The dramatic growth in the number of First Nations people living in urban communities in BC raises new and different challenges, which both federal and provincial levels of government will need to address.

### 16.4.2 Analysis and Recommendation

This is an area which is important in any analysis of the performance of the criminal justice system. Nevertheless, it is very complex and any analysis by me would require far more investigation and consideration of the various ongoing initiatives than has been available to the Review. Accordingly, I make no recommendation as to this area of concern.

## 16.5 RESTORATIVE JUSTICE

Restorative justice is a recommended alternative model for addressing criminal acts, whose proponents believe that it promises cost-effectiveness, low recidivism, and high victim and community engagement and satisfaction. In their experience, it is highly accountable and accepted by offenders and has higher restitution and compliance rates than the conventional system.

British Columbia has long had an interest

in restorative justice, with the history of some organizations going back to the early 1980s.

### 16.5.1 Factual Context

The majority of alternative measures programs in the province, which accept referral from Crown counsel, are run by Corrections Branch staff. They are not true restorative justice programs in the sense that they do not include victim offender reconciliation. However, they do include restorative aspects such as community work service and apology letters. There are also 32 alternative measures programs in First Nations communities funded jointly by the province and the federal government, as part of the Aboriginal Justice Initiative, run by First Nations communities and justice organizations, which accept alternative measures referrals from prosecution services. Although these programs all incorporate some restorative aspects, only a few support victim offender reconciliation interventions.

As well, there are 45 community accountability programs known as CAPs which provide some elements of restorative justice programming. These are volunteer-driven programs that receive minimal support from the province, \$5,000 to cover start up costs and then \$2,500 a year to support training and ongoing costs. These programs are primarily police diversion programs, and their clients are largely youth, although some accept some referrals of adults.<sup>297</sup> In addition to the small amount of Ministry funding, these community organizations are dependent on other program grants, volunteers, municipal funding and donations.

At this point, most offenders subject to alternative measures are exposed to some elements of a restorative process. However, only a few benefit from rigorous restorative intervention.

### 16.5.2 Policy Context

Alternative measures are provided for in s. 717(1) of the Criminal Code, which provides that

<sup>297</sup> Justice BC, *Restorative Justice*, online: Justice BC <<http://www.justicebc.ca/en/cjis/understanding/restorative/index.html>>.

<sup>298</sup> Community Safety and Crime Prevention Branch (Ministry of Justice) Submission to the BC Justice Reform Initiative (31 May 2012), at p. 1.

the measures must be “(a) ... part of a program of alternative measures authorized by the Attorney General” or other authorized person.

Most of the CAPs are not authorized alternative measures programs and thus prosecutors are not able to make referrals to them.

The leadership in the prosecution service has for some time supported the idea of prosecution referral to restorative justice programs, but there are limited opportunities to refer to a fully developed restorative justice program.

There has been some limited use of restorative approaches at sentencing, but this is not frequently used. While all courts take into account ways in which offenders can make amends for their offences, the two First Nation’s courts in British Columbia emphasize a restorative approach.

The federal corrections service has funded the limited use of restorative justice in relation to convicted and sentenced offenders, as a means to create greater understanding on the part of the offender of the harm he has caused to the victim. The purpose is also to bring “closure” to the victim, particularly where the victim has not found the formal criminal process to be very satisfying. This process has not been used in adult corrections in British Columbia although there are some examples of its use in the youth justice system.

Police policy with respect to restorative justice varies among the independent municipal forces, although the RCMP has a formal policy to encourage referrals to programs such as restorative justice.

### 16.5.3 Consultations

Advocates of restorative justice have a great deal of enthusiasm and zeal. They see restorative justice as a very different means of obtaining far better outcomes for victims, offenders and the community than are available through the traditional punitive model of justice.

In the consultations it was made clear that restorative justice advocates encounter widespread misunderstanding concerning what restorative justice programs are. One association stated that

they are not the “Hugs for Thugs Society,” and emphasized that victims must agree to participate, and that it is difficult and challenging for offenders to go through a restorative justice program. Although it is clear that within the restorative justice community itself there are differences of approach, the definition of restorative justice offered by the CSCP is helpful:

“Restorative justice is an approach that provides a new set of tools which complement and can work within all levels of the traditional justice system. By looking at victim and community needs first, restorative justice recognizes that while crime offends society as a whole, crime is primarily an offence against people. Justice therefore involves the victim, the offender, and their communities in the search for outcomes which meet the needs of those who have been harmed and address the underlying causes of the act. This may include restitution, counselling, apology letters and/or community service, but can also invite creative solutions determined by key stakeholders.”

The “gold standard” for a restorative justice session is one where the victim and offender both volunteer to meet under the supervision of a trained restorative justice worker. The victim has an opportunity to tell the offender how the offence impacted his or her life. The offender is required to demonstrate acceptance of responsibility but has the opportunity to offer an explanation of the circumstances which led to the crime. Where property losses have occurred, restitution is often an agreed-upon undertaking. There are opportunities to identify opportunities for forgiveness by the victim and restoration of the offender through positive changes in his or her behaviour. The Community Justice Initiatives Association 2010 Annual Report quotes an offender as saying: “It almost makes your

heart stop, when you're forgiven for something you didn't think you should be forgiven for."

The Review received moving submissions from the victims of serious crimes, including family members of murder victims, who identified restorative justice as delivering a greater degree of closure and healing than permitted solely by the traditional sentencing model. Restorative justice advocates strongly urged the referral of serious offences to restorative justice programs as complementary and not inconsistent with the goals of criminal justice.

Although restorative justice programs were long associated with youth and property crimes, some programs have been receiving adult criminal referrals for many years, and it is felt by many that equally positive results are available for adult offenders.

Research has been conducted which supports the expansion of the use of restorative justice programs as it concludes that there is a greater degree of acceptance by offenders, a far higher degree of satisfaction by victims, lowered recidivism rates and an increase in public confidence.

Similar methods are used by the Ministry of the Environment in relation to environmental offences.

These are not programs run generally by lawyers, although they have long had the support of some judges, lawyers, prosecutors and defence counsel. Many during consultations expressed their fear that their ethos, because it is very different than the traditional criminal justice model, has limited the use of restorative justice by police, prosecutors and the courts. In Abbotsford, it was reported that support from senior police leadership and the opportunity to educate members of the force about the nature and effectiveness of the programs has dramatically raised referrals to restorative justice in the past few years.

#### 16.5.4 Analysis and Recommendations

There appears to be need for both balance and consistent professional controls around the delivery of restorative justice programs.

Given their largely voluntary character and the fact they operate as an alternate model to the traditional criminal justice system, an important question arises: how best to permit these programs to flourish while holding them accountable for results and offering sufficient support to let them achieve continuity, training and experience.

In some senses restorative justice programs are thoroughly outside the criminal justice system; they are, to some degree, revolutionary in their methods, goals and personnel. At a different level, however, they represent a vast potential for the criminal system to obtain things that are worthy but difficult for police and prosecutors to achieve: reconciliation and healing within the community. As ultimately public confidence will be best assured when the community feels its needs are met, the encouragement and flourishing of community-based restorative justice programs should be an important part of any system plan.

**Recommendation: The Criminal Justice and Public Safety Plan for the Province should include a performance goal for increased use of restorative justice programs.**

**Recommendation: Expanded funding for restorative justice programs should be made available and innovative methods of funding, should be assessed, such as funding referrals, in cases where the offender would otherwise be subject to a significant criminal penalty.**





# 17. RESOURCES AND PRIORITIES

During the course of the Review submissions were made formally and informally respecting whether I ought to make recommendations concerning additional resources and priorities.

The proper level of resourcing was not central to my terms of reference and much of the subject-matter of the Review is not directly connected to a particular view or level of funding for the system as a whole. I was not cautioned by anyone against making recommendations concerning funding, and my consideration of this topic has been made so as to be consistent with the nature and scope of the recommendations I have made in this Report.

A number of the submissions in favour of greatly increased financing proceed from assumptions about the current system that are not consistent with the recent data, or they proceed from a proposition about a general social priority for funding for the justice system that to my knowledge has not been adopted anywhere in Canada now or in the past.

There have been resourcing decisions made within the justice system that were criticized as uneven or unfair. In general, expenditures for policing services have increased significantly. Expenditures for prosecutors and the courts have increased, but these funds have principally been made available to fund required benefit increases.

As a result of the government's core services review several years ago, non-governmental organizations had substantial cutbacks made to their funding. In my view it is critical that resources to non-governmental organizations need to be made available where doing so is important to the effective performance of the system. In some senses they are part of the system and need to be treated as such.

Legal aid has been under constraint since the mid-1990s and apart from large case funding, has received very little incremental funding. Despite this, it has actively led in producing innovative

programs and services. The submissions which touched on resources almost universally called for priority to increases in legal aid funding. In my view, incremental resources to enable legal aid to play an active role in the achievement of the reforms to the Provincial Court process would be necessary to its full success and would be money well spent.

There will clearly be financial implications to some of the recommendations made in this Report. However, many of the ideas or proposals committed to by the justice participants have not been refined to the point of determining budgets or whether incremental funding will be required. Furthermore, several of the proposals will involve spending in future fiscal periods. I have not sought access to the detailed budgets of the government that would be needed in relation to shifts in, or requests for, additional funding.

As a result, I do not have any recommendations to make concerning the overall funding to the criminal justice system. I certainly encourage the government to implement the measures recommended by this Review and to contribute to their success by making incremental resources available. In my view, a more compelling case for additional funding will be made if the participants commit to the scope and scale of changes needed for success. I recognize that this decision will ultimately need to be made having regard for the fiscal situation and other demands on public resources.

I think it is appropriate to add a word about priorities. In my view enabling the immediate commencement of a backlog reduction initiative should be given a high priority. Similarly, providing the Provincial Court and Supreme Court with enhanced business information and systems advice should take priority over other matters. Finally, the various measures which are recommended to achieve early case resolution are, in my view, worthy of funding priority.

No recommendation is made as to the general level of funding for the criminal justice system.

Recommendation: Within the scope of available funding, priority should be considered for reducing the backload of cases, enhancing the managerial

capacity of the courts, and enabling the full realization of the early case-resolution process.

Recommendation: To enable the aggressive resolution of the backlog of cases, an additional five judges should be appointed to the Provincial Court.

## ABBREVIATIONS AND ACRONYMS

<b>ACT</b>	assertive community treatment	<b>FTE</b>	full time equivalent
<b>ADAG</b>	assistant deputy attorney general	<b>JSB</b>	Justice Services Branch
<b>ADM</b>	assistant deputy minister	<b>ICON</b>	Integrated Corrections Operations Network
<b>ARJAA</b>	Abbotsford Restorative Justice and Advocacy Association	<b>IRP</b>	Immediate Roadside Prohibition
<b>BCACP</b>	British Columbia Association of Chiefs of Police	<b>JCM</b>	Judicial Case Manager
<b>BCCLA</b>	British Columbia Civil Liberties Association	<b>JOT</b>	Justice on Target
<b>BCGEU</b>	British Columbia Government Employee's Union	<b>JUSTIN</b>	Justice Information System
<b>CAAR</b>	Case Assignment and Retrieval	<b>LCJB</b>	local criminal justice boards
<b>CAD</b>	computer aided dispatch	<b>LSS</b>	Legal Services Society
<b>CAP</b>	community accountability programs	<b>MAG</b>	Ministry of Attorney General
<b>CBA</b>	Canadian Bar Association	<b>MCFD</b>	Ministry of Children and Family Development
<b>CCFM</b>	Criminal Case Flow Management	<b>Ministry of Justice</b>	Ministry of Justice and Attorney General
<b>CCJS</b>	Canadian Centre for Justice Statistics	<b>NCJB</b>	National Criminal Justice Board
<b>CCM</b>	Court Case Management	<b>NFPC</b>	North Fraser Pre-Trial Centre
<b>CFO</b>	Civil Forfeiture Office	<b>OCJ</b>	Office of the Chief Judge
<b>CMS</b>	Case Management System	<b>Plan</b>	Criminal Justice and Public Safety Plan
<b>Committee</b>	Provincial Community Safety Steering Committee	<b>PRIME</b>	Police Records Information Management Environment
<b>CORNET</b>	Corrections Network	<b>PSSG</b>	Ministry of Public Safety and Solicitor General
<b>Council</b>	Criminal Justice and Public Safety Council	<b>RCC</b>	report to Crown counsel
<b>Court Scheduling Project</b>	Provincial Court Process and Scheduling Project	<b>RCMP</b>	Royal Canadian Mounted Police
<b>CSCP</b>	Community Safety and Crime Prevention Branch	<b>SFU</b>	Simon Fraser University
<b>DCC</b>	Downtown Community Court	<b>STICS</b>	Strategic Training in Community Supervision Initiative
<b>DTES</b>	Downtown East Side	<b>TLH</b>	timeline hearing
<b>FASD</b>	fetal alcohol spectrum disorder	<b>UBCM</b>	Union of British Columbia Municipalities
		<b>VIC</b>	Victoria Integrated Court



## ANNEX: POLICY CONTEXT

### 1. BC INITIATIVES

Recent justice reform initiatives underway in British Columbia and elsewhere have continued the trend of preferring to use tribunals and to provide the public with alternatives to traditional courtroom litigation.

#### 1.1 IMMEDIATE ROADSIDE PROHIBITION (2010)

From a systems perspective, the transfer of impaired driving concerns away from the criminal justice system represents the loss of a significant volume of traditional criminal work. From every perspective this move should alert us all to the urgency and dramatic need for change.

In September 2010, the Province of British Columbia's IRP program came into effect through amendments to the *Motor Vehicles Act*. These amendments created an administrative regime to address impaired driving by establishing consequences for drivers who receive a "fail" or "warn" reading on a breathalyser or refuse to provide a breath sample.<sup>299</sup>

The impaired driving provisions of the Criminal Code, together with active enforcement, have been credited with helping facilitate a massive change in public opinion about drinking and driving, as well as a significant change in behaviour which has seen rates of drinking and driving, as well as fatalities and injuries caused by impaired drivers, drop substantially.

In British Columbia, fatalities from impaired driving dropped from over 200 per year in the late 1980s to just over 100 per year in 2000. However for ten years, the number of fatalities remained relatively

constant, at an average of 113 per year. Roadside prevalence surveys (voluntary fluid samples provided for analysis) showed a consistent level of alcohol and drug impaired driving at about 8–10% of drivers surveyed, while other surveys where drivers voluntarily had their breath alcohol tested showed that between 1–2% blew over 0.08 and 3–5% blew over 0.05 percent alcohol.<sup>300</sup>

As well, Criminal Code enforcement was proving to be more and more time-consuming for law enforcement, requiring four to five days of police officer time per criminal charge, as well as time consuming for the prosecution. In consultations, impaired driving charges were estimated to consume a greater percentage of the criminal court hearing hours than their portion of new cases in the system, formerly 12%.<sup>301</sup>

These are cases with important implications for those accused of the offence. Breathalyser legislation was developed to enable the efficient detection and prosecution of impaired drivers. Over the course of the past decade, however, the cost to the justice participants and the length of time required to try these cases have steadily increased. Prior to the IRP, cases could take from 10 to 24 months to complete.<sup>302</sup> During consultations it was regularly observed that impaired driving cases which once took half a day to try now take three to four days at trial. There are no plans to reduce the length of these trials, and my impression is that such a reduction is not considered readily achievable nor a priority given the success of the IRP program and the substantial diversion of these cases away from the Court system.

299 See: Ministry of Public Safety and Solicitor General, News Release 2010PSSG0026-000472 "B.C. Introduces Canada's Toughest Impaired Driving Laws" (27 April 2010) online: Government of British Columbia <[http://www2.news.gov.bc.ca/news\\_releases\\_2009-2013/2010PSSG0026-000472.htm](http://www2.news.gov.bc.ca/news_releases_2009-2013/2010PSSG0026-000472.htm)>.

300 Information provided to the BC Justice Reform Initiative by the Office of the Superintendent of Motor Vehicles, British Columbia.

301 Information provided to the BC Justice Reform Initiative by the Office of the Superintendent of Motor Vehicles, British Columbia.

302 Information provided to the BC Justice Reform Initiative by the Office of the Superintendent of Motor Vehicles, British Columbia.

The IRP legislation has nearly identical goals to the criminal law in terms of impaired driving. Its aim is to streamline the detection and adjudication of alleged impaired driving, with the view to applying a meaningful sanction that will deter the offender and signal society's general disapproval. The hope was that non-penal sanctions would—if applied immediately—have a substantial effect on offender behaviour. It was also expected that the more lenient circumstances concerning disclosure and paperwork would enable police officers to issue, in a shift, many more IRP notices than criminal charges.

Although challenged as a violation of constitutional limits, this law has been found to be a valid exercise of the provincial power to legislate the licensing of drivers and to enhance highway traffic safety.<sup>303</sup>

The IRP applies consequences that are significant (loss of vehicle and driving privileges, and monetary penalties which cover the cost of the program) and designed to change the behaviour of the impaired driver (ignition interlock, education programs and counselling). After roadside testing, the consequences are immediate, and appeals are dealt with in less than 21 days.<sup>304</sup>

By any measure this program has been hugely successful. It has had a significant impact on highway safety and a collateral effect on the criminal justice system in the province. In the first year after the IRP program came into effect, the MAG reported a 40% decrease in fatalities attributed to impaired driving.<sup>305</sup>

All the criminal laws respecting impaired driving remain in place and available to police and prosecutors. However, the number of impaired driving cases in the criminal court system has dramatically declined, reducing the burden that these cases placed

on the court system. Criminal cases have dropped from about 900 per month before implementation, to a low of about 140 per month, creating significant capacity in the criminal court, with about 8,000 fewer impaired driving cases in Provincial Court in 2011/12.<sup>306</sup> The increased efficiency in administering roadside screening and administrative sanctions have freed up police resources to increase enforcement and roadside screening, which in turn increases the likelihood of detection of impaired driving.

## 1.2 CIVIL RESOLUTION TRIBUNAL ACT (2012)

Another recent example of this ongoing trend towards tribunal decision-making is The *Civil Resolution Tribunal Act* (Bill 44), which received royal assent on May 31, 2012. It will establish a new dispute resolution and adjudicative body with authority to hear certain categories of disputes as set out in the Schedule to the Act. Initially this would include some strata property disputes and, where the parties jointly agree, small claims matters,<sup>307</sup> but the authority of the tribunal to hear other disputes may be expanded in future regulations.

According to the Ministry of Justice, civil resolution tribunals established under the Act are expected to resolve disputes within 60 days, as opposed to the 12 to 18 months currently required in small claims court.<sup>308</sup> The mandate of the tribunals includes the provision of dispute resolution services “in a manner that is accessible, speedy, economical, informal and flexible” while still applying the principles of law and fairness.<sup>309</sup> The government also expects that the level of resources applied to a dispute under the *Civil Resolution Tribunal*

303 *Sivia v. BC (Superintendent of Motor Vehicles)*, 2011 BCSC 1639 at para 13.

304 For further information on Immediate Roadside Prohibitions, see: *Impaired Driving – The Various Prohibitions and Suspensions*, online: British Columbia Ministry of Justice <<http://www.pssg.gov.bc.ca/osmv/prohibitions/impaired-driving.htm#irp>>.

305 British Columbia Ministry of Public Safety and Solicitor General, News Release, “Ministerial Statement on Immediate Roadside Prohibitions” (November 30, 2011), online: PSSG <[http://www2.news.gov.bc.ca/news\\_releases\\_2009-2013/2011PSSG0153-001555.htm](http://www2.news.gov.bc.ca/news_releases_2009-2013/2011PSSG0153-001555.htm)>.

306 See discussion in Section 3.9 of this Report.

307 For a description of Bill 44, 2012, see: British Columbia Ministry of Attorney General, “Civil Resolution Tribunal Act”, online: British Columbia Ministry of Justice <<http://www.ag.gov.bc.ca/legislation/civil-resolution-tribunal-act/index.htm>>.

308 British Columbia Ministry of Justice, News Release, “Online civil dispute tools to save time, money” (7 May 2012), online: Ministry of Justice <[http://www2.news.gov.bc.ca/news\\_releases\\_2009-2013/2012JAG0068-000600.htm](http://www2.news.gov.bc.ca/news_releases_2009-2013/2012JAG0068-000600.htm)>.

309 Bill 44, *Civil Resolution Tribunal Act*, 4th Sess, 39th Parl, British Columbia, 2012, s 2(2) (assented to 30 May 2012), SBC 2012, c 25.

Act will be proportionate to the nature of the dispute and the issues involved,<sup>310</sup> presumably under the policy direction of the executive branch.

### 1.3 FORFEITURE OF PROCEEDS OF CRIME (2006)

Police have long been of the view that an important part of law enforcement is to remove the profit from illegal activity in order to reduce the incentives for committing certain types of crime.

Concerned that the Criminal Code provisions authorizing the forfeiture of proceeds of crime had no significant impact on criminal activity, in 2005 British Columbia developed an alternate scheme, under the provincial constitutional responsibility for property and civil rights, to attach proceeds of crime.

The *Civil Forfeiture Act* (2006) established a scheme to suppress unlawful activity by forfeiting illicit profits and preventing property from being used to commit unlawful activity. The Act created a new civil cause of action that permits the province to apply to a court for the forfeiture of property that is found to be either the instruments or proceeds of unlawful activity.<sup>311</sup>

The Civil Forfeiture Office (CFO) was created to administer the Act. Funds forfeited under the Act must be paid into the Civil Forfeiture Special Account and may only be paid out of the Special Account at the discretion of the director for

- The administration of the Act;
- Crime prevention activities;
- Crime remediation activities; and,
- Eligible victims.<sup>312</sup>

Files are referred to the CFO by police and other investigative agencies and have been received from

every police agency in British Columbia, as well as the BC Securities Commission, Ministry of Environment, the U.S. Department of Homeland Security, U.S. Immigration and Customs Enforcement, and U.S. Attorney's Office. This suggests that police find this process a useful adjunct to their criminal investigations.<sup>313</sup>

Three hundred and seventy nine litigation files have been concluded to date, all but one in favour of the director of civil forfeiture, resulting in the forfeiture of \$27 million. A further 209 litigation files are before the courts involving property with a gross value of approximately \$50 million.

Approximately \$8 million in forfeited funds have been paid in grants to communities for crime prevention and crime remediation initiatives, and \$900,000 in forfeited funds have been paid to eligible victims.<sup>314</sup>

In 2011, the legislation was amended to permit administrative forfeiture of property of lower value (under \$75,000, not real property) without going to court, unless the defendant disputes the claim.<sup>315</sup> These new provisions make it cost-effective to proceed in cases where the property is of lower value but there are strong public interest factors in favour of proceeding. Examples include amounts of cash, vehicles and jewellery commonly seized from drug dealers, gang members and other organized criminals. This process reduces costs for both government and defendants, as well as reducing demands on Supreme Court resources. If no one disputes the province's claim within 60 days of notification, the director of civil forfeiture can dispose of the property. In the event of a dispute, the case automatically reverts to the usual civil forfeiture process, and defendants are entitled to dispute the matter up to and including a civil trial in BC Supreme Court.

310 British Columbia Ministry of Attorney General, "Civil Resolution Tribunal Act", online: British Columbia Ministry of Justice <<http://www.ag.gov.bc.ca/legislation/civil-resolution-tribunal-act/index.htm>>.

311 For further information on Civil Forfeiture in British Columbia, see: British Columbia Ministry of Justice, "Civil Forfeiture in British Columbia", online: British Columbia Ministry of Justice <<http://www.pssg.gov.bc.ca/civilforfeiture/>>.

312 *Civil Forfeiture Act*, SBC 2005, c 29, Part 6.

313 Information provided to the BC Justice Reform Initiative by the Civil Forfeiture Office.

314 Information provided to the BC Justice Reform Initiative by the Civil Forfeiture Office.

315 *Civil Forfeiture Act*, SBC 2005, c 29, Part 3.1.



In the first year of operations, 281 administrative forfeiture files have been undertaken by the Civil Forfeiture Office. One hundred and thirty-nine of these cases have been concluded, resulting in net forfeitures of \$911,000.<sup>316</sup> Administrative forfeiture files do not require the services of a lawyer, unless disputed. The CFO estimates that it saved between \$300,000 and \$500,000 in legal fees through the use of administrative forfeiture in these cases. Only 10% of administrative forfeiture cases have been disputed.<sup>317</sup>

There has been no evaluation of the impact on levels of crime. However \$27 million has been removed from the criminal economy, and police believe that a referral to the CFO is a useful element in their strategy to discourage crime.

This is another recent example of policy-makers moving a subject matter away from the criminal justice system in order to obtain greater process efficiencies and better outcomes—in this case more effectively capturing proceeds of crime and hopefully deterring criminal activity.

## 1.4 TRANSFERRING RESPONSIBILITY FOR THE ADJUDICATION OF BYLAW TICKET DISPUTES TO MUNICIPALITIES (2003)

The *Local Government Bylaw Notice Enforcement Act*<sup>318</sup> was developed to give local governments more authority to deal with local issues and to avoid the time-consuming court processes associated with disputing minor bylaw tickets in the Provincial Court. More rigorous penalties for serious bylaw breaches were created, which continue to be heard in Provincial Court.

This strategy not only freed up time in Provincial Court for criminal, civil and family matters but also

addressed the complaints of municipal governments that their matters were of the lowest priority in the Provincial Court, often passed over in favour of matters seen as having greater importance.

The new scheme provided that a notice of a bylaw infraction can be delivered by mail or by leaving it on the vehicle if it is a parking contravention. Then local governments can enter into what are called “compliance agreements” where there is a need for corrective action. Alternatively, if that is neither appropriate nor successful, then these matters will be referred to an adjudicator rather than to the Provincial Court.

The Act provides a more informal process for the hearing of these disputes. Hearings can take place with people present in person, by video conferencing, by telephone or even based on written submissions.

Recent amendments to permit evidence in writing where it is not disputed were designed to streamline the adjudication process by reducing the need for unnecessary appearances, particularly in relation to facts that are seldom seriously disputed. The movement of the responsibility for prosecution of violation tickets to the police reflected the relatively straightforward nature of most violation ticket disputes, which did not require the expertise of legally trained prosecutors.

### 1.4.1 New Administrative Process for Disputes Over Traffic Tickets

Very recently the provincial government announced that a new system for adjudicating provincial traffic offences (tickets) will be implemented, eliminating the need for people to dispute their traffic tickets in court in front of a judicial justice. Most hearings will be held by telephone, and disputes will be resolved within 60 days rather than the current 7 to 18 months.<sup>319</sup>

316 Information provided to the BC Justice Reform Initiative by the Civil Forfeiture Office.

317 Information provided to the BC Justice Reform Initiative by the Civil Forfeiture Office.

318 SBC 2003, c 60.

319 British Columbia Ministry of Justice, News Release, 2012JAG0072-000628, “Justice reform strengthened by traffic ticket changes” (7 May 2012), online: Government of British Columbia <[http://www2.news.gov.bc.ca/news\\_releases\\_2009-2013/2012JAG0072-000628.htm](http://www2.news.gov.bc.ca/news_releases_2009-2013/2012JAG0072-000628.htm)>.

## 1.5 OTHER INITIATIVES

The landscape of reform in the criminal justice system includes an array of previous, emerging and ongoing initiatives to address identified problems and to improve both the outcomes and performance of the justice system. This compels our attention; the likelihood or actual success of these initiatives should inform any reform program.

Their sheer number reflects not only the number of identified issues but also the number of differentiated, independent and empowered professionals. The strength of this entrepreneurial service innovation lies in its potential to produce successful local models that will be scalable as they become evaluated and as their successes are verified. There is, however, one notable weakness: leaders within the system can suffer from fatigue just by staying in touch with the large number of ideas and initiatives. Thus you have the paradox of a system that is resistant to change but beset with a large number of efforts to produce various changes in both process and outcomes.

At the same time, in British Columbia as in jurisdictions around the world, it is probably fair to say that there are more failed reform initiatives than successful ones, and it is thus important to try to understand the factors that have tended to contribute to success or failure.

### 1.5.1 Initiatives Designed to Improve Outcomes (a) Youth Crime

Perhaps the most dramatic success is in improved youth crime outcomes. Youth crime in British Columbia has been declining significantly for the last decade, at a much faster rate than the rest of the country. The number of youths incarcerated is down dramatically. In all of British Columbia an average of 100 youth were in custody in 2012, both in remand and sentenced.<sup>320</sup>

This trend has been evident for substantially more than a decade. As with all changes in the crime rate, it is difficult to identify the causes of change.

However, youth justice experts suggest that it is due to a variety of factors, including changes in police practice from primary reliance on the formal justice system to deal with offending behaviour, supported by a network of integrated support programs linked to community supervision.

This practical achievement was facilitated by the transfer of youth justice to the MCFD in 1995 which enabled services to young offenders to be effectively co-ordinated with services to youth generally and resulted in a well-functioning network of support and services that has effectively reduced and prevented youth crime and reduced recidivism. This approach has been supported by the implementation of the *Federal Youth Criminal Justice Act* in 2003, a coherent policy favouring a proactive and integrated approach to youth in conflict with the law.

### (b) Evidenced-Based Approach to Correctional Practice

In the consultations with BC Corrections it was observed that today's system is the result of a dramatic change in culture that began in 1994. This shift in culture has been centred around pursuing a rigorous evidence-based approach to its programs.

The results have been significant and enduring. There is now greater confidence in the ability to evaluate the risks to the community from an offender, and well-designed programs can reduce recidivism by addressing underlying cognitive and behavioural conditions that accompany criminal conduct.

Programs are developed based on best practice and then evaluated after implementation. Successful programs include domestic violence programming (Relationship Violence Prevention Program), anger management (Violence Prevention Program) and Integrated Offender Management, an innovative approach to the release of high risk offenders from custody. All of these have been evaluated to show reduction in recidivism. The Sex Offender Maintenance Program is currently being evaluated.<sup>321</sup>

<sup>320</sup> See discussion in [Section 3.3](#).

<sup>321</sup> For further information in relation to the Core Programs in use and under development, see: British Columbia Ministry of Justice, Corrections <<http://www.pssg.gov.bc.ca/corrections/in-bc/details/overview.htm>>.

Most recently Corrections participated in the Public Safety Canada pilot and evaluation of Strategic Training in Community Supervision Initiative (STICS). Corrections is now implementing this successful program to improve the impact probation officers have on recidivism through more effective supervision.<sup>322</sup>

For almost the last 20 years, Corrections has committed to a rigorous evidence-based approach to developing and implementing programs for offenders. As a result, resources are targeted to clients who will benefit the most. Leading Canadian research has identified the key factors to be addressed as offenders' risk, needs and responsivity to intervention. Corrections programs are designed with these principles in mind.<sup>323</sup> Services are delivered consistently, even where clients move back and forth from the community to custody.

### (c) Drug Treatment Court of Vancouver

This specialized court integrates the judiciary, federal and provincial prosecutors, Corrections, Social Development and Vancouver Coastal Health to develop and implement comprehensive plans for offenders to reduce or manage their addictions and reduce their criminal behaviour.

The 2010 comprehensive evaluation<sup>324</sup> determined that Drug Treatment Court of Vancouver clients demonstrated a significant reduction in recidivism. This is particularly impressive, since the evaluation also found that, in comparison to the general population in the Downtown East Side, Drug Treatment Court of Vancouver clients were less likely to be responsive to the justice system and substance abuse-related interventions. However, the evaluation

noted that it is not possible to determine which of the program elements influence the outcome.

This success appears to be a product of the application of a specialized approach to a particular problem through a separate and disciplined model. The factors which appear to have contributed to success include integrated program planning, evidence-based program development, ongoing monitoring and development, and an intensive, integrated and dedicated drug treatment service.

### (d) Downtown Community Court

The DCC was created as a pilot project in 2008 in response to a recommendation of the Justice Review Task Force and its Street Crime Working Group. The pilot was implemented to test a more efficient way to seek early constructive resolutions for summary offences, through an integrated delivery model for justice, health and social services.<sup>325</sup>

This is an ambitious approach which builds on judicial leadership and is aimed at transforming the entire approach to all incoming cases from a highly demanding part of the City of Vancouver.

The interim evaluation, which focused on process, found that the court was not demonstrably more efficient than other courts in BC. However, there was a high degree of satisfaction around the increased collaboration in the court.<sup>326</sup> The full evaluation is expected in 2013.

The caseload in DCC is higher than expected, which requires staff to spend more time in the courtroom with less time available for out-of-court discussions, offender management and programming.

Although DCC is a resolution court only, there are no time limits placed on the accused to

322 British Columbia Ministry of Justice, News Release, "Budget 2012 funds new probation officers, innovative approach" (6 March 2012), online: Ministry of Justice <[http://www2.news.gov.bc.ca/news\\_releases\\_2009-2013/2012JAG0012-000242.htm](http://www2.news.gov.bc.ca/news_releases_2009-2013/2012JAG0012-000242.htm)>.

323 For further information about the Risk/Needs/Responsivity Model, see: James Bonta & DA Andrews, *Risk-Need-Responsivity Model for Offender Assessment and Rehabilitation 2006-2007* (2007), online: Public Safety Canada <[http://www.publicsafety.gc.ca/res/cor/rep/\\_fl/Risk\\_Need\\_2007-06\\_e.pdf](http://www.publicsafety.gc.ca/res/cor/rep/_fl/Risk_Need_2007-06_e.pdf)>.

324 JM Somers et al., "Drug Treatment Court of Vancouver (DTCV): an Empirical Evaluation of Recidivism" (2011), *Addict Research and Theory* 2, p. 117.

325 For further information in relation to the Downtown Community Court, see: Criminal Justice Reform <[http://www.criminaljusticereform.gov.bc.ca/en/justice\\_reform\\_projects/community\\_court/index.html](http://www.criminaljusticereform.gov.bc.ca/en/justice_reform_projects/community_court/index.html)>.

326 Ministry of Attorney General, Justice Services Branch & Ministry of Public Safety and Solicitor General, Corrections Branch, *Downtown Community Court in Vancouver, Interim Evaluation Report* (30 August 2010), online: Criminal Justice Reform <[www.criminaljusticereform.gov.bc.ca/en/reports/pdf/interimevaluation.pdf](http://www.criminaljusticereform.gov.bc.ca/en/reports/pdf/interimevaluation.pdf)>.

either plead guilty and have the matter disposed of in DCC or set the matter down for trial at the Vancouver Provincial Court.

During consultations the cost-effectiveness of the DCC was raised as a potential barrier to scaling it to other areas of the province, even should the evaluations be positive.

Although not yet evaluated, there is a strong view that the effective co-ordination between the justice system and the health and social service sectors has led to improved outcomes for offenders.

#### (e) Prolific Offender Management Pilots

During the consultations police from around the province endorsed a focus on prolific offenders as an example of proactive strategic policing that benefits from integration with the rest of the justice system. It represents a shift in thinking from event-based policing to offender-based policing. It has great potential for social benefits for victims, the community and the offender. It also contains the natural risk of abuse or injustice that accompanies any systematic focus on an individual for enforcement and attention.

This project was based on the national prolific offender scheme introduced in the UK in 2004, with the objective of reducing recidivism of the most chronic offenders, thereby reducing the level of crime.

The initiative was launched in six communities in British Columbia in February 2008. Local teams were established in each community, with representatives from corrections, police, prosecutors, victim services, the health authority BC Housing, and the Ministries of Social Development and Children and Family Development.<sup>327</sup>

Based on a common set of guidelines, the local teams identified approximately 20–40 offenders in each community who would be the subject

of integrated and focused efforts, then notified them by letter. The teams pursued a two-pronged strategy of intensive support and enforcement, by offering offenders the opportunity to participate in rehabilitative programming and access supports, and at the same time assertively monitoring their behaviour and pursuing new charges when appropriate.

There was a commitment from the outset to do a rigorous evaluation, but two factors contributed to make meaningful evaluation difficult: the flexible definition of “prolific offender,” with latitude in each site to identify the offenders they thought were most problematic and the lack of a standardized response to those offenders. This meant that it was not possible to identify a control group to compare outcomes.

The evaluation is underway but generally participants found the improved relationships and collaboration helpful.

#### (f) Victoria Integrated Court (2010)

It was a common observation during consultations that many of the offenders in the Provincial Court are afflicted with mental illness. Yet there is also evidence that there is not necessarily a relationship between mental illness and crime.

The VIC is led and managed by members of the Provincial Court in Victoria to improve the co-ordination of the justice, health and social sectors to better manage offenders with a history of mental illness, substance addiction and unstable housing. These offenders are thought to be responsible for a disproportionate amount of social disorder and nuisance behaviour in the community, with a high use of emergency services.<sup>328</sup>

The VIC is held in a dedicated courtroom in the Victoria courthouse one morning a week for cases involving a restricted group of offenders. In the community, offenders are managed by the assertive

327 For further information on the Prolific Offender Management Program, see: Criminal Justice Reform <[http://www.criminaljusticereform.gov.bc.ca/en/justice\\_reform\\_projects/prolific\\_offender\\_management/](http://www.criminaljusticereform.gov.bc.ca/en/justice_reform_projects/prolific_offender_management/)>.

328 For further information on the Victoria Integrated Court, see: Provincial Court of British Columbia, *Victoria Integrated Court: Integration of Health, Social and Justice Services in our Community* (28 July 2011), online: Provincial Court of British Columbia <<http://www.provincialcourt.bc.ca/downloads/pdf/Victoria%20Integrated%20Court%20Report.pdf>> and Provincial Court of British Columbia, “Victoria Integrated Court in its Second Year: Continuity and Progress” (26, June 2012), online: Provincial Court of British Columbia <<http://www.provincialcourt.bc.ca/downloads/pdf/Victoria%20Integrated%20Court%20In%20Its%20Second%20Year.pdf>>.

community treatment (ACT) teams led by Vancouver Island Health Authority. The court is informed by the teams and supports the teams' efforts to manage offenders effectively in the community.

The court aims to increase public safety by decreasing recidivism, providing more effective sentencing that supports offender management and supporting more effective use of community services.

The court dealt with 128 offenders in the first year.<sup>329</sup> A comprehensive survey of participants, including offenders, was completed after the first 12 months.<sup>330</sup> The survey found

- The roles, responsibilities and processes of the VIC are generally clear to those involved;
- The VIC facilitated increased communication and collaboration among stakeholders and is perceived to have had a positive impact on their work;
- The position of co-ordinator facilitates consistency, although there may be some duplication in relation to hearing the cases in court;
- Offenders have a positive view of the process;
- Stakeholders were of the view that the process is now more effective for this group of offenders, it helps to reduce recidivism, and it improves offenders' mental and physical health and their access to services;
- Community awareness and engagement could be increased; and
- Service capacity issues would have to be addressed before the court could be expanded.

The VIC plans to develop some outcome measures including contact of offenders with the criminal justice system, health and social services.

### (g) Alternative Measures (2010)

Early risk assessment has been made available to the prosecutors at the charge approval stage in six locations in British Columbia as part of a pilot project. This was to determine if providing early risk assessments at the charge approval stage would increase the referrals to alternative measures. The referral to risk assessment could be made any time in the alternative measures process. According to a preliminary assessment, prosecutors at the pilot locations found that having the assessment available at the charge approval stage was helpful; however there appeared to be a limited increase in the number of referrals. The evaluation is being completed and a final report will be available in September 2012.<sup>331</sup>

## 1.5.2 Initiatives Designed to Reduce Workload or Improve Efficiency

### (a) Criminal Case Flow Management Rules (1999)

In 1998, the Chief Judge of the Provincial Court issued a report identifying issues related to increasing problems of high volumes, backlogs, and a culture of delay and inactivity.<sup>332</sup>

The Chief Judge convened a task force consisting of judges, defence lawyers, prosecutors, representatives of the Law Society, LSS and Court Services Branch of the MAG. Their recommendations led to the CCFM rules<sup>333</sup>, enacted in September 1999, which were intended to achieve a "wholesale change in 'culture' in criminal practice, encouraging early resolution of cases where appropriate, and achieving greater event certainty. More specifically, two primary goals were to reduce the number

329 Provincial Court of British Columbia, *Victoria Integrated Court: Integration of Health, Social and Justice Services in our Community* (28 July 2011), p. 26, online: Provincial Court of British Columbia <<http://www.provincialcourt.bc.ca/downloads/pdf/Victoria%20Integrated%20Court%20Report.pdf>>.

330 See: RA Malatest & Associates Ltd, *Victoria Integrated Court Exploratory Process Report: Reflections on the Court's First Year of Operation* (19 July 2011), online: Provincial Court of British Columbia <<http://www.provincialcourt.bc.ca/downloads/pdf/Victoria%20Integrated%20Court%20Exploratory%20Process%20Report.pdf>>.

331 Information provided to the BC Justice Reform Initiative by the British Columbia Ministry of Justice.

332 Chief Judge Robert W. Metzger, *The Report of the Chief Judge: Delay and Backlog in the Provincial Court of British Columbia* (Victoria: Ministry of Attorney General, 1998), online: Legislative Library of British Columbia <[http://www.llbc.leg.bc.ca/public/pubdocs/bcdocs2012/319602/delay\\_and\\_backlog\\_in\\_the\\_provincial\\_court\\_of\\_british\\_columbia.pdf](http://www.llbc.leg.bc.ca/public/pubdocs/bcdocs2012/319602/delay_and_backlog_in_the_provincial_court_of_british_columbia.pdf)>.

333 Associate Chief Judge Anthony J. Spence, *Report to the Chief Judge on Criminal Caseflow Management Rules* (April 2002), online: Provincial Court of British Columbia <<http://www.provincialcourt.bc.ca/downloads/pdf/ReporttoCJonCCFM.pdf>>.

of cases set for trial that do not proceed to the calling of evidence, and to reduce the number of unproductive appearances.”<sup>334</sup>

While there appeared to be some improvements in the areas of trial certainty and backlog, concerns that the rules were increasing rather than decreasing the number of appearances led to a review of the impact of the rules by Associate Chief Judge Spence, who reported on his findings, with recommendations for changes to the rules, in 2002.<sup>335</sup>

Judge Spence noted a variety of concerns with the rules. These included a lack of flexibility—requiring appearances even when they seem unnecessary—and inconsistent support for the rules from defence counsel, prosecutors and even the judiciary—thus undermining their consistent application. Judge Spence did not address in his report any impact of the rules on Court Services, which also reported increased workload as a result of the increase in appearances.

Recommendations were made to consider increasing flexibility while still maintaining the fundamental elements of the rules.

As discussed in the opening of [Section 10](#), there is a general consensus the rules have not succeeded. The strongest sign of this is that the collapse rate for those cases set for trial still appears to be around 70%.<sup>336</sup>

### (b) Creation of JCM Court in Victoria and Port Coquitlam (2007, 2008)

In June, 2007, then Chief Judge Stansfield issued a Practice Direction<sup>337</sup> directing changes in criminal case processing in support of the CCFM rules. The goal was to employ JCMs to deal with virtually all administrative

(trial confirmation hearings, arraignment hearings) and remand matters. This then would focus available judicial time on trials and hearings.

In August of 2008, the MAG initiated a review of the impact on Ministry resources of the Chief Judge’s Practice Direction, in relation to the creation of the JCM Court and the expanded role of the JCM. It looked at two locations Victoria and Port Coquitlam.

The report found that the judiciary reported a decrease in administrative appearances. Crown prosecutors at the pilot sites reported that, because of the increase in front end attention to the files, the quality of their work improved. However, all participants—Crown prosecutors and administrators, court administrators and sheriffs, and defence counsel—reported an increase in work and an increase in resources required. Although judicial workload decreased, appearances per case increased, as did the time to completion.

The Review concluded that it was likely that some cases may benefit from the increase in front end resources and processes while other less complex cases may be hindered by the extra processes.

### (c) Backlog Reduction at Vancouver Provincial Court (2004)

In February 2004, the Attorney General and Chief Judge announced a joint initiative to get criminal cases to trial faster at Vancouver’s Provincial Criminal Court, 222 Main Street.<sup>338</sup> A Committee was formed, chaired by Chief Judge Baird Ellan, with representatives from the judiciary, Criminal Justice Branch and Court Services Branch (both court administration and sheriffs) of the MAG, LSS, the CBA and the Law Society.<sup>339</sup>

334 Provincial Court of British Columbia, *Annual Report 2000/2001 Fiscal Year*, (Vancouver: Provincial Court of British Columbia, 2001) at p. 16, online: Provincial Court of British Columbia <<http://www.provincialcourt.bc.ca/downloads/pdf/annualreport2000-2001.pdf>>.

335 Associate Chief Judge Anthony J. Spence, *Report to the Chief Judge on Criminal Caseload Management Rules* (April 2002), online: Provincial Court of British Columbia <<http://www.provincialcourt.bc.ca/downloads/pdf/ReporttoCJonCCFM.pdf>>.

336 Information provided to the BC Justice Reform Initiative by the Office of the Chief Judge, Provincial Court of British Columbia.

337 Provincial Court of British Columbia, Chief Judge’s Practice Direction Victoria-South Island District, “Criminal Case Flow Management Rules” (June 18, 2007), online: British Columbia Provincial Court <<http://www.provincialcourt.bc.ca/types-of-cases/criminal-and-youth/practice-directions>>.

338 See: discussion in Provincial Court of British Columbia, *Main Street Criminal Procedure Committee Backlog Reduction Initiative: Report on Backlog in Vancouver Adult Criminal Court* (January 2005), at p. 1, online: <<http://www.provincialcourt.bc.ca/downloads/pdf/MainStreetCriminalProcedureCommitteeReportonBacklog.pdf>>.

339 Provincial Court of British Columbia, *Annual Report 2004-2005 Fiscal Year* (Vancouver: Provincial Court of British Columbia, 2005), at p. 18, online: <<<http://www.provincialcourt.bc.ca/downloads/pdf/annualreport2004-2005.pdf>>>.



The Committee recommended and implemented a variety of measures to maximize courtroom usage; make more effective use of judicial resources; comply with the CCFM rules; improve Crown file ownership and the level of Crown case preparation; and improve early communication between counsel, to support early resolution and increase the predictability of scheduling.<sup>340</sup>

The judicial complement was increased through the use of visiting judges from other court locations, and the scheduling of long trials was adjusted to maximize courtroom utilization.

Concern over the 70% trial collapse rate led the Committee to recommend sufficient Crown resources to support triple booking of cases, even though this would result in Crown preparing three times the number of cases than can actually proceed.

The committee also recommended increased use of alternative measures, as well as moving consent releases to JPs where appropriate.

Over the balance of 2004, the committee oversaw the implementation of their recommendations, resulting in a reduction of time to trial from 11 to 7 months by December 2004.<sup>341</sup> However this reduction was not sustained.

#### (d) Criminal Case Management Pilot in Victoria

This pilot was intended to improve justice efficiency and effectiveness through earlier assignment of cases to Crown and to reduce the number of administrative court appearances before arraignment by scheduling cases only when ready to proceed.<sup>342</sup>

The assumption behind the pilot is that since the majority of cases resolve within a reasonably short time period, there is no benefit to frequent administrative court appearances unless there is a

requirement for a judicial decision. For represented accused who are not in custody, eligible criminal matters are, at first appearance, adjourned directly to a “timeline hearing” (TLH), which is 60 days away for summary matters and 90 days away for indictable offences. This is done with the expectation that either the matter will be resolved or arraignment will take place before that date. The TLH appearance is only held if the case is not arraigned, and Crown and defence counsel must explain why.

The TLH process is intended to encourage out-of-court communication between Crown and defence counsel to avoid the routine bi-weekly scheduling of cases while ensuring continued court jurisdiction over the criminal cases. The Criminal Case Management project also encourages the use of e-adjudgments and e-arraignments.

The Criminal Case Management project includes pre-arraignment Crown file management whereby a dedicated prosecutor is assigned to manage each case in order to facilitate communication between Crown and defence counsel.

Additionally, a package of information about legal aid is provided to unrepresented accused early in the process. Applicants’ financial information is also expedited to the LSS so that eligibility can be established sooner, expediting the retaining of counsel.

A process evaluation was conducted by RA Malatest & Associates in September 2011,<sup>343</sup> which concluded:

- Anecdotally, it is generally agreed that the TLH process has reduced or has a potential to reduce court appearances.
- While fewer court resources are used, there is a greater strain on administrative resources, particularly Crown support staff and registry clerks, and a variety of administrative problems.

340 See: Provincial Court of British Columbia, *Main Street Criminal Procedure Committee Backlog Reduction Initiative: Report on Backlog in Vancouver Adult Criminal Court* (January 2005), at p.1, online: <<http://www.provincialcourt.bc.ca/downloads/pdf/MainStreetCriminalProcedureCommitteeReportonBacklog.pdf>>.

341 See: Provincial Court of British Columbia, *Main Street Criminal Procedure Committee Backlog Reduction Initiative: Report on Backlog in Vancouver Adult Criminal Court* (January 2005), at p., online: <<http://www.provincialcourt.bc.ca/downloads/pdf/MainStreetCriminalProcedureCommitteeReportonBacklog.pdf>>.

342 See: Provincial Court of British Columbia, “Main Street Criminal Procedure Committee Backlog Reduction Initiative: Report on Backlog in Vancouver Adult Criminal Court” (January 2005) at p., online: <<http://www.provincialcourt.bc.ca/downloads/pdf/MainStreetCriminalProcedureCommitteeReportonBacklog.pdf>>.

343 RA Malatest & Associates Ltd *Court Case Management: Timeline Hearing Process Evaluation Final Report* (September 2011).



- The TLH process has required more active file management on the parts of Crown and defence counsel.
- While the amount of paperwork has increased for the JCM, they have been able to close the court for one full day due to fewer files/appearances, in part as a result of this initiative.
- The perceived efficacy of the TLH process varies significantly. The JCM and the judiciary are most positive about—and see the most benefits from—the TLH process. Defence and prosecution are somewhat divided, while administrative staff view the change to have had a primarily negative impact on their work.
- There have been some difficulties adapting to this change in culture and approach, and ongoing judicial guidance has been needed in order to make sure the process becomes normalized.

Overall, while the TLH process has begun to yield some of the objectives of the original judiciary direction, there have been some challenges to administrative work, scheduling and communication.<sup>344</sup>

A more systemic approach to the planning and implementation might have avoided some of the negative impact and increased workload.

#### (e) Bail Reform Pilot Project in the Peace River District and Surrey

The goal of this project was to free up court time for trials by holding bail hearings outside of courtrooms. The planning involved intensive workshops with staff from all of the justice sectors. The pilots were implemented in 2008/09 and continue.<sup>345</sup>

In the Peace River District, bail hearings during regular court hours occurred by video-conferencing between a judicial justice at the Justice Centre, the accused at the police detachments, and Crown and defence

counsel at the courthouses in the three communities. It was expected that, as a result of the pilot, court resources would be freed up for trials and sentencing.

In Surrey, an additional Crown and duty counsel were made available for bail appearances with the Justice Centre on the weekends. It was expected that by effectively dealing with bail on the weekends, the need for bail hearings during the week would be reduced and that court resources would be reallocated to trials and sentencing.

An electronic assessment tool was developed as part of the project to assist the police with their determination whether to release the accused or proceed to a bail hearing before a judicial officer. Additional video-conferencing units were installed at court locations to permit defence counsel to conduct confidential interviews with the accused prior to proceedings.

The pilots were evaluated.<sup>346</sup> The findings in the Peace River District included:

- A reduction in unnecessary accused transports to the courthouse as accused remained at police detachments until they were either released by the police or a bail hearing before a judicial officer was held, using video-conferencing technology;
- A reduction in the time accused spent in police lock-ups awaiting a release decision;
- Decisions about pre-trial releases or remands were made with fewer court appearances, and the majority of hearings were occurring before judicial justices at the Justice Centre, reducing the demand on judicial and court resources for bail at the courthouses;
- Increased costs for police which were partially mitigated by sheriffs supporting the process in police stations; and
- Efficiencies created by the reduction in bail hearings at the participating courthouses did not,

344 RA Malatest & Associates Ltd *Court Case Management: Timeline Hearing Process Evaluation Final Report* (September 2011).

345 For further information on the Bail Reform Project, see: Criminal Justice Reform <[http://www.criminaljusticereform.gov.bc.ca/en/justice\\_reform\\_projects/bail\\_reform/index.html](http://www.criminaljusticereform.gov.bc.ca/en/justice_reform_projects/bail_reform/index.html)>.

346 RA Malatest & Associates Ltd, *Program Evaluation and Marketing Research, Evaluation of the Bail Reform Project Peace Region and Surrey: Final Evaluation Report* (March 31, 2010), online: Criminal Justice Reform <[http://www.criminaljusticereform.gov.bc.ca/en/justice\\_reform\\_projects/bail\\_reform/docs/brp\\_evaluation.pdf](http://www.criminaljusticereform.gov.bc.ca/en/justice_reform_projects/bail_reform/docs/brp_evaluation.pdf)>.

however, result in a reduction of the total court appearances at these locations, as additional administrative-type appearances were scheduled, and the time to trial did not change.

In Surrey, the additional resources of Crown and duty counsel for weekend bail hearings did not increase the number of substantive bail decisions on the weekend and did not reduce bail appearances in court the following week. Nonetheless the participants believed that the process was more efficient and more effective and contributed to other efficiencies such as a drop in C-informations (re-laid informations).

Generally, participants found that video-conferencing was a more appropriate means to conduct an interview or a bail hearing than by telephone.

The pilots increased the workload of police in both sites. While it was appreciated that there would be a workload increase, its magnitude was not anticipated.

The project benefited from close engagement with the judiciary resulting in effective sponsorship. A collaborative approach was taken in the planning and development stage, with all stakeholder groups represented on the Core Team and the Steering Committee. The Core Team was considered to be a successful means of involving the various stakeholders, both in planning and implementation. Stakeholders suggested that this approach should be considered for other projects.

The project planning and implementation were undertaken with project management rigor, but should have more effectively monitored implementation and impacts, to either capture the benefits of what worked, or else make a course correction.

#### (f) Solicitor-Client Video Conferencing Pilot Project

The Solicitor-Client Video Conferencing Project, implemented in April 2011, provides defence counsel at the Vancouver and Surrey Provincial Courts with access to video-conferencing equipment to confer with their clients held in custody at the North Fraser

Pre-Trial Centre (NFPC) in Port Coquitlam. The goal was to avoid unnecessary court appearances and prisoner transport, as well as defence counsel travel to correctional centres for in-person visits. The Solicitor-Client Video Conferencing Project provided the equipment and network support thought necessary for this to occur.

Evaluation is complete and shows that there has been very little uptake by defence counsel, with only 60 solicitor-client video visits to NFPC over the nine-month period, which amounts to fewer than seven video-conferencing visits per month.<sup>347</sup>

Although defence counsel were consulted in the development of the project, it appears that the design and/or the implementation did not adequately take into account the ways in which counsel prefer to speak with their clients. Issues include the requirement that counsel use the video-conferencing equipment at the courthouse, as well as the requirement for 24 hours notice to schedule an interview.

### 1.5.3 Efforts to Improve the Use of Information Technology

#### (a) JUSTIN/PRIME/CORNET

British Columbia has had a functioning Case Management System since the early 1990s; JUSTIN supports the judiciary, court services staff and the prosecution service. Police in BC have been using a common information system since the mid-2000s, and Corrections has had its own system CORNET since the early 1980s. The ability of these three systems to work together, since the late 1990s, is unique in Canada, and indeed in most countries.<sup>348</sup>

The LSS developed an integrated CMS in the late 1990s and is in the process of integrating its data with an up to date business management information system. This data has allowed LSS to predict demand for criminal legal aid services with far greater accuracy than other Canadian legal aid plans. Its growing involvement in the management of publicly funded complex criminal cases will require

347 Information provided to the BC Justice Reform Initiative by the British Columbia Ministry of Justice.

348 For further discussion of these systems, see Section 8.1 of this Report.

effective use of both case management technology and business information systems.<sup>349</sup>

ICON was recently developed by Corrections for business intelligence, electronic forms and a secure electronic portal. The business intelligence component was adopted by court services, the management services branch of the Ministry of Justice in relation to human resource data, as well as the youth justice division of the MCFD. This new system allows a comprehensive cross-referenced view of operational data, with information about clients, cases and staff for management purposes as well as for research and evaluation, for all parts of the justice system.<sup>350</sup>

### (b) Simulation Model

The Ministry of Justice has been working with the Complex Systems Modeling group at SFU for the last five years to develop a simulation model for the justice system. The model permits the justice system to model specific changes in resource allocation, as well as policy and legislation, prior to implementation.

The model has demonstrated its predictive capability to its developers but has not been publicly used or tested. The project has benefited from SFU's experience with modeling other complex systems, including health wait lists, as well as the availability of extensive information from the Ministry's existing systems. The development process required intense scrutiny of Ministry data by representatives from each sector, and as a result has led Ministry staff to have a better understanding of their own data.

## 2. OTHER JUSTICE REFORM INITIATIVES IN CANADA

The consultations carried out included people in Alberta, Manitoba and Ontario concerning their recent experiences. Of particular importance were the process reform underway in Alberta (building on earlier reforms in Manitoba) and the Justice

on Target (JOT) initiative in Ontario. The Review also looked at international initiatives for possible lessons. Of particular importance is the recent experience in the United Kingdom, including the publication in early July 2012 of a new White Paper, "Swift and Sure Justice."

The purpose of these consultations and consideration of the literature included the following:

- Are other systems experiencing similar problems?
- Are there common diagnoses of underlying issues?
- Identifying possible solutions and possible barriers to success.

Across Canada there appears to be widespread agreement on the importance of timeliness and the need for dramatic improvement in the time to trial. There are a number of projects aimed at improving court process and timeliness. Some successes have been reported, but there is concern that no enduring systemic change seems to have been accomplished anywhere in Canada. A common observation is that the successes have been championed by particular leaders and that, on their ceasing office, progress can stall and some or all of the original problems may reoccur.

Many of the particular problems such as disclosure and large case management are the subjects of conversations between those expert in criminal law across the country.

No jurisdiction appears to have achieved a satisfactory level of performance on the basis of reforms that could be readily adopted into British Columbia. The Alberta process reforms hold promise and are in the course of being adapted by the Provincial Court and Court Services Branch for application in British Columbia. The Ontario JOT program has dramatically improved institutional relationships, particularly through the establishment of integrated working groups centred around courthouses throughout the province, under a Provincial Board co-chaired by the Deputy Minister and a Superior Court Justice. It also appears to have enriched the understanding of the

349 For further discussion of these systems, see Section 8.1 of this Report.

350 For further discussion of these systems, see Section 8.1 of this Report.

cause of the problems and the barriers to change. However, it has not reached its stated goals of improving the time to trial by 30% and reducing the number of appearances per case by 30%; it is unclear whether it is likely to do so.

The projects in other provinces have been focused on delay and unproductive process. There is a good deal of innovation around problem-solving and integrated courts.

No province appears to have arrived at an overall plan that integrates improved process and fairness with achieving improved outcomes.

It may be useful to provide some detail regarding the experiences found useful to the Review.

## 2.1 ALBERTA

The Court Case Management (CCM) Program “is a judicially-led initiative designed to effectively manage cases in Edmonton and Calgary adult Provincial Criminal Court.”<sup>351</sup> The CCM implemented a number of methods to address scheduling and disposition of matters in the Provincial Court system, including:

- Assignment Courts to use a “day-of” approach to scheduling in order to evenly distribute daily trial work among judicial resources;
- Low Complexity Courts to allow low complexity matters to proceed to trial more quickly;
- Justice of the Peace Counter (i.e., a person can appear before a JP at a counter and not in a courtroom);
- Case Management Office (CMO) Counter to deal with administrative and uncontested matters outside a courtroom and to allow defence counsel to make appearances and book trials;
- Required Appearance Court;
- Scheduled Disposition Courts;

- Crown File Ownership, assigning one Crown prosecutor to a case from beginning to end, promoting proper case management, reducing time spent reviewing files and improving accountability; and
- Technological improvements such as a prosecutor information management system, a Web-based courtroom scheduling system, and electronic court signage in the Edmonton Courthouse.

The CCM Program was completed on time and below budget. The “CCM1 Closeout Report”<sup>352</sup> describes these initiatives and also outlines performance metrics (i.e., Court hours per day, time to trial, number of appearances, etc.) from directly before and directly after the implementation of the initiatives.

Data gathered over a five month period following implementation of the initiatives showed mixed results. For example, average court time hours per day increased by 19.2% in Edmonton but only by 1.8% in Calgary. Meanwhile, the length of time from first appearance to disposition of a matter by trial actually increased by 6.8% in Calgary and decreased by 3.8% in Edmonton.

Alberta is now in the second phase of the CCM program, focused on continuing and improving the implementation of the programs and expanding the program across the province.

## 2.2 MANITOBA

The Domestic Violence Front End Project implemented in 2003 indicates both the possibility of improvement and the risk of recession.<sup>353</sup> That project involved aggressive case management by pre-trial co-ordinators: the time between an

351 Alberta Courts, “Court Case Management Program”, online: Alberta Courts <<http://www.albertacourts.ab.ca/provincialcourt/courtcasemanagement/tabid/331/default.aspx>>.

352 For a summary of the performance metrics of Alberta CCM1 initiatives, see: Alberta Courts, *Court Case Management (CCM) Program Phase 1 Closeout Report* (30 September 2010), online: Alberta Courts <<http://www.albertacourts.ab.ca/LinkClick.aspx?fileticket=TFcLwniYMNE%3d&tabid=331>>.

353 Manitoba Courts, News Release, “National Recognition for Successful Court Delay Reduction Project” (31 August 2005), online: Province of Manitoba <<http://www.gov.mb.ca/chc/press/top/2005/08/2005-08-31-01.html>>. Also see: Manitoba Courts, *Pre-Trial Coordination Protocol* (12 February 2008), online: Manitoba Courts <[http://www.manitobacourts.mb.ca/pdf/pre-trial\\_coordination\\_protocol.pdf](http://www.manitobacourts.mb.ca/pdf/pre-trial_coordination_protocol.pdf)>.

accused's first court appearance to entering a plea dropped from more than seven months to a low of two months. The efficiencies generated resulted in savings of approximately \$120,000 in six months. The program was recognized by the Institute of Public Administration of Canada and by the United Nations.

In 2010-11, the Manitoba Department of Justice created a division called the Justice Innovation team, whose primary function is "examining opportunities to improve business processes initially related to criminal justice, to improve case velocity and to ensure a more efficient use of resources."<sup>354</sup> A new director was appointed in January 2012 and tasked with finding ways to minimize delays in court cases.<sup>355</sup>

Manitoba is exploring the integration of mental health services with criminal process and uses of technology in scheduling cases.<sup>356</sup> An example of employing the criminal process as an opportunity to intervene productively in an offender's life is the Winnipeg Mental Health Court that just recently opened in May 2012. If an offender qualifies and wants to participate in the program, he or she may enter a guilty plea. The offender will be granted a conditional release and must complete a course of treatment run by the Forensic ACT team, a part of the Winnipeg Regional Health Authority's community health services. Once the offender completes treatment, the Court may choose to stay charges or to recommend a community-based disposition.<sup>357</sup>

## 2.3 ONTARIO

Ontario's principal criminal justice system reform initiative of interest to the Review is JOT. The JOT website is a splendid example of transparency

and accountability as it both describes the JOT initiatives<sup>358</sup> and progress towards their achievement. These include:

- Meaningful First Appearances, an initiative to give an accused more information about court processes so they are informed before they get to court. The purpose of this initiative is to increase the speed and effectiveness of criminal courts.
- Dedicated prosecution initiative, allowing Crowns to screen and take ownership of files, reducing the number of people reviewing and getting up to speed on a file and improving continuity.
- A Crown Access Commitment initiative to increase communication with defence and duty Counsel for the purpose of reducing appearances and resolving less complex cases more quickly.
- A streamlined disclosure process to generate an initial and much briefer disclosure package earlier in the process. A second, more detailed disclosure is made only if the matter goes to trial.
- Setting a standard number of appearances for most matters, particularly less complex cases that should not be taking up significant court time. After reaching the standard number, the case should either go to trial or be otherwise resolved.
- A direct accountability initiative, which essentially takes a restorative justice approach and recognizes that some low-risk offences are addressed more effectively outside the court process.
- Enhanced video-conferencing initiatives to reduce the number of appearances and time between appearances, particularly for in-custody accused.
- Bail enhancement initiatives to reduce the number of appearances to obtain bail, such as

354 Manitoba Justice, *Annual Report 2010-2011* (Winnipeg: Manitoba Justice, 2011), online: <[http://www.gov.mb.ca/finance/pdf/annualrep/2010\\_11/justice.pdf](http://www.gov.mb.ca/finance/pdf/annualrep/2010_11/justice.pdf)>.

355 Paul Turenne, "Swifter Justice: Hamilton tasked with clearing cases quicker," *Winnipeg Sun* (13 January 2012), online: [Winnipeg Sun <http://www.winnipegsun.com/2012/01/13/swifter-justice-hamilton-tasked-with-clearing-cases-quicker>](http://www.winnipegsun.com/2012/01/13/swifter-justice-hamilton-tasked-with-clearing-cases-quicker).

356 Association of Canadian Court Administrators, "Court Process Transformation – Managing the Change", *Canadian Court Communique* (Summer 2012), at p. 12, online: ACCA <<http://www.acca-aajc.ca/LinkClick.aspx?fileticket=-bibNBWIKIA%3D&tabid=189>>.

357 Provincial Court of Manitoba, Notice, "Re: Mental Health Court" (2 April 2012), online: Provincial Court of Manitoba <[http://www.manitobacourts.mb.ca/pdf/mental\\_health\\_court.pdf](http://www.manitobacourts.mb.ca/pdf/mental_health_court.pdf)>.

358 Ontario Ministry of the Attorney General, "JOT Initiatives," online: Ministry of the Attorney General <[http://www.attorneygeneral.jus.gov.on.ca/english/jot/jot\\_in\\_action.asp](http://www.attorneygeneral.jus.gov.on.ca/english/jot/jot_in_action.asp)>.

better co-ordination of when and how accused persons are brought to the court.

- Initiatives to improve access to on-site legal aid.

During consultations it was reported that the integration of the various stakeholders—including prosecutors, defence counsel, police and staff at 57 courthouse locations, along with judicial chairs—achieved a significant change in professional culture. It has improved mutual understanding, improved professional relationships and generally enhanced a sense of common professional excellence. A wide spectrum of results has occurred, and the commitment of local leadership appears to have been central to success.

Another feature of the Ontario experience is that while the original 30:30 targets (30% reduction in time: 30% reduction in appearances) were set by the Attorney General, the successful recruitment of all stakeholders to full participation came at the cost of relaxing the original stated goals. My impression was that one cost of obtaining the participation of all sectors, including the judiciary, was that the initial goals were treated as aspirational only.

The Strategy focuses on court administration and reducing delay in the court system, as opposed to addressing the overall criminal justice system. The Strategy includes specific initiatives directed at meaningful first appearances, dedicated prosecution, crown access commitment, streamlined disclosure, appearance standards, increased availability of plea courts, direct accountability of the accused, enhanced video-conferencing, bail enhancements and on-site legal aid.

The Strategy was initiated by the Attorney General who set the target of a 30% reduction in time to

disposition and a 30% reduction in the number of appearances in criminal matters in Provincial Court. The implementation of the strategy is co-led by Justice Bruce Durno, a judge and former Regional Senior Justice for the Central West region in the Ontario Superior Court of Justice, and Lori Montague, Acting Director and ministry lead for the JOT Strategy.<sup>359</sup> In addition, the Strategy is supported by an Expert Advisory Panel consisting of judges, justices of the peace, chiefs of police, defence lawyers, a criminology professor, the CEO of legal aid, a senior director of the National Judicial Institute, the Associate Deputy Attorney General Court Services, the Associate Deputy Attorney General Criminal Law Division and the Director of Correctional Services.<sup>360</sup>

Each of Ontario's 57 court locations has a local leadership team. These teams consist of judges, justices of the peace, defence counsel, crown attorneys, police, court services staff, duty counsel, corrections, victim service workers, legal aid and other organizations. They develop court process improvements to reduce times to trial and unproductive appearances, and they share ideas, learn from each other and implement new initiatives.<sup>361</sup>

In four years, Ontario's JOT Strategy has resulted in a 7% decrease province-wide in the number of court appearances required to bring a charge to completion.<sup>362</sup> In addition, there has been a slight decrease in the number of days to complete a criminal charge.<sup>363</sup> According to the Strategy website, straightforward non-complex cases are being resolved sooner and there have been more than 500,000 fewer court appearances in non-complex, non-violent cases since the Strategy began.

In addition to the statistics on improved court process, I also heard that leadership teams and

359 Ontario Ministry of the Attorney General, "Frequently Asked Questions," *Justice on Target*, online: Ontario Ministry of the Attorney General <<http://www.attorneygeneral.jus.gov.on.ca/english/jot/faqs.asp>>.

360 Ontario Ministry of the Attorney General, "Frequently Asked Questions," *Justice on Target*, online: Ontario Ministry of the Attorney General <<http://www.attorneygeneral.jus.gov.on.ca/english/jot/faqs.asp>>.

361 Ontario Ministry of the Attorney General, "Frequently Asked Questions," *Justice on Target*, online: Ontario Ministry of the Attorney General <<http://www.attorneygeneral.jus.gov.on.ca/english/jot/faqs.asp>>.

362 Ontario Ministry of the Attorney General, "Frequently Asked Questions," *Justice on Target*, online: Ontario Ministry of the Attorney General <<http://www.attorneygeneral.jus.gov.on.ca/english/jot/faqs.asp>>.

363 Ontario Ministry of the Attorney General, "Frequently Asked Questions," *Justice on Target*, online: Ontario Ministry of the Attorney General <<http://www.attorneygeneral.jus.gov.on.ca/english/jot/faqs.asp>>.



working groups have made progress toward less readily measurable goals such as restoring relationships between the judiciary, the prosecution and defence at the local level. The LSS of BC suggests that the Ontario strategy “offers an instructive example of how a centrally co-ordinated reform process can foster local efforts to improve the justice system.”<sup>364</sup> Indeed, during consultations it was often suggested that grassroots-level leadership capable of carrying out innovative and flexible projects is an important component of any strategic management plan. This is particularly so when addressing issues such as domestic violence or mental health, where local teamwork with NGOs brings expertise and community sensitivity to bear.

The lessons learned from the JOT Strategy include an appreciation for the importance of strong linkages between the overarching plan for the system and grassroots or issue-specific teams that will be able to contribute their expertise and to carry out various elements of the plan. My understanding of that case is that, although goals were stated at the outset and the results have been reported, there was no plan put in place to meet the targets set by senior ministry leadership. Rather, the groups eventually came to be in control of their own progress and goals and were not required to identify changes that would be able to achieve those goals.

The JOT Strategy also offers another example of the benefits of a close working and planning relationship between the criminal justice ministries and the judiciary. The JOT Strategy confirms that joint leadership with the judiciary is not only beneficial but also appropriate in the Canadian context. That is, judicial leadership and participation in the JOT Strategy has not raised concerns about a conflict with the requirements of judicial independence. During my consultations, I heard that the leadership of the judiciary has been a

critical component to the JOT Strategy’s success in changing culture and relationships. Such leadership may be equally valuable in British Columbia.

## 2.4 NEWFOUNDLAND AND LABRADOR

In 2010, Newfoundland and Labrador implemented the case assignment and retrieval (CAAR) System.<sup>365</sup> The system schedules criminal trials and sentencing hearings in one central location and surplus-books trials. The system takes into account factors such as collapse rates, judicial resources, the likelihood of criminal charges proceeding and a particular counsel’s probable actions. Routine cases, such as breaches, theft or impaired driving, are assigned the day before trial. Last minute adjustments may occur the day of trial. Court staff monitor trial readiness by contacting the parties on an ongoing basis. This requires a great deal of flexibility.

Since the implementation of CAAR, the Court is now focusing on minimizing unproductive appearances. For example, they introduced consent postponement applications so that counsel could arrange new trial dates with the Court Utilization Manager, rather than requiring a court appearance for an administrative function.

There was some resistance to the organizational changes effected by CAAR. For example, judges were required to move between courtrooms. They were resistant as their benches would not be organized similarly. In response, the Court set up literature organizers to organize benches in the same manner in every courtroom. Additionally, whereas Crown and Legal Aid Counsel previously were assigned to a particular courtroom and judge, they are now assigned to files. Since the implementation of CAAR, time to trial in the St. John’s Provincial Court has been reduced from 12 to 24 months to 2 to 6 months.<sup>366</sup>

364 Legal Services Society, “Making Justice Work : Improving Access and Outcomes for British Columbians,” *Report to the Minister of Justice and Attorney General The Honourable Shirley Bond* (1 July 2012), [unpublished] at p. 11–12.

365 Association of Canadian Court Administrators, “Court Process Transformation – Managing the Change”, *Canadian Court Communique* (Summer 2012), at p. 16, online: ACCA <<http://www.acca-ajc.ca/LinkClick.aspx?fileticket=-bibNBWIKIA%3D&tabid=189>>

366 Newfoundland and Labrador Department of Justice, *Annual Report 2010–2011* (St. John’s: Department of Justice, 2011), at p. 32, online: Department of Justice <[http://www.justice.gov.nl.ca/just/publications/2010-2011/Justice\\_Annual%20Report%202010-11.pdf](http://www.justice.gov.nl.ca/just/publications/2010-2011/Justice_Annual%20Report%202010-11.pdf)>.



### 3. JUSTICE REFORM AND INNOVATION INTERNATIONALLY

Time and resources made a study of international developments impossible. However, during this Review the Ministry of Justice in the United Kingdom released its White Paper entitled “Swift and Sure Justice: The Government’s Plans for Reform of the Criminal Justice System,” which set out a program of reforms to the criminal justice system in England and Wales.<sup>367</sup> As well, their earlier reforms with the creation of a crime reduction board are informative.

#### 3.1 NATIONAL CRIMINAL JUSTICE BOARD, UNITED KINGDOM

In 1997, the Labour Party, led by Tony Blair, took office in the United Kingdom. The various reforms initiated by Mr. Blair’s government include a renewed national-level integration of criminal justice services. According to a later Strategic Plan for Criminal Justice, “effective joint working is necessary at all levels of the Criminal Justice System” so that offenders could be brought to justice efficiently, while victims and witnesses were well-served.<sup>368</sup>

A National Criminal Justice Board (NCJB) was established to assist criminal justice organizations in sharing their plans and co-ordinating operations. Participants in the NCJB included ministers of the Home Office,<sup>369</sup> the Department for Constitutional Affairs and Law Officers’ Departments<sup>370</sup> together

with the heads of main criminal justice agencies, the Association of Police Authorities and a representative of the judiciary.<sup>371</sup> In addition to the NCJB, local Criminal Justice Boards (LCJBs) brought together the chief officer of each criminal justice agency in local areas to lead joint and strategic operations. These LCJBs were seen as the “key drivers of cross-cutting criminal justice reform” and were supported by the NCJB.<sup>372</sup>

The criminal justice ministers on the NCJB were responsible for the delivery of certain targets, including bringing offences to justice and raising public confidence. The Board as a whole was responsible for monitoring progress towards these targets, holding agencies and areas of the justice system to account where performance fell short of expectations and finding solutions to problems as they arose.<sup>373</sup> The NCJB reported to the criminal justice system Cabinet Committee on its progress. The Cabinet Committee retained overall responsibility for delivery of criminal justice system targets.<sup>374</sup>

In its 2004 and 2008 strategic plans for criminal justice, the UK Home Office reported that the NCJB and LCJBs had yielded significant positive results. In 2004, the Home Office reported that partnerships between criminal justice departments had greatly improved and that the NCJB had provided “stronger leadership and close working between departments.” This resulted in “sustained improved performance on our key targets to bring more offenders to justice and

367 To read the White Paper, see: UK Ministry of Justice, *Swift and Sure Justice: The Government’s Plans for Reform of the Criminal Justice System* (London: Ministry of Justice, 2012), online: UK Ministry of Justice <<http://www.justice.gov.uk/downloads/publications/policy/moj/swift-and-sure-justice.pdf>>.

368 UK Office for Criminal Justice Reform, *Cutting Crime, Delivering Justice: A strategic plan for criminal justice 2004-2008* (London : Her Majesty’s Stationary Office, 2004), at p. 15, online: Official Documents Archive 2 <<http://www.archive2.official-documents.co.uk/document/cm62/6288/6288.pdf>> [*Cutting Crime, Delivering Justice*].

369 The Home Office is the United Kingdom’s lead government department for policies on immigration, passports, counter-terrorism, policing, drugs and crime. Online: <[www.homeoffice.gov.uk](http://www.homeoffice.gov.uk)>.

370 In the United Kingdom, reference to the “Law Officers” is a reference to the Attorney General, Solicitor General and the Advocates General for Northern Ireland and for Scotland: <[www.attorneygeneral.gov.uk/thelawofficers/pages/default.aspx](http://www.attorneygeneral.gov.uk/thelawofficers/pages/default.aspx)>.

371 *Cutting Crime, Delivering Justice*, at p. 15, online: Official Documents Archive 2 <<http://www.archive2.official-documents.co.uk/document/cm62/6288/6288.pdf>>.

372 UK Office for Criminal Justice Reform, *Working Together to Cut Crime and Deliver Justice: A strategic plan for 2008-2011* (London : Her Majesty’s Stationary Office, 2008) at p. 10, online: Official Documents <<http://www.official-documents.gov.uk/document/cm72/7247/7247.pdf>>.

373 *Cutting Crime, Delivering Justice*, at p. 15-16, online: Official Documents Archive 2 <<http://www.archive2.official-documents.co.uk/document/cm62/6288/6288.pdf>>.

374 UK Criminal Justice System, *National Criminal Justice Board*, online: The National Archives <<http://webarchive.nationalarchives.gov.uk/20100402221729/lcjb.cjsonline.gov.uk/ncjb/>>.

raise public confidence.<sup>375</sup> In addition to improved working relationships, crime had fallen by 25% since the government took power in 1997, a greater percentage of offences were brought to justice, and public confidence in the justice system had begun to improve.<sup>376</sup>

The Home Office particularly noted the important role that the judiciary played in its participation on the NCJB:

The active support and participation of the judiciary, in the magistrates' courts and in the higher courts, are crucial to the delivery of this strategy, as they have been in delivering the improvements achieved so far. Issues in which they have played a major role are: ... improving joint working between criminal justice agencies, particularly through membership on the National Criminal Justice Board.<sup>377</sup>

It appears that after some time following a change of government in the United Kingdom, the NCJB had been removed and replaced with other national agencies.<sup>378</sup> Local crime boards appear to remain in some areas.

The UK's NCJB and LCJB model provides a useful example for several reasons. First of all, it is a relatively successful example of higher level strategic co-ordination of justice system participants, and it demonstrates that working relationships among justice system participants can be improved by a multi-participant planning process. Also, it is encouraging to see that the increased collaboration experienced through the NCJB and LCJB model coincided with reductions in crime, increases in public

confidence and increases in offences being brought to justice. These improved working relationships and improvements to the justice system are also goals that our system is working towards, and this example provides a potential model for achieving those goals.

I also take from the UK experience an appreciation for the great benefits that may come with the participation of a representative of the judiciary on a strategic planning body. I am encouraged to see that it was possible for the judiciary to participate while still respecting judicial independence. The courts play a vital role in the delivery of criminal justice and, therefore, their involvement is critical to the proper co-ordination of system-wide management.

## 3.2 WHITE PAPER

The differences with British Columbia's system are many and include differences in historical resourcing, demographics, size, historical patterns of violence and crime, local government structures and many other material points. Despite this, the UK White Paper deserves careful consideration in the preparation of British Columbia's White Paper. It is reassuring that the same issues raised in this Review have been independently considered important in the UK White Paper. For our purposes the many proposals to emphasize outcomes, develop expertise for particular problems, achieve uniform timeliness, and achieve a dramatic change in legal culture all support the scale and depth of change recommended by this Review.

## 3.3 DIAGNOSIS

The Paper cites many of the same concerns expressed in the *Green Paper* and elsewhere

375 *Cutting Crime, Delivering Justice*, at p. 47, online: Official Documents Archive 2 <<http://www.archive2.official-documents.co.uk/document/cm62/6288/6288.pdf>>

376 *Cutting Crime, Delivering Justice*, at p. 9, online: Official Documents Archive 2 <<http://www.archive2.official-documents.co.uk/document/cm62/6288/6288.pdf>>.

377 *Cutting Crime, Delivering Justice*, at p. 19, online: Official Documents Archive 2 <<http://www.archive2.official-documents.co.uk/document/cm62/6288/6288.pdf>>.

378 For example, the UK National Crime Agency, with greater emphasis on policing and organized crime: UK Home Office <[www.homeoffice.gov.uk/crime/nca](http://www.homeoffice.gov.uk/crime/nca)>.

regarding British Columbia's system. The White Paper criticizes the UK system for slow operation, frequent delays, lack of transparency, complexity and bureaucratic process, failure to make the best use of its resources, a decay-tolerant culture, absence of systematic discipline, lack of accountability and involvement of the public, lack of transparency and responsiveness, poor use of technology, wasted investment and high rates of recidivism.

Some of these represent criticisms of the failure of the system to fully achieve goals set by earlier governments. Significant departures from the approach taken by the earlier administration include a priority placed on respecting local priorities and providing for greater professional discretion. The White Paper proposes a very long list of changes that will affect every aspect of the UK system.

### 3.4 OUTCOMES

Troubled Families is an example of a collaborative approach to reach better outcomes for very troubled people. The proposal builds on the recognition that very troubled families present a number of challenges but also can respond to intensive intervention. Rather than a range of different agencies working in silos to tackle each of the issues that troubled families experience, the program will incentivize local authorities and their partners to deal with each family's problems as a whole and put in place whole family interventions. This initiative will invest nearly £450 million over three years, targeting the 120,000 most troubled families. This is aimed at improving public safety for the community and presents an array of social, educational and economic outcomes for adults and children in these families.

### 3.5 TIMELINESS

The White Paper proposes that the criminal justice system be able to respond in a flexible way to fit the needs of victims and communities and to ensure that offenders quickly face the

consequences of their actions. This may require longer opening hours and a change in the culture of the criminal justice system, delivering services when they are needed, rather than when it is convenient for providers.

Up to 100 magistrates' courts are sitting on Saturdays and Bank Holidays, reducing delays and delivering swift, sure, flexible justice. They will continue to test innovative approaches to court sitting times, assessing the merits of more flexible sittings, including early morning, evening and weekend sittings for different types of hearings.

The judiciary is leading the Early Guilty Plea scheme for Crown Court cases. In these pilots, Crown Prosecution Service prosecutors identify cases in the Crown Court where a guilty plea is likely, which are then listed for an early hearing. There is a presumption that defendants who plead guilty at that hearing will receive the maximum available discount on their sentence, while those who subsequently change their plea to guilty are likely to receive a reduced discount, depending on the stage at which it is offered.

Stop Delaying Justice is an initiative developed by the judiciary which aims to tackle delay and inefficiency through stronger management of cases, ensuring that the basis of the defence, and the evidence to be challenged, is clearly understood.

### 3.6 USE OF TECHNOLOGY

The Paper proposes the following innovations in the use of technology as a means of improving the accessibility of the criminal justice system to victims and communities:

- Using text messages and email to provide victims and witnesses with updates on the progress of a case, and to provide reminders to them, and to defendants, about upcoming proceedings.
- Using social media websites to provide real time updates on the work of the criminal justice agencies. Avon and Somerset Constabulary, for example, have launched the TrackMyCrime

initiative, allowing victims to track the investigation of their crime as it happens.

- Providing information on the outcome of proceedings and sentencing decisions, on local cases in real time.

### 3.7 TRANSPARENCY

In January 2011, the Home Office and National Policing Improvement Agency launched online street-level crime data for every community in England and Wales ([www.police.uk](http://www.police.uk)). The website has received over 50 million visits since its launch. It now includes information about justice outcomes so that the public can see what happens after a crime is reported in their area.

They are also committed to routinely publishing more information about the local performance of the criminal justice system. Over 2011/12, they used the Open Justice microsite (<http://open.justice.gov.uk>) to make available for the first time detailed information about:

- Individual-level anonymized reoffending and sentencing outcomes;
- Sentencing data for every magistrates' court and Crown Court;
- Timeliness data for criminal, civil and family courts so that local people can see how long cases take to progress through the system; and
- Re-offending data for every Probation Trust, local authority and prison establishment.

They have also produced additional scenarios for the popular online *You be the Judge*, an interactive tool which helps people to understand the sentencing process. These will be launched during this summer.

This White Paper demonstrates that in some respects British Columbia is well ahead of the practices in the United Kingdom. Our technology platforms, for example, appear to be well ahead of those in the UK. It also demonstrates that we are not alone in recognizing the need for a far more effective criminal justice system.



## **Modernizing British Columbia's Justice System**

Minister of Justice and Attorney General

### **Terms of Reference for the Chair, Justice Reform Initiative**

February 2012

#### **Introduction**

A well-functioning criminal justice system in accordance with the rule of law contributes directly to the health of society and is an essential component of our democracy. British Columbians expect the decisions that are made and services that are provided to be fair, timely, and accessible. They look to the judiciary, police, prosecutors, corrections, court staff, defence counsel and government to ensure that the values of justice and safety have the broadest possible reach.

Criminal justice is not immune to change in society. The nature of crime, the laws that govern and condition behaviour, the knowledge of why crime occurs and how it may be reduced, and the skills and resources that are needed and available, are not static. Understanding how the system works, and how it is changing, is essential to preserving the core values of criminal justice.

Further, criminal justice is but one component of the larger justice system, which also encompasses civil and family matters. Not all disputes are resolved by courts; tribunals resolve others and in yet others statutory powers of decision are exercised. The profile of private mediation, arbitration and other dispute resolution models is increasing. The effectiveness and efficiency of the justice system in all its manifestations in delivering high quality, accessible and timely justice is critically important in supporting families and a vibrant economy.

While the responsibilities and values are clear, there is currently little consensus amongst participants over the most significant trends and challenges in criminal justice, nor often on the causes of those trends. Reaching consensus requires a framework. However, developing this framework involves a nuanced and sensitive approach. The public interest is best served if government does not seek to unilaterally impose a solution. It is preferable for government to facilitate a rational, prudent and well-considered process for developing new approaches, based on several key beliefs:

- Progress requires the full engagement of the executive and judicial branches of government, and other participants, recognizing the public interest in improving operations of the system

- Our work must be based on an understanding of, and respect for, constitutional independence of courts and prosecutors while recognizing that the actions of each participant affect other participants
- Time is of the essence in understanding and developing solutions to current pressures
- Progress is wholly dependent on our ability to reach a shared, empirical understanding of our key challenges
- Consensus around next steps will enhance both the chances of achieving success and the level of public confidence in the system and its governance

## **Rationale**

### **Progress in the last decade**

In the past decade there have been a number of advances in the understanding and management of British Columbia's criminal justice system. Major changes have been made to the way in which court, police, prosecution, and correctional data is captured and maintained. Problem-oriented approaches have been used to define and address a number of acute issues. Innovation has occurred through initiatives focused on community-based courts, case management, prolific offending, and evidence-based approaches to offender management and interventions. This work has also served to highlight for participants the interconnected nature of the way the system works.

### **Reforms in Other Parts of the Justice System**

Over the past number of years some reforms have been made to the civil and family justice areas. On civil matters, new Supreme Court Civil Rules came into force in 2010. In family matters, the Legislature recently passed the Family Law Act, which will modernize the resolution of legal matters between spouses on the breakdown of relationships.

### **Innovations to benefit the whole system**

Adult and youth criminal matters in the Provincial Court account for fully one half of all annual cases in British Columbia's courts. Meaningful reforms to the criminal justice system will not only reduce delays and enhance timelines to justice in these matters, but also have the potential to create similar benefits in the areas of civil and family justice by creating additional room in the system for the courts to schedule and hear these matters sooner.

### **The current paradox**

While innovation and progress have been achieved in discrete areas, and while the fundamentals of the system, its integrity and its personnel in fact remain strong, the basic indicators of health point in contradictory directions. The paradox for British Columbians is that in some respects the data would suggest that the observable 'business' of criminal justice is down, but timeliness remains a significant challenge most notably when an accused person's right to a trial within a reasonable time is at risk. Resolution of this paradox is clearly in the public interest and in the



interest of all participants. Coming to terms with why this paradox exists, and how we should respond, is critical if our capacity to deliver justice and safety to citizens is to be maintained.

## **Creating a common space to understand the system**

We must find a framework in which independent participants can have a common dialogue and create a shared understanding of how the system functions, its strengths, and its challenges. This is both obvious and difficult, due to the broad range of functions, training, experience, and traditions across the sector, the necessary safeguards, and the high stakes of personal liberty and public safety with which justice personnel deal every day.

The way forward requires a careful balance between the collective need to understand how the system functions and the preservation at all times of the independence of standing and decision-making which applies to some of the system's participants.

## **A Review to Establish the Key Priorities**

This document proposes an initial review to recommend what practical mechanisms should be established to promote continuous improvement within British Columbia's justice system. The review will have both a short term and longer term aspect. In the short term, the review will determine priority areas for immediate action. For the longer term, the review will focus on the practical structural or institutional changes that should be made to foster constitutionally appropriate collaboration among the various participants in the criminal justice system and promote a culture of continuous improvement.

The review is to be carried out by Geoffrey Cowper, QC as Chair, Justice Reform Initiative.

## **Mandate**

The mandate of the Chair, Justice Reform Initiative will be to report and make recommendations on:

- the major issues affecting timely justice in criminal matters;
- steps to ensure that criminal justice reform initiatives already underway are having the desired outcomes;
- immediate measures which could be taken to improve outcomes in the criminal justice system;
- the roles of the various justice system participants and how constitutionally appropriate collaboration and cooperation can be fostered, specifically
  - those matters in which each institution, for reasons of independence, should have exclusive decision-making authority;
  - those matters in which each institution, for reasons of best expenditure of public resources, should have exclusive decision-making authority;

- in the case of independence and best expenditures, whether in such cases consultation with other participants is required, is desirable or is not required;
  - those matters on which justice agencies should have shared or collaborative decision-making authority; and
  - practical and effective institutional or structural mechanisms by which consultation and shared decision-making can best take place
- steps, including legislative measures if any, within the constitutional authority of the province that can and should be taken to give effect to the recommendations.

Periodic updates on the work of the Justice Reform Initiative are to be released to the public by the Chair, Justice Reform Initiative.

The completed report is to be submitted by the Chair, Justice Reform Initiative to the Minister of Justice and Attorney General no later than July 2012.

In preparing the report the Chair, Justice Reform Initiative is requested to:

- consult with the judiciary, defence bar, Crown Counsel, legal aid, police and corrections (at the federal level where necessary);
- provide an opportunity for public input;
- view transparency of justice system outcomes as essential;
- articulate how performance measures by which the system can be accountable can be established and how public assurance of results achieved can be provided;
- consider the experience of other jurisdictions in addressing these matters.

## BC JUSTICE REFORM INITIATIVE

### REVIEW STAFF, APPROACH AND METHODOLOGY

#### Introduction

This Review into British Columbia's criminal justice system is an unusual exercise and accordingly it may be important to outline the approach that has been taken to the mandate, the methodology which has been followed, and some observations on the possible strengths and limitations which should be taken into account by the reader.

The obvious features of the Review which have framed the execution of the work include:

1. The publication of a Green Paper which highlights:
  - (a) the need to modernize the criminal justice system;
  - (b) the suggested paradox of declining crime rates and increasing costs;
  - (c) experience of failed initiatives;
  - (d) apparent barriers to change within the culture of the system, including resistance to systems thinking, dependence on subject matter experts, the interpretation of independence by the various independent participants and the complexity of the system;
  - (e) the existence of a substantial number of ongoing, proposed, and contemplated initiatives.
2. The decision to obtain an independent view by an experienced practitioner who is not a career criminal law practitioner.
3. The need for the Review to be completed in a very short timeline to enable government policy processes to be completed.
4. The request for two other reports on charge approval standard and process by Gary McCuaig, Q.C., an experienced Alberta prosecutor, and the Legal Services Society, on the subject of potential legal aid reform
5. The promise to receive and consider the Review and to publish a White Paper reflecting government policy.

#### Review Staff

I was fortunate to have the assistance of experienced and capable people in the execution of this Review. In particular:

Alison MacPhail contributed greatly from her expertise and experience as a justice system manager and leader with experience in both criminal justice reform and operations, and as a Deputy Minister with the former Ministry of Solicitor General and Public Safety.

Emma Dear served as the Executive Director for the Review.

Jennifer Chan conducted research and assisted in writing the Report, on her way to graduate work on efficiencies in the legal system.

Fasken Martineau LLP kindly donated not only much of my time for the Review, but also the able research assistance of Samantha Chang, Martin Ferreira-Pinho and others.

I am obliged to Richard Therrien and Eve Rickett for their editorial assistance.

### **Approach**

As a result of the factors discussed earlier, the following approach was adopted:

1. To maximize the advantage of independence, consultations were taken on both a public and confidential basis, with individuals and groups.
2. A substantial effort was undertaken to encourage the development or acceleration of internal reform processes by justice participants, to address the challenges set out in the Green Paper and the challenges to the system as they saw them.
3. An adjustment of the work to fit the available time, since the potential scope of the mandate could occupy a substantial policy commission for a substantial period of time, but only at the cost of distracting both ongoing efforts and displacing existing leadership.
4. Deference to internal processes where appropriate.
5. Avoidance of surprises, to maximize the chances that recommendations are fully informed and to receive at least some level of criticism or comment by existing leadership and stake holders.
6. Respect for subject matter expertise, experience and commitment of those working within the system.

### **Methodology**

The Review adopted a methodology composed of three phases, which were as follows:

7. Phase 1: We endeavoured to meet with representatives of all of the participants within the criminal justice system and members of the public. We were fortunate to receive input and suggestions from a very wide variety of individuals, professionals and institutional representatives.
8. Phase 2: We concentrated on generating and consulting on concrete proposals for reform. This phase included consultation tables which addressed proposals to improve

coordination and collaboration within the system, to address the problem of large case management, to consider reforms to the role of victims in the system, to consider reforms to the relationship between the police and crown counsel, and to consider an improved relationship with the public.

9. Phase 3: In this phase we developed proposals based upon the consultations we had conducted as well as the input we received from experts and through our literature review.

### **Strengths and Limitations of the Review Process**

#### 10. Strengths

The appointment of an independent reviewer encouraged candid conversations that permitted the exploration of concerns not normally expressed within the system.

The independence of the Review encouraged proposals that were not wedded to existing government policy, existing leadership direction or existing structures.

The candid, and in places blunt, language of the Green Paper provoked a determined defence of some aspects of the system, while at the same time provoking and accelerating the development and determination of leaders within the system to make real and constructive changes.

#### 11. Limitations

There are obvious limitations to what the Review has been able to accomplish and which should be borne in mind in the development of the White Paper and in the consideration of next steps. These include:

- (a) *Time*: Notwithstanding the number of meetings and consultations held, it is clear that the full development of some of the proposals that have come from within the system, or which are proposed for consideration in this report, require careful consideration and development. Indeed, some of these considerations would require a more disciplined process of consultation to ensure the necessary acceptance by those being asked to carry out proposed reforms.
- (b) *Depth of Institutional Understanding*: This Review has been asked to take a system-wide approach. Of necessity, this means that much of the detail and organizational structures that would otherwise be considered for the final outline of a reform proposal have not in this case been considered. In any event, it is my view that those detailed considerations are best left to leaders within the system.
- (c) *Internal Acceptance*: The successful execution of most of these proposals depends upon changes to the culture of both the criminal system of justice and some of the features of the cultures currently in place within the institutional participants. Culture change of this type cannot be carried out by an independent reviewer but must be carried out by the leadership of the organizations in a manner that is best tailored to the history, traditions and discipline within that organisation.

## BC JUSTICE REFORM INITIATIVE

## FIRST INTERIM REPORT BY THE CHAIR – MARCH 22, 2012

**Beginning the Review****1. Introduction**

The purpose of this report is to update the Minister of Justice and Attorney General and the public on the progress made so far in this review of B.C.'s criminal justice system.

This report addresses the steps taken to date, the plan for the Review going forward to completion this summer and some preliminary observations about the character of the issues facing B.C.'s criminal justice system.

The Terms of Reference for the Review have been finalised and are now publicly available. Although the Terms of Reference are restricted to criminal justice issues, I have received comments respecting family law and other areas of the system of justice which may bear consideration. For those matters that are outside of the Terms of Reference and with the consent of the sender I will forward concerns or proposals to the Ministry for its consideration.

I have been overwhelmed by the passion and care people have shown towards the challenges of modernising our system of criminal justice and the need to preserve and uphold its core values. Across the system the institutional participants acknowledge that their distinctive roles must serve the public interest in a manner that is complementary and effective. The private bar has expressed openness to improvements in the system that is consistent with effective representation of their clients. I have met with over 60 people since the announcement of the Review and expect this pace to continue until the summer months.

The problems faced by the system have not been ignored and there are a number of initiatives, reforms and proposals under development or being piloted. Hopefully many of these will prove constructive and provide both improved results and lessons for the future.

It is obvious that there are several independent participants in the criminal justice system. This is for important and well-established reasons. Equally obvious is that the participants are dependent on each other: this interdependence is widely acknowledged but the lack of effective coordination has frustrated some of the measures intended to achieve enduring and effective change.

The Green Paper has raised important questions about the best means of achieving reform in the public interest in the context of the structural independence found throughout the system. The Green Paper's focus on system-wide efficiencies and outcomes is very different from previous efforts and for that reason challenges everyone involved in the

conversation. That conversation is now well underway and I am confident the Review will help us all better understand how both independence and interdependence must be taken into account in improving British Columbia's criminal system of justice. The suggestions received to date make it apparent that the menu of possible recommendations span the spectrum from detailed changes in process to structural reform through legislative change.

## 2. **Plan for the Review**

The Terms of Reference present the Review with three basic tasks. First, the Review must address whether there are any measures that could be implemented in the short-term to improve outcomes in the system. Second, the Review must consider the broad questions of both framework and function that are raised for consideration in the Green Paper. Third, the Review should recommend measures for consideration and further development.

The Review will be carried out in three phases. The first phase will be to meet with the participants and public. These consultations will include learning from the participants what measures in their view would achieve more effective process and better outcomes.

The second phase will be to both generate and facilitate the development of concrete proposals for reform. I hope to have received all submissions and proposals by May 30, 2012.

The third phase will be to assess possible measures and report in July, 2012.

These phases will no doubt overlap and contribute in different ways to the final report. In all this work I will strive for a transparent process that respects the expertise within the community and those directly affected and also provides an opportunity for input from the public.

## 3. **Steps Taken To Date**

### (a) Stakeholder Consultations

In order to accomplish the Review in the time available I moved immediately to meet with representatives of the judiciary, defence bar, Crown counsel, legal aid, police and corrections. I have now met on a preliminary basis with representatives of each of these participants.

I have met with members of the government and opposition caucuses and have extended an invitation to meet with MLA's individually or with their communities, as time permits.

I have also benefitted from preliminary meetings with representatives of the Law Society of B.C., the Canadian Bar Association, and the Trial Lawyers of British Columbia.

I have also received extensive briefings on the work of the Ministry of Justice.



I have met with representatives of the Legal Services Society, especially with a view to co-ordinating their report with the Review. Gary McCuaig, Q.C. and I have met on several occasions to discuss his upcoming report on the charge approval process and standard.

The purpose of these initial meetings has been to obtain an orientation as to how the various participants in the system of justice view the issues raised by the Green Paper, to obtain a better understanding of current trends and practices, and to identify what changes are already underway.

I have been pleased with the openness to reform demonstrated in all these initial consultations. The problems faced by the system are acknowledged by all the participants and there is widespread recognition that many of the problems have proven recalcitrant. Indeed there are many measures being piloted, or in preparation already. I am confident that the opportunity for creative solutions afforded by the Review has been taken up by those with roles in the system and there will be many ideas and suggestions deserving careful consideration. The public character of the Review and the plans for public input and consultation will encourage the involvement of members of the public.

(b) Public Consultations

(i) *Website*

The Terms of Reference request that the Review provide an opportunity for public input. Very early on I determined that a website and blog offered a new means of engaging both those involved directly in the system and members of the general public.

On March 2, 2012 the Review website was launched to provide the the public and stakeholders with information about and updates on the Review, and as a forum for providing input. It can be found at [www.bcjusticereform.ca](http://www.bcjusticereform.ca). It hosts the interactive Chair's blog and also offers a vital opportunity to share the resources made available to us.

Some issues such as timeliness may be amenable to general feedback and we plan on providing online surveys on certain topics. Although this will not be scientifically valid it may provide an easier means for people to provide their input.

(ii) *Blog*

I have initiated (for me a first) a Chair's blog which I hope will afford a more informal and ongoing conversation. The Review also has a facebook page for the distribution of my blog postings and any comments on those.

The blog is intended as a means to address the system issues and solutions which are the subject of the Review and is not a vehicle for individual complaints or criticisms of particular individuals.

(iii) *Submission forms*

We are already receiving a steady flow of submissions through the Review website and hope that it will continue as we progress to the report. People have taken up the offer to provide their submissions in whatever form they are able and a convenient feedback form has been made available on the website. We will encourage everyone interested in making submissions to do so by May 30, 2012.

(iv) *Meetings*

The Review has received many requests for meetings and I am working hard to meet with as many as possible in the time available. I have been reflecting some of the input received in these meetings and conversations on the Chair's blog.

I am concerned that the particular needs and opportunities that exist in the regions outside the Lower Mainland be identified and have planned visits to the Interior and the North.

(c) Research

There is already a developed body of information and opinion that has been made available to the Review. I observe that the Ministry has launched a new data dashboard at [www.JusticeBC.ca](http://www.JusticeBC.ca), where the public can access court statistics.

The Review will conduct a literature review and some jurisdictions have been recommended as sources of best current practices. I have plans to meet with several of the academic commentators in this area from B.C. and elsewhere.

4. **No Shortage of Problems and Proposals**

The complexity of the justice system can overwhelm an assessment. Many of the problems faced by the system have been recognised by responsible people throughout the system. Various initiatives or pilots have been launched or are being developed. Innovation has not only arisen from institutional sources. For example, there are several Court-based initiatives that have been championed by individual judges such as the Domestic Violence Court in Duncan.

The Criminal Justice Branch has over 30 projects that are either proposed or ongoing; many of these are aimed at addressing the issues identified by the Green Paper.

The various police forces have numerous projects and initiatives underway. These are aimed at reducing crime and the social effects of crime on our society. For example the Vancouver Police Department and several other police forces in B.C. have had a chronic offender initiative aimed at focussing on the small number of offenders who account for a large number of offences and represent substantial risk and property loss to the community.

The Corrections Branch has a pilot program which provides early risk assessments of accused individuals to assist the Crown in its evaluation of whether alternative measures to the formal court process may be appropriate for the offender, consistent with the law and public safety.

The Review will include a focus on the framework within which these initiatives are intended to improve function and the best means of enhancing policy and program development, testing and objective assessment.

5. **What systemic obstacles and opportunities exist?**

Various committees and working groups have been put in place to bridge the perspective of the various participants, but I also have been told these means have not succeeded in achieving well coordinated responses to the challenges facing the system.

The important work that remains is to seek to better understand the various factors that have contributed to the current situation and to assess what measures, both systematic and particular, would improve the process and outcomes of the system.

6. **Closing note**

The preliminary work of organising the Review and completing a preliminary scan has been completed. I look forward to broadening the conversation around the issues raised by the Green Paper and the community and identifying possible measure for constructive reform. I anticipate my next report will address the measures already underway and whether there are any measures I can recommend for immediate implementation.

Geoffrey Cowper  
Chair, BC Justice Reform Initiative

March 22, 2012

## BC JUSTICE REFORM INITIATIVE

### SECOND INTERIM REPORT BY THE CHAIR – JUNE 22, 2012

#### Designing a Justice System for the 21<sup>st</sup> Century

##### Introduction

This second interim report provides an update on the progress of the Review. The First Phase of the Review was focussed on obtaining the broadest possible input from participants in the justice system and from the public concerning the criminal justice system in British Columbia. Well over 100 submissions have been received to date, and I have been able to meet with several hundred individuals and small groups throughout the province. Phase Two, nearing completion, is focussed on obtaining concrete suggestions for reform and consulting with the community regarding both proposals for reform and priorities for implementation. Phase Three, the Final Report, to be delivered before the end of July, will include both near-term and broader recommendations and proposals. The broader recommendations will require further study and development before implementation. I also briefly outline some of the many issues raised during my consultations with stakeholders and the public.

##### A Justice System for the 21<sup>st</sup> Century

There is an enduring consensus concerning the two fundamental goals for our criminal justice system: a safe community, and the administration of justice according to law. While there is general agreement about where the current system is falling short of our shared expectations, there is also more debate about the roles and responsibilities of institutions regarding public safety and fairness, and about the best possible solutions.

The proposals I have received over the past several months have one or both of two fundamental characteristics; some urge a return to the best elements of the past, and others wish to incorporate the best available systems-thinking and technologies that characterize contemporary life and culture.

Many Crown counsel, defence lawyers, judges and others who were active when early trial dates were the rule, observe that a significant number of the current problems would fall away if every accused were entitled to trial within a few months. At the same time, the expectation of the effective use of technology and modern systems-thinking is nearly universal. In considering how to get to a system with shortened timelines, modern approaches to systems and technology invariably frame the discussion.

When reduced to fundamentals there is little friction between the conservation of the fundamentals of a sound criminal justice system, and reforming the current system to better achieve expectations of modern processes that improve public outcomes. There is good reason to hope that sound proposals will find general acceptance by those who recall better times, and by those who desire modernisation.

Consultations to date

Over the past 18 or so weeks, I have had the benefit of either meeting or speaking with hundreds of people throughout the province and across the country. I have conducted or participated in roughly 100 in-person and telephone consultation sessions attended by several hundred people, varying from one-on-one meetings to larger groups of 20 or more. I have consulted throughout greater Vancouver, and travelled to Victoria, Kamloops, Kelowna, Prince George, Abbotsford, Nelson and Campbell River. In addition, I have conducted telephone consultations with stakeholders from other communities, and have received written submissions from a wide range of organisations and individuals via our website, e-mail, surface mail or hand-delivered.

The people I have met with include members of:

- Provincial Court, Supreme Court and Court of Appeal of British Columbia
- all branches of the Ministry of Justice
- Legal Services Society
- RCMP
- Municipal Police Forces
- Canadian Bar Association, BC Branch
- Law Society of British Columbia
- Native Courtworker and Counselling Association of BC
- Trial Lawyers Association of BC
- Crown Counsel Association
- B.C. Government and Service Employees' Union (BCGEU)
- B.C. Civil Liberties Association (BCCLA)
- British Columbia Bar
- NGO sector
- Restorative Justice Organisations
- Victim Services Organisations
- Vancouver Board of Trade
- Academics from the University of British Columbia, Simon Fraser University, University of the Fraser Valley and the University of Toronto.

I have also met with experts in the fields of business processes, systems analysis, fetal alcohol spectrum disorder, mental illness and addictions.

I have been impressed and inspired by the level of expertise and appetite for reform in all these communities.

Over the last week I have held a number of consultation sessions focusing on specific topics including strategic coordination of the criminal justice system, large case management and the role of victims in B.C.'s criminal justice system. Further sessions discussing police/crown interface and the role of the public are planned.

I have received submissions from more than 100 institutional stakeholders and members of the public. I had originally requested those interested in making a submission do so by the end of May; however in preparing my report I will endeavour to consider any submission received prior to June 30, 2012.

### Shared Expectations for the Criminal Justice System

In meeting with stakeholders and the public, I repeatedly heard the following expectations for the criminal justice system:

#### *Fairness and Justice*

British Columbians expect our system of justice to be fair and just. Justice requires that fairness be evident throughout the system, including: the investigation of criminal events; the consideration of charges; the consideration of guilt and innocence; the restrictions imposed on a person's liberty; and the availability of programs that enable offenders to realise a law abiding and valued place in the community.

#### *Timeliness*

In a timely system many goals can be achieved. The public is satisfied that reports of crime are taken seriously and something is being done about them. It has been clearly demonstrated that timeliness of apprehension and sanctions is a critical element in affecting the behaviour of those who break the law. For those at a low risk to reoffend, the sooner the charge reaches resolution, the greater the likelihood that they will successfully reintegrate into the community. Professionals throughout the system, including police officers, sheriffs, court staff, Crown, corrections professionals, lawyers and judges, take pride in moving cases along, when less of their working lives is occupied with administration and process. When trials are necessary and realized in a timely fashion, victims and witnesses do not have to strain their recollection of events, lawyers don't have to prepare time and again, and the community sees a resolution.

#### *Expertise*

We have all come to expect that problems will be addressed with the best methods and up to date expertise available. Stakeholders and the public alike expect that solutions will incorporate the best learning and benefit from an appropriate level of expertise in those charged with important public duties.

#### *Responsiveness*

The types and levels of crime vary from time to time and from place to place. The public expects that our criminal justice system will respond to these changes and not be overwhelmed by them.

*Cost Effective and Accessible*

People recognise that we are living in times of public restraint and that this reality is unlikely to change soon. At the same time the public has high expectations that public funds will be spent in an expert manner and that the justice system will demonstrate the sound allocation of available resources, and work effectively and efficiently.

*Respect*

The justice system must demonstrate that it is respectful of everyone affected by it. This includes victims, witnesses, participants in the system, and both accused persons and offenders. Respect requires a recognition that the system of justice is administered in the public interest.

*Effective Coordination of Services*

The public expects the various parts of the criminal justice system to be appropriately and effectively coordinated.

*Public confidence*

The public needs to have confidence in the criminal justice system. Members of the public frequently defer to the expertise of those in the system. However, when common sense is offended, private reservations are reinforced and public confidence is significantly reduced.

This is not a comprehensive list of expectations for the criminal justice system, and undoubtedly reflects the circumstances of the Review, but each of them has validity and requires consideration in the development of solutions.

*Systems Approach to Criminal Justice Management*

Over the past fifty years systems thinking has inundated both business and government. Many of us with law degrees are sceptical of—if not downright hostile to—the application of this approach to legal systems. In my consultations I have observed that some participants do not view themselves as being any part of a system at all. In what ways is systems-thinking appropriate to achieving the ends of justice? One definition of system is

*A set of things working together as parts of a mechanism or an interconnecting network; a complex whole.*

By any reasonable definition there is a criminal justice *system*, although its boundaries and over-all goals are open to reasonable debate.

A systems analysis is beneficial where the final outcome of the system is more meaningful than the individual results produced by the system's components. There is a consensus that the justice system indeed operates as a system in which many important participants have effects on one another's work and outcomes for victims, accused persons and the public are influenced by these complex relationships.



Some obvious examples can be shortly stated. When police investigate crimes, they must rely on Crown prosecutors to approve charges and bring cases to trial. The system relies on defence counsel to act fearlessly in the interests of the accused. We all count on the judiciary to interpret and apply the law to the facts. The judiciary in turn relies on court and administrative staff to assist them. The senior levels of government properly provide policy direction, but depend on many justice participants to realise those policies. No single participant of the justice system is able to achieve the public safety goals and the fair and just results expected of the justice system.

The reference to “silos” in our consultations has been legion. While “silo thinking” is not surprisingly applied to other institutions, it also frequently appears in conversations with participants when discussing their own role and function. The desirability of coordination and mutual support amongst the various participants in the criminal justice system is not new, but there appears to be a consensus that efforts to address this have not been as successful as needed.

The absence of over-all strategic planning and lack of stated common priorities is a frequently raised concern. In the coming weeks, I intend to consider how a systems approach to the criminal justice system might realise improved processes and outcomes. This may include consideration of the following:

- What are the boundaries of the system?
- Should there be a common strategy for the system, and who should be responsible to develop it?
- Can the interface between the participants of the system be improved?
- Do the roles and responsibilities of the various institutions in ensuring safe communities and guaranteeing fair and just processes need to be clarified or changed?
- How is success to be measured and how do we ensure reliable reporting to the public?
- Are there improvements to the managerial capacity within existing institutions that would be beneficial?

I look forward to upcoming discussions and consultations on these challenging topics.

### Some Elements of Success

In addition to considering how the criminal justice system may be better managed as a “system”, several other potential elements of success have been suggested to me during our consultations.

#### *Evidence-based Decisions*

The complexity of the justice system can make it difficult to base management decisions on facts. Many have commented on the use of “anec-data” (anecdote offered as data) in conversations concerning the justice system. We have one of Canada’s best data systems and, as a result of recent substantial investments, we should see significant improvement. Using this data to inform sound decision making and to monitor

performance and increase transparency should be part of any sound proposal.

*Expertise*

The courts have recognised the usefulness of building expertise around particular problems through the development of initiatives like the Downtown Community Court, pre-trial management for large cases, and the domestic violence courts on Vancouver Island and in Kelowna. Our community is accustomed to receiving specialised expertise in almost every work and profession, and the general expectation of expertise needs to be acknowledged in developing new approaches.

*Appropriate Incentives*

The justice system ought to be organized so that participants share incentives to resolve criminal occurrences in a fair, effective and efficient manner. Concomitantly, any incentives to delay the resolution of criminal occurrences should be identified and addressed.

*Use of Technology*

Modern technologies can offer time and resource efficiencies when used to their full potential. For example, allowing witnesses to appear by video-conference has reduced travel costs and inconvenience. Other uses of technology may merit further consideration.

*Rational allocation of resources*

Many of our consultations have included an expression of frustration with resource shortages. Many have also acknowledged improvements can be made within existing resources. Those who are most demoralised express disappointment that their function is relatively poorly resourced and that the decisions underlying resource allocations across the system are not well understood or accepted. For example, an understanding on judicial complement and how many judges are required, has so far failed to reach a satisfactory conclusion.

In considering potential reforms to the criminal justice system, it is imperative to look at the policy and institutional elements that must be in place to ensure that the system as a whole succeeds. I look forward to hearing further feedback and suggestions from stakeholders and members of the public on these and other elements of success.

**Context for Reform**

In some respects a time traveller from the 19<sup>th</sup> century would recognise a trial being conducted today. In other respects the justice system is undergoing remarkable changes. Several reform initiatives have attempted to address some of the very challenges that led to the creation of this Review. Understanding

trends and changes, as well as learning from the achievements and shortcomings of recent initiatives, will be important steps to developing sound recommendations.

### Previous and Ongoing Reform Initiatives

In the past decade, there have been numerous reform initiatives in British Columbia. For example, in 2004, the B.C. Provincial Court worked to reduce the backlog of cases through a Backlog Reduction Initiative.<sup>1</sup> Ministry of Justice officials attempted a broader approach to criminal justice planning and crime reduction through the development of a Provincial Community Safety Steering Committee. The Legislature has taken a significant number of cases out of criminal court by establishing alternate ways to ensure public safety, such as through the recent enactment of the Immediate Roadside Prohibition Program.

There are also several ongoing reform initiatives. Current criminal justice reform initiatives under the direction of the BC Ministry of Justice include: the Vancouver Downtown Community Court; the Prolific Offender Management Project; the Bail Reform Project; and Community Crime Prevention Projects.<sup>2</sup>

The Review needs to understand what progress is being made, or likely will be made, through these initiatives and should not get in the way of them succeeding. Learning about these and other attempts at criminal justice reform may also offer insights into the available options. In the next few weeks, I intend to continue meeting with stakeholders and the public to discuss previous and ongoing reform initiatives and to learn from their successes and failures.

### Learning from Other Jurisdictions

Achieving and maintaining a fair, effective and efficient criminal justice system is a challenge faced across Canada and around the world. I also have found instructive reports from the various reform initiatives that have taken place in other jurisdictions. Among others, these include: the former U.K. National Crime Reduction Board; the South Australia Court Administration Authority; the development of problem-solving courts in New York, to name a few. In Canada I have reviewed information about Alberta's scheduling reforms, Manitoba's front end initiatives and the Justice on Target Strategy in Ontario.

Although the strengths and opportunities present in the British Columbia criminal justice system may lead to a unique approach to justice reform, consideration of what has worked or failed in other jurisdictions will be valuable to my analysis. I look forward to receiving additional stakeholder and public input on examples of criminal justice reform in other jurisdictions.

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<sup>1</sup> Report of the Main Street Criminal Procedure Committee:

<http://provincialcourt.bc.ca/downloads/pdf/MainStreetCriminalProcedureCommitteeReportonBacklog.pdf>

<sup>2</sup> BC Criminal Justice Reform Website:

[http://www.criminaljusticereform.gov.bc.ca/en/justice\\_reform\\_projects/community\\_court/index.html](http://www.criminaljusticereform.gov.bc.ca/en/justice_reform_projects/community_court/index.html)

### Particular Issues

During consultations, several aspects of the criminal justice system were repeatedly identified as requiring special attention or reform. They are also the areas in which the broadest scope of opinion is found. Although all agreed that these are important questions, there is often disagreement as to the appropriate goals for the system, the appropriate measures that should be taken by the system, and even whether or not we are succeeding. Some of these are:

#### *Domestic Violence*

I heard wide-ranging views as to whether we are effectively protecting victims of domestic violence or achieving changes in offender behaviour. Some have suggested that an entirely new approach is necessary.

#### *Support for First Nations*

Despite the widespread recognition that aboriginal people are over-represented in the criminal justice system it is reported by many that aboriginal victims or accused are not being well served.

#### *Administration of Justice Offences*

There is widespread disagreement concerning almost everything about administration of justice offences—that is, offences related to the breach of conditions of release into the community. Some question the types of conditions being imposed. Others question the apparent increase in focus by police since the number of prosecutions for these offences is sharply on the rise. Many express frustration that the terms imposed don't seem to serve their purpose.

#### *Large Case Management*

Large and complex cases consume a great deal of court resources and have proven difficult to administer. Many have expressed the concern that these high-profile cases are at high risk of collapsing or failing to conclude. The B.C. Supreme Court has recently piloted a Criminal Pre-Trial Conference Pilot Project that involves active case management for complex criminal proceedings.

#### *Mental Health and Addiction*

A disproportionate number of people who are either accused of crime or are victims of crime suffer from mental illness and/or struggle with substance abuse and addiction. There is a widespread sense that traditional criminal processes and sanctions are ineffective in keeping the community safe from crimes committed by people resorting to crime to fund their substance addiction, and offer no hope for successful integration into the community. Victims of crime or accused persons suffering from mental illness present different but

serious challenges to their participation in the system. Many have suggested that the criminal justice system must develop greater expertise and more effective tools to recognize and address the causes and consequences of mental illness and substance abuse. This may require developing partnerships with healthcare and addiction agencies, or broadening the use of methods learned in existing pilots organised around mental health or drug issues.

### Upcoming Consultations

I will continue to meet with stakeholders and the public through consultation sessions scheduled to the end of June, 2012.

### Other ways to participate

I am grateful for the enthusiastic willingness to meet and discuss these important questions and the unstinting giving of time, attention and information by the members of the public and participants in the criminal justice system.

I hope that people will continue to follow the Review by reading my blog and leaving a comment, following our Facebook page or sending me an email, all via our website at [www.bcjusticereform.ca](http://www.bcjusticereform.ca). On June 1, 2012 we launched our online surveys on the website, and have received 49 responses in just over three weeks. I also encourage people to make use of our new subscription service available through the website, where you can sign up to receive emails from time to time announcing updates such as the release of my Final Report.

### Closing Note

Over the past few months I have sought input and suggestions from a broad range of participants and stakeholders in the criminal justice system, including the public. I have gained a far better appreciation for the diversity of challenges and responses that we have had to address and accommodate. Many share a hope for improvement. In reviewing the many proposals and ideas that have been generated I am confident that improvements, both immediate and longer-term, deserving widespread acceptance, will be developed.

Geoffrey Cowper  
Chair, BC Justice Reform Initiative

June 22, 2012



THE PROVINCIAL COURT  
OF BRITISH COLUMBIA

August 14, 2012

### Front-end Simplification of Criminal Process

The Court is examining the Criminal Caseflow Management Rules and expects to develop changes to front-end criminal processes intended to reduce the number of in-court appearances and return to counsel the primary responsibility for early case conduct. The model will include the development of case-streaming and differentiated case processing.

### Assignment Court

A new system of case assignment to courtrooms and judges will be developed and implemented in British Columbia. It is anticipated the new model will see the assignment of cases (when first set for trial) to a courthouse rather than to a specific judge and courtroom. If the case is not resolved in some other fashion and the trial is confirmed as proceeding on the day set for hearing, the matter will then be assigned to an available trial court. Rigid advanced booking of resources will be replaced by flexibility so to reduce the loss of sitting time arising from collapsed cases, adjournments, and last minute guilty pleas.

### Goals and Objectives of the new Scheduling Model

- To develop and implement scheduling practices that will enhance the effective, efficient and equitable use of judicial resources. This will improve access to justice and thereby increase public confidence in the justice system.
- To increase the breadth and reliability of case scheduling data that can be generated to better enable the Court to analyze its processes and manage changing caseloads and case types.
- To consult justice system stakeholders as new caseflow processes are developed and to foster systemic change.
- To develop new rota and scheduling software programs that will facilitate the new court scheduling system and take advantage of technological innovations including enhanced use of video technology and eCourt initiatives. Data that can be produced with a new Information Management system will better enable the court to monitor, evaluate and respond to changing needs.

## Criminal Justice Branch Justice Reform in B.C.'s Prosecution Service

The Criminal Justice Branch (CJB) actively engaged in the Justice Reform Initiative as Chaired by Geoffrey Cowper, Q.C. In support of the Initiative, the Branch developed its own set of measures that seek to streamline prosecution business processes; strengthen CJB's case management practices; and contribute in a meaningful way to a collaborative, systems-wide approach to justice reform.

CJB will use its best efforts to implement these measures by the end of December 2013. The Branch understands that its strategies form but one part of a larger, system-wide requirement for overarching reform and that further, cross-sector collaborative work between the Branch and other justice system participants is needed to achieve long-term, sustainable change and efficiencies.

**CJB Branch Management Committee, July 2012**

The CJB measures include:

### A. Cross-sector and In-House Reform for Increased Efficiency

- ✓ pending final approval and under the leadership and authority of the Provincial Court of British Columbia, CJB will work co-operatively with the Court and Court Services Branch (Ministry of Justice) to inform a redesign of criminal case scheduling that seeks to facilitate early resolution, streamline the process and decrease delay to trial
- ✓ Crown "file ownership" of prosecution files will be expanded to reduce duplication of effort, achieve continuity of conduct and facilitate pro-active case management
- ✓ front-end Crown Counsel disposition teams will be established where feasible, with increased flexibility for early resolution of prosecution files
- ✓ a province-wide, CJB tracking system with standardized timelines and other quality control measures will be institutionalized in the Branch to ensure file completeness for purposes of charge assessment, disclosure compliance, witness availability and trial readiness
- ✓ new technology and information-flow projects will be completed, including: (1) a JUSTIN/PRIME Multi-push (comprehensive electronic disclosure between police and the Prosecution Service); and (2) ICON II (electronic disclosure from police, to the Prosecution Service, to Corrections Branch for in-custody accused)
- ✓ with Corrections Branch, CJB will strive for enhanced use of alternative measures across the province, including early risk assessment as an information tool where available and other approaches, to ensure the most effective model for appropriate referrals to non-court options



- ✓ CJB will explore a principled, expanded use of Direct Indictments to move cases directly into the Supreme Court of British Columbia when delay to trial is a reasonably-based concern
- ✓ a Major Case Management Model will be implemented with a project-management approach for the efficient and effective conduct of the Branch's largest, high profile cases
- ✓ the Branch will explore having police liaison officers embedded within Crown offices to enhance communication and training with police on charge assessment and case-management issues

#### **B. Accountability, Transparency and Performance Measures**

- ✓ CJB will be an active participant in the Justice Reform Council, Ministry of Justice, for the purpose of developing a sustainable, integrated approach to justice sector planning and prioritization
- ✓ CJB will develop, utilize and share its business intelligence data for both Branch specific and Ministry-wide, justice sector planning, analysis and open data strategies
- ✓ Key Performance Indicators and performance measures will be developed specific to the Prosecution Service for assessing operational outcomes
- ✓ an on-line, Branch-wide file closing survey will be implemented for gathering business intelligence and tracking major decision-points along the life of a prosecution file
- ✓ CJB will continue its development of an index that seeks to objectively measure the complexity of prosecution files for the purpose of planning and resource allocation
- ✓ there will be enhanced tracking of the reasons for the return of Reports to Crown Counsel to police (with no charges approved), to better understand patterns and inform both Crown and police policy and practice

#### **About B.C.'s Prosecution Service**

B.C.'s Prosecution Service – the Criminal Justice Branch, Ministry of Justice - conducts or supervises prosecutions and appeals at all levels of court. In Canada, the administration of justice, including prosecutions and appeals, is a provincial responsibility, although there are some offences prosecuted by federal prosecutors. B.C.'s Prosecution Service was formed in 1974. Provincial legislation governing the Prosecution Service, the *Crown Counsel Act*, was passed in June 1991. Crown Counsel and the Branch's administrative support staff are located throughout B.C. The Prosecution Service is divided into five regions – North, Interior, Fraser, Vancouver and Vancouver Island-Powell River. Provincial Headquarters is in Victoria. There are criminal appeals and special prosecutions offices in both Vancouver and Victoria.



BC Association of Chiefs of Police  
PO Box 42529  
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July 23, 2012

Mr. G Cowper, Q.C.  
Chair  
BC Justice Reform Initiative  
2900-550 Burrard Street  
Vancouver, BC  
V6C 0A3

Dear Mr. Cowper:

Thank you again for your time when you met with Chief Constables Graham, Rich and me to discuss ways that police in the Province could contribute to the Justice Reform Initiative you are undertaking.

As we discussed, the BC Chiefs were in the midst of considering a Provincial Crime Reduction Initiative, where all police in the Province would agree on crime reductive goals for all communities as a commitment to work towards making B.C. safer. In our discussion, we saw a strong connection to the work you were doing.

On June 21<sup>st</sup>, 2012, at the BC Association of Chiefs of Police meeting held in Penticton, the following motion was passed:

### ***Provincial Crime Reduction Initiative***

**WHEREAS** the BCACP are committed to reducing crime and increasing the level of safety in all communities in BC, and

**WHEREAS** the crime rate in BC is currently 1.9 times higher than Ontario and BC ranks eighth out of the ten Provinces for overall crime rate, and

**WHEREAS** the BCACP desires to make significant strides to maintain the public trust and to make BC safer,

**THEREFORE BE IT RESOLVED** that the BCACP:

- Establishes a Provincial Crime Reduction Initiative,
- Creates a working group to implement the Provincial Crime Reduction Initiative, including recommendations on the goals, metrics and targets for the initiative, to allow the Provincial Crime Reduction Initiative to begin in 2013, and
- Recommends to the BC Justice Reform Initiative that the Provincial Crime Reduction Initiative be part of his recommendations, and that he recommend including other criminal justice system partners and stakeholders to increase the success of the Initiative.

The BC Chiefs will now establish a working group to implement this recommendation. We would be pleased to meet to discuss how to work with other partners in the criminal justice system and other related agencies to make this Initiative more effective.

We look forward to the report forthcoming from your Office and the opportunities it will create to make BC safer.

Sincerely,



Pete Lepine  
Chief Constable  
President, BCACP



## RISK ASSESSMENT, RISK-BASED CASE MANAGEMENT AND JUSTICE REFORM

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A submission to  
GEOFFREY COWPER, QC

Issued by:

Corrections Branch  
Ministry of Justice  
British Columbia  
August 2012

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## Introduction

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In February 2012, the Government of British Columbia released two papers focusing on the Justice System: (a) *Review of the Provincial Justice System in British Columbia* by the Internal Audit & Advisory Services, Ministry of Finance, and (b) *Modernizing British Columbia's Justice System* (the Green Paper).

The Audit review highlighted issues of accountability, workload, cost drivers, performance management, and operational management. The Green Paper provided the current context of the system, why the system needs reform, barriers to problem solving within the sector, and steps to engage in reform. A key element in the Green Paper was the acknowledgement that an external review was required. As stated in the paper, the reviewer(s) must participate directly in the administration of justice in B.C. but should not be a member of the criminal justice component, so they can objectively review and provide practical ways of improving the justice system. Geoffrey Cowper, QC, agreed to provide that review.

The Corrections Branch was invited by Mr. Cowper to participate in meetings to inform the review. Of the items discussed, risk assessment received the most focus. Subsequently, the Corrections Branch was invited to submit a short paper on risk assessment, including how it is used in Corrections, and how it could be expanded to assist in justice transformation. This paper is that submission.

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## Background

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During the 1990's, there was a shift in correctional philosophy, referred to as the "What Works" Movement<sup>i</sup>. The shift in offender management was an increased emphasis on risk and needs matching offenders to services for specific risk factors<sup>ii</sup>. Important advances in offender risk assessment came from the work of Dr. Don Andrews and Dr. James Bonta who state that *crime prevention efforts that ignore, dismiss, or are unaware of the psychology of human behaviour are likely to underperform in regard to successful crime prevention*<sup>iii</sup>.

The training and application of risk assessment is based on the evidence-based research of risk, needs and responsivity (RNR). RNR research states that the best way to reduce re-offending is to ensure the right intervention is matched to the right person in the most appropriate and timely manner. Research shows that as risk and needs increase, the level, intensity and type of intervention should be adjusted. Applying a standardized risk assessment tool based on RNR has the advantage of leading to more appropriate and if applicable, comprehensive case management plans which in turn leads to the right intervention and greater reductions in recidivism for medium and high risk clients<sup>iv</sup>.

Research has also demonstrated that referring low risk individuals to treatment programs with the intention of preventing them from 'graduating' to more serious antisocial behaviours, can interfere with existing supports and skills sets and actually increase a person's risk to reoffend. In addition, over supervision of low risk clients with a high number of conditions can also increase re-offending. Therefore, this means that in addition to enhancing public safety, the RNR approach is fiscally responsible as low risk individuals should experience limited supervision interventions in order to avoid an increase in the person's risk to re-offend.

The RNR model has three core principles:

- 1) the **risk principle**: criminal behaviour can be reliably predicted and the level of service should be matched to the offender's risk to reoffend.
- 2) the **need principle**: correctional programs should focus on *criminogenic needs* -dynamic (changeable) risk factors that are directly linked to criminal behaviour.
- 3) the **responsivity principle**: maximizing an offender's ability to learn from an intervention by tailoring the intervention to the offender's learning style, motivation, abilities, and strengths, typically through cognitive behavioural interventions.



The assessment of risk and needs associated with reoffending is an essential component of evidence-based case management<sup>v</sup>. Risk assessment can inform all service providers in the criminal justice system, from police to treatment providers, of the future likelihood of certain individuals to re-offend. It can also inform decisions on

- the level of supervision police should/could provide certain individuals;
- an appropriate length and type of sentence a person should receive;
- supervision requirements and conditions; and,
- the type and intensity of case management and appropriate interventions.

Thorough risk assessment involves gathering and verifying information, interviewing offenders and collaterals<sup>1</sup>, and applying standardized, validated tools to summarize an offender's risk level. Risk assessment procedures typically involve analyzing static (historical items such as number of prior convictions) and dynamic risk factors (criminogenic needs such as pro-criminal attitudes) which can cause offending behaviours, which are amenable to change, and inform risk prediction, case management, and treatment targets and options.

Research demonstrates that using actuarial<sup>2</sup> risk assessment tools are the most consistent method when predicting relative risk of criminal behaviour (relative to other offenders) and are considerably more accurate than unstructured professional judgment for sexual, violent, or other recidivism<sup>vi</sup>.

The development and validation of risk assessment tools is evolving regularly, building on the need for improved predictive accuracy, utility, and integration with case-management. To ensure appropriate application and scoring of risk assessment tools and to limit the rate of false predictions, the research literature recommends the following:

- professionals applying and interpreting the information know the methodology underlying the tools as well as possible application errors,
- there is quality control of these tools and their application through regular structured discussions such as peer reviews and mentorships, and
- validation the tool(s) on the population under examination.

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<sup>1</sup> Individuals directly affected by the criminal behaviour and/or persons who can speak knowledgeably about the offender.

<sup>2</sup> Actuarial risk assessment measures are developed in much the same way as insurance actuarial tables. Variables or factors that are statistically linked with increased risk of an outcome are scored together to produce a probability estimate against a comparison group.

### Risk Assessment in B.C. Corrections

B.C. Corrections started utilizing risk assessment measures in 1996. It is the foundation of the B.C. Corrections evidence-based approach to offender case management as it informs decisions beyond the anticipated level of supervision; it also provides information on the needs of offenders that, when addressed, reduces their likelihood of reoffending. B.C. Corrections Community Corrections Division currently uses four actuarial evidence-based risk assessment measures:

- **Correctional Risk Needs Assessment (CRNA)** assesses a sentenced<sup>3</sup> client's risk and needs that are predictive of future offending.
- **Static 99-R** assesses a sentenced client's *static* risk factors associated with sexual and violent reoffending for sexual offenders.
- **SONAR** assesses a sentenced client's *dynamic* risk factors associated with sexual reoffending.
- **SARA** assesses a sentenced client's *dynamic* risk factors associated with spousal assault.

Risk assessment requires ongoing training and skill building, continuous support and quality management. Within B.C. these tools are applied in a standardized manner within a structured professional judgment (SPJ) approach<sup>vii</sup>. SPJ combines objective evidence-based assessment of predetermined risk factors (actuarial scales) with a professional interpretation of the severity, frequency, or duration of those predetermined risk factors.

The training, use, and quality management process of these tools are outlined in Branch policy and focus primarily on sentenced individuals<sup>4</sup>.

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<sup>3</sup> This tool is not applied to sexual offenders, see Static 99-R and the SONAR.

<sup>4</sup> The exception in policy is the use of the SARA on domestic violence Adult Alternative Measures clients

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## Risk Assessment & Justice Reform

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### Risk assessment and sentence management

Knowledge and understanding of the risk, needs, responsivity (RNR) model, as well as risk assessment and how it informs case management, should facilitate better communication between the justice partners and promote more efficient use of justice resources. Specifically, this would ensure that

- all components of the Justice sector have a clear understanding of risk assessment and the relationship between risk level, order conditions and case management would be advantageous to the sector and the public;
- lower risk clients who require few conditions receive sentences that match their risk and needs will combat over-supervision and contribute to reductions in recidivism (further explained below); and
- higher risk offenders receive sentences (and conditions) that respond to their criminogenic needs will contribute to reduced re-offending and increased public safety.

The process of risk assessment in different areas of the Justice sector will necessarily focus on risk that is relevant to those areas. Each role within the Justice sector will view risk differently. For example in the Custody Centres, B.C. Corrections uses two assessment tools, the *Inmate Assessment* (IA; previously the Inmate Classification Assessment) which assesses an inmate's security rating, and determines placement, and escort level and the *Inmate Needs Assessment* (INA) which assesses sentenced inmates' dynamic needs while in custody. Neither focuses on risk to re-offend. Additional examples of risk assessments in other Justice sector program areas include:

- Police: risk to public safety, risk to an investigation,
- Mental Health professionals: risk of harm, risk to re-offend (in criminal settings),
- Crown: risk to case conclusion, and
- Victim Services: risk to victim.

Benefits of expanding the Justice sector's understanding of risk assessment and how it informs case management include:

- increased collaborative discussions on sentence conditions so that
  - lower risk individuals are less likely to be negatively impacted in the long term and higher risk individuals are more likely to succeed in abiding by their conditions post conviction; and
  - conditions designed to respond to offender needs that are directly linked to re-offending;
- consistent referral, understanding and use of information in pre-sentence reports;
- informed discussions of orders aimed at reducing re-offending.

### Pre-trial Risk Assessment for Bail Assignment and Violation

An additional benefit of a broader understanding of risk assessment may lead to the introduction of a pre-trial specific risk assessment tool. Pre-trial risk assessment focuses on identifying the likelihood of failure to appear in court and risk to public safety pending trial. Pre-trial risk assessment has a different purpose and focus from post-conviction assessment. As stated earlier, risk assessment to predict re-offending is comprehensive and time consuming due to the depth by which the assessor evaluates the offender's historic and current context to inform case management. For pre-trial, however, research has demonstrated that many of the factors considered relevant for post-conviction offenders do not accurately predict pre-trial success<sup>viii</sup>.

An evidence-based pre-trial instrument is validated through research and is not influenced by ethnicity, gender, race or financial status. In addition, to allow for independent decision-making and the exercise of judgment, the pre-trial risk assessment process is utilized within the SJP approach outlined above. The risk assessment tools are typically 10 questions or less<sup>5</sup>, are completed by the prosecution service, and match risk factors with easily accessible or already existing information such as type of charge and criminal history.

Studies in the United States show benefits to accused, the Justice sector, and public safety when pre-trial risk assessment for bail violation are in place<sup>6</sup>. Benefits include a reduction in higher-risk accused being released while awaiting trial, a reduction of low-risk accused being held in custody while awaiting trial, and reduction in bail violations by low-risk accused due to a decrease in the number of conditions and potential over supervision<sup>ix</sup>. A specific pre-trial tool would be required and does not exist at this time for B.C.

A pre-trial risk assessment in B.C. could also have additional benefits, including:

- a consistent referral process for pre-sentence reports to ensure applicable and appropriate referrals are made, thereby using resources in various areas of the Justice sector more effectively and efficiently, and ensuring sustainability;
- ensuring court ordered conditions for community supervision orders support interventions that are aimed at reducing re-offending;
- informing risk assessments throughout the Justice sector (as some of the core questions are similar across risk assessment tools), therefore decreasing the potential for duplicating work and increasing the responsivity of case management; and
- consistency of administration of justice charges.

<sup>5</sup> Virginia pre-trial risk assessment tool is an electronic tool that has eight items with a scoring mechanism that identifies low, below average, average, above average, or high risk levels and that informs (but not makes) the recommendation and then if appropriate, recommended conditions of release.

<sup>6</sup> See *Pretrial risk assessment in Virginia: The Virginia pretrial risk assessment instrument* (May 2009) Report by Luminostiy, Inc.

The development of a pre-trial risk assessment in B.C. would require the following elements:

- A research team to identify risk factors. This would include a research review, an examination of data from JUSTIN and CORNET (assuming the required data is collected and available) and subsequent data extraction and analysis;
- Development of an electronic pre-trial risk assessment tool into an existing system (e.g. JUSTIN) to gather the information and analyse risk;
- Piloting of that tool for a specific time (24 months is the recommended timeframe). The tool should be built into an existing system (e.g. JUSTIN) to gather the information and score the static historical items automatically. The score then informs the recommendation for bail;
- Validation of the pilot pre-trial tool using data extraction and analysis;
- Revisions of that tool and implementation of that tool procedurally and electronically;
- A second validation of the finalized risk assessment tool after a specific time; and
- Development and implementation of staff training in the use of the pre-trial risk assessment tool including subsequent refresher training and a quality management framework.

In addition, a more robust discussion would be required around the principles of pre-trial risk assessment, appropriate usage (e.g., it is a tool, not **the** tool, as it has limits), disclosure, ongoing support and quality management, challenges such as time constraints, resource constraints, capacity, culture, and mitigation strategies clearly identifying the process required should an accused act in an unpredicted manner.

Work in this area would improve the overall functioning of the justice system, including better service to the citizens of British Columbia, with a more focused and appropriate use of resources within the Justice sector.

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## Conclusion

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Research shows that risk assessment to determine risk to re-offend is a thoroughly validated and evidence-based method to inform offender case management. Standardized risk assessment leads to better case management plans, improved matching of interventions to offender needs, and therefore significant reductions in recidivism for medium and high-risk clients. In addition, it facilitates fiscally responsible resource management by limiting over-supervision and reducing program resources to lower risk offenders, due to the potential of increasing rather than decreasing their risk of re-offending.

Specific to B.C., Corrections uses post-conviction risk-assessment as a key element of their evidence-based approach to offender case management. Risk assessment post-conviction provides information on the risk and needs of offenders that, when appropriately addressed through interventions, reduces their likelihood of reoffending. Pre-trial risk assessment would focus on identifying the likelihood of failure to appear in court and risk to public safety pending trial.

Through RNR training and the development of a pre-trial risk assessment tool, a better understanding across the Justice sector of the Risk-Needs-Responsivity model and of risk-based case management would

- increase the likelihood that offenders receive sentences and conditions that are matched to their criminogenic risk and needs which would ultimately reduce reoffending;
- facilitate the work of Corrections staff in providing interventions that are designed to respond to these criminogenic needs and ultimately reduce reoffending; and
- facilitate better communication between the justice partners, ensure a consistent approach to the management of offenders across the system and use justice resources more efficiently.

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## Recommendations

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1. Police, Crown and the Judiciary be provided training on the principles of risk assessment. This training is intended to impact a number of the current issues in the Justice sector, such as over supervision of lows and increases in the administrative of justice cases that enter the criminal justice system. This could be accomplished by:
  - Corrections informing and updating its justice partners on the principles of risk assessment, how it guides case management and the application of interventions, and how evidence-based case management contributes to long-term behavioural change. Corrections sharing the expertise that it has developed through 16 years of work in this area, which positions the branch well to act as an advisor in the (a) development of training for the Justice sector in the risk, needs, responsivity (RNR), risk assessment, (b) how it informs case management, and (c) the quality management framework required to support it long-term.
  
2. Development of a specific pre-trial assessment tool. As discussed above the benefits of a pre-trial assessment tool could result in:
  - reductions in the number of court cases.
  - reductions in over supervision;
  - appropriate placement of accused waiting trial;
  - consistent use of pre-sentencing reports;
  - sentences and conditions that are matched to their criminogenic risk and needs which would ultimately reduce reoffending; and

Due to B.C. Corrections' extensive experience in this area including development, validation, implementation and quality management, it would be apt for Corrections to act as a consultant to the development, validation, and implementation of a pre-trial risk assessment tool, should that work occur as well as delivery models for such a tool.



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**Making Justice Work**  
**Improving Access and Outcomes for British Columbians**  
**Report from the Legal Services Society to the Minister of Justice and**  
**Attorney General The Honourable Shirley Bond, July 1, 2012**

## Executive summary

### Background

On February 8, 2012, the Province announced an initiative to address challenges facing British Columbia's justice system and to identify actions to give British Columbians more timely and effective justice services.

As part of this initiative, the Minister of Justice and Attorney General, Shirley Bond, asked the Legal Services Society (LSS or the society) for advice on reforms to legal aid and to the larger justice system that could reduce costs so that savings can be reallocated to legal aid.

The Ministry of Justice also released a Green Paper, *Modernizing British Columbia's Justice System*, that highlights a number of issues affecting justice system performance and discusses key areas that need reform.

As BC's legal aid provider, LSS has direct experience with the problems outlined in the Green Paper. Systemic delays and the cost of court appearances make it more expensive for us to deliver the same level of service year over year. We also see how justice system inefficiencies and the lack of advice and representation services prevent people from resolving their legal issues in a timely manner. This can compound peoples' original problems and lead to additional demands on the provincial justice, social service, and health care sectors.

For these reasons, LSS is committed to improving the efficiency of our justice system, to reducing system costs, and to improving the system's effectiveness in helping people to resolve their legal issues and get on with their lives.

### Request for advice

The Attorney General asked LSS to provide advice on a number of issues, including:

- New legal aid service delivery models that assume no funding increase
- Changes to the LSS tariffs to provide incentives for justice system efficiencies
- The use of telecommunications and the Justice Centre
- Ways that LSS might diversify its revenue stream to expand non-governmental revenue in a manner that will permit funding stability

The Attorney General also requested that, when preparing our advice, we look at experiences in other provinces, consult with justice system stakeholders, and consider the concerns of the bar that resulted in the partial withdrawal of criminal duty counsel services in the first four months of 2012.

## An outcomes-focused justice system

The goal of our proposed reforms is to support a justice system that focuses on outcomes. By “outcomes,” we mean timely, fair, and lasting resolution of legal problems.

This approach benefits not just those who are seeking a resolution to their problems, but the broader justice system and society as a whole. This is because a focus on outcomes will result in more enduring resolutions to the legal challenges that bring individuals to the justice system in the first place.

In civil matters, an outcomes-focused justice system starts with prevention, has timely resolution as its goal and views litigation as a last resort. For example, this might include education programs to assist separating couples and mediation services to help them settle matters on their own so they can avoid costly acrimonious court proceedings.

In the criminal context, an outcomes-focused justice system recognizes an accused person’s need for and right to representation, but also facilitates resolutions that benefit society as a whole by addressing the underlying problems that led to the criminal behaviour, thereby reducing recidivism. For example, in a theft case, police, lawyers, the courts, and corrections might work with social services to help the accused find treatment for mental health issues that led to the theft.

As we prepared this report, we consulted with lawyers, community service agencies, police, and other legal aid plans, and we reviewed literature and evaluations from around the world. We have been struck by the similarity of problems across jurisdictions and by the growing consensus that focusing on outcomes will lead to a better justice system for all stakeholders.

## Principles for making justice work

To support the development of an outcomes-focused justice system, we outline in Part 1 the fundamental principles and building blocks needed to shift from a lawyer-centric, process-centric culture to one that views outcomes as a fundamental metric of success and service to clients as the fundamental means of achieving that success.

## The current state of legal aid in BC

In Part 2, we discuss the current state of legal aid in BC. Legal aid clients are among the province’s most marginalized citizens. They lack the financial means to effectively access the justice system when their families, freedom, or security are at risk. Almost 70% have not graduated from high school, and many struggle with basic literacy. Others face linguistic or cultural barriers. Over 25% are Aboriginal; in some communities, this rises to 80%.

Today, the Legal Services Society has two staff offices and 31 contracted offices throughout the province, and provides services at more than 50 locations including law offices, courthouses, and community agencies. At each of these locations, individuals can get legal information and referrals to other social service agencies, and apply for legal representation. LSS also works with 24 community partners to bring legal aid information to rural and remote communities. Over 50% of eligible applicants receive a referral for representation on the day they apply; over 75% get a referral within five days.

Government funding recently increased by \$2.1 million but has otherwise not been adjusted for inflation over the past decade or kept pace with some other components of the justice system. As a

result, LSS is not able to provide the range of services low-income people need to resolve their legal problems. Nor is LSS able to establish tariffs that will attract and retain lawyers to legal aid work.

## Recommendations for reform

There has been a significant investment in the justice system over the past 15 years, primarily for prosecutorial and judicial services. As pressures within the system mount, it is important to identify where any future investments will have the greatest impact. In Part 3, we have identified a number of ways in which investment in legal aid will support an outcomes-focused and more efficient justice system.

Our recommendations for criminal law initiatives are expanded criminal duty counsel, early resolution referrals, disposition court, and increased use of video bail.

For family and child protection matters, we recommend increasing the availability of existing services by providing more duty counsel and more community-based advice services coupled with assistance for related, non-family legal problems; more unbundled services; and support for mediation programs.

Other recommendations include the use of non-lawyer service providers to assist duty counsel and support justice system efficiencies, poverty law services, increased services for Aboriginal peoples, and greater use of specialized, problem-solving courts such as drug courts or domestic violence courts.

For six of our proposed services, we provide an analysis, based on available data, of the potential savings to the broader justice system. Detailed research is required before full implementation of our proposals. This can best be done through pilot projects to test the underlying assumptions of our recommendations and to gather better data on service costs, savings, and outcomes.

## Next steps

The first stage in pursuing any of these initiatives will be to review Ministry of Justice data and operating assumptions, along with justice reform priorities and our own data. With that information, LSS would be in a position to develop the requisite project charters, budgets, and work plans to support effective implementation of the pilot projects. The timelines for these initiatives would be determined by the availability of resources to support them.

The criminal law initiatives that our preliminary analysis suggests will provide the greatest benefits in terms of outcomes for clients and quantifiable and unquantifiable savings to the justice system are expanded duty counsel services in high volume locations. Next are video and telephone bail, and early resolution referrals and tariff initiatives.

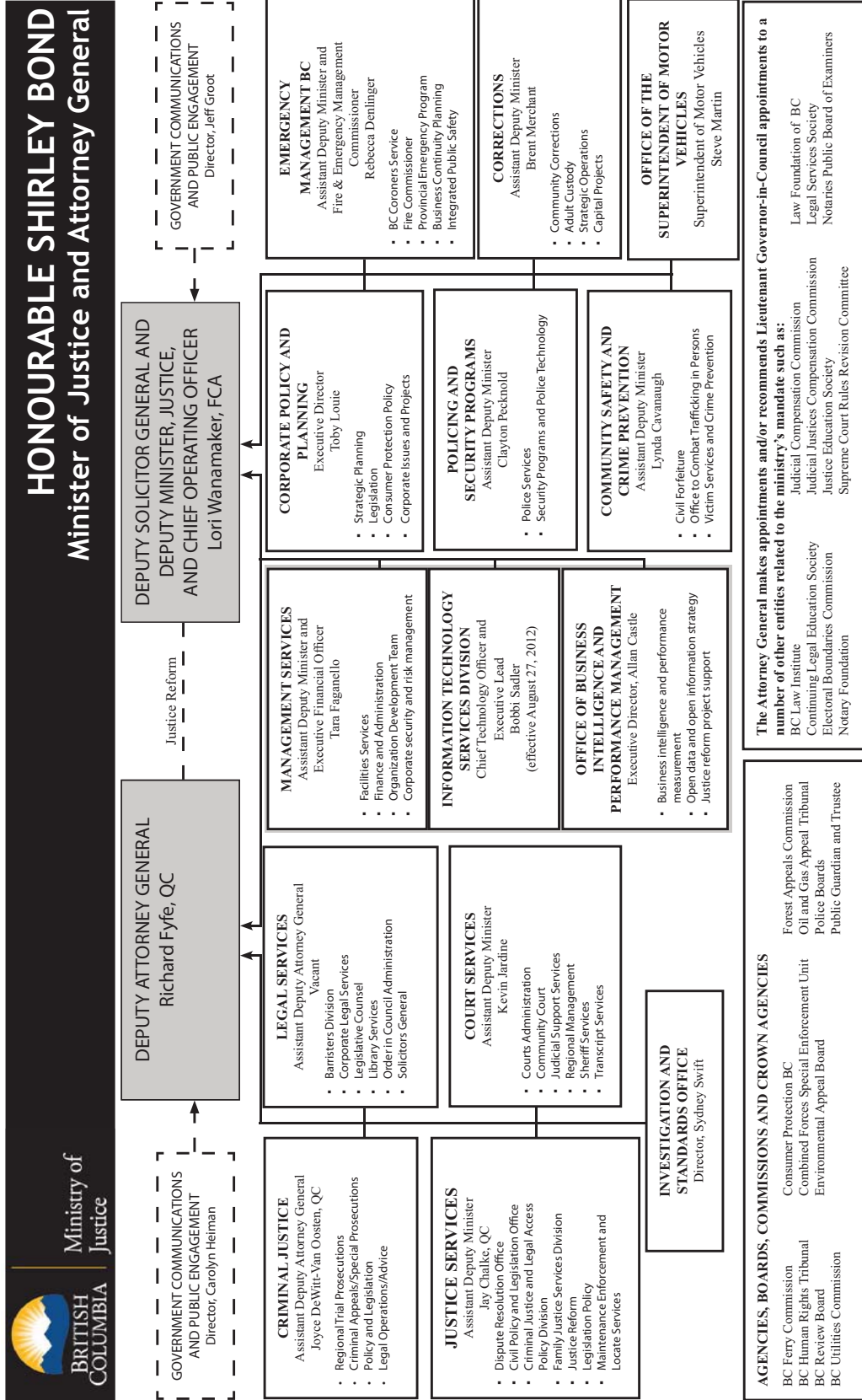
Increasing family law services to address public needs and to support recent changes to family legislation in BC should also be a priority. Given the scarcity of resources in the family justice system, it will be especially important to collaborate with agencies such as the Family Justice Services Division of the Ministry of Justice to plan and implement new or expanded service options. As well, to ensure the right resources are aligned with the most appropriate activities, training and skill development will be important considerations.

Another priority should be the addition of non-lawyer service providers to assist criminal and family duty counsel and to support efficiencies elsewhere in the justice system.

To be successful, reform requires the active commitment of all justice system partners to shared goals and measurable targets, and a collaborative approach to meeting them. Real reform as outlined in this paper will also require new investments in legal aid or reallocating funds within the justice system to support reform initiatives. Justice system savings generated by any enhancements to legal aid services can be measured and redirected to LSS to offset some of the costs of these enhancements. As most savings will be in avoided future costs, tracking the inputs, outputs, and outcomes of piloted services or system changes will be critical to quantifying results to ensure any dollars saved can be reallocated to the most effective projects.

Proposals that initiate a shift to an outcomes-focused justice system can also generate a range of savings that are real, significant, and system-wide, but difficult to quantify. For example, our proposals can create ancillary benefits through incremental improvements in working relationships, breaking down of silos, systems thinking, and process improvements that may vary location by location. Further, because the proposed initiatives focus on outcomes, they will create benefits for clients. For example, when clients achieve early and more stable resolution of their legal issues, they are less likely to experience legal problems in the future, and their related issues – such as health or debt – are less likely to escalate. While these benefits avoid future costs to the justice system and to government, they also generate a positive impact on clients, their families, and their communities that is both profound and immeasurable.

Implementing an outcomes-focused justice system will require strong leadership that might best be delivered through a dedicated Reform Secretariat. LSS is prepared to take an active role in ongoing justice reform discussions and to make justice work for all British Columbians.



# **British Columbia Charge Assessment Review**

Gary McCuaig, Q.C.  
**May 2012**



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## Background to the Review

On February 8, 2012, British Columbia announced a justice reform initiative to identify how the government, judiciary, legal profession, police and others can work together to improve the efficiency and effectiveness of the provincial justice system.

The scope of the reform agenda is set out in a Green Paper entitled “Modernizing British Columbia’s Justice System” that was released with the announcement. The initiative follows an internal audit conducted in 2011 to assess growing resource pressures on the justice system.

Geoffrey Cowper Q.C. was appointed Chair of the Review. He is to consult with stakeholders across the justice system to look at the challenges set out in the Green Paper. He is to identify top issues affecting the public’s access to timely justice and what can be done to ensure that efficiencies already underway have the desired impacts while respecting the independence of the judicial system.

As part of the broader justice system review, Gary McCuaig Q.C. has been engaged to conduct an independent review of the way in which criminal charges are assessed and laid in British Columbia.

British Columbia is one of three provinces that designate Crown prosecutors as the decision makers in the laying of charges. In other provinces, police make the decision to lay charges, with Crown prosecutors reviewing the charges once laid to determine if they will proceed with the prosecution. The relative merits of the systems are to be considered, including whether pre-charge assessment should be maintained, and if so, whether improvements to the system can be made.

## Executive Summary

The issues of court delays and increasing costs are not unique to BC. These are pressing concerns of all governments across Canada.

This Review was undertaken to examine the pre-charge assessment regime in place in BC. There has been a long-standing desire by segments of the police community to revert to a post-charge assessment process. The arguments have been based on constitutional authority and jurisdiction. There is some thought that a post-charge system is more efficient but there is no evidence to support this claim. This topic has been the subject of debate and analysis by a number of provincial Commissions and Inquiries going back to the 1980s. Each of them endorsed the existing system.

On a day to day basis, the two models differ little in any significant manner.

In summary, this Review has considered the following questions:

1. Is the charge standard of 'substantial likelihood of conviction' the appropriate one?
2. Should the Ministry retain the pre-charge assessment model or adopt a post-charge model?
3. What improvements to the assessment process would be appropriate?

After reviewing a portion of the written material on this subject and speaking with over 90 people, I have concluded that the pre-charge assessment regime – the charging standard and the existing assessment processes (as set in the Crown Counsel Manual Guidelines) – should be retained. The basics of the system are sound. Overall, it has worked well for almost 30 years. There is neither a general consensus nor compelling evidence that the process needs to be markedly changed, or that reverting to a post-charge system would increase efficiencies.

The Crown has legitimate needs and concerns in the process:

1. The need both legally and practically to have most files in a 'disclosure-ready' condition before or immediately after a charge is laid.
2. Recognition that its resources to assess and prosecute and the resources of the courts to hear cases are finite and the need to conserve all of these, as far as practicable, for more serious cases. The Crown is the most effective gatekeeper.

However, there are two parts of the process that should be examined to address police concerns:

1. Police resources needed to satisfy the Report to Crown Counsel (RTCC) requirements. This issue can be addressed by examining the types of cases where a charge assessment might be done (without lessening the quality of the assessment) using an abbreviated RTCC. As well, the police might be encouraged to consider alternate forms of investigative tools in certain cases to lessen their own workload in compiling reports.
2. Whether more public order offences/administrative offences should be prosecuted in some locales than now is believed to happen. This examination should include both a statistical component and whether the public interest factors, listed in the Charge Assessment Guidelines, need clarifying commentary, as they may, as now structured, suggest conflicting directions. For example, the need to protect the integrity of the justice system is a factor in favour of prosecution: it is a factor against prosecution if a conviction is likely to result in a very small or insignificant penalty. This scenario often presents itself in administrative offences.

## Introduction and Terms of Reference

The public controversy in BC is focused on delays and court costs. It is important to remember that these issues are not unique to BC. Every city of any size and every province in Canada is struggling with the same issues. They are topics of almost endless discussion with officials of provincial and federal governments.

In conducting this Review, I have spoken to over 90 people: judges, Crown Counsel, defence lawyers, correctional officials, legal aid and government officials (past and present), and others working in or interested in criminal justice. I have also had the invaluable assistance of Ministry officials and staff, particularly James Deitch, Wendy Jackson, Paula Bowering, Amber Ward and Dubravka Ceganjac. They have made my job immeasurably easier.

Without exception, all to whom I spoke gave generously of their time to educate me and help focus my thoughts. To them I extend my thanks. They are acutely aware of their responsibilities to their communities, the public and the accused. They are all genuinely committed to making the system better, more responsive, and fair to all.

In summary, I have been asked to examine the Charge Assessment process in use in British Columbia and determine:

1. Is the charge standard of 'substantial likelihood of conviction' the appropriate one?
2. Should the Ministry retain the pre-charge assessment model or adopt a post-charge model?
3. What improvements to the assessment process can be recommended?

In addition to answering these questions, I would like this Report to serve an educational purpose for those unfamiliar with the assessment process. So it is best to start by setting out some truths and caveats:

- Our criminal justice system is not an inquiry into truth. It is not about whether an accused actually committed a crime but whether there is sufficient evidence to prove that he committed it. To put it simply: it is not about whether an accused 'did it' but whether the Crown can prove it.
- Our criminal justice system, which has evolved and been refined over centuries, can be slow to respond to societal changes and public expectations. This is as it should be, as it is designed to provide a fair, rational hearing to an accused on the evidence presented, as free as possible from extraneous emotion.

The limited timeline for this Review has largely eliminated the possibility of gathering statistical data to support my analysis and conclusions. My comments and conclusions are based on the opinions of experienced and informed observers and system participants. My

recommendations are meant only to highlight areas that may benefit from a more detailed study.

There is no system that cannot be improved upon. But to justify changing fundamental and long standing practices, there must be compelling evidence that significant positive results will (not may) be achieved. Change without making the end product demonstrably better is disruptive, costly and serves no purpose.

### The Context in British Columbia in 2012

The justice system in Canada has deep roots both here and in Britain. It is the product of centuries of experience and refinements. It is far from perfect. There are other legal systems but this is the one we have chosen.

It is not a system amenable to 'quick fixes'. Our criminal law is the purview of the federal government, but the responsibility for making the system work and paying for it falls largely to the provinces. Add to that the fact that the various players – prosecutors, police, defence counsel and the judiciary – have historic roles and legally recognized 'independences' that each has jealously guarded over time and the challenges for problem-solving become apparent.

Looming over all of the provincial responsibilities to manage the system locally is the Charter of Rights – the right to a trial without undue delay, the right to make full answer and defence – and pronouncements of the Supreme Court of Canada – the right to full disclosure of the Crown's evidence. These contribute significantly to the length and complexity of the court process but are the laws of the land and beyond the jurisdiction of any provincial government to effectively limit or change.

It is understandable that those answerable to the public, who have many other calls on their time besides the justice system, seek fast and measurable improvements. Daily stories of court delays and costs and sensational trials dominate the media. In turn, public pressure mounts to 'do something'. But the various parts of the system are in practice interdependent. Change in one part affects all the others.

So those whose responsibility it is to manage and fund the system are in a very difficult position. The province must fund a system over which it has limited influence or control, putting money into one part sets up a domino effect and the resources available for all areas – justice, health care, education, social services, and many others – must now must be stretched further than in the past.

There is a move to use business processes – benchmarks, outputs, outcomes and the like – to improve efficiencies. These can be of some limited use in the criminal justice context. They can highlight trends and show that long-held assumptions may no longer be accurate. They can help focus on areas that need attention. But from there the value is questionable. Care must be taken as to what conclusions are drawn from statistics. The criminal justice system does not produce a tangible product or outcome. What it seeks to achieve is a just and timely result for all involved, following a fair process and trial. This is a quality outcome not fully measurable by business processes.



If there is a crisis of public confidence in the justice system (assuming that public surveys and media comments are an accurate gauge of this), the best way to rebuild that trust is to try to do the right thing on every case and ensure, as far as possible that justice is done. And to explain to the public much better than in the past how the system works and what we as a society should realistically expect of it.

### The Vancouver Riot Charges

The controversy surrounding criminal charges arising out of the 2011 Vancouver Stanley Cup riot provides a very timely and useful springboard to discuss parts of the charge assessment process.

There has been much criticism over the length of time that it has taken to bring charges to the courts. This demonstrates some of the general misunderstanding of the process.

It is clear that the investigation and prosecution involve almost unprecedented police and Crown resources. Accused number in the hundreds. The video evidence alone is comprised of thousands of clips. Lastly, the police and prosecution teams working on this project are not extra resources but have been reassigned from other duties.

Any new project, particularly of this size, will involve some trial and error. But rather than using the riot prosecutions as an example of what is wrong with the charge assessment system, they should be viewed as an example of how we would wish it could operate on all occasions.

To answer the criticisms:

- It is simply not feasible to charge everyone who can be charged. It is necessary to closely examine all of the investigations to focus on the most involved persons.
- Some of the trials will inevitably involve lengthy evidentiary arguments that may result in landmark rulings.
- To obtain an appropriate sentence, Crown Counsel must show the full extent of an offender's involvement. To do this takes hours of review of the evidence. It is rarely as simple as seeing someone throw a brick through a window. The main charges are those of participating in a riot, not wilful damage.
- As a matter of law, an accused is entitled to disclosure of all of the evidence against him. The earlier in the process that he sees full disclosure and the strength of the case he faces, the sooner his counsel can give him informed advice as to whether he should plead guilty. Indeed, no counsel would advise a guilty plea without seeing all of the evidence against his client.
- Comparison to other jurisdictions does not advance the argument. There has been comment that the UK dealt with its 2011 rioters much more quickly and why can't we do the same? Such comments overlook that the UK legislation provides more

options and broader prosecution and court powers than exist in Canada. As well, several of the more publicized sentences meted out early have been reduced by appeal courts.

The police and prosecution have weathered much criticism for what has or has not happened in the court process. This is both inaccurate and unfair. They have devoted significant personnel to this investigation. Both have been working full time for months to organize a huge amount of material so that the right people can be brought before the courts with strong evidence and the appropriate charges.

### A History of Charge Assessment in British Columbia

Up until the mid-1970s, a variety of post-charge assessment systems were in use in various municipalities in the province.

In 1974, a more uniform charge assessment practice began to develop with the establishment of the Crown Counsel system. At that time, significant court delays and stays flowing from inadequate police reports and unprovable charges had become a problem. There was still no one charge approval standard in use throughout the province. Some prosecutors used a prima facie case test, others a "reasonable chance of conviction" test and still others required that the evidence needed to establish the case beyond a reasonable doubt.

In 1982, a Ministerial Task Force recommended that the Crown take over the charging function to help improve the quality both of police reports and cases moving forward. These recommendations were adopted and widely credited with improving efficiencies and saving costs.

Circa 1983, the Attorney General's Department adopted a two-tiered test similar to what it is today: an evidentiary threshold of substantial likelihood of conviction, followed by a consideration of public interest factors. The decision to lay charges remained that of the Crown. The basics of that system continue to today.

The existing regime has not gone unchallenged. It has been the subject of discussion - directly or otherwise - on several occasions in BC:

1987 - Access to Justice: Report of the Justice Reform Committee - Ted Hughes Q.C.

1990 - Discretion to Prosecute Inquiry - Stephen Owen Q.C.

2010 - Special Prosecutor Review - Stephen Owen Q.C.

2011 - The Frank Paul Inquiry - William Davies Q.C.

The Hughes Commission in 1987 confirmed that the prosecution should retain the charging function but recommended that there should be an appeal procedure available to the police when they disagree with a Crown decision not to lay charges.

Stephen Owen, in his *Discretion to Prosecute Inquiry* (1990), examined the assessment standard and process in detail. He heard the arguments for and against retaining the existing system but found no compelling reason to recommend changing the regime. He did recommend that the charging standard be changed from 'substantial likelihood' to 'reasonable likelihood' (Volume 1 pp. 98-104).

In response, the Attorney General's Department struck a committee to consider Commissioner Owen's recommendations. The committee decided against changing the standard but did clarify the policy as to what the wording meant. As well, out of this came the Crown Counsel Act which statutorily recognized the independence of the Crown Counsel.

Since then, the charging Policy and Guideline has been periodically refined and added to, particularly:

- The addition of the 'exceptional case' standard; and
- An increase in the number of listed public interest factors that Crown Counsel must consider.

## The Charging Standard

The Charge Assessment Guidelines of the BC Crown Counsel Policy Manual read:

*Under the Crown Counsel Act, Crown Counsel have the responsibility of making a charge assessment decision which determines whether or not a prosecution will proceed.*

*In discharging that charge assessment responsibility, Crown Counsel must fairly, independently, and objectively examine the available evidence in order to determine:*

- 1. Whether there is a substantial likelihood of conviction; and, if so,*
- 2. Whether a prosecution is required in the public interest.*

*A substantial likelihood of conviction exists where Crown Counsel is satisfied there is a strong, solid case of substance to present to the Court.*

*Once Crown Counsel is satisfied that there is a substantial likelihood of conviction (the evidentiary test), Crown Counsel must determine whether the public interest requires a prosecution by considering the particular circumstances of each case and the legitimate concerns of the local community. Public interest factors include those outlined below.*

*Exceptional circumstances may require that a prosecution proceed even though the usual evidentiary test is not satisfied. Such circumstances will most often arise in cases of high-risk violent or dangerous offenders or where public safety concerns are of paramount consideration. In these cases, charging decisions must be approved by Regional or Deputy Regional Crown Counsel and the evidentiary test is whether Crown Counsel is satisfied that there is a reasonable prospect of conviction.*

*The requirement to meet the two-part charge assessment standard, consisting of the evidentiary test and the public interest test, continues throughout the prosecution.*

There follows a discussion of general principles:

*The independence of Crown Counsel must also be balanced with measures of accountability. Principled charge assessment decisions are assured when Crown Counsel experienced in assessing evidence exercise discretion in accordance with Branch public policies when reviewing the available evidence and applicable law.*

*During the charge assessment process, Crown Counsel does not have the benefit of hearing the testimony of Crown witnesses, either in direct or cross-examination, nor the defence evidence, if any. During the course of a preliminary hearing, when preparing for trial, or during trial, the Crown's case may be materially different than at the charge assessment stage. The requirement to meet the charge assessment standard continues throughout the prosecution.*

*The Criminal Justice Branch recognizes that the police have the authority to lay an Information; however, Crown Counsel have the ultimate authority to direct a stay of proceedings. Therefore, it is expected that the police will lay an Information only after the approval of charges by Crown Counsel, or, if charges are not approved, upon exhaustion of an appeal of that decision by the police (see policy CHA 1.1).*

*Recognizing that the charge assessment responsibility of Crown Counsel and the investigative responsibility of the police are independent, cooperation and effective communication between Crown Counsel and the police are essential to the proper administration of justice. In serious cases, or those of significant public interest, Crown Counsel discuss with the police, where practicable, their intention to not approve a charge recommended by the police (a 'no charge' decision).*

#### *Evidentiary Test-Substantial Likelihood of Conviction*

*The usual evidentiary test to be satisfied is whether there is a substantial likelihood of conviction.*

*A substantial likelihood of conviction exists where Crown Counsel is satisfied there is a strong, solid case of substance to present to the Court. In determining whether this standard is satisfied, Crown Counsel must determine:*

1. What material evidence is likely to be admissible;
2. The weight likely to be given to the admissible evidence; and
3. The likelihood that viable, not speculative, defences will succeed.

#### **Comment**

British Columbia uses the standard of 'substantial likelihood' while all other provinces (including Quebec and New Brunswick, which are also pre-charge assessment provinces) use the standards of 'reasonable prospect' or 'reasonable likelihood'. Articles and the Charging Guideline itself suggest that there is an articulable difference and that 'substantial' connotes a higher or stricter test than 'reasonable'.

Some police officers feel that there is a difference, as do some Crown Counsel. Others see no difference.

The use of the word 'substantial' is not incidental, nor has it been arrived at lightly. There has been considerable debate about it over time (see History in BC). It has been in use since the 1980s and its interpretation has been refined in the policy Guideline since that time. Nor should it be overlooked that Commissioner Owen, in his 1990 Report, recommended that the test be changed to that of 'reasonable likelihood', and that the Attorney General's Department deliberately chose to retain the "substantial likelihood" standard.

In practice, the views again diverge. A number of police, Crown Counsel, and judges were asked whether they saw any real difference in the application of the different standards. There was far from any consensus. Some felt that there would be no difference in assessing a file; others felt that there would be. This is consistent with the divergent opinions expressed in the Decision to Prosecute Inquiry back in 1990.

It is difficult to envision a situation in which the assessment of the case – whether to charge or not charge – would be different using the different standards. To rephrase in another way: what a prosecutor asks himself/herself in making an assessment decision is: “Is the admissible evidence such that I believe that I can prove this case beyond a reasonable doubt?”

If there is in fact a practical difference, the cases where there would be a difference in the charging decision would be few.

An obvious question has been asked – if there is little or no practical difference between the substantial and reasonable standards, and since all other Canadian jurisdictions use reasonable, then why should BC not adopt the reasonable standard, particularly since Stephen Owen recommended it in 1990?

Firstly, it is useful to consider that to change to a reasonableness standard could have several negative consequences:

- A significant mindset change in all of its Crown prosecutors and officials, as all have been working with the ‘substantial’ standard for almost 30 years.
- Crown Counsel may have less confidence in their own decisions with resulting potential delays in making charge decisions.
- A potential lowering of the evidential bar over time.
- A potential reduction in the quality of police investigations/reports, since the bar could be considered as lowered, even by a small margin.

As well, its long history in BC and the fact that the Ministry made a considered, principled decision to retain it previously.

As noted earlier, a change in the standard or process must be justified by a real probability of positive change. This is not so when we talk of the actual charging standard. BC may be alone in its choice of the standard but that does not mean that the choice is wrong. There is no evidence that changing it would bring tangible benefits. Whatever issues there may be with the process do not arise from the standard.

This would be change for the sake of change.

### Public Interest Test

Once Crown Counsel is satisfied that the evidentiary test is met, Crown Counsel must determine whether the public interest requires a prosecution. Hard and fast rules cannot be imposed as the public interest is determined by the particular circumstances of each case and the legitimate concerns of the local community. In making this assessment, the factors which Crown Counsel will consider include the following:

#### 1. Public Interest Factors in Favour of Prosecution

It is generally in the public interest to proceed with a prosecution where the following factors exist or are alleged:

- (a) the allegations are serious in nature;
- (b) a conviction is likely to result in a significant sentence;
- (c) considerable harm was caused to a victim;
- (d) the use, or threatened use, of a weapon;
- (e) the victim was a vulnerable person, including children, elders, spouses and common law partners (see policies ABD 1, CHI 1, ELD 1 and SPO 1);
- (f) the alleged offender has relevant previous convictions or alternative measures;
- (g) the alleged offender was in a position of authority or trust;
- (h) the alleged offender's degree of culpability is significant in relation to other parties;
- (i) there is evidence of premeditation;
- (j) the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor (see policy HAT 1);
- (k) there is a significant difference between the actual or mental ages of the alleged offender and the victim;
- (l) the alleged offender committed the offence while under an order of the Court;
- (m) there are grounds for believing that the offence is likely to be continued or repeated;
- (n) the offence, although not serious in itself, is widespread in the area where it was committed;
- (o) the need to protect the integrity and security of the justice system and its personnel;
- (p) the offence is a terrorism offence;
- (q) the offence was committed for the benefit of, at the direction of or in association with a criminal organization.



2. Public Interest Factors Against Prosecution

*It may not be in the public interest to proceed with a prosecution where the following factors exist or are alleged:*

- (a) a conviction is likely to result in a very small or insignificant penalty;*
- (b) there is a likelihood of achieving the desired result without a prosecution by the Criminal Justice Branch. This could require an assessment of the availability and efficacy of any alternatives to such a prosecution, including alternative measures, non-criminal processes or a prosecution by the Federal Prosecution Service. Crown Counsel need not conclude, in advance, that a prosecution must proceed in the public interest if a referral for an alternative measure is not acceptable. Information with respect to the suitability of a candidate for diversion or alternative measure is a factor to be taken into consideration by Crown Counsel in reaching a final charge assessment decision;*
- (c) the offence was committed as a result of a genuine mistake or misunderstanding (factors which must be balanced against the seriousness of the offence);*
- (d) the loss or harm can be described as minor and was the result of a single incident, particularly if caused by misjudgment;*
- (e) the offence is of a trivial or technical nature or the law is obsolete or obscure.*

3. Additional Factors to be Considered in the Public Interest

- (a) the youth, age, intelligence, physical health, mental health, and other personal circumstances of a witness or victim;*
- (b) the personal circumstances of the accused, including his or her criminal record;*
- (c) the length and expense of a prosecution when considered in relation to the social benefit to be gained by it;*
- (d) the time which has elapsed since the offence was committed;*
- (e) the need to maintain public confidence in the administration of justice.*

### Comment

The decision to discontinue or proceed with a prosecution after consideration of the relevant public interest factors ultimately represents a decision by Crown Counsel about what is the appropriate use of limited resources and what constitutes the appropriate response to an offence in a particular community. It is also an acknowledgement of the long-accepted view that not all criminal conduct needs to be prosecuted and that resorting to the criminal court process should generally be the last response to anti-social behaviour, rather than the first.

The public interest factors are aimed in part at sorting out those offences that can be dealt with more appropriately by means other than the court system. This could mean that the alleged offender is dealt with in an alternative way (such as by a diversionary program), or it could mean that the offence is simply not prosecuted. For example, an offence might be relatively minor and result in a very small penalty in the event of a conviction. These factors would weigh against a prosecution. However, it may be that the same relatively minor offence is widespread in the community and, as such, requires prosecution in order to achieve a deterrent effect (pp 35-36 Pre-Charge Assessment in British Columbia; A Review of the Process – Criminal Justice Branch Ministry of the AG January 2012).

The number of public interest factors has been increased over the years (from 5 to 14). Most other provinces have similar factors (some less detailed) in the public interest branch of their charging standards.

There has been no suggestion that the listed factors are wrong or in need of change. It is in their application that some criticisms have been made (see The Charge Assessment Process).

#### Exceptional Cases

Exceptional circumstances may require that a prosecution proceed even though the usual evidentiary test is not satisfied. Such circumstances will most often arise in cases of high-risk violent or dangerous offenders or where public safety concerns are of paramount consideration. In these cases, charging decisions must be approved by Regional or Deputy Regional Crown Counsel and the evidentiary test is whether Crown Counsel is satisfied that there is a reasonable prospect of conviction.

#### Evidentiary Test in Exceptional Cases

Exceptional circumstances may require that a prosecution proceed even though the usual evidentiary test described above is not satisfied. Such circumstances will most often arise in cases of high-risk violent or dangerous offenders or where public safety concerns are of paramount consideration. Such charging decisions must be approved by Regional or Deputy Regional Crown Counsel.

The evidentiary test in such cases is whether Crown Counsel is satisfied that there is a reasonable prospect of conviction. This test is higher than that of a prima facie case. A weighing of admissible evidence and viable defences is not required. Crown Counsel should consider:

1. what material evidence is arguably admissible;
2. whether that evidence is reasonably capable of belief; and
3. whether that evidence is overborne by any incontrovertible defence.

### Comment

In 1996, the charge assessment policy was amended by the addition of the exceptional case standard. It was aimed at high-risk or violent offenders or where the public safety concerns were heightened and permitted Crown Counsel to approve a charge in those instances if there was a reasonable, not substantial, prospect of conviction. Such approval had to be preceded by consultation with Regional Crown Counsel (RCC).

In 1999, this portion of the Guideline was amended by setting out what Crown Counsel had to consider before charge approval. It also now required the consent of RCC or Deputy RCC before charge approval.

This part of the guideline is a compromise between two approaches. It was suggested at one point that this type of case be dealt with by allowing Crown Counsel to approve a charge based solely on the public interest factors. This argument was rejected.

Although there may be an argument that this prong of the policy means that not everyone is subject to the same standard, it is preferable to allowing a charge to be laid without any evidentiary standard. The additional safeguard of senior Crown approval is present.

This section of the standard has been used in only a handful of cases and is satisfactory as drafted.

### Charging Standards – Other Jurisdictions

These charging standards are found in the prosecution policies of each respective province:

Alberta: reasonable likelihood of conviction – a reasonable jury, properly instructed, is more likely than not to convict the accused of the charge(s) alleged.

Saskatchewan: reasonable likelihood of conviction.

Manitoba: reasonable likelihood of conviction.

Ontario: reasonable prospect of conviction – does not require a probability of conviction.

Prince Edward Island: reasonable likelihood of conviction – the prospect of displacing the presumption of innocence must be real.

Nova Scotia: realistic prospect of conviction – the prospect of displacing the presumption of innocence must be real.

New Brunswick: reasonable prospect of conviction – more likely than not to convict.

Newfoundland: reasonable likelihood of conviction – the prospect of displacing the presumption of innocence must be real.

Public Prosecution Service of Canada: reasonable prospect of conviction.

#### Comment

In formulating its standard, each province has engaged in a rigorous examination of the literature on point and adopted the standard it has. None of these were arrived at without thought and discussion.

In addition to the sufficiency of evidence branch, every province has a second branch to be considered only after Crown Counsel has determined that there is sufficient evidence to proceed. These are the public interest factors which may affect the decision to prosecute. Each province has a similar list of factors. These can be reviewed by the prosecutor to decide either in favour of or against proceeding. They recognize established law and common sense that not every crime, however provable, need be prosecuted. Each case must be assessed on its own merits.

## The Charge Assessment Process

The Guideline reads as follows:

*In all cases, in applying the charge assessment standard, the important obligations of Crown Counsel are to:*

- 1. Make the charge assessment decision in a timely manner, recognizing the need to expedite the decision where an accused is in custody, where a Report to Crown Counsel requests a warrant, or where the charge involves violence;*
- 2. Record the reasons for any charge assessment decision which differs from the recommendation of the police in the Report to Crown Counsel;*
- 3. Where appropriate, communicate with those affected, including the police, so that they understand the reasons for the charge assessment decision; and*
- 4. Consider whether proceeding by indictment after the expiry of a limitation period could constitute an abuse of process based on any failure by Crown Counsel or the police to act in a timely manner.*

### Report to Crown Counsel

*In order that Crown Counsel may appropriately apply the charge assessment standard, the Report to Crown Counsel (RTCC) should provide an accurate and detailed statement of the available evidence. The following are the basic requirements for every RTCC whether the information is provided electronically or not:*

- 1. A comprehensive description of the evidence supporting each element of the suggested charge(s);*
- 2. Where the evidence of a civilian witness is necessary to prove an essential element of the charge (except for minor offences), a copy of that person's written statement;*
- 3. Necessary evidence check sheets;*
- 4. Copies of all documents required to prove the charge(s);*
- 5. A detailed summary or written copy of the accused's statement(s), if any;*
- 6. The accused's criminal record, if any; and*
- 7. An indexed and organized report for complex cases.*

*If the RTCC does not comply with these standards it may be returned to the investigator with a request outlining the requirement to be met.*

### Comment

From all accounts and statistics, Crown Counsel make their charging decisions (and approve a majority of RTCCs on first submission) in a timely manner. According to the 2010/2011 Criminal Justice Branch Annual Report, 71% of RTCCs are reviewed within 5 days of submission.

In most cases, the reasons given for a no-charge decision or a request for further information are in accordance with the Guideline. The police do seek greater consistency in the decisions themselves and in reasons given for charge rejection of similar offences. This can vary according to location.

The Ministry has undertaken a number of initiatives to ensure the proper processing of RTCCs and resolution of issues with the police:

- Police/Crown liaison committees have been established at both a senior level for systemic issues and an operational level for day-to-day problems.
- Initial charge assessment is done by experienced Crown Counsel (although all counsel continue to assess the evidence during the life of a case). In those offices where numbers allow, there is a separate assessment section staffed by experienced counsel. In smaller offices, more experienced counsel does charge assessment whenever possible.
- The Ministry provides training for its staff at Crown conferences and through instructional materials available on the Branch intranet site.
- The Ministry has provided materials and training for police in the preparation of an RTCC. Of particular value is the recent creation of a checklist for the police setting out what is needed in an RTCC package for various offences.
- In high volume locales, Crown offices have instituted procedures to deal with off-hours work, such as having assessment Crowns and staff on duty at night and on weekends.
- The police and the Ministry have entered into MOUs (Memorandums of Understanding) detailing the expectations of the parties with respect to RTCCs and Disclosure.

In speaking to various police services, one common concern was the view that Crown Counsel too often reject the laying of administrative offences (fail to appear in court/fail to comply with bail conditions/breach of probation) and public order offences (wilful damage/causing a disturbance). Police view these types of charges as important for offender management in their communities. That is, offenders who breach bail or probation conditions must know that they cannot re-offend with impunity. Otherwise, there is no deterrent to their continuing misconduct.

Crown Counsel have a different perspective:

- These charges often go hand in hand with substantive charges. Often, laying a separate breach charge would accomplish no more than proceeding on the substantive charge and advising the judge of the breach at sentencing.
- A stand-alone administrative charge may well be considered so minor by the court that only a nominal penalty would result, when alternative measures might accomplish the same end – making the accused responsible for his conduct.
- Occasionally, the offence itself is just part of the accused's more frequent anti-social (but not criminal) conduct and the proper context is not adequately detailed in the RTCC.

However, where these kinds of charges are recommended by the police, several of the public interest factors in the Guideline seem at odds with one another:

#### Public Interest Factors in Favour of Prosecution

*It is generally in the public interest to proceed with a prosecution where the following factors exist or are alleged:*

- (a) *The alleged offender has relevant previous convictions or alternative measures;*
- (b) *The alleged offender committed the offence while under an order of the Court;*
- (c) *The offence, although not serious in itself, is widespread in the area where it was committed;*
- (d) *The need to protect the integrity and security of the justice system and its personnel.*

#### Public Interest Factors Against Prosecution

*It may not be in the public interest to proceed with a prosecution where the following factors exist or are alleged:*

- (a) *A conviction is likely to result in a very small or insignificant penalty;*
- (b) *There is a likelihood of achieving the desired result without a prosecution by the Criminal Justice Branch. This could require an assessment of the availability and efficacy of any alternatives to such a prosecution, including alternative measures, non-criminal processes or a prosecution by the Federal Prosecution Service. Crown Counsel need not conclude, in advance, that a prosecution must proceed in the public interest if a referral for an alternative measure is not acceptable. Information with respect to the suitability of a candidate for diversion or alternative measure is a factor to be taken into consideration by Crown Counsel in reaching a final charge assessment decision;*
- (c) *The loss or harm can be described as minor and was the result of a single incident, particularly if caused by misjudgment;*
- (d) *The offence is of a trivial or technical nature or the law is obsolete or obscure.*

**Additional Factors to be Considered in the Public Interest**

- (a) the youth, age, intelligence, physical health, mental health, and other personal circumstances of a witness or victim;*
- (b) the personal circumstances of the accused, including his or her criminal record;*
- (c) the length and expense of a prosecution when considered in relation to the social benefit to be gained by it;*
- (d) the need to maintain public confidence in the administration of justice.*

These competing factors can cause confusion between Crown Counsel and investigators and need to be examined more closely to determine if their respective views on these types of charges can be brought more into line with each other.



## The Charge Assessment Decision – Police Appeal

The Ministry Guidelines set out an appeal procedure when the police disagree with a charge assessment decision:

### Policy

*Where the police disagree with a charge assessment decision, they should discuss their concerns with the Crown Counsel who made the decision and then follow the appeal procedure outlined below if not satisfied with that discussion.*

### Appeal Procedure

*After discussing their concerns with the Crown Counsel who made the decision and if not satisfied with that discussion, the police should contact Administrative Crown Counsel as the first step in appealing a charge assessment decision.*

*If the matter is not resolved following a discussion with Administrative Crown Counsel, and a Chief Constable, Officer in Charge of a detachment or more senior officer of the RCMP disagrees with the charge assessment decision, Regional Crown Counsel may be asked to review the decision and respond to the police.*

*If a Chief Constable, Officer in Charge of a detachment or more senior officer of the RCMP, disagrees with the decision of Regional Crown Counsel, the Assistant Deputy Attorney General may be asked to conduct a further review of the charge assessment decision and respond to the police.*

*If upon exhaustion of this appeal process the police decide to swear an Information, it is anticipated that it would be sworn by, or on behalf of, a Chief Constable or the Assistant Commissioner of the RCMP, as the case may be, and that the Assistant Deputy Attorney General would be notified in advance of the Information being sworn.*

*Where Information has been sworn by the police contrary to a charge assessment decision by Crown Counsel without exhaustion of the appeal process outlined above, the Private Prosecutions policy applies (see policy PRI 1).*

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**Comment**

This was added to the Guideline following the recommendation of the Hughes Commission in 1987.

By all reports, it has never needed to be carried through to its ultimate end where the police have laid an Information against all advice from the Crown. Where there have been disagreements, they have been resolved through discussion between the police and Crown Counsel.

This is one aspect of this Guideline that should be amended. If a dispute goes to the Assistant Deputy Attorney General and the police lay an Information, the appointment of a Special Prosecutor should be mandatory, rather than leaving the decision to be made on a case-by-case basis. By the time the last stage is reached, both the proper administration of justice and its appearance dictate that someone other than Crown Counsel conducts the prosecution.

## Pre and Post-charge Assessment – A Comparison

### Pre-Charge

In a pre-charge regime, a police officer will investigate an offence and then prepare a Report to Crown Counsel (RTCC), including recommended charges, and forward it to the Crown. Only if Crown Counsel is satisfied that the evidence is sufficient to meet the Ministry's charging standard (evidentiary and public interest factors) will a charge be laid.

Sequence Summary:

1. *Investigation*
2. *Crown Assessment*
3. *Information Laid*

### Post-Charge

In a post-charge regime (all provinces except British Columbia, New Brunswick, and Quebec), an officer will investigate an offence and lay what he views as the appropriate charge(s). As soon as a charge is laid, a police report containing the evidence (or some of it) is forwarded to the prosecutor in time for the accused's first court appearance. As soon as the prosecutor has the police report, he /she will determine whether the evidence meets the charging standard of that province – evidentiary and public interest factors – and decide whether the charge should continue or be stayed.

Sequence Summary:

1. *Investigation*
2. *Information Laid*
3. *Crown Assessment*

### Comments

It cannot be overemphasized that in a post-charge system, once a charge is laid, it does not simply appear in a trial court months later without any assessment by Crown Counsel.

From the accused's first appearance, the Crown has a duty to continually assess the case according to that province's charging standard. This standard is similar in all provinces and is at a higher level (reasonable likelihood/reasonable prospect) than the police require (reasonable grounds) to lay a charge. If at the beginning, or at any time afterwards, the evidence fails to meet the charging standard, the charge must be stayed.

Every post-charge province has developed internal processes in its prosecution services to encourage the streamlining of issues and resolution of charges.

In all provinces, including BC, the courts, as part of modern court and case management, require the prosecution and defence to appear at an interim court proceeding(s) on more serious cases to ensure that they have discussed the case and either narrowed the trial issues or settled the case.

In either system, late or last minute stays can happen for a variety of reasons: missing/deceased witnesses, additional evidence putting the circumstances in a new light, and/or a change in attitude of the victim.

There is less difference between the two systems than appears on the surface. One of the only real differences is when the evidence is assessed by Crown Counsel:

- In a pre-charge regime, the adequacy of the investigation is assessed at an earlier stage. This benefits the efficiency of the court system but has some drawbacks, notably for police in the resources required to prepare an RTCC. As a plus, cases which for a variety of reasons ought not to go further are stopped or diverted, saving valuable police time from being wasted attending court.
- In either regime, the police will be required to provide an equal amount of information to the Crown long before the trial date, whether before the charge is laid or at some point after arrest and first appearance. The only difference is when it is provided.

Lastly and very importantly, in almost all post-charge provinces, the police and prosecution services have entered into formal or informal protocols calling for pre-charge consultation in serious cases and/or in specialized areas (such as larger frauds in Alberta). This effectively converts the process to a pre-charge approval regime, as the police would be very reluctant to lay a charge in a case where the Crown was of the view that there was insufficient evidence.

Such protocols also establish a mindset in the parties for other types of cases, so that there is little hesitation in either the investigator or Crown Counsel to call his counterpart for advice or additional information.

## Pre- and Post-Charge Assessment – Pros and Cons

The main question asked by this Review – whether the province should revert to a post-charge system – assumed that it would be one in which the police would lay all criminal charges.

However, during discussions with various police services, a third option was raised: to allow the police to lay all summary conviction and certain lesser hybrid charges using a ‘reasonable likelihood of conviction’ standard.

What follows is not any adverse comment on the ability of the police to lay charges, nor to understand what is needed for a successful prosecution. The police, with significant additional costs and adjustments, could do the job. But the Crown can do it better.

As has been noted elsewhere, neither pre- nor post-charge regime is perfect, nor is either one inherently flawed. Both aim for the same result. It is a question of which regime a province chooses to enact.

The respective arguments (more fully set out in the Discretion to Prosecute Inquiry (1990) at pp. 20-27) as have been stated to me are:

### Reverting to Post-Charge Assessment

#### 1. Police Independence

**Police Position:** It would affirm the historical independence and jurisdiction of the police to lay charges (Section 504 (s.504) of Criminal Code).

**Crown Position:** The police s.504 argument is seductive but misleading. The issues of independence and authority are separate. S.504 has been in the Code for almost a century and was inserted at a time when police not only investigated crime but also acted as the prosecutor. It predates the creation of separate prosecution services.

Police independence lies in its investigative authority. No one can or should improperly influence them in who or what or how they investigate. The charge assessment system is not connected to that authority. There is no case or charge to assess until the police bring one forward.

Under s 504 of the Code, anyone can lay an Information. This does not give exclusive authority to do so to the police. So it follows that the charge assessment system in BC does not contravene the law. The police services in BC agreed decades ago, and confirmed that agreement more recently by the MOUs signed by the police and the province, to the system now in place. They still lay the charges, subject to approval of the Crown.

## 2. Transparency

Police Position: The process is not open.

This argument has several aspects:

1. There are times when no explanation, at least initially, is given to the investigator for a no-charge decision. This is not productive to either the education of the investigator as to what he needs for a successful investigation nor to the Crown/police relationship.
2. When the police do not know why a charge was not approved, they cannot explain the decision to the victim and may in turn be criticized by the victim. In fact, the police have done all that they believe is necessary.
3. The victim does not get his “day in court” and doesn’t know why.
4. If no charge is approved, the offender’s identity remains unknown to the public.

In a post-charge regime, if a charge is laid by the police and then stayed by Crown Counsel, the public will know that a person was charged and brought before the courts. The investigator will know what happened. If a victim questions why the case didn’t go ahead, it should be the prosecutor’s responsibility to answer. To put it in other terms, an accused has his alleged misconduct noted on the public record, even if the charge is eventually stayed.

Crown Position: When talking of a decision to lay or not lay a charge, it is important to examine what happens in each of a pre-charge vs. post-charge regime.

In a post-charge system, the police investigate and lay a charge. It is not until an accused is charged that his name becomes public. The police do not usually, nor should they, issue public statements about whom they are investigating until a charge is laid. The result is no different in a pre-charge regime. No accused’s name becomes public until a charge is laid.

The police argue that there is no public accountability in a pre-charge regime, as no one knows about the suspect’s conduct if he is not charged. It is further argued that the result in a post-charge regime is preferable, for if a person is charged, appears in court and then has the charges stayed, the public at least knows about the conduct. This argument confuses the purpose of the justice system. It is to determine the sufficiency of evidence, not out an accused where there is insufficient evidence.

If a charge is laid and then stayed because of a lack of evidence, an accused may be exposed to all the negative consequences of being charged – publicity, employment

problems, border crossing problems, child access problems if a family violence charge – when he arguably should not have been charged at all. This is particularly so in cases of sexual misconduct, where no amount of explanation after a stay can undo the damage to an accused's reputation. Some may say that this argument is one for the accused or his counsel to raise but it is the responsibility of the Crown to see, as far as possible, that the fair and proper thing is done.

The high-profile case of Michael Bryant, a former Ontario cabinet minister may serve to illustrate what can happen when a charge is laid on insufficient evidence. Bryant was driving in downtown Toronto, became involved in a heated argument with a cyclist, attempted to drive off and was involved in a collision, resulting in the cyclist's death. Within days he was charged with very serious charges. A media firestorm ensued. As the investigation proceeded, it became apparent that there was another side to what had happened and that he had committed no criminal offence. The charges were very publicly stayed. Bryant had the resources to defend his name publicly, but what of someone in his situation with lesser resources?

It is said that it is unlikely that this situation would have occurred in BC, as the requirement for a complete investigation and RTCC would mean that no charges would have been laid.

### 3. Unnecessary Police Resources

**Police Position:** It would save the police from expending as many resources on a full 'disclosure ready' court brief (RTCC) before a charge is even laid, as a number of persons charged with low level offences plead guilty almost immediately and less information is needed.

**Crown Position:** Many minor offences require only a very basic RTCC and material, so not much police time is saved. In all cases, even those where the accused pleads guilty very early in the process, it is essential that Crown Counsel know all of the circumstances of the offence so that the court can know and impose the appropriate bail conditions or sentence. A very brief summary of the offence risks an accused getting an inappropriately lenient bail release or sentence because Crown Counsel does not have all of the details of the accused conduct to tell the court

For those lesser charges that proceed to trial, an accused is entitled to disclosure of all of the evidence. So the investigator will need to provide a complete package in any event, be it right at the beginning or later in the process. In fact, most defence counsel will require full disclosure before the accused enters a plea, within several weeks of the first appearance.

#### 4. Usurping the Court's Role

**Police Position:** Under the present system, the Crown, via the charging standard, puts itself in the position of the judge. It is the perception of some police that Crown Counsel requires a certainty of conviction before it will approve a charge. A common phrase used is "let the judge decide". Reverting to a post-charge system would allow the judge to make the decision, not the prosecutor.

**Crown Position:** A 'letting the judge decide' approach ignores certain realities. In a post-charge regime, Crown Counsel will assess every case coming into the system by the Branch standard. By whatever standard, either 'substantial' or 'reasonable', the Crown has an ongoing responsibility as an agent of the Minister of Justice to assess the evidence in his/her cases to ensure that only the proper cases go forward and absorb precious court resources. To merely stand by and let whatever charges are laid proceed without further assessment is not only a recipe for a paralyzed court system but also a failure to fulfill a duty.

The criminal justice system can be looked at as a series of filters, with each successive stage employing a finer screen:

- a. The police use the screen with the widest mesh – 'reasonable grounds'. Once evidence meets that standard, a charge can be recommended to the Crown.
- b. Next comes the prosecution with either a 'substantial likelihood' or a 'reasonable likelihood' test, being a finer mesh.
- c. If the evidence is sufficient to pass through that screen, the court can convict only if the evidence is fine enough to pass through the finest mesh – "beyond a reasonable doubt."

In the end, only those against whom the evidence is the strongest can be found guilty.

#### 5. Efficiency

**Police Position:** Allowing police to lay a charge is more efficient. Using court liaison officers to review the RTCCs prior to submission and then lay Informations upon Crown Counsel approval makes for convoluted paper trails and can result in delays.

**Crown Position:** The public appearance is more objective (the same person conducting the investigation doesn't decide on charges) and efficient (need for fewer replacement Informations).



## 6. Police Morale

It would improve police morale and ‘buy-in’, as officers who are now discouraged by Crown Counsel’s no-charge decisions, particularly on administrative offences, would become more engaged as they assume more responsibility. It would also improve the quality of the initial reports as the police would rely on the prosecutors less in the initial stages.

## 7. Better Investigations

Police Position: There are some investigations that would be advanced by charges, even if all of the investigation was not complete. For example, in a gang case, if an accused were charged and in custody, witnesses may feel more comfortable coming forward to the police.

Crown Position: This argument has some validity but the cases where this would apply, although generally more serious, will be few. If witness protection is a concern, there are other avenues to accomplish this

## 8. Offender Management

Police Position: A repeating offender charged, brought before the court and released on bail, would be subject to bail conditions. This can facilitate offender management in the community. If he is not charged pending completion of the complete report, he may reoffend pending RTCC approval.

Crown Position: This can be true but it is a question of whether this goal can be achieved through other means so as to meet the concerns of the police while limiting the new charges coming into the system.

## 9. Importance of Lesser Offences

For lesser offences, not charging offenders has negative effects:

- It leads to public and victim disenchantment with the system: they retreat from lawful enjoyment of public facilities because of illegal activities of others.
- It fosters disrespect for the law: people who obey the law see others disobey it with no consequences.
- It promotes crime: petty offenders who see no consequences to their actions may graduate to more serious crime.

Other Arguments

1. The police are experts in investigations. Crown prosecutors by their training know the law. Given the complexity of the law today, it is unfair to expect the police to master the subtleties of the criminal law as well as their other responsibilities.
2. The Charter clock starts to run from the laying of an Information, not from the beginning of the investigation. Any time spent in compiling an RTCC package does not count towards a delay argument. If a charge is laid and further time and court delay is needed for disclosure or additional investigation, that time counts towards a Charter breach of delay.
3. If the police are able to lay charges, it is inevitable that additional charges – be they summary conviction or hybrid – will enter the system, even using a ‘reasonable likelihood’ standard. These additional charges will have to be dealt with, and Crown and court time used, when there may be other ways to address the same problem (Alternative Measures/revocation of bail) rather than a separate charge.
4. It is human nature (and shown by the experience of post-charge jurisdictions) that once a charge is laid for lesser offences, an investigator has other cases to deal with. If follow-up investigation is needed, it can take a back seat to more current cases and be more difficult to obtain. All the while the Charter clock is ticking and more interim court appearances are needed. As well, this can lead to delays in being able to make a decision as to guilty pleas or whether the case should be stayed or withdrawn.
5. An argument is sometimes heard that the BC system results in an inordinate number of stays and withdrawals and that it is less efficient than a post-charge system.

From the Canadian Center for Justice Statistics, we can get a picture over several years:

	Fiscal year	Total Decisions	Guilty	Acquitted	Stay/ Withdrawn	Other
Alberta	2007/2008	56,948	34,498	656	20,747	1,047
Alberta	2008/2009	57,877	37,320	656	18,748	1,153
Alberta	2009/2010	58,397	37,082	649	19,490	1,176
British Columbia	2007/2008	47,821	33,213	1,001	13,249	358
British Columbia	2008/2009	47,000	33,144	1,129	12,337	390
British Columbia	2009/2010	45,736	31,978	993	12,425	340

From this we can see that BC, with a larger population, has fewer charges coming into the system than Alberta. One reason for this is the front end screening system in BC. As well, we can calculate percentages of stays and withdrawals to total decisions:

	<u>Alberta</u>	<u>BC</u>
2007-8	36.4%	27.7%
2008-9	32.4%	26.2%
2009-10	33.4%	27.2%

There can be many variables in any set of statistics but one note of explanation is needed here: Stays and withdrawals are not just those where there was insufficient evidence. Those numbers include cases where an accused pleaded guilty to some charges and others were withdrawn or stayed. In fact, those situations may make up the bulk of the numbers in that column.

Again, the pre-charge assessment process in BC can be seen to screen out charges that Alberta must deal with later and with less efficiency.

This is but one set of numbers and Alberta is but one province but it does show that over several years, in comparison to at least one post-charge province, BC compares favourably.

### Comment

In my interviews, most of the players – judges prosecutors, defence counsel and others supported retention of the pre-charge system. There is a segment of the police community which expressed a desire to return to a post-charge system. Their concerns range from historical and constitutional to the practical. These have all been outlined above.

But there is no real consensus.

Many of the officers to whom I spoke have had policing experience in post-charge provinces and for a variety of reasons, generally prefer working in a post-charge regime. But they also have been in BC for enough time to adapt to the pre-charge system. Others have policed in BC for their entire careers.

They recognize that reverting to a post-charge system would involve significant training and cost issues. Most significantly, they acknowledged that reverting would not make the system more efficient. It would in fact add to the charges now coming into the system.

However, they are most concerned over resource and offender management issues and consistency of advice received from the Crown. They do not particularly want to take back the charging function but are prepared to do so if that is the only answer to these practical issues.

It is also useful to consider that the other two pre-charge provinces – Quebec and New Brunswick – strongly support the pre-charge process and would oppose any move to go back to a post-charge system. And in at least several post-charge provinces, justice ministries would not be averse to converting to pre-charge, but with the protocols in place, their systems work efficiently.

The arguments of the police are not without merit but do they outweigh the benefits of the existing system? Are there other avenues to address their concerns?

The real concerns of the police, as expressed to me, lie not in the charging standard but with parts of its daily application. They are more resource-founded than in any position of authority or jurisdiction.

## Effects of Reverting

If British Columbia were to revert to a post-charge system, there would be many costly adjustments needed:

- Police would need more reviewing officers and would need enhanced reviewing and legal training. This could be a much bigger adjustment than anticipated. In a post-charge regime, the police, in laying charges, do little actual screening. Charges are laid when there are “reasonable grounds” as per s. 504 of the Code. There is little assessment of any viable defences, nor can the police be expected to be current on sophisticated Charter issues and decisions. So if they were to take back the charging function, officers would need significant legal training and a sea change mindset shift.
- With more charges and more trials, more officers would have to attend court as witnesses.
- Crown Counsel – with more charges, would need more prosecutors and staff to assess and try the charges coming into court and would need to devote more time to training police.
- Witnesses – with more trials, would need to take more time off work.
- Court – with more charges, would need more court time (guilty pleas/trials) – and more judges and staff.
- Public – with more cases and more accused coming into court – would need more public money spent on all parts of the system.
- Municipalities and province – more officers would be needed – at a cost to these governments.

## Recommendations

### Terms of Reference

#### 1. *Is the Current Charge Assessment Standard of 'Substantial Likelihood' Correct?*

The BC standard is that of 'substantial likelihood' while that of all other provinces is either 'reasonable likelihood' or 'reasonable prospect'. There is no evidence that either standard produces markedly different results.

The phrase 'substantial likelihood' has been carefully considered and refined over time. While there is a perception by some that the standard is too high, it is supported by most players in the system. There is no suggestion that the public has concerns with the standard itself.

The differences, in theory and practice, have been debated at length (see: Discretion to Prosecute Inquiry – Appendix) and continue to be. There are conflicting opinions as to whether there is any real difference at all.

Since there is no persuasive evidence that the standard too high, there is no justification for changing it.

Recommendation 1: That the present standard of 'substantial likelihood' be retained.

#### 2. *Should B.C. Retain the Pre-Charge Assessment Model or Adopt a Post-Charge Model?*

The present pre-charge assessment system was adopted decades ago in BC in response to large numbers of inadequate police reports and charges. The quality of reports and charges improved when the new system was adopted.

While police are far better trained now than in the past, the fact remains that they are experts in conducting investigations. Crown Counsel are experts in assessing legal issues and evidentiary requirements.

The pre-charge regime is well thought out and proven and its retention has been advocated on several occasions by learned and experienced Commissioners. In the end, it is not far different from the post-charge system. Changing back would not make the system more efficient, nor would the quality of justice improve. Nor would it be a real answer to the practical concerns of the police.

The cost both in money and human terms to revert would be substantial.

Recommendation 2: That the pre-charge assessment process be retained in its existing form.

3. *What Improvements to the Assessment Process Can be Recommended?*

*(a) The Need for Directives*

The nuts and bolts of the screening process are contained in the Charge Assessment Guidelines. They have been developed and refined over the years in response to other Inquiry recommendations and daily experience.

There have been no directions issued by the Assistant Deputy Attorney General with respect to who should be doing charge assessment. Nor need there be any. Daily experience and the abilities of those in charge of the various Crown Counsel offices have resulted in Charge Assessment Crowns with the necessary experience, wherever possible, being given that assignment.

There have been and continue to be substantial educational initiatives undertaken by the Ministry through conference presentations and online materials.

The existing Guidelines themselves do not need to be made more specific. They provide good guidance to Crown Counsel, yet allow for flexibility in adapting to local conditions.

Recommendation 3(a): No directives are needed.

*(b) Who Does Pre-Charge Assessment / Where Is It Done?*

In the larger Crown offices, separate units of experienced prosecutors on longer term assignments perform the function. In smaller and mid-size offices, there is not the luxury of devoting separate long-term resources, but senior prosecutors do the assessments whenever possible.

As a general rule, Crown Counsel doing charge assessment should have a minimum of 5 years prosecutorial experience. This is a somewhat arbitrary number, as the content of that 5 years of experience must be looked at. The more trial experience that a prosecutor has the better feel he/she will have for what really happens in court and what are realistic charges/sentences.

There is always the caveat that smaller offices may not have the experienced staff to meet this suggestion.

The suggestion of a centralized charge approval unit for the province has drawbacks.

BC is a highly diverse province geographically and culturally. Crime and public interest considerations vary from place to place and over time. A centralized unit with (or without) more detailed guidelines would almost inevitably be slower and more cumbersome and could jeopardize local relationships between Crown Counsel and police (and the communication that goes with them) More importantly, it would result in the loss of local sensitivity in the

charge assessment process. This local sensitivity is recognized in the public interest factors in the existing Guideline.

Recommendation 3(b): Wherever possible, the assessment function should be done by local Crown Counsel who have significant trial experience.

*(c) Timeliness/Content of Assessment Decisions*

The feedback that I received indicates that the timeliness and content of Crown decisions on charge assessment varies throughout the province. This is to be expected, given the variability of office size, available resources and workload. For most files, the majority of RTCCs are reviewed within several working days. More serious cases benefit from more immediate Crown/police liaison and are streamlined once the police investigation is complete.

The timeliness of communication with the police needs to remain flexible, and attuned to local conditions. Further written guidelines in this area can be counter-productive. But the Crown needs to remain cognizant of the need for sufficient explanations for no-charge decisions

Recommendation 3(c): That no further guidelines setting out timelines need be issued but that the Ministry investigate ways to enhance Crown/police communication at an early stage in the process.

*(d) Police Appeal Procedure*

This process was put into the Guidelines in response to a recommendation in the Hughes Report. It has not, in anyone's memory, been used to its end, but is an important confirmation of the authority of the police to lay a charge.

However, the need for a Special Prosecutor, if the appeal process is fully invoked, should be formalized.

Recommendation 3(d): That the Guideline be amended to provide that where the appeal process has been exhausted and the police lay an Information, a Special Prosecutor will be appointed.

*(e) What Public Reporting, if Any, Should Occur Regarding Charge Assessment Decisions?*

The first part of this question focuses on the transparency of individual charge assessment decisions and has been discussed in detail at pp 29-30. As noted there, in either a pre or post-charge regime, a suspect's name need not and should not be made public unless and until a charge is approved/laid. Once a charge is laid, then subject to any statutory restrictions (e.g.- Youth Criminal Justice Act/court imposed publication bans), the name of the accused is a matter of public record. The laying of the charge can be considered as the public reporting.



Where there is a no-charge decision, there may be occasions when it is proper and necessary and in the public interest to explain the reasoning behind the decision to the victim (and in rare cases to the public). One of the concerns of the police now is that they are sometimes called upon to liaise with the victim and to try to explain a no charge decision that they may neither agree with nor fully understand. Since it is a decision of Crown counsel, it seems more logical that the prosecutor (or the Ministry issue a public statement if that is called for), either alone or in conjunction with the investigator, and subject to any privacy and operational concerns.

In the aggregate, statistics are now kept as to numbers of RTCCs submitted and approved/rejected. Collection of these numbers should be continued as they can highlight trends or problem areas that need to be addressed.

Recommendation 3(e): Where there is a no-charge decision, there should be no public reporting or comment, as the name of a suspect should be kept confidential by the police and prosecutor until a charge is laid.

On those occasions when a no-charge decision is made and the public interest requires an explanation to the victim or the public, it should be the responsibility of the prosecutor (or the Ministry), either with or without the investigator, to do so.

Statistics on the numbers of RTCCs submitted and approved/rejected should continue to be compiled.

#### 4. *Public Order and Administrative Offences*

A constant thread throughout discussions with police is their desire for the laying of more charges for public order and administrative offences. It is their view that the Crown rejects too many of these charges. The positions of the Crown and the police are set out earlier in this Report.

As there is some disconnect here, this issue merits further discussion at a provincial level.

Recommendation 4: That the Ministry review the issue of the laying of public interest/administrative offences to determine how much of the police concern is borne out by statistics and to examine initiatives by which this concern may be addressed.

5. *Police Resources Required for RTCCs*

A continuing police concern is that of the amount of police resources required to produce a disclosure ready file before a charge assessment will be done.

As elsewhere, this issue varies from place to place.

Conversely, there are areas where the police might consider alternative investigative methods to reduce the drain on their own resources.

**Recommendation 5:** That the Ministry review the issue of police resources to determine if there are RTCCs that could be assessed with a reduced investigative package.

### Other Recommendations

These are outside the strict parameters of the Terms of Reference but are related to the workings of the criminal justice system and merit comment.

#### 6. *Crown Office Resources/Structuring*

One of the concerns expressed was the number of different Crown Counsel who are responsible for a file during its journey through the system, particularly in some of the larger offices. Larger offices must, out of necessity, because of their large workloads, do this. With the great bulk of files, there are different Crown Counsel who handle first appearances, bail, arraignments and trials. This can result in differing views of the same file. This will happen as long as humans and not computers go to court.

But there may be value in trying to determine if there are ways to reduce the number of Crown Counsel who handle a file in larger offices. Other provinces have developed systems to address this concern. Alberta has initiated a file ownership system that has been effective in getting files into the hands of trial prosecutors at an early date.

Recommendation 6: That the Ministry investigate whether there is value in instituting a pilot file ownership project in Crown offices.

#### 7. *Dedicated Crowns/Police*

Several initiatives have been undertaken by the Ministry in conjunction with local police to dedicate specific Crown prosecutors to specific local problems. In Surrey and in Vancouver, Crown Counsel have in the past been dedicated to the areas of property crime and prolific offenders. These projects proved very successful, not only because of the dedication and efforts of the Crown Counsel involved but also because the police had one person to contact with all questions about their investigation. This highlights the value of good Crown/police communication.

Could this approach work for the police as well? Would it pay dividends to assign a police officer to a Crown office for some longer period of time to work with the charge approval Crown Counsel to gain a better appreciation of the factors that the Crown looks at in assessing files?

Recommendation 7: That the Ministry examine whether there would be value in re-establishing a dedicated Crown Counsel project

That the Ministry work with the police to examine the feasibility of a pilot project to assign a police officer to work in a Crown office with the Charge Assessment Crowns.

### 8. *Police Training*

New BC police recruits receive their training through one of two vehicles. The RCMP trains its officers in Regina. Municipal officers attend at the Police Academy section of the BC Justice Institute. There is a basic legal component to all of this training but a new officer must master a multitude of street skills in a short time. He/she is not being trained to be a lawyer.

Newly minted officers are mentored by more experienced officers once they are fully accredited. Depending on workload, demographics and transfers, this field supervisory training can be of variable effectiveness.

All police services require their officers to engage in on-going training.

The most knowledgeable people to assist in the legal training of police officers are Crown Counsel. The degree of involvement of Crown Counsel in police training in BC has varied, depending on location, time and availability. Where they have the resources, Crown offices have played an important role in police training.

This interaction has the additional benefit of exposing Crown Counsel and police officers to the perspectives of the other

**Recommendation 8:** That the police services and the Ministry investigate the feasibility of providing officers with enhanced training on legal concepts and evidentiary requirements and that the role of Crown Counsel in this training be increased wherever practicable.

### 9. *Police Reports*

While great strides have been made in the quality of police reports, there is no system that cannot be improved.

The focus of this review has been on the charge assessment process. Integral to the process is the quality of police reports. Some recent initiatives show that in some locales, the quality of reports may still be problematic.

Larger police services dedicate experienced officers to review reports before they are sent to Crown Counsel. This has improved quality in those areas but modern technology may help even more.

As an example, the Edmonton Police Service has recently developed its own computerized file review system (IMAC) that has markedly improved the quality of its reports. Other services have signalled an interest in this program.

**Recommendation 9:** That police services investigate the need and feasibility of computerizing and enhancing their report reviewing processes.

## 10. Legal Aid and Court Delays

One of the issues discussed during this review was the legal aid system in BC. It has been the victim of substantial budget cutbacks over the past few years. There are now far fewer lawyers who are willing to do legal aid work.

Anyone who has been in any courtroom in Canada will know that an unrepresented accused at trial takes up far more court time than someone who has counsel. The judge must take time to explain the process to the accused (often repeatedly).

One area where legal aid continues to help is through Duty Counsel. Private counsel are retained by the Legal Services Society for the day or the week to assist accused at non-trial appearances. But by the short term nature of their appointments, continuity and some familiarity with local issues and personnel can be lost.

Some other provinces (e.g., Alberta) have full-time salaried Duty Counsel working out of the major courthouses. These groups provide continuity of service and advice and as a by-product have earned the confidence and trust of the local bar and judiciary.

**Recommendation 10:** That the Legal Services Society examine the feasibility of employing Duty Counsel on a longer term basis.

## 11. Additional Resources

Although it has been made clear many times that government resources are tight, police, judges and other officials all confirmed to me that the charge assessment Crown Counsel are severely overworked. This varies by location but is acute in some of the larger offices. This apparently has been exacerbated by the court closures in 2002, which closed a number of courthouses and Crown offices and relocated their workloads, in some cases to offices which were already at capacity.

But it seems that additional Crown resources have not kept pace with other developments:

- During the past few years, additional funding has been made available to the police. More officers have been hired. When that happens, more charge recommendations inevitably follow. More RTCCs add to the Crowns' workload.
- Bill C-10 (the federal "Tough on Crime" legislation) will add to the workload of both the police and the Crown (and others) but to an unknown degree.
- As the population of the province grows, the volume of crime will inevitably increase.

**Recommendation 11:** That the Ministry continue to develop measures to gauge the workload of its staff and the effects of additional federal crime measures and population growth.

### 12. *Educating the Public*

A genuinely informed public is essential to societal acceptance of any justice system. Uninformed comments about what is happening in a system lead to generalities, wrong conclusions and misunderstandings.

Traditionally, the criminal justice system has not been effective in explaining itself to the public. Long academic articles do not reach those who need or want to understand the system. Responses to questions about an on-going case – “it is before the courts and we cannot comment” — while correct, can appear evasive.

Some of the dissatisfaction and angst surrounding criminal justice in all provinces flows from public ignorance of its real workings. This is fed by popular TV shows (e.g., Law and Order, CSI), from which the viewing public concludes that our system is similar to what is shown on television. Little could be further from the truth.

It is time for the Ministry, together with the courts, defence bar and the police, to adequately explain the system to the public. This by itself should quell many of the negative comments we hear.

**Recommendation 12:** That the Ministry examine its present approach to public statements and media relations with a view to proactively educating the public on how the justice system works and the daily roles and responsibilities of the Criminal Justice Branch and Crown Counsel.

## Summary of Recommendations

Recommendation 1: That the present standard of ‘substantial likelihood’ be retained.

Recommendation 2: That the pre-charge screening process be retained in its existing form.

Recommendation 3(a): No additional formal directives are needed at this time.

Recommendation 3(b): Wherever possible, the assessment function should be done by local Crown Counsel who have significant trial experience.

Recommendation 3(c): That no further guidelines setting out time lines be issued but that the Ministry investigate ways to enhance Crown/police communication at an early stage in the process.

Recommendation 3(d): That the Guideline be amended to provide that, where the appeal process has been exhausted and the police lay an Information, a Special Prosecutor will be appointed.

Recommendation 3(e): There is no need for public reporting of no-charge decisions, for either cases where there is a specific victim or those where there is no named victim.

Recommendation 4: That the Ministry review the issue of the laying of public interest/administrative offences to determine how much of the police concern is borne out by statistics and to examine initiatives by which this concern can be addressed.

Recommendation 5: That the Ministry review the issue of police resources to determine if there are RTCCs that could be assessed with a reduced investigative package.

Recommendation 6: That the Ministry investigate whether there is value in instituting a pilot file ownership project in Crown offices.

Recommendation 7: That the Ministry examine whether there would be value in re-establishing a dedicated Crown Counsel project.

That the Ministry work with the police to examine the feasibility of a pilot project to assign a police officer to work in a Crown office with the charge approval Crown Counsel.

Recommendation 8: That the police services and the Ministry investigate the feasibility of providing officers with enhanced training on legal concepts and evidentiary requirements and that the role of Crown Counsel in this training be increased wherever practicable.

**Recommendation 9:** That police services investigate the need and feasibility of computerizing and enhancing their report reviewing processes.

**Recommendation 10:** That the Legal Services Society examine the feasibility of employing Duty Counsel on a longer term basis.

**Recommendation 11:** That the Ministry continue to develop measures to gauge the workload of its staff and the effects of additional federal crime measures and population growth.

**Recommendation 12:** That the Ministry examine its present approach to public statements and media relations with a view to proactively educating the public on how the justice system works and the daily roles and responsibilities of the Criminal Justice Branch and Crown Counsel.



## Conclusion

At the beginning of this report, I mentioned the commitment of the people to whom I have spoken. This bears repeating:

The abilities and enthusiasm of judges, prosecutors, police, defence counsel and others who are part of the system are remarkable. The citizens of British Columbia are fortunate to have these people superintending criminal justice in the province. It is unfortunate that this fact is so rarely noted.

The work I have done on this project has reaffirmed for me certain facts that hold true regardless of the system in place:

- Prosecutions have become much more complex in ways that are beyond the authority of the provincial government to change. Truly effective improvements to the trial process can come only from the Bench (if given enhanced case management authority) and the federal government. Recommendations in these areas are more properly within the mandate of other reviews.
- Expending resources, whether those of the prosecution or police, pays greater dividends when concentrated at the beginning of the process. This comes at a cost but results in a more efficient justice system.
- Location and personalities are important. Factors such as the size and workload of Crown Counsel offices, court locations and police detachments and the experience of police officers and prosecutors in a given area can determine whether a part of the process is an issue in one place but not another. It is preferable to have policies and guidelines that are flexible enough to be adaptable to local conditions.
- While there must be formal protocols in place to establish minimum requirements on certain processes, one of the most valuable assets for any Crown Counsel or police officer to have is a good day-to-day working relationship with his or her counterparts. These need not in any way affect their respective independence. Simply being able to call someone you know can help clear up confusion or misunderstanding. Prosecutors and police have separate and independent roles but have similar values and goals: the appropriate enforcement of the law and the proper administration of justice. The working relationship in BC is good, the result of hard work over time by many people. But any relationship can be improved with better communication and understanding of each other's roles.

This Review has focused on the charge assessment regime in BC. The process is neither broken nor in crisis. Parts of it bear examination and possible refinement but no wholesale changes are needed.

## Appendices

- A. Terms of Reference – Charge Assessment Review
- B. Terms of Reference – Chair-Justice Reform Initiative (Geoffrey Cowper Q.C.)
- C. Green Paper – Modernizing BC’s Justice System (February 2012)
- D. Crown Counsel Act
- E. Crown Counsel Policy Manual – Charge Assessment Guidelines
- F. Previous Commissions/Inquiries
  - i. Access to Justice: Report of the Justice Reform Committee (Hughes) 1987 (excerpt)
  - ii. Discretion to Prosecute Inquiry (Owen) 1990 (excerpt)
  - iii. Special Prosecutor Review (Owen) 2010
  - iv. Alone and Cold (Davies) 2011 (excerpt)
- G. Participants
- H. Other Jurisdictions – Links to Crown Prosecution Policies
  - [Alberta](#)
  - [Saskatchewan](#)
  - [Manitoba](#)
  - [Ontario](#)
  - [Quebec](#)
  - [New Brunswick](#)
  - [Nova Scotia](#)
  - [Prince Edward Island](#)
  - [Newfoundland and Labrador](#)
  - [Public Prosecution Service of Canada](#)



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